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COURT OF APPEALS

STATE OF NEW YORK

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MENTAL HYGIENE LEGAL SERVICE, ET AL.,

Appellants,

-against-

NO. 1

ANNE MARIE T. SULLIVAN, ET AL.,

Respondents.

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20 Eagle Street  
Albany, New York  
January 8, 2019

Before:

CHIEF JUDGE JANET DIFIORE  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE LESLIE E. STEIN  
ASSOCIATE JUDGE EUGENE M. FAHEY  
ASSOCIATE JUDGE MICHAEL J. GARCIA  
ASSOCIATE JUDGE ROWAN D. WILSON  
ASSOCIATE JUDGE PAUL FEINMAN

Appearances:

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1 CHIEF JUDGE DIFIORE: Appeal number 1. It is the  
2 Matter of Mental Hygiene Legal Service v. Sullivan.

3 Counsel?

4 MR. STOCKWELL: May it please the court, I am  
5 Shannon Stockwell of the Mental Hygiene Legal Service,  
6 appearing on behalf of the petitioner, D.J. and MHLS in its  
7 agency capacity. I would like to reserve two minutes of my  
8 time for rebuttal, please.

9 CHIEF JUDGE DIFIORE: You may, sir.

10 MR. STOCKWELL: MHLS's ability to attend  
11 treatment planning meetings at mental hygiene facilities  
12 arises from Mental Hygiene Law Article 47, and is further  
13 supported by Mental Hygiene Law section 29.13 - - -

14 CHIEF JUDGE DIFIORE: So - - - so counsel, under  
15 the statute, it is required that someone who is an  
16 authorized representative or a significant individual be  
17 interviewed and given an opportunity to participate in the  
18 planning of the treatment for the patient. What - - - what  
19 does the lawyer do in the context of planning the actual  
20 treatment to be delivered to the patient?

21 MR. STOCKWELL: Sure. Well, certainly, it's our  
22 position that our - - - our ability to attend treatment  
23 team - - - or treatment planning meetings arises from our  
24 enabling statute, which provides us - - - or authorizes us  
25 to provide legal services and assistance to patients and



1 residents of mental hygiene facilities through the - - -

2 CHIEF JUDGE DIFIORE: But the enabling statute,  
3 doesn't that envision a traditional attorney-client  
4 relationship?

5 MR. STOCKWELL: It - - - well, that - - - that's  
6 our job. You know, we are - - - we are supposed to have -  
7 - - maintain an attorney-client relationship, a traditional  
8 one, to the extent that we're able. But MHLS is a very  
9 unique legal practice. We're lawyers and advocates. That  
10 was our role. We were created so that - - -

11 JUDGE FEINMAN: So let me see if I can build on  
12 the Chief's question, because I - - - I think while you're  
13 answering the question you want to answer, I don't think  
14 you really answered her question about what does the lawyer  
15 contribute at such a meeting.

16 And so let me see if I can tease that out a bit.  
17 What happens if you get to the meeting - - - let's say you  
18 are allowed to go, the lawyer from M - - - MHLS is allowed  
19 to go, and you know, they want to give the patient Haldol  
20 or lithium, and the client doesn't really want to take  
21 these medicines because they don't like the side effects.  
22 They don't want to be drowsy, sleepy, whatever.

23 Now, it seems to me that as the attorney, on the  
24 one hand, you would have some obligation to put forth that  
25 position when you get to the point of a hearing or, you



1 know, wherever it's going to lead to. On the other hand,  
2 if you're planning treatment, and you're trying to do  
3 what's in the welfare of - - - of the patient or - - -  
4 that's a different role. And - - - and so I guess that's  
5 what I'm struggling with. And I think that may be  
6 underlying some of the Chief's concerns.

7 MR. STOCKWELL: Right. What - - - what does MHLS  
8 bring to the - - - to the treatment tanning - - - planning  
9 table, so to - - - so to speak.

10 JUDGE FAHEY: Well, to follow up with the judge's  
11 question, as Judge Feinman knows - - - and all of us who  
12 have been trial judges know, one of the most common type of  
13 hearings you have on - - - in - - - with mental health  
14 issues is treatment over objections. And so the attorney  
15 has to play a particular role as an advocate that may be  
16 directly contrary to the role that a significant individual  
17 would play in - - - in developing a treatment plan.

18 And that would seem to be because of the inherent  
19 difference in the nature of their functions. One is - - -  
20 deals with medical issues and another one deals with  
21 advocating your legal rights, even though you might not  
22 necessarily agree with the assertion of those rights to the  
23 benefit of your treatment.

24 And - - - and that's - - - I don't know, as a  
25 trial judge, that seemed to be one of the most common kind



1 of determinations you were called on to make in these  
2 issues, in the treatment over objection issues.

3 MR. STOCKWELL: Sure. Well, certainly in the  
4 context of a treatment planning meeting, if medication were  
5 to be discussed MHL - - - and we were aware that the client  
6 was objecting to a certain medication, we might also know  
7 that he's - - - he's accepting of another medication. We  
8 would make that known to the treatment team.

9 JUDGE FAHEY: Well, yeah - - - that would be  
10 great as - - - as if you were his - - - his mother, wife,  
11 or brother, or sister, or someone like that. But an  
12 attorney is going to come in and give medical advice?

13 MR. STOCKWELL: Well, it's not medical advice. I  
14 mean, we have - - - if our - - - our clients typically  
15 aren't new to the mental health system - - -

16 JUDGE FAHEY: Um-hum.

17 MR. STOCKWELL: - - - by the time they end up in  
18 a mental hygiene facility. They may have been on a  
19 multitude of medications over the years and have had a  
20 conversation with us, hey, Haldol is okay, but I don't - -  
21 - do not want to be on XYZ medication - - -

22 JUDGE FAHEY: Sure.

23 MR. STOCKWELL: - - - because I've had a horrible  
24 - - -

25 JUDGE FAHEY: That makes sense.



1 MR. STOCKWELL: - - - allergic reaction to it  
2 over the years.

3 JUDGE STEIN: I - - - I have some trouble relying  
4 on the general provisions of Article 47 rather than the  
5 specific provisions of Article 29, particularly 29.13(b)  
6 and - - - and - - - you know, there're just, I think, a  
7 variety of things in the contents - - - context of the  
8 statute itself and the legislative history that would  
9 indicate that where the legislature sought or - - - or  
10 intended a role for MHLS, in particular proceedings or  
11 events, it says so. It said so in 29.15, for example. And  
12 - - - and there are - - - you know, there are other  
13 examples of that.

14 But I - - - so when you look at the - - - and  
15 also Article 10, where it referred to 29.13, it didn't  
16 refer to any role for MHLS. And 29.13 doesn't specifically  
17 mention any role for - - - for MHLS. So I think when we  
18 look at the part - - - the specific context, is what I'm  
19 saying is - - - is how do you find that role in the statute  
20 itself?

21 MR. STOCKWELL: Well, both Mental Hygiene Law  
22 Article 47 and 29.13, the treatment planning statute, are  
23 remedial statutes. I - - - I think that they're entitled  
24 to liberal construction. They're meant to protect the  
25 interests of disabled individuals. And certainly Mental



1 Hygiene Law 47.03 talks in terms of our general care and  
2 treatment advocacy function - - -

3 JUDGE RIVERA: Counsel, let - - - let's talk  
4 about the exact language of the statute. So 29.13, I just  
5 want to stay with the significant-individual provision,  
6 that language there about the individual concern with the  
7 welfare of the patient seems to me to almost mirror  
8 language that you find both in a general and specific  
9 provision, 47.03(c) and in - - - I think it's - - -  
10 29.15(f).

11 And in both of those provisions it's very clear  
12 that the legislature is referring to that type of  
13 individual, the individual that falls in that category,  
14 being informed about MHLS - - -

15 MR. STOCKWELL: Um-hum.

16 JUDGE RIVERA: - - - and the rights of the  
17 patient. So it - - - given that our rules of construction  
18 require that we treat terms used in a statute similarly, it  
19 strikes me that that means that the legislature did not  
20 intend, at least with the second part - - - let's just stay  
21 with the second part for the moment - - - of 29.13 - - -  
22 right, to refer to MHLS as that "individual" concerned with  
23 the welfare of the patient.

24 MR. STOCKWELL: Well, I think that when 29.13 was  
25 amended in 1993, I believe - - -



1 JUDGE RIVERA: Um-hum.

2 MR. STOCKWELL: - - - to include the term  
3 "significant individual", if you look at the legislative  
4 history, the - - - the assemblyman that introduced that  
5 legislation indica - - - specifically indicated that the  
6 intent was to allow a patient to select any individual  
7 that's - - - his or her choosing. It doesn't except - - -

8 JUDGE STEIN: But wasn't the purpose for those  
9 people who didn't have authorized representatives? Doesn't  
10 it also say that?

11 MR. STOCKWELL: That's how - - - that's how  
12 significant individual came into being.

13 JUDGE STEIN: Right.

14 MR. STOCKWELL: But - - - but certainly, Judge, I  
15 think we're losing sight of the fact that many of our  
16 clients have nobody in the entire world.

17 JUDGE STEIN: But all of your clients have MHLS.  
18 So if - - - if the purpose of the significant individual  
19 was for those people who didn't have an authorized  
20 representative and - - - or someone to advocate for them,  
21 right?

22 MR. STOCKWELL: Right. Yeah, I love the idea - -  
23 - I mean, if you're saying that - - - I mean, that's - - -  
24 that's our argument. We need to be at the treat - - - if  
25 there's no significant individual for the person - - -



1 JUDGE RIVERA: Well, the - - - no, no, no. I  
2 think the - - -

3 JUDGE STEIN: No, no, that's not my point.

4 JUDGE RIVERA: - - - no, no, no. I think in part  
5 what the point - - - I think that a couple of us are trying  
6 to make is that the - - - MHLS is already a representative.

7 MR. STOCKWELL: Um-hum.

8 JUDGE RIVERA: Right? This is about other  
9 categories of people for a particular purpose in that  
10 treatment plan conversation, whereas MHLS is serving  
11 another purpose, whether you look at it as the traditional  
12 attorney-client relationship or perhaps you have others on  
13 staff who work in some other way with your clients.

14 But I - - - I don't find where I think you were  
15 going with the response to my question very responsive,  
16 which is that this means - - - I think you meant that the  
17 individual concerned with the welfare of the patient is  
18 exactly who you are - - -

19 MR. STOCKWELL: We are.

20 JUDGE RIVERA: - - - and therefore you fit this.  
21 My point is a statutory construction point - - -

22 MR. STOCKWELL: Um-hum.

23 JUDGE RIVERA: - - - which is that's not the way  
24 this language is used in the statute otherwise. And I  
25 don't see then, how you can say we should read it



1 differently for this provision.

2 MR. STOCKWELL: Um-hum.

3 JUDGE RIVERA: Especially as Judge Stein points  
4 out, it seems not to really make sense to do that.

5 MR. STOCKWELL: I think the - - - the - - - the  
6 problem with the court's construing MHLS out of the - - -  
7 the statute in terms of being a significant - - -  
8 significant individual or authorized representative, is  
9 that we're leaving these individuals, potentially, by  
10 themselves at the treatment planning - - -

11 JUDGE RIVERA: Well, that's a different story.  
12 One could read this as the entity MHLS is not what the  
13 legislature had in mind. But any particular staff member  
14 of MHLS not serving within that attorney-client  
15 relationship could very well fit this bill, especially with  
16 your example.

17 MR. STOCKWELL: I - - -

18 JUDGE RIVERA: A client who has a patient who has  
19 no one else.

20 MR. STOCKWELL: I think that's hypothetically  
21 possible. But certainly the restrictions that OMH placed  
22 on one of our MHLS's attorneys serving as a significant  
23 individual in their private capacity would make them no  
24 longer be able to serve as an MHLS attorney. They had to  
25 swear that they would no longer be serving as an MHLS



1 attorney for this individual and I think never - - -

2 JUDGE RIVERA: Is it not the best of both worlds?

3 MR. STOCKWELL: That's - - -

4 JUDGE RIVERA: They have their MHLS attorney and  
5 they can have a representative from MHLS who is in the  
6 room?

7 MR. STOCKWELL: I don't - - - I don't think that  
8 model works in that we don't have the resources to assign  
9 an MHLS attorney for legal representation and an MHLS  
10 attorney in that discrete instance as the per - - -  
11 person's significant individual.

12 JUDGE STEIN: Well, do you need - - - I guess  
13 that's part of the question here. Was the intention to  
14 have an attorney in there at all? I know that in the Third  
15 Department, MHLS is a little different than in the other  
16 departments. And we'll probably talk about that a little  
17 bit in the other cases. But - - - but some of the MHLSs  
18 have - - - have non-lawyer people - - -

19 MR. STOCKWELL: Right.

20 JUDGE STEIN: - - - who are a little bit more  
21 involved with, you know, other issues, other than legal  
22 issues. I'm not sure exactly where the line is drawn.

23 But so - - -

24 MR. STOCKWELL: Well, those are information  
25 officers. But they share information with their MHLS



1 counterparts, so that - - - that doesn't fit OMH's demands  
2 with respect to putting up a barrier for - - - for - - - in  
3 terms of information flowing back to the agency. So it's  
4 an imperfect example, the information officer.

5 And in the Third Department, we don't - - - we  
6 don't employ any of them.

7 CHIEF JUDGE DIFIORE: Thank you, counsel.

8 MR. STOCKWELL: Thank you.

9 CHIEF JUDGE DIFIORE: Counsel?

10 MS. TREASURE: Your Honors, may it please the  
11 court, Kathleen Treasure for the respondents.

12 JUDGE FEINMAN: So - - - so - - -

13 JUDGE RIVERA: Counsel, what do you make of - - -

14 JUDGE FEINMAN: I'm sorry.

15 JUDGE RIVERA: - - - his - - - what do you make  
16 of this point that there are some patients who have no one  
17 else? They - - - the only person that they have some  
18 relationship with that they would feel comfortable  
19 requesting in the room is that MHLS attorney?

20 MS. TREASURE: Well, two points, Your Honor.  
21 First of all, the Third Department correctly determined  
22 that an MHLS attorney could qualify as a significant  
23 individual if they could establish that they have the  
24 personal connection with the patient such that they meet  
25 the definition of somebody - - -



1 JUDGE RIVERA: How do they resolve their resource  
2 issue? They say we don't have the resources to do that.

3 MS. TREASURE: Well, I think that that is all the  
4 more why the legislature really didn't intend to have MHLS  
5 serving any role in the treatment planning process.

6 JUDGE RIVERA: But - - - but - - - but the  
7 legislature and the history, of course supports this, it  
8 makes it clear that they did want someone to be able to  
9 choose an advocate to be in the room with them who's not a  
10 close friend and who's not a relative, but someone who's  
11 concerned about their welfare.

12 MS. TREASURE: That's right. And I think in most  
13 circumstances what OMH would say is they welcome somebody  
14 being designated as a significant individual on behalf of  
15 the patient. They want that input.

16 JUDGE RIVERA: Um-hum.

17 MS. TREASURE: But it's different when it's  
18 somebody from MHLS and an attorney, because - - -

19 JUDGE STEIN: So are you saying that - - - that  
20 MHLS is not excluded from filling that role, it's just that  
21 they don't automatically have a right to be there as the  
22 MLHS (sic) attorney - - - an MHLS attorney?

23 MS. TREASURE: That - - - that is - - - that is  
24 precisely the argument, Your Honor, that - - -

25 CHIEF JUDGE DIFIORE: And then what is the role



1 that person, then? Is it as an attorney, or is it as a  
2 person who is participating solely in the building of the  
3 treatment plan based on the mental health and getting that  
4 person better?

5 MS. TREASURE: We would be looking for them to  
6 participate in the treatment plan as the significant  
7 individual, as a person interested in the welfare of the  
8 patient and looking at their clinical needs.

9 CHIEF JUDGE DIFIORE: And then going on to  
10 represent their legal interests as well?

11 MS. TREASURE: I - - - I think that the court can  
12 leave for another day - - - OMH has said in - - - in the  
13 letters in the record that they would ask that that person  
14 recuse themselves from being MHLS counsel for the person.  
15 And I think whether or not the conditions that OMH places  
16 on somebody at MHLS who's acting as a significant  
17 individual is something that can be left for another day  
18 and whether that's rational. The Third Department did  
19 that, and the court did that - - -

20 JUDGE FEINMAN: So I just want to be clear.  
21 You're not advocating a blanket rule about no attorneys or  
22 no MHLS attorneys can serve as significant individuals.  
23 You're really - - - it sounds to me - - - saying you have  
24 to look at this case-by-case.

25 MS. TREASURE: It's a case-by-case basis. And



1 also, keep in mind, 29.13(b) is the individuals who the  
2 facility must give an opportunity to participate.

3 JUDGE FEINMAN: So if that's the case that it's a  
4 case-by-case analysis, isn't this just going to invite more  
5 litigation as opposed to some sort of clear-cut rule?

6 MS. TREASURE: Well, I think that it has to be a  
7 case-by-case analysis, because it - - - the Commissioner  
8 and the facility are charged with taking care of the care  
9 and treatment of the individual, and they have to look at  
10 what are the facts here that support - - -

11 JUDGE FEINMAN: So - - -

12 MS. TREASURE: - - - appointing this person as a  
13 significant individual.

14 I just want to - - - just - - - if I could - - -

15 JUDGE FEINMAN: Sure.

16 MS. TREASURE: - - - say this, Your Honor?

17 MHLS here is asserting a blanket right. So  
18 that's what we're - - -

19 JUDGE FEINMAN: Pushing back against.

20 MS. TREASURE: - - - objecting to is a - - - is a  
21 - - - is all the cases - - -

22 JUDGE RIVERA: I thought they were arguing that  
23 there's no blanket exclusion. I thought their point was  
24 that the if the patient - - - their client - - - selects  
25 them - - - and we're just staying with the significant



1 individual for the moment - - -

2 MS. TREASURE: Um-hum.

3 JUDGE RIVERA: - - - that there's no reason that  
4 they cannot serve in that role, whereas the facility and  
5 the AG now argues that no, they cannot serve in that role  
6 except under the circumstances in which they are not the  
7 MHLS attorney that represents that individual, moving  
8 forward.

9 MS. TREASURE: And - - - and unless they can also  
10 show there's that personal connection to the patient.

11 JUDGE RIVERA: Okay, so that's what I wanted to  
12 ask.

13 MS. TREASURE: Yes.

14 JUDGE RIVERA: Thank you. Now we're moving right  
15 along. So is your position that the facility gets to  
16 decide when a patient says I choose - - - I choose him or  
17 her whether or not the individual is concerned with the  
18 welfare of the patient?

19 MS. TREASURE: I - - - what happens again, Your  
20 Honor, I just want to be broad on this, is OMH and the  
21 facilities' position is that for the most part, there's  
22 going to be a presumption that the patient - - - the person  
23 designated by the patient as the significant individual is  
24 the per - - - a - - - an - - - a person who's appropriate  
25 to serve in that capacity, unless there's something in the



1 clinical record to indicate that that person shouldn't  
2 serve, such as maybe they're the victim of the - - - of the  
3 client, or whatever.

4 JUDGE RIVERA: No, no. Yes, okay.

5 MS. TREASURE: But in - - - in cases where  
6 somebody is coming forward and saying I want to participate  
7 as significant individual as their attorney, that's a  
8 different situation, because really, the only relationship  
9 they are pressing on OMH and the facility is the  
10 professional relationship that - - -

11 JUDGE RIVERA: I think you've changed - - -

12 MS. TREASURE: - - - they have.

13 JUDGE RIVERA: - - - a little bit their argument.  
14 I thought their argument is the patient has chosen me as  
15 the individual concerned with the welfare of the patient -  
16 - - who's not a family member, who's not a close friend. I  
17 also happen to be their lawyer.

18 MS. TREASURE: They're - - -

19 JUDGE RIVERA: But they've chosen me to serve in  
20 this role, but I also happen to be their lawyer.

21 MS. TREASURE: They've never explained what the  
22 basis for the significant ind - - - how it is that they  
23 qualify as the significant individual outside - - -

24 JUDGE RIVERA: But do you ask them or - - -

25 MS. TREASURE: - - - of their role as an attorney



1 - - -

2 JUDGE RIVERA: - - - or do you ask the patient?  
3 The patient chose.

4 MS. TREASURE: The patient chose, but the patient  
5 hasn't alleged anything outside the fact that the person is  
6 an attorney for them either.

7 JUDGE RIVERA: But - - - but they've said I want  
8 to choose them as a significant individual, right?

9 MS. TREASURE: Right. And at - - - because  
10 they're - - - precisely because they're their attorney. In  
11 the affidavit that was submitted by D.J., that's what he  
12 said.

13 JUDGE FAHEY: Yeah, but - - - but isn't - - -  
14 isn't the real-world implication is you're an isolated  
15 person with mental health problems in a psychiatric center.  
16 The only person you have contact with is an attorney.  
17 Sometimes you'll develop an actual personal relationship  
18 with that person - - -

19 MS. TREASURE: Um-hum.

20 JUDGE FAHEY: - - - and you say, all right, you  
21 care about me, therefore I would like you to be the person  
22 at this treatment meeting that they have. And what the  
23 facility is saying in response is, that's fine if you want  
24 to be the significant individual, but you can't be both the  
25 attorney and the significant individual. I under - - - and



1 so that inherently - - - I see why you say it's a question  
2 for another day, but it - - - it must be on a case-by-case  
3 basis to look at it.

4 MS. TREASURE: Right, Your Honor. That's exactly  
5 right. And they want to know what the basis - - - I mean,  
6 nobody said here we've established this relationship - - -

7 JUDGE FAHEY: Well - - - well, no - - -

8 MS. TREASURE: - - - over time - - -

9 JUDGE FAHEY: - - - you're - - - if I - - - and  
10 correct me if I'm wrong, but you're - - - you're not  
11 arguing that an attorney cannot become a significant  
12 individual; what you're saying is you can't be both the  
13 attorney sitting in on a medical treatment meeting and the  
14 significant individual?

15 MS. TREASURE: I think I'm - - - what I'm arguing  
16 is twofold.

17 JUDGE FAHEY: Okay.

18 MS. TREASURE: One is the attorney can be a  
19 significant individual. But we want to know what the basis  
20 for your being the significant individual is outside of  
21 asserting that you're just his counsel - - -

22 JUDGE STEIN: It's not just you - - - it's just -  
23 - - it's not enough that you care about me because you're  
24 my lawyer - - -

25 MS. TREASURE: Right.



1 JUDGE STEIN: - - - is that - - - is that what  
2 you're saying?

3 MS. TREASURE: Exactly. We want to know that  
4 there's a personal interest - - -

5 JUDGE FAHEY: So in this case, then, the record  
6 would be incomplete on that issue?

7 MS. TREASURE: Exactly.

8 JUDGE FAHEY: Yeah.

9 MS. TREASURE: That's exactly right. That's what  
10 we're arguing here.

11 JUDGE STEIN: So - - - so going back to Judge  
12 Rivera's question, and - - - and maybe we are going a - - -

13 MS. TREASURE: Um-hum.

14 JUDGE STEIN: - - - little beyond this case, but  
15 we need to - - - we need to - - -

16 MS. TREASURE: Right - - - right, no.

17 JUDGE STEIN: - - - look at that. Who - - - who  
18 would make that decision? So if the patient says this is  
19 my lawyer; he or she also has gotten to know me and is - -  
20 - you know, and is the only person I have that I feel  
21 comfortable with who cares about me, and I - - - and so  
22 then the - - - does the facility then make that  
23 determination, well, yes, okay, there's enough, or no  
24 there's not, or - - - who does it?

25 MS. TREASURE: Well, the facility would make it



1 in the first instance. And then they would have - - - if  
2 it was denied for whatever reason, they would have Article  
3 78 review.

4 JUDGE STEIN: Okay.

5 MS. TREASURE: And if it was granted, then  
6 everybody would be - - -

7 JUDGE GARCIA: Wouldn't it almost - - -

8 MS. TREASURE: - - - okay.

9 JUDGE GARCIA: - - - essentially come down to if  
10 you really want to serve in that role, you'll give up the  
11 other role as being an attorney?

12 MS. TREASURE: That's what OMH, again, has said  
13 in the letters, but again, none of the courts below reached  
14 that issue.

15 JUDGE GARCIA: Oh, yeah.

16 MS. TREASURE: The other part - - -

17 JUDGE GARCIA: Yeah, no, I just have - - -

18 MS. TREASURE: Oh, I'm sorry.

19 JUDGE GARCIA: - - - one question. Just curious.  
20 If you had someone in a situation who had a personal  
21 attorney they also happen to be friends with, and they make  
22 the same application to come in, what's the policy of the  
23 institution?

24 MS. TREASURE: They're going to look at it the  
25 same way. And it's because what happens at the treatment



1 planning meetings is very dependent on a solid therapeutic  
2 relationship between the treatment planning team and - - -

3 JUDGE GARCIA: So you would say to a private  
4 attorney this - - - give them the same essential choice:  
5 you can come as a significant other (sic) or you can  
6 represent this person?

7 MS. TREASURE: They would - - - they would be  
8 looking at the relationship very carefully, because what  
9 they don't want to do is inject an adversarial tone in the  
10 treatment planning process.

11 JUDGE RIVERA: Yeah, but that's a problem.  
12 Because that's not the legislative history. The  
13 legislative history is very clear that the legislature  
14 wanted someone who could serve as an advocate. Now, it may  
15 be that the team doesn't want someone who disagrees with  
16 them, but that's not what the legislature said.

17 It may very well be that the MHLS attorney is in  
18 complete agreement and is very helpful in moving - - -  
19 excuse me - - -

20 MS. TREASURE: Um-hum.

21 JUDGE RIVERA: - - - moving the plan forward.  
22 But there's nothing to suggest as - - - as is argued in  
23 these papers to this court, that this individual has to be  
24 on board with everything the team - - - excuse me - - -

25 MS. TREASURE: Um-hum.



1 JUDGE RIVERA: - - - recommends and persuade the  
2 patient to go along. That may be what is the hope. Don't  
3 get me wrong. But an advocate could be one who disagrees  
4 and tries to push things in the other direction. And  
5 certainly being a family member or close friend doesn't  
6 mean you're going to support what the team recommends.

7 MS. TREASURE: I did - - - I don't - - -

8 JUDGE RIVERA: Right.

9 MS. TREASURE: - - - disagree, Your Honor.  
10 Disagreement is not the issue. Disruption in the treatment  
11 planning process is.

12 JUDGE RIVERA: But why is there an assumption  
13 that that would be what would happen? That's my concern  
14 with the way this particular argument was put forward in  
15 the papers.

16 MS. TREASURE: Because it has happened in the  
17 past and that they had a 330.20 patient whom Gina  
18 McCormick, the treatment team leader, spoke about in her  
19 affidavit, where they had MHLS counsel come in and act on  
20 that person's behalf at the treatment planning meeting,  
21 only to turn around and then tell the patient not to  
22 cooperate any more with the discharge planning process or  
23 with - - -

24 JUDGE RIVERA: But that could be true of an  
25 individual who fits this bill. That could be true of the



1 family member. That could be true of a close friend.

2 MS. TREASURE: It could. But the fact that - - -

3 JUDGE RIVERA: There's no assurance, is all I'm  
4 saying to you.

5 MS. TREASURE: No, there's no assurance. But  
6 there's also more of a risk when you have somebody coming  
7 in and acting as their attorney that that - - - something  
8 like that's going to happen, particularly when they have  
9 the legal interests of the patient at stake.

10 There is just one more thing I'd like to add to  
11 the court - - -

12 JUDGE RIVERA: Please.

13 MS. TREASURE: - - - for the court's  
14 consideration. This - - - 29.13(b) is who must be given a  
15 - - - a participation opportunity. It does not limit the  
16 Commissioner or the director of the facility from  
17 considering people outside of this scope. If they come in  
18 and say I - - - for example, D.J. is alone, he - - - he  
19 would like me to act as his advocate, that there's  
20 something beneficial that I can do for him in the treatment  
21 planning process; there's nothing to prevent the director  
22 of the facility from considering that application and  
23 granting it as somebody outside of 29.13(b). 29.13(b) is  
24 just who must be given that opportunity.

25 JUDGE RIVERA: It certainly sounds like what the



1           - - - the - I think it was the Commission had recommended,  
2           to try and get more people involved in this process. It's  
3           better for the patient, better for society.

4                   MS. TREASURE: Right. And then - - - and they're  
5           also going to look - - - but they are going to consider who  
6           it is that's making the application, whether or not they do  
7           think that person is going to be beneficial and offer  
8           valuable input to the process.

9                   JUDGE RIVERA: What - - - what if the patient  
10          says I don't want them in the room?

11                  MS. TREASURE: Want - - - then I think they have  
12          to leave. They can't participate.

13                  JUDGE RIVERA: That wouldn't be helpful to the  
14          process.

15                  MS. TREASURE: Well, it's also - - - keep in  
16          mind, it's the patient or the authorized representative or  
17          if the patient's over the age of sixteen - - -

18                  JUDGE RIVERA: Right.

19                  MS. TREASURE: - - - it's the person that they  
20          request.

21                  JUDGE RIVERA: But I'm just talking about an  
22          adult patient. If someone - - -

23                  MS. TREASURE: Right.

24                  JUDGE RIVERA: - - - as you've described, comes  
25          forward and says, you know, I think I can be helpful; this



1 is what I can offer; I'd like to be in the room, and the  
2 patient says I don't want them in the room - - -

3 MS. TREASURE: Then we can't let them - - -

4 JUDGE RIVERA: - - - it seems they can't really  
5 do what - - -

6 MS. TREASURE: - - - we can't - - - we really  
7 can't let them in - - -

8 JUDGE RIVERA: - - - they hope - - -

9 MS. TREASURE: - - - the room.

10 JUDGE RIVERA: Right.

11 MS. TREASURE: That's - - -

12 JUDGE RIVERA: So but - - - but if they say I  
13 really, really want MHLS, my attorney, in the room, that's  
14 a different story?

15 MS. TREASURE: It's different - - - it works a  
16 different dynamic with the treatment team, Your Honor. And  
17 they have to be very - - - very conscious of that in order  
18 - - -

19 JUDGE RIVERA: What does that do to the dynamic  
20 to refuse the person - - - the person they have chosen, who  
21 clearly does have an interest in their welfare?

22 MS. TREASURE: Well, we haven't had any problems  
23 that I'm aware of in terms of - - - even when we've allowed  
24 MHLS attorneys to participate, they haven't shown up.  
25 People have gone forward with the planning process - - -



1 JUDGE RIVERA: Um-hum.

2 MS. TREASURE: - - - without any problem. So I'm  
3 not sure that it really impacts - - - it also - - -

4 JUDGE RIVERA: So in those cases - - -

5 MS. TREASURE: - - - doesn't prevent - - -

6 JUDGE RIVERA: - - - when they've been allowed to  
7 participate, are they wearing the hat of the lawyer also?

8 MS. TREASURE: I - - - I'm not sure that they  
9 are, Your Honor. I don't know.

10 JUDGE RIVERA: So in the past, they have been  
11 allowed to sit in that room?

12 MS. TREASURE: They've been - - - but they've  
13 been allowed to participate, maybe not as a significant  
14 individual, but as somebody else who can - - -

15 JUDGE RIVERA: Um-hum.

16 MS. TREASURE: - - - can provide some - - - some  
17 help to the proceeding and - - - and that's outside of  
18 29.13.

19 What we're just saying here is there's no  
20 categorical right.

21 CHIEF JUDGE DIFIORE: Thank you, counsel.

22 MS. TREASURE: Thank you.

23 CHIEF JUDGE DIFIORE: Counsel?

24 MR. STOCKWELL: Just getting back to 29.13  
25 briefly. The statute talks about the participation of a



1 significant individual who is any relative, close friend,  
2 or individual otherwise concerned with the welfare of the  
3 patient. That's - - - that's MHLS, the last part - - -  
4 otherwise concerned with the welfare of the patient. We  
5 have clearly an oversight role in terms of the care and  
6 treatment being offered at facilities, and we can commence  
7 any - - - any litigation necessary to protect our right - -  
8 - our clients' right to be free from abuse and  
9 mistreatment.

10 In terms of this scenario where an MHLS attorney  
11 would be participating in a treatment planning meeting - -  
12 - meeting as a significant indi - - - individual but no  
13 longer acting as an MHLS attorney, I think that that  
14 scenario would be - - - be exceedingly rare. I don't think  
15 that even if a client or a - - - one of our attorneys did  
16 develop a - - - had a longstanding relationship with a  
17 person, I don't - - - I don't think that attorney would be  
18 willing to say I'm going to give up my job over it. It  
19 just - - - it just doesn't make any sense.

20 JUDGE RIVERA: Counsel, we didn't talk about the  
21 authorized representative of the patient - - -

22 MR. STOCKWELL: Sure.

23 JUDGE RIVERA: - - - provision. So I just wanted  
24 to ask you, what is MHLS's position as to the scope of this  
25 authority of that person?



1 MR. STOCKWELL: In terms of author - - - we're an  
2 authorized representative of the individual if they select  
3 us in that capacity. We have a - - - it's - - - it flows  
4 from our enabling statute - - - article - - -

5 JUDGE STEIN: Do you have the right to make - - -  
6 consent to things on behalf of the patient?

7 MR. STOCKWELL: No. That was a finding that the  
8 Appellate Division made that - - - that we would have to be  
9 a person that could make decisions on behalf of our client.  
10 And that's not required by statute and it's not in the  
11 legislative history.

12 JUDGE RIVERA: Well, what's what I'm saying.  
13 What's the scope? What - - - what's the point of this  
14 person?

15 MR. STOCKWELL: It's - - - authorized  
16 representative - - - representative - - - I on - - - I  
17 think that the terms is - - - can be considered synonymous  
18 with "lawyer" in a lot of respects.

19 JUDGE STEIN: But if you look - - - if you look  
20 at the legislative history, it used to say that either the  
21 patient or the authorized representative could attend - - -  
22 and consent to treatment. And - - - and then - - - and  
23 then it - - - you know, so wouldn't that be an indication  
24 that it has to be somebody with that legal right?

25 MR. STOCKWELL: I wouldn't concede that point. I



1 - - - I would concede that our status as significant  
2 individual is probably the stronger argument in terms of  
3 29.13; but I'm not willing to give up that we serve as  
4 authorized representative as - - -

5 JUDGE RIVERA: The authorized representative,  
6 according to the statute - - - right, it says that person  
7 shall be interviewed and provided an opportunity to  
8 actively participate - - -

9 MR. STOCKWELL: Um-hum.

10 JUDGE RIVERA: - - - which potentially could be,  
11 even if the patient doesn't want them - - - although it  
12 seems that the team might not want that person in the room  
13 - - - but nevertheless the statute does say that they must  
14 be provided an opportunity to actively participate.

15 What's MHLS's position if - - - if you have the  
16 situation where the patient doesn't want you in the room?  
17 Under your theory, you've always got to be in the room.

18 MR. STOCKWELL: We wouldn't go. No - - - no, if  
19 a client didn't want us at a meeting, we wouldn't - - - we  
20 wouldn't attend the meeting. I think we would like to - -  
21 - our position is that we can attend under Article 47. If  
22 the client doesn't want us there, we're not - - - we're not  
23 going to attend. But we need to have the ability to attend  
24 in our agency capacity, because they're individuals that  
25 are so disabled that they're unable to select us as their



1 significant individual or authorized representative.

2 And I would just point out to the court that this  
3 - - - the Appellate Division's holding is not limited to  
4 secured treatment facilities. It's a pretty broad-brush  
5 interpretation of our enabling statute. And I would submit  
6 that if we are unable to attend treatment planning meetings  
7 and all other mental hygiene facilities, it would be a  
8 disaster in terms of MHLS and how we're serving our  
9 clients.

10 We go to treatment meetings all day, throughout  
11 the - - - throughout the State, and I would ask the court  
12 to exercise caution when interpreting our statute, because  
13 it is pretty - - -

14 JUDGE RIVERA: But - - - but your other concern  
15 is that if - - - if you could be in the room, so long as  
16 you didn't wear the hat of the lawyer - - - had to give up  
17 that role, that you just don't have the resources to do  
18 that?

19 MR. STOCKWELL: We don't have the resources. But  
20 I - - - and I also think that's - - - that's almost a  
21 fantasy scenario that - - - that - - - you know, that  
22 someone would - - - would give up their ability to serve as  
23 an attorney to - - - to be a significant individual to a  
24 patient that's having - - - those - - -

25 JUDGE FAHEY: Well, that's not the way it's



1           meant. I think it's meant - - - in a particular case, you  
2           would recuse from that particular case and act as a friend,  
3           not that you'd give up your job in MHLS.

4                       CHIEF JUDGE DIFIORE: Thank you, counsel.

5                       MR. STOCKWELL: Respectfully - - -

6                       CHIEF JUDGE DIFIORE: Oh, excuse me. I'm sorry.

7                       MR. STOCKWELL: Respectfully, I just don't see -  
8           - - I just don't see it happening.

9                       JUDGE FAHEY: I see.

10                      MR. STOCKWELL: Thank you very much.

11                      CHIEF JUDGE DIFIORE: Thank you.

12                      (Court is adjourned)

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C E R T I F I C A T I O N

I, Penina Wolicki, certify that the foregoing transcript of proceedings in the Court of Appeals of Mental Hygiene Legal Service, et al. v. Anne Marie T. Sullivan, et al., No. 1 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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