

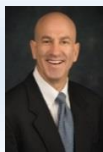
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### Message from the President

By

Howard S. Krooks



Welcome to the first edition of NYNAELA *Quarterly*. This

represents an important development for NYNAELA members, as the newsletter will allow the Chapter to keep members apprised of Chapter activities not only with respect to legislative advocacy-- a hallmark of the Chapter since its inception--but also with respect to new services (such as our updated web site and quarterly webinars), and new

ways in which the Chapter can assist our members to stay current on practice-related developments. A special thanks goes to Natalie Kaplan and Bob Mascali whose work led to the development of the NYNAELA website and whose recent efforts have evolved into our first newsletter, the NYNAELA *Quarterly*!

### From the Editor

By

Natalie J. Kaplan



In the spirit of this new, succinct, fun-loving, read-on-one-foot newsletter, I have two words: welcome and enjoy.

Our goal is to produce a quarterly newsletter that keeps you current on Chapter activities and on each other's lives, Upstate and Down. In addition to news, there will be special interest areas that are aimed somewhat outside the realm of typical elder law reading. For the times that you want none of that, you will find stand-on-one-foot entertainment: We introduce language esoterica, a word game and a crossword puzzle.

To keep this going at the brisk pace we want, WE CAN USE YOUR INPUT. Sit down and e-mail us anything new you have to share: favorite jokes, an enjoyable book, the answer to whether the chicken or the

egg came first. Aim for brevity and punch and, to the extent we can do it, we will publish your offerings.

We hope you like it.

NJK

### Committee News

#### Legislation Committee

By

Robert Mascali



The Legislation Committee meets by conference call on a monthly basis on the second Tuesday of the month at 4:00PM. Call information is circulated prior to the call and all Chapter members are welcome to join on the call.

The Committee focuses primarily on legislation pending in New York but is also following federal issues, including The ABLE Act and The Special Needs Trust Fairness Act. We are also following developments on Medicaid eligibility and

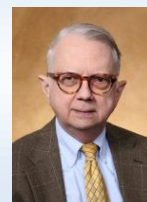
possible changes to benefits for veterans, especially a look back period that has been proposed.

In addition, the Legislation Committee serves as a clearinghouse for suggestions from NYNAELA members for legislative initiatives that may be recommended to the full board for consideration and support. Since NYNAELA does not require any further review for proposed legislation, as is usually required for other organizations, the hope is that the Committee can be a fast track leader in this area and a valuable resource for our members and the Elder Law Bar in general.

#### Litigation Committee

By

Rene Reixach



The National NAELA Litigation Committee is compiling a searchable, annotated database of pleadings, briefs

and opinions for member use in the development of a Litigation Resource Center. If you have such documents from relatively current litigation that you think might be helpful to other members, please download and use the "[Litigation Resource Center Submission Form](#)", attach the documents and e-mail to [naela@naela.org](mailto:naela@naela.org). Stetson University law students who are working on this project may contact you for additional information.

With the help of litigators throughout the country, the Center will be able to provide all members with an additional connection to trends and activities as they evolve.

### Membership, Website and Newsletter Committees

By

Natalie J. Kaplan

In this year alone, three new member benefits have been developed: Litigation

Coaching, the Chapter Website and the on-line newsletter, the NYNAELA *Quarterly*. We are also exploring, for the first time, the use of a legislative proposal-- for nursing home granny cams-- to effectuate change for clients.

Litigation coaching is an unprecedented opportunity for solo practitioners to get the value of a "moot court" or "partners'" rehearsal, offered by NAELA volunteers.

The website will continue to evolve to accommodate members' needs. The same is true of the newsletter which we have tried to craft for fast, pleasurable, stand-on-one-foot reading. Your contributions of ideas or writing are welcome.

### Webinar Committee

By

Deborah A. Slezak



The webinar recently completed was the Inaugural Annual Legislative Update from our lobbyist, Harold Iselin, and NYNAELA Legislation Chair, Bob Mascali. Harold has provided us some inside details in his newsletter article about how lobbying operates and Bob has given us an update, as of publication time, on the Legislation Committee.

Planned future webinars are:

- ABLE Act
- Nursing Home Litigation and Proposed Granny Cam Legislation
- What to Do When Undue Influence Walks in the Door
- Aid in Dying, Pending Litigation and Legislation

Please send us suggestions for next year's programs.

### Articles

#### Legislative Update

By

Harold Iselin



*Harold Iselin is Managing Shareholder of Greenberg Traurig's Albany office. He focuses his practice on governmental affairs and health care matters, representing diverse clients before the executive branch and state legislature. Additionally, he handles complex civil litigation matters, litigating a broad range of civil cases.*

*He was previously a trial attorney in the U.S. Department of Justice and later, Assistant Counsel to the Governor of New York.*

Greenberg Traurig (GT) represents NYNAELA's interests before the New York State legislative and executive branches. Due to the nature of NYNAELA's public policy

priorities, its issues traditionally have been addressed as part of New York's annual budget negotiations. For example, this was the twenty-sixth year that the Executive Budget proposed eliminating spousal refusal, claiming the change would save the State \$10.7 million for 2015-16. NYNAELA has consistently opposed the proposal on several grounds, and has consistently had a successful outcome. This year NYNAELA had an additional priority, as the Executive Budget also included a proposal to eliminate Medicaid services from the type of "public assistance" services that must be authorized while a Medicaid application is pending and where there is an "immediate need" for assistance.

The Governor released his budget proposal in January. After spending days analyzing the bills and updating NYNAELA representatives on what was included in the legislation, GT's Government Law and Policy team began meeting with key legislators and staff to explain why both of these proposals should be rejected. In addition, GT

worked with NYNAELA and the Elder Law Section of the New York State Bar Association to conduct a formal Lobby Day. Representatives from NYNAELA and the Bar Association joined us in Albany, to meet with legislative leaders and committee chairs, as well as the Executive Chamber and the Division of Budget, to educate them about the consequences of these proposals, and urge that the Legislature reject them both. Both before and after the Lobby Day, GT had regular contact with legislators and staff to help frame the issue and advocate for NYNAELA's position.

In early March, the Senate and Assembly officially announced their intention to reject the elimination of spousal refusal. The immediate need issue, however, was more complicated. The Senate was willing to reject the Governor's language, but the Assembly wanted to go further and advance language expressly authorizing immediate need assistance.

We continued having regular conversations with the key decision makers throughout

the negotiation process. Due to the nature of the budget process, these advocacy efforts can happen during scheduled meetings or conference calls; catching public officials in the halls of the Capitol; or late night emails and phone calls; all with the goal of ensuring that your position prevails when the two houses of the legislature and the Governor eventually reach an agreement. Ultimately, when the final budget was adopted by the start of the new fiscal year on April 1, spousal refusal was maintained, and the proposal regarding “immediate need” was significantly amended, resulting in a compromise that preserved access to immediate need services. In the end, NYNAELA had a successful New York State Budget. The question remains, however, as to whether the elimination of spousal refusal will be advanced for a 27th time, as part of next year’s budget.

### **What to Know & Do If a Nursing Home Client Develops Bed Sores**

By

Deborah Truhowsky



*I have been practicing law in the area of elder abuse and neglect for the past 15 years. My firm is now devoted exclusively to this area. I am pleased to share practice tips in this quarterly column with NYNAELA members. Since 75% of the calls my firm receives involve bed sores suffered by nursing home residents, I thought bed sores would be a fitting first subject.*

#### **What exactly are bed sores?**

Bed sores, also known as Pressure Ulcers or Decubitus Ulcers are areas of damaged skin caused by prolonged pressure to vulnerable parts of the body, such as the hips, buttock and heels. A bed sore may first appear as a reddened area of skin over a bony prominence, and can worsen to a deep wound

involving the underlying tissue, muscle and bone.

#### **Who is at greatest risk for bed sores?**

Examples of residents who are at risk for developing bed sores:

- Residents confined to bed or chair for long periods of time
- Incontinent residents
- Dehydrated or malnourished residents
- Residents with mobility problems
- Residents on antipsychotic drugs

#### **Are bed sores a sign of neglect?**

They are a likely sign of neglect. Medical experts advise that with appropriate care and equipment, bed sores are often easily preventable and completely treatable, if found early.

#### **How can they be prevented?**

Some examples of care used to prevent them are:

- Proper nutrition and hydration
- Changing wet or soiled diapers promptly

Turning and positioning every two hours in bed

Repositioning every hour, and limiting time out of bed, in recliner or chair

Some example of equipment used to prevent and heal them are:

Pressure reducing mattresses

Cushions for recliners or chairs

**Should the development of bed sores be reported?**

Yes, as with any case of suspected neglect or abuse, it should be reported to the facility and reported to:

*NYS Department of Health*

**1-888-201-4563 or**

[www.health.ny.gov/facilities/nursing/complaints.htm](http://www.health.ny.gov/facilities/nursing/complaints.htm)

**AND**

*NYS Attorney General's Office,  
Medicaid Fraud Control Unit  
1-800-771-7755*

**What legal recourse do nursing home residents have?**

Nursing home residents can bring actions under Public Health Law Section 2801-d seeking compensation for their injuries, if they have

been deprived of a "right or benefit" created for the protection of nursing home residents by contract, or by federal or State statute, code or regulation. This is in addition to available negligence or medical malpractice actions.

**Who has the burden of proof in a Section 2801-d lawsuit?**

Once a resident develops bed sores, the burden is on the facility to prove they took all steps reasonably necessary to prevent the bed sores.

**Are there also regulations that address bed sores?**

Yes, there are federal and State regulations, 42 CFR 483.25 (c) and 10 NYCRR 415.12 (c) (1). Generally, these regulations require that a resident entering a nursing home facility without bed sores and not develop any during their admission. Further, if a resident enters a facility with bed sores, the facility must provide necessary treatment and services to heal the bed sores, prevent infection and prevent new sores from developing.

**How are legal fees paid?**

Legal fees are paid on a contingency fee basis, and the fees are deducted from the amount recovered at the end of a case.

**Will a monetary recovery compromise a resident's Medicaid coverage?**

No. The amount of any damages recovered by a patient are exempt for purposes of determining initial or continuing eligibility for Medicaid. PHL §2801-d (5)

**The Intersection  
between Veterans  
Pension Benefits and  
Medicaid**

By

Felicia Pasculli



VA pension benefits and the Medicaid program have income and resource eligibility requirements. Countable income, called IVAP by the VA,



[www.NAELA.ORG/NYNAELA](http://www.NAELA.ORG/NYNAELA)

# NYNAELA

## Quarterly

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includes the annual income of the veteran, the annual income of the veteran's spouse, and the annual income of any dependent child of the veteran.<sup>1</sup> Income deductions and exclusions include welfare, proceeds of fire insurance policies or other casualty loss payments, profit from the sale of property other than in the course of business, interest received from the redemption of savings bonds, and unreimbursed medical expenses. Unreimbursed medical expenses may include payments to caregivers, including those made to children under a Personal Services Agreement.<sup>2</sup>

For eligibility purposes, Medicaid only considers income that is available to the applicant.<sup>3</sup> Unlike the VA, it permits "spousal refusal." Once spousal refusal is asserted, the refusing spouse's income cannot be deemed to be available to the applicant spouse.<sup>4</sup> There are also exempt income categories which can be found at 18 NYCRR § 360-4.6(a). If an

individual applicant's income exceeds the allowable level, the applicant can transfer his or her excess income to a pooled trust. Since 2005, the NYS Dept. of Health has specifically allowed the use of such trusts for the excess income of disabled individuals age 65 and over.<sup>5</sup>

Although VA regulations define resources as the "corpus of the estate,"<sup>6</sup> the VA utilizes a national guideline that allows the claimant's household no more than \$80,000 in resources, excluding the personal residence. If the claimant has excess resources, Medicaid qualifying trusts may be established for the purpose of rendering excess resources unavailable. It must be clear that a claimant has relinquished all rights of ownership, including the right to control property. The VA's General Counsel has held that property and income will not be countable as belonging to the claimant unless: (1) it is actually owned by the claimant; (2) the claimant possesses such control over

the property that the claimant may direct it to be used for his or her benefit; or (3) the funds have actually been allocated for the claimant's use.<sup>7</sup> Medicaid employs the same requirements, but does allow excess resources to be transferred to a spouse, instead of counting the assets of the entire household. Additionally, for 2015, Medicaid allows recipients to own resources up to \$14,850.00, far less than the VA's \$80,000. (GIS 14 MA/29)

Medicaid employs a "look-back" period for the purposes of determining eligibility for nursing home benefits.<sup>8</sup> However, there's no look-back period when applying for community Medicaid. Similarly, the VA does not employ a look-back period. The elder law attorney must be aware of the interplay between VA and Chronic Care Medicaid benefits, similar to the interplay between transfers to qualify for Community Medicaid and transfers within the five year look-back period when

applying for Chronic Care Medicaid. The creation of such a trust for VA purposes may create ineligibility for nursing home Medicaid, if the 5-year look-back hasn't expired.

According to NYS's Medicaid Income Disregards Chart, for disabled adults and those age 65 and over, the following income is excluded for eligibility and post-eligibility income determinations: (1) The portion of the VA pension that constitutes Unreimbursed Medical Expenses (UMEs); and, (2) The portion of the VA pension that constitutes Housebound or Aid and Attendance enhancements. Also, for nursing home claimants on Medicaid, the VA reduces the claimant's benefit to \$90, which is disregarded by Medicaid.<sup>9</sup>

There is a caveat – This reduction does not apply to claimants who are receiving care in NYS Veterans Homes. Pension beneficiaries who are living in a State Veterans Home are exempt from this reduction. This exemption allows the qualifying veteran to receive his or her full

pension award. (38 U.S.C. § 55039(d)(1).)

### Endnotes

1. 38 C.F.R. § 3.23(d)(4) (2008); 38 U.S.C.S. § 1521 (c), (h).
2. 38 U.S.C.S. § 501(a); 38 C.F.R. § 3.272 (2008).
3. Soc. Serv. L. § 366(2), 3; 18 NYCRR § 360-4.3, 4.6(a).
4. Soc. Serv. L. § 366(3)(a).
5. 05 OMM/INF-1.
6. 38 C.F.R. § 3.275(b) (2008).
7. GC Opinion #73-91.
8. 42 U.S.C.A. § 1396(c)(1)(B).
9. MRG pg 177; 18 NYCRR 360-4.6(a)(2)(vii).

## Current Aid in Dying Issues in New York

By

Peter J. Strauss



The moving story of Brittany Maynard, the 29 year old Oregon woman who ingested terminal medication and

ended her life on November 1, 2014, brought the issue of physician aid-in-dying to the forefront of American consciousness once again. The Supreme Court has held in two decisions that it is not unconstitutional for the states to make it a crime for a physician to "assist in a suicide." Since then three states, Oregon, Washington and Vermont have enacted laws allowing for aid-in-dying. Montana and New Mexico courts (New Mexico now on appeal), declared the statutes in those states, outlawing physician aid-in-dying, invalid. New York legislation, however, prohibits "aiding another person to commit suicide." Pen.L. 125.15.

On February 4, 2015, End of Life Choices of New York and the Disability Rights Legal Center, with three terminally ill individuals, four physicians and a nurse, filed *Myers v. Schneiderman*, in State Supreme Court, New York County. The action seeks a judgment clarifying that mentally competent, terminally ill persons may obtain aid in dying from their



physicians, if they find their dying process unbearable.

More specifically, they are seeking a declaration that physicians who provide a prescription for terminal medication, to mentally competent, terminally ill patients-- to bring about a self-administered, peaceful and painless death-- cannot be prosecuted. In addition to several constitutional arguments, the complaint also urges that physicians who prescribe terminal medication to such patients cannot be prosecuted under the State Penal Law, because they are merely choosing the time of their deaths, expected, in any event, within six months. They are not "committing suicide."

Advocates for change point out that words matter. They endorse "aid in dying," but not "assisted suicide." The former term is now widely preferred in law and medicine. It describes the practice of a physician prescribing medication to a terminally ill, mentally competent patient who may choose to ingest it to end suffering they find unbearable, and achieve a peaceful death. The American Public Health

Association and the American Medical Women's Association have accepted this term.

The Attorney General's motion to dismiss is now fully briefed and pending in *Meyers* before Hon. Joan Kenney. The lead lawyers for the plaintiffs are Kathryn Tucker -- Executive Director of the Disability Rights Legal Center, and former lead counsel in federal constitutional end-of-life cases, *Quill v. New York* and *Glucksberg v. Washington* -- and Edwin Schallert-- partner at Debevoise & Plimpton, member of its Litigation Department and co-chair of its Securities Litigation Practice. Debevoise is representing the plaintiffs pro bono. The complaint can be viewed at [www.endoflifechoicesny.org](http://www.endoflifechoicesny.org).

### Long Term Care Benefits "For Free"

By

Lynn Lavender



*Ms. Lavender is the principal of "Guide INS" a 15 year old boutique firm, specializing in providing lifestyle and asset protection in the form of life insurance, long-term-care insurance, fixed annuities and more recently, life settlements.*

If you have a client who needs care, and for whatever reason isn't applying for Medicaid, selling a life insurance policy may be a more financially sound decision than selling investments or using moneys from retirement accounts. Get an appraisal of the policy.

Life insurance policies may be turned into long term care benefits which may have more value than the cash surrender value would

suggest. Even if that policy is a term, universal life or group policy with no cash value, it is an asset to be sold!

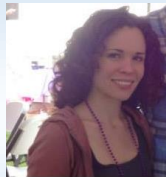
Selling a life insurance policy is not a new concept, but until very recently only policies with multi-million dollar face values were saleable. Today policies with face values as low as \$50,000 can provide significant long term care benefits. Since the proceeds are deposited into an FDIC account from which care providers are paid directly, no taxes are triggered. Any excess money ultimately is distributed to the named beneficiaries, also not taxable.

### **Nutrition Hints:**

#### **Aim to Add**

By

Caitlin MacShane, Nutritionist  
Personal Training Institute of  
New Rochelle



*We asked our resident nutritionist for a meaningful tip on losing weight. She came up with one we haven't seen before.*

When you think of weight-loss, you probably think about cutting calories, skipping the bread basket, and saying "no thanks" to dessert. It's easy to focus only on the food that you're not supposed to eat when trying lose a few pounds. But by changing your focus to all the food that you are able to eat, you'll limit the sense of deprivation and look forward to favorite items. Fill your plate with as many non-starchy vegetables as you'd like, like red peppers, tomatoes and cauliflower. Snack on fresh, seasonal fruits, like strawberries, peaches and

cantaloupe. Experiment with different methods of preparation for tasty variety!

#### **On the Light Side**

By

Natalie J. Kaplan

#### **A Five Dollar Word for the Quarter**

Ten law school professors sat over their dinner plates, some agitated, some bemused.

"Hold everything!" "Time out!" came two voices. Then a chorus of, "What does that mean?"

The previous speaker smiled happily, "What does WHAT mean?" she queried.

"That WORD," they snapped back.

The speaker had just described herself as "dysnomic."

What did she mean?

For the answer click [here](#).

### How Many Words can you Find?

Rules:

- Use the letters in the diagram below
- Letters may be used more than once per word
- 5 or more letters per word
- Each word must include R

15 = barely ok

20 = good

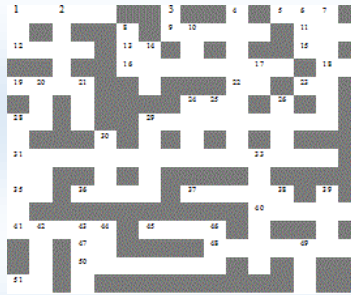
30 = excellent

35 or more = over the top

[\(send us your list\)](#)

### Elder Law Crossword

Click [here](#) for larger puzzle and clues



Click [here](#) for results.

