

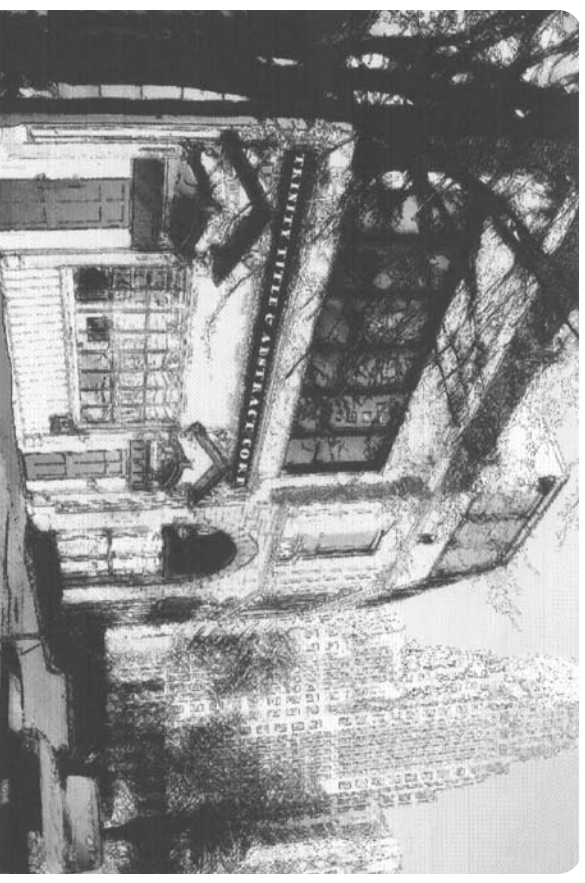
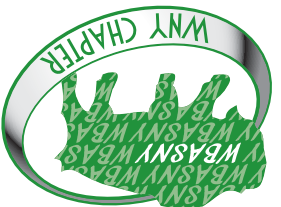
CELEBRATING 20 YEARS AS A UNITED VOICE  
FOR OUR MEMBERS



Find out more about our chapter events and programs. Send us your news! All submissions for a posting on our site, should be e-mailed to our Web Chair at: [gmlhasiotis@aol.com](mailto:gmlhasiotis@aol.com)

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**WOMEN'S BAR ASSOCIATION  
OF THE STATE OF NEW YORK  
WESTERN NEW YORK CHAPTER**



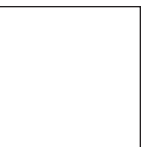
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# WBASNY Newsletter

VOL. 21, ISSUE 1 JULY 2004

WOMEN'S BAR ASSOCIATION OF THE STATE OF NEW YORK WESTERN NEW YORK CHAPTER



KAREN E. RICHARDSON  
PRESIDENT

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## PRESIDENT'S MESSAGE

Twenty years ago, a small group of women came together to form the Western New York Chapter of the Women's Bar Association of the State of New York. While many of the challenges which inspired that initial group of women to band together have dissipated, too many of them remain, and new challenges have emerged. What has not changed is our organization's commitment to meet those challenges and to offer a supportive environment for any attorney dedicated to the advancement of women in the legal profession and in society as a whole.

This Chapter has prospered due to the leadership of many fine women. Chief among them is our Immediate Past President, Melissa Nickson. I had the good fortune to meet Melissa at UB Law School, to serve as her Assistant on the Buffalo Moot Court Board, and to work with her at Phillips Lytle. Melissa possesses all the attributes of an outstanding leader— a dynamic personality, a strong work ethic, and a deep sense of loyalty. I am honored to be following in her footsteps.

Our Board of Directors and Committee Chairs will be meeting shortly to finalize plans for the upcoming year. We will continue our series on Women in the Law, which focuses on balancing the responsibilities of work and family and has previously addressed Child Care Options, the Family and Medical Leave Act, and Taking Care of Aging Parents. We will also continue our popular informal networking dinners and happy hours. In the tradition of our successful Tips from the Bench program, we are working with the Hon. Sheila A. DiTullio to organize a program for criminal defense practitioners— a practice area in which women are noticeably under-

represented. As always, we strive for a mix of programs which address the personal and professional interests of all of our members.

WBASNY was delighted to accept Administrative Judge Sharon S. Townsend's invitation to co-sponsor "Practicing Law with Civility," a lively discussion of professionalism within and among the bench and bar. Although the most egregious examples of unprofessional conduct can likely be traced back to a small number of persistent offenders, it is appropriate that we each take a moment to reflect upon the qualities we respect in the attorneys we practice with and to ask ourselves if we are consistently exhibiting those qualities ourselves.

There was certainly no shortage of civility at WBASNY's New Year Happy Hour! Thank you to all who stopped by to express their appreciation to Melissa for her hard work this past year and to wish me well on my upcoming term as President. WBASNY is grateful to Elizabeth Pressman at Settlement Professionals Incorporated for sponsoring this enjoyable evening.

As always, it was a pleasure to hear from the candidates for the Board of Directors of the Bar Association of Erie County at our annual joint luncheon with the Women Lawyers of Western New York. Our Chapter looks forward to working with both of these fine organizations this year.

Thank you to Schroeder, Joseph & Associates, LLP for their generous contribution to the Justice M. Dolores Denman Award at the ceremony rededicating their historic office building on Ellicott Street in honor of Judge Denman. As many of you know, WBASNY established the Denman

PLEASE SEE "PRESIDENT'S MESSAGE"  
ON PAGE TWO

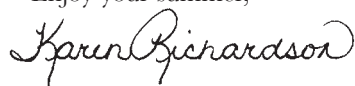
“ THIS  
CHAPTER HAS  
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## PRESIDENT'S MESSAGE (CONT'D)

Award with UB Law School in recognition of the fact that Justice Denman was a single parent who graduated from law school near the top of her class. The award supports parents through the bar review study period. Congratulations and best wishes to this year's recipient, Shaleeya Link, who graduated with both a JD and MSW.

As you can see, WBASNY's 20<sup>th</sup> year is off to a great start! With the support of a wonderful Board of Directors and committed Committee Chairs, many of whom I have had the pleasure of working with for several years now, I am confident that this will be another fantastic year. I look forward to serving as your president and welcome your suggestions, concerns, and comments.

Enjoy your summer,



Karen E. Richardson  
President

## EVENT PHOTOS



TWO WBASNY TEAMS COMPETED AT THE ANNUAL LAWYERS FOR LEARNING BOWLING TOURNAMENT ON MAY 6TH, 2004.

Front row: Jessica Murphy, Hilary Banker

Back Row: Tiffany Perry, Georgette Hasiotis, Tiffany Szymanek, Lisa Mueller, Conny Simonet-Bertino, Kristen Smith, Jenifer Barr, Cheryl Alois, Lenora Foote.



WBASNY'S NEW YEAR'S HAPPY HOUR, SPONSORED BY SETTLEMENT PROFESSIONALS, INC. ON MAY 26TH, 2004.

Karen Richardson, James Gerlach, Elizabeth Pressman (Our sponsor, Settlement Professionals), Conny Simonet-Bertino, Hilary Banker, Natalie Grigg, Melinda Saran, Beth Bivona.

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### NEWSLETTER DESIGN

Jason Tedeschi  
argonaut28@yahoo.ca

## REQUIREMENTS FOR ARTICLE SUBMISSION

Submissions for the October 2004 WBASNY-WNY newsletter must be received by Wednesday, September 15, 2004 at 5:00 p.m. Submissions must include the author's name and telephone number. Electronic submissions are preferred, either e-mail or disk. MSWord and WordPerfect formats are acceptable. All items will be edited and published, space permitting, at the editor's discretion. Submissions may include: articles of importance to the WBASNY membership; congratulatory notes for accomplishments by WBASNY members; opinion letters to the editor. Ideas for other items, articles and/or columns are always welcome, and strongly encouraged. If you have any questions or comments, need additional information, or wish to submit items for publication, please contact:

Jessica V. Murphy

Phone: (716) 853-2050, ext. 215

E-mail: jmurphy@sliva-lane.com

Note: Any opinions expressed in this newsletter are solely those of the author and do not reflect the opinions of WBASNY, the Western New York Chapter, the Officers and Directors, or the editor.

## LEADERS OF THE WESTERN NEW YORK CHAPTER

by Lisa M. Mueller, President-Elect

As our Chapter celebrates 20-years of promoting the status of women in society and in the legal community, we salute the women who led our Chapter in its early years. We thank them for their commitment to our members and our mission. Each issue of our Chapter's 2004-05 newsletter will highlight one of the many women who spent countless hours dedicated to the women attorneys of Western New York, and who have continued to act as voices for women in the legal profession and as leaders in the legal community.



**SHELLEY B. MAYER**  
WNY Chapter's First President

Shelley Mayer, the WNY Chapter's first president, is currently counsel at Manatt, Phelps & Phillips, LLP in New York City, New York where she focuses her practice on government relations, health policy and community affairs. She represents clients in the health-care industry and other clients with government affairs and community affairs matters.

Mayer was one of a handful of women in the Western New York area who were committed to creating a local chapter of WBASNY twenty years ago. "We were convinced that we had

unique perspectives as women lawyers that needed to be heard in the WNY community and especially the legal community," says Mayer. "While there was some uncertainty about what WBASNY really was, there was tremendous excitement and enthusiasm about the creation of the chapter. We struck a very responsive chord among women lawyers. Your success today shows that this message still rings true."

Since her term as WNY Chapter president, Mayer has worked as Corporate Vice-President, Government and Community Affairs, at Continuum Health Partners, Inc. in New York, a partnership of four major hospitals and one of the largest health care systems in New York City. Her responsibilities have included federal and state government relations, community affairs, health policy and legislation, and public health initiatives.

Prior to the formation of Continuum Health Partners in 1997, she was Vice-President, External Affairs at St. Luke's-Roosevelt Hospital Center, a major multi-site New York City teaching hospital, where she was in charge of public relations, government relations, community affairs and marketing. She also served as Special Counsel to the State Senate Minority Leader of the New

York State Senate and Assistant Attorney General at the New York State Department of Law for 12 years, including service as the Assistant Attorney General in Charge of the Westchester Regional Office and Special Counsel to the Attorney General.

Mayer speaks fondly of her experiences as Chapter President. "I think one of the most exciting moments as WNY President was when I came to meet the state leaders of WBASNY and realized what a terrific, smart, visionary group of women had started the organization," recalls Mayer. "It was a wonderful feeling to know that our small and new chapter was part of this dynamic initiative."



LEFT TO RIGHT: AWARD WINNER LISA BLOCH RODWIN, U.S. SENATOR MARY L. LANDRIEU (LOUISIANA) AND MELISSA H. NICKSON, IMMEDIATE PAST PRESIDENT.

### WNY CHAPTER MEMBER RECOGNIZED FOR EXCELLENCE IN JUVENILE JUSTICE

New Orleans, LA was the site of WBASNY's Convention 2004 Twenty-Fifth Anniversary Celebration. From May 20, 2004 through May 23, 2004, conventioners enjoyed the Hotel Monteleone. WNY Chapter's Lisa Bloch Rodwin received the Stephanie E. Kupferman Award for Juvenile Justice. This award is given to a WBASNY member who has shown outstanding achievement in legal matters involving juveniles over a period of three or more years, as a prosecutor, law guardian or judge. Ms. Rodwin said, "Receiving the Kupferman Juvenile Justice award was a tremendous honor and a highlight of my professional career. New Orleans was a perfect location for our 25th convention: networking, education, fine food and Pims Cups—what could be better!"

## FAMILY MEDICAL LEAVE ACT HIGHLIGHTS

The original eleven page outline was prepared by Judy S. Hernandez, Esq. of Damon & Morey, L.L.P. If you have specific questions, Ms. Hernandez can be reached at [jhernandez@damonmorey.com](mailto:jhernandez@damonmorey.com) or at (716) 856-5500.

The Family and Medical Leave Act ("the Act" or "FMLA") took effect on August 5, 1993. FMLA is codified at 29 USC 2601 et seq. Regulations implementing the FMLA are found at 29 CFR Part 825.

### EMPLOYERS COVERED BY THE ACT:

- 50 or more employees
- Part-time employees count toward the 50-employee threshold
- Employees on leave count toward 50-employee threshold as long as there is a reasonable expectation that they will return to active employment

### ELIGIBILITY REQUIREMENTS:

- Employed by covered employer for at least twelve (12) months  
AND
- Employed for at least 1,250 hours during the twelve (12) month period immediately preceding commencement of leave.

### EVENTS FOR WHICH LEAVE MAY BE TAKEN:

- Birth and care of an employee's child
- Employee adopts a child or provides foster care for a child
- Employee develops a serious health condition rendering him or her unable to perform the functions of his or her position. (Serious health condition means injury, illness, impairment or physical mental condition that requires in-patient care and/or continuing treatment).
- Care for a spouse, parent, son or daughter with a serious health condition.

### LEAVE PERIOD AND INCREMENTS:

Up to twelve (12) work weeks within a twelve (12) month period. There are different ways to measure the 12-month period.

Intermittent leave or a reduced schedule is allowed, but medical need must be demonstrated. Intermittent leave or reduced schedule for birth, adoption or placement of a child are at the employer's option.

Only the amount of leave taken may be counted against an employee's FMLA entitlement. (i.e. An employee that normally works an 8 hour day will be charged with one day of FMLA leave only after missing 8 hours of work.)

Employers may transfer the employee on intermittent leave or reduced schedule to an available position if the employee is qualified, the position has equivalent pay and benefits and the position better accommodates the recurring leave.

FMLA leave is unpaid. However, in most circumstances the Act permits an eligible employee to substitute accrued paid leave for FMLA leave. In addition, the employer can require the employee to substitute accrued paid leave for FMLA leave in some circumstances.

During a designated FMLA leave, the employer must maintain the employee's coverage under any group health plan on the same basis as if the employee continued to work. Employees must continue to pay their share of the health plan premiums during their leave. The Act does not require an employer to maintain any other employee benefits (e.g. life insurance) during the leave, but the employer must restore all benefits when the employee returns to work.

Employers must post a notice explaining the Act, must include information about FMLA in written policies and handbooks and must provide information when an employee requests it.

### PROHIBITED ACTS:

- Interference with exercise of rights under FMLA
- Discouraging employees from taking leave
- Discriminating against employees for taking leave

### ENFORCEMENT AND REMEDIES:

- File a complaint with the Secretary of Labor or in state or federal court.
- No administrative procedures or prerequisites exist
- Statute of Limitations expire two years from the date of the last alleged violation or three years from the date of an allegedly willful violation.
- Remedies include: monetary damages, interest on the monetary damages, equitable relief, liquidated damages, attorney's fees, expert witness fees and costs.

### LAWYERS NOT SUBJECT TO GLBA

by Georgette M. Hasiotis, Web Site Chair

In early May, U.S. District Judge Reggie B. Walton for the District of Columbia granted a final judgment in favor of The New York State Bar Association (NYSBA) and the American Bar Association (ABA) in their suits against the Federal Trade Commission (FTC) to stop enforcement of the Gramm-Leach-Bliley Act (GLBA) as it applies to the legal profession.

In these related suits, the FTC argued that lawyers engaged in such practice areas as tax planning and transactions, estate planning, real estate closing and personal bankruptcy should be subject to GLBA. The NYSBA and the ABA successfully asserted that the FTC acted arbitrarily and capriciously in refusing to exempt all lawyers from the regulation and that the GLBA, as it applies to lawyers, is unconstitutional under the 10<sup>th</sup> Amendment, which governs states' rights. In the U.S., only states have the ability to license lawyers; there is no federal entity that does so.

In response to a request by the ABA on behalf of attorneys throughout the country, the General Counsel of the FTC issued a letter on May 7, 2004 stating that unless and until the district court's decision is reversed, the FTC will not bring enforcement actions against or investigate any practicing attorney for failing to comply with the privacy provisions of the Act.

## HIPAA PRACTICE IMPLICATIONS

In order for our clients to be prepared in the event of a sudden or gradually debilitating health event, it is imperative for the client to have named an agent or agents (prior to the occurrence of the health event) who can take action on their behalf in regard to health care decision-making and financial decision-making. This article briefly discusses the impact of the HIPAA Privacy Rule (See Public Law 104-191 § 264 [December 2000]) on obtaining the authority to act on behalf of an incapacitated loved one. This is not meant to be a comprehensive analysis and does not include discussion regarding the Privacy Rule's impact on family members seeking legal guardianship either under Article 81 of the Mental Hygiene Law or Article 17a of the Surrogate's Court Procedure Act. (See R. Bailey and B. Hancock (2004) NYSBA Health Law Journal "Incapacity and the Privacy Rule: With a Nip and a Tuck They Might Fit" Spring 2004 Vol. 9 [pp. 32-43]).

The HIPAA Privacy Rule (45 C.F.R. § 160.502 [g][1]) establishes a national standard for an individual's rights regarding the privacy of his or her personally identifiable health information that is transmitted or maintained in electronic form.

Certain HIPAA covered entities including, but not limited to health care plans, and health care providers (such as hospitals and doctor's offices) may, only upon request of the individual, disclose individually identifiable health information. However, if an individual becomes incapacitated and unable to request information from a covered entity, a question arises as to who may make a request and under what circumstances the information may be disclosed. While the Privacy Rule specifically allows a person's "personal representative" to request and receive personally identifiable health information, the scope of the personal representative's authority is defined by New York State law and is specific to the legal role(s) the personal representative was appointed to fill. (See R. Bailey and B. Hancock (2004), Id. at 33; 45 C.F.R. § 160.502 [g][1],[2]).

New York law allows an individual to appoint an agent to make broad financial decisions by appointing an "attorney-in-fact" in a durable, non-durable, and/or springing Power of Attorney (See N.Y. GOL §§ 5-1502A - 5-1502O) and health care decisions by appointing a health care agent in a valid Health Care Proxy. (See N.Y. PHL § 2982[1]).

### POWERS OF ATTORNEY

From a practice perspective, attorneys-in-fact are experiencing difficulty gaining access to health care billing information. The authority to access medical information necessary to pay, challenge, or investigate the legitimacy of a medical bill is not specifically granted in the General Obligations Law statutory short form. (See N.Y. GOL §§ 5-1502A - 5-1502O). While proposed amendments to the General Obligations Law are in the works, in the meantime, many prudent practitioners have amended their Power of Attorney form to include language whereby the principal explicitly grants authority for access to medical billing information. In addition, many practitioners are also contacting clients who

have existing, pre-Privacy Rule Powers of Attorney to suggest executing a new one inclusive of the appropriate authority. (See R. Bailey and B. Hancock Id. at 34; New York State Law Revision Commission proposal submitted to the Judiciary Committees of the Senate and Assembly in February 2004 available on line at [www.lawrevision.state.ny.us](http://www.lawrevision.state.ny.us), under "Recent Commission Reports", "Powers of Attorney.")

Another, separate but equally important issue regarding Powers of Attorney involves springing powers of attorney. Springing powers of attorney take effect upon the occurrence of an event defined by the principal, i.e. incapacity. (See N.Y. GOL § 5-1506). Because the Privacy Rule protects information as to whether someone is incompetent, in the case of a springing power of attorney, the "would-be" agent cannot speak to a doctor to prove that the condition precedent for the agent to act has been met.

### HEALTH CARE PROXIES

Under the Privacy Rule, a health care agent, as appointed in a valid health care proxy, qualifies as an individual's personal representative who must be treated as the individual for purposes of disclosure of protected health information. (See R. Bailey and B. Hancock, Id. at 36; 45 C.F.R. § 164.502[g][2]). However, health care decision-making authority also "springs" into effect upon the happening of a condition precedent, a determination that an individual lacks the capacity to make her or his own health care decisions. Some attorneys are preparing separate authorizations solely for the purpose of obtaining the determination of incapacity that triggers the health care agent's authority. (See R. Bailey and B. Hancock, Id. at 36) Other attorneys make the assumption that the determination of incompetency will be conveyed to the agent by the health care provider so long as authority to act under

the HIPAA Privacy rule is explicitly stated in the proxy form and have therefore revised their proxy forms accordingly.

From a practice perspective, it is important to note that many hospitals and doctors are refusing to allow health care agents to act despite their designation because a separate "HIPAA authorization" form generated by the entity has not been signed in addition to the appointment of a Health Care Agent in a valid health care proxy. Adding Privacy-Rule compliant language to the proxy form empowers the Health Care Agent to sign such a document following the determination of incapacity to make health care decisions by an individual's physician.

Thus, the HIPAA Privacy rule impacts individuals "personal representatives" as lawfully appointed under New York law. Until amendments are made to the General Obligations Law and the broad rights afforded to health care agents under the Public Health Law are recognized by health care providers as adequate authority to act under the HIPAA Privacy Rule, many practitioners are revising both their Power of Attorney forms and their Health Care Proxy forms to explicitly include such authority.



**LIZ WRIGHT, ESQ., MSW**  
Bouvier, O'Connor, LLP