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INTRODUCTION TO THE WINNING ESSAYS OF THE ABA/FJC LAW AND AGING STUDENT ESSAY COMPETITION, SID KESS AWARD

*Kristin Booth Glen**

This issue of the *New York City Law Review* signals an intriguing and welcome departure from the traditional law review format by publishing entirely law student, rather than law professor, writing. All of the student articles are consonant with the *Law Review's* public interest focus: they examine serious issues of public concern that affect some of the most powerless and vulnerable members of our society, and they propose creative, justice-enhancing solutions. This issue also provides an opportunity for me, personally, to have two institutions about which I care deeply, CUNY School of Law and the ABA Commission on Law and Aging (Commission), brought together in a way that honors both their work.

The law school, celebrating its 20th anniversary, needs little introduction. It is the pre-eminent public interest law school in the country, as well as one of the most diverse, committed to bringing access to justice to those to whom it has been previously denied. Readers may, however, be less familiar with the Commission. It was founded at almost the same time as the law school and is comprised of a 15-member, inter-disciplinary body of experts in aging and law, including lawyers, judges, health and social services professionals, academics, and advocates. Its mission is “to strengthen and secure the legal rights, dignity, autonomy, quality of life, and quality of care of elders . . . through research, policy development, technical assistance, advocacy, education, and training.”

Over the years, the Commission's superb staff has researched and written about a variety of legal issues affecting the elderly, including, for example, a groundbreaking work on adult guardianship. At the same time, the Commission has also shown a commitment to educating and facilitating professionals – and soon-to-be professionals – in securing and maintaining the rights of older Americans. This latter work includes an annual, widely attended national conference, sponsored in partnerships with organizations like AARP, the Alzheimers Association, the National Guardianship Association, and the National Academy of Elder Law Attorneys

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(NAELA). In addition to the annual conference, the Commission has occasionally co-sponsored conferences resulting in law review symposium issues¹ and has otherwise participated in legal education through teaching and research assistance.

It was, therefore, entirely appropriate for the FJC Foundation, which itself has been deeply involved in both legal education and problems of law and aging, to ask the Commission to sponsor and administer a writing competition for students in elder law courses and clinics at law schools across the country. Each of the entries was read by a staff member with particular expertise in the area addressed, as well as by the Commission's director, Nancy Coleman, and by Jamie Philpotts, who administered the competition. The 14 finalists' papers were then read and judged by Ms. Coleman and two members of the Commission. It is an understatement to say that the entries constituted an embarrassment of riches. Choosing among so many fine papers that dealt with so many pressing issues in elder law and elder care, was an almost impossible task, given the research, passion and compassion that clearly informed them all.

When the hard choices were finally made, it became clear that the winners ought to be published in a law review indexed in the relevant print and electronic research services in order ensure availability to the widest legal audience. Just as the Commission was the obvious choice to host the competition, the student-run law journal of the foremost public interest law school in the country was an obvious choice to publish the winning papers. The editors of the *New York City Law Review* responded to this opportunity with enthusiasm, and the result is this path-breaking issue.

The submitted essays covered a breathtakingly broad range, from end-of-life decision-making, predatory lending and deceptive business practices aimed at seniors, economic and racial disparities in long-term care, to the special concerns of gay and lesbian elders, and strategies for the prevention of elder abuse and neglect. Interestingly, two of the winning papers deal with the same problem: pain management, which is of increasing concern to both law and health care professionals.

The competition winner, Laura Diane Seng of Valparaiso Law School, poignantly describes the pervasive problem of inadequately

¹ See, e.g., Symposium, *Wingspan – The Second National Guardianship Conference*, 31 STETSON L. REV. 573 (2002); Symposium, *Joint Conference on Legal/Ethical Issues in the Progression of Dementia*, 35 GA. L. REV. 391 (2001); Symposium, *Ethical Issues in Representing Older Clients*, 62 FORDHAM L. REV. 961 (1994).

treated pain in long-term care facilities (nursing homes), where almost half our aging population will spend some portion of their final years. Beginning with the startling figures that between 45 and 85 percent of nursing home residents – more than a million people – needlessly suffer from pain each year, Seng explores the multiple legal and institutional constraints on effective pain management. These include conflicts between legislative drug abuse prevention policies, which are entirely inappropriate to the population at issue, and those promoting pain management. Other impediments are regulation of physician practice, including fear of disciplinary action for prescribing opiates and other potentially addicting drugs, the failure of medical education to teach palliative care, and intense regulatory scrutiny, not only by state medical licensing boards, but by federal agencies, including the FDA and DEA, Medicare and Medicaid drug utilization review boards and private health insurers. These all combine to result in under-prescription for pain-reducing opioids, and unnecessary suffering for those whose debilitating pain goes under- or untreated. Regulation of long-term facilities by the Centers for Medicaid and Medicare Services (CMS) further contributes to this devastating failure to decrease or ameliorate the pain of chronic health conditions and painful terminal illnesses for the institutionalized elderly.

In her prize-winning paper, Seng recommends a number of possible improvements. These include state and federal legislation, changes in Medicare reimbursement rules, and regional education in pain management and treatment of terminally ill and dying patients for nurses, medical students, and practicing physicians. Adoption of some or all of these measures could, Seng hopes, both protect “an often forgotten and ‘voiceless’ population” and ensure that “we may all look forward to spending our final days in the dignity and comfort we deserve.” Given the compassion, as well as passion and expertise, that she brings to her subject, it is perhaps not surprising that, in addition to being an aspiring lawyer, Ms. Seng is also a registered nurse.

The second-prize winner, Lauren R. Sturm of the University of Kansas School of Law, considers a very different issue relating to the living conditions of the elderly: the involuntary transfer of residents of continuing care retirement communities (CCRCs) to skilled-nursing facilities. Increasing numbers of older Americans are voluntarily entering these facilities, hoping to maintain an independent life as long as possible. As the price of admission, the contract they sign may permit the housing provider to move them

to a nursing home, often against their will, thus permitting others to occupy their units at substantially higher profit to the provider. Despite a paucity of legal precedents, the paper explores possible remedies under the federal Fair Housing Act, including consideration of its “reasonable accommodation” provisions, and the comprehensive consumer protection regulations that have been adopted by a small number of states. Citing Maine’s statute as exemplary, because it is “comprehensive, simple and direct,” Sturm argues that its provisions should be adopted by Congress to provide CCRC residents protections against unwarranted transfer, because those protections are not clearly included within the design and scope of the FHA.

The third-prize winner, Anna D. Halechko of Duquesne University School of Law, explores the uses – and potential abuses – for elderly consumers of a relatively arcane legal instrument, the viatical settlement. Born of the AIDS pandemic, the viatical industry offered immediate financial benefits to victims of terminal illnesses by purchasing (and often re-selling) the life insurance policies of persons with relatively short life expectancies. With new drugs increasing life expectancy in persons with HIV, and fueled by passage of the 1991 Health Insurance Portability and Accountability Act (HIPAA), which made viatical settlements and accelerated death benefits for terminally and chronically ill persons non-taxable, viatical marketers began to focus on new target populations of terminally and chronically ill elderly.

As sellers of insurance policies, older persons are susceptible to fraud by viatical settlement companies. Less obviously, they may also be victimized by becoming investors in such companies, having been lured by false guarantees of liquidity, high interest rates and fixed maturity dates. Courts have struggled over whether viatical settlements are “securities” subject to the control of the SEC. In the absence of clear federal law, some states have taken legislative or regulatory actions to protect both the elderly sellers of policies (the “viators”) and investors who buy and then market viatical arrangements. Halechko describes model legislation developed by the National Association of Insurance Commissions, which, *inter alia*, provides for extensive disclosure and consumer warnings to potential viators, a rescission period, protection from excessive intrusion by purchasers of viatical settlements (*i.e.*, inquiries to physicians and others about the victim’s health status), and standards for determining reasonable viatical payments.

While viatical settlements may provide substantial benefits to

elderly persons as sellers, they are also problematic, potentially creating risks to, *inter alia*, Medicaid eligibility and the desire to provide for surviving dependents and other beneficiaries. Elderly investors may be defrauded out of assets critical for their continued well-being. Passage of the model legislation and heightened surveillance resulting from its provisions is, Halechko argues, necessary to reduce “flagrant abuses and allow the ill and the elderly to benefit from the positive features of viatical arrangements.”

Timothy McIntire, the author of the honorable mention paper on pain management, was a medical doctor for many years before beginning his legal studies at the University of Memphis Cecil C. Humphreys School of Law. His paper approaches the issue from the perspective of both doctors and lawyers, recognizing and contextualizing the conflicts faced by both, and proposes the adoption of specific policies relating to treatment of pain in the elderly and terminally ill, developed by the Pain and Policy Studies Group at the University of Wisconsin Comprehensive Cancer Center.

Even where palliative care has been legally accepted, however, physician acceptance and compliance laws have lagged. McIntire reviews lawyers’ use of new and inventive torts replacing traditional medical malpractice claims as a basis for enforcing a duty to practice appropriate pain management. Equally intriguing, he suggests the possibility of imposing liability under state elder abuse laws. The interconnection between the medical and legal professions, played out in legislatures, licensing authorities, and the courts may, he hopes, prove productive in “finding the balance between fighting illegal drug users and guarding against the negligence of under-treating a patient’s pain.”

Taken together, these papers offer a sobering look at a number of often invisible legal and quasi-legal problems facing the elderly. They also provide thoughtful and realistic proposals for legal solutions. Without question, all four papers accomplish the competition funder’s goal of “stimulat[ing], encourag[ing] and reward[ing] innovative student research and original writing on important issues and topics concerning law and aging as well as . . . promot[ing] recognition of the value of legal work with the elderly.” Sid Kess, an early advocate of continuing legal education for whom the awards are named, would surely be proud. Read together, all four papers wonderfully exemplify the promise of CUNY Law School’s motto, “Law in the service of human needs.”

