MESSAGE FROM THE CHAIR

Welcome to the Spring Edition of the Diversity Committee Newsletter dedicated to those attorneys who have turned their disability into an ability to accomplish great things in the practice of law. I would first like to thank our Committee Member, Alan Rachlin, for all his hard work and patience as he helps us understand what he and others go through and assists us in finding ways to be more inclusive of those who face disability challenges. Alan is a true advocate in every sense of the word and we could not advance the needs of the disabled without his sage advice and commitment to our goals. Thanks, Alan.

Our Spring outreach to middle schools and Diversity series in Boca Raton, Florida, were huge successes. Thanks to the efforts of ABA Staff Member Jennifer LaChance, 15 members of the Diversity, Staff Counsel and Law in Public Service Committees, met with 120 middle school students at the William Dandy Middle School in Fort Lauderdale, Florida to discuss “A Day in the Life of an Attorney” and answer questions from the students. It was an amazing event and the students were polite, engaged and very happy to actually meet real lawyers. I’m not sure who enjoyed it more…them or us! A local PBS television station filmed the event so I’m sure Hollywood will be calling soon. Our Diversity Series “A View from the Trenches” was also a highlight of our meeting. A distinguished panel of four local bar leaders, including a Federal Judge, discussed problems they had experienced with diversity and inclusion as they advanced in their practice and the advancements that had been achieved in their area. The panelists answered numerous questions from the audience and were very interactive in their presentations. A special thanks to TIPS Diversity Officer, Darcee Siegel, for assembling an outstanding class of panelists. Finally, our Committee distributed our revised Diversity Toolkit

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The Diversity Committee, Staff Counsel Committee and Law in Public Service Committee teamed up to meet with middle school students at Boca’s William Dandy Middle School.

As part of the Education Awareness Outreach Project, committee members presented “A Day in the Life of An Attorney” and fielded many questions from the eager–to–learn students. Presenters also met one–on–one with students to encourage career options in the legal industry.
Chair
Daniel G Acosta
Farmers Insurance Exchange
500 Marquette Ave NW, Ste 1050
Albuquerque, NM 87102-5310
(505) 248-3603
Fax: (505) 246-2924
dan.acosta@farmersinsurance.com

Chair-Elect
Deborah W Yue
Gallagher Sharp
1501 Euclid Ave, Fl 6
Cleveland, OH 44115-2132
(216) 522-1375
Fax: (216) 241-1608
dyue@gallaghersharp.com

Last Retiring Chair
John F Stephens
Sedgwick LLP
801 S Figueroa St, Ste 1900
Los Angeles, CA 90017-2575
(213) 426-6900
Fax: (213) 426-6921
john.stephens@sedgwicklaw.com

Staff Liaison
Jennifer LaChance
American Bar Association
321 N Clark St
Chicago, IL 60654-4714
(312) 988-5463
jennifer.lachance@americanbar.org

Director
Darcee S Siegel
169 Camden Drive
Bal Harbour, FL 33154
(305) 409-9670
darcees.siegel@gmail.com

Member
Akira Heshiki
Standard Insurance Company
900 SW 5th Ave, Ste 1400
Portland, OR 97204-1289
(971) 321-8446
Fax: (971) 321-6407
akira.heshiki@standard.com

Alan S Rachlin
NY State Dept of Financial Srv
25 Beaver St
New York, NY 10004-2310
(212) 480-2282
Fax: (212) 480-5272
alan.rachlin@dfs.ny.gov

Arlene Zalayet
Liberty Mutual Group
175 Berkeley St
Boston, MA 02116-3350
(617) 654-3929
Fax: (516) 294-4594
arlene.zalayet@libertymutual.com

Carole Dianne Smith
503 Hawthorn Ln
Winnetka, IL 60093-4106
carole_d_smith@comcast.net

Cassandra J Georges
271 E Walnut Park Dr
Philadelphia, PA 19120-1038
(267) 441-1243
cassandrageorges@gmail.com

Cynthia L Choate
Farley Seletos & Choate
5255 E Williams Cir, Ste 6600
Tucson, AZ 85711-7716
(520) 519-2450
Fax: (520) 519-1080
cynthia.choate@farmersinsurance.com

Denise Di Mascio
Farmers Insurance Group
3111 Camino Del Rio N
San Diego, CA 92108-5727
(619) 584-3366
Fax: (619) 280-4588
denise.dimascio@farmers.com

G Glennon Troublefield
Carella Byrne et al
5 Becker Farm Rd, Ste 200
Roseland, NJ 07068-1788
(973) 994-1700
Fax: (973) 994-1744
gtroublefield@carellabyrne.com

James Js Holmes
Sedgwick LLP
801 S Figueroa St, Ste 1900
Los Angeles, CA 90017-2575
(213) 426-6900
Fax: (213) 426-6921
james.holmes@sedgwicklaw.com

Karen Wells Roby
US Dist Court Eastern Dist of Louisiana
500 Poydras St, Rm 8437
New Orleans, LA 70130-3319
(504) 589-7615
Fax: (504) 589-7618
roby@laed.uscourts.gov

Kirsten Soto
Gilbert LLP
1100 New York Ave NW, Ste 700
Washington, DC 20005-6133
(202) 772-3989
sotok@gotofirm.com

Nancy N Quan
Quan & Associates
15029 Northwind Ln
North Hills, CA 91343-7829
(310) 621-6415
Fax: (818) 893-8001

Nosizi Ralephata
Turner Padget et al
PO Box 22129
Charleston, SC 29413-2129
(843) 576-2807
Fax: (843) 577-1655
nralephata@turnerpadget.com

Park Priest
English Lucas Priest & Owsley LLP
PO Box 770, 1101 College St
Bowling Green, KY 42102-0770
(270) 781-6500
Fax: (270) 782-7782
ppriest@elpolaw.com

Wesley Sunu
Tribler Orpett & Meyer PC
225 W Washington St, Ste 1300
Chicago, IL 60606-3408
(312) 201-6423
Fax: (312) 201-6401
hwsunu@tribler.com

Alicia J Donahue
Shook Hardy & Bacon LLP
1 Montgomery St, Ste 2700
San Francisco, CA 94104-5527
(415) 544-1900
Fax: (415) 391-0281
adonahue@shb.com

Deborah Smith
Gordon & Rees LLP
275 Battery St, Ste 2000
San Francisco, CA 94111-3361
(415) 986-5900
Fax: (415) 986-8054
dasmith@gordonrees.com

Elizabeth B Shirley
Burr & Forman LLP
420 20th St N, Ste 3400
Birmingham, AL 35203-3284
(205) 251-3000
Fax: (205) 458-5100
bshirley@burr.com

Sarah D Gordon
Steptoe & Johnson LLP
1330 Connecticut Ave NW
Washington, DC 20036-1795
(202) 429-8005
gordon@steptoe.com
As an attorney who has also been a respondent in a civil commitment proceeding, I have the unique perspective of sitting on both sides of the attorney-client relationship in which a client’s judgment and capacity is in question. And so I was disappointed in the editorial, “Impaired Clients Suing Their Lawyers,” published in the February 1, 2013 edition of the Law Tribune. The editorial was critical of the state Supreme Court’s decision in Gross v. Rell, 304 Conn. 234 (2012), which held that an attorney appointed to represent a respondent in a conservatorship proceeding is obligated to advocate for that client’s expressed wishes, and that failure to do so can result in liability because such attorneys are not protected by quasi-judicial immunity.

Immunity was extended to conservators appointed by the probate court who act pursuant to orders of the court or whose actions are ratified by the probate court. Since this decision there has been significant revision to probate court proceedings in Connecticut to require more court oversight of conservators.

When clients are represented by attorneys who zealously advocate for their objectives, outcomes are different. Clients who have impairments deserve no less – and arguably better. Agencies like the Connecticut Legal Rights Project, which represented Mr. Gross (and after his death, his daughter) in this case are dedicated to the mission of representing clients in accordance with their expressed preferences.

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As an attorney appointed by the court to represent a person in an involuntary conservatorship proceeding, it is your job to zealously advocate for your client. If she tells you she objects to the imposition of the conservatorship, you must challenge the petitioner’s claims and raise all statutory, procedural and factual defenses. It is not your job to substitute your judgment of what’s best for your client for your client’s judgment of what’s best for her. You are not her guardian, you are her advocate.

This is why I, as a person living with a psychiatric disability, welcomed the Connecticut Supreme Court’s decision in Gross v. Rell which held that an attorney appointed to represent a respondent in a conservatorship proceeding is obligated to advocate for that client’s expressed wishes, and that failure to do so can result in liability because such attorneys are not protected by quasi-judicial immunity.

I write this piece as Mental Health Awareness Month 2014 is coming to a close, staring at a quote from an old ABA Journal hanging over my desk which says “defending unpopular positions is what lawyers do.” Why then, when it comes to advocating for the rights of people with psychiatric disabilities do so many lawyers seem to have a fundamental misunderstanding of their role and responsibility?

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Among other things, the editorial misses the point that there were two distinct roles played by the attorneys who were sued in this case. One attorney was granted quasi-judicial immunity by the court. One was not. It is important to spell out the differences between their roles because it is apparent that the editorial’s author misunderstood them; it is possible that many others may, too.

When proceedings are instituted to conserve an individual pursuant to Connecticut General Statutes

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1 304 Conn. 234, 40 A. 3d 240 (Conn. 2012).
2 For a video which shows CLRP’s mission but is a great reminder of what lawyers are supposed to do, see: http://www.u10videos.com/dmhas/CLRP.wmv . Disclosure: I worked at CLRP after my first summer of law school, and have been involved with the organization ever since. I was President of the Board of Directors at the time of oral argument in the Gross v. Rell case.
§45a-649(b), an attorney is appointed to represent that individual. At that point, there has not yet been any determination as to the competency of that individual, who is presumed to be competent. Since it is not a voluntary conservatorship, one must also assume that the proposed ward opposes the imposition of the conservatorship. Therefore, the job of the attorney appointed to represent that individual is to zealously advocate for that client in opposition to the conservatorship being established [or continued]. In Gross, the counsel for this attorney put forth the erroneous argument that his job was to “assist the Probate Court and serve the best interests of his client.” The Court decided:

Thus, as a general rule, attorneys for respondents and attorneys for conservatees are not ethically permitted, much less required, to make decisions on the basis of their personal judgment regarding a respondent’s or a conservatee’s best interests, although they may be required to do so in an exceptional case ... to ensure that respondents and conservatees are fully informed of the nature of the proceedings and that their articulated preferences are zealously advocated by a trained attorney both during the proceedings and during the conservatorship. The purpose is not to authorize the Probate Court to obtain the assistance of an attorney in ascertaining the respondent’s or conservatee’s best interests. Because the function of such court appointed attorneys generally does not differ from that of privately retained attorneys in other contexts, this consideration weighs heavily against extending quasi-judicial immunity to them.

Contrast this to the other attorney who was appointed to be Mr. Gross’s conservator by the Probate Court. During her appointment, she made a number of decisions consistent with the Probate Court’s rulings. The Supreme Court ruled that conservators are entitled to quasi-judicial immunity as long as their actions are authorized or approved by the Probate Court. Only actions that are not authorized or approved by the Probate Court would subject a conservator to the common law rule of liability of failing in her fiduciary duty. What intrigued me about this editorial was its fascination with the brackets used by the Supreme Court in its decision. What maddened me is that when I read the actual decision, the brackets referred to were not even as cited in the article. This is what the court’s decision actually states:

Unlike children, however, who are not presumed to be competent, impaired adults are presumed to be competent under rule1.14 until incompetence is established. See Rules of Professional Conduct (2005) 1.14, commentary (“[t]he normal client-lawyer relationship is based on the assumption that the [impaired] client, when properly advised and assisted, is capable of making decisions about important matters”).

I see nothing misleading about the court’s language. The court is referring to Rule 1.14. The title of that rule is: “Client with Impaired Capacity.” The first sentence is that the lawyer shall, as far as possible, maintain a normal client-lawyer relationship with the client (no matter the reason for the impairment) [emphasis added]. The rule only discusses the relationship between lawyers and their clients with impairments. The rule is not about the scope of “normal” attorney-client relationships.

I participate in trainings for people living with psychiatric disabilities who will be certified as peer support specialists. One element of the class relates to ethics. I tell them every profession has ethical codes, even lawyers. (This usually gets a chuckle). I explain to them that some of our rules use the word “may” and some use “shall”; when “may” is used reasonable people can disagree on what is permissible whereas “shall” is a mandate.

Rule 1.14 is clear, and the Supreme Court’s decision in Gross v. Rell reinforces that the role of an attorney appointed to represent an individual in a conservatorship proceeding is to zealously advocate for that client’s expressed wishes. A conservator who is appointed by the court and takes action that is approved or authorized by the court will have immunity. Lawyers who do their job effectively have nothing to fear, and should welcome this decision. Our job is to zealously advocate for our clients. If you are not prepared to do that, then perhaps you should not answer yes when the probate judge comes calling. Then the next lawyer, who does say yes, will actually do her job the way it should be done. 

Kathleen M. Flaherty is a staff attorney at Statewide Legal Services of Connecticut, though the views expressed are solely those of the author. Flaherty, who has bipolar disorder, is also on Governor Dannel P. Malloy’s Sandy Hook Advisory Committee.
In the general perspective of society, disability is almost synonymous with disadvantage. Like the law, however, disabilities are often misunderstood. As a non-traditional hearing-impaired member of the law school community, I have experienced this misunderstanding my entire life.

My personal road to law school has been a long and proud journey. Hearing loss is an issue that has affected several members of my family, but throughout my youth I was reluctant to address this issue because of the social hardships that would come along with being labeled as “the deaf kid.” As my deficiency progressed, however, I succumbed to the notion of wearing hearing aids, and looking back, I wish my self-imposed insecurity had allowed me to do so much sooner. Notwithstanding my hearing-impairment I, like many other persons with disabilities, have led a successful career as an entrepreneur, student, and employee. In fact, being disabled has significantly contributed to my overall work ethic and has constantly motivated me to surpass the boundaries that many people in society have drawn for disabled individuals such as myself.

While the ABA is “committed to promote justice and the rule of law for persons with mental, physical, and sensory disabilities and to promote their full and equal participation in the legal profession,” students and lawyers with disabilities face significant barriers in both law school and the legal profession. This is likely a large reason why many disabled individuals decide not to pursue a career in law. Currently the best estimate of the number of hearing-impaired attorneys in the United States is about 200. Although this is only an example of one type of disability, this number can, and should, grow in years to come as law schools and legal organizations become aware of the value of lawyers with disabilities.

Disabilities can help foster a hard work ethic and a detail oriented mindset. A law student or lawyer who has gained the self-discipline to overcome, or compensate for, his or her disability, will likely possess the strength and work ethic to overcome any adversity he or she will face in the legal profession. For example, in 2012 the overall unemployment rate for persons with a disability in the United States was 13.4 percent, a 51 percent difference from the 7.9 percent unemployment rate for persons with no disability. In turn, 11.3 percent of persons with a disability were found to have addressed this issue through self-employment, whereas only 6.5 percent of persons with no disability were found to be self-employed.

Unknowingly, I followed this trend when I became an entrepreneur at age eighteen, overtaking ownership of a deli I began working in just three years prior. Although my father was pessimistic about the idea of owning a business before completing college, I decided to seize this unique opportunity and meet with an attorney to learn the legal implications of business ownership. From that meeting, a single statement stood out. The attorney stated, “I could file an LLC for you, or instruct you to do it yourself.” I chose the latter option and this seemingly insignificant sentence sparked my interest in law.

Several months later I co-founded a larger restaurant on the main street of a nearby downtown area, and lived up to my father’s fear of dropping out of college. My business partner and I succeeded in transforming what was a generic hamburger restaurant into a popular full-service fine dining establishment, and received an offer to sell it soon thereafter. We decided to accept the offer and I vowed to return to school.

Upon returning to college, I sat in the front row of every class due to my disability, in order to ensure that I was retaining all of the necessary information from my professors’ lectures. The requisite level of attention I needed to apply in my business law courses, because of my hearing impairment, kept me from daydreaming or straying onto Facebook like some of my other classmates, and confirmed my desire to become an attorney. I later decided that whilst studying for the LSAT and applying to law schools, I would further my education through obtaining a Masters of Business Administration (MBA).

The attention to detail and work ethic that I developed from my hearing loss drove me to begin taking graduate classes as an undergraduate student. It also provided me with the ability to become one of few students (if not the only student) at Rowan University to gain approval to take twenty-four credits in a single semester and sixty-four credits in a calendar year. This allowed me
to complete my MBA in one year, while also graduating summa cum laude.

As depicted above I have never allowed my disability to withhold me from obtaining success of my life goals, and many others have done the same.\(^5\) “People with disabilities who consider themselves successful generally accept their disabilities as one aspect of who they are, do not define themselves by their disabilities, recognize that they are not responsible for their disabilities, and know that they are not inherently impaired. They recognize their responsibility for their own happiness and future.”\(^6\)

Although disabled individuals may take a different route, through perseverance and determination, we all arrive at the same destination.\(^7\)

Ernest Holtzheimer is a 2016 J.D. candidate at Drexel University School of Law concentrating in business and entrepreneurship law. He is the ABA Commission on Diversity Rights’ May 2014 Law Student Spotlight.

\(^4\) Id.
Until February 2006, I was a relatively health attorney. In the early morning of February 2, because I felt ill, I was taken to the Emergency Department of the local hospital. I have no memory of the intervening several weeks, and emerged from medically induced sedation paralyzed in all four limbs. Since that time, I have regained mostly full functioning of my hands and arms, but I am still mobility impaired.

After a month in the hospital, the medical profession settled on a diagnosis of Critical Illness Poly-neuropathy attendant upon Community Associated Methicillin Resistant Staphaclococcus Aureus (CA-MRSA). While I could expound at length about CA-MRSA, its general causes, and the probable cause in my case, that is not the subject of this article.

After a month in the hospital and six months in a rehabilitation facility, I returned home and, at first part-time, to work. Having been parsimonious in my prior use of leave time, and working for an indulgent public employer, I was on full pay for the entirety of my time out of the office and have been able to take time-off for physical therapy.

Fortunately, my recovery has allowed me to resume my full life with little limitations. I am now aware of the need for, and take advantage of, handicapped accessible transportation and public accommodations. However, there is a pressing need for changes in public perceptions of “disabled” individuals. Even though I am only mobility impaired, individuals still assume I am mentally impaired and address questions to those, including my wife, who accompanies me.

After achieving almost complete recovery, albeit I am still mobility impaired, I joined the TIPS Diversity Committee and received a Presidential appointment to the American Bar Association’s Commission on Disability Rights. After completion of my term on the Commission, through Chairs’ appointment, I became the TIPS liaison to the Commission.

In order for the Association to adequately represent all parts of the profession, and for their own benefit, disabled attorneys should join the American Bar Association, and once members, identify as disabled.

Although, as places of public accommodation, courtrooms are required by the Americans with Disabilities Act (ADA) to be accessible to all, in practice such accessibility is not universal. In addition, absent otherwise planned modifications, the ADA does not require retrofitting of places of public accommodation. Recognizing the cost involved, states should be proactive in assuring access to all in courtrooms.

Although this does not affect me as mobility impaired attorney, attorneys with visual and hearing disabilities have difficulty in utilizing practice software. The Commission has taken this issue up with software vendors.

At present, court litigants and witnesses whose first language is not English, receive interpretation services. The Commission has received an Enterprise Grant from the Association to study and make recommendations concerning the availability of services, including sign language and closed captioning, for hearing impaired attorneys, litigants, and witnesses.

In addition, the Commission reached out unsuccessfully to the Law School Admission Council to eliminate the practice of having the scores of applicants who secure accommodations for the LSAT “flagged”. Such a practice is not engaged in by other tests, such as the SAT and GRE. The Commission has prevailed on one state, California, to ban the practice.

Further, the Commission is in dialogue with bar examiners concerning the conditions under which bar examinations are given and questions asked of successful applicants concerning past medical treatment, especially by psychologists and other mental health professionals.

Alan Rachlin, a Principal Attorney in the New York State Insurance Department, is a member of the TIPS Diversity Committee and of the Association’s Commission on Mental and Physical Disability Law. He is a former member of the TIPS Council.
Congratulations to the ABA Tort Trial and Insurance Practice Section on being recognized by the ABA Commission on Disability Rights as the Platinum Level 2014 Goal III Honor Roll recipient!

Join TIPS as it receives this prestigious recognition at the Lawyers with Disabilities Reception at the ABA Annual Meeting in Boston on Monday, August 11th at 6:00 p.m. at the Hynes Convention Center.
2014 TIPS CALENDAR

August 2014

4  Member’s Monday  Free Teleconference
   Contact: Ninah F. Moore – 312/988-5498

7-12  ABA Annual Meeting  Omni Parker Hotel
   Contact: Felisha A. Stewart – 312/988-5672
   Boston, MA
   Speaker Contact: Donald Quarles – 312/988-5708

October 2014

6  Member’s Monday  Free Teleconference
   Contact: Ninah F. Moore – 312/988-5498

15-19  TIPS Section Fall Leadership Meeting  Meritage Resort and Spa
   Contact: Felisha A. Stewart – 312/988-5672
   Speaker Contact: Donald Quarles – 312/988-5708
   Napa, CA

23-24  2014 Aviation Litigation Program  Ritz Carlton Hotel
   Contact: Donald Quarles – 312/988-5708
   Washington, DC

November 2014

5-7  FSLC & FLA Fall Meeting  Ritz Carlton Hotel
   Contact: Donald Quarles – 312/988-5708
   Philadelphia, PA

December 2014

8  Member’s Monday  Free Teleconference
   Contact: Ninah F. Moore – 312/988-5498

January 2015

15-17  LHPR Midwinter Symposium  Loews Ventana Canyon
   Contact: Ninah F. Moore – 312/988-5498
   Tucson, AZ

21-23  Fidelity & Surety Committee Midwinter Mtg  Waldorf Astoria Hotel
   Contact: Felisha A. Stewart – 312/988-5672
   New York, NY

February 2015

5-8  ABA Midyear Meeting  Hilton of the Americas
   Contact: Felisha A. Stewart – 312/988-5672
   Houston, TX