HISTORY OF THE MENTAL HYGIENE LEGAL SERVICE[1]

The Mental Hygiene Legal Service is the oldest legal advocacy program for the institutionalized mentally disabled in the United States. Originally named the Mental Health Information Service ("MHIS"), the agency's name was changed to the Mental Hygiene Legal Service ("MHLS") in l986 to more accurately reflect its duties and functions. Since its creation by statute in 1964, the Mental Hygiene Legal Service has served as the watchdog of the rights of the institutionalized mentally disabled in New York and has been recognized by the courts as essential to the state's statutory "protective shield of checks and balances" governing the admission, transfer and retention of psychiatric patients. See, Fhagen v. Miller, 29 NY2d 348, 355 (1972).

The MHIS was conceived by the Special Committee to Study Commitment Procedures of the Association of the Bar of the City of New York. In a 1962 book, Mental Illness and Due Process, which was published in cooperation with the Cornell Law School, this distinguished interdisciplinary committee studied and reported on the admission of patients to mental hospitals in New York. This seminal book declared:

> Any person hospitalized against his/her will is entitled to watchful protection of his/her rights, because he/she is a citizen first and a mental patient second. Mental Illness and Due Process, at p. 14.

To protect the rights of the institutionalized mentally disabled, the committee recommended the creation of a new statewide agency, independent of the hospitals and the then Department of

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1 The court rules of each of the four Departments delineate the duties of the corresponding MHLS agency. See, McKinney's 1998 Rules of Court (11 NYCRR) Parts 622, 694, 823, 1023, for the rules pertaining to MHLS, First, Second, Third and Fourth Departments, respectively.

Mental Hygiene[2], that would be responsible to the courts handling mental hospital admissions.

In 1964 the New York Legislature established the Mental Health Information Service by enacting MHL §29.09 and placed it in the judiciary to protect its independence. In 1986, MHL §47.01, the provision establishing the Mental Hygiene Legal Service, superseded MHL §29.09. The MHLS operates today under the aegis of the Presiding Justice of the Appellate Division in each of the state's four judicial departments, pursuant to uniform statewide rules. 22 NYCRR Parts 622, 694, 823, 1023.

The protective services of the agency were initially offered only to involuntary psychiatric patients. However, the agency's role and responsibilities have been consistently broadened and redefined by new legislative enactments and judicial decisions which include:

1966 • Patients involved in voluntary hospitalization proceedings entitled to counsel. See, People ex. rel. Rogers v. Stanley, 17 NY2d 256 (1966). See also, People ex. rel. Woodall v. Bigelow, 20 NY2d 852 (1967).

• MHIS, First Department, authorized to represent patients at hearings.

• MHIS to be served with notice of appointment of committee for patients in state facilities.

1968 • Services of MHIS extended to thousands of voluntary patients by decision of the Court of Appeals. Matter of Buttonow, 23 NY2d 385 (1968).

• Legislature authorized MHIS to provide services to "Old Law Patients," i.e., patients admitted to psychiatric facilities before 1965.

1969 • Legislature extended services of MHIS to children in facilities.

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2 The Department of Mental Hygiene was comprised of three autonomous offices: The Office of Mental Health ("OMH"), the Office of Mental Retardation and Developmental Disabilities ("OMRDD"), and the Office of Alcoholism and Substance Abuse. See, MHL §5.01. In 2010, OMRDD's official name was changed to the NYS Office for People with Developmental Disabilities ("OPWDD").

1970 • Legislature extended MHIS services to patients transferred from corrections institutions to institutions for the mentally ill or mentally defective, operated by Department of Corrections.

• Legislature extended MHIS services to incompetent defendants and persons found not guilty by reason of mental disease.

1971 • Banking Law amended to require that banks furnish MHIS financial information regarding patients in facilities.

1972 • MHIS services extended to the institutionalized mentally retarded and alcoholic.

• MHIS required to be given notice of conservatorship proceedings.

• MHIS authorized to give services to children transferred from Division for Youth facilities pursuant to Section 517 of the Executive Law to facilities operated by the Department of Mental Hygiene.

• In the first case of its kind in the country, MHIS forces the hospitals and the courts to acknowledge the right of a competent institutionalized psychiatric patient to refuse electroshock therapy. N.Y.C. Health and Hospitals Corporation v. Stein, 70 Misc2d 944 (1972).

1973 • In Matter of Kesselbrenner v. Anonymous, 33 NY2d 161 (1973), a case also brought by MHIS, the Court of Appeals recognized the applicability of the least restrictive alternative doctrine to psychiatric hospitalization and declared unconstitutional a provision of the Mental Hygiene Law that permitted civil psychiatric patients to be transferred to Mattawan, a facility operated by the Department of Corrections.

1974 • MHIS to receive notice of application for transfer of patients to Mid-Hudson and Kirby Forensic Psychiatric Centers, and may assist patients in objections to transfer. 14 NYCRR Part 57, Regulations of Department of Mental Hygiene.

1975 • Legislature extended services of MHIS to conditionally released patients.

• MHIS authorized to assist patients in objections to treatment in Department of Mental Hygiene facilities. 14 NYCRR §27.8, Regulations of the Department of Mental Hygiene.

• MHIS to be notified about discharge or absence without leave of juveniles

transferred from Division for Youth to Department of Mental Hygiene facilities.

- MHIS to be given notice of allegations of abuse and mistreatment in facilities operated by or certified by Department of Mental Hygiene. 14 NYCRR §24.2, Regulations of the Department of Mental Hygiene. (N.B. Regulation does not apply to private hospitals).

- Services of MHIS extended to children adjudicated juvenile delinquents by the Family Court and in need of psychiatric treatment.

1976 • MHIS authorized to investigate cases of alleged patient abuse and mistreatment and to represent patients in abuse cases.

- MHIS to be given notice of and right to attend meetings of boards of visitors.

- MHIS to examine the results of grievance and disciplinary procedures and to submit report to the Legislature.

1977 • MHIS granted access to any and all records and books of facilities operated by or certified by Department of Mental Hygiene.

- MHIS to be notified that application for release has been filed for patients admitted to facilities pursuant to Section 330 of the Criminal Procedure Law.

- MHIS authorized to act as guardian ad litem in applications to perform surgery on patients in Department of Mental Hygiene facilities. Matter of Strauss, 56 AD2d 570 (1977).

- MHIS to again examine and report to the Legislature the results of grievance and disciplinary procedures.

1979 • MHIS given access to coroner's reports and records.

- MHIS to receive notice of application to appoint guardians for the mentally retarded in Surrogate's Court.

- MHIS to provide services to patients found not responsible by reason of mental disease in periodic review proceedings.

1981 • MHIS to provide services to alleged juvenile delinquents found incapable of participating in proceedings in Family Court.

1982 • MHIS announces the settlement of a class action suit brought on behalf of the patients of Bellevue Psychiatric Hospital in the United States District Court for the Southern District of New York. (Moe v. Bohman, 80 Civ. 5255). As a result of the settlement, Bellevue opened a new building to house its psychiatric patients.

1983 • In Matter of Harry M., 96 AD2d 201 (2nd Dept 1983), the Appellate Division, Second Department held that dangerousness to self for the purpose of commitment could result from a failure to meet one's essential needs for food, clothing, and shelter.

1986 • MHIS becomes MHLS. Duties and functions include: reviewing admission and retention of all patients and residents of facilities defined in MHL §1.03; informing them of their legal rights; providing them with legal services and assistance in matters related to their admission, retention, care and treatment; gaining access to the medical records of these patients and residence which are maintained by MHL §1.03 facilities; and initiating and taking any legal action deemed necessary to safeguard the rights of these individuals. MHL §§47.01, 47.03.

• As a result of the Court of Appeals' ruling in Rivers v. Katz, 67 NY2d 485 (1986), after following the administrative procedures for administering treatment over objection set forth in 14 NYCRR §527.8, hospitals must obtain a court order to administer treatment over a patient or resident's objection. Patients/residents have a right to counsel.

1987 • In Matter of Boggs, 132 Ad2d 340 (1st Dept 1987), the First Department, reversing the decision of the hearing court which had ordered the release of the patient, held that the trial court had erred in placing great weight on the demeanor and testimony of the patient when she appeared in court while failing to compare that presentation to that which she displayed while living on the streets. Moreover, the testimony of the hospital's expert witnesses that the patient would be a danger to herself and that she was incapable of being an outpatient was based on actual observation of the patient on the streets, whereas the patient's experts based their testimony on interviews conducted after she had been receiving institutionalized care.

1988 • In Ritter v. Surles, 144 Misc2d 945 (Marbach, J., 1988), the Supreme Court of Westchester County, declared that CPL §§730.40(1), 730.60(6) and 14 NYCRR Part 540 were unconstitutional on their face and therefore invalid. CPL §730.40(1) provided that, upon a finding that a criminal defendant is an incapacitated person, the court must issue a final or temporary order of observation committing him to the custody of the Commissioner for care and

treatment in an appropriate institution for a period not to exceed 90 days. When a local court issues a final order of observation it must dismiss the accusatory instrument[3]. Under 14 NYCRR §540.3, before a person committed pursuant to CPL §730.40 could be released, he had to be reviewed by a special hospital forensics committee. CPL §730.60(6) provided that the District Attorney had the right to move for a hearing to determine whether a person being released under CPL §730.40 was dangerous to himself or others. The court ruled that there was no constitutional justification for these statutes as applied to those under final orders of observation (i.e., where the criminal charges have been dismissed) because a determination was never made that they were dangerous, only that they were incompetent (as a result of mental illness) to stand trial, and the proceedings were dismissed. There was no legal basis for holding these individuals in custody unless they met the substantive and procedural requirements for civil commitment.

- Stipulation reached in Doe v. Cuomo, 1988 US Dist., LEXIS 8062 (2nd Dept 1988), a class action brought by MHLS alleging that the care and treatment provided by Manhattan Psychiatric Center was so substandard as to violate the patients' constitutional rights. Under the stipulation, MPC was given three years to achieve substantial compliance with the terms of the agreement. These included meeting minimum requirements in the areas of staffing; medical care; nursing care supervision of staff; dispensation of medication; clinical and rehabilitative programming and other activities; the admission, treatment and transfer of mentally retarded patients; the education and training of nursing staff; and bringing the hospital buildings into compliance with national fire, health and safety standards.

1990 • In Savastano v. Nurnberg, 77 NY2d 300 (1990), the Court of Appeals, assuming without deciding that a transfer of a psychiatric patient from an acute care facility to a state operated institution implicates a constitutionally protected liberty interest, held that the procedural protections provided by the regulatory scheme sufficiently safeguard the due process rights of those involuntary patients who object to being transferred. The decision to transfer reflects primarily a medical judgment about the kind of facility that would best secure the patient's therapeutic needs. Additional procedural safeguards, therefore, such as providing objecting patients with an opportunity to cross-examine witnesses and requiring adherence to the rules of evidence would be of little, if any value to the decision-making process, nor would they decrease the risk of erroneous transfers.

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3 This may only occur when the accusatory instrument did not charge the defendant with a felony.

1993 • Stipulation reached in Jean D. v. Cuomo, a class action brought by MHLS to compel Manhattan Psychiatric Center ("MPC") to acknowledge that freedom of movement and access to the outdoors are aspects of a humane hospital setting and to provide daily outdoor access to all clinically suitable patients. MPC must now maintain logs reflecting each patient's access to the outdoors. These logs are monitored by MHLS and New York Lawyers for the Public Interest. Access to the outdoors must be provided to clinically suitable patients regardless of their legal status and the level of supervision they require. Explanations must be provided when patients are deemed not clinically suitable for access, and their suitability must be reviewed regularly.

• Article 81, the new guardianship statute, supersedes MHL Articles 77 and 78. Recognizing the diverse and complex needs of people with incapacities, the statute allows for the crafting of an individualized guardianship order based on the incapacitated person's functional limitations. MHLS is frequently appointed as either counsel or court evaluator in these proceedings.

• In Seltzer v. Hogue, 187 AD2d 239 (2nd Dept 1993), the Second Department reversed the hearing court's release of Hogue, finding that, although the patient's external behavior had improved somewhat in the structured setting of the hospital, where he also took seizure medication, he had a history of post-hospitalization noncompliance with outpatient treatment, and consequently of mental deterioration to the point of engaging in substance abuse and becoming dangerous to himself and others. Although there was evidence that the patient's family members were willing to care for him at home, the record did not support a finding that they would be able to properly care for him. The hospital records revealed that Hogue had been admitted to a psychiatric center numerous times during roughly the same period that his son claimed Hogue had lived with him and, because of Hogue's historic refusal of treatment outside of a hospital setting, there was no assurance that if the patient lived with his family, it would be able to prevent a deterioration of his condition or restrain his conduct.

• In Koskinas v. Boufford, 80 NY2d 684 (1993), the Court of Appeals affirmed the decision of the Appellate Division, First Department which upheld the New York County Supreme Court's declaration that the duties imposed on the N.Y.C. Health and Hospitals Corporation under MHL §29.15 include a duty to implement the individual written service plans of mentally ill patients with respect to adequate and appropriate housing upon their discharge from its hospitals. In the context of this case, MHL §29.15 imposes on HHC the duties: (1) to prescribe and assist in locating adequate and appropriate housing; (2) to discharge patients in accordance with their individualized, written service plans which include housing recommendations; and (3) to

coordinate the effectuation of those efforts among responsible entities.

1994 • Provision for involuntary outpatient treatment for civilly committed patients added to Mental Hygiene Law. See, MHL §9.61. This provision was a pilot project scheduled to be effective until June 30, 1998.

1995 • OMH and OMRDD authorized to provide the State Division of Criminal Justice Services with identities of patients/residents for the sole purpose of obtaining criminal history information. MHL §§7.09(j), 33.13(c)(13).

• MHLS, as co-counsel with Disability Advocates, Inc. in a civil rights action in Federal Court, settles suit providing a model ward and treatment services for Spanish speaking mentally ill consumers, including treatment in their own language, culturally sensitive treatment and socialization with other patients who speak their language. W.G. v. Morris, 95-CIV 2106 (CLB/MDF).

1996 • MHLS, as co-counsel with Disability Advocates, Inc. in a civil rights action in Federal Court, settles suit against OMH and OMRDD and establishes a procedure for placement and continuing retention of developmentally disabled CPL 730 incapacitated criminal defendants in facilities that will be most likely to provide appropriate care and treatment and advance the purpose of the CPL 730 defendant's confinement. J.S. v. Morris, 95 Civ. 0117 (BDP).

1997 • MHLS, working with New York Lawyers for the Public Interest, negotiates with OMH the provision of improved services for Asian language speaking mentally ill consumers in the five boroughs of New York City, including treatment in their own language, culturally sensitive treatment and socialization with other patients who speak their language.

1998 • MHLS challenges the adequacy of services for mentally ill deaf individuals at Rockland Psychiatric Center (RPC), and without the need to file suit, negotiates improvements in services including the provision of non-auditory safety signals, treatment in sign language, deaf-culture sensitive treatment and socialization with other patients who can sign. MHLS still monitors RPC's implementation of such services and compliance with the negotiated agreement.

1999 • The Legislature passes MHL §9.60, the Assisted Outpatient Treatment statute ("Kendra's Law"), extending the 1994 pilot project providing for court-ordered out patient treatment. MHLS is invited to provide speakers to discuss the operation and impact of the statute to numerous consumer and provider groups.

2000 • MHLS, with Legal Aid Society serving as co-counsel, files suit in federal court and successfully litigates Hirschfeld v. Stone, 193 FRD 175 (SDNY 2000), protecting the rights of CPL 730.50 incapacitated defendants to confidentiality of their clinical information. The suit ultimately resulted in the statewide adoption by OMH and OCA of new model fitness reports that carefully require only information essential to support determinations regarding fitness to stand trial.

2002 • MHLS successfully appeals two decisions calling for definition of the legal standard that the State must meet to retain insanity acquitees in non-secure facilities. The New York State Court of Appeals holds, in a decision consolidating the two appeals, Matter of David B. (Anonymous), and Matter of Richard S. (Anonymous), 97 NY2d 267 (2002), that proof of mental illness alone is insufficient to retain an insanity acquitee in a non-secure facility and that the Due Process Clause of the US. Constitution requires the State to prove, as it would in any civil commitment proceeding, both mental illness and dangerousness.

2003 • MHLS pilot project designed to encourage courts to better utilize the services of MHLS in Article 81 proceedings. The courts are highly satisfied with MHLS services and our Article 81 caseload more than doubled in the first year of the pilot project.

• MHLS is written into SCPA 1750(b), which empowers 17A guardians to consent to the giving or withholding of life support treatment. Healthcare providers cannot act on guardian's consent without MHLS' approval, or if MHLS does not approve, a court order must be obtained.

2004 • The New York State Court of Appeals issues its decision in Matter of K.L.,1NY3d 362 (2004), addressing specific provisions of New York's Assisted Outpatient Treatment ("AOT") Law [Kendra's Law], which MHLS argued fail to meet constitutional standards under the New York and United States Constitutions. MHLS requested the Court to read the statute in a way that preserves the statute's constitutionality, including reading in the requirement that the petitioner must prove by clear and convincing evidence that the subject of the petition is not capable of making a reasoned treatment decision before such individual can be subject to court-mandated outpatient treatment. The Court rejects this challenge finding a person cannot be forcibly medicated under an AOT order, thus no violation of due process arises.

- MHLS settles two civil rights actions brought pursuant to 42 U.S.C. §1983 in which monetary damages were sought to redress violations of patients' rights under both federal and state laws. Utilizing federal discovery laws, MHLS gains access to documents including employee and witness statements, which the Office of Mental Health refused to turn over to MHLS despite our demands for these documents under our Article 47 state mandate. The combined settlement approved by the United States District Courts in John L. v. Specht, et al., CV-01-3122, (DGT), and Pamela S. v. Kosson, et al., 04- CV-6047 (SAS), totals over $100,000.00.

2007

- MHLS is written into the new Article 10 of the MHL, also know as the Sex Offender Management and Treatment Act, or "SOMTA," to represent individuals convicted of sex offenses facing civil commitment in OMH facilities at the conclusion of their sentences on parole.

- In 2003 SCPA 1750 was amended to authorize most guardians of mentally retarded persons to withhold or withdraw life sustaining treatment. In many instances, unless MHLS objects, the guardian would be authorized to withhold or withdraw life sustaining treatment resulting in the death of the mentally retarded person. On July 3, 2007 a further amendment directs the Commissioner of OMRDD to develop a prioritized list of qualified family members who may, where there is no court appointed guardian of a mentally retarded or developmentally disabled person, make a binding decision to withhold or withdraw life sustaining treatment subject to the standards and procedures of SCPA 1750(b). Since only a relatively small percentage of mentally retarded or developmentally disabled persons have court appointed guardians, this new law extended to all mentally retarded persons with family the protections of SCPA 1750(b) and further expanded the MHLS mandate.

- In Hirschfeld v Hogan, 18 Misc3d 531, a declaratory judgment action commenced by MHLS, the Supreme Court, Nassau County, declares, inter alia, that, pursuant to Mental Hygiene Law §9.13(b), both a minor under the age of sixteen admitted to a psychiatric hospital as a voluntary patient, and the patient's MHLS counsel, have the right to request the patient's release. This action was brought as a challenge to an OMH policy which sought to deprive minor voluntary patients, and their MHLS counsel, of such rights. An appeal by OMH lead to a reversal on the basis of standing. Hirschfeld v Hogan, 60 AD 3d 728(2nd Dept. 2009). A motion filed by MHLS for leave to appeal this matter to the New York Court of Appeals was denied.

2010 • Representing a sweeping indictment of the conditions of confinement at the psychiatric inpatient wards and Comprehensive Psychiatric Emergency Program at Kings County Hospital Center, MHLS, along with co-counsel, brought a civil rights complaint under 42 USC §1983 seeking major and myriad reforms at was then known as the "G" Building. During the course of this litigation, Hirschfeld v. New York City Health and Hospitals Corporation, et al., CV-07-1819, and after having reviewed the verified complaint, the United States Department of Justice began an investigation of the conditions, including the physical abuse of patients by metal-baton wielding hospital police. Settlement discussions languished at first, with efforts by defendants to either downplay or deny the allegations in the complaint. Things radically changed with the death of a patient on the floor of the psychiatric emergency room who lay dying for over an hour while hospital staff, including hospital police, did nothing to intervene. Soon thereafter, the United States District Court issued a preliminary injunction requiring the hospital to monitor CPEP patients every fifteen minutes and imposing other time frames to push the hospital into compliance with state law and professional standards of care. Also, with the preliminary injunction in place, settlement talks were undertaken with a much greater urgency by defendants and personnel changes at the top administrative and clinical levels were made. Ultimately, in January, 2010, two separate but interrelated settlement documents were executed by the City, the Hirschfeld plaintiff, and DOJ, and endorsed by the Court. These remarkable documents (a combination of 59 pages) sought to assure the transformation of KCHC psychiatric services from "a chamber of filth, decay, indifference and danger" into a model of a safe, humane, and therapeutic environment. In order to help ensure that this transformation is fully achieved and maintained, a 5 year period of monitoring by both the Court and experts is mandated.

• Enactment of the Family Health Care Decisions Act ("FHCDA") which authorizes a family member or close friend to make medical decisions, including end of life decisions, for a patient who lacks capacity to do so, expanded MHLS's mandate once again. Under the Act, if a patient is transferred from a mental hygiene facility to a hospital, MHLS must be given notice if the patient is determined to lack capacity. MHLS may have to investigate and possibly challenge the finding of incapacity and/or of the proposed treatment. Further, MHLS must now be given notice and opportunity to object to in-hospital and out-of-hospital Do Not Resuscitate ("DNR") orders that apply to persons receiving services from an OMH or OMRDD operated or licensed facility.

- Amendments to MHL §29.23 and §33.07(e) were passed which include provisions requiring the Office of Mental Health and the Office of Mental Retardation and Developmental Disabilities and MHLS to collaboratively review, at least annually, the management of funds which a department facility director receives as a representative payee or of funds received pursuant to MHL 29.23 and that OMH, OMRDD and the Office of Alcoholism and Substance Abuse Services ("OASAS") are to promulgate regulations regarding the management of patient funds in collaboration with MHLS.

- An amendment to MHL Article 47 expanding MHLS jurisdiction to the representation of persons discharged from OMH licensed and operated facilities directly to residential health care facilities including nursing homes unanimously passed both Houses of the State Legislature but was vetoed by then Governor Patterson.

- MHLS in all four judicial departments coordinates its first Statewide Continuing Legal Education program under the auspices of the UCS Judicial Institute.

2012 • The NYS Office of Mental Health is funded to focus its efforts on its obligations under Olmstead and implement a system of delivering mental health care that relies on a network of State licensed private agencies to provide mental health care and community residential placements for individuals in need of varying levels of care. As the census in the State operated institutions drastically decreases and more State institutions are closed, MHLS begins to increasingly turn its attention to protecting the rights of the residents of these community residences.

MHLS continues to bring significant litigation on behalf of both individual clients and classes. In addition to its history of innovative litigation, the MHIS pioneered the opening of law offices in psychiatric hospitals. This revolutionary effort to bring advocacy services directly to mentally disabled clients has been widely praised and emulated:

> It hardly needs reiterating that . . . a system of effective representation almost certainly requires a staff of full-time in-hospital patient representatives, such as provided by the MHIS in New York's First Judicial Department. Thomas Litwak, 62 Calif L. Rev. 816, 839 (1974).

Today the MHLS maintains offices in dozens of state and municipal psychiatric hospitals, developmental centers, courthouses and commercial office buildings throughout New York State. From these field offices the staff provides free legal assistance to patients at all psychiatric hospitals and developmental centers, and OPWDD and OMH licensed community facilities in New York State.