

Disability Law and Practice

Financial and Health Care Benefits
and Future Planning

Editors

Professor Nancy Maurer
Simeon Goldman, Esq.

New York State Bar Association Continuing Legal Education publications are intended to provide current and accurate information to help attorneys maintain their professional competence. Publications are distributed with the understanding that NYSBA does not render any legal, accounting or other professional service. Attorneys using publications or orally conveyed information in dealing with a specific client's or their own legal matters should also research original sources of authority.

We consider the publication of any NYSBA practice book as the beginning of a dialogue with our readers. Periodic updates to this book will give us the opportunity to incorporate your suggestions regarding additions or corrections. Please send your comments to: CLE Publications Director, New York State Bar Association, One Elk Street, Albany, NY 12207.

Copyright 2015
New York State Bar Association
All rights reserved
ISBN:1-57969-442-X
Product Number: 42153-2

DISABILITY LAW AND PRACTICE

EDITORS-IN-CHIEF

Professor Nancy M. Maurer
Simeon Goldman, Esq.

CONTRIBUTING AUTHORS—BOOK TWO

Rose Mary Bailly, Esq.
Bridgit M. Burke, Esq.
Nina M. Daratsos, Esq.
Lawrence R. Faulkner, Esq.
Genoveffa Flagello, Esq.
Lisa Klee Friedman, Esq.
Professor Nancy M. Maurer
Tara Anne Pleat, Esq.
Sheila E. Shea, Esq.
Jo Anne Simon, Esq.
Louise M. Tarantino, Esq.
Edward V. Wilcenski, Esq.

REVIEWERS

Christine Doran, Esq.
Lawrence R. Faulkner, Esq.
Simeon Goldman, Esq.
Robert P. Mascali, Esq.
Professor Nancy M. Maurer
Cheryl A. Mugno, Esq.
Melinda R. Saran, Esq.
Louise M. Tarantino, Esq.

Special thanks to the past editors of *Representing People With Disabilities*:
Peter Danziger, Esq., Patricia W. Johnson, Esq. and Kathleen E. Surgalla, Esq.

**Co-sponsored by the Committee on Continuing Legal Education
and the Committee on Issues Affecting People with Disabilities
of the New York State Bar Association**

CONTENTS

Chapter 1	Ethical Issues in Representing Clients With Diminished Capacity	1
	<i>Professor Nancy M. Maurer</i>	
Chapter 2	Making a Law Office Accessible	47
	<i>Jo Anne Simon, Esq.</i>	
Chapter 3	Estate Planning for Individuals With Disabilities: Drafting Supplemental Needs Trusts	67
	<i>Edward V. Wilcenski, Esq.</i>	
	<i>Tara Anne Pleat, Esq.</i>	
Chapter 4	Government Benefits for Persons With Disabilities: Social Security, SSI, Medicare and Medicaid (An Emphasis on Income and Resource and Other Nondisability Requirements).....	93
	<i>Louise M. Tarantino, Esq.</i>	
Chapter 5	Managed Care and Disabilities	115
	<i>Nina M. Daratsos, Esq.</i>	
Chapter 6	Guardianship Article 17-A Proceedings Under the Surrogate's Court Procedure Act	175
	<i>Lawrence R. Faulkner, Esq.</i>	
	<i>Lisa Klee Friedman, Esq.</i>	
	<i>Genoveffa Flagello, Esq.</i>	
Chapter 7	Article 81 of the Mental Hygiene Law— Appointment of a Guardian for Personal Needs and/or Property Management	231
	<i>Rose Mary Bailly, Esq.</i>	
Chapter 8	Rights in Facilities.....	351
	<i>Sheila E. Shea, Esq.</i>	
Chapter 9	Disability Law: Internet Research and Resources.....	401
	<i>Bridgit M. Burke, Esq.</i>	

DETAILED TABLE OF CONTENTS

Preface	xix
Biographies.....	xxi
 Chapter 1 Ethical Issues in Representing Clients With Diminished Capacity	
<i>Professor Nancy M. Maurer</i>	
[1.0] I. Introduction	3
[1.1] II. Access to Legal Services.....	4
[1.2] A. Nondiscrimination.....	5
[1.3] 1. N.Y. Rules of Professional Conduct	5
[1.4] 2. Statutory Prohibitions Against Discrimination.....	7
[1.5] a. N.Y. Human Rights Law	7
[1.6] b. Americans With Disabilities Act (ADA).....	8
[1.7] B. Withdrawal From Representation Based on Client Capacity	9
[1.8] C. Pro Bono Obligations	11
[1.9] III. Lawyer-Client Relationship	13
[1.10] A. Client Autonomy	13
[1.11] B. Lawyer’s Responsibilities to Clients With Diminished Capacity	14
[1.12] 1. Rule 1.14	14
[1.13] 2. Other Guidance	17
[1.14] C. Determination of Client Capacity to Make Decisions	18
[1.15] D. Representing Incapacitated Clients in Emergency Situations	21
[1.16] E. Protection and Advocacy Authority	25
[1.17] F. Advocacy for Expressed Wishes Versus Best Interests	25
[1.18] IV. Exercising Independent Judgment and Avoiding Conflicts of Interest.....	28
[1.19] A. Determining Who Is the Client	29
[1.20] B. Interests of Third Parties	30
[1.21] C. Appointment of a Guardian <i>ad Litem</i> in Court Proceedings	32
[1.22] V. Confidentiality	34
[1.23] VI. Conclusion and Recommendations.....	38
Appendix.....	43

Chapter 2 Making a Law Office Accessible

Jo Anne Simon, Esq.

[2.0]	I.	Introduction	49
[2.1]	II.	Overview of Regulations for ADA Titles II and III....	51
[2.2]		A. Physical Access	52
[2.3]		B. Accessible Communications	54
[2.4]	III.	Guiding Principles.....	56
[2.5]	IV.	Key Issues in Representing Clients With Disabilities.....	58
[2.6]	V.	What to Do First?	59
[2.7]	VI.	Suggestions for Accommodating Clients With Disabilities.....	62

Chapter 3 Estate Planning for Individuals with Disabilities: Drafting Supplemental Needs Trusts

Edward V. Wilcenski, Esq.

Tara Anne Pleat, Esq.

[3.0]	I.	Introduction	69
[3.1]	II.	Preliminary Drafting Questions: The Basics.....	69
[3.2]		A. First-Party or Third-Party Trust: Which One Is It?.....	69
[3.3]		B. Court Involvement.....	72
[3.4]		C. The Nature of the Disability	73
[3.5]	III.	Specific Considerations in Supplemental Needs Trust Drafting	73
[3.6]		A. First-Party Trusts: Meeting the Statutory Requirements.....	73
[3.7]		B. Using EPTL 7-1.12 as a Foundation for First- and Third-Party Supplemental Needs Trusts	77
[3.8]		C. Specific Considerations in Drafting Third-Party Trusts	78
[3.9]		1. <i>Inter Vivos</i> Versus Testamentary Trust?	78
[3.10]		2. Gifts From Multiple Sources.....	78
[3.11]		3. Gift, Estate and Income Tax Considerations	79
[3.12]		a. Annual Exclusion From Gift Taxes.....	79
[3.13]		b. Retirement Accounts and Supplemental Needs Trusts	82
[3.14]	IV.	Common Drafting Issues.....	85
[3.15]		A. Statement of Intentions.....	85
[3.16]		B. Trust Creators as Trustees	85
[3.17]		C. Powers of Appointment.....	87

[3.18]	D. Power to Change Trustees	88
[3.19]	V. Making the Plan Complete: The Life Care Plan or Letter of Intent.....	90
[3.20]	VI. Conclusion.....	91

**Chapter 4 Government Benefits for Persons with Disabilities:
Social Security, SSI, Medicare and Medicaid
(An Emphasis on Income and Resource and
Other Nondisability Requirements)**

Louise M. Tarantino, Esq.

[4.0]	I. Distinction Between Social Security and SSI	95
[4.1]	A. Social Security	95
[4.2]	B. Supplemental Security Income	95
[4.3]	II. Social Security Benefits for Disabled Wage Earners and Their Families.....	95
[4.4]	A. Social Security Disability Insurance	96
[4.5]	1. Insured Status Requirements.....	96
[4.6]	2. Disability Requirements.....	97
[4.7]	3. Effective Date of SSDI Approval	97
[4.8]	B. Benefits for Dependents of a Disabled Wage Earner	98
[4.9]	C. Financial Criteria for SSDI	99
[4.10]	III. Supplemental Security Income Disability Benefits	99
[4.11]	A. Nature of the SSI Program	99
[4.12]	B. SSI Payment Rates	99
[4.13]	C. SSI Income Rules.....	100
[4.14]	D. SSI Resource Rules	101
[4.15]	E. Transferring Resources for Less Than Fair Market Value.....	102
[4.16]	F. Trusts as a Means to Exclude Cash Resources	103
[4.17]	G. Calculation of the SSI Check	103
[4.18]	H. Effective Date of SSI Approval	104
[4.19]	I. SSI Disability Benefits for Adults.....	104
[4.20]	J. SSI Disability Benefits for Children	105
[4.21]	IV. Health Insurance for Persons Receiving Disability Benefits: Medicare and Medicaid	105
[4.22]	A. Medicare.....	105
[4.23]	B. Medicaid.....	106
[4.24]	V. The Effect of Work Activity on Social Security and SSI Disability Benefits	109
[4.25]	A. The Substantial Gainful Activity Rule.....	109
[4.26]	B. SSI's Plan for Achieving Self-Support (PASS)....	111

[4.27]	VI.	Appeals and Attorney Fees.....	111
[4.28]	A.	Social Security and SSI Appeals.....	111
[4.29]	B.	Attorney Fees in Social Security and SSI Cases ...	111
[4.30]	C.	Medicaid Appeals.....	112
[4.31]	D.	Attorney Fees in Medicaid Cases.....	112

Chapter 5 Managed Care and Disabilities

Nina M. Daratsos, Esq.

[5.0]	I.	Introduction	117
[5.1]	II.	Federal and State Protections	117
[5.2]	A.	Continuation of Coverage (COBRA).....	117
[5.3]	B.	Continuation of Coverage for Adult Children.....	118
[5.4]	1.	Expansion of Dependent Coverage.....	118
[5.5]	2.	Young Adult Option (YAO)	119
[5.6]	3.	Make Available Option (MAO)	119
[5.7]	C.	Americans with Disabilities Act	120
[5.8]	D.	Health Insurance Portability and Accountability Act of 1996.....	120
[5.9]	1.	Introduction	120
[5.10]	2.	Preexisting Condition Exclusions	122
[5.11]	3.	Certificates of Creditable Coverage	124
[5.12]	4.	Individual Coverage Portability and Individual Policy Renewability	125
[5.13]	5.	Antidiscrimination Provisions.....	126
[5.14]	D.	Mental Health Parity and Addiction Equity Act of 2008.....	127
[5.15]	II.	New York State Provisions	130
[5.16]	A.	New York State Insurance Reforms: Open Enrollment and Community Rating	130
[5.17]	B.	Managed Care Reform Act and Subsequent Amendments.....	132
[5.18]	1.	Access to Specialty Care	134
[5.19]	2.	Utilization Review.....	137
[5.20]	3.	Grievance Rights	140
[5.21]	4.	External Appeals	142
[5.22]	a.	External Appeal—Medical Necessity Standard	143
[5.23]	b.	External Appeal—Experimental/ Investigational Standard	144
[5.24]	c.	Out-of-Network Standard	145
[5.25]	C.	Government-Sponsored Managed Care	149
[5.26]	1.	Medicaid Managed Care	149

[5.27]	2. Family Health Plus Program	150
Appendix		153

Chapter 6

Guardianship Article 17-A Proceedings Under the Surrogate’s Court Procedure Act
Lawrence R. Faulkner, Esq.
Lisa Klee Friedman, Esq.
Genoveffa Flagello, Esq.

[6.0]	I. Introduction	177
[6.1]	II. Legislative History	177
[6.2]	A. Article 17-A	177
[6.3]	B. Health Care Decisions Act	179
[6.4]	C. Family Health Care Decisions Act.....	180
[6.5]	III. Guardianship and Future Care Planning for the Person With Developmental Disabilities	181
[6.6]	IV. Types of SCPA Article 17-A Guardianships	181
[6.7]	A. Guardianship of Whom?	181
[6.8]	B. Guardian of the Person and/or Property	182
[6.9]	C. Limited Guardianship of the Property.....	182
[6.10]	D. Making Health Care Decisions	183
[6.11]	E. Tailored Guardianship Under SCPA Article 17-A	188
[6.12]	F. Applicability of SCPA Article 17	188
[6.13]	V. SCPA Article 17-A—Procedure	188
[6.14]	A. Standard Forms and Local Practice.....	188
[6.15]	B. Petition	189
[6.16]	1. Contents of Petition.....	189
[6.17]	2. Who Can Petition	190
[6.18]	3. Venue	190
[6.19]	4. Naming Standby Guardians	190
[6.20]	C. Medical or Psychological Certifications	191
[6.21]	D. Additional Filing Requirements	192
[6.22]	1. Birth Certificate.....	192
[6.23]	2. Request for Information Guardianship Form	192
[6.24]	3. Fingerprints	192
[6.25]	4. Death Certificate of Predeceased Parent	193
[6.26]	5. Renunciation	193
[6.27]	E. Citation and Notice of Petition.....	193
[6.28]	1. Citation	193
[6.29]	2. Notice of Petition	194
[6.30]	3. Missing Parent.....	195

[6.31]	F. Appointment of Guardian <i>ad Litem</i>	195
[6.32]	G. Role of MHLs	196
[6.33]	H. The Hearing	196
[6.34]	1. Dispensing With a Hearing	196
[6.35]	2. Procedure	197
[6.36]	I. Decree Appointing a Guardian	198
[6.37]	J. The Bond or Joint Control Subject to Order	198
[6.38]	K. Modification and Termination of the Guardianship	199
[6.39]	L. Confirmation of Standby Guardian	200
[6.40]	M. Who Should Be Appointed as Guardian?	200
[6.41]	1. Parents	200
[6.42]	2. Divorced Parents	201
[6.43]	3. Corporate Guardianship of the Person	201
[6.44]	4. The Consumer Advisory Board (CAB)	202
[6.45]	N. Accounting	202
[6.46]	1. Guardian of the Person	202
[6.47]	2. Guardian of the Property	203
[6.48]	O. Duration of the Guardianship	203
[6.49]	1. Age of Majority	203
[6.50]	2. Marriage of Persons With Developmental Disabilities	204
[6.51]	P. Guardian's Commissions	204
[6.52]	VI. Choosing Between MHL Article 81 and SCPA Article 17-A	204
[6.53]	A. History	204
[6.54]	B. Practical Considerations	207
[6.55]	1. Needs of Individual with Mental Retardation or a Developmental Disability	207
[6.56]	a. Generally	207
[6.57]	b. Infants	208
[6.58]	2. Alternatives to Guardianship	209
[6.59]	3. Appointment of the Guardian	210
[6.60]	a. Role and Authority of the Guardian	210
[6.61]	b. Accountability	210
[6.62]	c. Modification of the Guardianship	211
[6.63]	d. Creating Supplemental Needs Trusts and Other Considerations in Future Care Planning	211
[6.64]	e. Training	212
[6.65]	f. Duration of Guardianship	212

[6.66]	4. The Relationship Between OPWDD and the Guardian: Medical Consent and Residential Placement	212
[6.67]	a. Medical Consent	213
[6.68]	b. Residential or Nonresidential Programs Operated or Licensed by the OPWDD	215
[6.69]	5. Cost	216
[6.70]	C. Conclusion.....	219
Appendix	221

Chapter 7

Article 81 of the Mental Hygiene Law—
Appointment of a Guardian for Personal
Needs and/or Property Management

Rose Mary Bailly, Esq.

[7.0]	I. Introduction	233
[7.1]	II. Legislative History	234
[7.2]	III. Effect on Existing Committees and Conservatorships	235
[7.3]	IV. Standard for Appointment of Guardian.....	236
[7.4]	A. Necessity of Appointment.....	243
[7.5]	B. Agreement or Incapacity	251
[7.6]	1. Agreement	251
[7.7]	2. Incapacity	254
[7.8]	V. Procedural Protections for the Alleged Incapacitated Person	258
[7.9]	A. Notice	258
[7.10]	1. Form of Notice to the Alleged Incapacitated Person, Court Evaluator and Counsel	258
[7.11]	a. Service	259
[7.12]	(1) Persons to Be Served	259
[7.13]	(2) Manner of Service.....	259
[7.14]	2. Form of Notice to Other Individuals	265
[7.15]	a. Service	265
[7.16]	(1) Persons to Be Served	265
[7.17]	(2) Manner of Service.....	266
[7.18]	B. The Effect of the Health Insurance Portability and Accountability Act’s Privacy Rule on the Availability of Health Information for a Guardianship Proceeding	267
[7.19]	1. Commencement.....	267
[7.20]	a. Petitioner Health Care Facility	270

[7.21]	b. Department of Social Services Petitioner.....	271
[7.22]	2. Hearing	271
[7.23]	3. Post-Appointment.....	272
[7.24]	C. Petition	273
[7.25]	D. Court Evaluator	273
[7.26]	1. Appointment of Court Evaluator.....	273
[7.27]	a. Court Evaluator’s Responsibilities	273
[7.28]	b. Who May Be Appointed Court Evaluator.....	276
[7.29]	c. Court Evaluator’s Fee	276
[7.30]	2. Court Evaluator’s Access to the Alleged Incapacitated Person and the Alleged Incapacitated Person’s Medical Records Without His or Her Consent.....	277
[7.31]	a. Meeting the Alleged Incapacitated Person	277
[7.32]	b. Additional Procedures	278
[7.33]	E. Counsel.....	280
[7.34]	1. Appointment of Counsel	280
[7.35]	2. Counsel Fees	284
[7.36]	F. Hearing.....	287
[7.37]	G. Rules of Evidence.....	292
[7.38]	VI. Provisional Remedies	297
[7.39]	VII. Dispositional Alternatives	299
[7.40]	A. Appointment of Guardian.....	299
[7.41]	B. Protective Arrangement and Single Transactions	299
[7.42]	C. Dismissal or Discontinuance.....	302
[7.43]	D. Reimbursement of Petitioner’s Attorney Fees	304
[7.44]	VIII. Appointment of a Guardian	304
[7.45]	A. Who May Be Appointed Guardian.....	304
[7.46]	B. Duties and Powers of Guardian.....	311
[7.47]	1. Duties	311
[7.48]	2. Powers	312
[7.49]	C. Personal Needs Powers	313
[7.50]	D. Property Management Powers	320
[7.51]	IX. Guardian	335
[7.52]	A. Bond	335
[7.53]	B. Accountability	335
[7.54]	C. Compensation.....	336
[7.55]	D. Changes Relating to the Guardian.....	340

[7.56]	1. Removal	340
[7.57]	2. Modification or Discharge	341
[7.58]	3. Resignation.....	342
[7.59]	4. Vacancy	343
[7.60]	E. Miscellaneous.....	343
[7.61]	X. Effect of the Appointment on an Incapacitated Person	344
[7.62]	XI. Death of Incapacitated Person	347
[7.63]	XII. Education Requirements	348
[7.64]	XIII. Conclusion.....	349

Chapter 8 Rights in Facilities

Sheila E. Shea, Esq.

[8.0]	I. Introduction	353
[8.1]	II. Definitions	354
[8.2]	III. Admission and Retention—Articles 9 and 15 of the MHL	357
[8.3]	A. Mental Hygiene Legal Service	357
[8.4]	B. Notice of Status and Rights	358
[8.5]	C. Voluntary (Willing) Admissions.....	359
[8.6]	1. Suitability	359
[8.7]	2. Informal Admissions	359
[8.8]	3. Voluntary Admissions.....	359
[8.9]	a. Preference for Voluntary Status	360
[8.10]	b. Review of Voluntary Status.....	360
[8.11]	4. Non-Objecting Admissions	360
[8.12]	5. Request for Release.....	360
[8.13]	D. Involuntary Admissions	361
[8.14]	1. Involuntary Admission on Medical Certification.....	361
[8.15]	2. Emergency Admission for Immediate Observation, Care and Treatment	362
[8.16]	3. Involuntary Admission on Certificate of Director of Community Services	364
[8.17]	4. Other Emergency Admission Procedures	364
[8.18]	5. Admissions to Residential Treatment Facilities for Children and Youth.....	365
[8.19]	E. Court Authorization to Retain an Involuntary Patient.....	365
[8.20]	F. Judicial Review of Involuntary Admission and Retention	366
[8.21]	1. Legal Representation.....	366

[8.22]	2. Burden of Proof.....	366
[8.23]	3. Res Judicata.....	366
[8.24]	4. Findings by the Court.....	367
[8.25]	a. Substantive Criteria	367
[8.26]	b. Least Restrictive Alternative	368
[8.27]	c. Procedural Issues	368
[8.28]	5. Independent Medical Opinion.....	369
[8.29]	6. Rehearing and Review	369
[8.30]	7. Writ of Habeas Corpus.....	370
[8.31]	8. Sealing of Court Records and Papers.....	370
[8.32]	9. Presumption of Competency	370
[8.33]	IV. Admission and Retention—Article 10 of the MHL	371
[8.34]	A. Findings by the Court.....	371
[8.35]	B. Procedural Issues.....	372
[8.36]	C. Independent Medical Opinion.....	372
[8.37]	D. Legal Representation.....	373
[8.38]	E. Judicial Review of the Need for Confinement	373
[8.39]	F. Post-Commitment Remedies.....	373
[8.40]	V. Alternatives to Inpatient Treatment.....	373
[8.41]	A. Conditional Release.....	374
[8.42]	1. Legal Status	374
[8.43]	2. Termination of Involuntary Status Conditional Release	374
[8.44]	3. Termination of Voluntary Conditional Release	375
[8.45]	4. Provision of a Written Service Plan	375
[8.46]	B. Assisted Outpatient Treatment (AOT).....	376
[8.47]	1. Findings by the Court.....	376
[8.48]	2. Legal Representation.....	377
[8.49]	3. Least Restrictive Alternative.....	377
[8.50]	4. Categories of Service	377
[8.51]	5. Post-Adjudication Remedies	378
[8.52]	VI. Rights of Persons Receiving Services as In-Patients and in Community-Based Facilities	378
[8.53]	A. Notice of Rights	378
[8.54]	B. Right to Adequate Care and Treatment.....	380
[8.55]	1. Statutory Right	380
[8.56]	2. Constitutional Rights.....	381
[8.57]	a. Right to Treatment.....	381
[8.58]	b. Right to Protection From Harm.....	381
[8.59]	C. Informed Consent and Surrogate Decision Making	381

[8.60]	1. Surrogate Decision-Making Program	382
[8.61]	2. OMH Surrogate Consent Regulations.....	383
[8.62]	a. Decisions for Minors	383
[8.63]	b. Decisions for Adults Who Lack Capacity	384
[8.64]	c. Decisions for Adults With Capacity.....	384
[8.65]	d. Independent Opinion	384
[8.66]	3. OPWDD Surrogate Consent Regulations	385
[8.67]	a. Decisions for Minors	385
[8.68]	b. Decisions for Adults Who Lack Capacity	385
[8.69]	c. Decisions for Adults With Capacity.....	386
[8.70]	d. Independent Opinion	386
[8.71]	4. Special Consideration for Life-Sustaining Treatment	386
[8.72]	a. Substantive Standards.....	387
[8.73]	b. Notice	387
[8.74]	c. Objections.....	388
[8.75]	d. Dispute Mediation/Special Proceedings Authorized	389
[8.76]	D. Right to Object to Treatment.....	389
[8.77]	1. Existence of Right.....	389
[8.78]	2. Scope of the Right to Refuse Treatment	390
[8.79]	3. Application of Rights to Adults in Institutions for the Mentally Disabled.....	390
[8.80]	a. Emergency Treatment	390
[8.81]	b. Non-Emergency Treatment	391
[8.82]	c. Substituted Consent	391
[8.83]	4. Minors	393
[8.84]	E. Transfers of Patients.....	393
[8.85]	1. Generally	393
[8.86]	2. Right to Transfer	394
[8.87]	3. Involuntary Transfers	394
[8.88]	F. Restraint and Seclusion—Inpatient Facilities	395
[8.89]	1. Restraint	395
[8.90]	2. Seclusion	396
[8.91]	G. Clinical Records	397
[8.92]	1. Confidentiality.....	397
[8.93]	2. Access to Clinical Records.....	398
[8.94]	3. Sealing of Clinical Records.....	398
[8.95]	H. Communications and Visits	399
[8.96]	I. Personal Property of Patients	399

[8.97]	J. Work Activities of Patients	399
[8.98]	K. Service of Legal Process and Execution of Instruments	400

Chapter 9	Disability Law: Internet Research and Resources <i>Bridgit M. Burke, Esq.</i>	
[8.0]	I. Introduction	403
[8.1]	II. Websites	405
[8.2]	A. Legal Research	405
[8.3]	B. Government Websites	407
[8.4]	C. Public Policy	409
[8.5]	D. Medical, Health and Disability.....	411
[8.6]	E. Statistical	412
Table of Authorities		415

PREFACE

We are pleased to bring to you the second book in the New York State Bar Association's series *Disability Law and Practice*. This book focuses on Financial and Health Care Benefits and Future Planning. The first book covered Special Education, Assistive Technology and Vocational Rehabilitation, and the third will discuss the Civil Rights of People With Disabilities. Together, all three books will offer a comprehensive overview of the many facets of disability-related law relevant to the practice of New York attorneys.

Like the first book, this book has been a collective (volunteer) effort, relying upon the expertise and dedication of the authors and reviewers who have generously shared their considerable knowledge in preparing their chapters. We thank them all, as well as the former editors and authors of the three editions of *Representing People With Disabilities*, without whom this would have been an even more monumental undertaking. This also would not be possible without the publications staff of the New York State Bar Association, who have spent much time and effort making this book a reality.

Disability law is remarkably diverse, the issues often involving legal areas that, at first glance, do not appear to be germane to the field. The authors bring their unique perspectives to their chapters and we hope you will find both the subject matter and their perspectives to be valuable in your practice. We welcome your feedback so that future editions of the *Disability Law and Practice* series will be the best and most useful publication possible.

Both of us have dedicated much of our careers to the practice of disability law, and we cannot imagine an area of law where an attorney has the opportunity to accomplish more for people who, individually or as a group, have traditionally faced incredible barriers in all areas of life. We hope this book will be a resource for all practitioners, but especially for those of you undertaking representation of people with disabilities, either as part of your practices or in providing pro bono assistance. As practitioners in the field, working on the *Disability Law and Practice* series has been a great opportunity for us. We thank you for your readership.

Sincerely,

Nancy Maurer and Simeon Goldman
Co-editors

EDITORS-IN-CHIEF

SIMEON GOLDMAN, ESQ.

Simeon Goldman is Senior Staff Attorney at Disability Rights New York (formerly Disability Advocates, Inc.) in Albany, where he has worked to enforce the employment, housing, community integration and other civil rights of people with disabilities since 1991. DRNY is the designated independent protection and advocacy agency for New Yorkers with disabilities, and it is nationally recognized as one of the leading civil rights law firms for people with disabilities. Prior to joining DRNY, Mr. Goldman was Director of Advocacy at the Capital District Center for Independence. He has successfully litigated employment and housing discrimination claims under the Americans With Disabilities Act, the Fair Housing Act, and the NYS Human Rights Law, and he has advised elected officials, employers, housing providers and others on complying with these laws. Mr. Goldman is an Adjunct Professor at Albany Law School, where he teaches a seminar class on Mental Disability Law, and he has lectured extensively on the rights of persons with disabilities for the New York State Bar Association, the New York City Bar Association, the New York State Division for Human Rights, Cornell University, the National Lawyers' Guild, and numerous other organizations. Mr. Goldman is a 1986 graduate of SUNY Buffalo Law School, and he has authored the chapter on housing discrimination in the NYSBA's *Representing People With Disabilities*, 3rd Edition.

PROFESSOR NANCY M. MAURER

Nancy Maurer is a Professor of Law and Director of Field Placement Clinics at Albany Law School. She has taught a variety of clinical, skills, substantive, and interdisciplinary courses at Albany Law, including Disability Law, Negotiating for Lawyers, Fact Investigation, Trial Practice, and Legal Issues in Medicine. Prof. Maurer founded, and for many years directed, the Civil Rights and Disabilities Law Clinic—a program in which law students, working under faculty supervision, represented clients with disabilities in cases involving discrimination, public entitlements, education or other disability rights matters. She writes and lectures in the areas of legal education and disability law. Prior to joining the faculty of Albany Law School, Prof. Maurer served as a staff attorney with Neighborhood Legal Services in Charleston, South Carolina, and as an attorney with the New York State Commission on Quality of Care and Advocacy for Persons with Disabilities.

Prof. Maurer is a member of the NYSBA Committee on Issues Affecting People with Disabilities, and she was co-editor of the NYSBA publication, *Representing People With Disabilities*. She is a graduate of Middlebury College and George Washington University Law School.

AUTHORS

ROSE MARY BAILLY, ESQ.

As Executive Director of the New York State Law Revision Commission, Rose Mary Bailly's work includes developing recommendations for legislative reform. Ms. Bailly has written and lectured widely on the topic of guardianship law; most notably she is author of McKinney's *Practice Commentaries* for Article 81 of the Mental Hygiene Law and powers of attorney governed by the General Obligations Law. She is also an Associate Editor of *Guardianship Practice in New York State* (Robert Abrams, Esq., Editor-in-Chief, NYSBA 1998).

Ms. Bailly is an active member of the New York State Bar Association. She is also the editor-in-chief of the *Government, Law and Policy Journal*. She is a fellow of the Brookdale Center on Aging at Hunter College. Ms. Bailly received her law degree from Fordham University School of Law, where she was Commentary Editor of the law review.

BRIDGIT M. BURKE, ESQ.

Bridgit Burke, an Albany Law School Emeritus Professor, served the school for 20 years in roles that included co-director of the clinical program, director of the Civil Rights and Disabilities Law Project and professor of clinical, legal reasoning and writing courses. Her clinical work has involved representation of clients in Medicaid, Mental Hygiene Law, discrimination and educational proceedings. She has been called upon by the press and across the country for her expertise in the rights of individuals with developmental disabilities, clinical education and civil rights law. Ms. Burke started her public interest career in legal services representing clients in both discrete actions such as public benefits hearings and evictions, and representing groups in systemic reform actions. Through her work in the clinic and as a legal services attorney, she has been practicing public interest law for over 25 years. Ms. Burke has been honored with an Albany City Human Rights Award in 2013, the Clinical Legal Education Association's Award for Excellence in a Public Interest Case in 2011, and in 2007 she was the recipient of a Community Leader of the Year Award from the New York State Developmental Disabilities Planning Council.

NINA M. DARATSOS, ESQ.

Nina Daratsos is in private practice, focusing on Trusts, Estates and Elder Law. Ms. Daratsos recently retired from the New York State Department of Health where she participated in several initiatives including: the design and implementation of the Partnership Plan mandating enrollment of Medicaid beneficiaries into a managed care plan; design and implementation of the Family Health Plus Program; team member for several Medicaid redesign activities affecting enrollees in mainstream and managed long term care plans; design of the legal review for the Criminal History Background Check program; team member for the development of the MOLST initiative; and provided legal opinions concerning advanced health care directives. She received her B.S. in nursing from Niagara University (1974), a master's degree in nursing (pediatric clinical nurse specialist) from Boston University (1978), and a J.D. and LLM (Elder Law and Estate Planning) from Western New England College School of Law (1993, 2009).

LAWRENCE R. FAULKNER, ESQ.

Lawrence Faulkner is the Director of Corporate Compliance and General Counsel at ARC of Westchester. In that capacity he provides general legal advice to a large not-for-profit agency and supervises the agency's compliance program. In addition, he provides legal and legislative advocacy for the agency and its consumers, coordinates special efforts concerning emerging issues and provides training to agency staff. Mr. Faulkner has provided educational programs for families and attorneys in such areas as health care decision making, guardianship, end of life health care decision making, family access to investigation records, etc. He is a member and Secretary of the New York State Bar Association's Health Law Section and a member of its Committee on Issues Affecting Persons with Disabilities. He is co-chair of the Committee on Ethical Issues in the Provision of Health Care of the Health Law Section. Mr. Faulkner was instrumental in the drafting and passage of the New York Health Care Decisions Act for Persons with Disabilities, which gives the guardians of individuals with developmental disabilities the authority to make health care decisions, and guardians and family members the authority to make health care decisions concerned with end-of-life care. Mr. Faulkner has a B.S. from Cornell University and an M.S. and a J.D. from the State University of New York at Buffalo. Before coming to Westchester ARC he served as Deputy General Counsel at the New York State Office for People with Developmental Disabilities.

GENOVEFFA FLAGELLO, ESQ.

Genoveffa Flagello obtained a Juris Doctor degree from Pace University School of Law. She is admitted to practice in New York State and in the Federal Court, Southern District of New York, and has been a practicing attorney since 1980. Ms. Flagello's career has included the non-profit sector, private sector and private practice. She has provided advocacy and future care planning services to persons who are mentally retarded and developmentally disabled, as well as to their families. Her experience includes handling civil litigation and guardianships pursuant to Article 81 of the New York State Mental Hygiene Law and Article 17-A of the Surrogate's Court Procedure Act. She is employed as an attorney by the Mental Hygiene Legal Service, Second Judicial Department.

Ms. Flagello has been an invited speaker to the New York State Bar Association in 2000, 2003 and 2013. She is an active member of the Dutchess County Bar Association, the Mid-Hudson Women's Bar Association and the Columbian Lawyers Association.

LISA KLEE FRIEDMAN, ESQ.

Lisa K. Friedman is an attorney in private practice in New York City. Ms. Friedman's primary practice is in the area of future planning for people with disabilities, and individuals with family members who are disabled. She deals with many issues affecting personal needs of people with disabilities, including transition from special education to adult programs for people with disabilities, often known as "aging-out" issues, residential and program issues, guardianship (Mental Hygiene Law Article 81 and Surrogate's Court Procedure Act Article 17-A), as well as property needs of people with disabilities and trusts and estates, including supplemental needs trusts.

Ms. Friedman is a member of the Board of Trustees of the NYSARC Trust and NYSARC, Inc., Community Trusts and pooled supplemental needs trusts. She is a current member and former Co-chair of the New York State Bar Association Committee on Issues Affecting People with Disabilities and as well as a member of the New York State Bar Association Elder Law and Special Needs and Trusts and Estates Law Sections where she is on their Executive Committees. She is presently a Co-Chair and former Chair of the Trusts and Estates Law Section Committee on the Elderly and Disabled. She has served on Surrogate Decision Making panels pursuant to Article 80 of the New York State Mental Hygiene Law.

Ms. Friedman has co-authored and regularly updated with Lawrence Faulkner, Esq. the chapter “Distinguishing Article 81 and Article 17-A Proceedings,” in the New York State Bar Association’s *Guardianship Practice in New York State* (1997, 2004). She has also co-authored and regularly updated with Lawrence Faulkner, Esq. and Rose Mary Bailly, Esq. “Legislative Delegation: Guardianship Alternatives to Guardianship and Medical Care Decision-Making,” a chapter in the New York State Bar Association publication *Representing People With Disabilities*, Third Edition (2003).

Ms. Friedman has co-chaired and presented at various New York State Bar Association Continuing Legal Education Programs on Representing People with Disabilities, Pooled Supplemental Needs Trusts, and Guardianship, including “Article 81 of the Mental Hygiene Law” (1993, 1998, 2003, 2008 and 2013), “Handling a Special Education Proceeding in New York State” (1998), “Pooled Trusts for People with Disabilities” (1999), “Estate Planning and Future Planning for Persons with Developmental Disabilities, and Their Families” (1999), “Estate Planning and Future Planning for Persons with Mental Illness and Their Families” (2000), “Practical Skills—Introduction to Estate Planning” (2009), “Supplemental Needs Trusts” (2010), “Life after High School—Transition Planning for Students with Disabilities” (2011), “Records, Records Everywhere: What to Keep and What to Share” (2012), “Caring and Planning for an Aging Person with Disabilities” (2013), “Accessing and Eligibility for OPWD and OMH Services” (2013), “Residential Options for People With Disabilities” (2015) and “Housing Issues for Disabled Children” (2015). She has also presented on guardianship and/or future planning for personal needs and supplemental needs trusts to the New York County Lawyers’ Association and to various provider agencies that provide services to people with disabilities or advocacy groups.

She was a member of Long Term Planning and Trust Task Force in conjunction with the publication of the New York State Developmental Disabilities Planning Council’s *Planning for the Future: A Guide for Families and Friends of People with Developmental Disabilities* (1997) and was a co-editor of *Planning for the Future: A Guide for Attorneys*, which was used in the 1999 New York State Bar Association program.

TARA ANNE PLEAT, ESQ.

Tara Anne Pleat, Esq., is a co-owner and co-manager of the law firm of Wilcenski & Pleat PLLC. She practices in the areas of Special Needs Estate Planning and Administration, Trust and Estate Administration,

Estate and Trust Planning for residents of New York and Florida, Long Term Care Planning and Elder Law. Ms. Pleat is a *cum laude* graduate of Albany Law School, with honors in the Estate Planning concentration.

Ms. Pleat is admitted to practice in New York, Florida and Massachusetts, the United States Tax Court and the United States Federal District Court in the Northern District of New York.

A Co-Chair of the Special Needs Planning Committee of the Elder Law and Special Needs Section of the New York State Bar Association, she also is a Member of the Taxation Committee of the Trusts and Estates Law Section. In addition, Ms. Pleat is a member of the Special Needs Alliance, an invitation-only, national network of leading disability attorneys who practice in the areas of Special Needs Trusts and public benefits.

Ms. Pleat is the President of the Board of Directors of the Estate Planning Council of Eastern New York. She also serves as Vice-President for the Domestic Violence and Rape Crisis Services of Saratoga County. She is a graduate of the 2006 class of Leadership Saratoga, sponsored by the Saratoga Springs Chamber of Commerce, and is a Member of the Leadership Saratoga Advisory Board. She is on the Board of Directors of AIM Services, Inc., an organization serving individuals with disabilities in Saratoga, Warren and Washington Counties and the Wesley Foundation Board of Directors.

A frequent speaker on estate planning and administration, special needs planning and related disability issues for state and local bar associations, community organizations and parent groups, Ms. Pleat is also an adjunct faculty member at Albany Law School, teaching a spring course on estate and financial planning for the elderly and individuals with disabilities.

SHEILA E. SHEA, ESQ.

Sheila E. Shea is the Director of the Mental Hygiene Legal Service, Third Judicial Department, an agency of the Appellate Division of State Supreme Court which provides legal service and assistance to persons in mental hygiene facilities or those alleged to be in need of care and treatment in such facilities. Ms. Shea was appointed to the Service in 1987 and has served as its Director since 2007. She is a 1981 graduate of the University of Vermont and a 1986 graduate of the Albany Law School of Union University.

Ms. Shea is a member of the New York State Bar Association, its Elder Law and Special Needs Section, and serves on the NYSBA Committee on Disability Rights. She edits the chapters on “Rights in Facilities” and “Individual Rights and Discrimination: The Deaf and Hard of Hearing” for the NYSBA publication, *Disability Law and Practice*. Ms. Shea is also the author of “The Mental Hygiene Legal Service at 50: A Retrospective and Prospective Examination of Advocacy for People with Disabilities” published by the NYSBA *Government, Law and Policy Journal* (Winter 2012) and “Representing Clients With Mental Disabilities,” published by the New York State Defender’s Association Public Defense Backup Center Report (January–April 2013).

Ms. Shea is the recipient of the 2013 Hodgson/Jacobs Law Award presented by the NYSARC Inc. for demonstrating outstanding commitment and dedication to improving the lives of people who have intellectual and other developmental disabilities and the 2014 Cerebral Palsy Associations of New York State Public Service Award.

JO ANNE SIMON, ESQ.

Jo Anne Simon is in private practice in Brooklyn, New York, focusing on disability civil rights in high-stakes standardized testing, higher education law and employment discrimination. Previously, Ms. Simon was the staff attorney at Hofstra University School of Law’s Disabilities Law Clinic, and she now is an adjunct associate professor of law at Fordham University.

A graduate of Fordham University School of Law, Ms. Simon holds a master’s degree in the education of the deaf from Gallaudet University and was a certified sign language interpreter (1978–2000) and a founding member of the Association on Higher Education and Disability (AHEAD).

She is a former Chair of the New York City Bar Association’s Committee on Legal Issues Affecting the Rights of Persons with Disabilities and a member of the New York State Bar Association’s Committee on Issues Affecting People with Disabilities. In November 2014 she was elected to the New York State Assembly, 52nd Assembly District.

LOUISE M. TARANTINO, ESQ.

Louise M. Tarantino, a senior attorney at the Empire Justice Center, is a graduate of the State University of New York at Buffalo School of Law. She focuses her practice on Social Security and disability law. Ms. Taran-

tino is a member of the New York State Bar Association and serves on its Committee on Disability Rights. She is also a contributing author of *Benefits Management for Working People with Disabilities: An Advocate's Manual*. Ms. Tarantino is admitted to practice in New York and the District of Columbia. She is a frequent lecturer and trainer on Social Security and Supplemental Security Income issues.

EDWARD V. WILCENSKI, ESQ.

Edward V. Wilcenski, Esq., is a co-owner and co-manager of the law firm of Wilcenski & Pleat, PLLC, with offices in Clifton Park and Glens Falls, New York. He practices in the areas of Elder Law, Special Needs Planning, and Trusts and Estate Planning. He is a graduate of Albany Law School, and received his Bachelor of Science in economics, *magna cum laude*, from Siena College in Loudonville, New York.

Mr. Wilcenski is past Vice-Chair of the Medicaid Committee of the New York State Bar Association's Elder Law and Special Needs Section. He is a current Trustee of the NYSARC (formerly the New York State Association for Retarded Children) Pooled Trust, and serves as a Trustee of the Wildwood Programs Pooled Trust, a trust program serving individuals with developmental and learning disabilities.

His professional affiliations include membership in the National Academy of Elder Law Attorneys, the New York State Bar Association's Elder Law and Special Needs Section and Trusts and Estates Law Section, and NYSBA's Committee on Disability Rights. He is a former President of the Special Needs Alliance, www.specialneedsalliance.org, an invitation-only, not-for-profit organization of leading disability attorneys who practice in the areas of Special Needs Trusts and public benefits.

He is a contributing author to various publications of the New York State Bar Association, including *Representing People with Disabilities*, and *Planning for Incapacity*, and *Guardianship Practice in New York State*, and has co-authored a quarterly article entitled "Regulation News" for the NYS Bar Association Elder Law and Special Needs Section Newsletter. He lectures frequently to attorneys, agency staff and families on elder law, special needs trusts and other legal issues. He is "AV" rated by Martindale-Hubbell, the highest rating for expertise and ethics given by the independent rating service of the legal profession.