Experiential Wisdom

Insightful Perspectives on Dementia, the Legal Profession and the Law

By Robert Abrams

According to Michael Miller, Esq.[1], President-Elect Nominee of NYSBA:

> *Lawyers serve on the front-lines of many compelling social issues, but few, if any, are more profound than those relating to dementia. Dementia poses extraordinary challenges for the individuals directly affected, as well as for their loved ones. Lawyers can't cure dementia, but those practicing in the areas of elder law and estate planning are uniquely qualified to help develop an effective financial and care plan. Whether representing individuals and family members facing this scourge for a fee or pro bono, lawyers play an important role in making the best of an extraordinarily difficult and frightening reality in the human drama.*

Robert Freedman, Esq.[2] provides further insight as to why dementia has had a major impact on the legal profession and the law:

> *There is a high correlation between aging and dementia. The field of elder law is burgeoning not just because of demographic growth but because of the epidemic of dementia that accompanies the increase in life expectancy in the US and across the world. The dual phenomenon of contemporaneous growth of dementia and longevity created a vital need for a legal community response.*
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> *The disease is devastating. It destroys people and their families. There is no cure and no effective treatments. Nothing relieves the burden of the care that is needed. Family and informal caregiving takes a huge toll on the caregiver. Paid caregiving is enormously expensive, often wiping out a lifetime of savings. The burden on the family is enormous. There is very little that can be done. However, there is legal and financial planning that will ease the burden and make it better for the caregivers and the family. I tell my clients that I cannot help cure the patient or personally care for the patient, but I can give advice that will ease (not eliminate) the financial burden by explaining how to utilize Medicaid. I can provide legal documents like a HIPAA Medical Privacy Release, a Health Care Proxy and a Living Will to help the family deal with medical decisions. And I can provide legal documents like a Power of Attorney, Trusts and if necessary a Guardianship that will allow the caregivers to deal with the legal and financial issues that arise when the patient lacks the capacity to handle them. I cannot solve or ameliorate the burden of care and the pain of the disease as it destroys a loved one, but I can make it easier to deal with.*
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> *I will be the first to acknowledge that the people on the front line as caregivers, whether informal or paid, or as a support group leaders or participants have the more difficult roles, but I take comfort in the belief that I can contribute to make life a little bit easier for my clients and their families.*

The Hon. Justice H. Patrick Leis, III,[3] who has presided over hundreds of guardianship matters and has written many seminal decisions, including *In re Buffalino (James D.)*[4] and *Christopher C. v. Bonnie C.*[5], shares Mr. Freedman's belief that lawyers and judges must be sensitive to and understanding of the unique challenges faced by individuals with dementia and their loved ones. In particular, Judge Leis urges his colleagues to be patient and observant in assessing and communicating with individuals who have dementia:

> *Dementia is a condition effecting more and more people who enter our Guardianship courtrooms. What it means to the courts is that the usual and customary methods of communicating with an individual need to be reconsidered. Dementia not only affects the individual, it impacts the*

individual's family as well. This also must be recognized. For the family, it means taking on responsibilities previously handled by the individual which can often create resentment, impatience and fatigue.

For the individual who has dementia, a gradual slip in memory and inability to be independent is terrifying and at times overwhelming. Dealing with this condition requires great patience, understanding and tolerance. People with dementia try to hide the fact that their memory is failing and they become anxious performing tasks that they used to do with ease. Anger and anxiety are a common reaction when they perceive what is happening to them, for make no mistake – they know something is happening to them. Accordingly, adjustments to the courts' interactions with them and the court system's response to their defensiveness and anger, must be made.

We also need to recognize that in addition to the traditional forms of elder abuse – physical, emotional and financial – there is another form. This fourth form of abuse is the way that we as a society (including attorneys, judges and court staff) react to and look at a person who is suffering from a mental limitation.

How to recognize the condition and serve the individual is an evolving task. Interacting in a kind and understanding manner is extremely helpful in opening a door of communication. All attorneys, judges and court staff need to look at the person with dementia or any other condition resulting in diminished mental capacity, with a non-judgmental, non-critical, caring eye in order to accurately evaluate the person's wishes and concerns. The stress of being in a new environment makes it very difficult for the court to be able to competently assess the mental capacity of a frightened, defensive and stressed individual and to assess the person's ability to communicate his/her needs and wishes.

I have personally conducted a guardianship hearing in a nursing home where the initial recommendation of the court evaluator had been that the Alleged Incapacitated Person (AIP) was incapable of meaningfully participating in the hearing, but because of the use of a therapy/emotional support dog obtained by family members, the court was not only able to communicate with the AIP but also was able to discern the individual's needs and wishes.

Being able to look into a person's eyes and see the essence that is not affected or limited by the particular mental or physical condition is a great help in relaxing that individual and enabling him or her to communicate. Even if the communication is the blink of an eye or the raising or lowering of the thumb, the communication has been made possible. Being able to imagine what it would be like to be in the shoes of a person with diminished capacity goes a long way in opening the door for understanding and communication. Empathy and compassion are indeed a universal language in and of themselves.

In addition to and in furtherance of the need for judicial sensitivity expressed by Justice Leis, the Hon. Thomas P. Aliotta[6] cautions the legal community that a person who is diagnosed with dementia may not automatically require the appointment of a guardian. If, however, a determination is made pursuant to Article 81 of New York's Mental Hygiene Law that the appointment of a guardian is necessary, the guardian must only be authorized to make decisions on behalf of the incapacitated person which constitute "the least restrictive form of intervention consistent with the person's functional limitations and the likelihood of harm because of the person's inability to adequately understand and appreciate the nature and consequences of such functional limitations."[7]

Judge Aliotta further reminds us that MHL § 81.29 specifically addresses the rights retained by an incapacitated person if a guardian is appointed:

(a) An incapacitated person for whom a Guardian has been appointed retains all powers and rights except those powers and rights which the Guardian is granted; [and]

(b) Subject to subdivision (a) of this section, the appointment of a Guardian shall not be conclusive evidence that the person lacks capacity for any other purpose, including the capacity to dispose of property by will.[8]

Therefore, pursuant to Article 81 and other New York statutes, every New York adult is presumed to have capacity and, if ultimately a court determines the person has diminished capacity and requires assistance, such assistance should be "tailored to the individual needs of that person, which takes into account the personal wishes, preferences and desires of the person, and which affords the person to the greatest amount of independence and self-determination and participation in all the decisions affecting such person's life."[9]

This legislative objective begs the question as to the competence of judges and attorneys to not only assess capacity but to truly appreciate the capacity continuum. Throughout this special issue on the dementia crisis, we have emphasized that there are more than 100 types of dementia and each type has its own unique set of consequences be it, *inter alia*, an assault on its victims memory, judgment, motor skills, behavior, appetite, sleep habits and/or activities of daily living. What training have most judges and lawyers participated in, if any, to truly understand the nature, nuances and extent of the dementia epidemic? Moreover, should judges and lawyers rely on anecdotal evidence of an alleged incapacitated person's need for assistance and/or on input from physicians and other health care professionals?

I discussed this dilemma with Harry Ballan,[10] Dean of the Touro College Jacob D. Fuchsberg Law Center. Dean Ballan and I discussed the need for the legal community to collaborate with other professionals including, but not limited to, scientists and physicians. As a result of our discussions, Touro Law Center's Aging and Longevity Institute plans to present a special program in June of this year titled "Dementia, Science and the Law: A Need for Mutual Collaboration."

Elkhonon Goldberg, Ph'D, ABPP-CN,[11] an internationally renowned neuropsychologist and cognitive neuroscientist, provided Dean Ballan and I with insight as to the importance of an inter-disciplinary collaboration:

Increased longevity has resulted in profound demographic changes characterized by a large number of aging individuals with dementia in society. This has brought forth a host of unique legal issues requiring novel approaches and deeper understanding of the nature of the clinical conditions at hand. One set of issues involves the assessment of the elderly individual's competence to make testamentary, legal, medical, financial, and business decisions. Another set of issues relates to the diminished capacity of an elderly individual perpetrating a criminal act, e.g., traffic accident with grave consequences due to "driving while demented," shoplifting, or other antisocial behaviors due to dementia. Yet another set of issues relates to an accurate causal attribution of cognitive impairment (e.g., is it due to a medical procedure, an injury suffered in a fall, or due to a preexisting dementia).

A casual reliance on courtroom "common sense" falls short in addressing these issues. An aging individual may have an intact bank of general knowledge, relatively intact memory, and even a rhetorical ability to answer questions whether it is OK to shoplift if you don't have enough money to buy what you want, to run a red light when in a hurry, or to trust total strangers with your money, yet be unable to make sound decisions and exercise sound judgment in real life. Such breakdown of judgment and decision making is caused by an impairment of so-called executive functions, which is among the earliest manifestations of dementia and can be quite elusive to the untrained eye of a lay person or a lawyer.

To accurately address these and many other issues arising on the intersect of dementia and the law, special expertise and specialized procedures are often required. The field of neuropsychology offers such expertise, as well as specialized neurocognitive tests designed to be sensitive to cognitive impairment and to assess various aspects of cognition in a precise quantitative way. If this approach to diagnosis were to be adopted or even considered by the courts, the jurisprudence of capacity could be significantly, perhaps dramatically, altered. That

could be a signal moment in reconciling legal and scientific concepts in the interest of justice and the fair administration of the law.

Both Dean Ballan and Dr. Goldberg recognize that the dementia epidemic requires a joint "medico-legal" partnership.

The legal community has and also needs to continue to partner with representatives of state government to ensure that the dementia-induced legal needs of all New Yorkers are met. In this light, I was able to facilitate the formation of New York State Legal Services Initiative, which is a collaboration of NYSBA, the New York State Office of Court Administration (OCA), the New York State Office for the Aging and other state agencies. According to Vera Propser, Ph'D,[12] who recently retired as the Initiative's director:

> *The Initiative's Partnership was established in 2012 and is an effective collaboration at the policy level among the legal community, the court system, and the human services networks. Promoting this same type of collaboration at the community level is a major goal of the Partnership's activities.*
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> *We have found that where such collaboration exists, everyone involved in a client's presenting problem understands how the social, health, legal, and familial factors shaping that problem are having an interactive impact, and that addressing individual factors or issues in isolation often leads to repeated occurrences of the same problem. The Initiative's activities promote using a collaborative, holistic approach to more successfully effect a sustained resolution of a client's situation. Such an approach is particularly important when assisting caregivers, who, in addition to assuming responsibility for the problems and issues of the family member receiving the care, can experience their own physical and emotional stress, health decline, financial problems, job loss, marital or family discord, and other problems as a result of the caregiving responsibilities. The multiple impact of caregiving duties is exacerbated when the individual requiring care and assistance has Alzheimer's Disease, other forms of dementia, or a developmental and/or intellectual disability.*

As best told by Greg Olsen,[13] acting director of the state Office for the Aging, the Legal Services Initiative is a collaboration that actually provides meaningful data and assistance:

> *It became increasingly clear that significant numbers of older individuals, persons with disabilities and families could not find access to affordable legal help in civil matters. The intent of the State's Legal Services Initiative was to move from anecdote to science via 7 statewide surveys to understand in more depth the experiences of individuals, judges and lawyers and to use that data to set priorities and to develop actions and strategies that will enhance the availability of affordable legal assistance and help people gain access to this assistance.*
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> *While the Initiative focused on the status of legal service for older adults, people of all ages with disabilities, and the unpaid caregivers of these two populations, the activities that the Initiative's Partnership is employing will have a positive impact across all community members. For example, "access" is affected by the quality of communication skills. As an activity to improve access, the Partnership is developing a CLE training course that is meant to improve the effectiveness of communication between attorneys from all legal disciplines and their clients, many of whom have various types of disabilities, or are experiencing aging-related physical and cognitive changes, or have limited English-speaking ability, or their cultural norms and expectations differ from other population groups. Another example is a program of community-based Learning Sessions that will be available to all community members. The intent is to increase understanding of legal topics (such as power of attorney, hospital observation status, understanding dementia), legal processes (such as guardianship, eviction, child custody), court room procedures, and alternative resources for affordable legal help. These learning sessions can help individuals and families better understand situations they encounter and can help prepare them for actively taking alternative actions before problems turn into crisis situations.*

Acting Director Olsen and Dr. Prosper both mention the challenge for family members of individuals with dementia. Bob Lipp[14] provides insight regarding the practical and common non-legal challenges attorneys confront when meeting with an individual with dementia and family members:

> *When the subject of the conversation concerns a family member who has been diagnosed with dementia, it requires a sensitivity and understanding that addresses a range of issues. These issues run the gamut, from the psychological impact, to discussing and dealing with a myriad of business, financial and legal matters. The attorney's ability to relate to and appreciate the possibility that the client may be hampered by various levels of denial, guilt, fear, or even greed, make it incumbent upon him or her to be a great listener and to rely on non-verbal communication to fully understand and relate to the concerns of the client. It's a burdensome challenge for an attorney who may find themselves caught up in dealing with a range of human emotions, while addressing practical and necessary realities.*

Putting the practical realities and family dynamics aside, attorneys often experience serious ethical challenges as they must confirm "who" is the client – the individual with dementia and/or the one or more family members. The following is a sample of potential family conflicts that may arise:

> *1. A commencement of a divorce action by the well spouse. Such an action may be commenced to expedite the eligibility of the spouse with dementia for Medicaid and other government programs, prevent the financial impoverishment of the well spouse and/or simply to enable the well spouse to move on and not be responsible to pay medical bills or provide care.*
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> *2. Concerns by some family members that the cost of care will reduce if not eliminate a possible inheritance.*
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> *3. Disputes as to how, by whom, and how often care should be provided.*
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> *4. What family members have a right to reside in or make a claim of ownership of the personal residence of the family member with dementia.*
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> *5. Disputes between children of first marriage and current spouse of individual with dementia.*
>
> *6. Family members who pressure a loved one with dementia to change their estate plan.*

The list could go on and on. The stress of caring for a loved one with dementia combined with an array of related financial concerns, emotional entanglements and the fear of the unknown often results in familial upheaval. When such scenarios occur, the ability to serve as a family attorney is difficult and arguably inappropriate as the objectives of two or more family members may be in conflict.

Challenges of a different nature occur when an attorney represents a third party and/or entity that is at conflict with an individual with dementia. While the attorney's ethical duty to his or her client is clear, non-legal factors may force the attorney to recommend that his or her client exercise restraint and sensitivity beyond what the law requires.

For example, Lawrence DiGiovanna,[15] Esq., provides the challenges that exist for attorneys representing landlords:

> *In the context of a multiple dwelling, particularly cooperatives and condominiums, the landlord, has an obligation to maintain a level of quiet enjoyment for the residents, especially with respect to common areas of the building or outdoor portion of the property. This can be particularly challenging when an individual with Dementia is a member of the community. Possible offensive behaviors can range from excessive noise, and/or hoarding which presents fire hazard, to abusive and aggressive conduct although, perhaps, not criminal, to a resident's failure to observe basic hygiene standards of both their person and dwelling.*

The landlord or other management body is obligated to take action to suppress the disruptive conduct. Of course, this should be balanced with a compassionate concern for the welfare of the offending individual who is part of the community. Often it is appropriate to consult with Adult Protective Service or a similar agency for a possible intervention and to determine whether that will stem the conduct. Sometimes, family members can intervene.

The challenge of balancing the rights and interests of an individual with dementia and the rights and interests of others places ethical and legal obligations on all counsel. In a litigation context, for example, the attorney for a plaintiff who commences an action against an *ex parte* defendant who appears to have diminished mental capacity must inform the court and request the appointment of a guardian ad litem.[16] The question for the attorney (and the judge) is at what point does the defendant meet the statutory definition of a guardian ad litem, i.e., that the party is "incapable of adequately prosecuting or defending his rights.[17]

Possibly even more troubling for attorneys are the potential ethical and/or malpractice consequences when a working partner or employee in their law firm appears to be experiencing a cognitive decline and/or dementia. Moreover, many of us have witnessed and in some cases, provided legal services to judges and lawyers who have dementia.

Deborah A. Scalise,[18] a partner in the firm of Scalise & Hamilton, LLP, which focuses its practice on the representation of professionals in professional responsibility and ethics matters, shares her approach to recognize dementia in colleagues, in hopes of avoiding embarrassment or disciplinary action:

For lawyers who lack capacity, the newly enacted Rules for Attorney Disciplinary Matters, effective October 1, 2016, at 22 N.Y.C.R.R. § 1240.14 titled Attorney Incapacity, provide for a lawyer to be suspended if he or she lacks capacity. Judges with dementia retire or are removed based on their conduct.

Very often, a lawyer or judge with an exemplary 30- to 40-year career and an unblemished reputation hits a certain age, usually between their 60s and 70s, and complaints about their behavior or lack of judgment are filed. These complaints may be indicative of dementia. The complaining party is a client, an adversary, a coworker, an employee/former employee, or a litigant. The complaints are initially made to the lawyer or judge, who assures the complaining party that he or she will address the issue. If there is no response and the lawyer or judge works with others, the complaints are next made to their partners or an administrative judge. And, finally, when the complaining party is frustrated, he or she complains to either a Grievance Committee or the Judicial Conduct Commission. This is where an attorney or an administrative judge may have to get involved. They have the delicate task of identifying the issues in order to defend the lawyer or judge to protect their individual interests while balancing the interests of a law firm and its clients, or the court, and the litigants.

The first tool is intake. Our firm has a client fill out client intake forms that request information, including date of birth; year of admission; jurisdictions where admitted; the number of pending complaints; whether the client has any history of complaints or has ever been sanctioned by any court or in any jurisdiction; and whether he or she has been subject to malpractice actions. The intake form provides invaluable information and clues prior to the consultation. For instance, the following answers raise issues that need to be explored in the interview: the number of recent complaints, sanctions, and/or malpractice actions within the last five years, and the lack of a prior history in a career that spans decades. While everyday problems such as business partnership break-ups, marital issues, or caring for a sick relative may contribute to erratic conduct, there are occasions where the answers to the aforementioned questions are telltale signs of dementia. Thus, it is crucial for an in-person meeting.

The person handling the complaint should not delegate this to someone else because of the sensitive nature of the issues. This is especially so because the lawyer or judge who may have dementia (or other mental health issues) may be adept at covering his or her erratic behavior

and/or may not even be aware that his or her behavior is erratic. And, I am sure that we can all agree that lawyers and judges are persuasive, so, in all likelihood, they will be on their best behavior to get the interviewer to like, agree with, and defend them. A seasoned lawyer or administrative judge should have the requisite experience to observe and scrutinize the lawyer's or judge's behavior.

At the beginning of the interview, the facts surrounding the complaint, including a chronological account of what happened, should be discussed with the lawyer or judge present, and in turn, the lawyer or administrative judge to observe. While the lawyer or judge may be upset by the complaint, his or her answers to the following questions are useful: does he or she have command of the facts and is his or her reasoning logical? Does he or she provide incomplete facts or lack recall of the facts? Are they missing documents? Is his or her reaction to the questions posed disproportionate to what is asked, such as a tirade in response to a simple factual question or giggling when you mention that they may be subject to discipline for their behavior? These are all telltale signs of dementia.

The following questions during the interview are also helpful in every case alleging misconduct. They allow us to determine whether outside factors are causing or contributing to the questionable behavior or judgment:

1. Have you been diagnosed with any medical issues over the past five years? If so, what are they, when were you treated and by whom?

2. Have you been treated for any emotional or other mental health issues, including addiction to drugs or alcohol, over the past five years? If so, what are they, when were you treated and by whom?

3. Are you taking any medication?

4. Have you participated in any 12-step programs like Alcoholics Anonymous, Narcotics Anonymous, or Gamblers Anonymous?

5. Have you ever been arrested or convicted of a violation, a misdemeanor or a felony?

6. Have you been involved as a caregiver for any family member for medical or psychological or addiction issues? If so, what were they diagnosed with?

I turn to the New York Rules of Professional Conduct (RPC) at 22 N.Y.C.R.R. § 1200 Rule 1.14 – Client with Diminished Capacity, which sets forth an attorney's obligations when dealing with clients whose capacity is questionable. Rule 1.14 has three sections that appear to permit the attorney to use reasonable judgment to determine whether the client has the "capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason . . . ." and "the lawyer shall, as far as reasonably possible, maintain a conventional relationship with the client." If the lawyer has done so and is unable to maintain the relationship, he or she looks to the next section, RPC 1.14(b), which provides,

[w]hen 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.

However, RPC 1.14(c) provides the following caveat:

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.

Therefore, lawyers dealing with a client with dementia must carefully navigate these issues to ensure they are protecting the client's interests and they may not substitute their judgment for that of the client. If it is necessary to contact a relative or request that the court appoint a guardian, the lawyer must abide by the client's directives, until someone can make decisions for the client. This issue is more difficult when the person with dementia is a lawyer or judge, because they, as officers of the court, are entrusted with protecting the interests of their own clients or the litigants who appear before the court.

I submit that we, as a helping profession, should do our best to compassionately assist any lawyer or judge afflicted with dementia, who has had an exemplary career and who has well served the legal profession, to retire with his or her reputation intact.

Sadly, a few of us have even participated in guardianship matters where the incapacitated person was a former judge or lawyer who failed to plan. Timothy E. Casserly, Esq., CFP,[19] shares his experience:

I've worked with a number of lawyers and judges on their estate plans, but it's surprising how many of those are in their 70s and 80s who had nothing in place until we met. Too often, it's the classic case of the shoemaker's kids going barefoot as these lawyers do not have a basic will, power of attorney or health care proxy.

Hopefully, this issue of the *Journal* will motivate all of us to plan for ourselves, family members and our clients and, as Joan Robert, Esq.[20] reminds us, allow us to meet the needs of our clients in a timely, sensitive and humane manner:

Representing a client with diminished capacity presents ethical and practical dilemmas for the attorney. The ethical rules direct that as attorneys, we must maintain as normal an attorney-client relationship as possible. We must present the client's known wishes and advocate for his/her position. However, as human beings, we may wish to act in the best interest of the client, recognizing that the client's stated position may not be beneficial to him/her. When our client is no longer able to communicate, we must gauge the motivation and veracity of others furnishing us with information upon which we base our advice. In our practices, we must not lose sight of the fundamental ethical question: who is the client? Once we identify and remember whom we are representing, courts with the expertise and sensitivity to handle these matters should enable good outcomes to prevail.

Robert Abrams, Esq., Abrams, Fensterman, Fensterman, Eisman, Formato, Ferrara & Wolf, LLP. Mr. Abrams thanks his colleagues Christopher Renke, Esq., Sara Clark and Meghan Ivory for their assistance.

ENDNOTES

1. Michael Miller, Esq., Law Office of Michael Miller; President Elect Nominee, New York State Bar Association.

2. Robert M. Freedman, Esq. is a partner at the law firm of Schiff Harden, LLP. In 2016, Mr. Freedman received a lifetime achievement award from NYSBA's Elder Law Section.

3. Honorable Justice H. Patrick Leis, III, Supreme Court, Suffolk County.

4. *In re Buffalino (James D.)*, 39 Misc. 3d 634 (N.Y. Sup. Ct., 2013).

5. *Christopher C. v. Bonnie C.*, 40 Misc. 3d 859 (N.Y. Sup. Ct., 2013).

6. Honorable Justice Thomas P. Aliotta, Supreme Court, Richmond County, is an experienced and respected Guardianship judge.

7. MHL § 81.15 (c)(7) (McKinney 2004).

8. MHL § 81.29 (a) and (b) (McKinney 2010).

9. MHL § 81.01 (McKinney 1992).

10. Harry Ballan, Dean of the Touro College Jacob D. Fuchsberg Law Center.

11. Elkhonon Goldberg, Ph'D, ABPP-CN, clinical professor of Neurology, NYU School of Medicine; to learn more about executive functions and their breakdown, see Elkhonon Goldberg, *The New Executive Brain: Frontal Lobes in a Complex World*, Oxford University Press, 2009.

12. Vera Prosper, Ph'D, Former Director, New York State Legal Services Initiative, New York State Office for the Aging.

13. Greg Olsen, Acting Director, New York State Office for the Aging.

14. Bob Lipp, founder of Communication Masters, www.communicationmasters.net.

15. Lawrence DiGiovanna, Esq., Abrams, Fensterman, Fensterman, Eisman, Formato, Ferrara & Wolf, LLP.

16. CPLR 1201 provides the statutory circumstances under which a guardian ad litem is authorized or required in a civil action. More specifically, CPLR 1201 states, in relevant part, "[a] person shall appear by his guardian ad litem . . . if he is an adult incapable of adequately prosecuting or defending his rights." The procedure for the appointment of a guardian ad litem is provided in CPLR 1202.

17. CPLR 1201, 1203; *see* Practice Commentaries on CPLR 1203; *1234 Broadway LLC v. Feng Chai Lin*, 25 Misc. 3d 476, 483 (Civ. Ct., N.Y. Co. 2009); *see, e.g.*, *Mills v. Mills*, 111 A.D.3d 1306, 1307 (4th Dep't 2013); *see also* Stedmans Medical Dictionary 437900 (defining mental impairment as "a disorder characterized by the display of an intellectual defect, as manifested by diminished cognitive, interpersonal, social, and vocational effectiveness and quantitatively evaluated by psychological examination and assessment").

18. Deborah A. Scalise, Esq., is the immediate past Chair of the NYSBA CLE Committee and a member of the NYSBA Committee on Attorney Professionalism. She has served as Vice President of the Women's Bar Association of the State of New York (WBASNY), where she also serves as the Co-Chair of the Professional Ethics Committee. She is a Past Presi-dent of the Westchester Women's Bar Association and the White Plains Bar Association. She is the former Deputy Chief Counsel to the Departmental Disciplinary Committee for the First Judicial Department.

19. Timothy E. Casserly, Esq., CFP, Burke & Casserly, P.C.

20. Joan Robert, Esq., Kassoff, Robert & Lerner.