Health Care Law

New York's Medical Marijuana Program

In June 2014, Governor Cuomo signed into law legislation that will allow New York to join 22 other states and the District of Columbia in allowing residents to purchase and use marijuana for medicinal purposes.[1] As with the many other states that allow for the use of medical marijuana, the law lays the framework for a complex regulatory system that tasks the Department of Health ("DOH") with tightly controlling the growth, sale, and distribution of medical marijuana.

Benjamin Malerba

The regulations set forth stringent requirements on those entities that would grow, manufacture, and distribute medical marijuana, as well as limitations on the individuals that can obtain it. The regulations, which became official on April 15, 2015,[2] were crafted through a "very critical lens to ensure that the entire program would not be subject to enforcement action or legal challenges."[3] While the legislation legalizes medical marijuana under New York law, federal law continues to prohibit its possession and use, creating a complex legal landscape for those involved with medical marijuana.

Certified Users

Medical marijuana will be made available to those suffering symptoms caused by "severe diseases," defined by statute to include cancer, HIV/AIDS, multiple sclerosis, and similar illnesses.[4] The Commissioner of DOH has authority to expand the list of diagnoses, but has declined to exercise it.

Patients eligible for medical marijuana will be certified by a practitioner who is approved to certify a patient's use of marijuana (patients are not "prescribed" marijuana, but are "certified" to use it). A practitioner will only be able to certify a patient to use medical marijuana if he or she has treated the patient for the condition requiring the use of marijuana.

Upon a patient's certification by a physician, the patient (and his or her caregiver, if appropriate) will then apply for an identification card from DOH that will allow him or her to purchase marijuana at a dispensary. The patient or caregiver must have the ID card with them at all times they possess marijuana products; failure to do so can have repercussions under the penal code. The patient will need to be re-certified every year, unless he or she is deemed to be suffering from a "terminal illness," in which case the certification would last for the patient's lifespan.

A certified patient can also designate a caregiver who will be allowed to purchase and possess medical marijuana on the patient's behalf if the patient is unable to obtain the marijuana on his or her own.

Authorized Marijuana Dispensaries

Patients will obtain their medical marijuana from dispensaries operated by one of five "Registered Organizations" ("ROs"). ROs will be required to manage the manufacturing process "from seed to sale," meaning growth, manufacturing, and dispensing. Patients may have to travel to obtain marijuana products, however, as the law only allows for four dispensaries per RO, meaning there will only be 20 dispensaries in the state.

When a patient does visit a dispensary to purchase marijuana, the dispensary will more closely resemble a pharmacy than a dispensary one might see in other states. This is due in part to the fact that marijuana cannot be sold under the New York law in flower form, nor can it be smoked.

Patients will receive pills or vials of oil that contain the appropriate "brand" of product for their consumption. ROs will manufacture five different "brands," and a patient's certification will restrict the brands which he or she may purchase. Each "brand" will have a varying ratio of tetrahydrocannabinol ("THC") to cannabidiol ("CBD"); two of the active ingredients in marijuana (THC causes the anti-depressant-like effects associated with marijuana, while CBDs do not, but may be linked to some of the medical benefits that have been associated with marijuana).[5]

Patients will also have to bring cash with them to the dispensary. As discussed in more detail below, marijuana businesses are generally prohibited from using credit cards, and no insurance will cover the marijuana product as of yet. The DOH will set the price for all marijuana sold by a RO. Though there has yet to be an indication of how much marijuana products will cost, the regulations state that the DOH will review the RO's proposed price and consider it in light of the RO's practices, historical price, and past sales (if applicable) in either approving, modifying, or rejecting the proposed price. Patients may then consume the medical marijuana as directed by their doctor, but they may not vaporize the product anywhere that smoking is prohibited, such as schools, hospitals, or restaurants.

Reconciling State and Federal Laws

Despite New York's intricate regulatory scheme, the complex interplay between the federal prohibition and the proliferation of statewide legalization remains in flux. ROs and certified patients will face a difficult legal landscape that will present everything from potential criminal liability to financing issues.

Marijuana remains illegal under federal law. The Controlled Substances Act[6] ("CSA") and its regulations classify marijuana as a Schedule 1 narcotic, meaning it has "a high potential for abuse," "no currently accepted medical use in treatment," and "a lack of accepted safety" in its use.[7] Its manufacture, distribution, or possession in the quantities a RO will likely possess is a felony punishable by at least 10 years in prison, and possession by patients can also qualify as a federal felony.[8]

The growing state legalization trend has not gone unnoticed by the Department of Justice ("DOJ"), however, and the agency has issued three separate memoranda on the enforcement of the CSA, each progressively taking a more permissive stance. The most recent memorandum, issued by Deputy Attorney General James Cole on August 29, 2013, states that DOJ does not intend to use its resources to prosecute crimes relating to marijuana if the offenders are otherwise

See MARIJUANA, Page 6

Protection and Privacy: Applying for A Guardian Ad Litem Without Violating HIPAA

Attorneys are often faced with a difficult decision when they are aware that a party to the litigation is not functionally able to prosecute or defend his or her rights. If the attorney does not want to proceed with a costly and lengthy Article 81 Guardianship proceeding to have the party declared judicially incompetent, the attorney may proceed under New York Civil Practice Law and Rules under (CPLR) 1201 for the appointment of a guardian ad litem.

This appointment is for purposes of representing the party within the context of an individual lawsuit only. Certain individuals need legal assistance even though they have not been formally adjudicated as lacking capacity. However, unlike the statutory schemes which govern Article 81 Guardianship proceedings, there is limited guidance on what may be presented to the courts in the petitioner's initial application for a guardian ad litem without violating the Health Insurance Portability and Accountability Act of 1996 (HIPAA).

CPLR 1201 provides that a person shall appear by a guardian ad litem if "he is an adult incapable of adequately prosecuting or defending his rights."[1] Attorneys who litigate on behalf of nursing homes and other medical professionals are often advised by their clients when they believe an adult defendant is incapable of defending him or herself in the litigation.

Melanie I. Wiener

The courts have held that when a party's de facto incapacity is perceived, an interested person should apply for appointment of a guardian ad litem.[2] An attorney for the nursing home has standing to make the motion, and should do so to ensure the effectiveness of proceedings that are adverse to the party who is incapable of adequately prosecuting or defending his or her rights.[3]

How does the opposing party establish the defendant's "de facto incapacity" in its motion papers without violating HIPAA? When a lawsuit is in full-swing litigation and the parties have appeared numerous times before the judge, the court has an opportunity to assess the defendant's mental state while in the courtroom. However, when the lawsuit is commenced and the defendant does not interpose an answer, and the plaintiff may not enter a default judgment[4] whilst knowing of this incapacity, a motion must be filed.

There is case law that states that the burden is on the plaintiff, who has notice that a defendant in the action is under a mental disability, merely to bring that fact to the court's attention and then permit the court to determine whether a guardian ad litem should be appointed to protect such defendant's interests.[5] Even if a plaintiff determines that it lacks sufficient proof upon which to make a motion for appointment of a guardian ad litem, the plaintiff is nevertheless obligated to bring this fact to the court's attention so that the court can make a suitable inquiry as to whether a guardian ad litem is necessary to protect defendant's rights.[6]

Yet, there are unreported lower court decisions which state that the initial application for a guardian ad litem, merely alleging that upon information and belief the defendant is under a mental disability, is insufficient. The lower courts, in those decisions, did not even consider requesting a conference or further evidence in order to make its own determination regarding capacity.

Courts have found that merely stating that the party in question is "indecisive" is conclusory and not founded upon any evidence other than the attorney's desire to settle the case. A difference of opinion regarding settlement between the parties will be insufficient to warrant appointment of a guardian ad litem and there must be a showing that the individual suffers from something more serious than idiosyncratic behavior.[7]

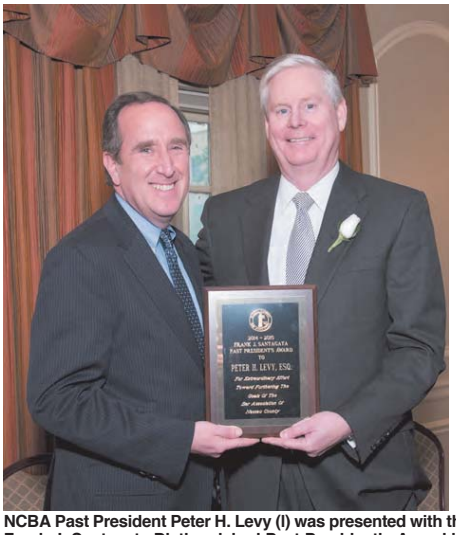
Is the allegation that the defendant resides at a mental hospital, while not revealing his current mental state or diagnoses, sufficient to conclude he is mentally incompetent? One might make the same argument regarding a resident at a nursing home. Does living at a nursing home automatically conclude that you are incapable of defending your rights? There are indeed numerous mentally competent patients who must remain at a nursing home for a long-term period due to recovery from an accident.

The answer, unfortunately, is unclear. When making a motion for a guardian ad litem on your own client's

See HIPAA, Page 14

NCBA then-President John P. McEntee (r) presents Hon. Peter B. Skelos with the President's Award.

Judiciary Committee Chair Rosalia Baiamonte received the Board of Directors' Award from then-President John P. McEntee.



NCBA Past President Peter H. Levy (l) was presented with the Frank J. Santagata Distinguished Past President's Award by then-President John P. McEntee.

(Photos by Hector Herrera)

MEMBERS ...

Continued From Page 1

Association at the sole discretion of the President. One of Immediate Past President McEntee's top priorities for his term was to enhance the Association's Lawyer Assistance Program (LAP), to provide expanded awareness, counseling and support to attorneys struggling with personal and professional challenges. Justice Skelos stepped in to help fashion a solution to provide funding through the Office of Court Administration for LAP to continue its superb work and counseling services.

"LAP is the most important service of this Association," McEntee said. "Justice Skelos' ability to achieve a consensus with all parties involved so that we could obtain the necessary funding is an example of true leadership."

Following approximately 15 years as a trial attorney in municipal and private practice, Justice Skelos has served as a Judge of the New York State District Court, a Justice of the Supreme Court, an Associate Justice of the Appellate Division and was re-elected to the Supreme Court and re-appointed to the Appellate Division in 2012. He has authored numerous scholarly opinions and is recognized as an insightful questioner from the bench.

Active at the Association, Justice Skelos was elected to serve a three year term as a Director on the NCBA Board of Directors, beginning in June. He also has served three terms as administrative co-chair of the We Care Fund, part of NCBA's charitable efforts, and he is a frequent lecturer and panel member for the Nassau Academy of Law Continuing Legal Education programs.

Directors' Award Honoree Rosalia Baiamonte

Rosalia Baiamonte, outgoing chair of the Judiciary Committee, received the Directors' Award, which is voted on by the NCBA Board of Directors. One of the most important services for the community provided by NCBA is screening candidates who are running for judicial office, as well as certified arbitrators and mediators. This year, Baiamonte oversaw a record 51 screenings including attorneys who serve as impartial mediators and arbitrators on NCBA's Mediation and Arbitration Service.

"Rosalia did an outstanding job, making sure all of the prospective candidates were evaluated properly and fairly," NCBA President John P. McEntee said. "She maintained the professionalism and integrity of the process and was able to perform extraordinary work under difficult circumstances."

Baiamonte focuses her practice on matrimonial and family law. She served as an arbitrator in the Early Neutral Evaluation Program in the Nassau County Supreme Court, and currently serves as a Discovery Referee in the Supreme Court Matrimonial Center as well as a Part 137 Fee Arbitrator for the 10th Judicial District. She earned her law degree at Syracuse University College of Law.

Appointed to the NCBA Judiciary Committee in 2009, Baiamonte is serving her third consecutive two-year term, currently as the Chair. She is a director on the Board of the Association, and next year will chair the Matrimonial Law Committee, NCBA's largest committee. She is also an active member of the New York State Bar Association, currently serving as the Financial Officer of the Family Law Section, and a co-chair of its Continuing Legal Education Committee. She lectures extensively at Nassau and other bar associations, law schools and law intern programs.

Santagata Award Honoree Peter Levy

The Frank J. Santagata Past President Award is presented when a past president out of office for three years or more remains vigorously committed in continuing to provide service to the Association. Peter Levy, who served as President in 2008-2009, received the award this year. "There is no member of the Association who is more universally respected or dedicated to the Association," McEntee said.

In private practice for almost 30 years, Peter Levy is based in Jericho where he concentrates in the areas of commercial litigation, personal injury, real estate, wills and estates. He is a graduate of the Tulane University School of Law and the Wharton School of Business of the University of Pennsylvania.

In addition to his terms as an officer and member of the NCBA Board of Directors, Levy currently serves as Co-Chair of the We Care Fund, part of the Nassau Bar Foundation, the charitable arm of the Bar Association, and is Chair of the NCBA's By-Laws Committee. He also has chaired the District Court Committee, Community Relations Committee, County Clerk's Committee and General Practice Committee. He has served as a student mentor, Nassau Academy of Law lecturer, Grievance Committee member, Mock Trial coach and has authored numerous task force reports for the NCBA.

Levy has been a member of the House of Delegates of the New York State Bar Association, and has chaired NYSBA's statewide Committee on Lawyers and the Community. He has served on the Board of Directors of Nassau/Suffolk Law Services since 1994.

He has been honored many times for his dedicated service to the Association. Peter Levy has received the Thomas Maligno Pro Bono Attorney of the Year, the New York State Bar Association President's Pro Bono Service Award, the Stephen Gassman We Care Award, and the Nassau County Bar Association's President's Award (twice).

"Although he has served in many capacities at NCBA, he continues to give of himself to make the Bar Association a better place," McEntee said.

Outside of the legal profession, Levy has been active in the youth services community on Long Island. He has chaired the Coalition of Nassau County Youth Service Agencies for over 19 years and served as Board President of the Five Towns Community Center for 6 years. He is a former trustee of Temple Beth El of Cedarhurst.

HIPAA ...

Continued From Page 3

behalf, your client can waive HIPAA and all diagnoses may be presented to the court. However, the case law does not provide guidance as to what is acceptable to put in the initial motion papers for an opposing party's guardian ad litem when a judge has not had the opportunity to make a determination in person.

According to some courts, the motion papers may contain the title of the disorder that the defendant suffers from, such as bipolar disorder, and that the defendant has been hospitalized or resides in a nursing home due to this disorder.[8] Setting forth facts regarding the defendant's living conditions, whether another person cares for the defendant on a daily basis, and his or her general daily mental state (i.e. discussion of conspiracy theories, paranoid delusions, general combative nature, chronic irrational and agitated state attributable to alcohol and substance abuse) will be sufficient for the court to appoint a guardian ad litem.[9]

HIPAA violations have not been alleged where the client's affidavit states limited facts "upon information and belief." Examples include general allegations that:

- Upon information and belief, she is most likely not aware of where she is and why she is in the nursing home.
- Upon information and belief, the defendant cannot adequately represent her rights and interests in the above-captioned action.
- Upon information and belief, the defendant has compromised mental capacity and is unable to handle her affairs.

Lastly, it behooves the movant to offer the defendant's medical records to the court for in-camera review to afford the court an opportunity to make a suitable inquiry as to whether a guardian ad litem is necessary to protect the defendant's rights. It appears that any further disclosure of the defendant's physical and mental conditions in the movant's public document would violate HIPAA.

Melanie I. Wiener, Esq. is the Director of the Nursing Home Litigation Department at Abrams, Fensterman, Fensterman, Eisman, Formato, Ferrara & Wolf, LLP.

1 CPLR 1201; *see also Anonymous v. Anonymous*, 256 A.D.2d 90, 90 (1st Dept. 1998).
2 CPLR 1202(a)(2), (3).
3 *Sarfaty v. Sarfaty*, 83 A.D.2d 748, 749 (4th Dept. 1981); *Rakiecki v. Ferenc*, 21 A.D.2d 741, 741 (4th Dept. 1964).
4 *See* Vincent C. Alexander, Practice Commentary, CPLR 1203; *Rakiecki*, 21 A.D.2d at 741.
5 *Sarfaty*, 83 A.D.2d at 749.
6 *New York Life Ins. Co. v. V.K.*, 184 Misc.2d 727, 733 (Civil Ct., N.Y. Co. 1999).
7 *See, e.g., In re Foreclosure of Tax Liens by the City of Ithaca*, 283 A.D.2d 703, 704-05 (3d Dept. 2001).
8 Complaint, *Greenberg v. Blake*, 2011 N.Y. Slip Op. 34127(U) (Sup. Ct., Kings Co. Sep. 9, 2011), 2010 WL 10873640.
9 *Riverside Park Community LLC v. Stubbs*, 39 Misc.3d 1219(A), at *5-6 (Civil Ct., N.Y. Co. 2013); *Anonymous*, 256 A.D.2d at 90.