

The Brooke Astor Case: “An Appalling Set of Circumstances”

Interview Conducted by Lori A. Stiegel, Senior Attorney,
ABA Commission on Law and Aging, with Expert Witness Alex Forger



On October 8, 2009, a New York City jury convicted Anthony Marshall, the 85-year-old son of the late philanthropist Brooke Astor, on 14 of 16 counts for financially exploiting his mother by first- and second-degree grand larceny, scheme to defraud, possession of stolen property, offering a false instrument, and conspiracy. Lawyer Francis Morrissey was convicted of 5 of 6 counts, including conspiracy, scheme to defraud, and forgery. To see the New York Times’ chart specifying charges, allegations, and verdicts against each defendant visit <http://www.nytimes.com/imagepages/2009/10/08/nyregion/09astorg.ready.html>.

On February 18, 2010, the Associated Press and several newspapers reported that Morrissey had been automatically disbarred due to the convictions in the Astor case. Four days later the defendants filed a “Notice of Motion to Vacate Judgment” on the grounds that the judge had erred by failing to investigate a juror’s claim that she had



Lori A. Stiegel is a senior attorney at the American Bar Association Commission on Law and Aging. She specializes in elder abuse and alternatives to guardianship and directs all of the Commission’s elder abuse activities. She is a co-author of *Elder Abuse Detection and Intervention: A Collaborative Approach* (Springer 2006) and serves on the editorial boards of and contributes to the *Journal of Elder Abuse and Neglect* and *Victimization of the Elderly and Disabled*. She was a member of the National Academy of Sciences Study Panel on the Risk and Prevalence of Elder Abuse, a contributing editor to *Abuse and Neglect of Vulnerable Adult Populations* (Civic Research Institute 2005), and served for eight years on the board of directors of the National Committee for the Prevention of Elder Abuse.

This interview was originally published in three parts in the December 2009, February 2010, and April 2010 issues of *Bifocal*, e-Journal of the American Bar Association Commission on Law and Aging. To access current and past issues of *Bifocal* or to obtain more information on the Commission’s elder abuse activities and other topics, go to: http://www.americanbar.org/groups/law_aging.html.

voted to convict Marshall and Morrissey after being threatened by another juror. The prosecutor's office filed a brief opposing the defendants' motion on April 9, 2010, arguing that the juror's claim of being threatened was highly implausible. On July 29, 2010, the judge denied the defendants' motion to vacate the verdicts.

Renowned 86-year-old New York lawyer Alex Forger, who practiced trusts and estates law for 42 years and was chairman of the American Bar Association Commission on Law and Aging from 1993-1995, testified as an expert witness for three days of the five-month trial. Assistant district attorney Elizabeth Loewy, head of the elder abuse unit in the Manhattan district attorney's office and one of the case's three prosecutors, described Mr. Forger as "a lion of the bar" and "incredibly generous with his time."

Mr. Forger continued his generosity by opining about the lessons that lawyers who represent older persons should learn from this case with ABA Commission Senior Attorney Lori A. Stiegel. Forger explained how he became involved in the case, why he did it pro bono, how he prepared, and the ways in which Mrs. Astor's long-standing estate plan was changed by the events in question.

Lori Stiegel: How did you come to be an expert witness in the Astor case?

Alex Forger: I met with the three assistant district attorneys in January. I had been aware of



Alex Forger

the indictment and the scheduled trial. They explained that much of the evidence would relate to trusts and estates practice—powers of attorney, wills, codicils, and standards of practice. Not being trusts and estates practitioners they realized that they would need some assistance and thought the jury also would probably need help in understanding the terms, the various documents, and their consequences. I said I would reflect on their request. As I read some of the material relating to the trial, including depositions, I concluded that this presented an appalling set of circumstances, but to reach a full understanding would require considerable interpretation and explanation to enable anyone not familiar with trusts and estates law to comprehend the issues and why what was alleged to have been done was inappropriate. So I agreed to help.

Stiegel: Why did you decide to do it pro bono?

Forger: I believe it was the fact that I've been urging lawyers to do more pro bono work. I think it is part of professional responsibility. If the government requests that you give assistance I think that you ought to do that. My motivation wasn't compensation—which I refused—but simply to help in this case, which I thought was important as it affected the legal profession.

Stiegel: What did you do to prepare for your testimony?

Forger: Mrs. Astor signed her first will in 1952. I read and analyzed the 32 wills that she executed over the ensuing period of nearly 50 years, as well as the seven codicils, the last two being the ones prepared by her new attorney and signed in 2002. These two codicils were at the focal point of the trial. In addition, I read powers of attorney, letters, memos, and thousands of pages of trial testimony preceding my own testimony. I became quite familiar with her estate plan as it evolved over 50 years. Analyzing the various components of the instruments, understanding the nature and extent of her property and the consequence of taxes was part of the basic preparation.

For more information on the American Bar Association Commission on Law and Aging's elder abuse resources, go to:

http://www.americanbar.org/groups/law_aging/resources/elder_abuse.html



Stiegel: Do you have a sense of how much time that took?

Forger: I would say many hundreds of hours; I didn't keep track of it. Then, as the testimony went forward, I must have read some 12,000 or 13,000 pages of testimony, particularly focusing on the testimony of the lawyers. [Note: Mr. Forger is referring to Henry Christensen, then of Sullivan & Cromwell, who had been Mrs. Astor's trusts and estates lawyer for many years and who prepared the first codicil, and to Warren Whitaker, of Day Pitney, who prepared the second and third codicils after Mr. Christensen was replaced.]

Stiegel: What is the current status of the case?

Forger: Anthony Marshall was convicted on 14 of 16 counts, including scheming to defraud and first degree grand larceny. The first degree grand larceny count carries a mandatory prison sentence of at least one year. Francis Morrissey was convicted on five counts, including conspiracy and forgery.

In December each was given a one-to-three-year prison sentence. In early January a justice of the New York Appellate Division allowed both defendants to remain free on bail while the case is appealed. The defendants have stated that their issues on appeal are:

- The judge's failure to interview one juror following a report that she felt coerced or threatened by one or more of the other jurors.

- The judge's instruction, deemed prejudiced, relating to Marshall's use of the power of attorney.
- The judge's ruling allowing me to testify as an "expert witness." During trial, the defendants contended that no such witness was required or appropriate, as my testimony would usurp the function of the judge. My role as prescribed by the judge was to testify as to the pattern of Mrs. Astor's estate planning (working through the maze of some 38 testamentary instruments and lifetime transfers) and as to customary practice standards—not touching on legal ethics.

It is my opinion that the appeal will likely extend over a lengthy period of time, being heard first in the Appellate Division and thereafter in the Court of Appeals.

Stiegel: In order to understand the issues in this case, perhaps it would be helpful if you provided a summary of the assets and estate plan of Mrs. Astor at or about the time of the execution of the second and third codicils in 2004.

Forger: Mrs. Astor's estate was valued at \$180 million (hereafter abbreviated as M). It included a marital trust of \$60M created by the will of her late husband, Vincent Astor. His will provided that the income from the marital trust

was payable to Mrs. Astor and on her death the principal was to be distributed as she determined by exercise of a power of appointment. Throughout the years since Vincent Astor's death in 1959, Mrs. Astor's estate plan had appointed the principal to charity. The remainder of her estate (\$120M) was to be distributed as follows:

- Real estate of \$40M, bequeathed to Marshall (who would be obliged to pay about \$20M in estate taxes on that property).



- Tangible property of about \$5M, of which \$4M was bequeathed to Marshall and the balance to others, including his wife Charlene Marshall, who was to receive one or two pieces of jewelry and two coats.
- Approximately \$75M of liquid assets providing a cash legacy of \$5M to Marshall, close to \$3M in other bequests, and a residue of roughly \$67M. Of that \$67M residue, about \$37M would be paid in taxes (in addition to the \$20M mentioned above), leaving \$30M

in a charitable remainder unitrust that provided that Marshall would receive 7 percent per year until his death and then the principal would be given to charities that Marshall would select. All bequests to Marshall were made on condition that he survive Mrs. Astor.

Her will named Marshall and her lawyer, Terry Christensen, as executors and trustees. Marshall could not name a successor to himself.

Stiegel: What was the effect of the second and third codicils on Mrs. Astor’s estate plan and on the principal participants in the case?

Forger: The second codicil, which was executed on January 12, 2004, made the following changes to the will it revised:

- It eliminated the charitable remainder unitrust and gave the \$30M residuary outright to Marshall. It had been years since Marshall had been given any part of his mother’s estate outright except for real estate, a cash legacy (\$2.5M earlier, but increased to \$5M in her latest testamentary instruments), and some tangible property.

- Marshall was named sole executor with the right to appoint successor and co-executors. He had never been named sole executor and never had the authority to appoint successor or co-executors in any of Mrs. Astor’s estate plans.
- Charity’s remainder interest was eliminated. Moreover, if Marshall failed to survive his mother, the residuary was given to his estate; this meant that he could give the residuary to whomever he designated in his will. Mrs. Astor’s prior estate plan provided that if he died before his mother virtually her entire estate of close to \$120M, in addition to the \$60M marital trust, would be given to charity.

The third codicil, dated March 3, 2004, had the effect of increasing Marshall’s inheritance while decreasing the amount charity would receive because:

- It created some \$5M of additional administrative expense by relieving Marshall of the costs to be incurred in selling the real estate (which he intended to do). This was to be accomplished by eliminating the specific legacy to him and, instead, causing the executors to sell the

property. As the proceeds of the sale would be part of the residuary there was no reduction in the overall amount Marshall would inherit (approximately \$54M), but he would avoid having to pay personally the expenses associated with the sale (maintenance until title was transferred; “flip tax”; New York City and state transfer taxes; brokerage commission; etc.). Under Mrs. Astor’s 2002 will and several earlier wills, administration expenses were to be paid out of the marital trust, so this change reduced the amounts to be received by charity, but not by Marshall.

- Additionally, the sales proceeds would become subject to executors’ commission, which would not have occurred before when it was Marshall’s individual responsibility. This meant that approximately \$1.6M would be payable to Marshall, Charlene Marshall, and Morrissey—the latter two having been named by Marshall as co-executors under the authority granted him in the second codicil. This \$1.6M also was an administrative expense to be paid by the marital trust, further reducing the amount to charity.

For more information on the American Bar Association Commission on Law and Aging’s elder abuse resources, go to:

http://www.americanbar.org/groups/law_aging/resources/elder_abuse.html



Stiegel: Please go into more details about the principal participants in the case and how they were involved in or benefited from the second and third codicils.

Forger: Then age 79 or 80, *Anthony Marshall* was Mrs. Astor's son from her first marriage. For many years mother and son did not have a close relationship though they may have grown closer in her last years. He was a Marine at Iwo Jima and an ambassador to a number of small countries during the Nixon Administration to which Mrs. Astor was a major contributor. For over 25 years up to the time of execution of the questioned codicils he was employed by his mother to oversee her investments. He also was interested in theater, had several successful productions, and won a Tony Award. He married Charlene in 1992. Mrs. Astor had always provided very substantial financial benefit for Marshall in her estate planning for over 40 years, primarily assuring him of a flow of income for his life. Over the 30 years up to and including her last will in 2002, Marshall was to receive residuary trust income for his life. In the last ten years this was manifested as a payment of 5 percent—subsequently increased to 7 percent—from a unitrust, payable to charity on his death. This trust income was in addition to the residuary legacies he would receive.

Before the residuary trust was eliminated by the second codicil, he would have received an annual payout estimated to be slightly more than \$2M on the

\$30+M trust that was to be paid over at his death to such charities as he selected. If he predeceased his mother, his estate would receive nothing and her estate, valued at some \$120M (excluding her marital trust under Vincent Astor's will—valued at about \$60M—which was always to go to charity) would be given to charity. Mrs. Astor in 2003, a year before the codicils in question, had given Marshall her estate in Maine, as well as a cash gift of \$5M so as to have enough, in her opinion, to enable him to take care of Mrs. Marshall.

The second and third codicils increased substantially the benefits he would receive from the Astor estate (approximately \$54M outright) whether or not he survived his mother. He now had the certainty of ample funds to “take care of Charlene.”

Francis Morrissey had befriended Mrs. Astor quite a few years before the codicils and was known to Marshall for many years. Morrissey escorted Mrs. Astor to some social events, accompanied her to the theater and dinners. He was referred to as a trust and estate lawyer, though according to Warren Whitaker, the lawyer who prepared the second and third codicils, Morrissey did not do much trust work but mostly conferred with clients and gave “strategic advice.” So far as was known Morrissey spent time with Mrs. Astor, particularly during the period in 2004 when her long-time lawyer was removed and the changes to her estate planning occurred. He contacted Warren Whitaker in December of 2003 saying that Mrs. Astor was dissatisfied

with her current counsel (Terry Christensen, discussed below) and wished to engage someone else to revise her will. Morrissey apparently had called on Whitaker to do some drafting for Morrissey earlier in the year for another client of his. It is not known whether Whitaker was aware of Morrissey's professional history, as it could not be mentioned during the trial. However, the *New York Times* published an article in 2006 reciting a number of will contests in which Morrissey had been involved, presumably as the decedent's lawyer, legatee, and/or fiduciary, and aided in most instances by an outside lawyer, whom he retained to do the drafting. Each case apparently had been settled and confidentiality agreements often entered into. Also, Morrissey had been suspended in the mid-1990s from practice in New York for two years for unprofessional conduct. After the second codicil Morrissey entered into an agreement with Warren Whitaker to split equally the estimated \$3.6M legal fee in representing Mrs. Astor's estate upon her death. In addition, he would become an executor and share in an estimated total commission of \$4.8M.

Terry Christensen was a partner at the law firm of Sullivan and Cromwell, which had represented Mrs. Astor for over 40 years. Christensen took on that client responsibility in the early 1990s and, over time, that professional relationship developed into a personal friendship. He drafted a number of testamentary instruments for Mrs. Astor, as well as powers of attor-

ney and deeds of gifts. The last such instrument was a codicil drafted and executed in December 2003. Under this codicil 49 percent of the marital trust was to be placed in a new trust, to be named the “Anthony Marshall Fund.” Marshall was to be sole trustee with the right to designate the charities to receive the fund on or before his death, at which time the fund would be terminated. He was to receive no compensation and could not name any other trustees. Christensen also represented Marshall and testified that he was persistently pressured by Marshall to cause Mrs. Astor to do more for him—stating his reason for doing so was to assure that his wife Charlene, who was considerably younger, would have sufficient resources if he predeceased her, which in view of the wide disparity in their ages was likely. Earlier in 2003, Christensen was involved in gifting Mrs. Astor’s Maine estate and \$5M to Marshall, who transferred the estate to Charlene soon after it was given to him.

Shortly after the execution of the second codicil Christensen was removed as an executor and he and his firm were replaced as counsel for Mrs. Astor and her estate.

Warren Whitaker was a recognized expert in trust and estate practice who, when he was asked by Morrissey to draw up

the second codicil, was a partner in the firm of Day Berry & Howard. It was not immediately clear from the evidence whom Whitaker was to represent. Morrissey was then representing Mrs. Astor, as well as Marshall, as was Christensen until he was later informed that he had been replaced. No retainer agreement was executed. Whitaker responded to Morrissey, with whom he later entered into an agreement to become co-counsel to Mrs. Astor’s estate. In the interim, his firm would become counsel to Marshall and to Mrs. Astor. He had neither met nor had any communication with Mrs. Astor until he supervised the execution of her second codicil.

Charlene Marshall was not a party to the proceedings but was very much a factor in the case. There apparently was little warmth in Mrs. Astor’s relationship with her, stemming in part perhaps from the fact that Mrs. Marshall, who was the wife of Mrs. Astor’s minister in Maine, divorced him and thereafter married Marshall. In her will Mrs. Astor gave Mrs. Marshall a piece or two of jewelry and two coats. Marshall’s persistence in seeking property from his mother was apparently for the purpose of providing additional resources for his wife, who participated in the meetings with Whitaker and Morrissey as the second codicil was drafted. Her

name was not mentioned in the codicil either as a legatee in the event Marshall did not survive his mother, or as a fiduciary.

At the time of the events in question *Brooke Astor* was a year or two beyond her 100th birthday. She had been diagnosed with Alzheimer’s disease some four or five years earlier. There was much testimony given by doctors, nurses, employees, and friends concerning her mental status. It was generally agreed that she had diminished capacity in 2003 and 2004 when documents were signed and gifts made. There was also testimony of her declining physical health, sight, and hearing. It was stated that she often failed to recognize those she knew and, on occasion, questioned nurses as to what had just transpired following the signing of documents.

The prime activity in her life was to be engaged in charitable giving, particularly favoring New York City where Vincent Astor had amassed his fortune. For over 40 years it was her plan to make significant bequests to these charities to be in addition to the funds in her marital trust.

Though not a party to the proceedings, *charity’s* interest in the estate of Mrs. Astor was ever present, as was the testimony—and her public personae—reciting the major contributions she had made through her grants, in particular to libraries, museums,

For more information on the American Bar Association Commission on Law and Aging’s elder abuse resources, go to:

http://www.americanbar.org/groups/law_aging/resources/elder_abuse.html





and education in New York City. The changes embraced within the second and third codicils significantly decreased—or in one circumstance eliminated—the charitable interest in her estate except for her marital trust. The charities’ interest, as well as all other matters relating to the disposition of Mrs. Astor’s estate, will be determined in the pending probate proceeding in Westchester County, N.Y.

Stiegel: What were the elements of the conspiracy resulting in the second and third codicils?

Forger: In brief, the conspiracy as alleged by the prosecution was causing Mrs. Astor to change her estate plan for the defendants’ own financial gain knowing that she was not capable of understanding the consequences of the codicils presented to her for signature or consenting to the changes being made in her estate plan. Those charged were Marshall and Morrissey. The prosecution suggested in closing argument that Whitaker was a facilitator by drafting the second codicil in reliance on instruc-

tions from those who personally benefited and in the absence of any communication with Mrs. Astor prior to the time of execution.

According to the testimony, the essence of the conspiracy took root in Marshall’s determination to obtain ever more from his mother, even after having obtained earlier in 2003 her Maine estate (which he promptly gave to Charlene) and thereafter a \$5M cash gift. Mrs. Astor said she thought the cash gift should be enough to relieve the pressure she felt from her son and assure Charlene’s comfort. Nevertheless, Marshall approached Christensen in early December 2003 requesting that the lawyer persuade his mother to give him part of the marital trust. Christensen refused, saying that trust was always destined for charity. Next, Marshall requested that he at least be able to name the charities that would be the recipients of the marital trust. Following negotiations with Marshall and discussion (termed “mediation” by Christensen) with Mrs. Astor, who expressed some reluctance to change the marital trust, the

codicil labeled “First and Final Codicil” was drafted. This codicil created on Mrs. Astor’s death the Anthony Marshall Fund to comprise 49 percent of the marital trust. Initially only 38 percent was to be committed but, according to Christensen, Marshall continued to press for more and “twisted arms” until Mrs. Astor ultimately agreed to 49 percent.

The right to name charities given to Marshall was in a sense consistent with the provision in Mrs. Astor’s will that authorized Marshall to name the charities to receive the residuary trust on his death. As to labeling the codicil as “First and Final,” Christensen testified that he could not recall why the “Final” was included. He stated that he had never used that term before. It was speculated that Christensen was either putting Marshall on notice that he would not ask Mrs. Astor to execute any more testamentary instruments or indicating that her capacity to execute any additional instruments was doubtful. Supporting that speculation was the statement made by Christensen—after the execution of the second codicil prepared by Whitaker—that he doubted Mrs. Astor was capable of making a major change in her estate plan.

The first codicil was executed on December 18, 2003. On January 4, 2004, Marshall informed Christensen that his mother was “much more at ease” that the codicil had been signed, but now he wanted Christensen to yield to him sole investment authority over the residuary trust of which he was to receive 7 percent annually. Christensen responded that he could not ab-

dicating his responsibility as a co-trustee with Marshall, but would be willing to give him the lead role. This refusal was followed by Marshall's initiative to remove Christensen and to eliminate the residuary trust. Marshall drafted a memo, dated January 8, suggesting that he be made sole executor and be given the residuary outright as he did not want to be restricted by a trust. The memo was made available at a meeting held by Marshall, Charlene, Morrissey, and Whitaker over the course of two days (January 8 and 10) to discuss drafting the second codicil.

A few days after the first codicil was signed and a few weeks before the second codicil drafting meeting, Morrissey telephoned Whitaker, apparently stating that Mrs. Astor was not satisfied with the first codicil, allegedly because it was too restrictive of Marshall's authority. Morrissey asked Whitaker—who did not know Mrs. Astor—to draft a new codicil addressing this concern. Testimony at trial indicated that Morrissey told Whitaker that Mrs. Astor was unsatisfied with Christensen and wanted a new lawyer because Christensen would not let her be more favorable to her son. At the January 8 and 10 meetings with Marshall, Charlene, and Morrissey, Whitaker presented a draft second codicil including language giv-

ing Marshall far more authority in managing the Anthony Marshall Fund and eliminating the requirement that it terminate on his death. That provision was soon discarded. A revised draft was prepared over the course of those meetings that named Marshall as sole executor and made Marshall or his estate sole residuary legatee. The second codicil was executed on January 12, 2004. As discussed previously, no provision was made for successor or co-executors although Marshall could name them by written instrument, and no individuals were named as beneficiaries of the residuary if Marshall did not survive Mrs. Astor. Apparently the notion of eliminating the restrictions of the Anthony Marshall Fund was dropped and attention turned instead to focusing on the major changes the codicil made to Mrs. Astor's estate plan. In any event, it was apparently decided that Marshall could make grants from the Fund to another grant-making entity in which Charlene was involved, thus circumventing the restrictions established in Mrs. Astor's estate plan.

As to bequeathing her residuary to Marshall's estate, the prosecution emphasized the fact that this was an extraordinary

provision, one rarely—if ever—seen. They argued that this was done to ensure that Marshall, if he died before his mother, could in effect leave Mrs. Astor's residuary estate to his wife Charlene without naming her as the substitute legatee. The prosecution claimed this plan was developed to prevent Mrs. Astor from learning that Charlene—for whom she had little, if any, affection—and not charity, could ultimately become a major beneficiary of her estate.



Either Morrissey or Whitaker was said to have told Mrs. Astor that Marshall, now being free of restrictions of a trust, could give the residuary to anyone he pleased, even Charlene. Christensen testified that it was his consistent belief that Mrs. Astor had no wish to leave anything to Charlene except for a few items of jewelry and clothing. The prosecutor noted that in Mrs. As-

For more information on the American Bar Association Commission on Law and Aging's elder abuse resources, go to:

http://www.americanbar.org/groups/law_aging/resources/elder_abuse.html



tor's will there never had been a designated successor to Marshall and over many years her will expressly stated that he could not name a successor.

The prosecution argued that the failure to name a successor executor in the codicil was another deliberate omission to avoid naming Charlene, relying instead on Marshall naming Charlene and Morrissey as co-executors by written instrument (that Mrs. Astor would not see) that Marshall signed a few days after the codicil execution. Whitaker testified that in the drafting meetings Marshall indicated that he would name Morrissey and Charlene as co-executors. At the time of execution Whitaker stated that Marshall could appoint anyone including Morrissey but made no mention of Charlene. It was noted that if Marshall died before naming co-executors, the estate would be managed by a court appointed administrator, but the parties obviously were prepared to take that short-term risk rather than identify Charlene as an executor.

It is not clear from whom Whitaker, the draftsman, was taking instruction for the codicil. He may have been taking instruction from Morrissey, who was thought to be counsel—or, as described by the defense, a strategic advisor—to Mrs. Astor and who was in need of co-counsel. He may also have been taking instruction from Marshall, who purported to speak on behalf of his mother. Similarly, it was unclear who Whitaker's client was. No retainer agreement or letter of engagement has been signed. He had never spoken to,

met, or otherwise communicated with Mrs. Astor, but was aware of the contemplated discharge of Christensen and his law firm, Sullivan Cromwell, which had represented Mrs. Astor for several decades.

It was pointed out in the testimony that the participants in the drafting meetings (Marshall, Charlene, Morrissey) all were financially interested in causing the second codicil to be executed. So too, it was argued, were Whitaker and his partner, who acted as a witness to the codicil, as their firm was to become counsel or co-counsel to Mrs. Astor and, ultimately, to her estate.

Whitaker met Mrs. Astor for the first time at the scheduled execution of the second codicil. He was introduced to Mrs. Astor as her new "independent counsel" and was in attendance for about 30 minutes while Morrissey talked with Mrs. Astor about Marshall's unhappiness with Christensen and his law firm. They explained/reviewed/described (the words changed in the various drafts of a memorandum memorializing the events) the codicil and gave it to her to read according to the memorandum. There was no mention of any probing as to her knowledge of her assets or the naming of possible alternatives to executors or residuary legatees. According to the memorandum, the recitation of the formalities of execution followed. Morrissey prepared his own memorandum in which he reported a conversation in which he and Mrs. Astor engaged following the codicil execution. She is said to have asked Mor-

rissey "how are things going," which he said he knew intuitively was a reference to troubles in the Mideast. She talked of her life in China during the Boxer Rebellion (which actually occurred before she was born); and, thereafter, she was said to have inquired as to the price of gold. These statements attributable to her were viewed by the prosecution as self-serving (an effort to indicate evidence of capacity to make a codicil) and in some respects incredible. Notations by Whitaker in one of the memoranda indicated his awareness of the possibility that the codicil would be contested.



Some while after the January 12, 2004, codicil execution, Christensen was informed that Mrs. Astor had retained "independent counsel" and had executed a second codicil. He protested and is alleged to have said that Mrs. Astor was not capable of making any significant change in her estate plan. Whitaker responded that Christensen oversaw the first codicil a few weeks before and, thus, he must have thought that Mrs. Astor had capacity to execute a testamentary document. To Christensen the consequence of the first codicil was a minor change (selection

of charities). Whitaker is said to have termed that a major change, whereas he declared that the effect of the second codicil was consistent with Mrs. Astor's pattern of estate planning. However, except for the marital trust, gifts to charity were eliminated by the second codicil. The prosecution characterized the second codicil as effecting a drastic change in Mrs. Astor's estate plan, not at all consistent with the pattern over the years.

The third codicil was prepared in March of 2004 by Whitaker, initially in the belief that its effect was to reduce estate taxes. He prepared the codicil without instruction from anyone. The consequence, as explained previously, was to increase the executors' commissions by some \$1.6M and to relieve Marshall of bearing personally the cost of sale of the properties bequeathed to him (which he had planned to sell) and the costs of their maintenance until sold—amounting to approximately \$5M which, as directed in Mrs. Astor's will, was to be paid out of charity's legacy of the marital trust.

Whitaker did not supervise execution of the third codicil but, instead, sent the document to Morrissey with instructions on how to supervise the execution. A departure from what likely is the more customary practice was the binding of the four page document with two staples (which

could quite easily have been removed) rather than ribbon and seal or some other means that would create an obstacle to tampering. Moreover, the witnesses' signature page (fourth page) was separate from the page that Mrs. Astor was to sign (third page), making it impossible for witnesses to be certain that the signature they saw Mrs. Astor write on the preceding page was indeed the same signature as appeared in the document submitted to court as the duly executed codicil. A substitute signature page could have replaced the one they witnessed. The Astor indictment charged—and the jury found—that Mrs. Astor's signature on the produced original codicil (which was stronger in appearance than subscribed in earlier documents) was not authentic, but instead was a forgery subscribed by Morrissey on a substitute page.

In addition to the charges related to the codicils, there were charges of larceny and theft directed against Marshall relating primarily to his taking paintings from Mrs. Astor's house, giving himself a retroactive salary increase of \$1M (with which he purchased a yacht), and charging her for his personal expenditures. His defense was either that his mother gave her consent or that he acted as her agent pursuant to her durable power of attorney. The jury apparently believed that Mrs. Astor was incapable

of giving consent and that if he was relying on the power of attorney his actions constituted an abusive use.

Stiegel: What can lawyers who represent older persons or persons with diminished capacity, or the people who purport to act on their behalf, learn from the Astor case?

Forger: For those who would take advantage of the elderly or any who suffer diminished mental capacity, irrespective of age, in order to obtain personal financial benefit, the consequences may lead to criminal prosecution and incarceration for both the person taking advantage and his or her lawyer.

Compare this to a will contest in civil court, where the consequences for the individual who acted wrongfully most often would be simply his or her failure to achieve the sought after benefit, even absent compromise or settlement, which frequently is the ultimate resolution. Compare this also to the usual effect on the individual's lawyer, who may be shielded from professional disciplinary action by an agreement of confidentiality entered into as part of the settlement.

A question frequently asked about the Astor case is why it was litigated in criminal court rather than in civil or probate court, as is usually the situation

For more information on the American Bar Association Commission on Law and Aging's elder abuse resources, go to:

http://www.americanbar.org/groups/law_aging/resources/elder_abuse.html



with a will contest. The response, of course, was that the district attorney believed the facts presented a serious case of elder abuse, constituting criminal activity deserving of prosecution, not only to punish the individuals involved, but to signal that others who engage in similar behavior may face similar consequences. Neither social position nor advanced age or family relationship or professional standing should provide exemption from enforcement of the law, which must, in fact and in perception, be applicable to all. To warrant criminal prosecution, with its many hurdles of procedural and evidentiary matters and the requirement of unanimity for conviction, however, a case such as Astor could not likely be brought simply based on an allegation of lack of testamentary capacity absent clear indicators of purposeful wrongdoing, such as present here.

Another reason for criminal prosecution is that the criminal court can order restitution of funds unlawfully taken. In Astor, the court heard argument on the point—the prosecution sought in excess of \$12M to be returned by Marshall—but the court declined to act on the issue, deferring instead to the probate court for its consideration.

A second lesson relates to practice standards applicable to lawyers. This case points out the importance of carefully following the customary standards to avoid any ambiguity when questions of capacity or conflict with multiple clients may be present.

First is the obvious: know who the client is. Many juris-

dictions now require the signing and delivery of retention agreements or letters of engagement. This offers clarity as to whom the lawyer owes a duty of undivided loyalty and the exercise of independent judgment. One must be wary of accepting and acting upon instructions from a third party—particularly a third party with a financial interest at stake—even if the third party holds a power of attorney or professes to have some attorney relationship with the client. If the client is fully capable the lawyer can readily verify instructions directly with the client.

A more difficult situation arises when the lawyer represents, simultaneously, two or more persons in the same family—most often “intergenerational representation.” In the Astor case both Christensen and Whitaker were in that position. Likely so, too, Morrissey, although there was little clarity as to who looked to him for counsel (notwithstanding, that did not prevent him from being inextricably involved in the conspiracy, according to the judge).

However, representation of multiple clients—even in one family—is not unusual in the practice of estate, family, or elder law. It is common for a major family asset to be held in corporate form, partnerships, trusts or some other form of ownership in which several members, often intergenerational, have an interest. In such cases a process should be worked out in advance as to the handling of differing interests that may evolve into conflicts, and all members should be made aware of the possibility of conflicts developing.

Many legal commentators warn about the risks in taking on representation of family members of different generations. Some counsel that such representation should be avoided. If a direct conflict actually arises, the lawyer would, of course, seek to orchestrate an acceptable resolution and, if that failed, follow the process agreed upon in advance, perhaps with the senior client—ordinarily the initial client. In the worst case scenario, the lawyer might need to withdraw entirely from the joint representation.



In Astor, it was mother and son. Christensen’s law firm began representing the mother long before the son entered the scene. Christensen inherited them both as clients, but over the decades Mrs. Astor was the principal client who would expect from Christensen loyalty and independent judgment. When the differing interests emerged between Marshall and Mrs. Astor as to a well-established estate plan, Christensen stated that he sought to act as mediator. Most lawyers would agree that was entirely proper. When Marshall’s demands for part of the marital trust created a serious conflict, Christensen rejected the request. He did the same later when Marshall stated that he wanted to make all investment decisions for the trust in which he and Christensen were co-trustees. Knowing that Mrs. Astor had always expected that Christensen would act in conjunction with Marshall, Christensen declined to abdicate his fiduciary responsibility. Ultimately he paid the price—being removed by message delivered by the lawyer newly hired to replace him and then by Marshall. Christensen sought to meet with Mrs. Astor for confirmation, but was told that she was not available. Later he received a letter that bore her signature confirming the discharge.

In regards to Whitaker, as with Morrissey, there was ambiguity as to the identity of the client. Perhaps Whitaker was co-counsel to Mrs. Astor with Morrissey (who only gave “strategic advice,” did not draft documents, did little trust work, and had never billed Mrs. Astor). Whitaker was also seen to be representing Marshall—perhaps even Charlene in view of their participation in the codicil drafting sessions. If Whitaker were representing Mrs. Astor it would have been because of his agreement with Morrissey, though at that point Christensen was her counsel in estate matters. And if Whitaker was representing Marshall, a direct conflict was present, although he may have considered that Marshall was giving instructions on Mrs. Astor’s behalf or was acting as her agent pursuant to her power of attorney. In any event, it was clear that Whitaker first met and spoke to Mrs. Astor when he arrived for the signing of her codicil as “independent counsel,” presumably succeeding Christensen and his law firm Sullivan and Cromwell, although that fact was unbeknownst to them at the time.

From a practice standpoint, when taking instructions from an interested third party it is possible and advisable to avoid ambiguity by having some direct contact with the client in the absence of

anyone who has an interest in the outcome. Here Morrissey, who was to become co-counsel to the estate, as well as co-executor upon nomination by Marshall, had a very significant financial interest at stake. The client/attorney relationship as it evolved in Astor had more complexity or uncertainty than the typical intergenerational representation. While the intergenerational issue of mother/son was certainly present, the existence of other parties clouded the application of customary practice standards of individual loyalty and exercise of independent judgment by counsel.

A further factor present in the Astor case was her acknowledged diminished capacity; this fact added another measure of concern to the usual intergenerational situation. Absent was the ability to obtain the “informed consent” of each party as to the course of action to be followed in the event of occurrence of conflict or to attempt mediation as Christensen sought to do. While a lawyer can resign as counsel for either or both of the parties in this situation, that is not a desirable or, at times, appropriate action; it is far better to try to avoid this situation in the first place.

As an element of protection for a lawyer who is supervising the execution of testamentary documents involving a client of

For more information on the American Bar Association
Commission on Law and Aging’s elder abuse resources, go to:

http://www.americanbar.org/groups/law_aging/resources/elder_abuse.html



diminished capacity, some would suggest videotaping the ceremony. Lawyers need to understand, however, that a videotape made without sound may not support a claim that the client had capacity to execute the documents, as one cannot assess mental capacity by appearance alone, particularly when a client has Alzheimer's disease and may have developed good coping skills or may have had help in dressing.

The presence of the client's physician when the documents are signed is another route to follow. In *Astor*, her neurologist cast doubt on her ability to comprehend any significant transaction. At trial, many instances were recited of her inability to perform simple tasks, recall events, or recognize close friends. But the neurologist's opinion was dismissed by the defense attorneys, who argued that he was not present at the codicil signing and Mrs. Astor likely could have had a lucid period at that time and been considered legally capable of signing the codicil.

In many cases in which diminished capacity is an issue, the lawyer will have some history with the client and be in the best position to make a determination of whether the client has sufficient capacity under applicable law to execute a testamentary document. The traditional standard relates to the client's ability to understand the nature and extent of her property, the natural objects of her bounty, and the consequences of executing the will or codicil. More than reciting the usual statutory requirements (acknowledging the will, asking witnesses to sign, etc.),

the lawyer should probe the client's understanding of property and beneficiaries. Does she know, in general terms, what her property interests are and have a reasonable understanding of its value? Does she wish to leave her estate to X alone or are there any others she wishes to remember? What if X does not survive her? Who should receive some part or all? Does she recognize that the instrument represents a change of her estate plan and to what extent? If her named executor does not survive, who should be the successor? Unless satisfied with the answers, it may be the wiser course for the lawyer not to proceed with supervising the execution.



A further issue that lawyers, on occasion, face is the denial of access to the client by family members, particularly after a change in lawyers has been made. This happened to Christensen after being informed by Whitaker that he had been replaced. Christensen expressed doubt that Mrs. Astor could have knowingly changed counsel and executed the second codicil, but

beyond that his options were very limited. Perhaps a guardianship proceeding could be initiated (preferably by a relative, as was the case in *Astor*) if thought necessary to protect either the person or property of the individual. That is obviously a difficult choice that could damage the client, as well as give rise to a misunderstanding of the lawyer's motive. New York law provides an alternative where the lawyer has been removed as an executor; the lawyer can await probate and if the court is satisfied that a question exists as to the validity of the will and the lawyer/executor has information that would be helpful to the court, the filing of an objection can be authorized.

Another lesson that can be learned from this case relates to counseling clients about and drafting durable powers of attorney and, when the opportunity presents itself as it may in situations of intergenerational representation, to counseling the agent under the power of attorney about the appropriate exercise of the authority given to him or her by the principal.

Marshall was his mother's agent under a durable power executed well before there was concern as to her capacity. Under New York law—and likely in all jurisdictions—the agent is deemed a fiduciary and must act in accord with principles applicable to those in a position of trust. In other words, the agent must be loyal, accountable, and act only in the principal's best interest. Under New York's civil law gifting to oneself is subject to strict scrutiny and must bear some relationship to the princi-

pal's past pattern of giving before any question of capacity had arisen. The typical power of attorney allows the agent to make modest gifts to himself or herself, often consistent with federal gift tax exclusions absent any other preexisting pattern. Marshall, in apparent exercise of his mother's power of attorney, took tangibles—mostly art—from Mrs. Astor's apartment and charged her with many of his personal expenses. This gave rise to several charges of larceny and theft, of which he was convicted. And, of course, under the power of attorney testamentary instruments cannot be executed by the agent professing authority to act on behalf of the principal. In order to ensure that the principal is fully cognizant of the agent's authority and the agent's ability to make gifts to himself or herself, New York law has recently been amended to require considerably more documentation and

authentication of any power and to require a detailed special rider to authorize any major gift.

Stiegel: Is there anything else you'd like to say in conclusion?

Forger: As the population ages and increasing numbers of the profession engage in representation of the elderly, there will likely be some lawyers who will either be unmindful of possible pitfalls of representing intergenerational clients or persons with diminished capacity. Some lawyers will be asked by third parties to give advice or draft documents that may prove not to be in the client's actual best interest. Those who purposely seek personal gain at the client's expense should and likely will face disciplinary action and possibly criminal prosecution as a result. One beneficial consequence of the Astor case, amid the unfortunate airing of a family tragedy,

is the raised awareness of elder abuse and the recognition that it has dimensions beyond the more readily identifiable physical mistreatment. To the credit of the Manhattan district attorneys office through the leadership of Assistant District Attorney Joel Seidmann, the senior trial lawyer, and of Elizabeth Loewy, the assistant district attorney overseeing the elder abuse unit, this dimension of elder abuse and its prosecution has now been established.

Even those lawyers whose motives and actions are intended to serve only their clients' best interests need to exercise a degree of caution in the dynamic of family conflicts that could give rise to unintended consequences and misimpressions of their actions. One must always be mindful of who the client is and must give him or her undivided loyalty and judgment, independent from the pressures and desires of others.

For more information on the American Bar Association Commission on Law and Aging's elder abuse resources, go to:

http://www.americanbar.org/groups/law_aging/resources/elder_abuse.html

