Adult Protective Services Legal Practice, Parts 1 & 2

2021 AATI Conference

Materials I

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Note- this set of materials contains statutes, regulations, materials on the ethics portion of the program, and forms, while the second set contains State agency directives and OCFS Best Practices.

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Statutes:

Statutes

NYS Social Services Law

SSL §473 Protective Services-

1. In addition to services provided by social services officials pursuant to other provisions of this chapter, such officials shall provide protective services in accordance with federal and state regulations to or for individuals without regard to income who, because of mental or physical impairments, are unable to manage their own resources, carry out the activities of daily living, or protect themselves from physical abuse, sexual abuse, emotional abuse, active, passive or self neglect, financial exploitation or other hazardous situations without assistance from others and have no one available who is willing and able to assist them responsibly. Such services shall include:

(a) receiving and investigating reports of seriously impaired individuals who may be in need of protection;

(b) arranging for medical and psychiatric services to evaluate and whenever possible to safeguard and improve the circumstances of those with serious impairments;

(c) arranging, when necessary, for commitment, guardianship, or other protective placement of such individuals either directly or through referral to another appropriate agency, provided, however, that where possible, the least restrictive of these measures shall be employed before more restrictive controls are imposed;

(d) providing services to assist such individuals to move from situations which are, or are likely to become, hazardous to their health and well-being;

(e) cooperating and planning with the courts as necessary on behalf of individuals with serious mental impairments; and

(f) other protective services for adults included in the regulations of the department.

2. (a) In that the effective delivery of protective services for adults requires a network of professional consultants and services providers, local social services districts shall plan with other public, private and voluntary agencies including but not limited to health, mental health, aging, legal and law enforcement agencies, for the purpose of assuring maximum local understanding, coordination and cooperative action in the provision of appropriate services.

(b) Each social services district shall prepare, with the approval of the chief executive officer, or the legislative body in those counties without a chief executive officer, after consultation with appropriate public, private and voluntary agencies, a district-wide plan for the provision of adult protective services which shall be a component of the district's multi-year consolidated services plan as required in section thirty-four-a of this chapter. This plan shall describe the local implementation of this section including the organization,

staffing, mode of operations and financing of the adult protective services as well as the provisions made for purchase of services, inter-agency relations, inter-agency agreements, service referral mechanisms, and locus of responsibility for cases with multi-agency services needs. Commencing the year following preparation of a multi-year consolidated services plan, each local district shall prepare annual implementation reports including information related to its adult protective services plan as required in section thirty-four-a of the social services law .

(c) Each social services district shall submit the adult protective services plan to the department as a component of its multi-year consolidated services plan and subsequent thereto as a component of its annual implementation reports and the department shall review and approve the proposed plan and reports in accordance with the procedures set forth in section thirty-four-a of this chapter.

3. Any social services official or his designee authorized or required to determine the need for and/or provide or arrange for the provision of protective services to adults in accordance with the provision of this section, shall have immunity from any civil liability that might otherwise result by reason of providing such services, provided such official or his designee was acting in the discharge of his duties and within the scope of his employment, and that such liability did not result from the willfull act or gross negligence of such official or his designee.

4. For the purpose of developing improved methods for the delivery of protective services for adults, the department with the approval of the director of the budget, shall authorize a maximum of five demonstration projects in selected social services districts. Such projects may serve a social services district, part of a district or more than one district. These demonstration projects shall seek to determine the most effective methods of providing the financial management component of protective services for adults. These methods shall include but not be limited to: having a social services district directly provide financial management services; having a social services district contract with another public and/or private agency for the provision of such services; utilizing relatives and/or friends to provide such services under the direction of a social services district or another public and/or private agency and establishing a separate public office to provide financial management services for indigent persons. The duration of these projects shall not exceed eighteen months. Furthermore, local social services districts shall not be responsible for any part of the cost of these demonstration projects which would not have otherwise accrued in the provision of protective services for adults. The total amount of state funds available for such financial management services demonstration projects, exclusive of any federal funds shall not exceed three hundred thousand dollars. The commissioner shall require that a final independent evaluation by a not-for-profit corporation be made of the demonstration projects approved and conducted hereunder, and shall provide copies of such report to the governor and the legislature.

5. Whenever a social services official, or his or her designee authorized or required to determine the need for, or to provide or arrange for the provision of protective services to adults in accordance with the provisions of this title has a reason to believe that a criminal offense has been committed, as defined in the penal law, against a person for whom the

need for such services is being determined or to whom such services are being provided or arranged, the social services official or his or her designee must report this information to the appropriate police or sheriff's department and the district attorney's office when such office has requested such information be reported by a social services official or his or her designee.

6. Definitions. When used in this title unless otherwise expressly stated or unless the context or subject matter requires a different interpretation:

(a) “Physical abuse” means the non-accidental use of force that results in bodily injury, pain or impairment, including but not limited to, being slapped, burned, cut, bruised or improperly physically restrained.

(b) “Sexual abuse” means non-consensual sexual contact of any kind, including but not limited to, forcing sexual contact or forcing sex with a third party.

(c) “Emotional abuse” means willful infliction of mental or emotional anguish by threat, humiliation, intimidation or other abusive conduct, including but not limited to, frightening or isolating an adult.

(d) “Active neglect” means willful failure by the caregiver to fulfill the care-taking functions and responsibilities assumed by the caregiver, including but not limited to, abandonment, willful deprivation of food, water, heat, clean clothing and bedding, eyeglasses or dentures, or health related services.

(e) “Passive neglect” means non-willful failure of a caregiver to fulfill care-taking functions and responsibilities assumed by the caregiver, including but not limited to, abandonment or denial of food or health related services because of inadequate caregiver knowledge, infirmity, or disputing the value of prescribed services.

(f) “Self neglect” means an adult's inability, due to physical and/or mental impairments to perform tasks essential to caring for oneself, including but not limited to, providing essential food, clothing, shelter and medical care; obtaining goods and services necessary to maintain physical health, mental health, emotional well-being and general safety; or managing financial affairs.

(g) “Financial exploitation” means improper use of an adult's funds, property or resources by another individual, including but not limited to, fraud, false pretenses, embezzlement, conspiracy, forgery, falsifying records, coerced property transfers or denial of access to assets.

7. Notwithstanding any other provision of law, for the purposes of this article an Indian tribe that has entered into an agreement with the office of children and family services pursuant to section thirty-nine of this chapter, which includes the provision of adult services by such Indian tribe, shall have the duties, responsibilities and powers of a social services district or a social services official for the purpose of providing adult protective services.

8. The office of children and family services shall create and keep current best practice guidelines for the provision of adult protective services pursuant to this article. Such

guidelines shall be distributed for use to local social services districts, and posted on such office's website, and shall include, but not be limited to, the procedures for:

(a) reviewing any previous child or adult protective involvement;

(b) assessing and identifying abuse and neglect of persons believed to be in need of protective services;

(c) interviewing persons believed to be in need of protective services and their caretakers;

(d) reviewing when it is appropriate to seek a warrant to gain access to persons believed to be in need of protective services;

(e) identifying and making referrals for appropriate services; and

(f) communicating the rights of persons believed to be eligible for protective services.

SSL §473-a Short Term Involuntary Protective Services Orders

1. Definitions. When used in this section unless otherwise expressly stated or unless the context or subject matter requires a different interpretation:

(a) “endangered adult” means a person, age eighteen or over who is:

(i) in a situation or condition which poses an imminent risk of death or imminent risk of serious physical harm to him or her, and

(ii) lacking capacity to comprehend the nature and consequences of remaining in that situation or condition, provided that:

a. refusal by the adult to accept protective services shall not in itself be sufficient evidence of such lack of capacity; and

b. mental illness shall not in itself be sufficient evidence of such lack of capacity.

(b) “short-term involuntary protective services” means those services set forth in section four hundred seventy-three of this article which are provided involuntarily pursuant to the procedures established by this title.

(c) “petitioner” means a social services official initiating a proceeding pursuant to this title.

(d) “respondent” means an allegedly endangered adult.

2. Jurisdiction. The supreme court and the county court shall each have jurisdiction over the special proceeding commenced pursuant to the provisions of this title.

3. Venue. A petition for the provision of short-term involuntary protective services shall be made to:

(a) a term of the supreme court:

(i) held in the county in which the allegedly endangered adult resides or is found; or

(ii) held in a county, within the same judicial district, adjacent to the county in which the allegedly endangered adult resides or is found; or

(b) the county court:

(i) in the county in which the allegedly endangered adult resides or is found; or

(ii) in a county adjacent to the county in which the allegedly endangered adult resides or is found.

4. Petition. (a) A special proceeding to obtain an order authorizing the provision of short-term involuntary protective services may only be initiated by a social services official.

(b) The petition shall state, insofar as the facts can be ascertained with reasonable diligence:

(i) the name, age and physical description of the allegedly endangered adult; and

(ii) the address or other location where the allegedly endangered adult can be found.

(c) The petition shall state facts showing:

(i) that the adult who is the subject of this petition is an endangered adult as defined in paragraph (a) of subdivision one of this section;

(ii) the specific short-term involuntary protective services petitioned for, how such services would remedy the situation or condition which poses an imminent risk of death or imminent risk of serious physical harm to the allegedly endangered adult, and why such services are not overbroad as to extent or duration;

(iii) that the short-term involuntary protective services being applied for are necessitated by the situation or condition described in paragraph (a) of subdivision one of this section;

(iv) that other voluntary protective services have been tried and have failed to remedy the situation, and that a future, voluntary, less restrictive alternative would not be appropriate or would not be available;

(v) if a change in the allegedly endangered adult's physical location is being applied for, that remedy of the dangerous situation or condition described in paragraph (a) of subdivision one of this section is not appropriate in existing physical surroundings of the allegedly endangered adult;

(vi) any inconsistency known to petitioner between the proposed short-term involuntary protective services and the allegedly endangered adult's religious belief;

(vii) that if it reasonably appears that the allegedly endangered adult does not understand the English language, the reasonable efforts have been made to communicate with the allegedly endangered adult in a language he or she understands;

(viii) that no prior application has been made for the relief requested or for any similar relief, or if prior application has been made, the determination thereof, and the new facts, if any, that were not previously shown which warrant a renewal of the application.

(d) The petition shall be verified. Any allegations which are not based upon personal knowledge shall be supported by affidavits provided by a person or persons having such knowledge. Such affidavits shall be attached to the petition.

5. Commencement of proceedings. (a) A special proceeding to obtain an order authorizing the provision of short-term involuntary protective services shall be commenced by an order to show cause, the petition and supporting affidavits, if any.

(b) The order to show cause shall set forth:

(i) in bold type, on its face, the following:

WARNING

IF YOU DO NOT APPEAR IN COURT YOUR LIFE AND LIBERTY MAY BE SERIOUSLY AFFECTED. FOR FREE INFORMATION CONCERNING YOUR LEGAL RIGHTS CALL OR VISIT

(ii) the protective services to be provided if the petition is granted;

(iii) the date, place and time of the hearing to determine whether the petition is to be granted;

(iv) that the respondent is entitled to counsel at all stages of the proceeding, that upon granting the order to show cause, the court shall assign counsel to assist the respondent, and that respondent is free at any time to discharge the counsel assigned by the court. The name, address and telephone number of the assigned counsel shall be inserted at the end of the warning referred to in subparagraph (i) of this paragraph;

(v) that if the respondent or retained counsel does not appear at the hearing to determine whether the petition is to be granted, the court will appoint a guardian ad litem;

(vi) that if the respondent discharges the assigned counsel prior to the hearing to determine if the petition is to be granted, such counsel shall report this fact to the court no later than the commencement of the hearing, and shall appear at the hearing, unless otherwise relieved by the court. In the event that neither the respondent nor his retained counsel appears at the hearing, the court may appoint the person previously assigned as counsel to act as the guardian ad litem; and

(vii) that a copy of the order to show cause, the petition, and supporting affidavits, if any, shall be served upon the respondent.

(c) Petitioner shall cause the order to show cause, the petition, and supporting affidavits, if any, to be delivered to the counsel assigned by the court.

(d) The order to show cause shall be made returnable within forty-eight hours following its issuance, unless such forty-eight hour period ends on a day in which the court is not in session, in which case the return date shall be the first business day following issuance of the order to show cause.

6. Service. (a) Service of the order to show cause, the petition, and supporting affidavits, if any, shall be made upon the respondent by any of the methods permitted by section three hundred eight of the civil practice law and rules. Notwithstanding any other provision of law to the contrary, Saturday and Sunday service is valid.

(b) The respondent shall be authorized to answer either orally or in writing.

7. Hearing. (a) Upon the return date designated in the order to show cause issued pursuant to subdivision five of this section a hearing shall be held forthwith.

(b) The allegedly endangered adult shall be entitled to be present at the hearing.

(c) Adjournments shall be permitted only for good cause shown. In granting adjournments the court shall consider the need to provide short-term involuntary services expeditiously.

(d) At the conclusion of the hearing the court shall issue for the record a statement of its findings of fact and conclusions of law.

8. Preference. The special proceeding authorized by this title shall have preference over all other causes in all courts of appropriate jurisdiction.

9. Findings. After a hearing, the court must find, in order to authorize the provision of short-term involuntary protective services, that all of the material allegations as specified in paragraph (c) of subdivision four of this section have been admitted or proven by clear and convincing proof.

10. Judgment. (a) The court, upon making the findings required by subdivision nine herein, shall direct the entry of a judgment authorizing the provision of short-term involuntary protective services to an endangered adult.

(b) A judgment authorizing short-term involuntary protective services to be provided to an endangered adult:

(i) shall prescribe those specific protective services, authorized by section four hundred seventy-three of this article, which are to be provided and what person or persons are authorized or ordered to provide them; and

(ii) shall not provide for any forcible entry unless the persons so entering are accompanied by a peace officer, acting pursuant to his special duties, or a police officer, who is a member of an authorized police department or force or of a sheriff's department;

(iii) shall require persons acting under subparagraphs (i) and (ii) of this paragraph to submit a written report to the court within one week following the commencement of the ordered protective services.

(c) The judgment may order any other public or law enforcement official to render such assistance and cooperation as shall be within his legal authority, as may be required to further the objects of this title.

(d) The judgment shall not order removal to a hospital, as that term is defined in section 1.03 of the mental hygiene law .

(e) Issuance of the judgment shall not be evidence of the competency or incompetency of the endangered adult.

(f) No order issued pursuant to this title shall extend for more than seventy-two hours. An original order may be renewed once for up to another seventy-two hour period upon showing by the petitioner to the court that continuation is necessary to remedy the original situation or condition. No further renewals shall be permitted.

(g) In no event shall the short-term involuntary services authorized to be provided to an endangered adult by the judgment be broader than those which are necessary to remedy the situation or condition which poses an imminent risk of death or imminent risk of serious physical harm to the endangered adult.

(h) Notice of the judgment rendered by the court shall be given to the respondent personally, or if personal service is not possible in whatever other fashion the court shall prescribe.

11. Appeals. Appeals arising from the issuance of judgments pursuant to the provisions of this title shall be expedited.

12. The assigned counsel and the guardian ad litem appointed by the court pursuant to this title shall be reimbursed for their services pursuant to section thirty-five of the judiciary law .

13. Nothing in this title precludes the simultaneous commencement of a proceeding under this title and a proceeding under section 9.43 of the mental hygiene law , or a proceeding under article seventy-seven or article seventy-eight of such law. A pending proceeding under section 9.43 of the mental hygiene law or under article seventy-seven or article seventy-eight of the mental hygiene law does not preclude commencement of a proceeding under this title.

14. No existing right or remedy of any character shall be lost, impaired or affected by reason of this title.

SSL §473-b Reporting of Endangered Adults; Persons in Need of Protective Services

Any person who in good faith believes that a person eighteen years of age or older may be an endangered adult or in need of protective or other services, pursuant to this article, and who, based on such belief either:

(a) reports or refers such person to the department, office for the aging, or any local social services district office or designated area agency on aging, law enforcement agency, or any other person, agency or organization that such person, in good faith, believes will take appropriate action; or

(b) testifies in any judicial or administrative proceeding arising from such report or referral shall have immunity from any civil liability that might otherwise result by reason of the act of making such report or referral or of giving of such testimony.

SSL §473-c An Order to Gain Access to Persons Believed to be in Need of Protective Services for Adults

1. A social services official may apply to the supreme court or county court for an order to gain access to a person to assess whether such person is in need of protective services for adults in accordance with the provisions of section four hundred seventy-three of this article when such official, having reasonable cause to believe that such person may be in need of protective services, is refused access by such person or another individual. A social services official who is refused access shall assess, in consultation with a person in a supervisory role, whether or not it is appropriate to apply for an order to gain access to such person. Such assessment must be made as soon as necessary under the circumstances, but no later than twenty-four hours after the investigating official is refused access. The determination of whether or not to apply for an order to gain access and the reasons therefor shall be documented in the investigation file. Such application for an order to gain access shall state, insofar as the facts can be ascertained with reasonable diligence:

(a) the name and address of the person who may be in need of protective services for adults and the premises on which this person may be found;

(b) the reason the social services official believes the person may be in need of protective services for adults, which may include information provided by other agencies or individuals who are familiar with the person who may be in need of protective services for adults;

(c) the person or persons who are responsible for preventing the social services official from gaining access to the person who may be in need of protective services for adults;

(d) the efforts made by the social services official to gain access to the person who may be in need of protective services for adults;

(e) the names of any individuals, such as physicians or nurses, or other health or mental health professionals qualified to participate in the assessment, who shall accompany and assist the social services official conducting an assessment of the need of a person for protective services for adults;

(f) the manner in which the proposed assessment is to be conducted;

(g) that the social services official seeks an order solely for the purpose of assessing the need of a person for protective services for adults in accordance with the provisions of section four hundred seventy-three of this article and applicable regulations of the department;

(h) that no prior application has been made for the relief requested or for any similar relief, or if prior application has been made, the determination thereof, and the new facts, if any, that were not previously shown which warrant a renewal of the application.

2. Any allegations which are not based upon personal knowledge shall be supported by affidavits provided by a person or persons having such knowledge. Such affidavits shall be attached to the application.

3. The applications authorized in this section shall have preference over all other causes in all courts of appropriate jurisdiction, except those with a similar statutory preference.

4. If the court is satisfied that there is reasonable cause to believe that a person in need of protective services for adults may be found at the premises described in the application, that such person may be in need of protective services for adults, and that access to such person has been refused, it shall grant the application and issue an order authorizing the social services official and such other individuals as may be designated by the said official, accompanied by a police officer, to enter the premises to conduct an assessment to determine whether the person named in the application is in need of protective services for adults. The standard for proof and procedure for such an authorization shall be the same as for a search warrant under the criminal procedure law.

5. The provisions of this section shall not be construed to authorize a social services official to remove any person from the premises described in the application, or to provide any involuntary protective services to any person other than to assess a person's need for protective services for adults. Nothing in this section shall be construed to impair any existing right or remedy.

SSL §473-d Community Guardianship

1. Definitions. When used in this section unless otherwise expressly stated or unless the context or subject matter requires a different interpretation:

(a) "Community guardian program" means a not-for-profit corporation incorporated under the laws of the state of New York or a local governmental agency which has contracted with or has an agreement with a local social services official to provide conservatorship or committeeship services to eligible persons as provided in this title.

(b) "Hospital" means a hospital as defined in subdivision one of section two thousand eight hundred one of the public health law, or a hospital as defined in subdivision ten of section 1.03 of the mental hygiene law.

(c) "Residential facility" means a facility licensed pursuant to article twenty-eight of the public health law, article nineteen, twenty-three, thirty-one or thirty-two of the mental hygiene law, or article seven of this chapter.

2. A social services official may contract with a community guardian program for the

provision of conservatorship or committeeship services. A social services official may bring a petition to appoint a community guardian program as conservator or committee for a person only if the person is:

(a) eligible for and in receipt of adult protective services, as defined in section four hundred seventy-three of this chapter, at the time of the petition; and

(b) without a capable friend or relative or responsible agency willing and able to serve as conservator or committee; and

(c) living outside of a hospital or residential facility, or living in a hospital or residential facility and appointment of the community guardian program is part of a plan to return such person to the community.

3. A contract or agreement between a local social services official and a community guardian program shall require that:

(a) the community guardian program shall make its best efforts to maintain each person for whom the community guardian program is appointed as conservator or committee in a place other than a hospital or residential facility;

(b) the community guardian program shall petition the court to relinquish its duties as conservator or committee if a person for whom the community guardian program is appointed as conservator or committee regains capacity or competence, or a capable friend or relative becomes available to serve as conservator or committee, or the person must enter a hospital or residential facility on a long-term basis;

(c) the community guardian program shall act on behalf of each person for whom the community guardian program is appointed as conservator or committee to obtain such medical, social, mental health, legal and other services as are available and to which the person is entitled and as are required for the person's safety and well-being and shall advocate for all entitlements, public benefits, and services for which the person qualifies and which the person requires;

(d) all remuneration awarded to the community guardian program by the court from the estate of a person for whom the community guardian program is appointed as conservator or committee shall be based upon the cost of the community guardian program incurred in serving such person or the fee that would otherwise be awarded by the court, whichever is the lesser, and paid over to the social services district;

(e) the files and records of the community guardian program shall be open to inspection to the local social services officials and the department;

(f) no director, officer or employee of the community guardian program shall have a substantial interest in any corporation, organization or entity that provides services to any

person for whom the community guardian program is conservator or committee;

(g) the community guardian program shall obtain annually a statement prepared by a physician, psychologist, nurse clinician, or social worker, or other person evaluating the condition and functional level of a person for whom the community guardian program serves as guardian pursuant to paragraph five of subdivision (b) of section 81.31 of the mental hygiene law and the appointing court shall be informed of the results of such evaluation or examination and may discharge or modify the powers of the guardian pursuant to section 81.36 of the mental hygiene law. The person conducting the evaluation pursuant to this paragraph shall not be affiliated with a community guardian program and shall be acting within their lawful scope of practice as established under the education law;

(h) persons hired by the community guardian program to provide services to a person for whom the community guardian program has been named conservator or committee shall have expertise in one or more of the areas of mental health services, protective services, social services or home care services or appropriate experience.

4. A local social services official shall not be relieved of any duty to provide services to a person by reason of the operation of a community guardian program in the locality or by cessation of such program in the locality.

5. The department may promulgate rules and regulations necessary to implement this title.

6. Expenditures made by a social services district, directly or through purchase of services, in petitioning for or acting as a conservator or committee, or made pursuant to contract for community guardianship services in accordance with the provisions of this title, shall be subject to reimbursement by the state, in accordance with regulations of the department, in the amount of fifty per centum of such expenditures, after first deducting therefrom any federal funds properly received or to be received on account thereof and any amounts received pursuant to paragraph (d) of subdivision three of this section.

7. Nothing in this title shall lessen or eliminate the responsibilities and powers required by law of any agency, department, or any subdivision thereof.

8. On or before December thirty-first, nineteen hundred eighty-seven, the commissioner shall submit an interim report to the governor, the temporary president of the senate and the speaker of the assembly detailing progress and evaluating results of this program. On or before December thirty-first, nineteen hundred eighty-eight, the commissioner shall submit a final report to the governor, the temporary president of the senate and the speaker of the assembly on the effectiveness of this act.

SSL §473-e Confidentiality of Protective Services for Adults Records

1. Definitions. When used in this section unless otherwise expressly stated or unless the context or subject matter requires a different interpretation:

(a) “Subject of a report” means a person who is the subject of a referral or an application for protective services for adults, or who is receiving or has received protective services for adults from a social services district.

(b) “Authorized representative of a subject of a report” means (i) a person named in writing by a subject to be a subject's representative for purposes of requesting and receiving records under this article; provided, however, that the subject has contract capacity at the time of the writing or had executed a durable power of attorney at a time when the subject had such capacity, naming the authorized representative as attorney-in-fact, and such document has not been revoked in accordance with applicable law; (ii) a person appointed by a court, or otherwise authorized in accordance with law to represent or act in the interests of the subject; or (iii) legal counsel for the subject.

2. Reports made pursuant to this article, as well as any other information obtained, including but not limited to, the names of referral sources, written reports or photographs taken concerning such reports in the possession of the department or a social services district, shall be confidential and, except to persons, officers and agencies enumerated in paragraphs (a) through (g) of this subdivision, shall only be released with the written permission of the person who is the subject of the report, or the subject's authorized representative, except to the extent that there is a basis for non-disclosure of such information pursuant to subdivision three of this section. Such reports and information may be made available to:

(a) any person who is the subject of the report or such person's authorized representative;

(b) a provider of services to a current or former protective services for adults client, where a social services official, or his or her designee determined that such information is necessary to determine the need for or to provide or to arrange for the provision of such services;

(c) a court, upon a finding that the information in the record is necessary for the use by a party in a criminal or civil action or the determination of an issue before the court;

(d) a grand jury, upon a finding that the information in the record is necessary for the determination of charges before the grand jury;

(e) a district attorney, an assistant district attorney or investigator employed in the office of a district attorney, a member of the division of state police, or a police officer employed by a city, county, town or village police department or by a county sheriff when such official requests such information stating that such information is necessary to conduct a criminal investigation or criminal prosecution of a person, that there is reasonable cause to believe that the criminal investigation or criminal prosecution involves or otherwise affects a person who is the subject of a report, and that it is reasonable to believe that due to the nature of the crime under investigation or prosecution, such records may be related to the criminal investigation or prosecution;

(f) a person named as a court-appointed evaluator or guardian in accordance with article eighty-one of the mental hygiene law, or a person named as a guardian for the mentally retarded in accordance with article seventeen-A of the surrogate's court procedure act; or

(g) any person considered entitled to such record in accordance with applicable law.

3. The commissioner or a social services official may withhold, in whole or in part, the release of any information in their possession which he or she is otherwise authorized to release pursuant to subdivision two of this section, if such official finds that release of such information would identify a person who made a referral or submitted an application on behalf of a person for protective services for adults, or who cooperated in a subsequent investigation and assessment conducted by a social services district to determine a person's need for such services and the official reasonably finds that the release of such information will be detrimental to the safety or interests of such person.

4. Before releasing a record made pursuant to this article in the possession of the department or a social services district, the appropriate official must be satisfied that the confidential character of the information will be maintained in accordance with applicable law, and that the record will be used only for the purposes for which it was made available.

5. In addition to the requirements of this section, any release of confidential HIV related information, as defined in section twenty-seven hundred eighty of the public health law , shall comply with the requirements of article twenty-seven-F of the public health law.

6. When a record made under this article is subpoenaed or sought pursuant to notice to permit discovery, a social services official may move to withdraw, quash, fix conditions or modify the subpoena, or to move for a protective order, as may be appropriate, in accordance with the applicable provisions of the criminal procedure law or the civil practice law and rules, to (a) delete the identity of any persons who made a referral or submitted an application for protective services for adults on behalf of an individual or who cooperated in a subsequent investigation and assessment of the individual's needs for such services, or the agency, institution, organization, program or other entity when such persons are employed, or with which such persons are associated, (b) withhold records the disclosure of which is likely to be detrimental to the safety or interests of such persons, or (c) otherwise to object to release of all or a portion of the record on the basis that requested release of records is for a purpose not authorized under the law.

Mental Hygiene Law Article 81

MHL §81.01 Legislative Findings and Purpose

The legislature hereby finds that the needs of persons with incapacities are as diverse and complex as they are unique to the individual. The current system of conservatorship and committee does not provide the necessary flexibility to meet these needs. Conservatorship which traditionally compromises a person's rights only with respect to property frequently is insufficient to provide necessary relief. On the other hand, a committee, with its judicial finding of incompetence and the accompanying stigma and loss

of civil rights, traditionally involves a deprivation that is often excessive and unnecessary. Moreover, certain persons require some form of assistance in meeting their personal and property management needs but do not require either of these drastic remedies. The legislature finds that it is desirable for and beneficial to persons with incapacities to make available to them the least restrictive form of intervention which assists them in meeting their needs but, at the same time, permits them to exercise the independence and self-determination of which they are capable. The legislature declares that it is the purpose of this act to promote the public welfare by establishing a guardianship system which is appropriate to satisfy either personal or property management needs of an incapacitated person in a manner tailored to the individual needs of that person, which takes in account the personal wishes, preferences and desires of the person, and which affords the person the greatest amount of independence and self-determination and participation in all the decisions affecting such person's life.

Mental Hygiene Law Article 83

MHL §83.01 Short title

This article shall be known and may be cited as the “uniform adult guardianship and protective proceedings jurisdiction act”.

MHL §83.03 Definitions

For purposes of this article, the following definitions shall apply:

(a) “Adult” means an individual who has attained eighteen years of age.

(b) “Emergency” means a circumstance that likely will result in substantial harm to a respondent's health, safety or welfare, and for which the appointment of a guardian is necessary because no other person has authority and is willing to act on the respondent's behalf.

(c) “Guardian of the property” means a person appointed by the court to administer the property of an adult, including a person appointed under article eighty-one of this title and article seventeen-A of the surrogate's court procedure act, and including a conservator appointed by a court in another state.

(d) “Guardian of the person” means a person appointed by the court to make decisions regarding the person of an adult, including a person appointed under article eighty-one of this title and article seventeen-A of the surrogate's court procedure act.

(e) “Home state” means the state in which the respondent was physically present, including any period of temporary absence, for at least six consecutive months immediately before the filing of a petition for a protective order or the appointment of a guardian of the person; or if none, the state in which the respondent was physically present, including any period of temporary absence, for at least six consecutive months ending within the six months prior to the filing of the petition.

(f) “Party” means the respondent, petitioner, guardian of the person, conservator guardian of the property, or any other person allowed by the court to participate in a guardianship proceeding for the appointment of a guardian of the person or a protective proceeding.

(g) “Person”, except in the term incapacitated person for whom a guardian of the person has been appointed or protected person, means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government or governmental subdivision, agency or instrumentality, or any other legal or commercial entity.

(h) “Protected person” means an adult for whom a protective order has been issued.

(i) “Protective order” means an order appointing a conservator, guardian of the property or other order related to management of an adult's property.

(j) “Protective proceeding” means a judicial proceeding in which a protective order is sought or has been issued.

(k) “Record” means information that is inscribed on a tangible medium or that is stored in an electronic §83.05

(l) “Respondent” means an adult for whom a protective order or the appointment of a guardian of the person is sought.

(m) “Significant-connection state” means a state, other than the home state, with which a respondent has a significant connection other than mere physical presence and in which substantial evidence concerning the respondent is available.

(n) “State” means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, a federally recognized Indian tribe, or any territory or insular possession subject to the jurisdiction of the United States.

MHL §83.05 International application of this article

A court of this state may treat a foreign country as if it were a state for the purpose of applying sections 83.01 through 83.37 of this article.

MHL §83.07 Communication between courts

(a) A court of this state may communicate with a court in another state concerning a proceeding arising under this article. The court may allow the parties to participate in the communication.

(b) If the parties are not allowed to participate in the communication, the court shall give all parties the opportunity to present facts and legal arguments before the court issues an order establishing jurisdiction.

(c) Except as otherwise provided in subdivision (d) of this section, the court shall make a record of any communication under this section and promptly inform the parties of the communication and grant them access to the record.

(d) Courts may communicate concerning schedules, calendars, court records and other administrative matters without making a record.

MHL §83.09 Cooperation between courts

(a) In a proceeding for the appointment of a guardian of the person or protective proceeding in this state, a court of this state may request the appropriate court of another state to do any of the following:

1. hold an evidentiary hearing;

2. order a person in that state to produce evidence or give testimony pursuant to procedures of that state;

3. order that an evaluation or assessment be made of the respondent;

4. order any appropriate investigation of a person involved in a proceeding;

5. forward to the court of this state a certified copy of the transcript or other record of a hearing under paragraph one of this subdivision or any other proceeding, any evidence otherwise produced under paragraph two of this subdivision, and any evaluation or assessment prepared in compliance with an order under paragraph three or four of this subdivision;

6. issue any order necessary to assure the appearance in the proceeding of a person whose presence is necessary for the court to make a determination, including the respondent or the person subject to a guardianship of the person or protected person; and

7. issue an order authorizing the release of medical, financial, criminal, or other relevant information in that state, including protected health information.

(b) The court may receive any evidence produced pursuant to subdivision (a) of this section in the same manner that it would admit into evidence the report of a court evaluator after the court evaluator had been subject to cross examination;

(c) If a court of another state in which a guardianship or protective proceeding is pending requests assistance of the kind provided in subdivision (a) of this section, a court of this state has jurisdiction for the limited purpose of granting the request or making reasonable efforts to comply with the request.

MHL §83.11 Taking testimony in another state

(a) In a proceeding for the appointment of a guardian of the person or protective proceeding, in addition to other procedures that may be available, testimony of a witness who is located in another state may be offered by deposition or other means allowable in this state for testimony taken in another state. The court on its own motion may order that the testimony of a witness be taken in another state and may prescribe the manner in which and the terms upon which the testimony is to be taken.

(b) In a proceeding for the appointment of a guardian of the person or protective proceeding, a court in this state may permit a witness located in another state to be deposed or to testify by telephone or audiovisual or other electronic means. A court of this state shall cooperate with the court of the other state in designating an appropriate location for the deposition or testimony.

(c) Documentary evidence transmitted from another state to a court of this state by technological means that do not produce an original writing may not be excluded from evidence on an objection based on the best evidence rule.

MHL §83.13 Significant connection factors

In determining under section 83.17 and subdivision (e) of section 83.31 of this article whether a respondent has a significant connection with a particular state, the court shall consider:

(a) the location of the respondent's family and other persons required to be notified of the proceeding;

(b) the length of time the respondent at any time was physically present in the state and the duration of any absence;

(c) the location of the respondent's property; and

(d) the extent to which the respondent has ties to the state such as voting registration, state or local tax return filing, vehicle registration, driver's license, social relationship, and receipt of services.

MHL §83.15 Exclusive basis

Subject to section 81.18 of this title, this article provides the exclusive jurisdictional basis for a court of this state to appoint a guardian of the person or issue a protective order for an adult.

MHL §83.17 Jurisdiction

A court of this state has jurisdiction to appoint a guardian of the person or issue a protective order for a respondent if:

(a) the state is the respondent's home state;

(b) on the date the petition is filed, this state is a significant-connection state and:

1. the respondent does not have a home state or a court of the respondent's home state has declined to exercise jurisdiction because this state is a more appropriate forum; or

2. the respondent has a home state, a petition for an appointment or order is not pending in a court of that state or another significant connection state, and before the court makes the appointment or issues the order:

(i) a petition for an appointment or order is not filed in the respondent's home state;

(ii) an objection to the court's jurisdiction is not filed by a person required to be notified of the proceeding; and

(iii) the court in this state concludes that it is an appropriate forum under the factors set forth in section 83.23 of this article;

(c) this state does not have jurisdiction under either subdivision (a) or (b) of this section, the respondent's home state and all significant-connection states have declined to exercise

jurisdiction because this state is the more appropriate forum, and jurisdiction in this state is consistent with the constitutions of this state and the United States; or

(d) the requirements for special jurisdiction under section 83.19 of this article are met.

MHL §83.19 Special jurisdiction

(a) A court of this state lacking jurisdiction under section 83.17 of this article has special jurisdiction to do any of the following:

1. appoint a guardian of the person in an emergency for a term not exceeding ninety days for a respondent who is physically present in this state;

2. issue a protective order with respect to a real or tangible personal property located in this state; and

3. appoint a guardian of the person or a guardian of the property for a person subject to a guardianship of the person or protected person for whom a provision order to transfer the proceeding from another state has been issued under procedures similar to section 83.31 of this article.

(b) If a petition for the appointment of a guardian of the person in an emergency is brought in this state and this state was not the respondent's home state on the date the petition was filed, the court shall dismiss the proceeding at the request of the court of the home state, if any, whether dismissal is requested before or after the emergency appointment.

MHL §83.21 Exclusive and continuing jurisdiction

Except as otherwise provided in section 83.19 of this article, a court that has appointed a guardian of the person or issued a protective order consistent with this article has exclusive and continuing jurisdiction over the proceedings until it is terminated by the court or the appointment or order expires by its own terms.

MHL §83.23 Appropriate forum

(a) A court of this state having jurisdiction under section 83.17 of this article to appoint a guardian of the person or issue a protective order may decline to exercise its jurisdiction if it determines at any time that a court of another state is a more appropriate forum.

(b) If a court of this state declines to exercise its jurisdiction under subdivision (a) of this section, it shall either dismiss or stay the proceeding. The court may impose any condition the court considers just and proper, including the condition that a petition for the appointment of a guardian of the person or issuance of a protective order be filed promptly in another state.

(c) In determining whether it is an appropriate forum, the court shall consider all relevant factors, including:

1. any expressed preference of the respondent;

2. whether abuse, neglect or exploitation of the respondent has occurred or is likely to occur, and which state could best protect the respondent from the abuse, neglect or exploitation;

3. the length of time the respondent was physically present in or was a legal resident of this or another state;

4. the distance of the respondent from the court in each state;

5. the financial circumstances of the respondent's estate;

6. the nature and location of the evidence;

7. the ability of the court in each state to decide the issue expeditiously and the procedures necessary to present evidence;

8. the familiarity of the court of each state with the facts and issues in the proceeding; and

9. if an appointment were made, the court's ability to monitor the conduct of the guardian or conservator.

MHL §83.25 Jurisdiction declined by reason of conduct

(a) If at any time a court of this state determines that it acquired jurisdiction to appoint a guardian of the person or issue a protective order because of unjustifiable conduct, the court may:

1. decline to exercise jurisdiction;

2. exercise jurisdiction for the limited purpose of fashioning an appropriate remedy to ensure the health, safety and welfare of the respondent, or the protection of the respondent's property or prevent a repetition of the unjustifiable conduct, including staying the proceeding until a petition for the appointment of a guardian of the person or issuance of a protective order is filed in a court of another state having jurisdiction; or

3. continue to exercise jurisdiction after considering:

(i) the extent to which the respondent and all persons required to be notified of the proceedings have acquiesced in the exercise of the court's jurisdiction;

(ii) whether it is a more appropriate forum than the court of any other state under the factors set forth in subdivision (c) of section 83.23 of this article; and

(iii) whether the court of any other state would have jurisdiction under factual circumstances in substantial conformity with the jurisdictional standards of section 83.17 of this article.

(b) If a court of this state determines that it acquired jurisdiction to appoint a guardian of the person or issue a protective order because a party seeking to invoke its jurisdiction engaged in unjustifiable conduct, it may assess against that party necessary and reasonable expenses, including attorney's fees, investigative fees, court costs, communication expenses, witness fees and expenses, and travel expenses. The court may not assess fees, costs or expenses of any kind against this state or a governmental subdivision, agency or instrumentality of this state unless authorized by law other than this article.

MHL §83.27 Notice of proceeding

If a petition for the appointment of a guardian of the person or issuance of a protective order is brought in this state and this state was not the respondent's home state on the date the petition was filed, in addition to complying with the notice requirements of this state, notice of the petition must be given to those persons who would be entitled to notice of the petition if a proceeding were brought in the respondent's home state. The notice must be given in the same manner as notice is required to be given in this state.

MHL §83.29 Proceedings in more than one state

Except for a petition for the appointment of a guardian of the person in an emergency or issuance of a protective order limited to property located in this state under paragraph one or two of subdivision (a) of section 83.19 of this article, if a petition for the appointment of a guardian of the person or issuance of a protective order is filed in this state and in another state and neither petition has been dismissed or withdrawn, the following rules apply:

(a) If the court in this state has jurisdiction under section 83.17 of this article, it may proceed with the case unless a court in another state acquires jurisdiction under provisions similar to such section before the appointment or issuance of the order.

(b) If the court in this state does not have jurisdiction under section 83.17 of this article, whether at the time the petition is filed or at any time before the appointment or issuance of the order, the court shall stay the proceeding and communicate with the court in the other state. If the court in the other state has jurisdiction, the court in this state shall dismiss the petition unless the court in the other state determines that the court in this state is a more appropriate forum.

MHL §83.31 Transfer of guardianship or conservatorship to another state

(a) A guardian of the person or a guardian of the property appointed in this state may petition the court to transfer the guardianship to another state.

(b) Notice of a petition under subdivision (a) of this section must be given to the persons that would be entitled to notice of a petition in this state for the appointment of a guardian of the person or a guardian of the property.

(c) On the court's own motion or on request of the guardian of the person, the guardian of the property, the person subject to the guardianship of the person, or the protected person, or other person required to be notified of the petition, the court shall hold a hearing on a petition filed pursuant to subdivision (a) of this section.

(d) The court shall issue an order provisionally granting a petition to transfer a guardianship of the person and shall direct the guardian of the person to petition for guardianship of the person in the other state if the court is satisfied that the guardianship of the person will be accepted by the court in the other state and the court finds that:

1. the person subject to the guardianship of the person is physically present in or is reasonably expected to move permanently to the other state;

2. an objection to the transfer has not been made or, if an objection has been made, the objector has not established that the transfer would be contrary to the interests of the person subject to the guardianship of the person; and

3. plans for care and services for the person subject to the guardianship of the person in the other state are reasonable and sufficient.

(e) The court shall issue a provisional order granting a petition to transfer a guardianship of the property and shall direct the guardian of the property to petition for guardianship of the property in the other state if the court is satisfied that the guardianship of the property will be accepted by the court of the other state and the court finds that:

1. the protected person is physically present in or is reasonably expected to move permanently to the other state, or the protected person has a significant connection to the other state considering the factors in section 83.13 of this article;

2. an objection to the transfer has not been made or, if an objection has been made, the objector has not established that the transfer would be contrary to the interests of the protected person; and

3. adequate arrangements will be made for management of the protected person's property.

(f) The court shall issue a final order confirming the transfer and terminating the guardianship of the person or property upon its receipt of:

1. a provisional order accepting the proceeding from the court to which the proceeding is to be transferred which is issued under provisions similar to section 83.33 of this article; and

2. the documents required to terminate a guardianship of the person or property in this state.

MHL §83.33 Accepting guardianship or conservatorship transferred from another state

(a) To confirm transfer of a guardianship of the person or guardianship of the property transferred to this state under provisions similar to section 83.31 of this article, the guardian of the person or guardian of the property must petition the court in this state pursuant to article eighty-one of this title or article seventeen-A of the surrogate's court procedure act to accept the guardianship of the person or guardianship of the property. The petition must include a certified copy of the other state's provisional order of transfer.

(b) Notice of a petition under subdivision (a) of this section must be given to those persons that would be entitled to notice if the petition were a petition for the appointment of a guardian of the person or issuance of a protective order in both the transferring state and this state. The notice must be given in the same manner as notice is required to be given in this state.

(c) On the court's own motion or on request of the guardian of the person or guardian of the property, the person subject to the guardianship of the person or protected person, or other person required to be notified of the proceeding, the court shall hold a hearing on a petition filed pursuant to subdivision (a) of this section.

(d) The court shall issue an order provisionally granting a petition filed under subdivision (a) of this section unless:

1. an objection is made and the objector establishes that transfer of the proceeding would be contrary to the interests of the incapacitated or protected person; or

2. the guardian of the person or guardian of the property is ineligible for appointment in this state.

(e) The court shall issue a final order accepting the proceeding and appointing the guardian of the person or guardian of the property as guardian of the person or guardian of the property in this state upon its receipt from the court from which the proceeding is being transferred of a final order issued under provisions similar to section 83.31 of this article transferring the proceeding to this state.

(f) Not later than ninety days after issuance of a final order accepting transfer of a guardianship of the person or guardianship of the property, the court shall determine whether the guardianship of the person or guardianship of the property needs to be modified to conform to the law of this state.

(g) In granting a petition under this section, the court shall recognize a guardianship order from the other state, including the determination of incapacity and the appointment of the guardian of the person or guardian of the property.

(h) The denial by a court of this state of a petition to accept a guardianship of the person or guardianship of the property transferred from another state does not affect the ability of the guardian of the person or guardian of the property to seek appointment as guardian of the person or guardian of the property in this state under article eighty-one of this title or article seventeen-A of the surrogate's court procedure act if the court has jurisdiction to make an appointment other than by reason of the provisional order of transfer.

MHL §83.35 Registration of orders appointing a guardian of the person

If a guardian of the person by whatever name designated has been appointed in another state and a petition for the appointment of a guardian of the person is not pending in this state, the guardian of the person appointed in the other state, after giving notice to the appointing court of an intent to register, may register the guardianship of the person order in this state by filing as a foreign judgment in a court, in any appropriate county of this state, certified copies of the order and letters of office.

MHL §83.37 Registration of protective orders

If a guardian of the property has been appointed in another state and a petition for a protective order is not pending in this state, the guardian of the property appointed in the other state, after giving notice to the appointing court of an intent to register, may register the protective order in this state by filing as a foreign judgment in a court of this state, in any county in which property belonging to the protected person is located, certified copies of the order and letters of office and of any bond. Thereafter, said guardian of the property shall comply with the requirements of subparagraph (vi) of paragraph six of subdivision (a) of section 81.20 of this title with regard to any real property of the protected person in this state.

MHL §83.39 Effect of registration

(a) Upon registration of an order appointing a guardian of the person or protective order from another state, the guardian of the person or guardian of the property may exercise in this state all powers authorized in the order of appointment or protective order except as prohibited under the laws of this state and, if the guardian of the person or guardian of the property is not a resident of this state, subject to any conditions imposed upon nonresident parties.

(b) A court of this state may grant any relief available under this article and other law of this state to enforce a registered order.

(c) Notwithstanding any provision of law to the contrary, upon registration of an order appointing a guardian of the person or protective order from another state, the guardian of the person or guardian of the property, if so authorized in the order of appointment or protective order, may commence and defend actions and proceedings in this state.

(d) Upon registration of a protective order from another state, the guardian of the property, if so authorized in the protective order, may petition the court pursuant to article seventeen of the real property actions and proceedings law, for permission to dispose of the real property, or an interest in the real property, of the protected person.

MHL §83.41 Uniformity of application and construction

In applying and construing this article, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

MHL §83.43 Relation to electronic signatures in global and national commerce act

This article modifies, limits and supersedes the federal Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001, et seq., but does not modify, limit or supersede Section 101(c) of such act, 15 U.S.C. Section 7001 (c) , or authorize electronic delivery of any of the notices described in Section 103(b) of such act, 15 U.S.C. Section 7003(b) .

MHL §83.45 Transitional provision

(a) This article applies to proceedings begun on or after this article's effective date.

(b) Sections 83.01 through 83.05 and sections 83.31 through 83.43 of this article apply to proceedings begun before this article's effective date, regardless of whether a guardianship or protective order has been issued.

Surrogate's Court Procedure Act Article 17-a

SCPA §1750. Guardianship of persons who are intellectually disabled

When it shall appear to the satisfaction of the court that a person is a person who is intellectually disabled, the court is authorized to appoint a guardian of the person or of the property or of both if such appointment of a guardian or guardians is in the best interest of the person who is intellectually disabled. Such appointment shall be made pursuant to the provisions of this article, provided however that the provisions of section seventeen hundred fifty-a of this article shall not apply to the appointment of a guardian or guardians of a person who is intellectually disabled.

1. For the purposes of this article, a person who is intellectually disabled is a person who has been certified by one licensed physician and one licensed psychologist, or by two licensed physicians at least one of whom is familiar with or has professional knowledge in the care and treatment of persons with an intellectual disability, having qualifications to make such certification, as being incapable to manage him or herself and/or his or her affairs by reason of intellectual disability and that such condition is permanent in nature or likely to continue indefinitely.

2. Every such certification pursuant to subdivision one of this section, made on or after the effective date of this subdivision, shall include a specific determination by such physician and psychologist, or by such physicians, as to whether the person who is intellectually disabled has the capacity to make health care decisions, as defined by subdivision three of section twenty-nine hundred eighty of the public health law , for himself or herself. A determination that the person who is intellectually disabled has the capacity to make health care decisions shall not preclude the appointment of a guardian pursuant to this section to make other decisions on behalf of the person who is intellectually disabled. The absence of this determination in the case of guardians appointed prior to the effective date of this subdivision shall not preclude such guardians from making health care decisions.

SCPA §1750-a. Guardianship of persons who are developmentally disabled

1. When it shall appear to the satisfaction of the court that a person is a person who is developmentally disabled, the court is authorized to appoint a guardian of the person or of the property or of both if such appointment of a guardian or guardians is in the best interest of the person who is developmentally disabled. Such appointments shall be made pursuant to the provisions of this article, provided however that the provisions of section seventeen hundred fifty of this article shall not apply to the appointment of a guardian or guardians of a person who is developmentally disabled. For the purposes of this article, a person who is developmentally disabled is a person who has been certified by one licensed physician and one licensed psychologist, or by two licensed physicians at least one of whom is familiar with or has professional knowledge in the care and treatment of persons with developmental disabilities, having qualifications to make such certification, as having an impaired ability to understand and appreciate the nature and consequences of

decisions which result in such person being incapable of managing himself or herself and/or his or her affairs by reason of developmental disability and that such condition is permanent in nature or likely to continue indefinitely, and whose disability:

(a) is attributable to cerebral palsy, epilepsy, neurological impairment, autism or traumatic head injury;

(b) is attributable to any other condition of a person found to be closely related to intellectual disability because such condition results in similar impairment of general intellectual functioning or adaptive behavior to that of persons with intellectual disabilities; or

(c) is attributable to dyslexia resulting from a disability described in subdivision one or two of this section or from intellectual disability; and

(d) originates before such person attains age twenty-two, provided, however, that no such age of origination shall apply for the purposes of this article to a person with traumatic head injury.

2. Notwithstanding any provision of law to the contrary, for the purposes of subdivision two of section seventeen hundred fifty and section seventeen hundred fifty-b of this article, “a person who is intellectually disabled and his or her guardian” shall also mean a person and his or her guardian appointed pursuant to this section; provided that such person has been certified by the physicians and/or psychologists, specified in subdivision one of this section, as (i) having an intellectual disability, or (ii) having a developmental disability, as defined in section 1.03 of the mental hygiene law , which (A) includes intellectual disability, or (B) results in a similar impairment of general intellectual functioning or adaptive behavior so that such person is incapable of managing himself or herself, and/or his or her affairs by reason of such developmental disability.

SCPA §1750-b. Health care decisions for persons who are intellectually disabled

1. Scope of authority. Unless specifically prohibited by the court after consideration of the determination, if any, regarding a person who is intellectually disabled's capacity to make health care decisions, which is required by section seventeen hundred fifty of this article, the guardian of such person appointed pursuant to section seventeen hundred fifty of this article shall have the authority to make any and all health care decisions, as defined by subdivision six of section twenty-nine hundred eighty of the public health law , on behalf of the person who is intellectually disabled that such person could make if such person had capacity. Such decisions may include decisions to withhold or withdraw life-sustaining treatment. For purposes of this section, “life-sustaining treatment” means medical treatment, including cardiopulmonary resuscitation and nutrition and hydration provided by means of medical treatment, which is sustaining life functions and without which, according to reasonable medical judgment, the patient will die within a relatively short time period. Cardiopulmonary resuscitation is presumed to be life-sustaining treatment without the necessity of a medical judgment by an attending physician. The provisions of this article are not intended to permit or promote suicide, assisted suicide or euthanasia; accordingly,

nothing in this section shall be construed to permit a guardian to consent to any act or omission to which the person who is intellectually disabled could not consent if such person had capacity.

(a) For the purposes of making a decision to withhold or withdraw life-sustaining treatment pursuant to this section, in the case of a person for whom no guardian has been appointed pursuant to section seventeen hundred fifty or seventeen hundred fifty-a of this article, a "guardian" shall also mean a family member of a person who (i) has intellectual disability, or (ii) has a developmental disability, as defined in section 1.03 of the mental hygiene law , which (A) includes intellectual disability, or (B) results in a similar impairment of general intellectual functioning or adaptive behavior so that such person is incapable of managing himself or herself, and/or his or her affairs by reason of such developmental disability. Qualified family members shall be included in a prioritized list of said family members pursuant to regulations established by the commissioner of the office for people with developmental disabilities. Such family members must have a significant and ongoing involvement in a person's life so as to have sufficient knowledge of their needs and, when reasonably known or ascertainable, the person's wishes, including moral and religious beliefs. In the case of a person who was a resident of the former Willowbrook state school on March seventeenth, nineteen hundred seventy-two and those individuals who were in community care status on that date and subsequently returned to Willowbrook or a related facility, who are fully represented by the consumer advisory board and who have no guardians appointed pursuant to this article or have no qualified family members to make such a decision, then a "guardian" shall also mean the Willowbrook consumer advisory board. A decision of such family member or the Willowbrook consumer advisory board to withhold or withdraw life-sustaining treatment shall be subject to all of the protections, procedures and safeguards which apply to the decision of a guardian to withhold or withdraw life-sustaining treatment pursuant to this section.

In the case of a person for whom no guardian has been appointed pursuant to this article or for whom there is no qualified family member or the Willowbrook consumer advisory board available to make such a decision, a "guardian" shall also mean, notwithstanding the definitions in section 80.03 of the mental hygiene law , a surrogate decision-making committee, as defined in article eighty of the mental hygiene law. All declarations and procedures, including expedited procedures, to comply with this section shall be established by regulations promulgated by the commission on quality of care and advocacy for persons with disabilities.

(b) Regulations establishing the prioritized list of qualified family members required by paragraph (a) of this subdivision shall be developed by the commissioner of the office for people with developmental disabilities in conjunction with parents, advocates and family members of persons who are intellectually disabled. Regulations to implement the authority of the Willowbrook consumer advisory board pursuant to paragraph (a) of this subdivision may be promulgated by the commissioner of the office for people with developmental disabilities with advice from the Willowbrook consumer advisory board.

(c) Notwithstanding any provision of law to the contrary, the formal determinations required pursuant to section seventeen hundred fifty of this article shall only apply to

guardians appointed pursuant to section seventeen hundred fifty or seventeen hundred fifty-a of this article.

2. Decision-making standard. (a) The guardian shall base all advocacy and health care decision-making solely and exclusively on the best interests of the person who is intellectually disabled and, when reasonably known or ascertainable with reasonable diligence, on the person who is intellectually disabled's wishes, including moral and religious beliefs.

(b) An assessment of the person who is intellectually disabled's best interests shall include consideration of:

(i) the dignity and uniqueness of every person;

(ii) the preservation, improvement or restoration of the person who is intellectually disabled's health;

(iii) the relief of the person who is intellectually disabled's suffering by means of palliative care and pain management;

(iv) the unique nature of artificially provided nutrition or hydration, and the effect it may have on the person who is intellectually disabled; and

(v) the entire medical condition of the person.

(c) No health care decision shall be influenced in any way by:

(i) a presumption that persons who are intellectually disabled are not entitled to the full and equal rights, equal protection, respect, medical care and dignity afforded to persons without an intellectual disability or a developmental disability; or

(ii) financial considerations of the guardian, as such considerations affect the guardian, a health care provider or any other party.

3. Right to receive information. Subject to the provisions of sections 33.13 and 33.16 of the mental hygiene law , the guardian shall have the right to receive all medical information and medical and clinical records necessary to make informed decisions regarding the person who is intellectually disabled's health care.

4. Life-sustaining treatment. The guardian shall have the affirmative obligation to advocate for the full and efficacious provision of health care, including life-sustaining treatment. In the event that a guardian makes a decision to withdraw or withhold life-sustaining treatment from a person who is intellectually disabled:

(a) The attending physician, as defined in subdivision two of section twenty-nine hundred eighty of the public health law , must confirm to a reasonable degree of medical certainty that the person who is intellectually disabled lacks capacity to make health care decisions. The determination thereof shall be included in the person who is intellectually disabled's medical record, and shall contain such attending physician's opinion regarding the cause and nature of the person who is intellectually disabled's incapacity as well as its extent and probable duration. The attending physician who makes the confirmation shall consult with

another physician, or a licensed psychologist, to further confirm the person who is intellectually disabled's lack of capacity. The attending physician who makes the confirmation, or the physician or licensed psychologist with whom the attending physician consults, must (i) be employed by a developmental disabilities services office named in section 13.17 of the mental hygiene law or employed by the office for people with developmental disabilities to provide treatment and care to people with developmental disabilities, or (ii) have been employed for a minimum of two years to render care and service in a facility or program operated, licensed or authorized by the office for people with developmental disabilities, or (iii) have been approved by the commissioner of the office for people with developmental disabilities in accordance with regulations promulgated by such commissioner. Such regulations shall require that a physician or licensed psychologist possess specialized training or three years experience in treating intellectual disability. A record of such consultation shall be included in the person who is intellectually disabled's medical record.

(b) The attending physician, as defined in subdivision two of section twenty-nine hundred eighty of the public health law , with the concurrence of another physician with whom such attending physician shall consult, must determine to a reasonable degree of medical certainty and note on the person who is intellectually disabled's chart that:

(i) the person who is intellectually disabled has a medical condition as follows:

A. a terminal condition, as defined in subdivision twenty-three of section twenty-nine hundred sixty-one of the public health law ; or

B. permanent unconsciousness; or

C. a medical condition other than such person's intellectual disability which requires life-sustaining treatment, is irreversible and which will continue indefinitely; and

(ii) the life-sustaining treatment would impose an extraordinary burden on such person, in light of:

A. such person's medical condition, other than such person's intellectual disability; and

B. the expected outcome of the life-sustaining treatment, notwithstanding such person's intellectual disability; and

(iii) in the case of a decision to withdraw or withhold artificially provided nutrition or hydration:

A. there is no reasonable hope of maintaining life; or

B. the artificially provided nutrition or hydration poses an extraordinary burden.

(c) The guardian shall express a decision to withhold or withdraw life-sustaining treatment either:

(i) in writing, dated and signed in the presence of one witness eighteen years of age or older who shall sign the decision, and presented to the attending physician, as defined in subdivision two of section twenty-nine hundred eighty of the public health law ; or

(ii) orally, to two persons eighteen years of age or older, at least one of whom is the person who is intellectually disabled's attending physician, as defined in subdivision two of section twenty-nine hundred eighty of the public health law .

(d) The attending physician, as defined in subdivision two of section twenty-nine hundred eighty of the public health law , who is provided with the decision of a guardian shall include the decision in the person who is intellectually disabled's medical chart, and shall either:

(i) promptly issue an order to withhold or withdraw life-sustaining treatment from the person who is intellectually disabled, and inform the staff responsible for such person's care, if any, of the order; or

(ii) promptly object to such decision, in accordance with subdivision five of this section.

(e) At least forty-eight hours prior to the implementation of a decision to withdraw life-sustaining treatment, or at the earliest possible time prior to the implementation of a decision to withhold life-sustaining treatment, the attending physician shall notify:

(i) the person who is intellectually disabled, except if the attending physician determines, in writing and in consultation with another physician or a licensed psychologist, that, to a reasonable degree of medical certainty, the person would suffer immediate and severe injury from such notification. The attending physician who makes the confirmation, or the physician or licensed psychologist with whom the attending physician consults, shall:

A. be employed by a developmental disabilities services office named in section 13.17 of the mental hygiene law or employed by the office for people with developmental disabilities to provide treatment and care to people with developmental disabilities, or

B. have been employed for a minimum of two years to render care and service in a facility operated, licensed or authorized by the office for people with developmental disabilities, or

C. have been approved by the commissioner of the office for people with developmental disabilities in accordance with regulations promulgated by such commissioner. Such regulations shall require that a physician or licensed psychologist possess specialized training or three years experience in treating intellectual disability. A record of such consultation shall be included in the person who is intellectually disabled's medical record;

(ii) if the person is in or was transferred from a residential facility operated, licensed or authorized by the office for people with developmental disabilities, the chief executive officer of the agency or organization operating such facility and the mental hygiene legal service; and

(iii) if the person is not in and was not transferred from such a facility or program, the commissioner of the office for people with developmental disabilities, or his or her designee.

5. Objection to health care decision. (a) Suspension. A health care decision made pursuant to subdivision four of this section shall be suspended, pending judicial review,

except if the suspension would in reasonable medical judgment be likely to result in the death of the person who is intellectually disabled, in the event of an objection to that decision at any time by:

(i) the person who is intellectually disabled on whose behalf such decision was made; or

(ii) a parent or adult sibling who either resides with or has maintained substantial and continuous contact with the person who is intellectually disabled; or

(iii) the attending physician, as defined in subdivision two of section twenty-nine hundred eighty of the public health law ; or

(iv) any other health care practitioner providing services to the person who is intellectually disabled, who is licensed pursuant to article one hundred thirty-one, one hundred thirty-one-B, one hundred thirty-two , one hundred thirty-three, one hundred thirty-six, one hundred thirty-nine, one hundred forty-one , one hundred forty-three , one hundred forty-four , one hundred fifty-three, one hundred fifty-four, one hundred fifty-six, one hundred fifty-nine or one hundred sixty-four of the education law ; or

(v) the chief executive officer identified in subparagraph (ii) of paragraph (e) of subdivision four of this section; or

(vi) if the person is in or was transferred from a residential facility or program operated, approved or licensed by the office for people with developmental disabilities, the mental hygiene legal service; or

(vii) if the person is not in and was not transferred from such a facility or program, the commissioner of the office for people with developmental disabilities, or his or her designee.

(b) Form of objection. Such objection shall occur orally or in writing.

(c) Notification. In the event of the suspension of a health care decision pursuant to this subdivision, the objecting party shall promptly notify the guardian and the other parties identified in paragraph (a) of this subdivision, and the attending physician shall record such suspension in the person who is intellectually disabled's medical chart.

(d) Dispute mediation. In the event of an objection pursuant to this subdivision, at the request of the objecting party or person or entity authorized to act as a guardian under this section, except a surrogate decision making committee established pursuant to article eighty of the mental hygiene law, such objection shall be referred to a dispute mediation system, established pursuant to section two thousand nine hundred seventy-two of the public health law or similar entity for mediating disputes in a hospice, such as a patient's advocate's office, hospital chaplain's office or ethics committee, as described in writing and adopted by the governing authority of such hospice, for non-binding mediation. In the event that such dispute cannot be resolved within seventy-two hours or no such mediation entity exists or is reasonably available for mediation of a dispute, the objection shall proceed to judicial review pursuant to this subdivision. The party requesting mediation shall provide notification to those parties entitled to notice pursuant to paragraph (a) of this subdivision.

6. Special proceeding authorized. The guardian, the attending physician, as defined in subdivision two of section twenty-nine hundred eighty of the public health law , the chief executive officer identified in subparagraph (ii) of paragraph (e) of subdivision four of this section, the mental hygiene legal service (if the person is in or was transferred from a residential facility or program operated, approved or licensed by the office for people with developmental disabilities) or the commissioner of the office for people with developmental disabilities or his or her designee (if the person is not in and was not transferred from such a facility or program) may commence a special proceeding in a court of competent jurisdiction with respect to any dispute arising under this section, including objecting to the withdrawal or withholding of life-sustaining treatment because such withdrawal or withholding is not in accord with the criteria set forth in this section.

7. Provider's obligations. (a) A health care provider shall comply with the health care decisions made by a guardian in good faith pursuant to this section, to the same extent as if such decisions had been made by the person who is intellectually disabled, if such person had capacity.

(b) Notwithstanding paragraph (a) of this subdivision, nothing in this section shall be construed to require a private hospital to honor a guardian's health care decision that the hospital would not honor if the decision had been made by the person who is intellectually disabled, if such person had capacity, because the decision is contrary to a formally adopted written policy of the hospital expressly based on religious beliefs or sincerely held moral convictions central to the hospital's operating principles, and the hospital would be permitted by law to refuse to honor the decision if made by such person, provided:

(i) the hospital has informed the guardian of such policy prior to or upon admission, if reasonably possible; and

(ii) the person who is intellectually disabled is transferred promptly to another hospital that is reasonably accessible under the circumstances and is willing to honor the guardian's decision. If the guardian is unable or unwilling to arrange such a transfer, the hospital's refusal to honor the decision of the guardian shall constitute an objection pursuant to subdivision five of this section.

(c) Notwithstanding paragraph (a) of this subdivision, nothing in this section shall be construed to require an individual health care provider to honor a guardian's health care decision that the individual would not honor if the decision had been made by the person who is intellectually disabled, if such person had capacity, because the decision is contrary to the individual's religious beliefs or sincerely held moral convictions, provided the individual health care provider promptly informs the guardian and the facility, if any, of his or her refusal to honor the guardian's decision. In such event, the facility shall promptly transfer responsibility for the person who is intellectually disabled to another individual health care provider willing to honor the guardian's decision. The individual health care provider shall cooperate in facilitating such transfer of the patient.

(d) Notwithstanding the provisions of any other paragraph of this subdivision, if a guardian directs the provision of life-sustaining treatment, the denial of which in reasonable medical judgment would be likely to result in the death of the person who is intellectually disabled,

a hospital or individual health care provider that does not wish to provide such treatment shall nonetheless comply with the guardian's decision pending either transfer of the person who is intellectually disabled to a willing hospital or individual health care provider, or judicial review.

(e) Nothing in this section shall affect or diminish the authority of a surrogate decision-making panel to render decisions regarding major medical treatment pursuant to article eighty of the mental hygiene law.

8. Immunity. (a) Provider immunity. No health care provider or employee thereof shall be subjected to criminal or civil liability, or be deemed to have engaged in unprofessional conduct, for honoring reasonably and in good faith a health care decision by a guardian, or for other actions taken reasonably and in good faith pursuant to this section.

(b) Guardian immunity. No guardian shall be subjected to criminal or civil liability for making a health care decision reasonably and in good faith pursuant to this section.

SCPA §1751. Petition for appointment; by whom made

A petition for the appointment of a guardian of the person or property, or both, of a person who is intellectually disabled or a person who is developmentally disabled may be made by a parent, any interested person eighteen years of age or older on behalf of the person who is intellectually disabled or a person who is developmentally disabled including a corporation authorized to serve as a guardian as provided for by this article, or by the person who is intellectually disabled or a person who is developmentally disabled when such person is eighteen years of age or older.

SCPA §1752. Petition for appointment; contents

The petition for the appointment of a guardian shall be filed with the court on forms to be prescribed by the state chief administrator of the courts. Such petition for a guardian of a person who is intellectually disabled or a person who is developmentally disabled shall include, but not be limited to, the following information:

1. the full name, date of birth and residence of the person who is intellectually disabled or a person who is developmentally disabled;

2. the name, age, address and relationship or interest of the petitioner to the person who is intellectually disabled or a person who is developmentally disabled;

3. the names of the father, the mother, children, adult siblings if eighteen years of age or older, the spouse and primary care physician if other than a physician having submitted a certification with the petition, if any, of the person who is intellectually disabled or a person who is developmentally disabled and whether or not they are living, and if living, their addresses and the names and addresses of the nearest distributees of full age who are domiciliaries, if both parents are dead;

4. the name and address of the person with whom the person who is intellectually disabled or a person who is developmentally disabled resides if other than the parents or spouse;

5. the name, age, address, education and other qualifications, and consent of the proposed guardian, standby and alternate guardian, if other than the parent, spouse, adult child if eighteen years of age or older or adult sibling if eighteen years of age or older, and if such parent, spouse or adult child be living, why any of them should not be appointed guardian;

6. the estimated value of real and personal property and the annual income therefrom and any other income including governmental entitlements to which the person who is intellectually disabled or person who is developmentally disabled is entitled; and

7. any circumstances which the court should consider in determining whether it is in the best interests of the person who is intellectually disabled or person who is developmentally disabled to not be present at the hearing if conducted.

SCPA §1753. Persons to be served

1. Upon presentation of the petition, process shall issue to:

(a) the parent or parents, adult children, if the petitioner is other than a parent, adult siblings, if the petitioner is other than a parent, and if the person who is intellectually disabled or person who is developmentally disabled is married, to the spouse, if their residences are known;

(b) the person having care and custody of the person who is intellectually disabled or person who is developmentally disabled, or with whom such person resides if other than the parents or spouse; and

(c) the person who is intellectually disabled or person who is developmentally disabled if fourteen years of age or older for whom an application has been made in such person's behalf.

2. Upon presentation of the petition, notice of such petition shall be served by certified mail to:

(a) the adult siblings if the petitioner is a parent, and adult children if the petitioner is a parent;

(b) the mental hygiene legal service in the judicial department where the facility, as defined in subdivision (a) of section 47.01 of the mental hygiene law , is located if the person who is intellectually disabled or person who is developmentally disabled resides in such a facility;

(c) in all cases, to the director in charge of a facility licensed or operated by an agency of the state of New York, if the person who is intellectually disabled or person who is developmentally disabled resides in such facility;

(d) one other person if designated in writing by the person who is intellectually disabled or person who is developmentally disabled; and

(e) such other persons as the court may deem proper.

3. No process or notice shall be necessary to a parent, adult child, adult sibling, or spouse of the person who is intellectually disabled or person who is developmentally disabled who has been declared by a court as being incompetent. In addition, no process or notice shall be necessary to a spouse who is divorced from the person who is intellectually disabled or person who is developmentally disabled, and to a parent, adult child, adult sibling when it shall appear to the satisfaction of the court that such person or persons have abandoned the person who is intellectually disabled or person who is developmentally disabled.

SCPA §1754. Hearing and trial

1. Upon a petition for the appointment of a guardian of a person who is intellectually disabled or person who is developmentally disabled eighteen years of age or older, the court shall conduct a hearing at which such person shall have the right to jury trial. The right to a jury trial shall be deemed waived by failure to make a demand therefor. The court may in its discretion dispense with a hearing for the appointment of a guardian, and may in its discretion appoint a guardian ad litem, or the mental hygiene legal service if such person is a resident of a mental hygiene facility as defined in subdivision (a) of section 47.01 of the mental hygiene law , to recommend whether the appointment of a guardian as proposed in the application is in the best interest of the person who is intellectually disabled or person who is developmentally disabled, provided however, that such application has been made by:

(a) both parents or the survivor; or

(b) one parent and the consent of the other parent; or

(c) any interested party and the consent of each parent.

2. When it shall appear to the satisfaction of the court that a parent or parents not joining in or consenting to the application have abandoned the person who is intellectually disabled or person who is developmentally disabled or are not otherwise required to receive notice, the court may dispense with such parent's consent in determining the need to conduct a hearing for a person under the age of eighteen. However, if the consent of both parents or the surviving parent is dispensed with by the court, a hearing shall be held on the application.

3. If a hearing is conducted, the person who is intellectually disabled or person who is developmentally disabled shall be present unless it shall appear to the satisfaction of the court on the certification of the certifying physician that the person who is intellectually disabled or person who is developmentally disabled is medically incapable of being present to the extent that attendance is likely to result in physical harm to such person who is intellectually disabled or person who is developmentally disabled, or under such other

circumstances which the court finds would not be in the best interest of the person who is intellectually disabled or person who is developmentally disabled.

4. If either a hearing is dispensed with pursuant to subdivisions one and two of this section or the person who is intellectually disabled or person who is developmentally disabled is not present at the hearing pursuant to subdivision three of this section, the court may appoint a guardian ad litem if no mental hygiene legal service attorney is authorized to act on behalf of the person who is intellectually disabled or person who is developmentally disabled. The guardian ad litem or mental hygiene legal service attorney, if appointed, shall personally interview the person who is intellectually disabled or person who is developmentally disabled and shall submit a written report to the court.

5. If, upon conclusion of such hearing or jury trial or if none be held upon the application, the court is satisfied that the best interests of the person who is intellectually disabled or person who is developmentally disabled will be promoted by the appointment of a guardian of the person or property, or both, it shall make a decree naming such person or persons to serve as such guardians.

SCPA §1755. Modification order

Any person who is intellectually disabled or person who is developmentally disabled eighteen years of age or older, or any person on behalf of any person who is intellectually disabled or person who is developmental 1 disabled for whom a guardian has been appointed, may apply to the court having jurisdiction over the guardianship order requesting modification of such order in order to protect the person who is intellectually disabled's, or person who is developmentally disabled's financial situation and/or his or her personal interests. The court may, upon receipt of any such request to modify the guardianship order, appoint a guardian ad litem. The court shall so modify the guardianship order if in its judgment the interests of the guardian are adverse to those of the person who is intellectually disabled or person who is developmentally disabled or if the interests of justice will be best served including, but not limited to, facts showing the necessity for protecting the personal and/or financial interests of the person who is intellectually disabled or person who is developmentally disabled.

1 So in original. (”developmental” should be “developmentally”.)

SCPA §1756. Limited guardian of the property

When it shall appear to the satisfaction of the court that such person who is intellectually disabled or person who is developmentally disabled for whom an application for guardianship is made is eighteen years of age or older and is wholly or substantially self-supporting by means of his or her wages or earnings from employment, the court is authorized and empowered to appoint a limited guardian of the property of such person who is intellectually disabled or person who is developmentally disabled who shall receive, manage, disburse and account for only such property of said person who is intellectually

disabled or person who is developmentally disabled as shall be received from other than the wages or earnings of said person.

The person who is intellectually disabled or person who is developmentally disabled for whom a limited guardian of the property has been appointed shall have the right to receive and expend any and all wages or other earnings of his or her employment and shall have the power to contract or legally bind himself or herself for such sum of money not exceeding one month's wages or earnings from such employment or three hundred dollars, whichever is greater, or as otherwise authorized by the court.

SCPA §1757. Standby guardian of a person who is intellectually disabled or person who is developmentally disabled

1. Upon application, a standby guardian of the person or property or both of a person who is intellectually disabled or person who is developmentally disabled may be appointed by the court. The court may also, upon application, appoint an alternate and/or successive alternates to such standby guardian, to act if such standby guardian shall die, or become incapacitated, or shall renounce. Such appointments by the court shall be made in accordance with the provisions of this article.

2. Such standby guardian, or alternate in the event of such standby guardian's death, incapacity or renunciation, shall without further proceedings be empowered to assume the duties of his or her office immediately upon death, renunciation or adjudication of incompetency of the guardian or standby guardian appointed pursuant to this article, subject only to confirmation of his or her appointment by the court within one hundred eighty days following assumption of his or her duties of such office. Before confirming the appointment of the standby guardian or alternate guardian, the court may conduct a hearing pursuant to section seventeen hundred fifty-four of this article upon petition by anyone on behalf of the person who is intellectually disabled or person who is developmentally disabled or the person who is intellectually disabled or person who is developmentally disabled if such person is eighteen years of age or older, or upon its discretion.

3. Failure of a standby or alternate standby guardian to assume the duties of guardian, seek court confirmation or to renounce the guardianship within sixty days of written notice by certified mail or personal delivery given by or on behalf of the person who is intellectually disabled or person who is developmentally disabled of a prior guardian's inability to serve and the standby or alternate standby guardian's duty to serve, seek court confirmation or renounce such role shall allow the court to:

(a) deem the failure an implied renunciation of guardianship, and

(b) authorize, notwithstanding the time period provided for in subdivision two of this section to seek court confirmation, any remaining standby or alternate standby guardian to serve in such capacity provided (i) an application for confirmation and appropriate notices pursuant to subdivision one of section seventeen hundred fifty-three of this article are filed,

or (ii) an application for modification of the guardianship order pursuant to section seventeen hundred fifty-five of this article is filed.

SCPA §1758. Court jurisdiction

1. The jurisdiction of the court to hear proceedings pursuant to this article shall be subject to article eighty-three of the mental hygiene law.

2. After the appointment of a guardian, standby guardian or alternate guardians, the court shall have and retain general jurisdiction over the person who is intellectually disabled or person who is developmentally disabled for whom such guardian shall have been appointed, to take of its own motion or to entertain and adjudicate such steps and proceedings relating to such guardian, standby, or alternate guardianship as may be deemed necessary or proper for the welfare of such person who is intellectually disabled or person who is developmentally disabled.

SCPA §1759. Duration of guardianship

1. Such guardianship shall not terminate at the age of majority or marriage of such person who is intellectually disabled or person who is developmentally disabled but shall continue during the life of such person, or until terminated by the court.

2. A person eighteen years or older for whom such a guardian has been previously appointed or anyone, including the guardian, on behalf of a person who is intellectually disabled or person who is developmentally disabled for whom a guardian has been appointed may petition the court which made such appointment or the court in his or her county of residence to have the guardian discharged and a successor appointed, or to have the guardian of the property designated as a limited guardian of the property, or to have the guardianship order modified, dissolved or otherwise amended. Upon such a petition for review, the court shall conduct a hearing pursuant to section seventeen hundred fifty-four of this article.

3. Upon marriage of such person who is intellectually disabled or person who is developmentally disabled for whom such a guardian has been appointed, the court shall, upon request of the person who is intellectually disabled or person who is developmentally disabled, spouse, or any other person acting on behalf of the person who is intellectually disabled or person who is developmentally disabled, review the need, if any, to modify, dissolve or otherwise amend the guardianship order including, but not limited to, the appointment of the spouse as standby guardian. The court, in its discretion, may conduct such review pursuant to section seventeen hundred fifty-four of this article.

SCPA §1760. Corporate guardianship

No corporation may be appointed guardian of the person under the provisions of this article, except that a non-profit corporation organized and existing under the laws of the

state of New York and having the corporate power to act as guardian of a person who is intellectually disabled or person who is developmentally disabled may be appointed as the guardian of the person only of such person who is intellectually disabled or person who is developmentally disabled.

SCPA §1761. Application of other provisions

To the extent that the context thereof shall admit, the provisions of article seventeen of this act shall apply to all proceedings under this article with the same force and effect as if an “infant”, as therein referred to, were a “person who is intellectually disabled” or “person who is developmentally disabled” as herein defined, and a “guardian” as therein referred to were a “guardian of the person who is intellectually disabled” or a “guardian of a person who is developmentally disabled” as herein provided for.

General Obligations Law Article 5- Power of Attorney (portions)

GOL §5-1501. Application and definitions

1. This title shall apply to all powers of attorney except powers of attorney excluded from this title by section 5-1501C of this title.

2. As used in this title the following terms shall have the following meanings:

(a) “Agent” means a person granted authority to act as attorney-in-fact for the principal under a power of attorney, and includes the original agent and any co-agent or successor agent. Unless the context indicates otherwise, an “agent” designated in a power of attorney shall mean “attorney-in-fact” for the purposes of this title. An agent acting under a power of attorney has a fiduciary relationship with the principal.

(b) “Benefits from governmental programs or civil or military service” means any benefit, program or assistance provided under a statute or governmental regulation, including social security, medicare and medicaid.

(c) “Capacity” means ability to comprehend the nature and consequences of the act of executing and granting, revoking, amending or modifying a power of attorney, any provision in a power of attorney, or the authority of any person to act as agent under a power of attorney.

(d) “Compensation” means reasonable compensation authorized to be paid to the agent from assets of the principal for services actually rendered by the agent pursuant to the authority granted in a power of attorney.

(e) “Financial institution” means a financial entity, including, but not limited to: a bank, trust company, national bank, savings bank, federal mutual savings bank, savings and loan association, federal savings and loan association, federal mutual savings and loan association, credit union, federal credit union, branch of a foreign banking corporation, public pension fund, retirement system, securities broker, securities dealer, securities firm, and insurance company.

(f) “Incapacitated” means to be without capacity.

(g) “Internal Revenue Code” means the United States Internal Revenue Code of 1986, as amended. Such references, however, shall be deemed to constitute references to any corresponding provisions of any subsequent federal tax code.

(h) “Monitor” means a person appointed in the power of attorney who has the authority to request, receive, and seek to compel the agent to provide a record of all receipts, disbursements, and transactions entered into by the agent on behalf of the principal.

(i) “Person” means an individual, whether acting for himself or herself, or as a fiduciary or as an official of any legal, governmental or commercial entity (including, but not limited to, any such entity identified in this subdivision), corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government, governmental subdivision, government agency, government entity, government instrumentality, public corporation, or any other legal or commercial entity.

(j) “Power of attorney” means a written document, other than a document referred to in section 5-1501C of this title, by which a principal with capacity designates an agent to act on his or her behalf and includes both a statutory short form power of attorney and a non-statutory power of attorney.

(k) “Principal” means an individual who is eighteen years of age or older, acting for himself or herself and not as a fiduciary or as an official of any legal, governmental or commercial entity, who executes a power of attorney.

(l) “Record” means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(m) “Sign” means to place any memorandum, mark or sign, written, printed, stamped, photographed, engraved or otherwise upon an instrument or writing, or to use an electronic signature as that term is defined in subdivision three of section three hundred two of the state technology law, with the intent to execute the instrument, writing or electronic record. In accordance with the requirements of section three hundred seven of the state technology law, a power of attorney or any other instrument executed by the principal or agent that is recordable under the real property law shall not be executed with an electronic signature.

(n) “Statutory short form power of attorney” means a power of attorney that meets the requirements of paragraphs (a), (b) and (c) of subdivision one of section 5-1501B of this title, and that substantially conforms to the wording of the form set forth in section 5-1513 of this title; provided however, that any section indicated as “Optional” that is not used may be omitted and replaced by the words “Intentionally Omitted”. A given power of attorney substantially conforms to the form required pursuant to section 5-1513 of this title notwithstanding that the form contains (i) an insignificant mistake in wording, spelling, punctuation or formatting, or the use of bold or italic type; or (ii) uses language that is essentially the same as, but is not identical to, the statutory form, including utilizing language from a previous statute. The determination of whether there is substantial conformity with the form set forth in section 5-1513 of this title shall not depend on the presence or absence of a particular clause. Failing to include clauses that are not relevant to a given power of attorney shall not in itself cause such power of attorney to be found to not substantially conform with the requirements of such form. The use of the form set forth in section 5-1513 of this title is lawful and when used, it shall be construed as a statutory short form power of attorney. A statutory short form power of attorney may be used to grant authority provided in sections 5-1502A through 5-1502N of this title. A “statutory short form power of attorney” may contain modifications or additions as provided in section 5-1503 of this title.

(o) “Non-statutory power of attorney” means a power of attorney that is not a statutory short form power of attorney.

(p) “Third party” means a financial institution or person other than a principal or an agent.

(q) “Third party” means a financial institution or person other than a principal or an agent.

GOL §5-1505. Standard of care; fiduciary duties; compelling disclosure of record

1. Standard of care. In dealing with property of the principal, an agent shall observe the standard of care that would be observed by a prudent person dealing with property of another.

2. Fiduciary duties. (a) An agent acting under a power of attorney has a fiduciary relationship with the principal. The fiduciary duties include but are not limited to each of the following obligations:

(1) To act according to any instructions from the principal or, where there are no instructions, in the best interest of the principal, and to avoid conflicts of interest.

(2) To keep the principal's property separate and distinct from any other property owned or controlled by the agent, except for property that is jointly owned by the principal and agent at the time of the execution of the power of attorney, and property that becomes jointly owned after the execution of the power of attorney as the result of the agent's acquisition of an interest in the principal's property by reason of the agent's exercise of authority granted in the modifications section of a statutory short form power of attorney or in a non-statutory power of attorney. The agent may not make gifts of the principal's property to himself or herself without specific authorization in a power of attorney.

(3) To keep a record of all receipts, disbursements, and transactions entered into by the agent on behalf of the principal and to make such record and power of attorney available to the principal or to third parties at the request of the principal. The agent shall make such record and a copy of the power of attorney available within fifteen days of a written request by any of the following:

(i) a monitor;

(ii) a co-agent or successor agent acting under the power of attorney;

(iii) a government entity, or official thereof, investigating a report that the principal may be in need of protective or other services, or investigating a report of abuse or neglect;

(iv) a court evaluator appointed pursuant to section 81.09 of the mental hygiene law;

(v) a guardian ad litem appointed pursuant to section seventeen hundred fifty-four of the surrogate's court procedure act;

(vi) the guardian or conservator of the estate of the principal, if such record has not already been provided to the court evaluator or guardian ad litem; or

(vii) the personal representative of the estate of a deceased principal if such record has not already been provided to the guardian or conservator of the estate of the principal.

The failure of the agent to make the record available pursuant to this paragraph may result in a special proceeding under subdivision one of section 5-1510 of this title.

(b) The agent may be subject to liability for conduct or omissions which violate any fiduciary duty.

(c) The agent is not liable to third parties for any act pursuant to a power of attorney if the act was authorized at the time and the act did not violate subdivision one or two of this section.

3. Resignation. (a) An agent who has signed the power of attorney may resign by giving written notice to the principal and the agent's co-agent, successor agent or the monitor, if one has been named, or the principal's guardian if one has been appointed. If no co-agent, successor agent, monitor or guardian is known to the agent and the principal is incapacitated or the agent has notice of any facts indicating the principal's incapacity, the agent may give written notice to a government entity having authority to protect the welfare of the principal, or may petition the court to approve the resignation.

(b) The principal may provide for alternative means for an agent's resignation in the power of attorney.

GOL §5-1510 Special proceedings

1. If the agent has failed to make available a copy of the power of attorney and/or a record of all receipts, disbursements, and transactions entered into by the agent on behalf of a principal to a person who may request such record pursuant to subparagraph three of paragraph (a) of subdivision two of section 5-1505 of this title, that person may commence a special proceeding to compel the agent to produce a copy of the power of attorney and such record.

2. A special proceeding may be commenced pursuant to this section for any of the following additional purposes:

(a) to determine whether the power of attorney is valid;

(b) to determine whether the principal had capacity at the time the power of attorney was executed;

(c) to determine whether the power of attorney was procured through duress, fraud or undue influence;

(d) to determine whether the agent is entitled to receive compensation or whether the compensation received by the agent is reasonable for the responsibilities performed;

(e) to approve the record of all receipts, disbursements and transactions entered into by the agent on behalf of the principal;

(f) to remove the agent upon the grounds that the agent has violated, or is unfit, unable, or unwilling to perform, the fiduciary duties under the power of attorney;

(g) to determine how multiple agents must act;

(h) to construe any provision of a power of attorney; or

(i) to compel acceptance of the power of attorney.

A special proceeding may also be commenced by an agent who wishes to obtain court approval of his or her resignation.

3. A special proceeding may be commenced pursuant to subdivision two of this section by any person identified in subparagraph three of paragraph (a) of subdivision two of section 5-1505 of this title, the agent, the spouse, child or parent of the principal, the principal's successor in interest, or any third party who may be required to accept a power of attorney.

4. If a power of attorney is suspended or revoked under this section, or the agent is removed by the court, the court may require the agent to provide a record of all receipts, disbursements and transactions entered into by the agent on behalf of the principal and to deliver any property belonging to the principal and copies of records concerning the principal's property and affairs to a successor agent, a government entity or the principal's legal representative.

General Obligations Law §5-1511. Termination or revocation of power of attorney; notice

1. A power of attorney terminates when:

(a) the principal dies;

(b) the principal becomes incapacitated, if the power of attorney is not durable;

(c) the principal revokes the power of attorney;

(d) the principal revokes the agent's authority and there is no co-agent or successor agent, or no co-agent or successor agent who is willing or able to serve;

(e) the agent dies, becomes incapacitated or resigns and there is no co-agent or successor agent or no co-agent or successor agent who is willing or able to serve;

(f) the authority of the agent terminates and there is no co-agent or successor agent or no co-agent or successor agent who is willing or able to serve;

(g) the purpose of the power of attorney is accomplished; or

(h) a court order revokes the power of attorney as provided in section 5-1510 of this title or in section 81.29 of the mental hygiene law .

2. An agent's authority terminates when:

(a) the principal revokes the agent's authority;

(b) the agent dies, becomes incapacitated or resigns;

(c) the agent's marriage to the principal is terminated by divorce or annulment, as defined in subparagraph two of paragraph (f) of section 5-1.4 of the estates, powers and trusts law , unless the power of attorney expressly provides otherwise. If the authority of an agent is revoked solely by this subdivision, it shall be revived by the principal's remarriage to the former spouse; or

(d) the power of attorney terminates.

3. A principal may revoke a power of attorney:

(a) in accordance with the terms of the power of attorney; or

(b) by delivering a revocation of the power of attorney to the agent in person or by sending a signed and dated revocation by mail, courier, electronic transmission or facsimile to the agent's last known address. The agent must comply with the principal's revocation notwithstanding the actual or perceived incapacity of the principal unless the principal is subject to a guardianship under article eighty-one of the mental hygiene law.

4. Where a power of attorney has been recorded pursuant to section two hundred ninety-four of the real property law , the principal shall also record the revocation in the office in which the power of attorney is recorded pursuant to section three hundred twenty-six of the real property law , provided the revocation complies with section three hundred seven of the state technology law .

5. (a) Termination of an agent's authority or of the power of attorney is not effective as to any third party who has not received actual notice of the termination and acts in good faith under the power of attorney. Any action so taken, unless otherwise invalid or unenforceable, shall bind the principal and the principal's successors in interest. A financial institution is deemed to have actual notice after it has had a reasonable opportunity to act on a written notice of the revocation or termination following receipt of the same at its office where an account is located.

(b) Termination of an agent's authority or of the power of attorney is not effective as to the agent until the agent has received a revocation as required by subdivision three of this section. An agent is deemed to have received a revocation when it has been delivered to the agent in person, or within a reasonable time after it has been sent by mail, courier, electronic transmission or facsimile in accordance with subdivision three of this section.

6. The execution of a power of attorney does not revoke any power of attorney previously executed by the principal.

General Obligations Law §5-1512. Powers of attorney executed in other jurisdictions

Notwithstanding the provisions of section 5-1501B of this title, a power of attorney executed in another state or jurisdiction in compliance with the law of that state or jurisdiction or the law of this state is valid in this state, regardless of whether the principal is a domiciliary of this state. A power of attorney that complies with section 5-1501B of this title and is executed in another state or jurisdiction by a domiciliary of this state is valid in this state. A power of attorney executed in this state by a domiciliary of another state or jurisdiction in compliance with the law of that state or jurisdiction or the law of this state is valid in this state.

Public Health Law Article 29-c- Health Care Proxy

PHL §2980. Definitions

The following words or phrases, used in this article, shall have the following meanings, unless the context otherwise requires:

1. "Adult" means any person who is eighteen years of age or older, or is the parent of a child, or has married.

2. "Attending physician" means the physician, selected by or assigned to a patient, who has primary responsibility for the treatment and care of the patient. Where more than one physician shares such responsibility, or where a physician is acting on the attending physician's behalf, any such physician may act as the attending physician pursuant to this article.

2-a. "Nurse practitioner" means a nurse practitioner certified under section sixty-nine hundred ten of the education law , practicing within his or her scope of practice.

2-b "Psychiatric nurse practitioner" means a nurse practitioner certified by the department of education as a psychiatric nurse practitioner.

2-c. "Attending nurse practitioner" means the nurse practitioner, selected by or assigned to a patient, who has primary responsibility for the treatment and care of the patient. Where more than one nurse practitioner shares such responsibility, or where a nurse practitioner is acting on the attending nurse practitioner's behalf, any such nurse practitioner may act as the attending nurse practitioner pursuant to this article.

3. "Capacity to make health care decisions" means the ability to understand and appreciate the nature and consequences of health care decisions, including the benefits and risks of and alternatives to any proposed health care, and to reach an informed decision.

4. "Health care" means any treatment, service or procedure to diagnose or treat an individual's physical or mental condition.

5. "Health care agent" or "agent" means an adult to whom authority to make health care decisions is delegated under a health care proxy.

6. "Health care decision" means any decision to consent or refuse to consent to health care.

7. "Health care provider" means an individual or facility licensed, certified, or otherwise authorized or permitted by law to administer health care in the ordinary course of business or professional practice.

8. "Health care proxy" means a document delegating the authority to make health care decisions, executed in accordance with the requirements of this article.

9. "Hospital" means a general hospital as defined in subdivision ten of section two thousand eight hundred one of this chapter and a residential health care facility as defined

in subdivision three of section two thousand eight hundred one of this chapter, and a mental hygiene facility as defined in subdivision ten of this section and a hospice as defined in subdivision one of section four thousand two of this chapter.

9-a. "Life-sustaining treatment" means any medical treatment or procedure without which the patient will die within a relatively short time, as determined by an attending physician to a reasonable degree of medical certainty. For purposes of this article, cardiopulmonary resuscitation is presumed to be a life sustaining treatment without the necessity of a determination by an attending physician.

10. "Mental hygiene facility" means a residential facility, excluding family care homes, operated or licensed by the office of mental health or the office of mental retardation and developmental disabilities.

11. "Mental illness" means a mental illness as defined in subdivision twenty of section 1.03 of the mental hygiene law , provided, however, that mental illness shall not include dementia, such as alzheimer's disease or other disorders related to dementia.

12. "Principal" means a person who has executed a health care proxy.

13. "Reasonably available" means that a person to be contacted can be contacted with diligent efforts by an attending physician or another person acting on behalf of the attending physician or the hospital.

14. "Residential health care facility" means a residential health care facility as defined in subdivision three of section two thousand eight hundred one of this chapter.

15. "Qualified psychiatrist" means, for the purposes of this article, a physician licensed to practice medicine in New York state who: (a) is a diplomate of the American Board of Psychiatry and Neurology or is eligible to be certified by that board; or (b) is certified by the American Osteopathic Board of Neurology and Psychiatry or is eligible to be certified by that board.

PHL §2981. Appointment of health care agent; health care proxy

1. Authority to appoint agent; presumption of competence. (a) A competent adult may appoint a health care agent in accordance with the terms of this article.

(b) For the purposes of this section, every adult shall be presumed competent to appoint a health care agent unless such person has been adjudged incompetent or otherwise adjudged not competent to appoint a health care agent, or unless a committee or guardian of the person has been appointed for the adult pursuant to article seventy-eight of the mental hygiene law or article seventeen-A of the surrogate's court procedure act.

2. Health care proxy; execution; witnesses. (a) A competent adult may appoint a health care agent by a health care proxy, signed and dated by the adult in the presence of two adult witnesses who shall also sign the proxy. Another person may sign and date the health care proxy for the adult if the adult is unable to do so, at the adult's direction and in the adult's presence, and in the presence of two adult witnesses who shall sign the proxy.

The witnesses shall state that the principal appeared to execute the proxy willingly and free from duress. The person appointed as agent shall not act as witness to execution of the health care proxy.

(b) For persons who reside in a mental hygiene facility operated or licensed by the office of mental health, at least one witness shall be an individual who is not affiliated with the facility and, if the mental hygiene facility is also a hospital as defined in subdivision ten of section 1.03 of the mental hygiene law , at least one witness shall be a qualified psychiatrist or psychiatric nurse practitioner.

(c) For persons who reside in a mental hygiene facility operated or licensed by the office for people with developmental disabilities, at least one witness shall be an individual who is not affiliated with the facility and at least one witness shall be a physician, nurse practitioner or clinical psychologist who either is employed by a developmental disabilities services office named in section 13.17 of the mental hygiene law or who has been employed for a minimum of two years to render care and service in a facility operated or licensed by the office for people with developmental disabilities, or has been approved by the commissioner of developmental disabilities in accordance with regulations approved by the commissioner. Such regulations shall require that a physician, nurse practitioner or clinical psychologist possess specialized training or three years experience in treating developmental disabilities.

3. Restrictions on who may be and limitations on a health care agent. (a) An operator, administrator or employee of a hospital may not be appointed as a health care agent by any person who, at the time of the appointment, is a patient or resident of, or has applied for admission to, such hospital.

(b) The restriction in paragraph (a) of this subdivision shall not apply to:

(i) an operator, administrator or employee of a hospital who is related to the principal by blood, marriage or adoption; or

(ii) a physician or nurse practitioner, subject to the limitation set forth in paragraph (c) of this subdivision, except that no physician or nurse practitioner affiliated with a mental hygiene facility or a psychiatric unit of a general hospital may serve as agent for a principal residing in or being treated by such facility or unit unless the physician is related to the principal by blood, marriage or adoption.

(c) If a physician or nurse practitioner is appointed agent, the physician or nurse practitioner shall not act as the patient's attending physician or attending nurse practitioner after the authority under the health care proxy commences, unless the physician or nurse practitioner declines the appointment as agent at or before such time.

(d) No person who is not the spouse, child, parent, brother, sister or grandparent of the principal, or is the issue of, or married to, such person, shall be appointed as a health care agent if, at the time of appointment, he or she is presently appointed health care agent for ten principals.

4. Commencement of agent's authority. The agent's authority shall commence upon a determination, made pursuant to subdivision one of section two thousand nine hundred eighty-three of this article, that the principal lacks capacity to make health care decisions.

5. Contents and form of health care proxy. (a) The health care proxy shall:

(i) identify the principal and agent; and

(ii) indicate that the principal intends the agent to have authority to make health care decisions on the principal's behalf.

(b) The health care proxy may include the principal's wishes or instructions about health care decisions, and limitations upon the agent's authority.

(c) The health care proxy may provide that it expires upon a specified date or upon the occurrence of a certain condition. If no such date or condition is set forth in the proxy, the proxy shall remain in effect until revoked. If, prior to the expiration of a proxy, the authority of the agent has commenced, the proxy shall not expire while the principal lacks capacity.

(d) A health care proxy may, but need not, be in the following form:

Health Care Proxy

I (name of principal) hereby appoint (name, home address and telephone number of agent) as my health care agent to make any and all health care decisions for me, except to the extent I state otherwise.

This health care proxy shall take effect in the event I become unable to make my own health care decisions.

NOTE: Although not necessary, and neither encouraged nor discouraged, you may wish to state instructions or wishes, and limit your agent's authority. Unless your agent knows your wishes about artificial nutrition and hydration, your agent will not have authority to decide about artificial nutrition and hydration. If you choose to state instructions, wishes, or limits, please do so below:

I direct my agent to make health care decisions in accordance with my wishes and instructions as stated above or as otherwise known to him or her. I also direct my agent to abide by any limitations on his or her authority as stated above or as otherwise known to him or her.

In the event the person I appoint above is unable, unwilling or unavailable to act as my health care agent, I hereby appoint (name, home address and telephone number of alternate agent) as my health care agent.

I understand that, unless I revoke it, this proxy will remain in effect indefinitely or until the date or occurrence of the condition I have stated below:

(Please complete the following if you do NOT want this health care proxy to be in effect indefinitely):

This proxy shall expire: (Specify date or condition)

Signature:

Address:

Date:

I declare that the person who signed or asked another to sign this document is personally known to me and appears to be of sound mind and acting willingly and free from duress. He or she signed (or asked another to sign for him or her) this document in my presence and that person signed in my presence. I am not the person appointed as agent by this document.

Witness:

Address:

Witness:

Address:

(e) The health care proxy shall not be executed on a form or other writing that also includes the execution of a power of attorney, provided, however, that nothing in this paragraph shall invalidate a delegation of the authority to make health care decisions executed prior to the enactment of this article.

(f) A health care proxy may include the principal's wishes or instructions regarding organ and tissue donation and may limit the health care agent's authority to consent to organ or tissue donation or designate another person to do so, under article forty-three of this chapter. Failure to state wishes or instructions shall not be construed to imply a wish not to donate.

6. Alternate agent. (a) A competent adult may designate an alternate agent in the health care proxy to serve in place of the agent when:

(i) the attending physician or attending nurse practitioner has determined in a writing signed by the physician or nurse practitioner (A) that the person appointed as agent is not reasonably available, willing and competent to serve as agent, and (B) that such person is not expected to become reasonably available, willing and competent to make a timely decision given the patient's medical circumstances;

(ii) the agent is disqualified from acting on the principal's behalf pursuant to subdivision three of this section or subdivision two of section two thousand nine hundred ninety-two of this article, or

(iii) under conditions set forth in the proxy.

(b) If, after an alternate agent's authority commences, the person appointed as agent becomes available, willing and competent to serve as agent:

(i) the authority of the alternate agent shall cease and the authority of the agent shall commence; and

(ii) the attending physician or attending nurse practitioner shall record the change in agent and the reasons therefor in the principal's medical record.

PHL §2985. Revocation

1. Means of revoking proxy. (a) A competent adult may revoke a health care proxy by notifying the agent or a health care provider orally or in writing or by any other act evidencing a specific intent to revoke the proxy.

(b) For the purposes of this section, every adult shall be presumed competent unless determined otherwise pursuant to court order.

(c) A health care proxy shall also be revoked upon execution by the principal of a subsequent health care proxy.

(d) The creation by the principal of written wishes or instructions about health care, or limitations upon the agent's authority, shall not revoke a health care proxy unless such wishes, instructions or limitations expressly provide otherwise. Such wishes, instructions or limitations shall constitute evidence of the principal's wishes for purposes of subdivision two of section two thousand nine hundred eighty-two of this article.

(e) The appointment of the principal's spouse as health care agent shall be revoked upon the divorce or legal separation of the principal and spouse, unless the principal specifies otherwise.

2. Duty to record revocation. (a) A physician or nurse practitioner who is informed of or provided with a revocation of a health care proxy shall immediately (i) record the revocation in the principal's medical record and (ii) notify the agent and the medical staff responsible for the principal's care of the revocation.

(b) Any member of the staff of a health care provider informed of or provided with a revocation of a health care proxy pursuant to this section shall immediately notify a physician or nurse practitioner of such revocation.

New York Public Health Law Article 29-CC – Family Health Care Decisions Act (Portions)

PHL §2994-b. Applicability; priority of certain other surrogate decision-making laws and regulations

1. This article shall apply to health care decisions regarding health care provided in a hospital, and to decisions regarding hospice care without regard to where the decision is made or where the care is provided, for a patient who lacks decision-making capacity, except as limited by this section.

2. Prior to seeking or relying upon a health care decision by a surrogate for a patient under this article, the attending physician or attending nurse practitioner shall make reasonable efforts to determine whether the patient has a health care agent appointed pursuant to article twenty-nine-C of this chapter. If so, health care decisions for the patient shall be governed by such article, and shall have priority over decisions by any other person except the patient or as otherwise provided in the health care proxy.

3. Prior to seeking or relying upon a health care decision by a surrogate for a patient under this article, if the attending physician or attending nurse practitioner has reason to believe that the patient has a history of receiving services for mental retardation or a developmental disability; it reasonably appears to the attending physician or attending nurse practitioner that the patient has mental retardation or a developmental disability; or the attending physician or attending nurse practitioner has reason to believe that the patient has been transferred from a mental hygiene facility operated or licensed by the office of mental health, then such physician or nurse practitioner shall make reasonable efforts to determine whether paragraphs (a), (b) or (c) of this subdivision are applicable:

(a) If the patient has a guardian appointed by a court pursuant to article seventeen-A of the surrogate's court procedure act, health care decisions for the patient shall be governed by section seventeen hundred fifty-b of the surrogate's court procedure act and not by this article.

(b) If a patient does not have a guardian appointed by a court pursuant to article seventeen-A of the surrogate's court procedure act but falls within the class of persons described in paragraph (a) of subdivision one of section seventeen hundred fifty-b of such act, decisions to withdraw or withhold life-sustaining treatment for the patient shall be governed by section seventeen hundred fifty-b of the surrogate's court procedure act and not by this article.

(c) If a health care decision for a patient cannot be made under paragraphs (a) or (b) of this subdivision, but consent for the decision may be provided pursuant to the mental hygiene law or regulations of the office of mental health or the office for people with developmental disabilities, then the decision shall be governed by such statute or regulations and not by this article.

4. If, after reasonable efforts, it is determined that a health care decision for the patient cannot be made pursuant to subdivision two or three of this section, then the health care decision shall be made pursuant to this article.

PHL §2994-d. Health care decisions for adult patients by surrogates

1. Identifying the surrogate. One person from the following list from the class highest in priority when persons in prior classes are not reasonably available, willing, and competent to act, shall be the surrogate for an adult patient who lacks decision-making capacity. However, such person may designate any other person on the list to be surrogate, provided no one in a class higher in priority than the person designated objects:

(a) A guardian authorized to decide about health care pursuant to article eighty-one of the mental hygiene law;

(b) The spouse, if not legally separated from the patient, or the domestic partner;

(c) A son or daughter eighteen years of age or older;

(d) A parent;

(e) A brother or sister eighteen years of age or older;

(f) A close friend.

2. Restrictions on who may be a surrogate. An operator, administrator, or employee of a hospital or a mental hygiene facility from which the patient was transferred, or a physician or nurse practitioner who has privileges at the hospital or a health care provider under contract with the hospital may not serve as the surrogate for any adult who is a patient of such hospital, unless such individual is related to the patient by blood, marriage, domestic partnership, or adoption, or is a close friend of the patient whose friendship with the patient preceded the patient's admission to the facility. If a physician or nurse practitioner serves as surrogate, the physician or nurse practitioner shall not act as the patient's attending physician or attending nurse practitioner after his or her authority as surrogate begins.

3. Authority and duties of surrogate. (a) Scope of surrogate's authority.

(i) Subject to the standards and limitations of this article, the surrogate shall have the authority to make any and all health care decisions on the adult patient's behalf that the patient could make.

(ii) Nothing in this article shall obligate health care providers to seek the consent of a surrogate if an adult patient has already made a decision about the proposed health care, expressed orally or in writing or, with respect to a decision to withdraw or withhold life-sustaining treatment expressed either orally during hospitalization in the presence of two witnesses eighteen years of age or older, at least one of whom is a health or social services practitioner affiliated with the hospital, or in writing. If an attending physician or attending nurse practitioner relies on the patient's prior decision, the physician or nurse practitioner shall record the prior decision in the patient's medical record. If a surrogate has already been designated for the patient, the attending physician or attending nurse practitioner shall make reasonable efforts to notify the surrogate prior to implementing the decision; provided that in the case of a decision to withdraw or withhold life-sustaining treatment, the attending physician or attending nurse practitioner shall make diligent efforts

to notify the surrogate and, if unable to notify the surrogate, shall document the efforts that were made to do so.

(b) Commencement of surrogate's authority. The surrogate's authority shall commence upon a determination, made pursuant to section twenty-nine hundred ninety-four-c of this article, that the adult patient lacks decision-making capacity and upon identification of a surrogate pursuant to subdivision one of this section. In the event an attending physician or nurse practitioner determines that the patient has regained decision-making capacity, the authority of the surrogate shall cease.

(c) Right and duty to be informed. Notwithstanding any law to the contrary, the surrogate shall have the right to receive medical information and medical records necessary to make informed decisions about the patient's health care. Health care providers shall provide and the surrogate shall seek information necessary to make an informed decision, including information about the patient's diagnosis, prognosis, the nature and consequences of proposed health care, and the benefits and risks of and alternative to proposed health care.

4. Decision-making standards. (a) The surrogate shall make health care decisions:

(i) in accordance with the patient's wishes, including the patient's religious and moral beliefs; or

(ii) if the patient's wishes are not reasonably known and cannot with reasonable diligence be ascertained, in accordance with the patient's best interests. An assessment of the patient's best interests shall include: consideration of the dignity and uniqueness of every person; the possibility and extent of preserving the patient's life; the preservation, improvement or restoration of the patient's health or functioning; the relief of the patient's suffering; and any medical condition and such other concerns and values as a reasonable person in the patient's circumstances would wish to consider.

(b) In all cases, the surrogate's assessment of the patient's wishes and best interests shall be patient-centered; health care decisions shall be made on an individualized basis for each patient, and shall be consistent with the values of the patient, including the patient's religious and moral beliefs, to the extent reasonably possible.

5. Decisions to withhold or withdraw life-sustaining treatment. In addition to the standards set forth in subdivision four of this section, decisions by surrogates to withhold or withdraw life-sustaining treatment (including decisions to accept a hospice plan of care that provides for the withdrawal or withholding of life-sustaining treatment) shall be authorized only if the following conditions are satisfied, as applicable:

(a)(i) Treatment would be an extraordinary burden to the patient and an attending physician or attending nurse practitioner determines, with the independent concurrence of another physician or nurse practitioner, that, to a reasonable degree of medical certainty and in accord with accepted medical standards, (A) the patient has an illness or injury which can be expected to cause death within six months, whether or not treatment is provided; or (B) the patient is permanently unconscious; or

(ii) The provision of treatment would involve such pain, suffering or other burden that it would reasonably be deemed inhumane or extraordinarily burdensome under the circumstances and the patient has an irreversible or incurable condition, as determined by an attending physician or attending nurse practitioner with the independent concurrence of another physician or nurse practitioner to a reasonable degree of medical certainty and in accord with accepted medical standards.

(b) In a residential health care facility, a surrogate shall have the authority to refuse life-sustaining treatment under subparagraph (ii) of paragraph (a) of this subdivision only if the ethics review committee, including at least one physician or nurse practitioner who is not directly responsible for the patient's care, or a court of competent jurisdiction, reviews the decision and determines that it meets the standards set forth in this article. This requirement shall not apply to a decision to withhold cardiopulmonary resuscitation.

(c) In a general hospital, if the attending physician or attending nurse practitioner objects to a surrogate's decision, under subparagraph (ii) of paragraph (a) of this subdivision, to withdraw or withhold nutrition and hydration provided by means of medical treatment, the decision shall not be implemented until the ethics review committee, including at least one physician or nurse practitioner who is not directly responsible for the patient's care, or a court of competent jurisdiction, reviews the decision and determines that it meets the standards set forth in this subdivision and subdivision four of this section.

(d) Providing nutrition and hydration orally, without reliance on medical treatment, is not health care under this article and is not subject to this article.

(e) Expression of decisions. The surrogate shall express a decision to withdraw or withhold life-sustaining treatment either orally to an attending physician or attending nurse practitioner or in writing.

Family Court Act §812

1. Jurisdiction. The family court and the criminal courts shall have concurrent jurisdiction over any proceeding concerning acts which would constitute disorderly conduct, harassment in the first degree, harassment in the second degree, aggravated harassment in the second degree, sexual misconduct, forcible touching, sexual abuse in the third degree, sexual abuse in the second degree as set forth in subdivision one of section 130.60 of the penal law , stalking in the first degree, stalking in the second degree, stalking in the third degree, stalking in the fourth degree, criminal mischief, menacing in the second degree, menacing in the third degree, reckless endangerment, criminal obstruction of breathing or blood circulation, strangulation in the second degree, strangulation in the first degree, assault in the second degree, assault in the third degree, an attempted assault, identity theft in the first degree, identity theft in the second degree, identity theft in the third degree, grand larceny in the fourth degree, grand larceny in the third degree, coercion in the second degree or coercion in the third degree as set forth in subdivisions one , two and three of section 135.60 of the penal law between spouses or former spouses, or between parent and child or between members of the same family or household except that if the respondent would not be criminally responsible by reason of age pursuant to section 30.00 of the penal law , then the family court shall have exclusive jurisdiction over such proceeding. Notwithstanding a complainant's election to proceed in family court, the criminal court shall not be divested of jurisdiction to hear a family offense proceeding pursuant to this section. In any proceeding pursuant to this article, a court shall not deny an order of protection, or dismiss a petition, solely on the basis that the acts or events alleged are not relatively contemporaneous with the date of the petition, the conclusion of the fact-finding or the conclusion of the dispositional hearing. For purposes of this article, “disorderly conduct” includes disorderly conduct not in a public place. For purposes of this article, “members of the same family or household” shall mean the following:

(a) persons related by consanguinity or affinity;

(b) persons legally married to one another;

(c) persons formerly married to one another regardless of whether they still reside in the same household;

(d) persons who have a child in common regardless of whether such persons have been married or have lived together at any time; and

(e) persons who are not related by consanguinity or affinity and who are or have been in an intimate relationship regardless of whether such persons have lived together at any time. Factors the court may consider in determining whether a relationship is an “intimate relationship” include but are not limited to: the nature or type of relationship, regardless of whether the relationship is sexual in nature; the frequency of interaction between the persons; and the duration of the relationship. Neither a casual acquaintance nor ordinary fraternization between two individuals in business or social contexts shall be deemed to constitute an “intimate relationship”.

2. Information to petitioner or complainant. The chief administrator of the courts shall designate the appropriate persons, including, but not limited to district attorneys, criminal and family court clerks, corporation counsels, county attorneys, victims assistance unit staff, probation officers, warrant officers, sheriffs, police officers or any other law enforcement officials, to inform any petitioner or complainant bringing a proceeding under this article, before such proceeding is commenced, of the procedures available for the institution of family offense proceedings, including but not limited to the following:

(a) That there is concurrent jurisdiction with respect to family offenses in both family court and the criminal courts;

(b) That a family court proceeding is a civil proceeding and is for the purpose of attempting to stop the violence, end the family disruption and obtain protection. Referrals for counseling, or counseling services, are available through probation for this purpose;

(c) That a proceeding in the criminal courts is for the purpose of prosecution of the offender and can result in a criminal conviction of the offender;

(d) That a proceeding or action subject to the provisions of this section is initiated at the time of the filing of an accusatory instrument or family court petition, not at the time of arrest, or request for arrest, if any;

(e) Repealed.

(f) That an arrest may precede the commencement of a family court or a criminal court proceeding, but an arrest is not a requirement for commencing either proceeding; provided, however, that the arrest of an alleged offender shall be made under the circumstances described in subdivision four of section 140.10 of the criminal procedure law ;

(g) That notwithstanding a complainant's election to proceed in family court, the criminal court shall not be divested of jurisdiction to hear a family offense proceeding pursuant to this section.

3. Official responsibility. No official or other person designated pursuant to subdivision two of this section shall discourage or prevent any person who wishes to file a petition or sign a complaint from having access to any court for that purpose.

4. Official forms. The chief administrator of the courts shall prescribe an appropriate form to implement subdivision two of this section.

5. Notice. Every police officer, peace officer or district attorney investigating a family offense under this article shall advise the victim of the availability of a shelter or other services in the community, and shall immediately give the victim written notice of the legal rights and remedies available to a victim of a family offense under the relevant provisions of the criminal procedure law, the family court act and the domestic relations law. Such notice shall be available in English and Spanish and, if necessary, shall be delivered orally and shall include but not be limited to the following statement:

“If you are the victim of domestic violence, you may request that the officer assist in providing for your safety and that of your children, including providing information on how to obtain a temporary order of protection. You may also request that the officer assist you in obtaining your essential personal effects and locating and taking you, or assist in making arrangement to take you, and your children to a safe place within such officer's jurisdiction, including but not limited to a domestic violence program, a family member's or a friend's residence, or a similar place of safety. When the officer's jurisdiction is more than a single county, you may ask the officer to take you or make arrangements to take you and your children to a place of safety in the county where the incident occurred. If you or your children are in need of medical treatment, you have the right to request that the officer assist you in obtaining such medical treatment. You may request a copy of any incident reports at no cost from the law enforcement agency. You have the right to seek legal counsel of your own choosing and if you proceed in family court and if it is determined that you cannot afford an attorney, one must be appointed to represent you without cost to you.

You may ask the district attorney or a law enforcement officer to file a criminal complaint. You also have the right to file a petition in the family court when a family offense has been committed against you. You have the right to have your petition and request for an order of protection filed on the same day you appear in court, and such request must be heard that same day or the next day court is in session. Either court may issue an order of protection from conduct constituting a family offense which could include, among other provisions, an order for the respondent or defendant to stay away from you and your children. The family court may also order the payment of temporary child support and award temporary custody of your children. If the family court is not in session, you may seek immediate assistance from the criminal court in obtaining an order of protection.

The forms you need to obtain an order of protection are available from the family court and the local criminal court (the addresses and telephone numbers shall be listed). The resources available in this community for information relating to domestic violence, treatment of injuries, and places of safety and shelters can be accessed by calling the following 800 numbers (the statewide English and Spanish language 800 numbers shall be listed and space shall be provided for local domestic violence hotline telephone numbers).

Filing a criminal complaint or a family court petition containing allegations that are knowingly false is a crime.”

The division of criminal justice services in consultation with the state office for the prevention of domestic violence shall prepare the form of such written notice consistent with the provisions of this section and distribute copies thereof to the appropriate law enforcement officials pursuant to subdivision nine of section eight hundred forty-one of the executive law . Additionally, copies of such notice shall be provided to the chief administrator of the courts to be distributed to victims of family offenses through the family court at such time as such persons first come before the court and to the state department of health for distribution to all hospitals defined under article twenty-eight of the public health law. No cause of action for damages shall arise in favor of any person by reason of any failure to comply with the provisions of this subdivision except upon a showing of gross negligence or willful misconduct.

NY Elder Law §225 Elder abuse enhanced multidisciplinary team program

1. The office is hereby authorized, subject to appropriation of funds for the program, to establish an elder abuse enhanced multidisciplinary team program consisting of teams at the regional or county level for complex cases of elder abuse, including but not limited to financial exploitation, physical abuse, psychological abuse, sexual abuse, and neglect, involving a victim sixty years of age or older.

2. Such elder abuse enhanced multidisciplinary teams shall consist of representation by professionals generally authorized to make decisions on behalf of their agency from public, private, and voluntary agencies. Represented professions may include, but are not limited to, health/medical, mental health, aging, protective services, human services, social work, banking/financial institutions, legal services, district attorney's offices, law enforcement agencies, and forensic accounting.

3. Teams will also consist of a coordinator who will provide case consultation, triage cases, facilitate elder abuse enhanced multidisciplinary team meetings, monitor progress, and facilitate coordination and cooperative action in the provision of appropriate services to an individual identified as being a victim of elder abuse, as well as other duties associated with the role.

4. Notwithstanding any other provision of law to the contrary, members of an elder abuse enhanced multidisciplinary team may share with other team members client-identifiable information concerning victims of elder abuse as appropriate to facilitate team activities.

New York General Municipal Law §801- Conflicts of Interest Prohibited

Except as provided in section eight hundred two of this chapter, (1) no municipal officer or employee shall have an interest in any contract with the municipality of which he is an officer or employee, when such officer or employee, individually or as a member of a board, has the power or duty to (a) negotiate, prepare, authorize or approve the contract or authorize or approve payment thereunder (b) audit bills or claims under the contract, or appoint an officer or employee who has any of the powers or duties set forth above and (2) no chief fiscal officer, treasurer, or his deputy or employee, shall have an interest in a bank or trust company designated as a depository, paying agent, registration agent or for investment of funds of the municipality of which he is an officer or employee. The provisions of this section shall in no event be construed to preclude the payment of lawful compensation and necessary expenses of any municipal officer or employee in one or more positions of public employment, the holding of which is not prohibited by law.

Regulations

18 NYCRR 457.1 General.

(a) Protective services for adults is a State-mandated service. The provisions of Parts 400 through 407 of this Title apply in general to this service. The following factors relate specifically to protective services for adults, hereinafter referred to as PSA.

(b) Definitions.

When used in this Part unless otherwise expressly stated or unless the context or subject matter requires a different interpretation:

(1) *Physical abuse* means the nonaccidental use of force that results in bodily injury, pain or impairment, including but not limited to, being slapped, burned, cut, bruised or improperly physically restrained.

(2) *Sexual abuse* means nonconsensual sexual contact of any kind, including but not limited to, forcing sexual contact or forcing sex with a third party.

(3) *Emotional abuse* means wilful infliction of mental or emotional anguish by threat, humiliation, intimidation or other abusive conduct, including but not limited to, frightening or isolating an adult.

(4) *Active neglect* means willful failure by the caregiver to fulfill the care-taking functions and responsibilities assumed by the caregiver, including but not limited to, abandonment, willful deprivation of food, water, heat, clean clothing and bedding, eyeglasses or dentures, or health related services.

(5) *Passive neglect* means nonwillful failure of a caregiver to fulfill care-taking functions and responsibilities assumed by the caregiver, including but not limited to, abandonment or denial of food or health related services because of inadequate caregiver knowledge, infirmity, or disputing the value of prescribed services.

(6) *Self neglect* means an adult's inability, due to physical and/or mental impairments to perform tasks essential to caring for oneself, including but not limited to, providing essential food, clothing, shelter and medical care, obtaining goods and services necessary to maintain physical health, mental health, emotional well-being and general safety; or managing financial affairs.

(7) *Financial exploitation* means improper use of an adult's funds, property or resources by another individual, including but not limited to, fraud, false pretenses, embezzlement, conspiracy, forgery, falsifying records, coerced property transfers or denial of access to assets.

(c) Client characteristics.

Protective services for adults are provided to individuals 18 years of age or older who, because of mental or physical impairments:

(1) are unable to meet their essential needs for food, shelter, clothing or medical care, secure entitlements due them or protect themselves from physical, sexual or emotional abuse, active, passive of self neglect, or financial exploitation; and

(2) are in need of protection from actual or threatened harm due to physical, sexual or emotional abuse, or active, passive or self neglect, or financial exploitation or by hazardous conditions caused by the action or inaction of either themselves or other individuals; and

(3) have no one available who is willing and able to assist them responsibly.

(d) Services.

PSA services are limited as appropriate to:

(1) identifying such adults who need assistance or who have no one willing and able to assist them responsibly;

(2) providing prompt response and investigation upon request of adults at risk or other persons acting on their behalf. At the time of referral, the local district shall make a determination as to whether a life-threatening situation exists. If a situation is designated as life-threatening, the district shall commence an investigation as soon as possible but not later than 24 hours after receipt of the referral. For potential PSA cases not designated as life-threatening situations, the district shall commence an investigation within 72 hours of receipt of the referral and shall make a visit to the client within three working days of the referral. For the purposes of this Part, a *referral* is defined as any written or verbal information provided to a district in which a specific person is identified as apparently in need of PSA, or any verbal or written information provided to a district on behalf of an adult for whom the district determines that a PSA investigation and assessment is necessary;

(3) assessing the individual's situation and service needs;

(4) providing counseling to such adults, their families, other responsible persons or to fiduciaries such as representative payees, on handling the affairs of such adults;

(5) arranging for appropriate alternative living arrangements in the community or in an institution providing room and board as an integral but subordinate part of the provision of PSA for a period not to exceed 30 days;

(6) assisting in the location of social services, medical care and other resources in the community, including arrangement for day care in a protective setting;

(7) arranging for guardianship, commitment or other protective placements as needed;

(8) providing advocacy and assistance in arranging for legal services to assure receipt of rights and entitlements due to adults at risk;

(9) functioning as a guardian, representative payee, or protective payee where it is determined such services are needed and there is no one else available or capable of acting in this capacity;

(10) providing homemaker and housekeeper/chore services when provided as an integral but subordinate part in the provision of PSA to meet the goal of protection for adults who demonstrate specified functional deficits. The provision of such services shall be limited to six months when provided without regard to financial criteria. When such services are available through other public or private community resources, these should be utilized. The provision of these services beyond six months may be authorized on a case-by-case basis under the following conditions:

(i) guardianship or other financial management proceedings have been started within the first 60 days of the provision of PSA services; and

(ii) the local district must accept the responsibility to function as a guardian, representative payee or protective payee on behalf of a PSA client if no other resources are available within 45 days of a determination by either:

(a) a court that a guardian is required;

(b) an office of the Federal Social Security Administration or the Railroad Retirement System that a representative payee is required; or

(c) the social services district that a protective payee is required.

Under these conditions, the provision of homemaker and housekeeper/chore services without regard to financial criteria may be continued beyond six months until the guardianship or other financial management proceedings are completed, except in no case will such services be authorized to continue for a period of more than three months subject to one reauthorization not to exceed an additional three months; and

(11) other components of PSA included in the State's Consolidated Services Plan (CSP), as required by section 34-a of the Social Services Law and Part 407 of this Title.

18 NYCRR 457.2 PSA client case record.

The case record of a PSA client must include the following:

(a) Application.

(1) The completion of the application form designated by the department is required in order for the PSA activity to be reimbursed from Federal and State financial participation.

(2) There will be those situations when the adult in need of protective services is unable or unwilling to sign the application or complete information that cannot be immediately obtained. In these situations, the application form shall be completed and, in accordance with department instructions, entries shall be made in the case record documenting the circumstances and reasons why the application form was not signed.

(b) PSA assessment/services plan.

(1) The case record of each PSA client shall include a PSA assessment/services plan consisting of the following information:

(i) source of referral;

(ii) reason for referral;

(iii) household composition;

(iv) residence and living arrangements;

(v) income and resources;

(vi) medical and mental limitations;

(vii) ability to manage resources;

(viii) identification of significant other persons such as family members and friends and their willingness and capability to assist the individual;

(ix) identification of other agencies involved with the individual;

(x) assessment of problem(s) and needs and the names of agencies involved in the assessment;

(xi) client specific objective(s) to be achieved;

(xii) service(s) to be provided to obtain the objective(s) and name(s) of the agencies providing the services;

(xiii) expected duration of the services;

(xiv) frequency of contact with the client;

(xv) concurrence and acceptance of services by the applicant or a notation that the client is involuntary;

(xvi) in the case of a client who cannot or will not sign the application for services (DSS 2921), documentation as to why the worker is signing the application on behalf of the client;

(xvii) frequency of review of the services plan;

(xviii) progress evaluation at the time of review;

(xix) changes made in the client's services plan as a result of the periodic reviews;

(xx) signatures of worker and supervisor; and

(xxi) such other information as the department shall require.

(2) The PSA assessment/services plan shall replace the individual service plan required in section 406.2(b) of this Title.

(3) The PSA assessment/services plan shall be prepared on a form prescribed by the department or on a local equivalent form approved by the department.

(4)

(i) The PSA assessment/services plan must be completed within 60 days of the referral date. The date of completion will be determined by the date of the supervisor's signature on the form prescribed by the department or an approved local equivalent.

(ii) Notwithstanding the time frames for completing the PSA assessment/services plan specified in subparagraph (i) of this paragraph, the services needs of individuals who are being assessed for PSA must be addressed promptly and appropriately, in accordance with the provisions of section 457.1(c) of this Part, regardless of the date the PSA assessment/services plan is completed.

(5) The PSA assessment/services plan must be reviewed and updated:

(i) within six calendar months of the date of referral and every six calendar months thereafter; or

(ii) whenever a PSA case is closed or transferred to another service provided by the social services district, except that a form need not be completed when a case is closed due to the client's death. The date of review will be determined by the date of the supervisor's signature on the form prescribed by the department or an approved local equivalent.

(c) Progress notes.

Progress notes must be maintained as part of the PSA client record as prescribed by the department. Progress notes must be recorded in the PSA case record as soon as possible but no later than 30 days after date of the event which required the use of progress notes.

(d) Other information.

The PSA client record shall contain all other information required in section 406.2 of this Title, with the exception of the individual service plan, and any other information which the department may from time to time require.

18 NYCRR 457.3 Eligibility for PSA.

(a) The controlling eligibility factor is the adult's need for such services in that he/she meets the criteria as established in the definition. Except as provided in paragraph (10) of subdivision (c) of section 457.1 of this Part, PSA are to be provided such adults without regard to financial eligibility if and as long as State reimbursement is made available.

(b) When other services are used as part of a plan of protective services, the eligibility criteria as established by the local districts component of the CSP then in effect will apply unless otherwise specified.

18 NYCRR 457.4 Staffing standards.

(a) Designation.

The local commissioner of social services shall designate, as an identifiable assignment, protective services for adult caseworker position(s), as indicated by the district's estimated needs.

(b) Qualifications.

Such caseworkers shall:

(1) preferably have had experience in working with the elderly or have basic knowledge in the field of gerontology; and

(2) meet such qualifications as established under section 680.1 of this Title.

(c) Training.

(1) All workers who provide PSA, including supervisors, are required to complete satisfactorily a basic training program in PSA. Staff must attend the first department-sponsored PSA institute designated for their region following the date of their employment in PSA. Basic PSA training provided directly by local districts in lieu of the department-sponsored institute must be approved by the department.

(2) All workers who provide PSA, including supervisors, must attend department-sponsored training on the legal aspects of PSA at the first session designated for their region following their completion of the basic PSA institute or approved local equivalent. Training on the legal aspects of PSA provided directly by social services districts must be approved in advance by the department.

(3) All PSA supervisors must attend department-sponsored PSA supervision training at the first session designated for their region following the date of their employment as a PSA supervisor. PSA supervision training provided directly by social services districts must be approved in advance by the department.

(4) If the department does not have sufficient resources to enable a social services district to comply with the requirements set forth in paragraph (1), (2) or (3) of this subdivision, the department must make arrangements with the district to have its staff attend a subsequent offering of the required training for which there are adequate resources available to meet the district's needs.

18 NYCRR 457.5 Duties and responsibilities.

(a) In the provision of this service, the agency shall be responsible for the services as listed in subdivision (c) of section 457.1 of this Part and the then in effect CSP.

(b) Contacts with PSA clients.

(1) PSA staff must maintain contact with PSA clients as frequently as staff of the local social services district determine necessary to assure that the service needs of such clients are adequately met through the utilization of available community resources. The type and frequency of client contacts will depend on:

(i) the specific circumstances of the individual's situation;

(ii) the ability and willingness of family members, friends and neighbors to assist the individual; and

(iii) the involvement of other agencies in the provision of services to PSA clients.

(2) At a minimum, PSA clients, who are living in the community and are in any of the situations specified in subparagraphs (i), (ii) and (iii) of this paragraph, must be visited in their homes at least once every calendar month:

(i) when abuse, neglect or exploitation by another person is suspected or documented;

(ii) when environmental conditions exist in the home which are a threat to the health and safety of the client; or

(iii) when a client is home bound or when there is no other way to have a face to face contact with the client without making a home visit.

(3) For PSA clients in any of the situations specified in subparagraphs (2)(i), (ii) and (iii) of this subdivision, the monthly home visit may be delegated to the professional casework or social work staff of another public agency or voluntary agency if the following conditions are met:

(i) the case is stabilized;

(ii) the other agency agrees to submit written monthly status reports which become part of the client's case record;

(iii) the district evaluates the status reports submitted by the other agency;

(iv) the PSA caseworker visits the client within 72 hours of the receipt of the status report, if the report indicates that there has been a change in the client's circumstances; and

(v) local districts adhere to their case management responsibilities as defined in section 403.4 of this Title.

(4) For all other PSA clients living in the community, PSA staff must maintain at least face to face contact every calendar month and make a home visit at least once every three calendar months.

(5) For PSA clients who are permanent residents of residential care facilities, PSA staff must maintain telephone contact with facility staff at least once every three months in order to monitor the condition of the client.

(6) PSA clients who are hospitalized need not be visited, but PSA staff must maintain monthly telephone contact with hospital discharge planning staff in order to monitor the client's condition and to plan for the discharge of the client to his or her home or other appropriate setting.

(7) PSA clients who are incarcerated need not be visited, but PSA staff must maintain monthly telephone contact with correction facility staff in order to monitor the client's condition and plan for his or her release to the community.

(c) In addition to those activities listed in subdivision (a) of this section, the PSA unit has the following areas of responsibility:

(1) Emergency assistance to adults. PSA staff shall be responsible in conformity to subdivision (c) of section 397.5 of this Title for a social study to determine the need for protective services in those EAA situations where there is need to replace lost or mismanaged cash for a person who by reason of advanced age, illness, infirmity, mental weakness, physical handicap, intemperance, addiction to drugs, or other cause, has a substantial impairment in his ability to manage. An application for emergency assistance shall not be deemed an application for services.

(2) Alternative social services payment procedures. Based on the adult's incapacity as established by social study, there may be a need to initiate forms of payment as otherwise provided, and include restricted money payments, vendor payments, and the designation of a protective payee. The designation of a protective payee shall preferably be made from the PSA staff in conformity to section 381.7 of this Title.

(3) Representative payee for social security benefits. When there are indications that social security benefits are being mishandled due to the recipient's incapacities, the PSA staff will be responsible for:

(i) developing a social study to determine the need for the designation of a representative payee;

(ii) initiating the application to the social security office in those situations where there is no one else available; and

(iii) securing a representative payee in appropriate situations. It shall be the responsibility of the local commissioner of social services or director of social services to serve as representative payee when there is no one else willing or able to do so, provided, however, that the responsibility for actual service delivery may be delegated to appropriate staff.

18 NYCRR 457.6 Serving involuntary clients.

(a) General.

When the district believes that there is a serious threat to an adult's well being and that the adult is incapable of making decisions on his or her own behalf because of mental impairments, the social services official has a responsibility to pursue appropriate legal intervention in accordance with the provisions of sections 473 and 473-a of the Social Services Law, articles 9, 15 and 81 of the Mental Hygiene Law, article 8 of the Family Court Act and article 17-A of the Surrogate's Court Procedure Act, even though such intervention may be against the wishes of or without the knowledge of the adult at risk. The districts must employ the least restrictive intervention necessary to effectively protect the

adult. The immediacy and seriousness of the threat to the individual will determine whether crisis intervention procedures and/or other legal procedures are warranted as set forth in subdivisions (b) and (c) of this section.

(b) Crisis intervention.

For an adult who exhibits such a degree of self-destructive behavior or who is living in such a hazardous situation that there is substantial risk of harm to himself, herself or others and such adult is incapable of making decisions on his or her own behalf because of mental impairments, the social services official has a responsibility to initiate appropriate action even though it may be without the adult's consent or knowledge. Such actions of intervention will usually include enlisting the services of other agencies and professionals. The district shall utilize the appropriate intervention or procedures as follows:

(1) enlist immediate help of a peace officer to take an adult into custody pursuant to section 9.41 of the Mental Hygiene Law or for other appropriate assistance;

(2) request the local director of community services to apply for admission of an adult to a hospital or to direct the removal of an adult to a hospital pursuant to sections 9.37 and 9.45 of the Mental Hygiene Law or to take other appropriate action;

(3) initiate application for admission to a mental hygiene facility on certification of two examining physicians pursuant to sections 9.27 and 15.27 of the Mental Hygiene Law;

(4) enlist help from public health officials and call an ambulance or other emergency medical care provider in acute situations;

(5) take the necessary action for the initiation by a social services official of a petition to obtain an order authorizing the provision of short-term involuntary protective services pursuant to section 457.10 of this Part; and/or

(6) take the necessary action to initiate proceedings for an order of protection against an abusive household or family member pursuant to sections 119, 822 and 842 of the Family Court Act.

(c) Other legal procedures.

There are other procedures established in the Mental Hygiene Law and the Surrogate's Court Procedure Act to be utilized in non-crisis situations in order to provide long range planning or protection to certain PSA clients. These procedures require more time to implement than afforded in emergency or crisis situations. In appropriate situations the district must:

(1) initiate efforts to arrange for the appointment of a guardian in accordance with the provisions of article 81 of the Mental Hygiene Law;

(2) serve in the capacity of guardian in those situations in which a PSA client is in need of a guardian and no one else is willing and able to serve responsibly; or

(3) initiate efforts to arrange for the appointment of a guardian for the mentally retarded in accordance with article 17-A of the Surrogate's Court Procedure Act.

(d) Local social services districts must develop and implement procedures for the provision of services to involuntary clients. Such procedures must include provisions for:

(1) training PSA and legal staff in the appropriate utilization of the various interventions which may be employed on behalf of involuntary PSA clients, as described in this section and in paragraphs (2) and (3) of subdivision (c) of section 457.5 of this Part;

(2) continuing community education and networking activities in accordance with section 457.7 of this Part, including meetings with representative community agencies for the purpose of establishing specific agency roles and areas of responsibility in the provision of services to involuntary clients;

(3) obtaining mental health evaluations on behalf of PSA clients when involuntary interventions are being considered;

(4) assuring the availability of the agency's legal staff for timely consultation with PSA staff when requested and the timely implementation of legal interventions on behalf of involuntary clients in appropriate situations; and

(5) assuring that any significant disagreements between PSA and legal staff regarding the need for legal intervention on behalf of an involuntary PSA client are promptly referred to the local social services commissioner or his or her designee for resolution.

18 NYCRR 457.7 Coordination and utilization of community resources.

(a) The provision of PSA shall not be viewed as a single agency responsibility but rather as a community-based service responsibility.

(b) As such, the local social services agency must make known and, to the extent possible, secure the active participation and cooperation of those community resources providing specific services for adults.

(c) Community resources to be involved will include personnel from medical, psychiatric, nursing and legal resources, law enforcement groups, public service agencies, advocacy groups, church councils and those other public and private service agencies of the particular community. These resources shall constitute a PSA delivery network.

(d) Meetings shall be held with representative community agencies for the purpose of establishing specific agency roles and areas of responsibility in the provision of PSA. The social services district shall initiate such efforts directed at establishing this community-based responsibility unless such action has been initiated by other agencies.

(e) In addition to the involvement of other community agencies in the provision of services to PSA clients, the other divisions/units of the local social services department, such as legal, accounting, medical assistance, income maintenance and services, shall be effectively integrated into the PSA service delivery network.

(f) Social services districts must educate the general public, service providers, advocacy groups and other appropriate agencies about the scope of PSA and how to obtain services. Public education and outreach activities must:

(1) be sufficient to ensure access to PSA;

(2) be conducted on an on-going basis; and

(3) use any informational materials provided by the department.

18 NYCRR 457.8 Annual plan for the provision of PSA.

(a) After consultation with appropriate public, private and voluntary agencies, including but not limited to health, mental health, aging, legal and law enforcement agencies, each local department of social services shall prepare and submit to the State commissioner an annual plan for the provision of PSA.

(b) Prior to submission to the State commissioner, each local social services department shall obtain the approval of such PSA plan by the chief executive officer, or the legislative body in those counties without a chief executive officer.

(c) The annual plan for the provision of PSA shall be an integral component of a district's consolidated services plan, as required by section 34-a of the Social Services Law and Part 407 of this Title. These plans shall be submitted by each local social services department to the State commissioner, in a manner and in a format prescribed by the department.

(d) Annual plans for the provision of PSA shall describe the local implementation of this program, including the organization, staffing, mode of operations and financing of PSA, as well as provisions made for the purchase of services, interagency relations, interagency agreements, service referral mechanisms, locus of responsibility for cases with multiagency services needs, and any other information the department shall determine pertinent.

(e) The department shall establish a schedule for the submission of annual plans for the provision of PSA by the local departments of social services. Within 30 days of receipt of plans, the State commissioner shall certify whether or not the plan submitted by a local department of social services fulfills the purposes and meets the requirements of section 473 of the Social Services Law and applicable department regulations. If the State commissioner certifies that an annual plan for the provision of PSA submitted by a local department of social services does not fulfill the purposes or does not meet the requirements of section 473 of the Social Services Law and applicable department regulations, the State commissioner shall inform the district in writing of such determination and the reasons therefor and may withhold State reimbursement for all or part of a local department's PSA activities.

(f) A social services district shall take immediate action in cooperation with the department to correct any deficiencies in such district's annual plan for the provision of PSA.

(g) Any social services district aggrieved by a decision of the State commissioner concerning the disapproval of the local department's annual plan for the provision of PSA or the withholding of State reimbursement for PSA activities, shall be entitled to a fair hearing in accordance with the applicable provisions of the Social Services Law and department regulations. In the event of an adverse fair hearing decision, a social services district shall be entitled to judicial review pursuant to section 22 of the Social Services Law. The withholding of reimbursement for expenditures incurred pursuant to disapproved portions of a district's PSA plan shall remain effective pending final resolution of such review.

18 NYCRR 457.9 Immunity from civil liability.

(a) Any social services official or his designee authorized or required to determine the need for or to provide or arrange for the provision of protective services for adults in accordance with sections 473 and 473-a of the Social Services Law shall have immunity from any civil liability that might otherwise result by reason of providing these services, in accordance with section 473.3 of the Social Services Law, provided such official or his designee was acting in the discharge of his duties and within the scope of his employment, and that such liability did not result from the willful act or gross negligence of such official or his designee.

(b) Any person who in good faith believes that a person 18 years of age or older may be an endangered adult, as such term is defined at section 473-a of the Social Services Law, or in need of protective services, and who, based on such belief either:

(1) reports or refers such person to the department, Office for the Aging or any local social services district office or designated area agency on aging, law enforcement agency, or any other person, agency or organization that such person, in good faith, believes will take appropriate action; or

(2) testifies in any judicial or administrative proceeding arising from such report or referral, shall have immunity, in accordance with section 473-b of the Social Services Law, from any civil liability that might otherwise result by reason of the act of making such report or referral or of giving of such testimony.

18 NYCRR 457.10 Short-term involuntary protective services orders.

(a) Definitions.

When used in this section unless otherwise expressly stated or unless the context of subject matter requires a different interpretation:

(1) *Endangered adult* means a person, age 18 or over who is:

(i) in a situation or condition which poses an imminent risk of death or imminent risk of serious physical harm to him or her; and

(ii) lacks the capacity to comprehend the nature and consequences of remaining in this situation or condition. However, refusal by the adult to accept protective services shall not in itself be sufficient evidence of such lack of capacity. In addition, mental illness shall not in itself be sufficient evidence of such lack of capacity.

(2) *Short-term involuntary protective services* are those services authorized in section 473 of the Social Services Law and set forth in subdivision (c) of section 457.1 of this Part which are provided involuntarily pursuant to the procedures established by this section.

(3) *Petitioner* means a social services official, as defined in section 2 of the Social Services Law, initiating a proceeding pursuant to this section.

(4) *Respondent* means an allegedly endangered adult.

(5) *Allegedly endangered adult* means a person who is the subject of a petition by a social services official for a short-term involuntary protective services order.

(b)

(1) Petition.

A social services official may petition a supreme or county court of appropriate venue for an order authorizing the provision of short-term involuntary protective services pursuant to section 473-a of the Social Services Law.

(2) The petition shall state, to the extent the facts can be determined with reasonable diligence, considering the need to provide services expeditiously:

(i) the name, age and physical description of the allegedly endangered adult; and

(ii) the address or other location where the allegedly endangered adult can be found.

(3) The petition shall state facts showing:

(i) that the adult who is the subject of this petition is an endangered adult as defined in paragraph (a)(1) of this section;

(ii) the specific short-term involuntary protective services petitioned for, how such services would remedy the situation or condition which poses an imminent risk of death or imminent risk of serious physical harm to the allegedly endangered adult, and why such services are not overbroad as to scope or duration;

(iii) that the short-term involuntary protective services being applied for are necessitated by the situation or condition described in paragraph (a)(1) of this section;

(iv) that other voluntary protective services have been tried and have failed to remedy the situation, and that a future, voluntary, less restrictive alternative would not be appropriate or would not be available;

(v) if a change in the allegedly endangered adult's physical location is being applied for, that remedy of the dangerous situation or condition described in paragraph (a)(1) of this

section is not appropriate in existing physical surroundings of the allegedly endangered adult;

(vi) any inconsistency known to petitioner between the proposed short-term involuntary protective services and the allegedly endangered adult's religious belief;

(vii) that the petitioner shall not knowingly apply for medical evaluations or medical treatment pursuant to section 473-a of the Social Services Law for a competent adult for the sole reason that such person relies upon or is being furnished treatment by spiritual means through prayer, in lieu of medical treatment, in accordance with the tenets and practices of a recognized church or religious denomination of which the adult is a member or bona fide adherent;

(viii) that is it reasonably appears that the allegedly endangered adult does not understand the English language, that reasonable efforts have been made to communicate with the allegedly endangered adult in a language he or she understands;

(ix) that no prior application has been made for the relief requested in the petition or for any similar relief, or if prior application has been made, the determination thereof, and the new facts, if any, that were not previously shown which warrant a renewal of the application.

(4) The petition shall be verified. Any allegations which are not based upon the personal knowledge of the petitioner shall be supported by affidavits provided by a person or persons having such knowledge. Such affidavits shall be attached to the petition.

(c) Each district shall submit such reports on the implementation of section 473-a of the Social Services Law as may be required by the department. These reports shall be in a manner and on a format prescribed by the department.

(d) Nothing in this Part precludes the simultaneous commencement of a proceeding under this section and a proceeding under section 9.43 of the Mental Hygiene Law, or a proceeding under article 81 of such law. Furthermore, a pending proceeding under article 81 of such law does not preclude commencement of a proceeding under this section.

18 NYCRR 457.11 Orders to gain access to persons believed to be in need of protective services.

(a) General.

In accordance with the provisions of section 473-c of the Social Services Law, a social services official may apply to the Supreme Court or the county court for an order to gain access to a person to assess whether that person is in need of PSA when such an official, having reasonable cause to believe that the person may be in need of PSA, is refused access by that person or another individual. Any PSA provided pursuant to this section must be provided in accordance with the provisions of section 473 of the Social Services Law and of this Part.

(b) Response to referrals.

Appropriate staff of a social services district must respond to PSA referrals in accordance with the provisions of section 457.1(c)(2) of this Part. If an employee of a social services district who is authorized to provide PSA is denied access to a person who is believed to be in need of PSA by another individual or by such person, the social services district must take the following action:

(1) enlist the aid of family members, friends, neighbors, or staff of other appropriate agencies, including law enforcement agencies, for the purposes of persuading the individual(s) responsible for denying access to a person who may be in need of PSA to permit the district to complete an assessment of the person's need for PSA; and

(2) if the efforts initiated in accordance with paragraph (1) of this subdivision are unsuccessful, the social services district must determine whether or not to apply to the Supreme Court or the County Court for an order to gain access to a person who may be in need of PSA, in accordance with the provisions of this section. In deciding whether or not to apply for such an order, the social services district must determine if the information provided by the referral source and other persons familiar with the situation and the observations of staff of the social services district warrant such an action.

(c) Situations in which a social services official decides not to apply for an order to gain access.

When a social services official determines that it is not appropriate to apply for an order to gain access to a person who may be in need of PSA, the reasons for his or her decision must be documented in the case record along with the efforts made by the district to gain access to the person believed to be in need of PSA in accordance with paragraph (b)(1) of this section and all other relevant information related to the social services district's response to the referral. In addition, the district shall notify the client and known relatives, friends and interested agencies of the continued willingness of the district to complete an assessment and provide appropriate services if the person agrees to accept such services.

(d) Situations in which a social services official decides to apply for an order to gain access.

In those situations in which a social services official decides to apply for an order to gain access to a person who may be in need of PSA, an application must be prepared which states, to the extent that the facts or circumstances can be verified or determined:

(1) the name and address of the person who may be in need of PSA and the premises at which such person may be found;

(2) the reason the social services official believes that such person may be in need of PSA, which may include information provided by other agencies or individuals who are familiar with that person;

(3) the person or persons who are responsible for preventing the social services official from gaining access to the person who may be in need of PSA;

(4) the efforts made by the employees of a social services district to gain access to the person who may be in need of PSA as set forth in paragraph (b)(1) of this section;

(5) the names of any individuals, such as physicians or nurses, or other health or mental health professionals qualified to participate in the assessment, who will accompany and assist the social services official in conducting the PSA assessment;

(6) the manner in which the proposed assessment is to be conducted;

(7) that the social services official seeks an order solely for the purpose of assessing the need of a person for PSA; and

(8) that no prior application has been made for the relief requested or for any similar relief, or if prior application has been made, the determination thereof, and the new facts, if any, that were not previously shown which warrant a renewal of the application.

(e) Affidavits.

Any allegations which are not based upon personal knowledge must be supported by affidavits provided by a person or persons having such knowledge. Such affidavits must be attached to the application.

(f) Preference.

Applications for orders to gain access to persons who may be in need of PSA will have preference over all other causes in all courts of appropriate jurisdiction, except those with a similar statutory preference.

(g) Standard for proof and procedure.

The standard for proof and procedure for an authorization from a court for a social services district to conduct a PSA assessment is the same as for a search warrant under article 690 of the Criminal Procedure Law.

(h) When a court denies a social services official an order to gain access to a person believed to be in need of PSA, the district must:

(1) maintain a copy of the court's decision in the case record; and

(2) notify the potential client and any known relatives, friends and interested agencies of the district's willingness to complete an assessment and provide appropriate services upon the request of the potential client.

(i) When a court grants an order to gain access in accordance with the provisions of this section, the social services official or his or her designee, accompanied by a police officer, will enter the premises where the person who is believed to be in need of PSA can be found and conduct an assessment of the person's needs in accordance with the provisions of section 457.2 of this Part. A social services official must conduct an assessment, pursuant to the provisions of this section, in cooperation with those qualified individuals named in the application in accordance with paragraph (d)(5) of this section. A copy of the court order must be maintained in the case record.

(j) Neither the provisions of section 473-c of the Social Services Law nor the provisions of this section are to be construed to authorize a social services official to remove any person

from the premises described in an application for an order to gain access to a person who may be in need of PSA, or to provide any involuntary protective services to any person other than to assess a person's need for PSA. Nothing in this section shall be construed to impair any existing right or remedy.

(k) In the event that a person who is assessed for PSA, pursuant to this section, is determined to be in need of PSA and refuses to accept services, involuntary protective services must be provided in appropriate situations in accordance with the provisions of sections 473 and 473-a of the Social Services Law, and sections 457.6 and 457.10 of this Part.

(l) In order to ensure the effective implementation of this section, social services commissioners must facilitate cooperative action between the district's PSA staff and the county or agency attorneys who file petitions for orders to gain access to persons who may be in need of PSA.

(m) As part of their outreach and community education efforts for PSA, mandated pursuant to section 457.7 of this Part, social services districts must notify the courts, law enforcement agencies and those health and mental health professionals and agencies who may be needed to assist the districts in completing a PSA assessment, of the provisions of section 473-c of the Social Services Law and this section.

(n) Reports.

Each social services district must submit such reports on the implementation of section 473-c of the Social Services Law and this section as may be required by the department. Such reports must be prepared in a manner and be in a format prescribed by the department.

(o) Social services districts must document their efforts to utilize section 473-c of the Social Services Law and this section, and must maintain case records specific to such utilization of this section, as prescribed by the department.

18 NYCRR 457.12 Community guardianship.

(a) General.

Pursuant to the provisions of section 473-c of the Social Services Law, a social services district may contract with a community guardian program for the purposes of acting as a guardian on behalf of persons who meet the requirements of subdivision (c) of this section and for whom the district has commenced a special proceeding for the appointment of a guardian pursuant to article 81 of the Mental Hygiene Law.

(b) Definitions.

When used in this section, unless otherwise expressly stated or unless the subject matter requires a different interpretation:

(1) *Community guardian program* means a not-for-profit corporation incorporated under the laws of the State of New York or a local governmental agency which has contracted with or has an agreement with a local social services official to provide guardianship services to adults who are eligible for such services, in accordance with the provisions of article 81 of the Mental Hygiene Law.

(2) *Hospital* means an inpatient medical facility as defined in subdivision one of section 2801 of the Public Health Law, or the inpatient services of a psychiatric center under the jurisdiction of the Office of Mental Health or any other psychiatric inpatient facility as defined in subdivision 10 of section 1.03 of the Mental Hygiene Law.

(3) *Residential facility* means any of the following:

(i) a skilled nursing facility or health-related facility operated pursuant to article 28 of the Public Health Law; or

(ii) an alcoholism or substance abuse treatment facility operated pursuant to article 19 or 23 of the Mental Hygiene Law; or

(iii) a community residence, family care home, or other community care facility for the mentally disabled operated pursuant to article 31 of the Mental Hygiene Law; or

(iv) an adult care facility operated pursuant to article 7 of the Social Services Law.

(c) Eligibility requirements.

A social services official may bring a petition to appoint a community guardian as guardian for a person only if the person is:

(1) eligible for and in receipt of PSA, as defined in section 457.1(b) of this Part at the time of the petition; and

(2) without a capable friend or relative or responsible agency willing and able to serve as guardian; and

(3) living outside of a hospital or residential facility, or living in a hospital or residential facility and appointment of a community guardian is part of a discharge plan to return such person to the community.

(d) Contract requirements.

A contract between a local social services official and a community guardian program must comply with the requirements of Part 405 of this Title pertaining to the purchase of services by social services districts. In addition, each contract must provide that:

(1) the community guardian program will make diligent efforts to maintain each person for whom the community guardian program is appointed as guardian in the community;

(2) the community guardian program will petition the court to relinquish its duties as guardian if a person for whom it is appointed as guardian is no longer in need of a guardian, or a capable friend or relative becomes available to serve as guardian, or the person enters a hospital or residential facility with the expectation of a long-term stay which

will exceed six months and there is no anticipation of a return to the community, or the person remains in a hospital for more than six months with no expectation of a return to the community;

(3) whenever a community guardian program intends to petition the court to relinquish its responsibilities as guardian, the community guardian program will notify the social services district in writing, for its reviewed approval, of the reasons for the proposed relinquishment of responsibility and the community guardian program's proposed plan to meet the adult's continuing services needs. Upon receiving such approval from the social services district, the community guardian program must present such proposed plan to the court along with its petition to relinquish its responsibilities as guardian;

(4) the community guardian program will act on behalf of each person for whom it is appointed as guardian to obtain such medical, social, mental health, legal and other services and all entitlements and public benefits that are available and to which the person is entitled or qualifies and which are required for the person's safety and well-being;

(5) all remuneration awarded to the community guardian program by the court from the estate of a person for whom the community guardian program is appointed as guardian will be the lesser of the cost incurred by the community guardian program in serving such person or the fee that would otherwise be awarded by the court. Such remuneration must be paid over to the social services district;

(6) the community guardian program will obtain annual assessments from two qualified psychiatrists or one qualified psychiatrist and one qualified psychologist who are independent of the community guardian program for each person for whom it serves as guardian to determine whether continuation of such service is necessary;

(7) the community guardian program will promptly inform the appointing court and the social services district of the result of the assessments required by paragraph (6) of this subdivision;

(8) the files and records of the community guardian program will be open to inspection by the local social services officials and the department;

(9) a case record must be established for each recipient of services from a community guardian program. At a minimum, the case record must contain:

(i) copies of the PSA assessment/services plan and updates prepared by the district in accordance with the provisions of section 457.2 of this Part;

(ii) semiannual assessments which must contain a description of the person's current mental and physical condition, housing conditions, availability of family members and friends and their willingness and capacity to assist the individual, the involvement of other agencies in the delivery of services to the client and the continuing services needs of the client and the plan for addressing these needs;

(iii) copies of the annual assessments required by paragraph (6) of this subdivision;

(iv) a separate financial management folder containing an individual financial management plan, a record of all financial transactions made on behalf of the adult by the community guardian program, copies of receipts for all expenditures made by the program on behalf of an individual, and copies of all other documents pertaining to the adult's financial situation as required by the department;

(v) itemized statements of costs incurred in the provision of services for which the community guardian program received court-authorized reimbursement directly from the individual's estate; and

(vi) other information as required by the department;

(10) a community guardian program must advise the persons served by such program of their right to review their case record in accordance with the provisions of section 357.2(c) of this Title; and

(11) in the event a conflict exists or develops between the stated wishes of a client, or the known customs, values, preferences, or beliefs of a client, and the values, standards, mission, or principles of a community guardian program, or an employee of such program, and if, under such circumstances, the community guardian program or the employee intends to substitute its own judgment in contravention of the client's stated wishes or known customs, values, preferences or beliefs, such program will immediately notify the local social services official and the appointing court of the conflict. Under such circumstances, the local social services official must investigate the circumstances of the conflict and must either take action to resolve the conflict and notify the court of the action taken to resolve the conflict; seek the advice of the court for resolution of the conflict; or petition for a substitute guardian.

(e) Department review and approval of contracts.

Social services districts choosing to establish a community guardian program must submit a copy of the proposed contract between the district and a community guardian program to the department for its review and approval prior to the execution of the contract. The proposed contract must contain the following information:

(1) the name of the social services district;

(2) the name of the community guardian agency with whom the district plans to contract;

(3) documentation of the agency's status as a not-for-profit corporation or a local governmental organization;

(4) a description of the particular population or area to be served if not all PSA recipients served by the district who require guardianship are to be served by the community guardian agency, and a justification for utilizing a community guardian program in such a limited application;

(5) the projected number of persons for whom the community guardian agency will be appointed guardian;

(6) the projected budget of the program;

(7) a description of the relationship between the community guardian program and the district's PSA program, including a description of each agency's service delivery responsibility for persons receiving community guardianship services; and

(8) any other information required to be included in a purchase of services agreement pursuant to Part 405 of this Title.

(f) Contract monitoring responsibilities of the social services district.

(1) A social services district must conduct semiannual reviews of each case record maintained by a community guardian program to assure that the needs of the persons served by the program are adequately met and that continued services by the community guardian program are necessary.

(2) Each social services district must assure that no director, officer, or employee of a community guardian program will have a substantial interest in any corporation, organization or entity which contracts with such program to provide services to any person for whom the community guardian program is guardian. For the purpose of this paragraph, a person is determined to have a substantial interest in a corporation, organization or entity if such person receives financial remuneration from such corporation, organization or entity. A social services district may impose a more restrictive conflict of interest standard subject to the prior approval of the department.

(3) Each social services district must assure that persons hired by the community guardian program to provide services to a person for whom the community guardian program has been named guardian will be able to provide evidence of successful paid or volunteer experience in providing direct services to frail elderly or mentally disabled persons. Such experience may have been obtained in one or more of the following settings: a mental health facility or agency, a protective services agency, other human services agency, a home care services agency, a hospital or other health care agency. Documentation of such employee's experience must be maintained by the district and must be available for review by the department upon request. For the purposes of this paragraph, evidence of successful paid or volunteer experience means a demonstrated capability by the person that he or she is able to effectively serve the frail elderly or the mentally disabled population.

(g) Service delivery responsibilities of the district.

(1) A social services district must continue to provide PSA for three months following the appointment of a community guardian program as a guardian for a PSA client to assure that the client's situation is stabilized and that the services needs of the client will continue to be met. In those situations in which the client's situation is not stabilized after three months, the district must continue to provide PSA until the client's situation is stabilized.

(2) A local social services official will not be relieved of any duty to provide services to eligible persons because of the operation of a community guardian program in the locality or by cessation of such program in the locality. Eligibility determinations for services available from social services officials must be based on an individual assessment of need

which must not be determined solely on the basis of the presence of the services of a community guardian program.

(h) Reimbursement to community guardian programs.

Expenditures made by a social services district, pursuant to an approved contract for community guardianship services in accordance with the provisions of this section, will be subject to reimbursement by the State, in the amount of 50 percent of such expenditures, after first deducting therefrom any Federal funds properly received or to be received and any amounts received pursuant to paragraph (d)(5) of this section.

(i) Reporting requirements.

Each social services district must submit reports on the implementation of section 473-c of the Social Services Law as may be required by the department. Such reports must be in a manner and in a format prescribed by the department.

18 NYCRR 457.13 Notice.

A person who is the subject of a referral or an application for PSA must receive written notice of the district's determination of eligibility or ineligibility for PSA in accordance with section 404.1(f) of this Title in the following circumstances:

(a) when the district makes a determination of eligibility or ineligibility for PSA after an application for PSA has been made by an adult, the adult's authorized representative, or by someone acting responsibly for such adult, in accordance with section 404.1(c) of this Title; or

(b) when the district makes a determination of eligibility or ineligibility for PSA following acceptance of a referral as defined in this Part and completion of a PSA investigation and assessment in accordance with the terms of this Part.

18 NYCRR 457.14 Informing referral sources.

(a) When referrals are made to a social services district from community resources which are part of a PSA service delivery network in accordance with section 457.7(c) of this Part, the following requirements must be met:

(1) When information provided by a referral source is accepted as a PSA referral, the referral source must be informed orally or in writing of the client's eligibility or ineligibility for PSA within 15 calendar days of the completion of the PSA assessment required by section 457.2(b) of this Part.

(2) When information provided by a referral source is not accepted as a PSA referral, the referral source must be informed orally or in writing of the district's decision within 15 calendar days of the decision.

(b) When referrals are made to a social services district from sources other than community resources which are part of a PSA delivery network, the following requirements must be met:

(1) When information provided by a referral source is accepted as a PSA referral, the referral source must be informed orally or in writing within 15 calendar days of the completion of the PSA assessment required by section 457.2(b) of this Part that the district will or will not provide services to the client. The information provided to the referral source must not specify the nature of the services that will or will not be provided to the client.

(2) When information provided by a referral source is not accepted as a PSA referral, the referral source must be informed orally or in writing within 15 calendar days of the decision that the district will or will not provide services to the client.

(c) The oral or written information provided to referral sources must include the name and telephone number of a supervisor to whom any further questions regarding the referral can be directed.

(d) Documentation of information provided to referral sources.

(1) Documentation of oral information provided to referral sources must be contained in progress notes as prescribed by the department.

(2) Copies of written information provided to referral sources must be maintained in the case record.

(e) Any other disclosure of information about an applicant for PSA or a recipient of PSA must comply with the provisions of Part 357 of this Title.

18 NYCRR 457.15 Reports to law enforcement officials.

(a) Whenever a social services official, or his or her designee authorized or required to determine the need for, or to provide or arrange for the provision of PSA, in accordance with the provisions of this Part, has a reason to believe that a crime (a misdemeanor or a felony), as defined in the Penal Law, has been committed against a person for whom the need for such services is being determined or to whom such services are being provided or arranged, the social services official or his or her designee must report this information to the appropriate police or sheriff's department. This information also must be reported to the district attorney's office when such office has requested this information.

(b) In determining whether there is a reason to believe that a crime, as defined in the Penal Law, has been committed against a person whose need for PSA is being determined, or a person for whom PSA is being provided or arranged, a social services official or his/her designee must review and evaluate, as necessary, the following:

(1) information obtained through observing and interviewing a person whose need for PSA is being determined, or a person for whom PSA is being provided or arranged;

(2) information obtained from other persons, agencies, offices or organizations who are involved in determining a person's need for PSA or providing or arranging services for a person who is receiving PSA;

(3) information obtained from the person or persons who are suspected of committing a crime against a person whose need for PSA is being determined or a person for whom PSA is being provided or arranged; and

(4) information obtained from other persons who have knowledge about the person whose need for PSA is being determined, or a person for whom PSA is being provided or arranged.

18 NYCRR 457.16 Confidentiality.

(a) Definitions.

When used in this section, unless otherwise expressly stated or unless the context requires a different interpretation:

(1) *Subject of a report* means a person who is the subject of a referral or an application for PSA or who is receiving or has received PSA from a social services district.

(2) *Authorized representative of a subject of a report* means:

(i) a person named in writing by a subject to be a subject's representative for purposes of requesting and receiving records under this Part; provided, however, that the subject has contract capacity at the time of the writing or had executed a durable power of attorney at a time when the subject had such capacity, naming the authorized representative as attorney-in-fact, and such document has not been revoked in accordance with applicable law;

(ii) a person appointed by a court, or otherwise authorized in accordance with law to represent or act in the interests of the subject; or

(iii) legal counsel for the subject.

(b) Information in the possession of the department or a social services district including, but not limited to, reports made pursuant to this Part, the names of referral sources, written reports or photographs, required forms, progress notes and other information in the case record concerning the subject of a report, is confidential. Accordingly, the department or a social services district must not release reports or other information in their possession which pertain to a person who is the subject of a report without the approval of such subject or his or her authorized representative, except as provided for in subdivision (c) of this section.

(c) The following persons, officers and agencies may receive information from the department or a social services district concerning the subject of a report:

(1) any person who is the subject of a report or such person's authorized representative;

(2) a provider of services to a current or former PSA client where a social services official, or his/her designee, has determined that such information is necessary to determine the need for, or to provide or arrange for the delivery of PSA. For the purposes of this section a *PSA client* means the subject of a PSA report;

(3) a court, upon a finding that the information in the record is necessary for the use by a party in a criminal or civil action or in the determination of an issue before the court;

(4) a grand jury, upon a finding that the information in the record is necessary for the determination of charges before the grand jury;

(5) a district attorney, assistant district attorney or an investigator employed in the office of the district attorney, a member of the Division of the State Police, a police officer employed by a city, county, town or village police department or by a county sheriff when such official requests such information stating that:

(i) the information is necessary to conduct a criminal investigation or criminal prosecution of a person;

(ii) there is reasonable cause to believe that a criminal investigation or prosecution involves or otherwise affects a person who is the subject of a PSA referral or application or is receiving or has received PSA; and

(iii) it is reasonable to believe that due to the nature of the crime under investigation or prosecution, such records may be related to the criminal investigation or prosecution;

(6) a person named court appointed evaluator or guardian pursuant to article 81 of the Mental Hygiene Law, or a person named as a guardian for the mentally retarded pursuant to article 17-A of the Surrogate's Court Procedure Act; or

(7) any person entitled to such record in accordance with applicable law.

(d) Prior to the release of a record or other information maintained pursuant to this Part to persons, officers and agencies specified in subdivision (c) of this section, the department or a social services district must be satisfied that the confidential character of the information will be maintained in accordance with applicable law and that such information will be used solely for the purposes for which it was made available. Furthermore, any release of confidential HIV information, as defined in section 2780 of the Public Health Law, must comply with the requirements of article 27-f of such law and Parts 357 and 403 of this Title.

(e) The commissioner or a local social services official may withhold in whole, or in part, the release of any information in their possession which they are otherwise authorized to release in accordance with subdivision (c) of this section, if such official determines that:

(1) the release of such information would identify a person who made a referral or submitted an application on behalf of a person for PSA, or who cooperated in a subsequent investigation and assessment conducted by a social services district to determine a person's need for PSA; and

(2) the official reasonably determines that the release of such information would be detrimental to the safety or interests of such individual.

(f) When a record made under this Part is subpoenaed or sought pursuant to notice to permit discovery, a social services official may move to withdraw, quash, fix conditions or modify the subpoena, or to move for a protective order, as may be appropriate, in accordance with the applicable provisions of the Criminal Procedure Law or the Civil Practice Law and Rules to:

(1) delete the identity of any persons who made a referral or submitted an application for PSA on behalf of an individual, or who cooperated in a subsequent investigation and assessment of the individual's need for such services, or the agency, institution, program or other entity when persons are employed, or with which such persons are associated;

(2) withhold records, the disclosure of which is likely to be detrimental to the safety or interests of such persons; or

(3) otherwise object to the release of all or a portion of the record on the basis that the requested release of records is for a purpose not authorized under the law.

(g) For the purpose of this section, a *record* means any information in the possession of the department or a social services district regarding the subject of a report as defined in subdivision (a) of this section.

NAPSA (or APS) Code of Ethics

Adult Protective Services programs and staff promote safety, independence, and quality-of-life for older persons and persons with disabilities who are being mistreated or in danger of being mistreated, and who are unable to protect themselves.

Guiding Value

Every action taken by Adult Protective Services must balance the duty to protect the safety of the vulnerable adult with the adult's right to self-determination.

Secondary Value

Older persons and persons with disabilities who are victims of mistreatment should be treated with honesty, caring, and respect.

Principles

- Adults have the right to be safe.
- Adults retain all their civil and constitutional rights, i.e., the right to live their lives as they wish, manage their own finances, enter into contracts, marry, etc. unless a court adjudicates otherwise.
- Adults have the right to make decisions that do not conform with societal norms as long as these decisions do not harm others.
- Adults have the right to accept or refuse services.

NAPSA (or APS) Practice Guidelines

APS worker practice responsibilities include:

- Recognize that the interests of the adult are the first concern of any intervention.
- Avoid imposing personal values on others.
- Seek informed consent from the adult before providing services.
- Respect the adult's right to keep personal information confidential.
- Recognize individual differences such as cultural, historical and personal values.
- Honor the right of adults to receive information about their choices and options in a form or manner that they can understand.
- To the best of one's ability, involve the adult as much as possible in developing the service plan.
- Focus on case planning that maximizes the vulnerable adult's independence and choice to the extent possible based on the adult's capacity.
- Use the least restrictive services first whenever possible—community-based services rather than institutionally-based services.
- Use family and informal support systems first as long as this is in the best interest of the adult.
- Maintain clear and appropriate professional boundaries.
- In the absence of an adult's expressed wishes, support casework actions that are in the adult's best interest.
- Use substituted judgment in case planning when historical knowledge of the adult's values is available.
- Do no harm. Inadequate or inappropriate intervention may be worse than no intervention.

NEW YORK RULES OF PROFESSIONAL CONDUCT (portions)

(Effective April 1, 2009)

PREAMBLE:

A LAWYER'S RESPONSIBILITIES (partial)

[1] A lawyer, as a member of the legal profession, is a representative of clients and an officer of the legal system with special responsibility for the quality of justice. As a representative of clients, a lawyer assumes many roles, including advisor, advocate, negotiator, and evaluator. As an officer of the legal system, each lawyer has a duty to uphold the legal process; to demonstrate respect for the legal system; to seek improvement of the law; and to promote access to the legal system and the administration of justice

[2] The touchstone of the client-lawyer relationship is the lawyer's obligation to assert the client's position under the rules of the adversary system, to maintain the client's confidential information except in limited circumstances, and to act with loyalty during the period of the representation.

SCOPE

[5] Under various legal provisions, including constitutional, statutory and common law, the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships. For example, a lawyer for a government agency may have authority on behalf of the government to decide whether to agree to a settlement or to appeal from an adverse judgment. Such authority in various respects is generally vested in the attorney general and the state's attorney in state government, and in their federal counterparts, and the same may be true of other government law officers. Also, lawyers under the supervision of these officers may be authorized to represent several government agencies in intragovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients. These Rules do not abrogate any such authority.

RULE 1.1:
COMPETENCE

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

(b) A lawyer shall not handle a legal matter that the lawyer knows or should know that the lawyer is not competent to handle, without associating with a lawyer who is competent to handle it.

(c) A lawyer shall not intentionally:

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

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

RULE 1.2:
SCOPE OF REPRESENTATION AND
ALLOCATION OF AUTHORITY BETWEEN CLIENT AND LAWYER

(a) Subject to the provisions herein, a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances, the client gives informed consent and where necessary notice is provided to the tribunal and/or opposing counsel.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is illegal or fraudulent, except that the lawyer may discuss the legal consequences of any proposed course of conduct with a client.

(e) A lawyer may exercise professional judgment to waive or fail to assert a right or position of the client, or accede to reasonable requests of opposing counsel, when doing so does not prejudice the rights of the client.

(f) A lawyer may refuse to aid or participate in conduct that the lawyer believes to be unlawful, even though there is some support for an argument that the conduct is legal.

(g) A lawyer does not violate these Rules by being punctual in fulfilling all professional commitments, by avoiding offensive tactics, and by treating with courtesy and consideration all persons involved in the legal process.

Comment

Allocation of Authority Between Client and Lawyer

[1] Paragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. The decisions specified in paragraph (a), such as whether to settle a civil matter, must also be made by the client. See Rule 1.4(a)(1) for the lawyer's duty to communicate with the client about such decisions. The lawyer shall consult with the client with respect to the means by which the client's objectives are to be pursued. See Rule 1.4(a)(2).

[2] Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters. On the other hand, lawyers usually defer to their clients regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client's objectives. Because of the varied nature of the matters about which a lawyer and client might disagree, and because the actions in question may implicate the interests of a tribunal or other persons, this Rule does not prescribe how such disagreements are to be resolved. Other law, however, may be applicable and should be consulted by the lawyer. The lawyer should also consult with the client and seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation. See Rule 1.16(c)(4). Likewise, the client may resolve the disagreement by discharging the lawyer, in which case the lawyer must withdraw from the representation. *See* Rule 1.16(b)(3).

[3] At the outset of a representation, the client may authorize the lawyer to take specific action on the client's behalf without further consultation. Absent a material change in circumstances and subject to Rule 1.4, a lawyer may rely on such an advance authorization. The client, however, may revoke such authority at any time.

[4] In a case in which the client appears to be suffering diminished capacity, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.14.

Refusal to Participate in Conduct a Lawyer Believes to Be Unlawful

[5] In some situations such as those described in paragraph (d), a lawyer is prohibited from aiding or participating in a client's improper or potentially improper conduct; but in other situations, a lawyer has discretion. Paragraph (f) permits a lawyer to refuse to aid or participate in conduct the lawyer *believes* to be unlawful, even if the conduct is arguably legal. In addition, under Rule 1.16(c)(2), the lawyer *may* withdraw from representing a client when the client persists in a course of action involving the lawyer's services that the lawyer reasonably *believes* is criminal or fraudulent, even if

the course of action is arguably legal. In contrast, when the lawyer *knows* (or reasonably should know) that the representation will result in a violation of law or the Rules of Professional Conduct, the lawyer *must* withdraw from the representation under Rule 1.16(b)(1). If the client "insists" that the lawyer pursue a course of conduct that is illegal or prohibited under the Rules, the lawyer must not carry out those instructions and, in addition, may withdraw from the representation under Rule 1.16(c)(13). If the lawyer is representing the client before a tribunal, additional rules may come into play. For example, the lawyer may be required to obtain the tribunal's permission to withdraw under Rule 1.16(d), and the lawyer may be required to take reasonable remedial measures under Rule 3.3 with respect to false evidence or other criminal or fraudulent conduct relating to a proceeding.

RULE 1.4:

COMMUNICATION

(a) A lawyer shall:

(1) promptly inform the client of:

(i) any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(j), is required by these Rules;

(ii) any information required by court rule or other law to be communicated to a client; and

(iii) material developments in the matter including settlement or plea offers.

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with a client's reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by these Rules or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Comment

[1] Reasonable communication between the lawyer and the client is necessary for the client to participate effectively in the representation.

Communicating with Client

[2] In instances where these Rules require that a particular decision about the representation be made by the client, paragraph (a)(1) requires that the lawyer promptly consult with the client and secure the client's consent prior to taking action, unless prior discussions with the client have resolved what action the client wants the lawyer to take. For example, paragraph (a)(1)(iii) requires that a lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case must promptly inform the client of its substance unless the client has previously made clear that the proposal will be acceptable or unacceptable or has authorized the lawyer to accept or to reject the offer. *See* Rule 1.2(a).

[3] Paragraph (a)(2) requires that the lawyer reasonably consult with the client about the means to be used to accomplish the client's objectives. In some situations — depending on both the importance of the action under consideration and the feasibility of consulting with the client — this duty will require consultation prior to taking action. In other circumstances, such as during a trial when an immediate decision must be made, the exigency of the situation may require the lawyer to act without prior consultation. In such cases, the lawyer must nonetheless act reasonably to inform the client of actions the lawyer has taken on the client's behalf. Likewise, for routine matters such as scheduling decisions not materially affecting the interests of the client, the lawyer need not consult in advance, but should keep the client reasonably informed thereafter. Additionally, paragraph (a)(3) requires that the lawyer keep the client reasonably informed about the status of the matter, such as significant developments affecting the timing or the substance of the representation.

[4] A lawyer's regular communication with clients will minimize the occasions on which a client will need to request information concerning the representation. When a client makes a reasonable request for information, however, paragraph (a)(4) requires prompt compliance with the request, or if a prompt response is not feasible, that the lawyer or a member of the lawyer's staff acknowledge receipt of the request and advise the client when a response may be expected. A lawyer should promptly respond to or acknowledge client communications, or arrange for an appropriate person who works with the lawyer to do so.

Explaining Matters

[5] The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. Adequacy of communication depends in part on the kind of advice or assistance that is involved. For

example, when there is time to explain a proposal made in a negotiation, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that are likely to result in significant expense or to injure or coerce others. On the other hand, a lawyer ordinarily will not be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interest and the client's overall requirements as to the character of representation. In certain circumstances, such as when a lawyer asks a client to consent to a representation affected by a conflict of interest, the client must give informed consent, as defined in Rule 1.0(j).

[6] Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from diminished capacity. *See* Rule 1.14. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to those who the lawyer reasonably believes to be appropriate persons within the organization. *See* Rule 1.13. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client.

RULE 2.1:

ADVISOR

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social, psychological, and political factors that may be relevant to the client's situation.

Comment

Scope of Advice

[1] A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. Nevertheless, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.

[2] Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.

[3] A client may expressly or impliedly ask the lawyer for purely technical advice. When such a request is made by a client experienced in legal matters, the lawyer may accept it at face value. When such a request is made by a client inexperienced in legal matters, however, the lawyer's responsibilities as advisor may include the responsibility to indicate that more may be involved than strictly legal considerations. For the allocation of responsibility in decision making between lawyer and client, see Rule 1.2.

[4] Matters that go beyond strictly legal questions may also be in the domain of another profession. Family matters can involve problems within the professional competence of psychiatry, clinical psychology or social work; business matters can involve problems within the competence of the accounting profession or of financial or public relations specialists. Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation. At the same time, a lawyer's advice at its best often consists of recommending a course of action in the face of conflicting recommendations of experts.

Offering Advice

[5] In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, the lawyer's duty to the client under Rule 1.4 may require that the lawyer offer advice if the client's course of action is related to the representation. Similarly, when a matter is likely to involve litigation, it may be advisable under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation. A lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.

RULE 3.1.

Non-Meritorious Claims and Contentions

(a) A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous. A lawyer for the defendant in a criminal proceeding or for the respondent in a proceeding that could result in incarceration may nevertheless so defend the proceeding as to require that every element of the case be established.

(b) A lawyer's conduct is "frivolous" for purposes of this Rule if:

(1) the lawyer knowingly advances a claim or defense that is unwarranted under existing law, except that the lawyer may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law;

(2) the conduct has no reasonable purpose other than to delay or prolong the resolution of litigation, in violation of Rule 3.2, or serves merely to harass or maliciously injure another; or

(3) the lawyer knowingly asserts material factual statements that are false.

Comment

[1] The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed. However, the law is not always clear and is never static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change.

[2] The filing of a claim or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. Lawyers are required, however, to inform themselves about the facts of their clients' cases and the applicable law, and determine that they can make good-faith arguments in support of their clients' positions. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the action has no reasonable purpose other than to harass or maliciously injure a person, or if the lawyer is unable either to make a good-faith argument on the merits of the action taken or to support the action taken by a good-faith argument for an extension, modification or reversal of existing law (which includes the establishment of new judge-made law). The term "knowingly," which is used in Rule 3.1(b)(1) and (b)(3), is defined in Rule 1.0(k).

[3] The lawyer's obligations under this Rule are subordinate to federal or state constitutional law that entitles a defendant in a criminal matter to the assistance of counsel in presenting a claim or contention that otherwise would be prohibited by this Rule.

New York State Bar Association
Committee on Professional Ethics
Opinion 986 (10/25/13)

QUESTION

1. May a lawyer who represents a mentally incapacitated adult in a Medicaid benefits proceeding also represent that person's sister in seeking to petition for a guardianship for him where the sister, against the client's wishes, has refused to remove her brother from a hospital and will not permit him to return to her home?

BACKGROUND

2. A Legal Services lawyer was retained to represent a severely incapacitated man to appeal the denial of certain Medicaid services. He has been diagnosed with schizophrenia and mental retardation. A recent evaluation concluded that he is "unable to function autonomously, and he cannot make financial or health decisions on his own. He is significantly mentally retarded." The client is not able to make decisions during the representation and "does not understand what is involved in appealing the denial of Medicaid Services." The client was assisted by his sister in applying for Legal Aid Services.

3. The sister has cared for and lived with the client until recently, when the client accidentally set fire to the sister's home. The sister brought him to a hospital where he remains. The hospital wants to discharge the client and his expressed desire is to return to the sister's home. The sister is unwilling to accept the client back to her home.

4. The attorney states that there is no practical method of protecting the client's interests other than to have a guardian appointed. There is no other family. Social services agencies have extremely limited resources. The sister is willing to serve as the guardian, but the client is so incapacitated that he is not capable of consenting or objecting to the appointment of his sister as guardian.

5. The attorney asks whether he is permitted to represent the sister in a petition for guardianship over her brother.

OPINION

6. The lawyer asks whether concurrent representation of client A with significant diminished capacity and another client (B) who seeks to become the guardian for client A is permissible when the stated wishes of client A are directly contrary to the position of Client B as the prospective guardian. To what extent is the lawyer bound by the arguably unreasonable and ill-considered stated desire of the incapacitated client in assessing whether such a conflict exists? What action is permissible by the lawyer?

7. Concurrent conflicts of interest are governed by Rule 1.7 of the Rules of Professional Conduct which prohibits a lawyer from representing clients with "differing interests." This includes "every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse, or other interest. Rule 1.0(f); See also Rule 1.7 Cmts. [1],[2],[8]. The lawyer is expected to be loyal, protect client confidences and provide independent judgment.

8. In the representation of Client A in the Medicaid appeal, the lawyer learned of the client's stated desire to return to his sister's home. Living arrangements are a fundamental interest of the client as contemplated by Rule 1.7. Unquestionably, if Client A did not have significant diminished capacity, the lawyer could not undertake to represent his sister in any proceeding where Client A's stated desires would be undermined, and in this case directly contrary to the client's wishes, by the lawyer's representation of another client. [1]

9. Thus, the question is whether the client's significantly diminished capacity alters the judgment as to whether the lawyer would be representing "differing interests" if he undertook representation of the sister in the guardianship proceeding. As explained below, it does not.

10. Rule 1.14 seeks to provide guidance to a lawyer in such circumstances. It acknowledges the difficulty of providing diligent and competent representation to clients who have diminished capacity precisely because the client is often incapable of understanding and making decisions about the matter. In such circumstances, even though the representation may be premised upon the goal of maximizing a client's autonomy and dignity, the lawyer may believe that advocating the client's stated position to be directly contrary to what the lawyer reasonably believes is the only viable choice for the client with significant diminished capacity. May the lawyer maintain a position contrary to the client's stated wishes when that client has significant diminished capacity?

11. Rule 1.14 suggests a course of action for the attorney in such circumstances. [2] First, a lawyer must "as far as reasonably possible" maintain a normal lawyer-client relationship. The fact that a client suffers from mental illness or retardation does not diminish the lawyer's responsibility to treat the client attentively and with respect. Rule 1.14, Cmt. [2].

12. Second, Rule 1.14 permits a lawyer to take protective action when the lawyer reasonably believes that the client is at risk of physical, financial, or other harm unless such action is taken. Before considering what measures to undertake, lawyers must carefully evaluate each situation based on all of the facts and circumstances. "Any condition that renders a client incapable of communicating or making a considered judgment on the client's own behalf casts additional responsibilities on the lawyer." Roy D. Simon, Simon's Rules of Professional Conduct Annotated, 662 (2013). One of those responsibilities is to acknowledge that even clients with diminished capacity may have

the ability to make decisions or reach conclusions about matters affecting their own well-being.

CONCLUSION

32. It is a conflict of interest for a lawyer who represents a mentally incapacitated client in a Medicaid benefits proceeding to also represent the client's sister in seeking to petition for a guardianship for the client where the incapacitated client's stated wishes as to living arrangements are contrary to the sister's position.

9-13

[1] In some circumstances, the concurrent conflict may be waived, but not in this case. Even if the lawyer reasonably believed that he could provide competent and diligent representation to both Clients A and B, Client A is not capable of providing informed consent to such a waiver. Rule 1.7 (b)

RULE 1.13:

ORGANIZATION AS CLIENT

(a) When a lawyer employed or retained by an organization is dealing with the organization's directors, officers, employees, members, shareholders or other constituents, and it appears that the organization's interests may differ from those of the constituents with whom the lawyer is dealing, the lawyer shall explain that the lawyer is the lawyer for the organization and not for any of the constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action or intends to act or refuses to act in a matter related to the representation that (i) is a violation of a legal obligation to the organization or a violation of law that reasonably might be imputed to the organization, and (ii) is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include, among others:

(1) asking reconsideration of the matter;

(2) advising that a separate legal opinion on the matter be sought for presentation to an appropriate authority in the organization; and

(3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization as determined by applicable law.

(c) If, despite the lawyer's efforts in accordance with paragraph (b), the highest authority that can act on behalf of the organization insists upon action, or a refusal to act, that is clearly in violation of law and is likely to result in a substantial injury to the organization, the lawyer may reveal confidential information only if permitted by Rule 1.6, and may resign in accordance with Rule 1.16.

(d) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the concurrent representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

Comment

The Entity as the Client

[1] An organizational client is a legal entity, but it cannot act except through its officers, directors, employees, members, shareholders and other constituents. Officers, directors, employees and shareholders are the constituents of the corporate organizational client. The duties defined in this Rule apply equally to unincorporated associations. "Other constituents" as used in this Rule means the positions equivalent to officers, directors, employees, and shareholders held by persons acting for organizational clients that are not corporations.

[2] When one of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by Rule 1.6. Thus, for example, if an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews between the lawyer and the client's employees or other constituents made in the course of that investigation are covered by Rule 1.6. This does not mean, however, that constituents of an organizational client are the clients of the lawyer. The lawyer may not disclose to such constituents information relating to the representation except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation or as otherwise permitted by Rule 1.6.

[2A] There are times when the organization's interests may differ from those of one or more of its constituents. In such circumstances, the lawyer should advise any constituent whose interest differs from that of the organization: (i) that a conflict or potential conflict of interest exists, (ii) that the lawyer does not represent the constituent in connection with the matter, unless the representation has been approved in accordance with Rule 1.13(d), (iii) that the constituent may wish to obtain independent representation, and (iv) that any attorney-client privilege that applies to discussions between the lawyer and the constituent belongs to the organization and may be waived by the organization. Care must be taken to ensure that the constituent understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent, and that discussions between the lawyer for the organization and the constituent may not be privileged.

[2B] Whether such a warning should be given by the lawyer for the organization to any constituent may turn on the facts of each case.

Acting in the Best Interest of the Organization

[3] When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer, even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province. Paragraph (b) makes clear, however, that when the lawyer knows that the organization is likely to be substantially injured by action of an officer or other constituent that violates a legal obligation to the organization or is in violation of law that might be imputed to the organization, the lawyer must proceed as is reasonably necessary in the best interest of the organization. Under Rule 1.0(k), a lawyer's knowledge can be inferred from circumstances, and a lawyer cannot ignore the obvious. The terms "reasonable" and "reasonably" connote a range of conduct that will satisfy the requirements of Rule 1.13. In determining what is reasonable in the best interest of the organization, the circumstances at the time of determination are relevant. Such circumstances may include, among others, the lawyer's area of expertise, the time constraints under which the lawyer is acting, and the lawyer's previous experience and familiarity with the client.

[4] In determining how to proceed under paragraph (b), the lawyer should give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility within the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters, and any other relevant considerations. Measures to be taken may include, among others, asking the constituent to reconsider the matter. For example, if the circumstances involve a constituent's innocent misunderstanding of law and subsequent acceptance of the lawyer's advice, the lawyer may reasonably conclude that the best interest of the organization does not require that the matter be referred to higher authority. If a constituent persists in conduct contrary to the lawyer's advice, it may be necessary for the lawyer to take steps to have the matter reviewed by a higher

authority in the organization. If the matter is of sufficient seriousness and importance or urgency to the organization, referral to higher authority in the organization may be necessary even if the lawyer has not communicated with the constituent. Any measures taken should, to the extent practicable, minimize the risk of revealing information relating to the representation to persons outside the organization. Even in circumstances where a lawyer is not obligated by Rule 1.13 to proceed, a lawyer may bring to the attention of an organizational client, including its highest authority, matters that the lawyer reasonably believes to be of sufficient importance to warrant doing so in the best interest of the organization. *See* Rule 1.4.

[5] The organization's highest authority to which a matter may be referred ordinarily will be the board of directors or similar governing body. However, applicable law may prescribe that under certain conditions the highest authority reposes elsewhere, for example, in the independent directors of a corporation.

Relation to Other Rules

[6] The authority and responsibility provided in this Rule are concurrent with the authority and responsibility provided in other Rules. In particular, this Rule does not limit or expand the lawyer's responsibility under Rule 1.6, Rule 1.8, Rule 1.16, Rule 3.3 or Rule 4.1. Rules 1.6(b)(2) and (b)(3) may permit the lawyer in some circumstances to disclose confidential information. In such circumstances Rule 1.2(d) may also be applicable, in which event withdrawal from the representation under Rule 1.16(b)(1) may be required.

[7] The authority of a lawyer to disclose information relating to a representation under Rule 1.6 does not apply with respect to information relating to a lawyer's engagement by an organization to investigate an alleged violation of law or to defend the organization or an officer, employee or other person associated with the organization against a claim arising out of an alleged past violation of law. Having a lawyer who cannot disclose confidential information concerning past acts relevant to the representation for which the lawyer was retained enables an organizational client to enjoy the full benefits of legal counsel in conducting an investigation or defending against a claim.

[8] A lawyer for an organization who reasonably believes that the lawyer's discharge was because of actions taken pursuant to paragraph (b), or who withdraws in circumstances that require or permit the lawyer to take action under paragraph (b), must proceed as "reasonably necessary in the best interest of the organization." Under some circumstances, the duty of communication under Rule 1.4 and the duty under Rule 1.16(e) to protect a client's interest upon termination of the representation, in conjunction with this Rule, may require the lawyer to inform the organization's highest authority of the lawyer's discharge or withdrawal, and of what the lawyer reasonably believes to be the basis for the discharge or withdrawal.

Government Agency

[9] The duties defined in this Rule apply to governmental organizations. Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context. Although in some circumstances the client may be a specific agency, it may also be a branch of government, such as the executive branch, or the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the relevant branch of government may be the client for purposes of this Rule. Defining or identifying the client of a lawyer representing a government entity depends on applicable federal, state and local law and is a matter beyond the scope of these Rules. *See* Scope [9]. Moreover, in a matter involving the conduct of government officials, a government lawyer may have greater authority under applicable law to question such conduct than would a lawyer for a private organization in similar circumstances. Thus, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulation. This Rule does not limit that authority. *See* Scope [10].

[10] *See* Comment [2A].

[11] *See* Comment [2B].

Concurrent Representation

[12] Paragraph (d) recognizes that a lawyer for an organization may also represent a principal officer or major shareholder, subject to the provisions of Rule 1.7. If the corporation's informed consent to such a concurrent representation is needed, the lawyer should advise the principal officer or major shareholder that any consent given on behalf of the corporation by the conflicted officer or shareholder may not be valid, and the lawyer should explain the potential consequences of an invalid consent.

RULE 1.14:

CLIENT WITH DIMINISHED CAPACITY

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a conventional relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer 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.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

Comment

[1] The responsibilities of a lawyer may vary according to the intelligence, experience, mental condition or age of a client, the obligation of a public officer, or the nature of a particular proceeding. The conventional client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. Any condition that renders a client incapable of communicating or making a considered judgment on the client's own behalf casts additional responsibilities upon the lawyer. When the client is a minor or suffers from a diminished mental capacity, maintaining the conventional client-lawyer relationship may not be possible in all respects. In particular, a severely incapacitated person may have no power to make legally binding decisions. Nevertheless, a client with diminished capacity often has the ability to understand, deliberate upon and reach conclusions about matters affecting the client's own well-being.

[2] The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client attentively and with respect.

[3] The client may wish to have family members or other persons participate in discussions with the lawyer. The lawyer should consider whether the presence of such persons will affect the attorney-client privilege. Nevertheless, the lawyer must keep the client's interests foremost and, except for protective action authorized under paragraph (b), must look to the client, and not family members, to make decisions on the client's behalf.

[4] If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. In matters involving a minor, with or without a disability, the question whether the lawyer should look to the parents as natural guardians may depend on the type of proceeding or matter in which the lawyer is representing the minor. If the lawyer represents the guardian as distinct from the ward,

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and reasonably believes that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct. *See* Rule 1.2(d). **Taking Protective Action**

[5] If a lawyer reasonably believes that a client is at risk of substantial physical, financial or other harm unless action is taken, and that a conventional client-lawyer relationship cannot be maintained as provided in paragraph (a) because the client lacks sufficient capacity to communicate or to make adequately considered decisions in connection with the representation, then paragraph (b) permits the lawyer to take reasonably necessary protective measures. Such measures could include: consulting with family members, using a reconsideration period to permit clarification or improvement of circumstances, using voluntary surrogate decision-making tools such as durable powers of attorney, or consulting with support groups, professional services, adult-protective agencies or other individuals or entities that have the ability to protect the client. In taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client's best interest, and the goals of minimizing intrusion into the client's decision-making autonomy and maximizing respect for the client's family and social connections.

[6] In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as: (i) the client's ability to articulate reasoning leading to a decision, (ii) variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision, and (iii) the consistency of a decision with the known longterm commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.

[7] If a legal representative has not been appointed, the lawyer should consider whether appointment of a guardian ad litem, conservator or guardian is necessary to protect the client's interests. Thus, if a client with diminished capacity has substantial property that should be sold for the client's benefit, effective completion of the transaction may require appointment of a legal representative. In addition, rules of procedure in litigation sometimes provide that a minor or a person with diminished capacity must be represented by a guardian or next friend if they do not have a general guardian. In many circumstances, however, appointment of a legal representative may be unnecessarily expensive or traumatic for the client. Seeking a guardian or conservator without the client's consent (including doing so over the client's objection) is appropriate only in the limited circumstances where a client's diminished capacity is such that the lawyer reasonably believes that no other practical method of protecting the client's interests is readily available. The lawyer should always consider less restrictive protective actions before seeking the appointment of a guardian or conservator. The lawyer should act as petitioner in such a proceeding only when no other person is available to do so.

[7A] Prior to withdrawing from the representation of a client whose capacity is in question, the lawyer should consider taking reasonable protective action. *See* Rule 1.16(e).

Disclosure of the Client's Condition

[8] Disclosure of the client's diminished capacity could adversely affect the client's interests. For example, raising the question of diminished capacity could, in some circumstances, lead to proceedings for involuntary commitment. Information relating to the representation is protected by Rule 1.6. Therefore, unless authorized to do so, the lawyer may not disclose such information. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized to make the necessary disclosures, even when the client directs the lawyer to the contrary. Nevertheless, given the risks of disclosure, paragraph (c) limits what the lawyer may disclose in consulting with other individuals or entities or in seeking the appointment of a legal representative. At the very least, the lawyer should determine whether it is likely that the person or entity consulted will act adversely to the client's interests before discussing matters related to the client.

RULE 3.3:

CONDUCT BEFORE A TRIBUNAL

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

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

(3) offer or use evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client before a tribunal and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

(e) In presenting a matter to a tribunal, a lawyer shall disclose, unless privileged or irrelevant, the identities of the clients the lawyer represents and of the persons who employed the lawyer.

(f) In appearing as a lawyer before a tribunal, a lawyer shall not:

(1) fail to comply with known local customs of courtesy or practice of the bar or a particular tribunal without giving to opposing counsel timely notice of the intent not to comply;

(2) engage in undignified or discourteous conduct;

(3) intentionally or habitually violate any established rule of procedure or of evidence; or

(4) engage in conduct intended to disrupt the tribunal.

Comment

[1] This Rule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal. See Rule 1.0(w) for the definition of "tribunal." It also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition. Thus, for example, paragraph (a)(3) requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client has offered false evidence in a deposition.

[2] This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate's duty of candor to the tribunal. Consequently, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law and may not vouch for the evidence submitted in a cause, the lawyer must not allow the tribunal to be misled by false statements of law or fact or by evidence that the lawyer knows to be false.

Representations by a Lawyer

[3] An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein because litigation documents ordinarily present assertions by the client or by someone on the client's behalf and not assertions by the lawyer. Compare Rule 3.1. However, an assertion purporting to be based on the lawyer's own knowledge, as in an affidavit or declaration by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation

prescribed in Rule 1.2(d) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. *See also* Rule 8.4(b), Comments [2][3].

Legal Argument

[4] Although a lawyer is not required to make a disinterested exposition of the law, legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. Paragraph (a)(2) requires an advocate to disclose directly adverse and controlling legal authority that is known to the lawyer and that has not been disclosed by the opposing party. A tribunal that is fully informed on the applicable law is better able to make a fair and accurate determination of the matter before it.

Offering or Using False Evidence

[5] Paragraph (a)(3) requires that the lawyer refuse to offer or use evidence that the lawyer knows to be false, regardless of the client's wishes. This duty is premised on the lawyer's obligation as an officer of the court to prevent the trier of fact from being misled by false evidence. A lawyer does not violate this Rule if the lawyer offers the evidence for the purpose of establishing its falsity.

[6] If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce or use false evidence, the lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer the false evidence. If only a portion of a witness's testimony will be false, the lawyer may call the witness to testify but may not (i) elicit or otherwise permit the witness to present testimony that the lawyer knows is false or (ii) base arguments to the trier of fact on evidence known to be false.

[6A] The duties stated in paragraphs (a) and (b) – including the prohibitions against offering and using false evidence – apply to all lawyers, including lawyers for plaintiffs and defendants in civil matters, and to both prosecutors and defense counsel in criminal cases. In criminal matters, therefore, Rule 3.3(a)(3) requires a prosecutor to refrain from offering or using false evidence, and to take reasonable remedial measures to correct any false evidence that the government has already offered. For example, when a prosecutor comes to know that a prosecution witness has testified falsely, the prosecutor should either recall the witness to give truthful testimony or should inform the tribunal about the false evidence. At the sentencing stage, a prosecutor should correct any material errors in a presentence report. In addition, prosecutors are subject to special duties and prohibitions that are set out in Rule 3.8.

[7] If a criminal defendant insists on testifying and the lawyer knows that the testimony will be false, the lawyer may have the option of offering the testimony in a narrative form, though this option may require advance notice to the court or court approval. The lawyer's ethical duties under paragraphs (a) and (b) may be qualified by judicial decisions interpreting the constitutional rights to due process and to counsel in

criminal cases. The obligation of the advocate under the Rules of Professional Conduct is subordinate to such requirements.

[8] The prohibition against offering or using false evidence applies only if the lawyer knows that the evidence is false. A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact. A lawyer's knowledge that evidence is false, however, can be inferred from the circumstances. See Rule 1.0(k) for the definition of "knowledge." Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.

[9] Although paragraph (a)(3) prohibits a lawyer from offering or using evidence the lawyer knows to be false, it permits the lawyer to refuse to offer testimony or other proof that the lawyer reasonably believes to be false. Offering such proof may impair the integrity of an adjudicatory proceeding. Because of the special protections historically provided criminal defendants, however, this Rule does not permit a lawyer to refuse to offer the testimony of a criminal defense client where the lawyer reasonably believes, but does not know, that the testimony will be false. Unless the lawyer knows the testimony will be false, the lawyer must honor the criminal defendant's decision to testify.

Remedial Measures

[10] A lawyer who has offered or used material evidence in the belief that it was true may subsequently come to know that the evidence is false. Or, a lawyer may be surprised when the lawyer's client or another witness called by the lawyer offers testimony the lawyer knows to be false, either during the lawyer's direct examination or in response to cross-examination by the opposing lawyer. In such situations, or if the lawyer knows of the falsity of testimony elicited from the client during a deposition, the lawyer must take reasonable remedial measures. The advocate's proper course is to remonstrate with the client confidentially, advise the client of the lawyer's duty of candor to the tribunal, and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence. If that fails, the advocate must take further remedial action. If withdrawal from the representation is not permitted or will not undo the effect of the false evidence, the advocate must make such disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal confidential information that otherwise would be protected by Rule 1.6. It is for the tribunal then to determine what should be done, such as making a statement about the matter to the trier of fact, ordering a mistrial, taking other appropriate steps or doing nothing.

[11] The disclosure of a client's false testimony can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is for the lawyer to cooperate in deceiving the court, thereby subverting the truth-finding process, which the adversary system is

designed to implement. *See* Rule 1.2(d). Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. The client could therefore in effect coerce the lawyer into being a party to a fraud on the court.

Preserving Integrity of the Adjudicative Process

[12] Lawyers have a special obligation as officers of the court to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process. Accordingly, paragraph (b) requires a lawyer who represents a client in an adjudicative proceeding to take reasonable remedial measures, including disclosure if necessary, whenever the lawyer knows that a person, including the lawyer's client, intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding. Such conduct includes, among other things, bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official or other participant in the proceeding; unlawfully destroying or concealing documents or other evidence related to the proceeding; and failing to disclose information to the tribunal when required by law to do so. For example, under some circumstances a person's omission of a material fact may constitute a crime or fraud on the tribunal.

[12A] A lawyer's duty to take reasonable remedial measures under paragraph (b) does not apply to another lawyer who is retained to represent a person in an investigation or proceeding concerning that person's conduct in the prior proceeding.

[13] Judicial hearings ought to be conducted through dignified and orderly procedures designed to protect the rights of all parties. A lawyer should not engage in conduct that offends the dignity and decorum of proceedings or that is intended to disrupt the tribunal. While maintaining independence, a lawyer should be respectful and courteous in relations with a judge or hearing officer before whom the lawyer appears. In adversary proceedings, ill feeling may exist between clients, but such ill feeling should not influence a lawyer's conduct, attitude, and demeanor toward opposing lawyers. A lawyer should not make unfair or derogatory personal reference to opposing counsel. Haranguing and offensive tactics by lawyers interfere with the orderly administration of justice and have no proper place in our legal system.

Ex Parte Proceedings

[14] Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the opposing position is expected to be presented by the adverse party. However, in any ex parte proceeding, such as an application for a temporary restraining order, there may be no presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the opposing party, if absent, just consideration. The lawyer for the represented party has

the correlative duty to make disclosures of material facts known to the lawyer that the lawyer reasonably believes are necessary to an informed decision.

Withdrawal

[15] A lawyer's compliance with the duty of candor imposed by this Rule does not automatically require that the lawyer withdraw from the representation of a client whose interests will be or have been adversely affected by the lawyer's disclosure. The lawyer, however, may be required by Rule 1.16(d) to seek permission of the tribunal to withdraw if the lawyer's compliance with this Rule's duty of candor results in such an extreme deterioration of the clientlawyer relationship that the lawyer can no longer competently represent the client. *See also* Rule 1.16(c) for the circumstances in which a lawyer will be permitted to seek a tribunal's permission to withdraw. In connection with a request for permission to withdraw that is premised on a client's misconduct, a lawyer may reveal information relating to the representation only to the extent reasonably necessary to comply with this Rule or as otherwise permitted by Rule 1.6.

RULE 4.3:

COMMUNICATING WITH UNREPRESENTED PERSONS

In communicating on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person other than the advice to secure counsel if the lawyer knows or reasonably should know that the interests of such person are or have a reasonable possibility of being in conflict with the interests of the client.

Comment

[1] An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. In order to avoid a misunderstanding, a lawyer will typically need to identify the lawyer's client and, where necessary, explain that the client has interests opposed to those of the unrepresented person. As to misunderstandings that sometimes arise when a lawyer for an organization deals with an unrepresented constituent, see Rule 1.13(a), Comment [2A].

[2] The Rule distinguishes between situations involving unrepresented parties whose interests may be adverse to those of the lawyer's client and those in which the person's interests are not in conflict with the client's. In

the former situation, the possibility that the lawyer will compromise the unrepresented person's interests is so great that the Rule prohibits the giving of any advice apart from the advice to obtain counsel. Whether a lawyer is giving impermissible advice may depend on the experience and sophistication of the unrepresented party, as well as the setting in which the behavior and comments occur. This Rule does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person. So long as the lawyer has explained that the lawyer represents an adverse party and is not representing the person, the lawyer may inform the person of the terms on which the lawyer's client will enter into an agreement or settle a matter, prepare documents that require the person's signature, and explain the lawyer's own view of the meaning of the document or the lawyer's view of the underlying legal obligations.

RULE 3.7:
LAWYER AS WITNESS

(a) A lawyer shall not act as advocate before a tribunal in a matter in which the lawyer is likely to be a witness on a significant issue of fact unless:

(1) the testimony relates solely to an uncontested issue;

(2) the testimony relates solely to the nature and value of legal services rendered in the matter;

(3) disqualification of the lawyer would work substantial hardship on the client;

(4) the testimony will relate solely to a matter of formality, and there is no reason to believe that substantial evidence will be offered in opposition to the testimony; or

(5) the testimony is authorized by the tribunal.

(b) A lawyer may not act as advocate before a tribunal in a matter if:

(1) another lawyer in the lawyer's firm is likely to be called as a witness on a significant issue other than on behalf of the client, and it is apparent that the testimony may be prejudicial to the client; or

(2) the lawyer is precluded from doing so by Rule 1.7 or Rule 1.9.

Comment

[1] Combining the roles of advocate and witness can prejudice the tribunal and the opposing party and also can create a conflict of interest between the lawyer and client.

Advocate-Witness Rule

[2] The tribunal may properly object when the trier of fact may be confused or misled by a lawyer's serving as both advocate and witness. The opposing party may properly object where the combination of roles may prejudice that party's rights in the litigation. A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof. The requirement that the testimony of the advocate-witness be on a significant issue of fact provides a materiality limitation.

[3] To protect the tribunal, the Rule prohibits a lawyer from simultaneously serving as advocate and witness except in those circumstances specified in paragraph (a). Paragraph (a)(1) recognizes that if the testimony will be uncontested, the ambiguities in the dual role are purely theoretical. Testimony relating solely to a formality is uncontested when the lawyer reasonably believes that no substantial evidence will be offered in opposition to the testimony. Paragraph (a)(2) recognizes that where the testimony concerns the extent and value of legal services rendered in the action in which the testimony is offered, permitting the lawyer to testify avoids the need for a second trial with new counsel to resolve that issue. Moreover, in such a situation the judge has firsthand knowledge of the matter in issue; hence, there is less dependence on the adversary process to test the credibility of the testimony.

NYSBA Ethics Opinions

Ethics Opinion 1153

New York State Bar Association
Committee on Professional Ethics

Opinion 1153 (5/24/2018)

Topic: Conflicts of Interest: County attorney's service on the board of a county-sponsored community college

Digest: Whether a county attorney may also serve on the board of a county-sponsored community college may raise legal issues that overtake ethical concerns. If such dual service is legally permissible, then a lawyer occupying these roles must assess, in each instance when the interests of the county and community college overlap, whether a reasonable lawyer would conclude that the two positions create a significant risk that the lawyer's duty to one will adversely affect the lawyer's duty to the other. If the lawyer determines that such a condition exists, then the lawyer must decide whether the conflict is subject to waiver and, if so, whether the affected client(s) may give informed consent, either for the lawyer or another lawyer in the county attorney's office. In all events, the lawyer must assure that the affected client(s) is or are aware of the potential risk to evidentiary privileges that the lawyer's dual roles occasion.

Rules: 1.0(f), (h), (j), (q) & (r); 1.6(a)& (b); 1.7(a) & (b); 1.10(a) & (d).

FACTS

1. A county legislature in New York appointed the inquiring lawyer, who is admitted in New York, as county attorney. In this particular county, the county attorney is a full-time position overseeing a staff of assistant county attorneys. Section 501 of the County Law provides that a county attorney "shall be the legal advisor to the board of supervisors [or legislature] and every officer whose compensation is paid from county funds in all matters involving an official act of a civil nature. The county attorney shall prosecute and defend all civil actions and proceedings brought by or against the county, the board of supervisors [or legislature] and any officer whose compensation is paid from county funds for any official act, except as otherwise provided by this chapter or other law." These duties engage the county attorney in representing the county, its officials, its agencies, and its personnel in litigated matters and administrative proceedings; preparing contracts between the county and others; drafting legislation; and generally acting as legal advisor to the county, its officers, its legislature, and its agencies. The county legislature sets the compensation of the county attorney.

2. The inquiring attorney also serves as a member of the board of trustees of the county-sponsored community college and currently chairs that board. Section 6306.1 of

the Education Law says that a community college "shall be administered by a board of trustees" consisting, with exceptions not applicable here, of nine members serving seven-year terms, five of whom the legislature names, which may include one member of that body; and four of whom the governor names from among county residents. (A tenth member must be a student, elected by the student body for a one-year term.) Trustees receive no compensation for their service as such. Community college personnel are paid, at least in part, out of county funds.

5. We are told that, in any litigation involving the community college, its board, or its staff, the county attorney's office represents the community college and its constituents, either through the office's own staff attorneys or by selecting outside counsel. The county attorney's office supplies other legal services to the community college as well.

6. The inquirer's appointment as county attorney post-dated the inquirer's appointment to the community college board and election as its chair. The inquirer wishes to know whether ethical issues arise from remaining on the community college's board of trustees while acting as county attorney.

QUESTIONS PRESENTED

7. Does a conflict of interest arise when an attorney simultaneously serves as a county attorney and as a member of the board of trustees of a county-sponsored community college and, if so, is the conflict subject to waiver by informed consent? What other considerations must a lawyer in these two roles take into account in discharging the lawyer's ethical obligations to each?

CONCLUSION

24. If no law or regulation prohibits the dual roles, an attorney may serve as both county attorney and chair of a county-sponsored community college to which the county attorney's office provides legal services if, in each circumstance when the interests of the county and the community college overlap, a reasonable lawyer would conclude that the dual roles do not involve a significant risk that the lawyer's interests as a board member would adversely affect the discharge of the lawyer's independent professional judgment on behalf of the county. If the lawyer cannot so conclude, then the lawyer may seek a waiver of the conflict from each the county and the community college if the lawyer reasonably believes that the lawyer may provide competent and diligent representation to the county and the lawyer obtains informed consent, confirmed in writing. Absent such a reasonable belief and accompanying informed consent, another lawyer in the county attorney's office may generally act for the affected client upon informed consent confirmed in writing that the other attorney in the office may provide the requisite representation. In all events, the county attorney must take special precautions to assure the protection of evidentiary privileges that the lawyer's dual roles might imperil.

New York State Bar Association
Committee on Professional Ethics

Opinion 1074 (11/13/15)
Topic: Conflict of interest; part-time lawyers working for a Department of Social Services
Digest: A part-time lawyer for a county Department of Social Services may not accept appointments as assigned counsel for indigent persons in which the Department of Social Services is involved.
Rules: Rules 1.0(h), 1.7(a) & (b), 1.8(f), 1.10(a)

FACTS

1. A county Department of Social Services has a legal unit that employs a part-time attorney. In this capacity, the attorney handles paternity and child support matters, liens, Medicaid issues, and guardianships, and on occasion is able to assist others on the Department's legal staff in child abuse and neglect cases. In addition to part-time work at the Social Services Department, the attorney maintains a solo practice in which, among other things, the attorney participates in the County's Assigned Counsel Program representing indigent individuals in criminal matters as well as Family Court proceedings. The attorney wishes to continue to accept assignments in criminal and Family Court matters from the County's Assigned Counsel Program, for which the County pays. The attorney does not intend to accept any such assignments in child abuse and neglect cases.

QUESTION

2. May a part-time attorney for a county Department of Social Services accept assignments from the same county's Assigned Counsel Program to represent clients at the County's expense in criminal and Family Court matters?

CONCLUSION

11. A part-time lawyer for a county Department of Social Services may accept appointments as assigned counsel for indigent persons in Family Court and in criminal matters provided that the Department or others in law enforcement with whom the lawyer works are not materially involved.

New York State Bar Association
Committee on Professional Ethics

Opinion #859 (03/25/2011)
Topic: Part-time government attorneys: conflicts of interest, imputed conflicts, non-consentable conflicts.
Digest: A part-time Department of Social Services attorney's representation, in a criminal proceeding, of a private client who is also a respondent in unrelated child abuse

and neglect proceedings brought by Social Services, creates an incurable conflict of interest that is imputed to the other members of the Social Services legal unit.
Rules: 1.0(f) & (h), 1.7, 1.8, 1.9, 1.10, 1.11.

FACTS

1. A County's Department of Social Services ("Social Services") has a legal unit ("Legal Unit") that employs one full-time attorney (the inquirer) and one part-time attorney. The full-time attorney supervises the Legal Unit and has an office at Social Services. The part-time attorney is in private practice and does not have an office at Social Services. However, the part-time attorney frequently visits Social Services and its Legal Unit to retrieve and discuss files, to conference cases, and to obtain supplies.

2. Social Services brought a child neglect petition against an individual (the "Respondent"), and the Legal Unit assigned the case to the part-time attorney. Upon assignment, the part-time attorney realized that the Respondent is the part-time attorney's client in an "unrelated" local criminal proceeding.[1]

QUESTIONS

3. These facts raise four related questions:

a. May the part-time attorney represent the Respondent in the child neglect proceedings brought by Social Services?

b. Would consent (waiver) by the Respondent (or Social Services) cure the conflict?

c. If the conflict cannot be cured by consent, may the full-time attorney in the Legal Unit prosecute the child neglect proceedings?

d. Would a screening process avoid or cure the conflict?

OPINION

CONCLUSION

23. The part-time Social Services attorney may not represent the Respondent in abuse and neglect proceedings brought by Social Services. The full-time attorney is disqualified from representing Social Services in the child neglect and abuse proceedings against the Respondent while the part-time attorney is representing the Respondent in the unrelated criminal matter. These conflicts of interest are not curable by consent or by screening, but may be cured if the part-time attorney either terminates his association with Social Services or withdraws from representing the Respondent in the unrelated criminal matter.

New York State Bar Association
Committee on Professional Ethics

Opinion 1083 (1/21/16)

Topic: Conflict of interest; differing interests

Digest: A lawyer whose firm represents nursing homes may form a nonprofit corporation for the purpose of accepting judicial guardianship appointments for low-asset nursing home residents who lack the capacity to document their eligibility for Medicaid. But representing the nonprofit in certain matters might present conflicts of interest. Consent to a conflict of interest by both the nonprofit and the nursing home may be possible, but if the matter involved a claim (e.g. regarding quality of care issues) by the guardian against a nursing home that is represented by the inquirer's firm in the matter, the firm could not represent both the guardian and the nursing home, because the conflict would be non-consentable.

Rules: Rules 1.0(f), 1.7(a) & (b), 1.9(a), 1.10(a), 8.4(c).

FACTS

1. The inquirer is a member of a law firm that represents many nursing home clients. The inquirer proposes to form a nonprofit organization (the "Nonprofit") to accept judicial guardianship appointments for low-asset, long-term nursing home residents ("Incapacitated Persons" or "IPs") who lack the necessary capacity to authorize release of the financial records that are needed to document their eligibility for Medicaid, who do not have family members or others holding a power of attorney to manage the Medicaid application process, and who might be at risk of discharge from the facility for non-payment.[1]

2. The inquirer states that the nonprofit organization would be independent from the inquirer's law firm. Neither the inquirer nor any lawyer or employee in the inquirer's firm would be officers, directors or employees of the Nonprofit. The Nonprofit would be staffed by an administrator, who would oversee the Nonprofit's financial obligations. The Nonprofit also would partner with schools or community organizations that could provide social workers or social work students to perform on-site visits with Incapacitated Persons.

3. The inquirer's representation regarding the Nonprofit's independence from the inquirer's law firm is critical to our analysis. Based on that representation, we assume that the Nonprofit's board of directors, its administrator and its staff will not be controlled, directly or indirectly, by the law firm or any of the firm's nursing home clients and that the employees and agents of the Nonprofit will always act in what they perceive to be the best interests of the Nonprofit and those IP clients for whom it serves as guardian, regardless of the impact their actions might have upon the inquirer's law firm or its nursing home clients.

4. The inquirer states that the petitioner seeking the appointment of a guardian for an Incapacitated Person would be the nursing home where the IP resides. The inquirer's firm would represent the nursing home in seeking appointment of a guardian and be paid by the nursing home for that representation.

5. Guardianships may involve two type of responsibilities – guardianship for property management or guardianship to provide for personal needs. As either property management or personal needs guardian, the guardian must act with the utmost care and diligence and the utmost degree of trust, loyalty and fidelity in relation to the IP.[2]

6. Where the incapacitated person has assets, the Mental Hygiene Law gives the property management guardian a number of powers regarding the management of the IP's property.[3] The property management guardian also has the power to apply for government benefits and to authorize access to or release of confidential records. Access to the IP's financial records is necessary to document that the IP meets the income and asset eligibility requirements for Medicaid benefits in connection with an application to the County Department of Social Services ("DSS") for such benefits.

7. Personal needs guardianship involves providing for the personal needs of the IP, including determining who shall provide personal care or assistance to the IP, choosing the IP's place of abode and making health care decisions where there is no health care proxy.[4] The guardian must visit the IP at least four times a year.

8. The inquirer states that the nursing home petitioner would not "nominate" the Nonprofit as guardian, but would "make the judge aware" that the Nonprofit is available to act as guardian. The Nonprofit would charge the nursing home petitioner a one-time flat fee for accepting an appointment to serve as property management and personal needs guardian for the IP. The fee would be based on the anticipated cost of securing a payment source for the IP's nursing home care (primarily the fees due to the law firm retained to prepare the Medicaid application) plus an amount estimated to be necessary to cover the cost of addressing personal needs issues.

9. We assume that the law firm will advise the judge of the capabilities of the Nonprofit and of potential conflicts of interest between the petitioning nursing home and the Nonprofit, including (i) the Nonprofit's capabilities to act as personal needs guardian, and (ii) how the proposed fee structure provides for personal needs issues. See Rule 8.4(c) (a lawyer or law firm shall not engage in conduct involving deceit or misrepresentation).

10. If the Nonprofit is appointed property management guardian, it might opt to, but would not be required to, hire the inquirer's law firm to prepare and file the IP's application to the DSS for Medicaid benefits.

11. The inquirer identifies three reasons for forming the Nonprofit – one practical and two financial. The practical reason, the inquirer states, is that guardianship judges have

complained that they have difficulty finding persons who will accept guardianship appointments in low-asset cases, and the appointments therefore are being made to non-profit organizations. According to the inquirer, the nonprofit organizations accepting such appointments in the inquirer's geographic practice area often do not have the staffing or expertise to fulfill their duties to successfully prosecute a Medicaid application. In these cases, the burden and expense of securing Medicaid funding falls to the nursing home where the IP resides, while the designated non-profit guardian receives court-awarded guardianship fees for performing little or no work.

12. The financial reasons both stem from the negative economic effects on the inquirer's nursing home clients that result from the current financing system. The first arises from the way the DSS is required to treat, for the purpose of establishing an IP's Medicaid budget, the monthly payment amounts typically awarded to non-profit organization guardians that are paid out of the IP's Social Security benefit payments. Medicaid recipients in nursing homes are responsible for paying the nursing home a certain amount of the nursing home costs each month out of their income, usually out of the monthly Social Security benefit. This amount is termed the recipient's Net Available Monthly Income (NAMI). Medicaid benefits are paid to the nursing home in an amount equal to the difference between the facility's approved Medicaid rate and the NAMI amount. However, the DSS does not disregard guardianship fees that are paid out of the IP's Social Security benefits in determining the Medicaid budget. According to the inquirer, the monthly guardian's fee is typically $450. Thus, on an annualized basis, the nursing home may receive $5,400 (i.e. 12 x $450) less for an IP for whom a guardian has been appointed, compared to nursing home residents whose cost of care is being paid by Medicaid but who do not have guardians.

13. The second financial reason is that, according to the inquirer, where a nonprofit organization guardian is appointed, the social security benefit payment and other income is often paid directly to the non-profit organization, so that it may deduct its monthly court-awarded fee. The non-profit organization is then expected to remit the balance to the nursing home. However, many of the existing non-profit organizations accepting guardianship appointments often fail to pay over or are late in paying over the excess to the nursing home, to the home's financial detriment.

QUESTIONS

14. If the Nonprofit were appointed property management guardian for an Incapacitated Person who is a resident of a nursing home represented by the inquirer's firm, could the inquiring lawyer or the lawyer's firm accept an engagement from the Nonprofit to prepare and file the Medicaid application for an Incapacitated Person? Does the fact that the inquirer formed the Nonprofit or regularly represents the nursing home constitute a conflict of interest?

15. If the Nonprofit were appointed personal needs guardian for an Incapacitated Person who is a resident of a nursing home represented by the inquirer's firm, could the

Inquirer's firm represent the Nonprofit? Would the fact that the firm formed the Nonprofit or regularly represents the nursing home constitute a conflict of interest?

OPINION

16. The jurisdiction of our Committee is to interpret the New York Rules of Professional Conduct (the "Rules") as they apply to the conduct of lawyers. We therefore make no determinations here on whether the Nonprofit meets the requirements of the Mental Hygiene Law for a guardian of IPs, the provisions of the tax law governing not-for-profits, including their eligibility to receive and retain non-profit status under the Internal Revenue Code, or the provisions of any business corporation law with respect to the governance of the Nonprofit.

Conflicts of Interest

17. The principal conflict rule in the New York Rules of Professional Conduct (the "Rules") governing concurrent representations is Rule 1.7. Rule 1.7(a) provides:

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if a reasonable lawyer would conclude that either:

(1) the representation will involve the lawyer in representing differing interests; or

(2) there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests.

18. Under the definition of "differing interests" in Rule 1.0(f), "differing interests" include "every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse or other interest." Comment [8] to Rule 1.7 explains the meaning of "differing interests":

[8] Differing interests exist if there is a significant risk that a lawyer's exercise of professional judgment in considering, recommending or carrying out an appropriate course of action for the client will be adversely affected or the representation would otherwise be materially limited by the lawyer's other responsibilities or interests. . . . The conflict in effect forecloses alternatives that would otherwise be available to the client. The mere possibility of subsequent harm does not itself require disclosure and consent. The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will adversely affect the lawyer's professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.

Moreover, differing interests can arise even if the lawyer does not represent the two clients in the same proceeding. See Rule 1.7, Cmt. [6] ("a lawyer may not advocate on one matter against another client that the lawyer represents in some other matter, even when the matters are wholly unrelated").

19. Finally, while lawyers are associated in a firm none of them may knowingly represent a client when any one of them practicing alone would be prohibited from doing so. Rule 1.10(a).

20. We assume for purposes of this opinion that each of the inquirer's nursing home clients is a continuing client. Once the inquirer forms the Nonprofit, if the inquirer continues to represent the Nonprofit, the Nonprofit and the nursing homes will be concurrent clients. Similarly, once the Nonprofit has been formed, if the Nonprofit has been named guardian and the Nonprofit seeks to hire the inquirer's firm to prepare a Medicaid application or to pursue matters involving personal care, the Nonprofit and the nursing home would be concurrent clients.

21. If the Nonprofit has not selected the law firm to prepare the Medicaid application, and if the law firm were to do no other work for the Nonprofit, then the Nonprofit would be a former client. The lawyer's ethical duties to a former client are found in Rule 1.9(a), which prohibits a lawyer who formerly has represented a client in a matter from thereafter representing 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, unless the former client gives informed consent, confirmed in writing. For example, another client would have a substantially related matter if the other client sought to challenge the creation or tax exemption of the Nonprofit.

The Formation of the Nonprofit

22. As we understand the inquiry, in forming the Nonprofit, the law firm is acting on its own and not on behalf of a client. Consequently the terms of Rule 1.7(a)(1) and 1.9 do not apply. If the firm were construed to be representing the to-be-formed organization, then such Rules would apply. See Scope ¶ [9] ("Whether a client-lawyer relationship exists for any specific purpose can depend in the circumstances and may be a question of fact.").

23. If the law firm has no client in connection with the formation of the Nonprofit, or if the Nonprofit is its only client, the issue under Rule 1.7(a)(2) is whether there is a significant risk the lawyer's representation of the Nonprofit would be adversely affected by the lawyer's interest in remaining in the good graces of his or her nursing home clients. Since we accept the inquirer's representation that the creation of the Nonprofit would be in the interest of nursing home clients, such risk does not arise.

24. It is possible that the law firm could be deemed to be acting on behalf of a nursing home client in forming the Nonprofit. Although the inquirer states that the law firm is acting solely on a pro bono basis in forming the Nonprofit, the objective of forming the Nonprofit is, at least in part, to benefit financially the firm's nursing home clients. If the law firm is deemed to represent one or more nursing home clients in the formation of the Nonprofit, the issue under Rule 1.7(a) would be whether representing one nursing home client in the formation of the Nonprofit and representing other nursing home clients in other matters constituted representation of interests that are

"differing." See Rule 1.0(f) (definition of "differing interests"). While this is a question of fact, it seems unlikely that representing one client in the formation of the Nonprofit would involve differing interests from those of the firm's other clients.

Representation of the Nonprofit in Property Guardianship Matters

25. If the law firm is asked to represent the Nonprofit in connection with property management guardianship matters involving a resident of a nursing home represented by the law firm, including preparing and filing a Medicaid application, there is a potential conflict under Rule 1.7(a)(1), in that a reasonable lawyer might conclude that the representation involves the law firm in representing differing interests. The guardian of an incapacitated person must act in the best interests of the incapacitated person, whereas the nursing home may have financial interests that differ from those of the incapacitated person. Whether a reasonable lawyer might so conclude will clearly depend on the factual circumstances. If the IP has limited assets, e.g., below the Medicaid threshold, the interests of the resident and the nursing home in the appointment of a guardian and the successful completion of a Medicaid application would seem to be the same. See N.Y. State 1046 (2015) (the interests of the incapacitated person and the care facility are not always differing).[5] Ultimately, however, the question whether there are differing interests is one of fact that is beyond the jurisdiction of this Committee.

26. Even if there were no differing interests in the matter, there is still a question of whether the lawyer has a personal interest conflict under Rule 1.7(a)(2). As we said in N.Y. State 1046:

Where the lawyer or the lawyer's firm have a continuing relationship with the Care Facility that is the petitioner under the guardianship proceeding, or into which the Guardian might place the AIP [alleged incapacitated person], the relationship between the law firm and the Care Facility could adversely affect the independent professional judgment of the lawyer in representing the AIP, thus creating a personal interest conflict for the lawyer.

This question is also a factual one that is beyond the jurisdiction of this Committee.

Representation of the Nonprofit in Personal Needs Matters

27. Personal needs matters, such as quality of care issues, treatment decisions and decisions about the IP's place of abode, are more likely to involve differing interests between the guardian, which must exercise the utmost degree of trust, loyalty and fidelity in relation to the incapacitated person, and the law firm's nursing home client. This question, too, is one of fact that is beyond our jurisdiction. But if a facility's violations may lead to substantial monetary penalties or disenrollment from the Medicare or Medicaid programs, or if facilities compete for residents to fill empty beds, and if an injury sustained by a resident caused even in part by noncompliance with government standards and procedures may lead to litigation, then the prospect of

conflicting loyalties between the lawyer's nursing home clients and the guardian with respect to personal needs issues would seem to be not insubstantial.

Client Consents to Conflicts

28. A lawyer may sometimes represent a client despite the existence of a conflict, if the conditions set forth in Rule 1.7(b) are met:

(a) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

Under Rule 1.7(b), client consent does not cure a conflict of interest if the representation is prohibited by law, if the lawyer could not reasonably believe that he or she will be able to provide competent and diligent representation to each affected client, or if the representation involves one client asserting a claim against another client represented by the lawyer in the same litigation or other before a tribunal.

29. Thus, the inquirer and the inquirer's law firm clearly could not represent the guardian with respect to a guardianship matter involving a resident of a client nursing home if (i) the firm did not believe it could provide competent and diligent representation to both the nursing home and the IP, (ii) if the dual representation were prohibited by law, such as the Mental Hygiene Law, or (iii) if the firm represented both the nursing home and the guardian in the same matter and the dual representations involved the assertion of a claim by the guardian against the nursing home or by the nursing home against the guardian, as guardian for the IP. In any such case, the conflict would be non-consentable.

30. Even if the inquirer's firm did not represent the nursing home in such matter, there would still be a question under Rule 1.7(a)(2) whether there is a significant risk that the lawyer's professional judgment on behalf of the guardian might be adversely affected by the lawyer's personal financial interest in remaining in the good graces of the nursing home client. Thus, if the matter involved the assertion of a claim by the guardian against a nursing home client of the law firm, even if the law firm represented only the guardian and not the nursing home in the matter, the question remains (and we do not opine) whether the lawyer could reasonably believe that he or she could provide competent and diligent representation to the guardian.

CONCLUSION

31. A lawyer whose firm represents nursing homes may form a nonprofit corporation for the purpose of accepting judicial guardianship appointments for low-asset nursing home residents who lack the capacity to document their eligibility for Medicaid. But representing the nonprofit in certain matters might present conflicts of interest. For example, if the nonprofit is appointed property management guardian for an incapacitated person who resides in a nursing home client of the firm and the firm is asked to provide services for the guardian (such as preparing the Medicaid application) there is a potential conflict of interest between the guardian and the nursing home client, but if the incapacitated person has limited assets, the interests of the two clients are unlikely to differ. If the nonprofit is appointed personal care guardian for an incapacitated person who resides in a nursing home client of the law firm, the interests of the guardian and nursing home clients are more likely to differ. Consent to a conflict of interest by both the nonprofit and the nursing home may be possible, but if the matter involved a claim by the guardian against a nursing home client (i.e. regarding quality of care issues) that is represented by the inquirer's firm in the matter, the firm could not also represent the nursing home, because the conflict would be non-consentable.

(19-15)

[1]A not-for-profit corporation organized to act as guardian is eligible for such appointment. See Mental Hygiene Law, §81.19.

[2]See Mental Hygiene Law § 81.20

[3]See Mental Hygiene Law § 81.21

[4]See Mental Hygiene Law § 81.22

[5]In N.Y. State 1046, we were asked whether a law firm that regularly represented nursing homes could represent an alleged incapacitated person in the guardianship proceeding where the firm did not represent the nursing home in the guardianship proceeding. Because the guardianship proceeding here would have ended when the Nonprofit has been appointed guardian, the posture is slightly different and the special consent issues discussed there do not arise here. But because the guardian has the duty to act in the best interests of the IP, many of the conflict issues are the same. For example, if, during its research into the IP's finances in connection with the Medicaid application, the law firm discovered that the IP had assets above the Medicaid threshold, there would be a conflict of interest between the Nonprofit as Guardian and the nursing home. The interests of the nursing home in being paid by the resident as a "private pay" patient and the interest of the resident in preserving assets, or even the interest of the guardian in being paid sufficient guardianship fees to cover the costs of serving as guardian, may be differing. See Nina Bernstein, To Collect Debts, Nursing Homes are Seizing Control Over Patients, N.Y. Times, Jan. 25, 2015; Nancy Levitan, Nursing Home Petitioners and Guardianship, N.Y. State Bar Ass'n J. (Sept. 2015).

Former DSS Lawyer Moving Into Private Practice

New York State Bar Association
Committee on Professional Ethics

Opinion 1148 (4/2/2018)

Topic: Conflicts of Interest: Former government lawyer in private practice in matters involving former government employer

Digest: A lawyer formerly employed by a county department to handle child support enforcement proceedings may, after termination of such employment, represent respondents in such proceedings, provided that the lawyer was not personally and substantially involved in the same matter while a government employee.

Rules: 1.0(j), 1.6, 1.9(a) & (c), 1.11(a) & (c).

FACTS

1. The inquirer is a New York lawyer formerly employed by a county social services agency (the "Department") within New York State. Among the duties of a county social services department are to assist "the state in the location of absent parents, establishment of paternity and enforcement and collection of support" obligations of legally responsible relatives to contribute for the support of their dependents. N.Y. Social Services Law §111-c(1) (outlining Departmental duties). The Department employs an enforcement unit staffed, in part, by four or five attorneys, who seek to enforce alleged obligations to support dependents. We assume for our purposes that, in doing so, the attorneys represent the Department rather than individuals to whom the support payments may be owed.

2. The inquirer recently retired as one of the Department's enforcement unit attorneys, and has started a solo law firm in the same region. In this practice, the inquirer wishes to represent clients adverse to the Department, including opposing the Department's enforcement actions.

QUESTION

3. May an attorney, formerly employed by a county department of social services, represent clients opposing the efforts of the attorney's erstwhile government employer, including representing clients challenging support enforcement proceedings brought by that employer?

OPINION

4. This Committee's charter is limited to interpretation of the New York Rules of Professional Conduct (the "Rules") and does not extend to opining on issues of law, statutes, county ethics codes, or other regulations that may govern the duties of current or former government employees in their relations with their current or former government employers. Accordingly, here, we proceed without deciding that the

inquirer's proposed representation conforms to any such limitation on the inquirer's proposed conduct.

5. Nothing in the Rules creates an absolute bar to a former government attorney's representation of a client in opposition to the attorney's former employer. Rule 1.11(a)(2) is the principal Rule governing conflicts that may be faced by a former government attorney. N.Y. State 1029 ¶ 9 (2014). Rule 1.11(a) provides in pertinent part that "a lawyer who has formerly served as a public officer or employee of the government . . . shall not represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation." Hence, Rule 1.11(a)(2) allows a former government attorney to represent private clients on matters in which the attorney did not participate "personally and substantially" while in government service.

6. The history of Rule 1.11(a)(2) makes "clear that the disqualification must be based on the lawyer's "personal participation to a significant extent." N.Y. State 748 (2001). "[T]hat a former government lawyer was counsel for the government in unrelated matters at the same time that the defendant's case was investigated or prosecuted is not enough to demonstrate personal and substantial participation under DR 9-101," the precursor to Rule 1.11(a)(2) in the N.Y. Code of Professional Responsibility (the "Code"), "or to require disqualification under that rule." *Id.* "Neither the Code, nor its goal of promoting public confidence require so limiting the practice of former government lawyers that they may not, following their return to private practice undertake work involving the types of matters in which they have gained particular expertise while in public service." N.Y. State 453 (1976).

7. The aims of Rule 1.11(a), a rule specific to onetime government lawyers, are akin to, but significantly differ from, those of Rule 1.9(a), a rule more generally regulating a lawyer's duty to former clients. The goals of Rule 1.9(a) include preventing a lawyer from "switching sides" and "improperly using confidential information of the former client," Rule 1.9, Cmts. [3] &[4], whereas Rule 1.11(a) is designed not only to protect the former government client but also to "prevent a lawyer from exploiting public office for the advantage of another client," Rule 1.11, Cmt. [3]. An additional and important concern of Rule 1.11(a), however, is to avoid an undue deterrent on lawyers serving in a public position without forever forgoing private practice in the legal area in which the lawyer served the government. Rule 1.11, Cmt. [3]; N.Y. State 1029 ¶ 10. For this reason, the test applicable to Rule 1.9 is qualitatively different from the test applicable to Rule 1.11.

8. To be sure, underlying each Rule is a protection of the former client's confidential information. A government lawyer, like any lawyer, owes an ongoing duty to a former client to preserve the confidential information the lawyer garnered in the representation unless the former client releases the lawyer from that duty. Rule 1.11(a)(1) requires a lawyer who formerly served as a public officer or government

employee to comply with Rule 1.9(c), which in turn provides that "a lawyer who has formerly represented a client in a matter" [in this case, a government or governmental agency] "shall not thereafter use confidential information of the former client protected by Rule 1.6 to the disadvantage of the former client" or reveal such information, in each case "except as these Rules would permit or require with respect to a current client." Among the exceptions in each Rule is the former client's "informed consent" within the meaning of Rule 1.0(j). Consistent with this proscription, Rule 1.11(a)(2) says that the government agency may consent if a former government attorney seeks to represent another party "in a matter in which the lawyer participated personally and substantially" while a government employee, subject always to the proscription in Rule 1.11(c) against the use of confidential government information against third persons, a ban that consent may not waive (and that is not an issue we address in this opinion).

9. Absent the former client's informed consent, the differing language of the two Rules reflects their different objectives. Rule 1.9(a) bars representation adverse to a former client "in the same or a substantially related matter" to the matter in which the lawyer previously represented a client. Rule 1.11(a) bars representation by a former government employee adverse to the former client only in the same specific matter as the matter in which the lawyer participated "personally and substantially" during the lawyer's government employment. As a result, the application of each Rule may diverge in practical ways. Solely by way of illustration, some courts apply Rule 1.9(a)'s "substantial relationship" test to disqualify lawyers who represented clients in specific types of matters. *See, e.g., Panebianco* v. *First Unum Life Ins. Co.*, 2005 U.S. Dist. LEXIS 7314 (S.D.N.Y. Apr. 27, 2005) (disqualifying law firm that represented former client in disability matters); *Lott* v. *Morgan Stanley Dean Witter & Co.,* 2004 U.S. Dist. Ct. LEXIS 25682 (S.D.N.Y. Dec. 23, 2004) (disqualifying law firm that represented former client in ERISA matters); *Mitchell* v. *Metro. Life Ins. Co.*, 2002 U.S. Dist. LEXIS 4675 (S.D.N.Y. Mar. 21, 2002) (disqualifying law firm that represented former client in discrimination matters). Without endorsing these decisions – disqualification to appear in court is a question of law not ethics and governed by judicial standards outside our purview – a theme running through the opinions, sometimes labeled the "playbook" approach, is not practicable in the context of former government lawyers. Many state and sub-state legal departments represent the government only in specific types of cases. To use this "playbook" approach in interpreting Rule 1.11(a) is to disregard both its purpose of encouraging public service and the different language that Rule 1.11(a) uses to assess whether a government lawyer is able to represent a client against the lawyer's former employer.

10. Otherwise put, Rule 1.11(a) ousts the application of Rule 1.9(a) in the context of government lawyers. Rule 1.9(a)'s "substantial relationship" may extend its reach to encompass matters that Rule 1.11(a)'s requirement of "personal and substantial" involvement in the specific matters was not intended to embrace. We do not negate the possibility that the two may overlap in some instances, but neither do we believe that the two are necessarily congruent. That each Rule uses different language, that Rule

1.11(a) is specific to government lawyers in contrast to Rule 1.9(a)'s general application, and that Rule 1.11(a) serves public purposes beyond those animating Rule 1.9(a), fortify this conclusion. We note, too, that the considerations for determining whether Rule 1.11(a) applies are materially narrower than those customarily applied in analysis of a Rule 1.9(a) conflict. *Compare* Rule 1.11, Cmt. 10 (factors to be used in determining whether two matters are the same include "the extent to which (i) the matters involve the same basic facts, (ii) the matters involve the same or related parties, and (iii) time has elapsed between the matters") *with* Rule 1.9, Cmts. [2] & [3] (setting forth additional factors to be considered in making a decision about whether a conflict exists).

11. Consequently, we conclude that a onetime government lawyer may represent clients adverse to the lawyer's former government employer unless that lawyer had a personal and substantial involvement in the same specific matter in which the lawyer now proposes to challenge the government's position. This conclusion rests on the assumptions (a) that the inquiring lawyer does not possess confidential information about the specific matter obtained during the inquirer's government service, and (b) that the inquiring lawyer does not otherwise possess confidential information about the specific matter which, owing to the lawyer's confidentiality obligations, the lawyer could not competently represent the client in resisting the government's action without violating the lawyer's ongoing duty of confidentiality, *see* N.Y. State 901 ¶ 10 (2011) (a lawyer possessing non-disclosable confidential information relating to existing representation must assess whether the lawyer reasonably believes that the lawyer may competently represent client). But merely knowing how the government agency usually handles such matters, untethered to personal and substantial involvement in or confidential information about the specific matter, is alone insufficient to prevent the former government lawyer from representing a private client against the lawyer's former government employer.

CONCLUSION

12. A lawyer formerly employed by a county department to handle child support enforcement proceedings may, after termination of such employment, represent respondents in such proceedings, provided that the lawyer was not personally and substantially involved in, and possesses no confidential information acquired about, the same specific matter while a government employee.

(32-17)

Ethics Opinion 1153

New York State Bar Association
Committee on Professional Ethics

Opinion 1153 (5/24/2018)

Topic: Conflicts of Interest: County attorney's service on the board of a county-sponsored community college

Digest: Whether a county attorney may also serve on the board of a county-sponsored community college may raise legal issues that overtake ethical concerns. If such dual service is legally permissible, then a lawyer occupying these roles must assess, in each instance when the interests of the county and community college overlap, whether a reasonable lawyer would conclude that the two positions create a significant risk that the lawyer's duty to one will adversely affect the lawyer's duty to the other. If the lawyer determines that such a condition exists, then the lawyer must decide whether the conflict is subject to waiver and, if so, whether the affected client(s) may give informed consent, either for the lawyer or another lawyer in the county attorney's office. In all events, the lawyer must assure that the affected client(s) is or are aware of the potential risk to evidentiary privileges that the lawyer's dual roles occasion.

Rules: 1.0(f), (h), (j), (q) & (r); 1.6(a)& (b); 1.7(a) & (b); 1.10(a) & (d).

FACTS

1. A county legislature in New York appointed the inquiring lawyer, who is admitted in New York, as county attorney. In this particular county, the county attorney is a full-time position overseeing a staff of assistant county attorneys. Section 501 of the County Law provides that a county attorney "shall be the legal advisor to the board of supervisors [or legislature] and every officer whose compensation is paid from county funds in all matters involving an official act of a civil nature. The county attorney shall prosecute and defend all civil actions and proceedings brought by or against the county, the board of supervisors [or legislature] and any officer whose compensation is paid from county funds for any official act, except as otherwise provided by this chapter or other law." These duties engage the county attorney in representing the county, its officials, its agencies, and its personnel in litigated matters and administrative proceedings; preparing contracts between the county and others; drafting legislation; and generally acting as legal advisor to the county, its officers, its legislature, and its agencies. The county legislature sets the compensation of the county attorney.

2. The inquiring attorney also serves as a member of the board of trustees of the county-sponsored community college and currently chairs that board. Section 6306.1 of the Education Law says that a community college "shall be administered by a board of trustees" consisting, with exceptions not applicable here, of nine members serving seven-year terms, five of whom the legislature names, which may include one member

of that body; and four of whom the governor names from among county residents. (A tenth member must be a student, elected by the student body for a one-year term.) Trustees receive no compensation for their service as such. Community college personnel are paid, at least in part, out of county funds.

3. Section 6306.2 of the Education Law directs the community college board to appoint a college president and to adopt curricula, in each case "subject to approval by the state university trustees." The board must also prepare an annual budget, which must be submitted to the local legislative body for adoption, and must discharge such other duties as may be appropriate under the "general supervision of the state university trustees." Section 6306.4 of the Education Law authorizes the community college board, among other things, to acquire by deed or lease any real or personal property to carry out the purposes of the college, subject to county legislative appropriation, and apply any proceeds to college purposes subject to the regulations of the state university trustees. Under the same section, title to personal property thus acquired vests in the board of trustees, while title to any real property vests in the sponsoring county. The county and the community college may be parties to other college-related contracts, either between each other or, together or separately, with third parties. The county legislature has the right to audit the community college's expenditures.

4. As the statutory arrangement evinces, the governance of a community college is triangular. Although a county (or, in less-populated areas, a group of counties) sponsors a community college, the county does so in coordination with and only upon approval of the state university system. Section 355 of the Education Law prescribes that the state university trustees shall provide standards and regulations for the organization and operation of community colleges, which the state university trustees have done (*see* 8 N.Y.C.R.R. §600 *et seq.*). Sections 202 and 207 of the New York State Education Law repose ultimate authority over state and community college programs in the New York Board of Regents. By law, then, the county, the community college, and the state university system each plays a role in running the community college.

5. We are told that, in any litigation involving the community college, its board, or its staff, the county attorney's office represents the community college and its constituents, either through the office's own staff attorneys or by selecting outside counsel. The county attorney's office supplies other legal services to the community college as well.

6. The inquirer's appointment as county attorney post-dated the inquirer's appointment to the community college board and election as its chair. The inquirer wishes to know whether ethical issues arise from remaining on the community college's board of trustees while acting as county attorney.

QUESTIONS PRESENTED

7. Does a conflict of interest arise when an attorney simultaneously serves as a county attorney and as a member of the board of trustees of a county-sponsored community college and, if so, is the conflict subject to waiver by informed consent? What other considerations must a lawyer in these two roles take into account in discharging the lawyer's ethical obligations to each?

OPINION

Introduction

8. The jurisdiction of this Committee is limited to interpreting the New York Rules of Professional Conduct (the "Rules"). We do not opine on issues of law. The current inquiry potentially raises legal issues under, among others, the County Law, the Education Law, the Public Officers Law, the Rules and Regulations of the New York State University Trustees, the Governance Rules of the Board of Regents, the County Ethics Code, and any ethics regulations of the community college. We note, too, that the so-called "doctrine of incompatibility" – in brief summary, disallowing dual public offices when the holder of one government position has a right to interfere with or subject to audit and review the holder of another government position – is embedded not only in specific statutes, *see, e.g.,* N.Y. County Law §411 (elected county officer may not serve in any other elected county or municipal office or as county supervisor); N.Y. General City Law § 3 (member of common council may not hold appointed city office), and but also more generally in the common law, *see, e.g., People ex rel. Ryan* v. *Green,* 58 N.Y. 295, 304-05 (1874) (state legislator could not serve as court clerk); *Dupras* v. *County of Clinton*, 213 A.D.2d 952, 953 (3d Dep't 1995) (county legislator could not serve as senior clerk on board of elections); *Held* v. *Hall,* 191 Misc.2d 427, 432 (Supreme Ct., Westchester Co. 2002) (county legislator could not serve as police chief); Informal Op. 1039, 1999 N.Y. AG 45 (1999) (under common law, Town Supervisor could not serve as Town Librarian). Questions concerning the effect of any of these or other legal issues on the proposed conduct is best directed to persons with the statutory authority to render advice on such matters, such as the Attorney General of New York or the New York Joint Commission on Public Ethics. If the inquirer's proposed action does not comply with an applicable law or regulation, then the question to this Committee is moot because applicable laws or regulations take precedence over the Rules. *See* Rule 1.7(b)(2) (disallowing a representation prohibited by law when a concurrent conflict of interest is present). Here, we address solely whether the inquirer's proposed action gives rise to a conflict of interest or other concerns under the Rules.

9. Considerable literature exists on the wisdom of lawyers serving simultaneously as counsel for a corporate entity and as a member of the entity's governing board. *See, e.g.*, Okray, *Lawyers as Corporate Board Members: A Paradigm Shift*, Fed.Lwy. 12 (Mar 2013); Litov, Sepe & Whitehead, *Lawyers and Fools: Lawyer-Directors in Public Corporations*, (Feb. 25, 2013) (available at ssrn.com/abstract=2218855); Frievogel, *An Ethics Primer for Business Lawyers* 8-9 (June 2009) (available at

apps.americanbar.org/buslaw/newsletter/0085/materials/ethics.pdf); C. Wolfram, Modern Legal Ethics 738-40 (1986). Although debate on the wisdom of such service is robust, nothing in the Rules, in the ABA Model Rules of Professional Conduct (the "Model Rules"), or, as best we can determine, in any state ethics rules, prohibits the practice. *See* Restatement (Third) of the Law Governing Lawyers §135, Cmts. d and e (Am. Law. Inst. 1998). Nevertheless, common to all analyses is an acknowledgement that conflicts and confidentiality issues inhere in the occupation of two roles that implicate the lawyer/director's duties of care and loyalty to the organization.

10. In N.Y. State 589 (1988), we examined these issues under the predecessor of the Rules, the New York Code of Professional Responsibility (the "Code"). There, consistent with opinions from other jurisdictions we cited, this Committee said that no *per se* bar exists to concurrent service as a lawyer for an organization and service as a member of its board. We then identified three principal concerns, one of which – that a lawyer may not use board membership improperly to solicit matters for the lawyer's firm – is inapposite here in the context of a full-time government lawyer heading an office the purpose of which is to represent the organization. The other two concerns are applicable here, namely, the risk to the lawyer's exercise of independent professional judgment arising out of the lawyer's role as a director, a risk heightened, we said, when the lawyer serves as board chair; and the risk of loss of evidentiary privileges, in particular the attorney-client privilege. *See* ABA 98-410 (1998) (stating similar concerns under the Model Rules).

Conflicts of Interest

11. N.Y. State 589 was decided under DR 5-105 of the Code, which is the forerunner of Rule 1.7(a). The language of DR 5-105 differs somewhat from Rule 1.7(a), but we do not regard the differences as meaningful to our analysis. Rule 1.7(a) says in part that, subject to Rule 1.7(b), "a lawyer shall not represent a client if a reasonable lawyer would conclude either" that the representation "involves the lawyer in representing differing interests" or that the representation poses a "significant risk" that the "lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests." Rule 1.0(f) defines "differing interests" to include "every interest that will adversely affect either the judgment or the loyalty of a lawyer a client, whether it be a conflicting, inconsistent, diverse, or other interest." Here, the inquirer's position on the community college board, acting solely in the capacity as trustee, is a personal interest that may differ from or adversely affect the inquirer's legal representation of the county and the county's constituents.

12. A Comment accompanying Rule 1.7 describes the potential conflicts arising from the dual roles of lawyer and director:

A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the two roles may

conflict. The lawyer may be called on to advise the corporation in matters involving actions of the trustees. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board, and the possibility of the corporation's obtaining legal advice from another lawyer in such situations.

Rule 1.7, Cmt. [35].

13. We can envision a variety of circumstances when a reasonable lawyer (on which more below) would conclude that "differing interests" may be involved in the lawyer's dual roles or that a "significant risk" may exist that the county attorney's obligations to the county, its board, and its officials will be adversely affected by the inquirer's personal interests as a member of the community college board. By way of illustration, the community college board must submit any proposed acquisition or leasing of real property to the county board. As a fiduciary of the community college, the inquirer owes a duty to the community college to promote the real estate plan as adopted by the community college board the inquirer chairs, while at the same time owing the county a fiduciary duty to exercise professional judgment in advising the county on that same matter. Whether the terms of any real estate transaction, in which the community college board chair presumably plays an active part in negotiating, accords with the county's interests, with title being vested in the county, is an issue on which the county is entitled to uncompromised independent judgment. The circumstances become more problematic if, as a board member, the inquirer opposed the transaction, yet as board chair must defend a decision to the county board which the inquirer personally disfavors. We have no difficulty determining that, in circumstances like these, a reasonable lawyer would conclude that a significant risk is present that the lawyer's interests as a community college board member imperils the lawyer's independence as attorney for the county.

14. The inquirer must make this determination in each instance in which the interests of the county and the community college intersect. The exercise is necessarily a case-by-case analysis, including, but not limited to, budget matters, audits, contract matters in which the two entities are co-parties or counter-parties, state-directed mandates, or in the event that the inquirer is personally named in any litigation or other proceeding against the community college trustees. This last event may create special tension: When the subject is the potential liability of the college board or one or more of its members, the lawyer must assure that the lawyer can render independent professional judgment, free of overt or subtle influences that the lawyer's own potential exposure or the lawyer's collegial relationships with other board members may incite.

15. In any circumstance, if the lawyer determines that the conditions of Rule 1.7(a) appear, then the lawyer must decide whether, in the particular instance involved, the conflict is subject to waiver by informed consent under Rule 1.7(b), which says that, notwithstanding "the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent represent to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

Waiver of Conflicts

16. "The requirements of informed consent are set forth in Rule 1.0(j)." N.Y. State 1055 ¶ 12 (2015). We have previously opined that a lawyer may accept "consent by a government entity if he or she is reasonably certain that the entity is legally authorized to waive a conflict of interest and the process by which the consent was granted was sufficient to preclude any reasonable perception that the consent was provided in a manner inconsistent with the public trust." *Id.*; N.Y. State 629 (1992). The inquirer should not participate in the decision whether to consent or advise the county or community college on this issue of consent. *See* N.Y. City 1988-5 (1988) (an attorney who is a member of a cooperative apartment board may not participate in "any decision of the [board] that will reasonably affect the lawyer's own personal" interests as counsel to the board).

17. There remain the other three elements of Rule 1.7(b). As we have said, if the law prohibits the representation under Rule 1.7(b)(2), then no ethics issue need be considered, for the law transcends the Rules. If no law erects a barrier to the representation, then, under Rule 1.7(b)(1), the lawyer must reasonably believe, that is, both subjectively and objectively, that the lawyer is able "to provide competent and diligent representation to each affected client." *See* Rule 1.0(r) (defining reasonable belief); Rule 1.0(q) ("When used in the context of conflict of interest determinations, 'reasonable lawyer' denotes a lawyer acting from the perspective of a reasonably prudent and competent lawyer who is personally disinterested in commencing or continuing the representation"); N.Y. State 1048 ¶ 20 (2015) (Rule 1.7(b)(1) "has both a subjective and an objective component"). Situations may occur in which, despite the existence of a disqualifying "significant risk" under Rule 1.7(a), a disinterested lawyer could well conclude that the lawyer is able to provide the representation that Rule 1.7(b)(1) requires. In other instances, the facts may preclude such a conclusion, in which event the remedy of informed consent is unavailable.

18. In the latter instance, the question arises whether a lawyer in the county attorney's office other than the county attorney may represent the county or community college in the matter in which a conflict prevents involvement of the county attorney. Rule 1.0(h) includes a "government law office" as a "law firm" within the meaning of the Rules. Rule 1.10(a) says that, while lawyers are associated in a law

firm, “none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so” by, among other things, Rule 1.7. Thus, if Rule 1.7 disqualifies the county attorney based on a conflict, then the conflict is imputed to all other lawyers in the county attorney’s office who are aware of the conflict. Rule 1.10(d), however, says that a “disqualification prescribed by this Rule [1.10(a)] may be waived by the affected client” under the conditions set forth in Rule 1.7. This means that, though the disqualification of the county attorney is imputed to the entire county attorney’s office, the applicable entity (whether the county, the community college, or, more likely, both) may consent to representation by another attorney in that office notwithstanding that attorney’s knowledge of the conflict. N.Y. State 968 ¶ 25 (2013). Otherwise put, if that other attorney reasonably believes that the attorney may “provide competent and diligent represent to each affected client,” then the attorney may proceed with the informed consent of the affected client(s), confirmed in writing.

19. One situation may not allow informed consent no matter the foregoing. Rule 1.7(b)(3) forbids a lawyer to represent a client in “the assertion of a claim by one client against another represented by the lawyer in the same litigation or other proceeding before a tribunal.” A county and a community college may find themselves in litigation opposed to each other. We leave for a later resolution, on concrete facts, whether circumstances may exist in which the county attorney or a member of the county attorney’s may appear with informed consent in such a dispute or whether the parties would have no recourse but to retain separate independent counsel. *See* N.Y. State 968 ¶ 28 (leaving open the question whether consent is possible in comparable circumstances).

Protection of Confidential Information

20. The other major risk identified in N.Y. State 589 is the preservation of a client’s evidentiary privileges, especially the attorney-client privilege. The county attorney acts as counsel to the county and to the community college, but does not represent the community college merely by reason of membership on the college board. Although evidentiary privileges are questions of law beyond our purview, N.Y. State 789 ¶ 4 (2005), Rule 1.6(a) forbids a lawyer to reveal “confidential information” – the definition of which in that Rule includes information “protected by the attorney-client privilege” – unless the client gives informed consent, the disclosure is impliedly authorized, or the disclosure is permitted by Rule 1.6(b), the elements of which need not detain us here. Our concern – one resonant in the literature to which we alluded at the outset – is that the multiple roles may create confusion about, and threaten the ability to assert, the attorney-client privilege.

21. The Comment to Rule 1.7 is again instructive:

The lawyer should advise the other members of the board that, in some circumstances, matters discussed at board meetings while the lawyer is present in the capacity of trustee might not be protected by the attorney-client privilege and that conflict of interest

considerations might require the lawyer's recusal as a trustee or might require the lawyer and the lawyer's firm to decline representation of the corporation in a matter.

Rule 1.7, Cmt. [35].

22. We do not trespass the limits of our jurisdiction to recognize that, ordinarily, an attorney's confidential communications with a client in pursuit of legal advice are subject to a claim of attorney-client privilege, whereas communications by one board member with fellow board members on matters of corporate policy are not. When the board member communicating on matters of organizational policy is also the lawyer for that organization, the communication is pregnant with potentially perplexing privilege problems – that is, whether the lawyer is communicating as a lawyer to a client or to fellow policymakers as a board member. The consequence is that, when the attorney is also serving as a board member, a danger exists that the attorney-client privilege may not protect the attorney's communications with the board on legal matters. This may be so even if the lawyer is explicit in distinguishing between the lawyer's provision of legal advice and business advice as a board member, because others (such as courts) may disagree.

23. Juggling the competing responsibilities and overlapping roles of government lawyer and board member thus demands acute alertness to the capacity in which the lawyer is acting in a particular setting and to the audience's understanding of the lawyer's communications. Among other things, the lawyer should advise the other members of the community college board that, in some circumstances, matters discussed at board meetings while the lawyer is present in the capacity as trustee might not be protected by the attorney-client privilege, and a parallel disclosure is required when the lawyer is acting as county attorney before county officials in matters involving the community college. At every meeting and during every discussion, clarity is essential on whether the lawyer is participating as counsel or as a board member. That the inquirer is chair of the board enhances this need. As we said in N.Y. State 589, owing to "the chair's more extensive involvement in decision-making concerning the management of the organization," it is possible "if not, indeed, more likely that the responsibilities of the two roles will conflict more frequently than in the case of a mere director." Hence, when the lawyer is participating as counsel, the lawyer must assure that precautions are taken to protect the client's privilege, including safeguards against public disclosure of privileged communications in board minutes or the presence of third parties whose knowledge of the communication might endanger the privilege.

CONCLUSION

24. If no law or regulation prohibits the dual roles, an attorney may serve as both county attorney and chair of a county-sponsored community college to which the county attorney's office provides legal services if, in each circumstance when the interests of the county and the community college overlap, a reasonable lawyer would conclude that

the dual roles do not involve a significant risk that the lawyer's interests as a board member would adversely affect the discharge of the lawyer's independent professional judgment on behalf of the county. If the lawyer cannot so conclude, then the lawyer may seek a waiver of the conflict from each the county and the community college if the lawyer reasonably believes that the lawyer may provide competent and diligent representation to the county and the lawyer obtains informed consent, confirmed in writing. Absent such a reasonable belief and accompanying informed consent, another lawyer in the county attorney's office may generally act for the affected client upon informed consent confirmed in writing that the other attorney in the office may provide the requisite representation. In all events, the county attorney must take special precautions to assure the protection of evidentiary privileges that the lawyer's dual roles might imperil.

(6-18)

New York State Bar Association
Committee on Professional Ethics

Opinion 986 (10/25/13)
Topic: Whether it is a conflict of interest for a lawyer who represents a mentally incapacitated client in a Medicaid benefits proceeding to also represent the client's sister in seeking to petition for a guardianship for the client where the incapacitated client's stated wishes as to living arrangements are contrary to the sister's position.
Digest: It is a conflict of interest for a lawyer who represents a mentally incapacitated client in a Medicaid benefits proceeding to also represent the client's sister in seeking to petition for a guardianship for the client where the incapacitated client's stated wishes as to living arrangements are contrary to the sister's position.
Rules 1.7, 1.14

QUESTION

1. May a lawyer who represents a mentally incapacitated adult in a Medicaid benefits proceeding also represent that person's sister in seeking to petition for a guardianship for him where the sister, against the client's wishes, has refused to remove her brother from a hospital and will not permit him to return to her home?

BACKGROUND

2. A Legal Services lawyer was retained to represent a severely incapacitated man to appeal the denial of certain Medicaid services. He has been diagnosed with schizophrenia and mental retardation. A recent evaluation concluded that he is "unable to function autonomously, and he cannot make financial or health decisions on his own. He is significantly mentally retarded." The client is not able to make decisions during

the representation and "does not understand what is involved in appealing the denial of Medicaid Services." The client was assisted by his sister in applying for Legal Aid Services.

3. The sister has cared for and lived with the client until recently, when the client accidentally set fire to the sister's home. The sister brought him to a hospital where he remains. The hospital wants to discharge the client and his expressed desire is to return to the sister's home. The sister is unwilling to accept the client back to her home.

4. The attorney states that there is no practical method of protecting the client's interests other than to have a guardian appointed. There is no other family. Social services agencies have extremely limited resources. The sister is willing to serve as the guardian, but the client is so incapacitated that he is not capable of consenting or objecting to the appointment of his sister as guardian.

5. The attorney asks whether he is permitted to represent the sister in a petition for guardianship over her brother.

OPINION

6. The lawyer asks whether concurrent representation of client A with significant diminished capacity and another client (B) who seeks to become the guardian for client A is permissible when the stated wishes of client A are directly contrary to the position of Client B as the prospective guardian. To what extent is the lawyer bound by the arguably unreasonable and ill-considered stated desire of the incapacitated client in assessing whether such a conflict exists? What action is permissible by the lawyer?

7. Concurrent conflicts of interest are governed by Rule 1.7 of the Rules of Professional Conduct which prohibits a lawyer from representing clients with "differing interests." This includes "every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse, or other interest. Rule 1.0(f); See also Rule 1.7 Cmts. [1],[2],[8]. The lawyer is expected to be loyal, protect client confidences and provide independent judgment.

8. In the representation of Client A in the Medicaid appeal, the lawyer learned of the client's stated desire to return to his sister's home. Living arrangements are a fundamental interest of the client as contemplated by Rule 1.7. Unquestionably, if Client A did not have significant diminished capacity, the lawyer could not undertake to represent his sister in any proceeding where Client A's stated desires would be undermined, and in this case directly contrary to the client's wishes, by the lawyer's representation of another client. [1]

9. Thus, the question is whether the client's significantly diminished capacity alters the judgment as to whether the lawyer would be representing "differing interests" if he undertook representation of the sister in the guardianship proceeding. As explained below, it does not.

10. Rule 1.14 seeks to provide guidance to a lawyer in such circumstances. It acknowledges the difficulty of providing diligent and competent representation to clients who have diminished capacity precisely because the client is often incapable of understanding and making decisions about the matter. In such circumstances, even though the representation may be premised upon the goal of maximizing a client's autonomy and dignity, the lawyer may believe that advocating the client's stated position to be directly contrary to what the lawyer reasonably believes is the only viable choice for the client with significant diminished capacity. May the lawyer maintain a position contrary to the client's stated wishes when that client has significant diminished capacity?

11. Rule 1.14 suggests a course of action for the attorney in such circumstances. [2] First, a lawyer must "as far as reasonably possible" maintain a normal lawyer-client relationship. The fact that a client suffers from mental illness or retardation does not diminish the lawyer's responsibility to treat the client attentively and with respect. Rule 1.14, Cmt. [2].

12. Second, Rule 1.14 permits a lawyer to take protective action when the lawyer reasonably believes that the client is at risk of physical, financial, or other harm unless such action is taken. Before considering what measures to undertake, lawyers must carefully evaluate each situation based on all of the facts and circumstances. "Any condition that renders a client incapable of communicating or making a considered judgment on the client's own behalf casts additional responsibilities on the lawyer." Roy D. Simon, Simon's Rules of Professional Conduct Annotated, 662 (2013). One of those responsibilities is to acknowledge that even clients with diminished capacity may have the ability to make decisions or reach conclusions about matters affecting their own well-being.

13. Any protective action taken by the lawyer should be limited to what is essential to carry out the representation. Thus, the lawyer may consult with family members, friends, other individuals, agencies or programs that have the ability to take action to protect the client. The Rule does not specify all of the potential protective actions that may be undertaken, but it makes clear that seeking the appointment of a guardian is the last resort, when no other protective action will protect the client's interests.

14. This opinion presumes that, before considering guardianship, the attorney has considered and exhausted other options. First, the lawyer has attempted to maintain a normal client-lawyer relationship as best as possible under the circumstances. A primary aspect of that relationship is to maintain communications with the client. The attorney has determined that the client's stated desire is to return to his sister's home. Even if the attorney reasonably believes this to be unwise, unreasonable, or otherwise ill advised, the client still deserves attention and respect.

15. Second, before deciding whether to take protective action with respect to the client, the lawyer has a reasoned basis, beyond what he believes to be the client's ill considered judgments, to conclude that the client cannot act in his own best interests

and that protective action is necessary. The lawyer unsuccessfully attempted to communicate with the client, obtained information and assistance from the client's sister, and sought a medical evaluation.

16. It is not clear whether there are other individuals, community resources or social services agencies that may be of assistance to the client. Nor is it clear whether other options have been explored prior to seeking the appointment of a guardian. This includes an assessment as to whether or not referral to support groups or social services could provide protection to the client.

17. These alternatives should be exhausted prior to seeking the appointment of a guardian. The situation is particularly fraught for clients with limited financial means and social support networks. There are few social services available to assist such clients, thereby leaving the attorney in circumstances with few options to carry out representation as contemplated by Rule 1.14. Therefore, these circumstances require a lawyer to exercise careful judgment to adopt a course of action that best protects the client's interests.

18. The lawyer must recognize that seeking a guardianship is an extreme measure as it "deprives the person of so much and control over his or life." *In the Matter of the Guardianship of Dameris L.,* 38 Misc 3d 570 (Sur. Ct. NY Cty 2012) citing Rose Mary Bailly, Practice Commentaries, McKinney's Con Law of NY, Book 34A, Mental Hygiene Law § 81.01 at 79 (2006). It has been suggested that the lawyer should seek a guardian only if "serious harm is imminent, intervention is necessary, no other ameliorative development is foreseeable, and nonlawyers would be justified in seeking guardianship." Paul R. Tremblay, *On Persuasion and Paternalism: Lawyer Decisionmaking and the Questionably Competent Client*, 3 Utah L. Rev. 515, 566. (1997); See 62 Fordham L. Rev. 1073 (1993-1994)

19. Article 81 of the Mental Hygiene Law, allows for the judicial appointment of a legal guardian for one's personal needs, property management or both, when a person is incompetent to conduct his or her own affairs. N.Y. Mental Hygiene Law § 81.02(a); 81.06 et seq. The statute expects that the system is tailored to meet the individual's specific needs by taking into account the incapacitated person's wishes, and preferences. N.Y. State 746 (2001).

20. Assuming that the attorney has undertaken this thorough evaluation of the circumstances, and now reasonably believe that guardianship is the only alternative, that lawyer may seek out others to petition for the guardianship.

21. The guardianship process is initiated by a petition. The lawyer may seek out any available individual, social service agency or private organization to petition for guardianship. Article 81 specifies seven categories of persons who may file such a petition. § 81.06.

22. The court then is required to appoint a court evaluator who will recommend whether the alleged incapacitated person (AIP) requires counsel. The court evaluator will also make recommendations as to who should serve as guardian and make appropriate living arrangements. Any conflicts between the sister and AIP will be addressed by the court evaluator. *See e.g.,* MHL 81.09(c)(5)(xv). It is not apparent whether court evaluators are appointed in all matters as required by statute.

23. The court then considers all of the evidence and determines, by clear and convincing evidence, whether the person is likely to suffer harm because he or she is unable to provide for his or her personal needs and/or property management and cannot adequately understand and appreciate the nature and consequences of this inability. § 81.02 (b).

24. The guardian is to engage in the "least restrictive form of intervention, consistent with the concept that the needs of persons with incapacities are as diverse and complex as they are unique to the individual." NY Mental Hgy Law §81.01.

25. The attorney may suggest that the sister seek a petition for guardianship and may make suggestions as to individuals or agencies to assist her in completing the petition, but the lawyer may not represent her in petitioning for the guardianship. Her interests are contrary to that of the client. She has clearly stated, contrary to the client's desires, that she will not permit him to return to her home. Thus, the attorney would be in conflict with his client if he represents the sister and assists her in filing a petition seeking an objective contrary to the client's stated desire.

26. The lawyer's position in protecting the client's interests is complicated by perceived difficulties for lay persons in completing the petition for guardianship and the lack of social service and other resources to assist the family of incapacitated people. The sister may desire to file a petition for guardianship but may be ill-equipped to do so and there may be no assistance available to her. Consequently, it may be that the attorney is the only person who can reasonably seek the appointment of a guardian. In general, a lawyer should only act as petitioner in seeking the appointment of a guardian if there is no one else who reasonably can do so. Simon, Rules of Prof Conduct Annot. at 663, N.Y. State 746 (2001).

27. In general, the interests of the petitioner in a guardianship proceeding are in conflict with that of the client, notably where there will be a contested hearing and the petitioner will serve as a witness. However, where the client does not oppose the guardianship or is incapacitated and cannot express an opinion as to the guardianship, Rule 1.14 implicitly acknowledges that the lawyer may file the petition to seek a guardianship in circumstances where the guardianship will not be subject to a hearing and no one else is reasonably available to file the petition. We previously considered the issue of whether an attorney-in-fact could petition for guardianship for a client and concluded, under the then-existing Code of Professional Conduct, that it was permissible under circumstances such as those presented here where there is no other option and there will not be a contested hearing under Article 81. We considered

whether the “dual role” of petitioner in a guardianship proceeding and as client representative was impermissible in these circumstances and concluded that, given other safeguards in the Article 81 proceedings, the dual role was not impermissible. N.Y. State 746 (2001). We affirm that opinion under the Rules of Professional Conduct.

28. Should the attorney file the petition for guardianship, and the court become aware that the sister may be the only person who can be appointed as the client’s guardian, the lawyer should advise the court of the sister’s position regarding the client’s living arrangements. The court can then consider whether, in light of the potential conflict between the client and his sister, she is the appropriate guardian.

29. Thus, using the same reasoning, Connecticut has determined that in these circumstances should the lawyer petition for the appointment of a guardian, the lawyer does not need to withdraw from representation on the underlying Medicaid matter. In circumstances involving clients with disabilities, this is not a preferred course of action. *See* Connecticut Inf. Opinion 97-19 (1997).

30. Assuming that a guardian is appointed, the lawyer should consult with the client and the guardian as to the position to be asserted in the Medicaid matter. The guardian is the representative of the client. The rationale for the appointment of a guardian is to have someone who can make decisions for the incompetent client. Thus, after the appointment of the guardian, the lawyer generally must take direction from that guardian.

31. Finally, Rule 1.14 is often frustrating because it does not provide solutions to all problems in dealing with clients with diminished capacity. It does, however, provide “an intelligible frame of reference for the lawyer and those who might later judge his conduct.” Geoffrey C. Hazard Jr. and W. William Hodes, The Law of Lawyering, § 1.14:101, p.439. (1990). See Connecticut Inf. Opinion 97-19.

CONCLUSION

32. It is a conflict of interest for a lawyer who represents a mentally incapacitated client in a Medicaid benefits proceeding to also represent the client’s sister in seeking to petition for a guardianship for the client where the incapacitated client’s stated wishes as to living arrangements are contrary to the sister’s position.

9-13

[1] In some circumstances, the concurrent conflict may be waived, but not in this case. Even if the lawyer reasonably believed that he could provide competent and diligent representation to both Clients A and B, Client A is not capable of providing informed consent to such a waiver. Rule 1.7 (b)

[2] Rule 1.14 provides that:

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a conventional relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer 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.

(c) Information related to representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6 (a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

“Bank Letter” Forms

Letter of Introduction Form for Local Banks/Credit Unions

NOTE TO APS: This letter is to introduce the form to local banks. If you are sending the request to a national bank's central subpoena processing unit just send the form without the fetter.

Agency Letterhead

Date
Bank Official's Name and Address Dear
[Bank Officer]:

I would like to introduce myself and my agency, Adult Protective Services (APS) [full name and location]

APS is a [county/city] agency which is authorized under New York State Social Services Law Section 473 to carry out investigations of reported adult abuse, neglect and financial exploitation.

When investigating financial exploitation, it is often necessary for the investigator to review the client's bank records in a timely manner.

APS is authorized under the Federal Gramm-Leach-Bliley Act to obtain a bank customer's records, because APS falls under the law's exceptions in that:

1) The purpose of viewing the records is to prevent actual or potential fraud, and
2) APS is authorized under state law to carry out civil investigations.

Please see the attached standard form created for APS to request a client's bank records. On the reverse side is the Gramm-Leach-Bliley Act language setting forth the exceptions cited above, and also the New York APS statutory language regarding APS's authority to conduct civil investigations of vulnerable adult financial exploitation.

Upon receipt of this form from an APS investigator, we hope that your staff will promptly provide the requested records so that a full investigation can be conducted within the program's deadlines. This will help to stop the financial losses to the client and bank and will help APS take other measures to protect the client and their overall well-being.

We look forward to working with you and your staff to protect the assets and well-being of your customers who have been referred to APS for alleged financial abuse. If you have any questions or would like to discuss this further, please contact me at [

Sincerely,

[Signature]

(Your name]

Supervisor [or other title]

APS Agency Letterhead

OFFICIAL REQUEST FOR CUSTOMER RECORDS

Pursuant to Gramm-Leach-Bliley Act (GLBA) (15 U.S.C. §6802(e)(8); and 15 U.S.C. §6802(e)(3)(B)): *and New York Social Services Law Section 473*

I, _____ , an Adult Protective Services Investigator operating under the laws of the State of New York *,* am conducting an authorized investigation of an adult person. One of the purposes of my investigation is to protect against or prevent actual or potential fraud, unauthorized transactions, claims, or other liability.

I hereby request records from _____for all accounts relating to _____ for the period of _____ to _____ , including but not limited to:

___ Bank statements for ALL accounts, including checking, savings, money market, certificates of deposit

___ Copies of all checks and withdrawals from the account(s)(front and back) including offsets

___ Copies of all deposits and deposit items

___ Customer Profile showing all accounts, including opening and/or closing dates

___ All Power of Attorney documents and signature cards

___ Statements for any loans, lines of credit, or credit cards and copies of any cash advances

___ Other: _____

Please provide these records on or before _____.

_____ _____

Signature Phone

_____ _____

Title Email

_____ County Department of Social Services

Adult Protective Services
_____ _____ Street
_____, N Y 1____

Gramm-Leach-Bliley Act
15 U.S.C. §6802 - Obligations with respect to disclosures of personal information

(e) General exceptions

Subsections (a) and (b) of this section shall not prohibit the disclosure of nonpublic personal information—

(3)(B) to protect against or prevent actual or potential fraud, unauthorized transactions, claims, or other liability;

(8) to comply with Federal, State, or local laws, rules, and other applicable legal requirements; to comply with a properly authorized civil, criminal, or regulatory investigation or subpoena or summons by Federal, State, or local authorities; or to respond to judicial process or government regulatory authorities having jurisdiction over the financial institution for examination, compliance, or other purposes as authorized by law.

Adult Protective Services (APS) is properly authorized, under the state statute cited below, to carry out civil investigations of elder/vulnerable adult abuse, neglect and financial exploitation.

New York State Social Services Law
Article 9-B Adult Protective Services
Title 1 Protective Services
Section 473. Protective Services

1. *In addition to services provided by social services officials pursuant to other provisions of this chapter, such officials shall provide protective services in accordance with federal and state regulations for or to individuals without regard to income who, because of mental or physical impairments, are unable to manage their own resources, carry out the activities of daily living, or protect themselves from physical abuse, sexual abuse, emotional abuse, active, passive or self-neglect, financial exploitation or other hazardous situations without assistance from others and have no one available who is willing and able to assist them responsibly. Such services include:*
   (a) Receiving and investigating reports of seriously impaired individuals who may be in need of protection.

(emphasis added)

Letter of Reply to Financial Institutions which have Refused to Release Records

NOTE TO APS: This letter is to reply to a bank which has refused to release records

APS Agency Letterhead

Date
Bank Official's Name and Address

Re. Denial of the attached APS Request for Client Records

Dear [Bank Officer]:

In response to your recent correspondence (phone call/etc.), please note that a careful reading of the Gramm-Leach-Bliley Act makes plain that financial institutions are indeed permitted to release client records without the client's permission and without a subpoena under the following conditions:

> 15 U S C 56802 — Obligations with respect to disclosures of personal information
>
> (e) General exceptions
>
> Subsections (a) and (b) of this section shall not prohibit the disclosure of non-public personal information —
>
> (3)(B) to protect against or prevent actual or potential fraud, unauthorized transactions, claims or other liability:
>
> (8) to comply with Federal, State, or local laws, rules and other applicable legal requirements: to comply with a properly authorized civil, criminal or regulatory Investigation or subpoena or summons by Federal, State or local authorities or to respond to judicial process or government regulatory authorities having jurisdiction over the financial institution for examination, compliance, or other purposes as authorized by law (emphasis added).

Adult Protective Services (APS) is authorized under these provisions to obtain a bank customer's records in the course of investigating financial abuse of an older or vulnerable adult; because APS falls under the law's exceptions in that.

> 1. Its purpose in viewing the records is to "protect against or prevent actual or potential fraud, unauthorized transactions, claims, or other liability and
> 2. APS is authorized under state law to carry out civil investigations of adult abuse, neglect and financial exploitation. New York State Social Services Law Section 473.

3. The requirement for a subpoena is an alternative and not a requirement when complying with a properly authorized civil investigation, to wit: "to comply with a properly authorized civil investigation OR subpoena OR summons „ (emphasis added).

In light of the clear language in GLBA and APS's statutory authority to conduct a "properly authorized civil. investigation", please comply with the attached request for records in the timeframe specified.

Thank you. Working together, we can better protect the assets and well-being of our mutual client, Sincerely,

[Signature]

[Your name]

Model APS Letter Requesting Records from an Agent Under GOL Section 5-1505

("15 Day Letter")

(Send Certified Mail, RRR)

Date:

****
**********, NY *****

Re:

Dear:

The _____Department of Social Services hereby requests the power of attorney document, as well as a record of, all receipts, disbursements, and transactions entered into you as an agent with the Power of Attorney on behalf of **********. We request that you provide these documents and records and this information to the _____ Department of Social Services within 15 days of receipt of this letter. The record must include all receipts, disbursements, and transactions for each and every account of ********** ,and for any financial action otherwise taken by you as Power of Attorney.

Please forward a copy of the records and information to:

_____ Caseworker

_____ DSS, Adult Protective Services

_____ _____ _____Street, _____, NY _____

New York General Obligations Law Section §5-1505 authorizes this agency to make this request, and requires you to comply with this request within 15 days. Your failure to make the records available may result in the necessity of _____ DSS commencing a Special Proceeding under §5-1510 of that law.

Sincerely,

_____
Caseworker

_____
Supervisor, Adult Protective Services