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Guardianship Proceedings in New York: Proposals for Article 81 to Address Both the Lack of Funding and Resource Problems

Julie M. Solinski

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Comment

Guardianship Proceedings in New York: Proposals for Article 81 to Address Both the Lack of Funding and Resource Problems

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I. Introduction

Article 81 of the Mental Hygiene Law, guardianship proceedings for personal care and/or property management, was enacted in July, 1992, and became effective on April 1, 1993.¹ The statute established a procedure for the appointment of a guardian, whose powers are limited specifically to the particular needs of an incapacitated person for personal care, property and financial management, or both.²

The most difficult task in guardianship proceedings is finding professionals to participate as court evaluators, counsel and guardians.³ There is also considerable controversy over the appointment of both a court evaluator and counsel, since the payment of compensation to both potentially exhausts the resources of the alleged incapacitated person [AIP].⁴ In fact, re-

1. See N.Y. MENTAL HYG. LAW § 81 (McKinney Supp. 1993) [hereinafter "Article 81"]. See also Rose Mary Bailly, *Introduction to Article 81 of the Mental Hygiene Law Guardianship for Personal Care and/or Property Management*, in ARTICLE 81 OF THE MENTAL HYGIENE LAW 3, 3 (New York State Bar Ass'n, 1991) [hereinafter "Bailly I"].

2. See N.Y. MENTAL HYG. LAW § 81 (McKinney Supp. 1993).

3. See interview with Charles F. Devlin, Esq. Principal Law Clerk, Tax Certiorari and Guardianship Parts, in White Plains, N.Y. (Oct. 26, 1995).

4. See Wallace L. Leinhardt, *Article 81—How's It Doing?*, in ELDER LAW ATT'Y, 23, 23 (Spring 1995). The alleged incapacitated person [hereinafter "AIP"] is the person against whom the proceeding is brought, whereby the petitioner seeks the appointment of a guardian. N.Y. MENTAL HYG. LAW § 81 (McKinney Supp. 1993).

There are two components to a determination of incapacity: 1) the person cannot understand and appreciate the nature and consequences of the person's particular inabilities; and 2) the person is likely to suffer harm because of these limitations and the inability to appreciate the consequences of the limitations. This standard does away with the labels of incompetency and substantial impairment in Articles 77 and 78 and their requirement of some underlying illness or condition.

Id.

cent decisions and the opinion of some elder law attorneys indicate the belief that the appointment of counsel is often sufficient.⁵

Additionally, Article 81 fails to make any provision for compensation for the services of such professionals if the AIP is indigent.⁶ Finally, since many of those involved (judges, practitioners, and the AIP) are concerned about the great expense involved in these proceedings, the finding and implementation of ways to decrease costs would be beneficial. This Comment will address the problems associated with the appointment of the various professionals involved in Article 81 proceedings.⁷

Part II of this Comment discusses the history of Article 81, the roles of the various professionals involved, and the difficulties that arise during the course of these proceedings. Part III introduces potential solutions to the problems inherent in Article 81, such as finding professionals to participate when an AIP is indigent, eliminating excessive legal fees, and reducing the costs of these proceedings. Part IV concludes with suggestions for the New York State Legislature to consider for improvement of Article 81. Some proposals for betterment are as follows: continuing education to inform attorneys of the need for their services, mandatory *pro bono* hours to ensure attorney representation of indigents, and dispensing with the appointment of a court evaluator in certain instances when counsel is appointed, in order to reduce the costs of these proceedings.

II. Background

A. *The History of Article 81 Proceedings*

Article 81 of the Mental Hygiene Law, proceedings for appointment of a guardian for personal needs or property management, became effective on April 1, 1993.⁸ Article 81 replaced

5. *In re Rochester General Hosp.*, 158 Misc. 2d 522, 525, 601 N.Y.S.2d 375, 378 (Sup. Ct. Monroe County 1993); *In re Heumann*, N.Y.L.J. Nov. 17, 1993, at 29 col. 6 (Sup. Ct. Kings County 1993); *In re Sulzberger*, 159 Misc. 2d 236, 603 N.Y.S.2d 656 (Sup. Ct. N.Y. County 1993). See also Leinhardt, *supra* note 4, at 23.

6. N.Y. MENTAL HYG. LAW § 81 (McKinney Supp. 1993).

7. See *id.*

8. See *id.* § 81.01.

Articles 77 and 78⁹ because of the inflexibility of the dual structure of the conservatorship¹⁰ and committee¹¹ system in meeting the unique needs of persons with incapacities.¹²

Prior to 1972, no conservatorship law existed in New York State.¹³ The appointment of a committee, pursuant to Article 78 of the Mental Hygiene Law,¹⁴ was the only available legal remedy to handle the needs of an alleged incompetent.¹⁵ However, the committee statute required a finding of complete incompetence.¹⁶ Because of the stigma and loss of civil rights accompanying such a finding, the judiciary became reluctant to invoke the committee statute.¹⁷

9. See *id.* §§ 77 and 78 (McKinney 1988) (repealed April 1, 1993).

10. "A conservator is one appointed by the court to manage [the] affairs of [an] incompetent or to liquidate business or person appointed by [the] court to manage the estate of one who is unable to manage property and business affairs effectively." BLACK'S LAW DICTIONARY 306 (6th ed. 1990).

Under Article 77, the court had the power to appoint one or more conservators of the property (a) for a resident who has not been judicially declared incompetent and who by reason of advanced age, illness, infirmity, mental weakness, alcohol abuse, addiction to drugs, or other cause, has suffered substantial impairment of his ability to care for his property or has become unable to provide for himself or others dependent upon him for his support. . . .

N.Y. MENTAL HYG. LAW § 77.01 (McKinney 1988) (repealed April 1, 1993).

11. "A committee is a person . . . to whom the . . . management of any matter is committed or referred, as by a court or legislature." BLACK'S LAW DICTIONARY 273 (6th ed. 1990). Under Article 78,

[T]he court shall preserve the property of a person it declared incompetent or of a patient who has been found to be unable adequately to conduct his personal or business affairs from waste or destruction and, out of the proceeds thereof, provides for the payment of his debts and for the safekeeping, support and maintenance, and the education, when required, of the incompetent and his family.

N.Y. MENTAL HYG. LAW § 78.01 (McKinney 1988) (repealed April 1, 1993). In exercising such custody, the court may appoint a committee of the person or a committee of the property who may be the same or different individuals. See *id.*

12. See Bailly I, *supra* note 1, at 4-5.

13. See G. Oliver Koppell & Kenneth J. Munnelly, *The New Guardian Statute: Article 81 of the Mental Hygiene Law*, N.Y. ST. B. J., Feb. 1993, at 16.

14. See N.Y. MENTAL HYG. LAW § 78.03 (McKinney 1988) (repealed April 1, 1993).

15. Koppell & Munnelly, *supra* note 13, at 16.

16. See *id.* See N.Y. MENTAL HYG. LAW § 78.03 (McKinney 1988) (repealed April 1, 1993).

17. See Koppell & Munnelly, *supra* note 13, at 16; See also N.Y. MENTAL HYG. LAW § 81.01 (McKinney Supp. 1993).

In 1972, the New York State Legislature enacted a conservatorship statute as a less restrictive alternative to the committee procedure.¹⁸ Unlike the committee procedure, the appointment of a conservator did not require a finding of incompetence.¹⁹ However, the conservatorship statute was designed only to deal with the AIP's property and financial matters.²⁰

In 1974, the New York State Legislature passed two amendments, attempting to expand the role of conservators by substituting the conservatorship procedure for the committee procedure.²¹ The first amendment established a statutory preference for the appointment of a conservator in both Articles 77 and 78.²² The second amendment allowed the conservator to assume a limited role to protect the personal well-being of the conservatee.²³ These amendments contributed to the "legal

18. See 1972 Laws 251; N.Y. MENTAL HYG. LAW § 77 (McKinney 1988) (repealed April 1, 1993); Koppell & Munnelly, *supra* note 13, at 16.

19. See N.Y. MENTAL HYG. LAW § 77 (McKinney 1988) (repealed April 1, 1993); Koppell & Munnelly, *supra* note 13, at 16.

20. See Koppell & Munnelly, *supra* note 13, at 16; N.Y. MENTAL HYG. LAW § 77.19 (McKinney 1988) (repealed April 1, 1993); N.Y. MENTAL HYG. LAW § 81.01 (McKinney Supp. 1993).

21. See Koppell & Munnelly, *supra* note 13, at 16; 1974 N.Y. Laws 277; 1974 N.Y. Laws 623.

22. See Koppell & Munnelly, *supra* note 13, at 16; The Mental Hygiene Law was amended to add § 78.02, which reads as follows:

Prior to appointment of a committee under this article, it shall be the duty of the court to consider whether the interests sought to be protected could best be served by the appointment of a conservator. The court shall not make a finding that a person is incompetent or is a patient who is unable adequately to conduct his personal or business affairs unless the court first determines that it would not be in such person's best interests to treat him as suffering substantial impairment under Article 77 of this chapter.

1974 N.Y. Laws 297. Section 77.04 was also added and reads as follows:

[T]he court may treat a petition for declaration of incompetency and appointment of a committee under article seventy-eight of this chapter as a petition for the appointment of a conservator.

Id.

23. See Koppell & Munnelly, *supra* note 13, at 16; 1974 N.Y. Laws 623. Section 77.19 of the Mental Hygiene Law was amended to read as follows:

[T]he court order appointing a conservator shall set forth (1) the duration of the conservatorship; (2) the extent of income and assets of the proposed conservatee which are to be placed under the conservatorship; and (3) the court approved plan for the preservation, maintenance, and care of the conservatee's income, assets and personal well-being, including the provision of necessary personal and social protective services to the conservatee.

blurring between Articles 77 and 78," such that alterations in the Mental Hygiene Law would have to be made if guardianship proceedings were ever to be effective.²⁴

In 1991, the New York Court of Appeals decided *In re Grinker*,²⁵ holding that Article 77 did not authorize a court to grant a conservator the power to commit the conservatee to a nursing home, and that such power can be granted only pursuant to Article 78, the committee statute.²⁶ This decision "settled the debate that had surrounded Article 77 regarding whether a conservator can be granted the power to make decisions concerning the person of the conservatee, and thus significantly clarified the distinction between the conservator and committee statutes."²⁷ Unfortunately, the decision "dramatized the very difficulty the courts were trying to resolve, namely, choosing between a remedy which governs property and finances or a remedy which judges a person completely incompetent."²⁸

Pursuant to the inherent problems surrounding Articles 77 and 78, the New York State Law Revision Commission proposed the creation of a single statute, with a standard for guardian appointment focused on the individual's needs.²⁹ The result of these efforts was Article 81 of the Mental Hygiene Law, which are guardianship proceedings for personal care and/or property management.³⁰

1974 N.Y. Laws 623. Section 77.21 of the Mental Hygiene Law was amended to read "to the extent of the net estate available therefore, a conservator shall provide for the maintenance, support, and personal well-being of the conservatee . . ." *Id.* Any references to "personal well-being" in the above sections were new. *See id.*

24. Koppell & Munnely, *supra* note 13, at 16.

25. 77 N.Y.2d 703, 573 N.E.2d 536, 570 N.Y.S.2d 448 (1991).

26. *See id.* at 710, 573 N.E.2d at 539, 570 N.Y.S.2d at 451.

27. Koppell & Munnely, *supra* note 13, at 16.

28. *Id.* at 17.

29. *See id.*

30. N.Y. MENTAL HYG. LAW § 81 (McKinney Supp. 1993); 1992 N.Y. Laws 698. Article 81 was enacted to:

amend the Mental Hygiene Law in relation to the appointment of guardians for personal needs and property management for persons who are likely to suffer harm because they are unable to provide for personal needs including food, shelter, health care, or safety and/or unable to manage property and financial affairs in repealing certain provisions of such law relating thereto.

1992 N.Y. Laws 698.

Article 81 established a procedure³¹ for the appointment of a guardian whose powers are specifically tailored to the needs of an incapacitated person for personal care or property management.³² A guardian's powers are limited to ensure the "least restrictive form of intervention which assists them in meeting their needs but, at the same time, permits them to exercise the independence and self-determination of which they are capable."³³ The New York Legislature mandated that the New York State Law Revision Commission monitor the guardianship law for three years ending in April, 1996, and at that time, report to the Governor and the Legislature on the effectiveness of Article 81 together with recommendations regarding its modification.³⁴ On May 23, 1996, Senator Nicholas Spano introduced a bill to amend Article 81;³⁵ this Comment will delineate the changes proposed where relevant to this article.

31. Under § 81.02,

[T]he court may appoint a guardian for a person if the court determines: (1) that the appointment is necessary to provide for the personal needs of that person, including food, clothing, shelter, health care, or safety and/or to manage the property and financial affairs of that person; and (2) that the person agrees to the appointment, or that the person is incapacitated

N.Y. MENTAL HYG. LAW § 81.02 (McKinney Supp. 1993). "In deciding whether the appointment is necessary, the court shall consider the report of the court evaluator . . . and the sufficiency and the reliability of available resources . . . to provide for personal needs or property management without the appointment of a guardian." *Id.* "Any guardian appointed under this article, shall be granted only those powers which are necessary to provide for personal needs and/or property management of the incapacitated person in such a manner as appropriate to the individual and which shall constitute the least restrictive form of intervention. . . ." *Id.*

32. *See id.* § 81.01.

33. *Id.*

34. *See* 1992 N.Y. Laws 698. Groups including the Office of Court Administration, the Elder Law Section of the New York State Bar Association, the Mental Hygiene Legal Service, Brookdale Institute on Law & Rights of Older Adults, the Department of Social Services, and the Human Resources Administration of the City of New York, have been reviewing the implementation of the statute since its inception. *See also* Rose Mary Bailly, *Proposed Legislative Changes*, in *ADVANCED ISSUES IN GUARDIANSHIP* 263, 263 n.2 (New York State Bar Ass'n, 1995) [hereinafter "Bailly II"]. On March 10, 1995, the Commission's staff was terminated as part of a budget proposal to abolish the Commission. *Id.* Nevertheless, the Elder Law Section of the New York State Bar Association, as well as Brookdale, the Human Resource Administration of the City of New York and the Office of Court Administration remain committed to improving the effectiveness of the guardianship statute. *Id.*

35. *See* 1995 N.Y. S.B. 7601, Reg. Sess. (1996).

B. *The Roles of Court Evaluator, Counsel and Guardian*

1. *Court Evaluator*

Section 81.09 requires that the court appoint a court evaluator³⁶ at the time of issuance of the order to show cause.³⁷ Under section 81.09(b)(1):

the court may appoint as court evaluator any person drawn from a list maintained by the office of court administration with knowledge of property management, personal care skills, the problems associated with disabilities, and the private and public resources available for the type of limitations the person is alleged to have, including, but not limited to, an attorney-at-law, physician, psychologist, accountant, social worker, or nurse.³⁸

36. See N.Y. MENTAL HYG. LAW § 81.09(c) (McKinney Supp. 1993).

The duties of the court evaluator shall include the following: (1) meeting, interviewing, and consulting with the [AIP]; (2) explaining to the [AIP], in a manner which the person can reasonably be expected to understand, the nature and possible consequences of the proceeding, the general powers and duties of a guardian, available resources, and the rights to which the person is entitled, including the right to counsel; (3) determining whether the [AIP] wishes legal counsel to be appointed and otherwise evaluating whether legal counsel should be appointed; (4) interviewing the petitioner, or, if the petitioner is a facility or government agency, a person within the facility or agency fully familiar with the person's conditions, affairs and situation; and (5) investigating and making a written report and recommendations to the court . . . [which] shall include the court evaluator's personal observations as to . . . the [AIP's] condition, affairs and situation.

Id. The bill presented by the Senate on May 23, 1996 would amend § 81.09(c)(3) as follows: "determining whether the [AIP] wishes legal counsel to be appointed and otherwise evaluating whether legal counsel of his or her own choice to be appointed and otherwise evaluating whether legal counsel should be appointed in accordance with § 81.10 of this Article." 1995 N.Y. S.B. 7601, Reg. Sess. (1996).

37. See N.Y. MENTAL HYG. LAW § 81.09 (McKinney Supp. 1993).

38. *Id.* The bill introduced by the Senate on May 23, 1996 amends this section to read as follows:

the court may appoint as court evaluator any person, the Mental Hygiene Legal Service or a not-for-profit corporation. The court evaluator must have completed the education requirements of § 81.39 of this Article [Guardian Education Requirements] and the name of the court evaluator must be drawn from a list maintained by the office of court administration.

1995 N.Y. S.B. 7601, Reg. Sess. (1996). In essence, the amendment would specifically authorize the Mental Hygiene Legal Service to be appointed as court evaluator. See *id.* Furthermore, the amendment would compel the court evaluator to have the same educational requirements as required of a guardian. See *id.* See N.Y. MENTAL HYG. LAW § 81.39 (McKinney Supp. 1993).

The Law Revision Committee Comments explain that the choice of court evaluator must be made in light of the fact that each case presents unique challenges and needs that cannot always be met by the same type of professional.³⁹ The court evaluator is "intended to act as an independent investigator to gather information to aid the court in reaching a determination about the person's capacity, the availability and reliability of alternative resources, assigning the proper powers to the guardian, and selecting the guardian."⁴⁰

Attorney Charles F. Devlin, Principal Law Clerk for the Tax Certiorari and Guardianship Parts of the Supreme Court of the State of New York in White Plains,⁴¹ explained that the most difficult task in guardianship proceedings is finding resources to act as either court evaluator or court-appointed counsel.⁴² Pursuant to section 81.09, the court must appoint a court evaluator at the time of the issuance of the order to show cause.⁴³ The court chooses from a list of approved fiduciaries produced by the Office of Court Administration.⁴⁴ The court

39. See LAW REVISION COMMISSION COMMENTS, *reprinted in* the notes to N.Y. MENTAL HYG. LAW § 81.09 (McKinney Supp. 1993)[hereinafter L.R.C. COMM. with a reference to the notes under which section the commentary appears].

40. *Id.* See *In re Lichtenstein*, 223 A.D.2d 309, 646 N.Y.S.2d 94 (1996) (holding the court evaluator's investigation and report inadequate where evaluator failed to make personal assessment of AIP's wishes, failed to make recommendations on appointment of counsel, failed to interview petitioner, neglected to report on AIP's physical and financial condition, and failed to analyze AIP's appreciation of her own limitations).

41. There is a districtwide Guardianship Part for the Ninth Judicial District (Counties of Westchester, Putnam, Dutchess, Rockland and Orange) that supervises the annual and final accountings of all guardianships in the district. See interview with Charles F. Devlin, Esq., *supra* note 3. The districtwide Guardianship Part for the Ninth Judicial District handles the initial petitions for guardianship in Westchester; in the remaining four counties, the initial hearings are heard usually by the Surrogate Court. See *id.* Previously, under Articles 77 and 78, the Conservatorship and Incompetency Part in White Plains handled every aspect of the conservatorship and incompetency hearings for all five counties. See *id.* With Article 81.07's requirement that the court set a date no more than 28 days from the date of the filing of the petition on which the order to show cause is returnable, time constraints necessitated each county to conduct its own initial hearings. See *id.*

42. See Interview with Charles F. Devlin, Esq., *supra* note 3.

43. See *id.*

44. The list maintained by the office of court administration contains the name, address and telephone number of lawyers, social workers, accountants, psychologists and other professionals eligible to serve as court evaluator, guardian or

then contacts (usually by telephone) the proposed evaluator best suited to evaluate the AIP's situation, and asks this person to participate as court evaluator.⁴⁵

At the time of the issuance of the order to show cause, the court is given a sense of the AIP's needs from the petition.⁴⁶ It is the general practice in the Ninth Judicial District to appoint attorneys as court evaluators.⁴⁷ Nevertheless, attorneys are not exclusively appointed.⁴⁸ Specialized circumstances often recommend appointment of specialized professionals.⁴⁹ Unless the statute mandates otherwise,⁵⁰ the court then usually awaits the court evaluator's interview with the AIP and any report by the court evaluator that the AIP requests counsel to be appointed.⁵¹

2. Counsel

Section 81.10(c) requires that the court appoint counsel when the AIP: (1) requests counsel, (2) wishes to contest the petition, (3) does not consent to the authority requested in the petition to move the person from where he or she presently resides to a nursing home or other similar facility or (4) does not consent to needed major medical or dental treatment.⁵² Other situations where the court must appoint counsel are when the petition requests temporary powers, the court determines a possible conflict of interest, or any other time the court deems counsel would be helpful.⁵³

counsel for the AIP. See interview with Charles F. Devlin, Esq., *supra* note 3; N.Y. MENTAL HYG. LAW § 81.09(b)(1).

45. See interview with Charles F. Devlin, Esq., *supra* note 3.

46. See *id.*

47. See *id.*

48. See *id.*

49. See interview with Charles F. Devlin, Esq., *supra* note 3. For example, if the problem is financial, an attorney might be appointed as court evaluator; conversely, if the AIP has functional disabilities, a social worker might be appointed.

50. See *infra* part II.B.2.

51. See interview with Charles F. Devlin, Esq., *supra* note 3.

52. See N.Y. MENTAL HYG. LAW § 81.10(c) (McKinney Supp. 1993). See *In re Lichtenstein*, 223 A.D.2d 309, 646 N.Y.S.2d 94 (1996) (holding that the appointment of counsel for the AIP was required given that the AIP contested the appointment of the petitioner as guardian, and opposed a move to another nursing home).

53. See N.Y. MENTAL HYG. LAW § 81.10(c) (McKinney Supp. 1993). The bill introduced by the Senate on May 23, 1996 proposes to amend § 81.10(c) as follows: "[t]he court shall appoint counsel in any of the following circumstances if the court has no reason to believe that the [AIP] is represented. . ." 1995 N.Y. S.B. 7601, Reg. Sess. (1996).

The attorney representing an AIP is often faced with the dilemma of how to represent a client who is presumed competent at law but truly does not understand the nature or consequences of the litigation.⁵⁴ Because of this dilemma, some members of the legal profession believe section 81.10, which defines the role of court-appointed counsel, should be clarified.⁵⁵ They find it problematic that the section seems to require that a court-appointed attorney follow the wishes expressed by the client no matter how impaired that client may be.⁵⁶ For example, as a zealous advocate,⁵⁷ one would think that because of the adversarial nature of proceedings, the AIP's attorney would try to prevent the appointment of a guardian.⁵⁸ In other words, an AIP should be entitled to have counsel present to contest the proceeding, regardless of whether a guardian should in fact be appointed.

However, some attorneys feel that contesting the proceeding may not be in the best interests of the AIP, in that if the AIP is clearly incapacitated, counsel should not represent the AIP in the role of zealous advocate.⁵⁹ The AIP might require some form of assistance in meeting his or her personal or property management needs, whereby the lack of guardian appointment would work a substantial hardship on the AIP.⁶⁰ To avoid such a detrimental effect, some attorneys believe that counsel for an AIP who is unable to make responsible decisions on his or her own behalf should be a zealous advocate for the least restrictive form of intervention, as opposed to a zealous advocate completely contesting the appointment of a guardian.⁶¹

54. Anne K. Pecora, *Representing Defendants in Guardianship Proceedings: The Attorney's Dilemma of Conflicting Responsibilities*, 1 ELDER L.J. 139, 174 (1993).

55. Leinhardt, *supra* note 4, at 24.

56. *See id.*

57. The Model Rules of Professional Conduct assert, "[a]s advocate, a lawyer zealously asserts the client's position under the rules of the adversary system." MODEL RULES OF PROFESSIONAL CONDUCT, Preamble (1983).

58. As reported by an Interview with Frances M. Pantaleo, Esq., Adjunct Professor of Law at Pace University School of Law, who teaches *Legal Problems of the Elderly*, in White Plains, N.Y. (Nov. 6, 1995). This information is based upon debate among members of the Elder Law Section of the New York State Bar Association.

59. *See id.*

60. *See id.*

61. *See Pecora, supra* note 54, at 166.

Clarification as to the role of counsel is needed, either under the statute or under the Code of Professional Responsibility.⁶² Although courts charge lawyers with the highest standard of advocacy when representing individuals unable to comprehend the nature of the guardianship proceeding, the American Bar Association's Model Rules of Professional Conduct and the Ethical Considerations⁶³ give little guidance to the attorney representing an AIP.⁶⁴ Ethical Consideration 7-12⁶⁵ states,

[a]ny mental or physical condition of a client that renders him incapable of making a considered judgment on his own behalf casts additional responsibilities upon his [or her] lawyer If the disability of a client and the lack of a legal representative compel the lawyer to make decisions for his [or her] client, the lawyer should consider all circumstances then prevailing and act with care to safeguard and advance the interests of his [or her] client.⁶⁶

Under ABA Model Rule of Professional Conduct 1.14(a),⁶⁷ "[w]hen a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client."⁶⁸ The comments to the rule explain that the normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters.⁶⁹ However, when the client suffers from a mental disorder or disability, maintaining the ordinary client-lawyer relationship may not be possible in all respects.⁷⁰ The comments stress that despite a disability, a client lacking legal competence often has the ability to understand, deliberate

62. See Leinhardt, *supra* note 4, at 24; Interview with Frances M. Pantaleo, Esq., *supra* note 58.

63. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.14(a) (1983); MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-12 (1981).

64. Pecora, *supra* note 54, at 160.

65. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-12 (1981).

66. *Id.*

67. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.14(a) (1983).

68. *Id.*

69. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.14(a) cmt. (1983).

70. See *id.*

upon, and reach conclusions about matters affecting the client's own well-being.⁷¹

3. *Guardian*

Under section 81.02(a) of the Mental Hygiene Law, the court may appoint a guardian⁷² for a person if the court determines:

1) that the appointment is necessary to provide for the personal needs of that person, including food, clothing, shelter, health care, or safety and/or to manage the property and financial affairs of that person; and 2) that the person agrees to the appointment, or that the person is incapacitated as defined in subdivision (b) of this section.⁷³

In most cases, the petitioner is a relative of the AIP and wants to be appointed as guardian.⁷⁴ In descending order of frequency, the next most common petitioners are: the Department of Social Service,⁷⁵ a hospital or nursing home,⁷⁶ or concerned

71. *See id.*

72. *See* N.Y. MENTAL HYG. LAW § 81.03 (McKinney Supp. 1993). A guardian is: a person who is eighteen years of age or older, a corporation, or a public agency, including a local department of social services, appointed in accordance with terms of this article by the supreme court, the surrogate's court, or the county court to act on behalf of an incapacitated person in providing for personal needs and/or property management.

Id.

73. N.Y. MENTAL HYG. LAW § 81.02(b) (McKinney Supp. 1993). Under § 81.02(b),

the determination of incapacity shall be based on clear and convincing evidence and shall consist of a determination that a person is likely to suffer harm because: 1) the person is unable to provide for personal needs and/or property management; and 2) the person cannot adequately understand and appreciate the nature and consequences of such inability.

Id.

74. *See* interview with Charles F. Devlin, Esq., *supra* note 3. *See, e.g., In re Lichtenstein*, 223 A.D.2d 309, 646 N.Y.S.2d 94 (1st Dep't 1996); *In re O'Hear*, 219 A.D.2d 720, 631 N.Y.S.2d 743 (2d Dep't 1995); *In re Claiman*, 646 N.Y.S.2d 940 (Sup. Ct. Queens County 1996); *In re Nhan Thi Thanh Le*, 168 Misc. 2d 384, 637 N.Y.S.2d 614 (Sup. Ct. Queens County 1995); *In re Sulzberger*, 159 Misc. 2d 236, 603 N.Y.S.2d 656 (Sup. Ct. N.Y. County 1993). The relative seeking appointment of a guardian for an AIP does not always seek the role of guardian for him/herself. *See In re Maher*, 207 A.D.2d 133, 621 N.Y.S.2d 617 (2d Dep't 1994); *In re Marmol*, 168 Misc. 2d 845, 640 N.Y.S.2d 969 (Sup. Ct. N.Y. County 1996); *In re Kustka*, 163 Misc. 2d 694, 622 N.Y.S.2d 208 (Sup. Ct. Queens County 1994).

75. *See, e.g., In re Hammons* (McCarthy), 168 Misc. 2d 874, 645 N.Y.S.2d 392 (Sup. Ct. Queens County 1996); *In re Commissioner of Cayuga County Dep't of*

neighbors or friends.⁷⁷ In cases where the Department of Social Service is the petitioner, the AIP usually has no next of kin and is indigent; therefore, if no one comes forward at the hearing to be guardian, the court must appoint one.⁷⁸ In such a case, the guardian is chosen from the list of approved fiduciaries.⁷⁹

Under Article 81, a guardian's powers are specifically limited to allow the AIP to retain as much independence as is feasible.⁸⁰ Whether the guardian is appointed for personal care and/or property management, according to section 81.20, his or her duty to "afford the [AIP] the greatest amount of independence and self-determination . . . in light of that person's functional level, understanding and appreciation of his or her functional limitations, and personal wishes, preferences and desires with regard to managing the activities of daily living" is constant.⁸¹ Even when a proposed act by a guardian on behalf of an AIP may be in the AIP's best interests, if the specific power is not

Social Services, 639 N.Y.S.2d 234 (4th Dep't 1996); *In re Hammons* (Ehmke), 164 Misc. 2d 609, 625 N.Y.S.2d 408 (Sup. Ct. Queens County 1995); *In re Wingate*, 627 N.Y.S.2d 257 (Sup. Ct. Suffolk County 1995); *In re Onondaga County Dep't of Social Services*, 162 Misc. 2d 733, 619 N.Y.S.2d 238 (Sup. Ct. Onondaga County 1994).

76. See, e.g., *In re Lula "XX"*, 637 N.Y.S.2d 234 (4th Dep't 1996); *In re Rimler*, 164 Misc. 2d 403, 625 N.Y.S.2d 443 (Sup. Ct. Queens County 1995); *In re Janczak*, 634 N.Y.S.2d 1020 (Sup. Ct. Ontario County 1995); *In re Chachkers*, 159 Misc. 2d 912, 606 N.Y.S.2d 959 (Sup. Ct. N.Y. County 1993); *In re Rochester General Hospital*, 158 Misc. 2d 522, 601 N.Y.S.2d 375 (Sup. Ct. Monroe County 1993); *In re St. Luke's-Roosevelt Hosp. Ctr.*, 159 Misc. 2d 932, 607 N.Y.S.2d 574 (Sup. Ct. N.Y. County 1993), *aff'd*, 640 N.Y.S.2d 73 (N.Y. App. Div. 1996), *aff'd*, No. 259, 1996 WL 730469 (N.Y. Dec. 20, 1996).

77. See Interview with Charles F. Devlin, Esq., *supra* note 3. See, e.g., *In re Saphier*, 17 Misc. 2d 130, 637 N.Y.S.2d 630 (Sup. Ct. N.Y. County 1995).

78. See interview with Charles F. Devlin, Esq., *supra* note 3.

79. See *id.*; see *supra* note 44 and accompanying text.

80. Under § 81.20(a),

(1) a guardian shall exercise only those powers that the guardian is authorized to exercise by court order; (2) a guardian shall exercise the utmost care and diligence when acting on behalf of the incapacitated person; (3) a guardian shall exhibit the utmost degree of trust, loyalty and fidelity in relation to the incapacitated person; (4) a guardian shall file an initial and annual reports in accordance with sections 81.30 and 81.31 of this article; (5) a guardian shall visit the incapacitated person not less than four times a year or more frequently as specified in the court order

N.Y. MENTAL HYG. LAW § 81.20(a) (McKinney Supp. 1993).

81. *Id.*

authorized by the order of appointment, a court will not expand that guardian's powers to include the proposed act.

There have been numerous cases where a court has checked the ability of an appointed guardian to augment his or her powers. For example, in *In re Gordon*,⁸² the court denied the petitioner's request for powers to compel his spouse, the AIP, to receive psychiatric treatment and administration of antipsychotic drugs without her consent.⁸³ Pursuant to section 81.22(b), whereby "[n]o guardian may: (1) consent to the voluntary formal or informal admission of the [AIP] to a mental hygiene facility . . ." the court found that the petitioner could not consent to such medical intervention against the AIP's will.⁸⁴ The court therefore determined that the only available remedy for the relief requested would be involuntary commitment pursuant to Article 9 of the Mental Hygiene Law⁸⁵ and an application for administration of medication.⁸⁶

In the similar case of *In re Beth Israel Medical Center*,⁸⁷ the court denied a guardian's motion for an order of the court directing the police department to assist in transporting an AIP to the hospital against her wishes based upon the guardian's determination of the need for evaluation for psychotropic medication.⁸⁸ In this case, the appointed guardian was directed to arrange for twenty-four hour home care of the AIP, who suffered from degenerative dementia.⁸⁹ The guardian was also authorized to consent or refuse routine and major medical treatment without the AIP's consent.⁹⁰ Due to the AIP's refusal to allow home care attendants to assist her, which included encounters wherein the AIP was even violent, the guardian sought the advice of a psychiatrist, because she feared that under such adverse conditions, she would soon be unable to find a companion willing to stay with the AIP.⁹¹ The psychiatrist

82. 162 Misc. 2d 697, 619 N.Y.S.2d 235 (Sup. Ct. Rockland County 1994).

83. *See id.* at 698, 619 N.Y.S.2d at 236.

84. *See id.* at 699, 619 N.Y.S.2d at 236.

85. *See* N.Y. MENTAL HYG. LAW § 9.27 (McKinney 1996).

86. *See Gordon*, 162 Misc. 2d at 700, 619 N.Y.S.2d at 237.

87. 163 Misc. 2d 26, 619 N.Y.S.2d 239 (Sup. Ct. N.Y. County 1994).

88. *See id.* at 26, 619 N.Y.S.2d at 239.

89. *See id.* at 26, 619 N.Y.S.2d at 240.

90. *See id.*

91. *See id.*

recommended that she bring the AIP to the hospital for an evaluation regarding the administration of Haldol, a psychotropic medication.⁹²

As the AIP refused to go to the hospital voluntarily, the guardian sought an order to direct the police department to assist in bringing the AIP to the hospital for an evaluation.⁹³ The court sympathized with the guardian's situation, in that the short hospital stay would not be the same as an involuntary commitment under Article 9.⁹⁴ However, pursuant to an analysis similar to that in *Gordon*, the court found that since such action would be against the AIP's will, section 81.22(b)(1)⁹⁵ prevented it from granting the relief requested.⁹⁶

Finally, in *In re Barsky*,⁹⁷ the court denied a guardian's ex parte application for an order modifying and expanding his powers to withhold life-sustaining treatment from an AIP.⁹⁸ A heart attack or stroke suffered by the AIP had rendered her incapable of ingesting solid food.⁹⁹ Despite the medical recommendation that a nutrition and hydration tube be surgically inserted into the AIP's stomach, the guardian claimed he would not consent to the procedure, based upon conversations he had previously had with the AIP indicating that she would not desire such treatment.¹⁰⁰

The court acknowledged that as guardian for the property management and personal needs of the AIP, this guardian possessed the broad powers set forth in section 81.22(a)(8), which includes the power to

consent to or refuse generally accepted routine or major medical or dental treatment; the guardian shall make treatment decisions . . . in accordance with the patient's wishes, including the patient's religious and moral beliefs, or if the patient's wishes are

92. *See id.*

93. *See id.* at 26, 619 N.Y.S.2d at 239.

94. *See id.* at 26, 619 N.Y.S.2d at 241.

95. Under § 81.22(b), "[n]o guardian may: (1) consent to the voluntary formal or informal admission of the [AIP] to a mental hygiene facility under article nine or fifteen of this chapter. . ." N.Y. MENTAL HYG. LAW § 81.22(b) (McKinney Supp. 1993).

96. *See Gordon*, 162 Misc. 2d at 698, 619 N.Y.S.2d at 241-42.

97. 165 Misc. 2d 175, 627 N.Y.S.2d 903 (Sup. Ct. Suffolk County 1995).

98. *See id.*

99. *See id.*

100. *See id.*

not known and cannot be ascertained with reasonable diligence, in accordance with the person's best interests, including a consideration of the dignity and uniqueness of every person, the possibility and extent of preserving the person's life, the preservation, improvement or restoration of the person's health or functioning, the relief of the person's suffering, the adverse side effects associated with the treatment, any less intrusive alternative treatments, and such other concerns and values as a reasonable person in the [AIP's] circumstances would wish to consider.¹⁰¹

Furthermore, the court quoted section 81.29(e) which provides:

[n]othing in this article shall be construed either to prohibit a court from granting, or to authorize a court to grant, to any person the power to give consent for the withholding or withdrawal of life sustaining treatment, including artificial nutrition and hydration. . . . When used in this article, life sustaining treatment means medical treatment which is sustaining life functions and without which, according to reasonable medical judgment, that patient will die within a relatively short time period.¹⁰²

Nevertheless, the court also noted that the Law Revision Commission Comments to this section state:

Article 81 does not change the current law in New York regarding whether a guardian has the authority to make decisions regarding the withholding or withdrawal of life-sustaining treatment nor does it impede the development of the law in this area. . . . Under present New York law, the right to decline treatment is a personal one whose exercise has been denied to a third party when the patient is unable to do so unless a health care proxy or Do Not Resuscitate Order is in place or there is otherwise clear and convincing evidence of the patient's wishes regarding such treatment expressed while the patient was competent.¹⁰³

101. *Id.*; See N.Y. MENTAL HYG. LAW § 81.22(a)(8) (McKinney Supp. 1993). The bill presented by the Senate on May 23, 1996 proposes to change this section as follows: "consent to or refuse generally accepted routine or major medical or dental treatment subject to the provisions of subdivision (e) of § 81.29 of this Article" 1995 N.Y. S.B. 7601, Reg. Sess. (1996). Thus, the change will mandate that § 81.22(a)(8) be read in conjunction with the provisions of § 81.29(e).

102. Barsky, 165 Misc. 2d at 175, 627 N.Y.S.2d at 904; N.Y. MENTAL HYG. LAW § 81.29(e) (McKinney Supp. 1993).

103. Barsky, 165 Misc. 2d at 175, 627 N.Y.S.2d at 904; See L.R.C. Comm., *supra* note 39, in notes following N.Y. MENTAL HYG. LAW § 81.29 cmts. (McKinney Supp. 1993).

The guardian in this proceeding was unable to provide clear and convincing evidence of the AIP's wishes while she was competent, providing only an affidavit containing a conclusory assertion that the treatment would not be the AIP's desire.¹⁰⁴ Therefore, the court denied his application for an expansion of powers to include the power to determine whether life-sustaining treatment should be provided or withheld.¹⁰⁵

C. *The Controversy Over the Necessity of Both Court Evaluator and Counsel*

Active practitioners in Article 81 proceedings have expressed concern over the necessity of both court evaluator and counsel.¹⁰⁶ Some elder law attorneys believe that section 81.10(c),¹⁰⁷ which describes the mandatory appointment of counsel, substantially increases the cost of the proceedings unnecessarily.¹⁰⁸ They feel that counsel should not be appointed unless there is a *prima facie* showing that there is a role for counsel in the proceeding.¹⁰⁹ For example, if the AIP is able to provide counsel with some direction and where the AIP opposes some portion or all of the application and expresses a desire to have counsel, then counsel should be appointed for the AIP.¹¹⁰ In the alternative, the court should be permitted, at its discretion, to appoint counsel when it deems such appointment appropriate.¹¹¹

104. Barsky, 165 Misc. 2d at 175, 627 N.Y.S.2d at 905.

105. *See id.*

106. *See* Leinhardt, *supra* note 4, at 23.

107. Under section 81.10(c):

the court shall appoint counsel in any of the following circumstances: (1) the [AIP] requests counsel; (2) the [AIP] wishes to contest the petition (3) the [AIP] does not consent to the authority requested in the petition to move the [AIP] from where that person presently resides to a nursing home or other residential facility . . . (4) if the petition alleges that the person is in need of major medical or dental treatment and the [AIP] does not consent; (5) the petition requests temporary powers . . . ; (6) the court determines that a possible conflict may exist between the court evaluator's role and the advocacy needs of the [AIP]; (7) if at any time the court determines that appointment of counsel would be helpful to the resolution of the matter.

N.Y. MENTAL HYG. LAW § 81.10(c) (McKinney Supp. 1993).

108. *See* Leinhardt, *supra* note 4, at 23.

109. *See id.*

110. *See id.*

111. *See id.*

In contrast, other elder law attorneys feel that limiting the mandatory appointment of counsel to situations where the AIP wishes to contest the proceeding or requests counsel will dilute the protection afforded the AIP under Article 81.¹¹² These attorneys believe that Article 81 purposefully created the separate roles of court evaluator, to conduct an objective investigation of the case,¹¹³ and counsel, to advocate on the AIP's behalf.¹¹⁴ Since the appointment of a guardian is a serious intervention in a person's life, often resulting in involuntary medical procedures, hospitalization, or placement in a nursing home, counsel should be available to the AIP.¹¹⁵ The Law Revision Commission Comments stress the importance of counsel by delineating the role to "include conducting personal interviews with the person; explaining to the person his or her rights and counseling the person regarding the nature and consequences of the proceeding; securing and presenting evidence and testimony; providing vigorous cross-examination; and offering arguments to protect the rights of the [AIP]."¹¹⁶

However, recent decisions indicate the feeling among judges and attorneys that counsel could provide the same services as would a court evaluator; therefore, the appointment of both is unnecessary.¹¹⁷ Additionally, the appointment of both a court evaluator and counsel may potentially exhaust an AIP's relatively limited assets.¹¹⁸ Under section 81.10(g), if the court

112. See *Bailly II*, *supra* note 34, at 275.

113. See *id.* at 274; See also Neil B. Posner, Comment, *The End of Parens Patriae in New York: Guardianship Under the New Mental Hygiene Law Article 81* 79 MARQ. L. REV. 603, 624 (1996) (noting that "[b]y distinguishing between the roles [of court evaluator and counsel], Article 81 permits the court to choose an evaluator whose sphere of expertise is closely aligned with the functional limitations likely to be considered in the proceedings.").

114. See *Bailly II*, *supra* note 34, at 274; See also L.R.C. COMM., *supra* note 39, in notes following N.Y. MENTAL HYG. LAW § 81.10 (McKinney Supp. 1993).

115. See *Bailly II*, *supra* note 34, at 274.

116. *Id.* at 274 (citing L.R.C. COMM., *supra* note 39, in notes following N.Y. MENTAL HYG. LAW § 81.10 (McKinney Supp. 1993)).

117. See, e.g., *In re Rochester General Hosp.*, 158 Misc. 2d 522, 525, 601 N.Y.S.2d 375, 378. (Sup. Ct. Monroe County 1993); *In re Heumann*, N.Y.L.J., Nov. 17, 1993, at 29 (Sup. Ct. Kings County 1993); *In re Sulzberger*, 159 Misc. 2d 236, 603 N.Y.S.2d 656 (Sup. Ct. N.Y. County 1993). See also *Leinhardt*, *supra* note 4, at 23.

118. See *In re Rochester General Hosp.*, 158 Misc. 2d 522, 525, 601 N.Y.S.2d 375, 378 (Sup. Ct. Monroe County 1993).

appoints counsel, the court may dispense with the appointment of a court evaluator.¹¹⁹ According to the Law Revision Commission Comments, the rationale is that counsel's advocacy role will provide protection for the AIP, and that some estates may be financially overburdened by the expenses of both court evaluator and counsel.¹²⁰ Thus, the objective "best interests" assessment of the AIP, rather than the adversarial approach, may better serve the AIP's needs.¹²¹

There are numerous cases where courts have dispensed with a court evaluator when counsel is appointed.¹²² For example, in *In re Heumann*,¹²³ the AIP's son sought the appointment of a guardian for his father for the sole purpose of moving him to a health care facility in Israel where the son resided. The court-appointed counsel for the AIP and dispensed with the appointment of a court evaluator.¹²⁴ Since counsel merely had to prove that the AIP's needs were being met at his present residence, and that he adamantly objected to living in Israel, an attorney, rather than a court evaluator, would best represent the AIP's interests.¹²⁵

Similarly, in *In re Sulzberger*,¹²⁶ the daughter of an AIP, who resided in France, sought an order appointing her as guardian to handle her father's substantial property holdings in New York.¹²⁷ The court determined that counsel could best

119. See N.Y. MENTAL HYG. LAW § 81.10(g) (McKinney Supp. 1993).

120. See L.R.C. COMM., *supra* note 39, in notes following N.Y. MENTAL HYG. LAW § 81.10 (McKinney Supp. 1993). See also Posner, *supra* note 113, at 626-27 (arguing that although this is not a perfect solution, it is the only appropriate outcome, in that under the circumstances the legislature has chosen protection of the respondent's [AIP's] interests over the court's need for a neutral evaluating party).

121. See L.R.C. COMM., *supra* note 39, in notes following N.Y. MENTAL HYG. LAW § 81.10 (McKinney Supp. 1993).

122. See, e.g., *In re Heumann*, N.Y.L.J. Nov. 17, 1993, at 29 (Sup. Ct. Kings County 1993); *In re Sulzberger*, 159 Misc. 2d 236, 603 N.Y.S.2d 656, (Sup. Ct. New York County 1993). Compare *In re St. Luke's-Roosevelt Hosp. Ctr.*, 640 N.Y.S.2d 73 (1st Dep't 1996), *aff'd*, 89 N.Y.2d 889, 1996 WL 730469 (1996) (noting that whether to dispense with the appointment of court evaluator is a matter entrusted to the discretion of the court, especially in cases where the guardian will have power to either place the AIP in a nursing home or to make major medical decisions).

123. N.Y.L.J. Nov. 17, 1993, at 29 (Sup. Ct. Kings County 1993).

124. See *id.*

125. See *id.*

126. 159 Misc. 2d 236, 603 N.Y.S.2d 656 (Sup. Ct. New York County 1993).

127. See *id.* at 237, 603 N.Y.S.2d at 657-58.

serve the needs of the AIP, since the issues to be investigated were predominantly legal questions.¹²⁸ The court also concluded that the appointment of a court evaluator to travel to France would be an unnecessary expense, probably in excess of \$10,000, to be borne by the AIP.¹²⁹ The court avoided overburdening the estate of the AIP by appointing counsel for the AIP and dispensing with the appointment of a court evaluator.¹³⁰

D. *Compensation for Court Evaluator and Counsel*

The other controversy underlying the necessity of both a court evaluator and counsel in guardianship proceedings is the compensation awarded. A court-appointed attorney is paid on a quantum meruit¹³¹ basis, while the court evaluator and counsel for petitioner are paid according to a percentage, instructed by rule of the Appellate Division.¹³²

1. *Compensation for Court Evaluator*

Under section 81.09(f), the court may award a reasonable allowance to a court evaluator, including the Mental Hygiene Legal Service.¹³³ When a judge grants a petition, the sum is payable by the AIP's estate.¹³⁴ When a judge denies or dis-

128. *See id.* at 241, 603 N.Y.S.2d at 659.

129. *See id.* at 241, 603 N.Y.S.2d at 660.

130. *See id.* at 241, 603 N.Y.S.2d at 659.

131. *See* interview with Charles F. Devlin, *supra* note 3.

Quantum meruit:

measures recovery under implied contract to pay compensation as reasonable value of services rendered. An equitable doctrine, based on the concept that no one who benefits by the labor and materials of another should be unjustly enriched thereby; under those circumstances, the law implies a promise to pay a reasonable amount for the labor and materials furnished, even absent a specific contract therefor.

BLACK'S LAW DICTIONARY 1243 (6th ed. 1990).

132. *See* N.Y. MENTAL HYG. LAW § 81.28 (McKinney Supp. 1993); Interview with Charles F. Devlin, Esq., *supra* note 3. The percentage calculation is 2% of the first \$125,000 of the AIP's estate; then 1% of the next \$75,000 of the AIP's estate; amounts over \$200,000 are calculated to be .05% of the AIP's estate. *See id.* One-third of this total is allocated to the court evaluator and two-thirds are allocated to the petitioner's attorney. *See id.*

133. *See* N.Y. MENTAL HYG. LAW § 81.09(f) (McKinney Supp. 1993). The bill presented by the Senate on May 23, 1996 proposes to substitute the word "compensation" for the word "allowance" in § 81.09(f). *See* 1995 N.Y. S.B. 7601, Reg. Sess. § 10(f) (1996).

134. *See* N.Y. MENTAL HYG. LAW § 81.09(f) (McKinney Supp. 1993).

misses the petition, the sum is payable by the petitioner, by the AIP or both as the court may deem just.¹³⁵

For example, in *In re Presbyterian Hospital*,¹³⁶ the hospital commenced a proceeding for the appointment of a guardian for the AIP, alleging that she should be placed in a residential health care facility due to her psychological and physical incapacities.¹³⁷ The AIP, a blind, diabetic and frail eighty-year-old, resided alone until a fall resulted in hospitalization.¹³⁸ The AIP contested the proceeding, strongly objecting to placement in a nursing home.¹³⁹ The court found that she understood her functional limitations, and therefore had arranged for a certain level of home care to be provided by her friends, including preparing meals, shopping, laundry and managing her finances.¹⁴⁰ The

135. *See id.*

136. N.Y.L.J. July 2, 1993, at 1A (Sup. Ct. New York County 1993).

137. *See id.*

138. *See id.*

139. *See id.*

140. *See id.* *See, e.g., In re Crump*, 646 N.Y.S.2d 825 (2d Dep't 1996) (reversing appointment of guardian where AIP's plan for management of affairs and possession of sufficient resources to protect her well-being obviated need for guardian); *In re O'Hear*, 219 A.D.2d 720, 631 N.Y.S.2d 743 (2d Dep't 1995) (holding that notwithstanding any incapacity of the AIP, the appointment of a guardian was unnecessary in light of plan made while she had capacity for management of her affairs, which included granting an unlimited power of attorney to adult son, will, living will and health care proxy; further, there was no showing that the AIP's son engaged in any impropriety with respect to care of AIP or her assets); *In re Maher*, 207 A.D.2d 133, 612 N.Y.S.2d 617 (2d Dep't 1994) (holding that despite the AIP's functional limitations resulting from a stroke, evidence that the AIP appreciated the extent of his handicaps to the extent that he effectuated a plan for assistance in managing his financial affairs made the appointment of a guardian unnecessary). *See also In re Janczak*, 167 Misc. 2d 766, 634 N.Y.S.2d 1020 (Sup. Ct. Ontario County 1995) (appointing county commissioner of social services as special guardian for an AIP, despite the willingness and availability of the AIP's son and daughter-in-law to assist her, due to the fact that in the past these relatives had been unable to maintain proper hygiene and had not sought prompt medical attention for the AIP when required); *In re Rimler*, 164 Misc. 2d 403, 625 N.Y.S.2d 443 (Sup. Ct. Queens County 1995) (holding that the appointment of a guardian was necessary for an obese patient with borderline personality disorder who was unable to manage her property, had not shown a desire to have people assist her with her personal needs and property management, and lacked understanding and appreciation of the nature and consequences of her functional limitations); *In re Kustka*, 163 Misc. 2d 694, 622 N.Y.S.2d 208 (Sup. Ct. Queens County 1994) (holding that appointment of independent guardian for the AIP was appropriate in view of evidence of AIP's new wife's questionable financial transactions with AIP's assets and evidence that AIP seemed confused regarding his financial affairs). *Compare In re Lichtenstein*, 223 A.D.2d 309, 646 N.Y.S.2d 94 (1st Dep't

petitioner failed to prove with clear and convincing evidence that the AIP was incapable of providing for herself both personally and financially; therefore, the court dismissed the petition.¹⁴¹ Pursuant to section 81.09(f),¹⁴² the court ordered the petitioner to pay the court evaluator compensation for his service.¹⁴³

Some elder law attorneys feel that imposing the court evaluator's compensation on the petitioner, when the petition is dismissed, will prevent people from rendering assistance to those who are impaired.¹⁴⁴ Perhaps requiring a "bad faith or willful" standard before imposing costs on the petitioner will prevent concerned individuals from the fear of instituting such a proceeding.¹⁴⁵ However, some commentators have said that the current scheme does not discourage petitioners.¹⁴⁶ They feel that hospitals, nursing homes, the Department of Social Service

1996) (holding the appointment of a guardian without the AIP's consent was error absent specific findings on the record as to functional limitations, need for guardian to prevent harm, specific powers of guardian and duration of appointment); *In re Onondaga County Dep't of Social Services*, 162 Misc. 2d 733, 619 N.Y.S.2d 238 (Sup. Ct. Onondaga County 1994) (dismissing petition seeking designation of guardian where petition did not set forth any meaningful facts pertaining to person's functional level, made no reference to any medical test results or specific evaluations, and provided no specific factual allegations as to personal actions or financial transactions illustrating that AIP was likely to suffer harm because of inability to adequately understand and appreciate the nature and consequences of his actions).

141. See *In re Presbyterian Hosp.*, N.Y.L.J. July 2, 1993, at 1A. Compare *In re Nhan Thi Thanh Le*, 168 Misc. 2d 384, 637 N.Y.S.2d 614 (Sup. Ct. Queens County 1995) (appointing co-guardians where there was clear and convincing evidence that AIP (a ten-year-old child) was likely to suffer harm because he was unable to provide for management of proposed settlement of his personal injury claim and could not adequately understand and appreciate the nature and consequences of that inability).

142. See N.Y. MENTAL HYG. LAW § 81.09(f) (McKinney Supp. 1993).

143. See *In re Presbyterian Hosp.*, N.Y.L.J. July 2, 1993, at 1A.; See also *In re Crump*, 646 N.Y.S.2d 825 (2d Dep't 1996) (ordering petitioner to pay any compensation awarded guardian, petitioner's own legal fees, court evaluator fee, and fee of petitioner's expert, in case where appointment of guardian was reversed).

144. See *Leinhardt*, *supra* note 4, at 25.

145. See *id.*; Cf. *In re Arnold "O"*, 640 N.Y.S.2d 355 (3d Dep't 1996) (upholding the imposition of an award of counsel fees for frivolous conduct where petitioners not only engaged in a course of conduct designed to interfere with a guardian's performance of his duties, but also attempted to remove said guardian based only upon conclusory allegations of misconduct, while the record was replete with evidence that the guardian had fulfilled his responsibilities).

146. See interview with Charles F. Devlin, Esq., *supra* note 3.

and individuals take these proceedings very seriously and do not initiate them merely to injure an AIP.¹⁴⁷ Furthermore, the dismissal of a petition is a very rare occurrence.¹⁴⁸

2. *Compensation for Court-Appointed Attorney*

Under section 81.10(f), the court shall determine the reasonable compensation for the Mental Hygiene Legal Service or any appointed attorney.¹⁴⁹ The AIP must pay for such compensation, unless the AIP is indigent.¹⁵⁰ If the petition is dismissed, the court has the discretion to direct the petitioner to pay such compensation for the AIP.¹⁵¹

In *In re Rocco*,¹⁵² on the day scheduled for the commencement of a jury trial for this guardianship appointment, the court granted the petitioner's application to withdraw the petition.¹⁵³ The parties agreed that the petitioner should pay the reasonable allowance due the court evaluator.¹⁵⁴ However, the AIP contended that section 81.10(f) also authorized the court to direct the petitioner to pay the AIP's attorney's fees.¹⁵⁵ The court determined that the plain language of section 81.10(f) indicates that the only fees recoverable by the AIP's attorney are those for the Mental Hygiene Legal Service or a court-appointed attorney.¹⁵⁶ Thus, the court found that section 81.10(f) does not allow the recovery of fees when the AIP retains his or her own attorney.¹⁵⁷

The court noted that it would be more equitable to the AIP, if upon the dismissal of a petition, Article 81 included the authority for the court to direct payment of legal fees of the AIP

147. *See id.*

148. *See id.*

149. *See* N.Y. MENTAL HYG. LAW § 81.10(f) (McKinney Supp. 1993).

150. *See id.*

151. *See id.*

152. 161 Misc. 2d 760, 615 N.Y.S.2d 260 (Sup. Ct. Suffolk County 1994).

153. *See id.* at 761, 615 N.Y.S.2d at 261. Despite the fact that the AIP had a dysfunctional family, the court found that she was entirely capable of handling her activities of daily living and financial affairs, and therefore did not require the "extreme measure" of appointing a guardian. *Id.* at 766, 615 N.Y.S.2d at 264.

154. *See id.* at 761, 615 N.Y.S.2d at 261.

155. *See id.*

156. *See id.* at 762, 615 N.Y.S.2d at 261.

157. *See id.* at 763, 615 N.Y.S.2d at 262. *See also* N.Y. MENTAL HYG. LAW § 81.10(f) (McKinney Supp. 1993).

whether counsel is appointed or privately retained.¹⁵⁸ The court reasoned that the current scheme might discourage AIPs from retaining an attorney, when such person already faces other expenses during the proceeding.¹⁵⁹ The court lamented:

[i]n a statutory scheme which is so greatly focused on recognizing and protecting the rights of an alleged incapacitated person, the practical limitation on such a person's present access to counsel is incongruous. The statute should encourage an alleged incapacitated person, irrespective of such person's financial status, who may be inclined to resist a petition . . . to assert all legal rights, and this ordinarily can only be done with the assistance of counsel.¹⁶⁰

The court respectfully urged the New York Legislature to amend Article 81 to address this issue.¹⁶¹

3. *Compensation for Petitioner's Attorney*

Under section 81.16(f), when a petition is granted, or where the court otherwise deems it appropriate, the court may award reasonable compensation for the petitioner's attorney, including the attorney general for a local department of social services.¹⁶²

In *In re Chachkers*,¹⁶³ the court determined that an Article 81 proceeding may be discontinued prior to an evidentiary hearing if it is in the best interest of the AIP.¹⁶⁴ In *Chachkers*, the petitioner, the Director of Social Services of New York University Medical Center, sought the appointment of a guardian for the AIP.¹⁶⁵ The bed-bound seventy-seven year old AIP was recovering from a stroke, had to be fed through a nasal-gastric tube, and was disoriented from dementia and clinical depression.¹⁶⁶ By the return date of the order to show cause, the court evaluator's report of the AIP revealed that she had recovered significantly both physically and mentally.¹⁶⁷

158. See *Rocco*, 161 Misc. 2d at 763, 615 N.Y.S.2d at 262.

159. See *id.*

160. *Id.*

161. See *id.*

162. See N.Y. MENTAL HYG. LAW § 81.16(f) (McKinney Supp. 1993).

163. 159 Misc. 2d 912, 606 N.Y.S.2d 959 (Sup. Ct. N.Y. County 1993).

164. See *id.* at 914, 606 N.Y.S.2d at 960.

165. See *id.* at 913, 606 N.Y.S.2d at 960.

166. See *id.*

167. See *id.*

Because of the AIP's recovery, petitioner's counsel wished to withdraw the proceeding; both the court evaluator and retained counsel for the AIP also desired a discontinuance.¹⁶⁸ The court determined that a discontinuance was appropriate, even without a hearing, since all parties agreed that a guardian was not necessary.¹⁶⁹ Since the petitioner acted in good faith in bringing the proceeding, the AIP had to pay for the court evaluator's services.¹⁷⁰ However, the court declined to impose petitioner's counsel fees on the AIP, since there was no special circumstance to warrant fee shifting in this discontinued proceeding.¹⁷¹

E. *The Problem of Excessive Legal Fees*

Article 81 delineates how the court evaluator, counsel, and guardian are to be compensated.¹⁷² Additionally, the statute gives the court the discretion to reduce legal fees it deems excessive.¹⁷³ The percentage system of compensation is not mandatory. Thus, if the AIP has a large estate and the case requires little work, the court has the discretion to recommend payment of the court evaluator and counsel at an hourly rate rather than in a lump sum.¹⁷⁴

Excessive legal fees seem to result from the participating attorneys' ignorance that the court ultimately has the discretion to determine "reasonable compensation."¹⁷⁵ For example, in *In*

168. *See id.*

169. *See Chackers*, 159 Misc. 2d at 914, 606 N.Y.S.2d at 960.

170. *See id.* at 916, 606 N.Y.S.2d at 962.

171. *See id.*

172. *See* N.Y. MENTAL HYG. LAW §§ 81.09(f), 81.10(f) and 81.28 (McKinney Supp. 1993).

173. *See id.* These sections give the court the discretion to determine "reasonable compensation" for the roles of court evaluator, counsel and guardian. *See In re Franczoz*, No. 24410-I-94 (Sup. Ct. Nassau County 1994), *reprinted in* ADVANCED ISSUES IN GUARDIANSHIP 70 (New York State Bar Ass'n 1995). *See also In re Lichtenstein*, 223 A.D.2d 309, 646 N.Y.S.2d 94 (1st Dep't 1996) (reversing and remanding for reconsideration of an award of attorney's fees to petitioner's counsel due to the absence of a basis in the record for said award); *In re Whitehead*, 642 N.Y.S.2d 979 (Sup. Ct. Suffolk County 1996) (holding that Article 81 of the Mental Hygiene Law requires that the determination of reasonable fees be awarded under New York law, notwithstanding previous fee determination by a Canadian court).

174. *See* Interview with Charles F. Devlin, Esq., *supra* note 3.

175. *See* N.Y. MENTAL HYG. LAW §§ 81.09(f), 81.10(f) and 81.28 (McKinney Supp. 1993).

re Roy,¹⁷⁶ following the appointment of guardians for the AIP, the court addressed the issue of the fee awarded to the petitioner's attorney.¹⁷⁷ Even though the petitioner had signed a retainer agreement, setting the rate of payment at \$250.00 per hour, which would have resulted in a total fee of \$11,186, the court awarded the petitioner's attorney \$5,500.¹⁷⁸ Since the AIP must pay the petitioner's attorney's fees when a petition is granted, the court concluded that the terms of a retainer agreement between a petitioner and counsel in an Article 81 proceeding are not necessarily determinative of "reasonable compensation" within the meaning of section 81.16(f).¹⁷⁹

In fact, the court stated that if an attorney persuades a client to sign a retainer agreement with an assurance that the proceeding will ultimately result in no expense to the petitioner, such attorney has either negligently or deliberately made a material misrepresentation to the client.¹⁸⁰ Therefore, the court suggested that when consulted by a client anticipating an Article 81 proceeding, an attorney should clearly state that whatever fee arrangement is agreed upon is subject to the court's determination as to what constitutes "reasonable compensation."¹⁸¹

Sometimes attorneys take advantage of a wealthy AIP, in which case, the court's ability under Article 81 to intervene and reduce legal fees is a great protection for AIPs. For example, in *In re Spingarn*,¹⁸² the court found many of the 230 hours billed by a large firm of attorneys to a ninety-five year old wealthy woman during an Article 81 proceeding to be unnecessary, duplicative, and not the responsibility of the AIP.¹⁸³ Accordingly, the court reduced such fees.¹⁸⁴

The court noted, for example, that when two or more partners conversed or sent internal memos to each other, they all billed for their time, even though this was a relatively simple

176. 164 Misc. 2d 146, 623 N.Y.S.2d 995 (Sup. Ct. Suffolk County 1995).

177. *See id.* at 151, 623 N.Y.S.2d at 999.

178. *See id.*

179. *See id.* at 148-49, 623 N.Y.S.2d at 997-98.

180. *See id.* at 149, 623 N.Y.S.2d at 998.

181. *See id.* at 149-50, 623 N.Y.S.2d at 998.

182. 164 Misc. 2d 891, 626 N.Y.S.2d 650 (Sup. Ct. N.Y. County 1995).

183. *See id.* at 898, 626 N.Y.S.2d at 654.

184. *See id.*

proceeding.¹⁸⁵ The guardian in the proceeding pointed out that attorneys involved in guardianship proceedings had been attending Bar Association programs to acquire expertise without billing the clients for "study time," yet the attorneys in this case billed for their research time.¹⁸⁶ The court noted that a client who retains an attorney has the right to expect that the attorney has the required expertise; acquiring such knowledge should not be at the client's expense without prior agreement.¹⁸⁷

Finally, a court might simply determine that a fee should be reduced due to the nature of the proceeding, the expertise required or the amount of work that was completed.¹⁸⁸ For example, in *In re Franczoz*,¹⁸⁹ although the AIP's assets were estimated at over ten million dollars and the court was satisfied with the submitted hourly billable rates of counsel, the court evaluator obtained a consensus from counsel that they would accept eighty-three percent of their requested legal fees.¹⁹⁰

The court noted that the compensation sought was to be paid by an individual who had "no independent voice in the legal entanglements of which he became the primary subject."¹⁹¹ Therefore, the court concluded that fees should be determined in sums which are less than typically commanded in the private legal sector.¹⁹²

F. *Who Pays When the AIP Is Indigent?*

Section 81.10(f) states that the AIP shall be liable for compensation for the Mental Hygiene Legal Service or any court-appointed attorney unless the court is satisfied that the person is indigent.¹⁹³ However, Article 81 fails to make any provision for the situation where the AIP is indigent.¹⁹⁴ In *In re St.*

185. *See id.*

186. *See id.* at 896, 626 N.Y.S.2d at 653.

187. *See id.*

188. No. 24410-I-94 (Sup. Ct. Nassau County 1994), *reprinted in* ADVANCED ISSUES IN GUARDIANSHIP 70 (New York State Bar Ass'n 1995).

189. *See id.*

190. *See id.* at 71.

191. *Id.*

192. *See id.* at 72.

193. *See* N.Y. MENTAL HYG. LAW § 81.10(f) (McKinney Supp. 1993).

194. *See generally id.*, § 81.

Luke's-Roosevelt Hospital Center,¹⁹⁵ the petitioner sought the appointment of a guardian for an elderly indigent woman who was a patient at the hospital.¹⁹⁶ The petitioner's request for the appointment of a temporary guardian, for the transfer of the AIP to a nursing home, and for the appointment of a guardian to make major medical decisions without the AIP's consent, required the appointment of counsel under section 81.10.¹⁹⁷

The court found that when an Article 81 petition requests that a guardian be given power to either place the AIP in a nursing home or other institutional facility, or to make major medical decisions, an indigent AIP is constitutionally entitled to the appointment of counsel at the state's expense.¹⁹⁸ The court concluded that the cost of the appointed counsel in a guardianship proceeding should be borne by New York City pursuant to Articles 18-A and B of the County Law.¹⁹⁹ Under Articles 18-A and B, "a judge may assign counsel to represent any adult in a proceeding under this act if he determines that such assignment of counsel is mandated by the constitution of the State of New York or of the United States, and includes such determination in the order assigning counsel."²⁰⁰

The court addressed an additional conflict of interest problem that arises during the appointment of both a court evaluator and counsel.²⁰¹ The court praised Article 81's recognition of the AIP's right to counsel due to the risk that the court evaluator may make recommendations at odds with the wishes of the AIP.²⁰² The court noted that just as the statute is silent about compensation for counsel to indigents, the statute is also silent as to compensation for court evaluators where the petition is dismissed, or where the AIP's estate is inadequate.²⁰³ Thus, the court determined that since, "in a case like this, where both a

195. 159 Misc. 2d 932, 607 N.Y.S.2d 574 (Sup. Ct. N.Y. County 1993), *aff'd*, 640 N.Y.S.2d 73 (1st Dep't. 1996), *aff'd*, 89 N.Y.2d 889, 1996 WL 730469 (1996).

196. *See id.* at 933, 607 N.Y.S.2d at 576.

197. *See id.* at 933-34, 607 N.Y.S.2d at 576.

198. *See id.* at 939-40, 607 N.Y.S.2d at 580.

199. *See id.* at 945, 607 N.Y.S.2d at 583; *See also* N.Y. COUNTY LAW §§ 18-A & 18-B (McKinney 1991).

200. *St. Luke's*, 159 Misc. 2d at 941, 607 N.Y.S.2d at 580 (quoting FAM. CT. ACT. § 262 (b)(McKinney 1991); SURRE. CT. PROC. ACT, § 407 (McKinney 1991)).

201. *See id.* at 943, 607 N.Y.S.2d at 582.

202. *See id.* at 942, 607 N.Y.S.2d at 581.

203. *See id.* at 942, 607 N.Y.S.2d at 581-82.

[court evaluator] and counsel are required, if the [Mental Hygiene Legal Service] constitutes the only source from which a [court evaluator], can be drawn, because of conflict problems it cannot not also be a resource from which counsel may be appointed."²⁰⁴ In other words, independent counsel would have to be appointed to represent the interests of the AIP.

Historically, funds have not been available to allow the Mental Hygiene Legal Service to be appointed for everyone in need.²⁰⁵ Therefore, the resources of the Mental Hygiene Legal Service have been limited to those who are institutionalized.²⁰⁶ The court noted that the Mental Hygiene Legal Service was not authorized to serve as a court evaluator or counsel unless the AIP is already institutionalized.²⁰⁷ Thus, there is no source of payment for the appointment of either a court evaluator or counsel in cases where the AIP resides in the community.²⁰⁸ In the instant case, since the AIP was a patient in the hospital, the court appointed the Mental Hygiene Legal Service as the court evaluator pursuant to section 81.09(b)(2)²⁰⁹ and a solo practitioner from the 18-B panel as counsel for the AIP.²¹⁰

On appeal, the court found it was error to adjudge that the city was the entity responsible for the payment of Article 81 assigned counsel without notice or fact-finding.²¹¹ The city did not contest that the indigent AIP had the right to assigned counsel by reason of a constitutional mandate.²¹² However, since the city was denied notice and an opportunity to submit factual arguments on the availability of alternatives to representation of the AIP by County Law 18-B panelists, the court remanded the case for reconsideration of this issue.²¹³

On April 2, 1996, the Appellate Division affirmed the Supreme Court, New York County's decision which had directed

204. *Id.* at 943, 607 N.Y.S.2d at 582.

205. *See* interview with Frances M. Pantaleo, Esq., *supra* note 58.

206. *See* N.Y. MENTAL HYG. LAW § 81.10(e) (McKinney Supp. 1993).

207. *See St. Luke's*, 159 Misc. 2d at 943, 607 N.Y.S.2d at 582.

208. *See id.*

209. *See id.*

210. *See id.* at 945, 607 N.Y.S.2d at 583.

211. *See In re St. Luke's-Roosevelt Hosp. Ctr.*, 627 N.Y.S.2d 357 (1st Dep't. 1995).

212. *See id.*

213. *See id.* at 357-58.

the City of New York to pay the fees of attorneys appointed to represent indigent AIPs

in every case in the City of New York where, (i) a petition pursuant to Article 81 of the Mental Hygiene Law seeks appointment of a guardian with power either to place an AIP in a nursing home or to make major medical decisions for the AIP and, (ii) the Mental Hygiene Legal Service is not appointed to serve as counsel.²¹⁴

The court explained that “[g]iven legislative silence on the matter, [the] [s]upreme [c]ourt appropriately directed that the expense should be borne by the City which, as between the City and the State, is the more appropriate source of public funding for the appointment of counsel in constitutionally mandated cases.”²¹⁵

Justice Kupferman dissented, arguing that the majority could have avoided the funding problem entirely by dispensing with the appointment of court evaluator under section 81.10(g), and appointing the Mental Hygiene Legal Service as counsel for the AIP.²¹⁶ The majority noted that “whether to dispense with the appointment of a court evaluator is a matter entrusted to the sound discretion of the court,” apparently believing that the AIP’s interests in this case must be represented independently from the court evaluator by counsel.²¹⁷ On December 20, 1996, the New York Court of Appeals affirmed this decision.²¹⁸ The

214. *In re St. Luke’s-Roosevelt Hospital*, 640 N.Y.S.2d 73, 74 (1st Dep’t. 1996).

215. *Id.* (citing *Deason v. Deason*, 32 N.Y.2d 93, 95, 296 N.E.2d 229, 343 N.Y.S.2d 321 (1973)).

216. *See id.* at 74 (Kupferman, J., dissenting). He argued, “[w]ith the Mental Hygiene Legal Service as her counsel, respondent [the AIP] would be well protected while the taxpayers would have one less funding obligation.” *Id.* at 75.

217. *Id.* at 73.

218. *See In re St. Luke’s-Roosevelt Hospital*, 89 N.Y.2d 889, 1996 WL 730469 (1996). The court explained,

[a]lthough the statutes are silent on who should pay counsel in Mental Hygiene Article 81 proceedings, the responsibility of paying for assigned counsel in the overwhelming majority of cases in which the appointment of counsel for indigents has been authorized has fallen upon the locality under Article 18-b, rather than the state pursuant to Judiciary Law § 35. The evidence in the record before us establishes that Article 18-b panels are better able, both financially and practically, to provide the needed assistance under this provision of the Mental Hygiene Law. Accordingly, in the absence of legislation directing otherwise, we affirm the determination of the courts below that assignment of counsel here is appropriately funded by the

court specifically noted that the supreme court did not abuse its discretion in failing to simply remove the Mental Hygiene Legal Service as court evaluator and appointing that entity to represent the AIP.²¹⁹

Other New York courts have found an informal way to address the problem of lack of funding for the representation of indigent AIPs, because the alternative of no representation at all would be unjust.²²⁰ In the Ninth Judicial District,²²¹ if the AIP is indigent, in most cases neither the court evaluator nor counsel are compensated.²²² Nine out of ten times, if an attorney from the list of approved fiduciaries is asked to represent an indigent AIP, the attorney will agree to the representation, knowing he or she will not be compensated.²²³ Such representation is not forgotten when a recommendation for counsel is required to handle a wealthy estate; the attorney who represented an AIP *pro bono* will be asked first.²²⁴

On the other hand, if a petition is brought by the Department of Social Services, as is often the case, the petitioner is paid by the County.²²⁵ The County pays the petitioner and any court-appointed attorney, even if the County does not meet its burden of proof or if the case is dismissed.²²⁶ Thus, it is not always true that attorneys are not compensated when the AIP is indigent.²²⁷ Rather, only the court evaluator is left uncompensated.²²⁸ The net effect of the inequitable scheme of compensation for petitioner, court evaluator and counsel for the indigent AIP is that concerned individuals may be less inclined to bring these proceedings.²²⁹

City of New York in accordance with the procedures set forth in County Law Article 18-b.

Id. at 1.

219. *See id.* at 2, n.*.

220. *See* Interview with Charles F. Devlin, Esq., *supra* note 3.

221. The Ninth Judicial District consists of the counties of Westchester, Putnam, Dutchess, Rockland and Orange.

222. *See* interview with Charles F. Devlin, Esq., *supra* note 3.

223. *See id.*

224. *See id.*

225. *See* Telephone Interview with Denise P. Ward, Esq., Elder Law Attorney, Rye, N.Y. (Aug. 7, 1996).

226. *See id.*

227. *See id.*

228. *See id.*

229. *See id.*

Another problem associated with the payment of legal fees arises when an AIP is not indigent, yet does not want to pay for legal services.²³⁰ This occurs when the court evaluator asks the AIP if he or she would like an attorney to represent him or her.²³¹ Often the AIP wants to contest the petition, but does not understand the role an attorney might play.²³² Furthermore, even though the AIP could afford legal fees, he or she does not want to pay for such representation.²³³ The problem is compounded by the lack of financial disclosure of the AIP.²³⁴ The court evaluator only has access to information made available by the AIP, and therefore must rely on what is stated in the petition with regard to the AIP's assets.²³⁵ Considering the reputation of some attorneys for excessive legal fees, the AIP's fears are not ungrounded. However, this problem exists, and the potential for an AIP to be denied representation is great if there is no way for the court to determine whether an AIP can afford counsel or if counsel needs to be appointed by the court.

In conclusion, the statute needs to be amended to address the compensation of attorneys in cases where the AIP is indigent. The practice among judges of asking attorneys to represent AIPs on a *pro bono* basis and subsequently appointing the same attorney to a case in which the judge knows there will be a substantial fee is quite common.²³⁶ The judges, law clerks and attorneys involved are uncomfortable with this informal "make-shift" arrangement.²³⁷ Article 81 affords some relief, in that the court can dispense with the appointment of a court evaluator if counsel is appointed; and the court can appoint professionals whose fees may not be as high as those of an attorney, such as a social worker.²³⁸

The Committee on Pro Bono Services for the Elderly published an article in *Elder Law Attorney* encouraging attorneys

230. See *id.*

231. See Telephone Interview with Denise P. Ward, Esq., *supra* note 225.

232. See *id.*

233. See *id.*

234. See *id.*

235. See *id.*

236. See Bailly II, *supra* note 34, at 277.

237. See *id.*

238. See *id.*

to volunteer for *pro bono* services.²³⁹ The article advocated assisting elderly clients with their financial, family and health care problems, because "the poor elderly are entitled to legal assistance comparable to their contemporaries of more substantial means despite their inability to pay legal fees."²⁴⁰ The article listed resources throughout New York for attorneys to become involved in *pro bono* projects.²⁴¹ Attorneys need to keep in mind that Article 81 proceedings require counsel who are qualified to act in the capacity of court evaluator or attorney for the AIP.²⁴² There are many continuing legal education programs available for attorneys who are not versed in Article 81 proceedings, yet have an interest in Elderlaw issues.

G. *Practitioner's Proposals to Decrease the Cost of Guardianship Proceedings*

Since many involved (judges, practitioners, and the AIP) are concerned about the great expense involved in these proceedings, the finding and implementation of ways to decrease costs would be beneficial. Under section 81.11(a), "a determination that the appointment of a guardian is necessary for a person alleged to be incapacitated shall be made only after a hearing."²⁴³ Members of the legal profession have suggested that the requirement of a full hearing be eliminated in cases where the AIP is in a coma or is otherwise unable to communicate.²⁴⁴ These lawyers have also advocated the elimination of a full hearing when there is no substantial dispute regarding the AIP's functional limitations.²⁴⁵ They believe that these minor

239. *Do the Public Good Volunteer for Pro Bono*, ELDER LAW ATT'Y Vol. 3, No. 2 (Fall/Winter 1993) at 32, N.Y.S.B.A.

240: *Id.*

241. *See id.* at 33.

242. *See* Telephone Interview with Denise P. Ward, Esq., *supra* note 225.

243. N.Y. MENTAL HYG. LAW § 81.11(a) (McKinney Supp. 1993).

244. As reported during an Interview with Frances M. Pantaleo, Esq., *supra* note 58.

245. *See id.* Under § 81.36(c),

[t]here shall be a hearing on notice to the persons entitled to notice . . . If any party to the proceeding raises an issue of fact as to the ability of the [AIP] to provide for his or her personal needs or property management and demands a jury trial of such issue, the court shall order a trial by jury thereof.

changes will not affect the procedural safeguards of the statute and that considerable resources will be saved as a result.²⁴⁶

III. Analysis

A. *Finding Resources to Serve as Court Evaluator, Counsel and Guardian*

The most difficult task in guardianship proceedings is finding resources to act as either court evaluator or court-appointed counsel.²⁴⁷ The incentive to participate in these proceedings is lacking somewhat, due to the inability of many elderly to compensate these individuals. An effort to encourage attorneys to serve in these roles should be made to ensure that the elderly receive adequate representation. The current scheme of requesting an attorney to represent AIPs on a *pro bono* basis with the intent of awarding him or her a fee in the subsequent representation of a wealthier AIP is inadequate.²⁴⁸ Article 81 should be amended to implement alternative methods of compensation for these attorneys.

There are several possibilities that might solve the problem of compensation for counsel representing indigent AIPs. The first involves having attorneys participate without any compensation. Legislation requiring minimum *pro bono* hours for attorneys is an option; however, there are drawbacks to this solution.²⁴⁹ Mandatory *pro bono* might not be even-handedly

N.Y. MENTAL HYG. LAW § 81.36(c) (McKinney Supp. 1993). The bill introduced by the Senate of May 23, 1996 proposes the following amendment to this section:

[t]here shall be a hearing on notice to the persons entitled to notice The court may for good cause shown, dispense with the hearing, provided that the order of discharge or modification shall set forth the factual basis for dispensing with the hearing. If the [AIP] or his or her counsel raises an issue of fact as to the ability of the [AIP] to provide for his or her personal needs or property management and demands a jury trial of such issue, the court shall order a trial by jury thereof.

1995 N.Y. S.B. 7601, Reg. Sess. § 26 (1996).

246. As reported during an Interview with Frances M. Pantaleo, Esq., *supra* note 58.

247. See interview with Charles F. Devlin, Esq., *supra* note 3.

248. See *supra* text accompanying notes 220-24.

249. See, e.g. Cynthia R. Watkins, Note, *In Support of Mandatory Pro Bono Rule for New York State*, 57 BROOK. L. REV. 177 (1991). While this author advocates mandatory *pro bono* for New York state, she raises some provocative arguments against its implementation. *Id.* at 196-97. The following are several which

applied, in that it may affect some attorneys more than others. For example, one attorney might represent an AIP in a proceeding that is resolved expeditiously, while another attorney may become involved in a case that lasts for several years.

An additional problem with mandatory *pro bono* is that large law firms can allocate the *pro bono* hours to an associate, while a solo practitioner might have to struggle to find time to meet the minimum hours requirement. Furthermore, with mandatory *pro bono* hours, there is no guarantee that attorneys would choose to participate in guardianship proceedings. Thus, the resource problem might not even be addressed.

On the other hand, mandatory *pro bono* hours would certainly address the problem, even if only at a minimum. Although there is no guarantee that attorneys with a *pro bono* requirement would choose to represent indigent AIPs, it is likely that some will. Perhaps if continuing education were also required for attorneys, familiarity with Article 81 would provide an incentive to participate in guardianship proceedings. One commentator notes that providing "continuing education 'certificates' or 'vouchers' in return for *pro bono* hours would be an incentive to increase *pro bono* contributions."²⁵⁰ Thus, perhaps the requirement or provision of continuing education, combined

she discusses: (1) "doubts about the effectiveness of any representation where the attorney has been forced to accept the case," (2) the rule will have a "chilling effect" on voluntarism and contributions to legal aid programs, (3) the rule will "relieve government of its obligation to provide legal services for the poor." *Id.* at 198-99 (citing arguments rejected by the Marrero Committee, the entity charged with examining the availability of legal services and to make recommendations for improvements). *Id.* at 178. Furthermore, this author discusses the general sentiment that "the best solution to meeting the legal needs of the poor is increased funding for legal services programs." *Id.* at 181-82 (citing comments of the Committee to Improve the Availability of Legal Services, Final Report to the Chief Judge of the State of New York (Apr. 1990)). The theory is that

[t]he legal problems of the poor are best handled by professionals experienced in the field and available full-time to handle cases that may require protracted appearances in court and which may last for years More funding would increase the availability of legal services by making it possible to provide more full-time attorneys with expertise in poverty law and poverty issues. Increased funding would provide resources to increase salary levels, or to provide other financial incentives to attract attorneys to legal services offices.

Id. at 182.

250. See *Watkins*, *supra* note 249, at 194. To provide incentives, this author also advocates encouraging law firms "to count *pro bono* work, or a portion thereof,

with mandatory *pro bono*, might help to provide additional resources to represent indigent AIPs.

There are other alternatives to mandatory *pro bono* hours that might better address the lack of resource problem. Concerned individuals could lobby for incentives, such as an income tax break for attorneys who represent AIPs on a *pro bono* basis. Currently, "unreimbursed litigation expenses made incident to the rendition of services" to a qualified tax-exempt organization are fully deductible.²⁵¹ For example, expenses for the telephone, stamps, supplies and filing fees made in the course of representing an AIP for Westchester Putnam Legal Services would be deductible as a charitable contribution for income tax purposes.²⁵² Similarly, out-of-pocket transportation expenses necessarily incurred in performing donated services are deductible.²⁵³

Although these deductions should create an incentive to represent AIPs on a *pro bono* basis, perhaps the Legislature might consider an even greater inducement for such representation. For example, the Internal Revenue Service could allow attorneys to exclude other sources of income from their tax return, to offset the income which they are not receiving during *pro bono* representation.

Another way to attract attorneys to act as court evaluator, counsel or guardian in guardianship proceedings might be to make attorneys more aware of the existing lack of resource problem. Perhaps if attorneys had knowledge of the need for their assistance, more would offer their services. The New York State Bar Association should sponsor regular advertisements in journals, similar to the one published in *Elder Law Attorney*, to advocate *pro bono* representation of impoverished AIPs.²⁵⁴ However, the advertisements should be run in a variety of journals, and not merely ones read by attorneys who regularly represent elders. In this manner, any interested attorney could obtain the requisite training with regard to Article 81 proceedings and participate as court evaluator, counsel or guardian.

as 'billable hours,' and to consider *pro bono* activities in their decisions regarding promotions, bonuses and partnership." *Id.*

251. See Treas. Reg. § 1.170A-1(g) (1995).

252. See *Lee v. Commissioner*, 80 T.C.M. 348, 349 (1980).

253. See Treas. Reg. § 1.170A-1(g) (1995).

254. See *supra* text accompanying notes 239-41.

B. *The Necessity of Court Evaluator and Counsel*

Since the appointment of both a court evaluator and counsel has the potential to deplete the assets of the AIP, courts should regularly opt to appoint only one of these professionals.²⁵⁵ The argument that limiting the mandatory appointment of counsel to situations where the AIP contests the proceeding or requests counsel will dilute the protection afforded the AIP under Article 81 is not well-grounded.²⁵⁶ Individuals who are concerned about the AIP's well-being or his or her ability to manage financially are generally the petitioners in guardianship proceedings.²⁵⁷ Therefore, unless the AIP contests the guardianship appointment, the proceedings generally should not be adversarial.

Of course, counsel should be available if the AIP cannot represent his or her own interests, or is adamantly opposed to the appointment of a guardian. However, the decision to appoint counsel should be discretionary, depending on the circumstances of each case. For example, if at the time of the hearing, the court determines the AIP has problems managing his or her finances, the court should appoint counsel and dispense with the appointment of a court evaluator. On the other hand, if the AIP's problems are generally functional, the court should appoint a social worker as court evaluator. The reason is that a social worker is better equipped to address activities of daily living issues; furthermore, his or her fees would almost certainly be substantially less than those required for payment of counsel. This procedure should effectively reduce the cost of Article 81 proceedings, thereby protecting the AIP from excessive depletion of his or her finances.

C. *The Role of Counsel*

Clarification as to the role of counsel in guardianship proceedings is necessary under Article 81 and the Code of Professional Responsibility.²⁵⁸ As a zealous advocate, the role of the attorney for the AIP seems to be to contest the proceeding, even

255. See *supra* text accompanying notes 117-30.

256. See *supra* text accompanying notes 112-16.

257. See *supra* notes 74-77 and accompanying text.

258. See N.Y. MENTAL HYG. LAW § 81.10 (McKINNEY SUPP. 1993); MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-12 (1981).

though the AIP clearly needs assistance.²⁵⁹ To avoid such a detrimental effect on the AIP, perhaps counsel for an AIP who is unable to make responsible decisions on his or her own behalf should advocate for the least restrictive form of intervention.²⁶⁰ The attorney's duty is thereby met as long as he or she does not waive any fundamental rights of the client, "such as the right to a hearing."²⁶¹

D. *Who Should Pay for the Services of Court Evaluator and Counsel?*

There is considerable controversy regarding the method of compensation for court evaluator and counsel in Article 81 proceedings.²⁶² When a judge grants a petition, the AIP or the estate of the AIP is responsible for payment of both the court evaluator and any court-appointed attorney.²⁶³ When a judge denies or dismisses a petition, the court then has the discretion to allocate payment to either the AIP, the petitioner, or both, as the court deems just.²⁶⁴

Rather than leave the allocation of payment to the discretion of the court, Article 81 should be amended to require a bad faith or willful standard for the imposition of costs on the petitioner.²⁶⁵ Leaving the decision to the court's discretion increases the likelihood that petitioners will unfairly have to pay for these proceedings.²⁶⁶ For example, if the Department of Social Service, in good faith, files a petition to appoint a guardian

259. See *supra* notes 54-58 and accompanying text.

260. See Pecora, *supra* note 54, at 167.

261. *Id.*

262. See *supra* part II.D.

263. See N.Y. MENTAL HYG. LAW §§ 81.09(f), 81.10(f) (McKinney Supp. 1993).

264. *Id.*

265. See *supra* text accompanying notes 144-48.

266. One commentator notes,

[f]rom the point of view of the petitioner, however, the climb is steep. Benevolence and good intentions will not suffice, nor will the word of the family doctor or neurologist. Unless the petitioner can afford good legal counsel, not only might the petition fail, but the petitioner may be charged for the cost of the court evaluator and court-appointed counsel. On one hand, this policy is likely to discourage the filing of petitions prematurely, as well as some inspired by venal motives. On the other hand, a good faith petitioner might take an unnecessarily conservative approach and wait as long as possible, perhaps too long, before filing.

Posner, *supra* note 113, at 640-41.

for an AIP with obvious functional problems, yet the petition is dismissed for procedural reasons, the court may still impose these costs on the petitioner. If this outcome becomes the rule, rather than the exception, concerned individuals and institutions will become overly cautious and might fail to act when an elder is truly in need.²⁶⁷ Thus, it would be more equitable to require proof of either petitioner's intent to cause financial harm to the AIP or a lack of any evidence on the record as to functional limitations of the AIP before the court imposes these costs. This requirement will serve to encourage rather than discourage individuals from bringing these proceedings.

E. *Eliminating Excessive Legal Fees*

The current scheme which gives the court discretion to reduce legal fees it deems excessive is quite appropriate.²⁶⁸ The percentage system of compensation occasionally would award greater fees than warranted if left unchecked by the court.²⁶⁹ Often an hourly rate of payment is appropriate if little time and effort were required during the proceeding, rather than a percentage of the estate.

In addition, attorneys should keep apprised of Article 81 procedure, and therefore should not charge the AIP for research time. The Elder Law Section of the American Bar Association often conducts seminars on Article 81 to educate attorneys on how to participate as court evaluator, counsel or guardian in Article 81 proceedings. Therefore, an attorney who wishes to practice in this area should either be familiar with the statute or refer the individual to a qualified Elder Law attorney, until the time when he or she is properly educated.

Article 81 should be amended to give the court the discretion to impose sanctions on attorneys who charge excessive legal fees. Such sanctions will deter attorneys from charging for research time or billing at an exorbitant rate. Hopefully, this will prevent deceptive attorneys from taking advantage of

267. See also *id.* at 640-41, 645.

268. N.Y. MENTAL HYG. LAW §§ 81.09(f), 81.10(g) and 81.28 (McKinney Supp. 1993). See also *In re Franczoz*, No. 24410-I-94 (Sup. Ct. Nassau County 1994), reprinted in *ADVANCED ISSUES IN GUARDIANSHIP* 70 (New York State Bar Ass'n 1995).

269. See *supra* note 132 and accompanying text.

unsuspecting elders who have put, not only their faith, but also their ultimate fate, in their attorneys.

F. *Addressing the Problem of Indigence*

The problem of indigence in Article 81 proceedings is one that could potentially affect the lives of elders who cannot afford to hire counsel to represent their interests. One possible solution to the problem of indigence is for the state to set aside funds for the representation of impoverished AIPs. *In re St. Luke's-Roosevelt Hospital Center*²⁷⁰ established that an indigent AIP is constitutionally entitled to the appointment of counsel at state expense when a petition seeks to appoint a guardian with the power either to place an AIP in a nursing home or to make major medical decisions.²⁷¹ The decision named the entity responsible for the payment of counsel to be the locality under Article 18-b, rather than the state itself.²⁷² Concerned individuals should lobby for amendments to laws such as Article 18-A and B of the County Law²⁷³ and Article 81, so that a provision is made specifically allocating funds for indigents in guardianship proceedings.

Perhaps a seemingly radical change in Article 81 might sufficiently address the problem of indigence. Article 81's provisions for court evaluator and court-appointed counsel could be entirely eliminated.²⁷⁴ In their place, the statute could mandate the appointment of the Mental Hygiene Legal Service for all indigents, as attorney.²⁷⁵ Under this scheme, the Probation Department could play the role of court evaluator.²⁷⁶ Two probation officers could be permanently assigned to the Guardianship Part to do investigations, which the court, in its discretion, might order.²⁷⁷ This program could be funded by filing

270. 159 Misc. 2d 932, 607 N.Y.S.2d 574 (Sup. Ct. N.Y. County 1993), *aff'd*, 640 N.Y.S.2d 73 (N.Y. App. Div. 1996), *aff'd*, No. 259, 1996 WL 730469 (N.Y. Dec. 20, 1996).

271. *Id.* at 939-40, 607 N.Y.S.2d at 580.

272. *See supra* notes 214-18 and accompanying text.

273. *See* N.Y. COUNTY LAW §§ 18-A & 18-B (McKinney 1991).

274. *See* Letter from Charles F. Devlin, Esq. Principal Law Clerk, Tax Certiorari and Guardianship Parts, White Plains, N.Y. (August 6, 1996) (on file with the *Pace Law Review*).

275. *Id.*

276. *Id.*

277. *Id.*

fees.²⁷⁸ If the petitioner is successful in obtaining guardianship, these fees could be assessed against the estate of the AIP.²⁷⁹ If the petitioner is unsuccessful, the costs could be assessed against the petitioner.²⁸⁰

Additionally, the inequitable treatment among AIPs who are indigent must also be addressed. There is differential treatment regarding representation by the Mental Hygiene Legal Service of AIPs residing in facilities as opposed to AIPs residing in the community. Currently, if the AIP is a patient in a state facility, a nursing home, adult home or hospital, the court can appoint the Mental Hygiene Legal Service, which charges minimal fees and serves for no fee in the case of indigence.²⁸¹

On the other hand, an indigent person residing in the community has practically no recourse.²⁸² The only occasion for relief appears to be cases where the Human Resources Administration of the City of New York is the petitioner, in which it will pay a flat fee of \$600 for the court evaluator's services.²⁸³ Since these fact-specific circumstances arise quite infrequently, and there appears to be no reason for the disparity in treatment of facility versus community residents, the expansion of the appointment of the Mental Hygiene Legal Service to AIPs residing in the community is necessary. Therefore, funds should be allocated by the state for AIPs residing in the community, and Article 81 should be amended accordingly.

G. *Proposals to Decrease the Cost of Guardianship Proceedings*

The finding and implementation of ways to decrease the cost of guardianship proceedings would be beneficial.²⁸⁴ The requirement of a full hearing should be eliminated in cases where the AIP is in a coma or is otherwise unable to communicate. A

278. *Id.*

279. See Letter from Charles F. Devlin, Esq. Principal Law Clerk, Tax Certiorari and Guardianship Parts, White Plains, N.Y. (August 6, 1996) (on file with the *Pace Law Review*).

280. *Id.*

281. See N.Y. MENTAL HYG. LAW § 81.10(e); *In re St. Luke's-Roosevelt Hosp. Ctr.*, 159 Misc. 2d 932, 939-40, 607 N.Y.S.2d 574, 580.

282. *Id.*

283. *Id.*

284. See *supra* text accompanying notes 243-46.

full hearing should also be eliminated when there is no substantial dispute regarding the AIP's functional limitations. These minor changes will not affect the procedural safeguards of the statute and will make these proceedings less costly and time-consuming.

IV. Conclusion

Guardianship proceedings under Article 81 have certainly improved since the prior conservator and committee statutes under Articles 77 and 78 were in force. Under Article 81, a guardian's powers are limited specifically to the particular needs of an incapacitated person for personal care, property and financial management, or both, thereby ensuring "the least restrictive form of intervention" in the AIP's life.²⁸⁵ However, despite the improvements in the Mental Hygiene Law, some problems remain.

The New York State Legislature might consider some of the ideas discussed in this Comment for modifying Article 81. Article 81 should be amended to ensure that when counsel for the AIP is appointed, the court should dispense with the appointment of a court evaluator. Additionally, the mandatory appointment of counsel should be eliminated, except for situations where the AIP contests the proceeding or specifically requests counsel. Article 81 should also be amended to remove the requirement of a full hearing when the AIP is unable to communicate or when no dispute exists regarding the AIP's functional limitations.

Furthermore, the present scheme of requesting an attorney to represent indigent AIPs on a *pro bono* basis, with the intent to compensate them in a subsequent proceeding is inadequate.²⁸⁶ Therefore, the statute should be amended to explicitly delineate how court-appointed-counsel, court evaluator and guardian are to be compensated when the AIP is indigent.

The inequitable treatment between indigent AIPs who live in the community as opposed to those who reside in institutions also needs to be addressed. Article 81 should be amended to allow the Mental Hygiene Legal Service to be a resource, not

285. N.Y. MENTAL HYG. LAW § 81.02 (a)(2) (McKinney Supp. 1993).

286. See Bailly II, *supra* note 34, at 277.

only for AIPs who are institutionalized, but also for AIPs who reside in the community. Furthermore, since an indigent AIP is constitutionally entitled to the appointment of counsel at state expense, Article 81 and Articles 18-A and 18-B of the County Law should be amended so that funds can be specifically allocated for such representation.

Finally, allowing courts the discretion of reducing legal fees it deems excessive is quite appropriate.²⁸⁷ Perhaps Article 81 can be amended to impose sanctions on attorneys when the court determines that a fee is extremely excessive. Such sanctions might deter lawyers from taking advantage of elderly clients in these proceedings.

In conclusion, with these minor changes in the statute, AIPs will still receive the protections guaranteed under Article 81, yet the ultimate cost of these proceedings will be reduced. Thus, the modifications will ensure that the AIP's assets will not be unnecessarily depleted. Additionally, there will be less uncertainty as to compensation for court evaluator, counsel, and guardian, which will perhaps attract more professionals to participate in these proceedings. If the New York State Legislature successfully achieves these modifications, Article 81 will truly be "the least restrictive form of intervention which assists [AIPs] in meeting their needs but, at the same time, permits them to exercise the independence and self-determination of which they are capable."²⁸⁸

*Julie M. Solinski**

287. See N.Y. MENTAL HYG. LAW §§ 81.09(f), 81.10(g), and 81.28 (McKinney Supp. 1993). See also *In re Franczoz*, No. 24410-I-94 (Sup. Ct. Nassau County 1994), reprinted in *ADVANCED ISSUES IN GUARDIANSHIP* 70 (New York State Bar Ass'n 1995).

288. N.Y. MENTAL HYG. LAW § 81.03 (d) (McKinney Supp. 1993).

* This article is dedicated to Rose Mulligan—my Godmother, my Aunt, my special friend, who passed away on February 20, 1997.