

Health Care Law

Representing Clients with Mental Illness

Attorneys in all areas of practice often confront not only clinical mental health issues, but also related legal mental health issues when meeting with potential or current clients. Whether a matrimonial attorney is representing a mentally ill parent fighting for custody, a landlord is dealing with complaints about a mentally ill tenant, or a criminal attorney is counseling a mentally ill defendant, it is likely that attorneys across all practice areas will come across legal mental health issues at some point in their career.

Unfortunately, the stigma surrounding mental illness can often lead to discrimination and prejudicial behavior. In too many cases, the lack of education about the intricacies of mental illness among attorneys, judges, court personnel and other parties to an action can lead to fear, prejudice and discrimination toward anyone struggling with a mental health problem.¹ The following is an overview of how mental health legal issues overlap with many other areas of legal practice and highlights the importance of these issues.

Matrimonial/Family Law

When the court considers questions of child custody it must make every effort to determine what is in the best interest of the child.² Although not determinative, the mental health and fitness of a parent is a relevant factor to be considered as part of this analysis.³

The parents in a contested custody case may put their own or the other spouse's physical and/or mental condition at issue. When the question of parental mental health is presented it is important that all parties, attorneys and the court understand the nature of the illness or disorder and how it may or may not affect the individual's parenting abilities. In New York and many other states, the appointment of a neutral forensic psychiatrist or psychologist is now essentially required in any custody litigation where parental fitness is questioned in order to provide the court with an unbiased professional opinion.⁴ There is a significant need to ensure that the court receives scientifically valid mental health information, and that the court has the ability to evaluate the validity of the expert's opinion.

It is important for matrimonial attorneys and their clients to understand the rules of confidentiality and access to mental health records under the Health Insurance Portability and Accountability Act (HIPAA) and related pertinent state mental hygiene laws.⁵ The mental health professionals who may treat a client, including psychiatrists, psychologists, social workers, and others, are required to keep all conversations and records confidential unless given permission to disclose such information.

However, when custody is at issue, there are exceptions to this rule and no privilege is absolute.⁶ For example, the judge can order that written treatment records be provided to the forensic evaluator, other parties and/or the court. Additionally, information that a client provides to a court-appointed mental health professional or forensic evaluator is not confidential. That individual's role is to investigate and report back to the court to assist the court in making a custody decision.



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Criminal Law

Individuals suffering from a mental illness are abundant in the criminal justice system. In fact recent statistics suggest that as many as one-third of all inmates suffer from serious mental illness.

The recidivism rates among these individuals is rather high, in part because of the court's failure to recognize mental illness as a factor that contributes to their continued criminal involvement and in larger part because there are no facilities or clinical interventions that assist on any substantive level. Long-term mental health care is almost nonexistent in the criminal justice system. Further, the current Mental Hygiene Law in New York that makes it difficult to involuntarily commit a mentally ill person to a hospital psychiatric unit, leads to an increase in the number of mentally ill persons in the criminal justice system.

Specialized courts for individuals with mental illness, such as mental health courts, are designed to divert these individuals from the criminal justice system and ensure that they receive the proper mental health treatment. The Nassau County Mental Health Court Program was established in 2008 "to provide a more effective response to the specific challenges posed by mentally ill criminal defendants."⁷ This court orders defendants with serious mental illnesses (such as schizophrenia or bipolar disorder) to participate in community based treatment and monitors their compliance with treatment, as an alternative to incarceration.⁸

However, space in these programs is limited. Admission to the Mental Health Court rests entirely in the discretion of the prosecutor which may present additional obstacles for criminal defendants to access meaningful treatment. Additionally, criminal defendants may be deemed too ill for Mental Health Court. Unfortunately, it seems jails have become institutionalized replacements for in-patient psychiatric care facilities.

Landlord/Tenant Law

Under federal law, tenants suffering from a mental illness or other disability have the right to apply for and live in a rental unit regardless of their impairment. Landlords, condominium boards and cooperative corporation boards of directors face special challenges when dealing with unit owners or tenant-shareholders who suffer from mental illness, psychological disorders and/or substance abuse. Landlords and building owners must be cognizant of any discriminatory housing practices in order to avoid violating such laws.

Co-op and condo boards have to be careful not to violate any federal laws that protect mentally ill tenants, such as the Fair Housing Act or the Americans with Disabilities Act.⁹ The federal Fair Housing Act and the Fair Housing Amendments Act state that landlords cannot discriminate against tenants or prospective tenants because of a disability.¹⁰ The law protects persons with a mental or physical disability that substantially limits a person's ability to perform one or more major life activities; or a person that has a record of the disability; or a person that is considered by others as having the disability.¹¹ Protected disabilities include mental illness, certain drug addictions, mobile, visual and hearing impairments, developmental disabilities, and alcoholism, among others.

Additionally, landlords are prohibited from asking discriminatory questions about whether an individual has a disability or the severity of that disability. Issues may arise as to reasonable accommodations, modifications to a rental unit, and situations where a tenant may pose a direct threat or risk of harm to him or herself or other individuals.

Early intervention by an attorney experienced in the mental health legal landscape can provide guidance in navigating the frequently complex laws relating to intervention in situations involving persons with mental illness and/or substance abuse issues.

Health Care Proxies and Powers of Attorney

When meeting with a potential or current client, questions may arise as to who can make medical or financial decisions for an individual and how a family can ensure that an individual is financially taken care of and protected from abuse. The law allows for several avenues by which other family members or trusted individuals can make decisions for an individual suffering from a mental illness.

A Health Care Proxy is a legal document that allows an individual, the Principal, to appoint a trusted individual, such as a family member or close friend, as his/her Agent, to make health care decisions in the event that the Principal loses the ability to make decisions for him or herself.¹² The Principal must have capacity in order to validly execute an advanced directive such as a Health Care Proxy.¹³ Hospitals, doctors and other health care providers must follow the Agent's decisions as if they were the Principal's own.

In the event that the individual lacks the capacity to appoint an agent, the Family Health Care Decisions Act allows for family and/or friends to make decisions even if the individual does not execute a Health Care Proxy.¹⁴ This Act creates a hierarchy of decision makers including a legal guardian, spouse or domestic partner, adult child, parent, brother or sister, or close friend.¹⁵ It is important to note, however, that neither an Agent nor Surrogate can make decisions to involuntarily hospitalize an individual or force the individual to take medication or related treatments over his/her objection.

The preparation and execution of a Durable Power of Attorney is one way to ensure that an individual's finances

are protected, allowing another individual the ability to make financial decisions on behalf of the mentally ill individual.¹⁶ In New York, a valid Power of Attorney necessitates the signature of a principal with capacity.¹⁷ "Capacity" means the ability to comprehend the nature and consequences of the act of executing and granting, revoking, amending or modifying a power of attorney or any provision in a power of attorney, or the authority of any person to act as agent under a power of attorney.¹⁸ A Power of Attorney authorizes the Agent, called an "Attorney-in-Fact" to make all or only specific financial decisions while the person still has capacity and also when that person loses capacity.

Wills and Trusts

Another option for protecting an individual's assets is the creation of a Supplemental Needs Trust.¹⁹ A Supplemental Needs Trust enables a person under a physical or mental disability, or an individual with a chronic or acquired illness, to have, held in Trust for his or her benefit, an unlimited amount of assets.²⁰

This tool is very important for protecting access to government benefits. Any assets placed in this kind of trust will not affect an individual's eligibility for Medicaid, Social Security Disability, or Social Security Income provided that the funds are used to supplement not supplant benefits already received. In a properly-drafted Supplemental Needs Trust, those assets are not considered countable assets for purposes of qualification for certain governmental benefits.

A Last Will and Testament is a legal document that expresses an individual's wishes regarding his/her assets and the beneficiaries who should receive them. In order for a will to be valid, the testator must have testamentary capacity, or mental capacity.²¹ An individual lacks testamentary capacity if he is unable to understand both the extent and nature of his property, the natural objects of his bounty, and the disposition of that property, and unable to relate these elements to one another and form an orderly desire regarding disposition of the property.

Proper estate planning tools can help an individual and his/her family protect assets and aid in providing for loved ones with special needs. When drafting documents such as a trust or will, it may be prudent to include specific provisions about distributions to incapacitated persons, or substance or alcohol users, such as allowing distributions to be made to a guardian or the requirement of drug or alcohol testing and treatment before a distribution can be made.

Caring for individuals with mental illness is one of the greatest healthcare challenges in our society. In addition to the clinical mental health issues there are multiple legal mental health issues that affect all legal practice areas. With the assistance of legal professionals, who have the knowledge of the mental health statutes and judicial decisions, and the experience, in both the court room and the community, it is possible to achieve a positive legal outcome for those who struggle with mental health issues.

PRO BONO ATTORNEY OF THE MONTH



Ashka Patwa

BY MICHAEL HEFFERNAN AND SUSAN BILLER

It is with great pleasure that Nassau/Suffolk Law Services' Volunteer Lawyer Project (VLP) and the Nassau County Bar Association recognize Ashka Patwa as our most recent Pro Bono Attorney of the Month. This month's award honors an attorney who has displayed incredible passion and dedication for the clients she represents. Ms. Patwa has volunteered for Nassau Suffolk Law Service's VLP Landlord/Tenant Attorney of the Day Project since 2012, providing tenants with much needed representation which they would not otherwise be able to afford. Ms. Patwa has devoted over 30 hours in the past year assisting tenants with their disputes, helping many remain in their residences who would otherwise be faced with eviction and rendered homeless.

Ms. Patwa graduated from SUNY Binghamton in 2005, earning her Bachelor of Arts degree in Philosophy, Politics, and Law, with a minor in History. She earned her J.D. from Hofstra University School of Law in May 2008, and became a legal intern at Horing Welikson and Rosen, P.C. She joined the firm as an associate in June 2009 concentrating in Real Estate/Landlord-Tenant Litigation. Ms. Patwa currently oversees the firm's Nassau County Landlord-Tenant practice in the Nassau County District Court, which resolves residential and commercial summary proceedings. She is also a part of the firm's Administrative Law Department, where she

has succeeded in assisting clients challenge proceedings before the New York State Division of Housing and Community Renewal (DCHR).

While Ms. Patwa and her firm represent landlords in litigation, her work at the VLP is on the opposite side of the case representing tenants. What she finds most rewarding about her work at the VLP is getting the chance to understand both sides of landlord-tenant disputes. Ms. Patwa's work at the VLP allows her to see all perspectives involved in landlord-tenant litigation and more deeply understand the tenants' position. The tenants are indeed grateful for her assistance.

Ms. Patwa encourages more attorneys to provide pro bono legal services to help those who cannot afford an attorney. Not only does pro bono service help clients in dire need of an attorney, but it can also provide the attorneys with important new perspective on a case. Best of all are the personal rewards of helping individuals who may not be able to navigate the courts and advocate effectively for themselves.

"Pro bono service helps you understand the position that the clients are in and the difficulties they are experiencing and helps you sympathize with the client. Also, pro bono service may provide you with the opportunity to represent another side of litigation allowing you to understand all aspects of the law you work in."

According to Roberta Scoll, Staff Attorney and Coordinator of the Attorney of the Day Program: "Ashka brings a special talent with her when she volunteers with the Attorney of the Day Project.... She is always cheerful and her exuberance is contagious. We are so lucky to have her share her landlord/tenant experience with us and her passionate representation of our clients can be seen in the settlements that she obtains."

In addition to her incredible commitment to pro bono service with the VLP, Ms. Patwa is a member of the Nassau County Bar Association and Nassau County District Court Committee. She is admitted to practice in the U.S. District Courts of the Eastern District of New York and Southern District of New York. Ms. Patwa is also fluent in Gujarati and Hindi.

Ms. Patwa is best known to the Volunteer Lawyer's Project for her tremendous work ethic and dedication to aiding clients with their landlord-tenant disputes. Her devotion to helping Nassau County residents in need is indeed admirable; we are very proud to honor Ms. Ashka Patwa as Pro Bono Attorney of the Month.

The Volunteer Lawyers Project is a joint effort of Nassau/Suffolk Law Services and the Nassau County Bar Association, who, for many years, have joined resources toward the goal of providing free legal assistance to Nassau County residents who are dealing with economic hardship. Nassau/Suffolk Law Services is a non profit civil legal services agency, receiving federal, state and local funding to provide free legal assistance to Long Islanders, primarily in the areas of benefits advocacy, homelessness prevention (foreclosure and eviction defense), access to health care, and services to special populations such as domestic violence victims, disabled, and adult home residents. The provision of free services is prioritized based on financial need and funding is often inadequate in these areas. Furthermore, there is no funding for the general provision of matrimonial or bankruptcy representation, therefore the demand for pro bono assistance is the greatest in these areas. If you would like to volunteer, please contact Susan Biller, Esq. 516-292-8100, ext. 3136.

MENTAL ...

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1 Michael J. Fitzpatrick, *How Shootings Stigmatize People Living with Mental Illness*, NAMI blog, available at <http://blog.nami.org/2013/09/how-shootings-stigmatize-people-living.html>.

2 *Eschbach v. Eschbach*, 56 N.Y.2d 167, 171 (1982); See also Domestic Relations Law §§ 70,

240(1); *Matter of Bennett v. Jeffreys*, 40 N.Y.2d 543 (1976); *Matter of Gloria S. v. Richard B.*, 80 A.D.2d 72, 76 (2d Dept. 1981).

3 See *Matter of Darlene T.*, 28 N.Y.2d 391, 395 (1971); *Rosenblitt v. Rosenblitt*, 107 A.D.2d 292, 293-294 (2d Dept. 1985); see also *Matter of Shepard v. Roll*, 278 A.D.2d 755, 756-757 (3d Dept. 2000).

4 *Stern v. Stern*, 225 A.D.2d 540, 541 (2d Dept. 1996); See, *Vernon Mc. v. Brenda N.*, 196 A.D.2d 823 (2d Dept. 1993).

5 Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191 (HR 3103), 110 Stat. 1936 (1996); See, e.g., N.Y. Mental Hyg. Law § 33.13.

6 Courtney Waits, *The Use of Mental Health Records in Child Custody Proceedings*, 17 J. Am. Acad. Matrim. Law 139 (2001).

7 Jacqueline Rosenblum, *Demystifying the Nassau County Mental Health Court Program*, Nassau Lawyer, at 7 (June 2012).

8 *Id.*

9 42 U.S.C. § 3601-3619; 42 U.S.C. § 12101.

10 42 U.S.C. § 3601-3619, 3631.

11 42 U.S.C. § 3602(h).

12 See Pub. Health Law § 2981 (2012).

13 *Id.*

14 Pub. Health Law § 2994-d (2011).

15 *Id.*

16 See Gen. Oblig. Law § 5-1501B(1)(b) (2009).

17 *Id.*

18 Gen. Oblig. Law § 5-1501(2)(c) (2009).

19 See EPTL § 7-1.12.

20 EPTL § 7-1.12(a)(4) and (5).

21 Restatement (Third) of Property (Wills & Don. Trans.) § 8.1(a) (2003).

TELEHEALTH ...

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The FSNB is a national non-profit organization representing all medical boards within the United States and its territories that license and discipline allopathic and osteopathic physicians.¹²

According to the FSMB, the compact would create a voluntary systematic licensing system for physicians seeking licenses in multiple states. The compact would modernize and streamline the medical licensure process, facilitate multi-state practice, enhance telemedicine practices and expand access to healthcare to underserved areas. In addition, the compact would ensure and maintain critical state level regulatory oversight, accountability, and patients' protections. This would ease the ability for physicians to practice telemedicine across state lines.¹³

In order for the compact agreement to be formalized, the Compact must be signed into law in seven states. Presently, West Virginia, South Dakota, Utah, Wyoming, and Idaho enacted the law. Seventeen other states have formally introduced the legislation into their legislative chambers. New York is not one of them. Eleven other state legislatures are considering it.

Policy Guidance

As the use of telemedicine increases, so will the legal issues associated with its proper use. Oversight and scrutiny by federal and state regulators and state medical boards will be crucial to ensuring the quality and safety of patient care and security of patients' health care information. Providers, therefore, will have to be well advised regarding regulatory compliance, fraud and abuse, credentialing, privileging, licensing, and informed consent.

In April of 2014, the FSMB issued a Model Policy for the Appropriate Use of Telemedicine Technologies in the Practice of Medicine. Included in the model policy are model guidelines regarding licensure, the establishment of the Physician-Patient Relationship, evaluation and treatment of the patient, informed consent, continuity of care, referrals for emergency services, medical records, and privacy and security.¹⁴

This model policy for use of telemedicine may serve as instructive guidance for working standards for telemedicine to state boards where federal and state regulations do not currently exist. The AMA also issued a report on telemedicine.¹⁵

Providers and organizations that intend to incorporate telemedicine as part of the delivery of healthcare services must be cognizant of the limitations that presently exist and the pitfalls to avoid. These include reimbursement allowances, Medicare and

Medicaid state policies, developing state health law regulations, and public and private payor contract reimbursement. Providers must be extremely careful of non-compliant claims which can be vulnerable to liability for fraud and abuse charges, anti-kickback violations, and Stark Law violations. Proper legal advice will be extremely important when organizations are considering structuring telemedicine arrangements particularly medical staff by-laws and credentialing and privileges policies to distant site practitioners.

Patient privacy, always a top priority, will require not only ensuring the use of secure communication technology but will require entity and technology specific business associate confidentiality and privacy agreements. Shared information must comply with HIPAA and HITEC. Federal policy and security laws now require that all subcontractors, no matter how remote the access to information may be, must comply with all of the requirements applicable to business associates of certain health plans and health care providers.¹⁶

Telehealth contains all the elements that lawyers either love or hate. It is evolving and navigating its waters can be exciting. Or it is the nightmare of ambiguity, confusion, contradiction and opposition to change. Either way, telehealth is here to stay.

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1 netrc.org/news/new-york-legislative-update/

http://assembly.state.ny.us/leg/?default_fld=&bn=A02552&term=2015&Summary=Y&Memo=Y.

2 www.americantelmed.org/policy/state-policy-resorce-center.

3 www.telehealthtechnology.org/sites/default/files/documents/Telehealth%20Definition%20Framework%20for%20TRCs.pdf.

4 www.omh.ny.gov/omhweb/guidance/telepsychiatry-guidance.pdf.

5 [www.jonesday.com/files/upload/AMA%20Policy%20on%20Telehealth%20\(June%202014\).PDF](http://www.jonesday.com/files/upload/AMA%20Policy%20on%20Telehealth%20(June%202014).PDF).

6 assembly.state.ny.us/leg/?default_fld=&bn=A02552&term=2015&Text=Y.

7 *Id.*

8 *Id.*

9 *Id.*

10 www.cms.gov/Newsroom/MediaReleaseDatabase/Fact-sheets/2015-Fact-sheets-items/2015-03-10.html.

11 www.fiercehealthit.com/story/va-treat-ed-690k-veterans-through-telemedicine-fiscal-year-2014-2014-10-13.

12 www.fsmb.org.

13 www.fsmb.org/Media/Default/PDF/Advocacy/Interstate%20Medical%20Licensure%20Compact%20FINAL.pdf.

14 www.fsmb.org/Media/Default/PDF/FSMB/Advocacy/FSMB_Telemedicine_Policy.pdf.

15 www.jonesday.com, *supra* n.5.

16 45 CFR § 160.103.