CONSTITUTIONAL

Aid-In-Dying a New York State of Mind

By Cory Morris

Does one have the *right* to assisted suicide in New York? In 1997, the United States Supreme Court made it clear that there is no fundamental right to die and that New York's prohibition on assisted suicide does not violate the Equal Protection Clause of the Fourteenth Amendment.

Recently, some have tried to wrestle free of this prohibition. Just a few weeks ago, in *Myers v Schneiderman*, the New York City Supreme Court denied the right to assisted suicide by means of an "injunction prohibiting prosecution of the professionals who aid mentally competent, terminally ill patients with the means and/or methods to end their lives."[1] The decision is currently being appealed and it appears that other challenges to similar laws are arising in light of recent news.

States are legalizing and others are pushing for what is being referred to as Aid-In-Dying legislation. "Oregon became the first state to allow physician aid in dying in 1997 when voters chose by a wide margin to approve The Oregon Death with Dignity Act."[2] "In early October [of 2015], California's End of Life Option Act made the state the most recent to legalize physician aid in dying … a process that allows terminally ill patients to receive life-ending medication from physicians." California, Oregon, Vermont and Washington currently allow physician aid in dying. Similar to what was sought in *Myers v Schneiderman*, a court ruling in Montana protects physicians who aid dying patients from prosecution.

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Along with California, Canada is now added to the list of places that allow for assisted suicide. "People with grievous and irremediable medical conditions should have the right to ask a doctor to help them die, Canada's highest court says in a unanimous ruling."[3] The Canadian case was brought by a civil liberties group on behalf of two women with degenerative diseases who wanted the right to have a doctor help them die. The lawyer arguing the case called it discrimination because of their physical disabilities, essentially arguing, "that they were being discriminated against because their physical disabilities didn't allow them to kill themselves the way able-bodied people could." The decision was unanimous, albeit silent on the extent of which it could be employed. For instance, if one was suffering from extreme emotional disturbance or mental illness, it is unclear whether a medical professional could determine the candidate was the appropriate recipient of assisted suicide treatment.

The legislation introduced in New York would allow terminally ill, mentally capable adults the option to self-administer prescribed, life-ending medication. Similar legislation was introduced in New Jersey. Currently however, "[i]n New York, as in most states, it is a crime to aid another to commit or attempt suicide, but patients may refuse lifesaving medical treatment."[4] Able-bodied adults not suffering from mental illness have the freedom to make their own medical decisions but cannot engage a doctor to assist in suicide, or euthanasia. The New York Court of Appeals held that a right to refuse medical treatment is not the equivalent of a right to commit suicide[5] and that we are guided by the capacity of the individual to make medical decisions.

While some might consider it humane, New York treats assisted suicide as a serious crime — a felony. Some believe that legalizing euthanasia, or allowing assisted suicide, is the peak of a very slippery slope. In New York, "[a] person is guilty of promoting a suicide attempt when he intentionally causes or aids another person to attempt suicide," a Class E felony or worse, "[a] person is guilty of manslaughter in the second degree when … [h]e intentionally ... aids another person to commit suicide,"[6] a Class C felony. "It is, [however,] within the sole discretion of each district attorneys executive power to orchestrate the prosecution of those who violate the criminal laws of this state."[7] In other words, New York District Attorneys can effectively decide to allow for what some phrase as Aid-in-

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COMMERCIAL LITIGATION

Attorneys' Eyes Only Designations Within a Protective Order

By Leo K. Barnes Jr.

A Protective Order is standard fare in commercial litigation. Those matters which assert the theft of trade secrets or a breach of a non-compete agreement will often permit an "Attorneys' Eyes Only" ("AEO") designation within the Protective Order if discovery documents are of such a highly sensitive nature that revelation of the same to an adversary litigant will likely cause a current competitive harm.

Although there is no definitive list of documents that are entitled AEO designation, Magistrate Cheryl L. Pollack in *Gerffert Co., Inc. v. Dean*[1] proposed the following language in a dispute between two competing businesses that could not agree on a definition:

> The designating party may designate any Confidential document, thing, material, testimony or other information derived therefrom as "Attorneys' Eyes Only" if the designating party can show good cause that the materials contain extremely sensitive trade secrets or commercial information, such as pricing, product development, profits, and future marketing strategies, that if disclosed to the opposing side could result in serious competitive or other harm, that cannot be avoided by less restrictive means.[2]

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Once designated as AEO, counsel is not permitted to share the documents or information with the client. Of course, the designation, and the corresponding limitation upon sharing the information, raises a host of obstacles that make it more difficult for an attorney to counsel the client.

> The AEO designation must be used selectively because discovery and trial preparation are made significantly more difficult and expensive when an attorney cannot make a complete disclosure of relevant facts to a client and because it leaves the litigant in a difficult position to assess whether the arguments put forward on its behalf are meritorious. [] To justify the AEO designation, the designating party must do more than show that it is a competitor of the receiving party or that the documents in question disclose information about the designating party's relationships with other competitors.[3]

Despite the occasional necessity for utilizing AEO designations within a Protective Order, the process is also ripe for abuse, and corresponding sanctions for counsel.[4] The New York City Bar Association Committee recognized this issue when deliberating over the content of its model Stipulation and Order for the Production and Exchange of Confidential Information ("Model Protective Order"),[5] which was drafted for use in Commercial Division matters.[6] More specifically, in the notes preceding the Model Protective Order, the New York City Bar Association Committee recognized the potential issues with respect to AEO provisions:

> As for "Attorneys' Eyes Only," the Committee decided not to include the option for such protection primarily out of a concern that it would be invoked far more than necessary. Inevitable disputes over the propriety of a party's invoking "Attorneys' Eyes Only" protection would undercut the overall goal of the Committee to reduce the time required to negotiate confidentiality agreements.[7]

Recently, in *Global Material Technologies Inc. v. Dazheng Metal Fibre Co. Ltd.*,[8] an Illinois Federal Court examined the same issues the New York City Bar Association was concerned with: the over application of AEO designations. In *Global Material*, plaintiff alleged that defendants misappropriated plaintiff's trade secrets and used confidential customer information to compete with plaintiff. During discovery, plaintiff moved to remove certain AEO designations concerning documents produced by one defendant and a non-party.

The *Global Material* court granted the motion to remove AEO status on the documents produced by the defendant finding that defendant made only "broad allegations of unspecified harm that consistently have been found insufficient to justify the 'extreme measure' of preventing a party's attorneys from sharing the documents with their clients." The court further elaborated that defendant failed to describe with any particularity how the generalized

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SEQRA Standing Is Not Defeated (Continued from page 18)

at large to claim they were directly injured by the challenged municipal actions. The Court of Appeals agreed the petitioners had standing because they alleged "repeated, not rare or isolated use" of the pine barrens recreational area, so they suffered harm different that "the public at large."

The Court of Appeals found that it does not matter that more than one person is directly impacted by the noise created from increased train traffic. It quoted with approval the United States Supreme Court's decision in *Untied States v. Students Challenging Regulatory Agency Procedures (SCRAP)*:[8]

"[W]e have ... made it clear that standing is not to be denied simply because many people suffer the same injury ... To deny standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread Government actions could be questioned by nobody."

The court in *Painted Post* reiterated what it said only a year ago,[9] that standing rules should not be "heavy-handed," and that the court was "reluctant to apply [standing] principles in an overly restrictive manner where the result would be to completely shield a particular action from judicial review."[10] "[B]ecause no resident of the Village would have standing to challenge the actions of the Village, notwithstanding that the train noise fell within the zone of interest of SEQRA," and the result would be to "effectively insulate the Village's actions from any review," the Court of Appeals rejected the reasoning of the Appellate Division.

Because Marvin alleged that increased train traffic kept him awake at night, even without differentiating between train traffic on the tracks and noise from the loading facility, he had standing to challenge the actions of the village pursuant to SEQRA, the court held.

It thus appears that, as long as an individual can assert direct harm from the challenged municipal action of the type that falls within the interests that SEQRA is intended to protect, he or she will be found to have standing, even though many others suffer the same direct harm.

The result should be that more challenges to municipal actions on SEQRA grounds will be decided on their merits.

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[1] 38 N.Y.2d 6, 8 (1975).
[2] 115 A.D.3d 1310 (4th Dep't 2014).
[3] *Id.* at 1312-13, *citing Save Our Main St. Bldgs*, 293 A.D.2d 907, 909 (3rd Dep't 2002).
[4] 2015 WL 7288109 (Ct. of Appeals November 19, 2015).
[5] 77 N.Y.2d 761 (1991).
[6] *Id.* at 774–775.
[7] 13 N.Y.3d 297 (2009).
[8] 412 U.S. 669, 687–688 (1973).
[9] *Matter of Association for a Better Long Is., Inc. v. New York State Dept. of Envtl. Conservation*, 23 N.Y.3d 1 (2014).
[10] *Id.* at 6.

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Dying by simply not prosecuting the doctors and medical professionals who assist adults in ending their own lives.

Myers v Schneiderman is not the first time that New Yorkers challenged this prohibition. Just shy of two decades ago, the Second Circuit held that "New York does not treat similarly circumstanced persons alike: those in the final stages of terminal illness who are on life-support systems are allowed to hasten their deaths by directing the removal of such systems; but those who are similarly situated, except for the previous attachment of life-sustaining equipment, are not allowed to hasten death by self-administering prescribed drugs."[8] The United States Supreme Court disagreed.

It came down to a matter of perspective on affirmative conduct: while those on life-support may consciously end that aid, an act causing death, those not on life support may not consciously seek an act to cause their own death. In the opinion by Chief Judge Rehnquist, there was no equal protection clause violation for the differential treatment between the two groups.[9] Indeed, the Supreme Court based its decision to refuse treatment on a different principle, that of bodily integrity as opposed to the right to intend, ensure or "hasten" the process of death. One should note, however, Justice O'Connor's concurrence in *Vacco v. Quill* seems to indicate that there is no prohibition that dying patients may even obtain palliative care, even if it would "hasten" their death.

The mention of Aid-in-Dying legislation often evokes thoughts of Dr. Kevorkian, Nancy Cruzan and/or Terri Schiavo, the highly publicized case of a Floridian woman who lay in a vegetative state. Ultimately, the Schiavo case involved over a dozen appeals, received political intervention not only from the Florida Governor, Jeb Bush, but also then President George W. Bush. Schiavo's case, and others like her, differs from Aid-In-Dying in that advocates pushing for aid in dying operate effectively as legalizing euthanasia. The problem advocates are facing are the criminal prohibitions on doing just that, irrespective of the patient's circumstances. Rejecting the challenge to the Washington statute, the United States Supreme Court held that states have legitimate interests in protecting the integrity and ethics of the medical profession as well as vulnerable groups some of whom may be suffering from mental illness.[10]

Others are advocating for quality at the end of life instead of Aid-In-Dying. As Justice O'Connor indicates in *Vacco*, perhaps palliative care is the best option. New York Times[11] author Katy Butler advocates for Part Q, standing quality at the end of life. What she describes as "a concierge medical service for the 99 percent," Butler advocates that our focus should shift from enduring the pain of treatment in an effort to be kept alive to focusing on quality of life and reducing overall costs that would delay death, even for a few extra days. She states "[t]o qualify for Part Q, I would promise, upfront, to forgo medical treatments that evidence shows are outrageously expensive, not cost-effective, painful to endure, and likely to extend my life, if at all, by only months." Notably, Butler's ideas do not raise the concerns addressed by the United States Supreme Court while still providing dignity to those at the last stages of their lives.

Will New York follow California in becoming the next state with Aid-In-Dying legislation? "Senators Diane Sevino, of Staten Island, and John Bonacic, of the Catskills, each introduced an aid-in-dying bill"[12] in New York. The Buffalo Law Journal notes that "[i]t would allow terminally ill, mentally capable adults the option to self-administer prescribed, life-ending medication." Since its introduction, the topic has stirred in the news[13] and accentuated the need for palliative care and other end of life options. Perhaps with the ever increasing cost of health care and shift in public opinion, New York State may join as others have in allowing for Aid-In-Dying.

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[1] *Myers v Schneiderman*, 2015 NY Slip Op 31931[U], *2 (Sup Ct, NY County 2015); Andrew Denny, *Patients' Group Appeals Dismissal of Aid-in-Dying Lawsuit*, New York Law Journal (Dec. 16, 2015), http://www.newyorklawjournal.com/id=1202744902248/Patients-Group-Appeals-Dismissal-of-AidinDying-Lawsuit#ixzz3uWFymFLQ.
[2] Samantha Scotti, *California Latest State to Pass 'Death With Dignity', National Conference of State Legislatures*, NCSL (Nov. 23, 2015), http://www.ncsl.org/blog/2015/11/23/california-latest-state-to-pass-death-with-dignity.aspx (*available at*: https://www.oregonlegislature.gov/bills_laws/ors/ors127.html)
[3] Laura Payton, *Supreme Court says yes to doctor-assisted suicide in specific cases*, CBC News (Feb 06, 2015 9:53 AM ET), http://www.cbc.ca/news/politics/supreme-court-says-yes-to-doctor-assisted-suicide-in-specific-cases-1.2947487 .
[4] *Myers v Schneiderman*, 2015 NY Slip Op 31931[U], *7 (Sup Ct, NY County 2015).
[5] *Matter of Bezio v Dorsey*, 21 NY3d 93, 101 (2013).
[6] NY Penal Law §§ 120.30 and 125.15(3).
[7] *Myers v Schneiderman*, 2015 NY Slip Op 31931[U], *9 (Sup Ct, NY County 2015) (citing N.Y. Const., art. XIII, §13).
[8] *Quill v Vacco*, 80 F3d 716, 729 (2d Cir 1996).
[9] *Vacco v. Quill*, 521 U.S. 793 (1997).
[10] *See Wash. v Glucksberg*, 521 US 702, 730 (1997).
[11] Katy Butler, *Imagine a Medicare 'Part Q' for Quality at the End of Life*, New York Times Opinionator (3:45 AM, Dec. 9, 2015), http://opinionator.blogs.nytimes.com/author/katy-butler/
[12] Michael Petro, *Making the case for aid-in-dying legislation*, Buffalo Law Journal (Nov 30, 2015, 10:47am EST), http://www.bizjournals.com/buffalo/blog/buffalo-law-journal/2015/11/making-the-case-for-aid-in-dying-legislation.html
[13] See, e.g., Tom Koch, *Living Versus Dying With Dignity*, Huffington Post (10:40 AM, 11/30/2015), http://www.huffingtonpost.com/tom-koch/living-versus-dying-with-dignity_b_8676602.html; Kaiser Health News, *Aid-In-Dying Laws Only Accentuate Need For Palliative Care, Providers Say*, NewsOK (Dec. 10, 2015), http://new-