OREGON STATE BAR 1935

Elder Law Newsletter

Volume 10
Number 1
January 2007

Three documents used for surrogate health care decisions

By Brian Haggerty, Attorney at Law

Oregon has been a pioneer in the use of health-care powers of attorney: documents that allow an individual to state preferences for health care, including end-of-life decisions, and appoint a representative to carry out those preferences when the principal is unable to communicate them. Oregon has its advance directive, declaration for mental health treatment, and physician's orders for life-sustaining treatment (POLST). The documents differ, but they overlap in their purposes and effects.

Advance directive

Elder law attorneys should be familiar with the advance directive, the form of which is contained in ORS 127.531. A case can be made that it should be offered to every estate planning client. The advance directive allows a "capable adult" to appoint a "competent adult" as an attorney-in-fact for health care, usually referred to as the "health care representative." The health care representative (HCR) has "all the authority over the principal's health care that the principal would have if not incapable," subject to certain limitations set forth by statute. ORS 127.535. A "capable adult" is a person over 18 years of age, or married or emancipated, who is able to make and communicate health care decisions to health care providers. This determination of ability to make and communicate decisions is made by the person's attending physician or by a court "in a proceeding to appoint or confirm authority of a health care representative… ." ORS 127.505. "Competent adult" is not defined in Chapter 127, and the distinction between a "capable adult" and a "competent adult" is not explained.

It should be noted that, although the HCR has, in the general statement, all the authority over health care decisions that the principal would have if capable, there are additional restrictions on the HCR's ability to withhold or withdraw life-sustaining procedures or to withhold or withdraw artificial nutrition and hydration. These limitations are set out in ORS 127.540.

There is a presumption, set forth in ORS 127.580, of consent to artificially administered nutrition and hydration when necessary to sustain life. Although there are numerous ways to overcome the presumption, which are set forth in the statute, the client to whom this is important should be sure to initial number 3 in Part B of the advance directive form, to give the HCR specific authority to withhold or withdraw artificial nutrition and hydration.

Similarly, the HCR's power to withhold or withdraw life-sustaining procedures should be specifically authorized by initialing number 2 in Part B of the form. The advance directive form as set forth in the statute states unequivocally that if numbers 2 and 3 are not initialed, the HCR may not decide about such procedures. However, ORS 127.540(6) seems to say that the HCR, even in the absence of specific authorization on the form, may decide to with-

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hold or withdraw life support when the patient has been "medically confirmed" (the opinion of the attending physician has been confirmed by a second physician) to be in one of four "end-of-life" conditions set forth in the statute (approximately the same as the four situations set forth in the form). ORS 127.580 allows the presumption for tube feeding to be overcome if there is no appointed HCR, and the person is in one of three terminal conditions.

The authority of the HCR "trumps" that of a guardian appointed by the court, although in the absence of an HCR a guardian may make health care decisions for the protected person. ORS 127.545(6), 125.315(c), 127.535.

In many circumstances, the existence of an advance directive may make a guardianship proceeding unnecessary. However, if the principal has become incapable and there are disagreements about the health care decisions being made by the HCR, a guardianship may need to be established in order to resolve the issues. The HCR (or another person) may decide to file a petition for guardianship if an incapable principal has signed multiple advance directives or has made repeated attempts to leave a care facility against medical advice or if there are ongoing disputes about health care decisions.

It is an interesting question whether a principal, in the "Special Conditions or Instructions" (Part B, number 1 of the advance directive) could direct that his or her HCR had authority to place the principal in a residential care setting. If in doubt about the validity of the instruction, the HCR could petition under ORS 127.550(i) for a court order to affirm the placement.

ORS 127.535 says that an HCR has "the same right as the principal to receive information regarding the proposed health care, to receive and review medical records and to consent to the disclosure of medical records," subject, however, to any limitations of federal law, evidentiary privilege, and the principal's "right to assert confidentiality with respect to others." Even if it were possible for the HCR to use medical information to petition for guardianship (the health care provider honors the HCR's request) it might be a violation of the HCR's fiduciary duty to the principal to do so. Can the HCR request, and can health care providers release, health care information to a long term care insurer, or to a trustee?

Declaration for mental health treatment

Other decisions the HCR cannot make are set forth in ORS 127.540, and include admission to a facility for treatment of mental illness, convulsive treatment, and psychosurgery. These decisions may be made by an attorney-in-fact named in a declaration for mental health treatment (ORS 127.700 *et seq.*). The form of a declaration for mental health treatment is set forth in the statute ORS 127.736.

The declaration for mental health treatment allows the individual, while of sound mind, to make "a declaration of preferences or instructions regarding mental health treatment." ORS 127.702.

"Mental health treatment" means convulsive treatment, treatment with psychoactive medication, admission to or retention in a facility for a period of not more than 17 days for treatment of mental illness, and "outpatient services" as defined. ORS 127.700(6) and (7).

It is not necessary to appoint an attorney-in-fact; the declaration for mental health treatment can provide consent to specific procedures, without the intercession of an attorney-in-fact.

The declaration for mental health treatment becomes part of the patient's medical record. ORS 127.717.

The declaration for mental health treatment becomes effective when the principal is "incapable," defined in ORS 127.700(5), which is similar to, but not completely congruent with, the definition of "incapable" for purposes of the advance directive, ORS 127.505(13). The implementation of the declaration for mental health treatment requires the opinion of two physicians that the patient is "incapable" or the finding of a court "in a protective proceeding under ORS Chapter 125." The statutes governing the declaration for mental health treatment do not authorize a special court proceeding to appoint or confirm the authority of an attorney-in-fact for mental health decisions, as they do for an HCR under an advance directive.

A declaration for mental health treatment can be in effect for a period of only three years, unless the person becomes incapable during that time (in which case the declaration continues in effect until the person is no longer incapable).

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While the advance directive is suitable for anyone, the declaration for mental health treatment is appropriate for a smaller group of clients. The person must be capable at the time of executing the document, but anticipating a period of incapacity which may start within the next three years. It could be used by a person with chronic mental illness to specify certain medications which have been effective in the past, or to specify medications he or she does not want used.

POLST

The POLST takes a very different approach to providing patients with a way to express their preferences for health care. The POLST is filled out and signed by the patient's attending physician or nurse practitioner. It constitutes "doctor's orders," and becomes part of the patient's medical record, so that it is transferred from provider to provider whenever the patient is transferred.

The POLST was developed by the health care community, led by the Center for Ethics in Health Care at Oregon Health Sciences University. Because it was developed by health care providers, the POLST may seem clearer and less ambiguous to the medical community than the advance directive. However, the two forms do complement each other in some respects.

The POLST is filled out by the physician or nurse practitioner after a discussion with the patient or a surrogate for the patient. An HCR nominated in an advance directive may serve as such a surrogate, and may direct the completion of a POLST for a principal. A wealth of information about the POLST form may be found at **www.polst.org**.

The first section of the form is a "resuscitate/do not resuscitate" choice. In the event the patient has a pulse or is breathing, the second section of the POLST form gives three choices,—"comfort measures only," "limited additional interventions," or "full treatment"— and in each case describes the levels of care desired. The third section states preferences for antibiotics, and the fourth for tube feeding. The form is signed by the physician or nurse practitioner.

In one particular area, the POLST has an advantage over the advance directive. The POLST has been recognized in the scope of practice for emergency medical service (EMS) providers, so that the do-not-resuscitate instructions and limitations on medical interventions on a POLST can be executed by EMS personnel in the field. OAR 847-35-0030. Because the advance directive does not become effective until the patient's attending physician has declared the patient "incapable," EMS personnel cannot honor the instructions in the advance directive and will have to take whatever invasive procedures are called for by their protocols.

This will put the physician and HCR in the position of having to terminate life support at the hospital, rather than simply never having initiated the life support. Some families may find this choice much harder. The POLST, a bright pink form, was designed to be visible and patients are instructed to post their POLST on their refrigerator, so that EMS personnel can easily find it.

While anyone could ask his or her physician to fill out a POLST, it is generally used by people with chronic and potentially life-threatening conditions. This allows the doctor to "tune" the interventions set forth (as allowed or as extraordinary) in the POLST to the patient's particular condition and expectations.

Options require further discussion

Oregon has been a leader in the development of these documents that allow patients to control their health care choices even when they cannot speak for themselves. Because many patients feel it is important that they be allowed to make their own health care choices, these documents should continue to be refined and developed. In particular, it is vital that lawyers and health care professionals maintain an ongoing dialogue about the available choices, and how they can be clearly expressed so that they are understood in health care settings.

Elder law practitioners must also continue to learn about health care issues, so that we may guide our clients to the proper planning documents. For example, is dementia a health care issue, which can be managed by an HCR under an advance directive, or is it a mental health issue that requires an attorney-in-fact under a declaration for mental health treatment?

The health care of many patients with dementia is being managed by HCRs, under their general authority to make such health care decisions as the principals could make if capable. But if a drug were available to manage or alleviate a patient's dementia, would this be a "psychoactive medication," which would be outside the HCR's authority? The term not being defined in the statute, this determination would have to be made by reference to the health care professionals.

In all cases, a person makes his or her own choices for health care and mental health care as long as he or she is capable of doing so. With either the advance directive or the declaration for mental health treatment, the determination of whether an individual is capable (defined slightly differently in each case) may be made either by physicians or by a court, which would almost certainly require the testimony of health care professionals.

On the other hand, a lawyer may be called upon to decide whether a person is competent to execute an advance directive or declaration for mental health treatment. Is it appropriate as an advocate to ask health care professionals whether the client has the capacity to designate an HCR or consent to certain mental health interventions? Or is the determination of capacity to execute a health care power of attorney a legal question, while capacity to express health care choices is a medical one?

Assuming that the basic premise continues unchanged—that patients have a right to determine their own health care and mental health care choices—legal and health professionals will have to continue to work together toward a common understanding of how that right is clearly and fairly exercised. ■

Notaries play important role in witnessing legal documents

By Thomas Wrosch

Tom Wrosch works in the Corporation Division of Oregon's Secretary of State agency as Senior Policy Advisor, with an emphasis in notary public, UCC, and electronic commerce issues. He has conducted notary public training seminars throughout the state, and is a nationally recognized leader in notary public issues.

Very early in Western civilization, people discovered a need to have an impartial witness to transactions between them. This witness could seal a document testifying to the transaction so that a third party could rely on the contents therein, as well as vouch in person to the events that transpired, should the document need to be verified after all. The *notarii* served as this witness then, and the notary public does so today. The notary public is an agent of the state who serves as an impartial witness to certain acts—and only those acts—outlined in statute. It is important that attorneys understand the role of the notary and how it relates to their handling of documents.

What a notary does

There are only five common notarial acts specified in Oregon statute (ORS 194.515) that a notary public may perform:

- acknowledgment in an individual capacity
- acknowledgment in a representative capacity, such as corporate acknowledgment and attorney-in-fact acknowledgment
- verification of oath or affirmation, including administration of verbal oath
- witnessing or attesting a signature
- certifying or attesting a copy of a document

In statute, an "acknowledgment" is simply "a statement by a person that the person has executed an instrument for the purposes stated therein." ORS 194.505 (1). That statement can be made either on the signer's or another's behalf. Note that it is not the notary's acknowledgment, but the signer's, and that it is often not necessary to witness the signature, unless the notarial certificate actually says the notary witnessed it, i.e., "subscribed before me."

Witnessing a signature is merely a form of acknowledgment wherein the notary specifically attests to the signing.

Verification of oath or affirmation is a written "statement by a person who asserts it to be true and makes the assertion upon oath or affirmation." ORS 194.505 (6). An oath is a vow in the presence of the notary: "so help me God." The affirmation omits mention of the deity, but usually adds "under the penalty of perjury."

Although other countries and even some states allow notaries public to make various attestations or declarations of fact, Oregon does not. It does allow certifying or attesting a copy of a document in the possession of another. The notary is simply noting that the document accompanied by the notarial certificate is a full, accurate, and true transcription or reproduction. ORS 194.515 (4).

The responsibilities of the notary

As you can see, the law is quite specific about what is expected of notaries public. Courts expect a notary to follow the law closely, and they do not grant a notarial officer discretion to interpret or go beyond the law's dictates.

Notaries are liable for "official misconduct," which is a "notary's performance of or failure to perform any act prohibited or mandated" by Oregon law. ORS 194.005 (8). The penalties for misconduct include administrative penalties, such as fines, suspension, and revocation of the commission; civil penalties, such as damages claimed by suit; and criminal penalties, including but not limited to Class B misdemeanor. ORS 194.200, 194.980 and 194.990. Civil liability includes actual damages and punitive awards, as well as court costs. These penalties can be passed on to the employer, if the notary performed such misconduct because of coercion by the employer. ORS 194.200 (3).

Clearly, Oregon law views the notarial act very seriously. It is much more than a pro forma procedure, and the lack of a proper notarization can have serious consequences. As noted in the Oregon Notary Public Guide, the best way for a notary to avoid misconduct is to take "reasonable care" when notarizing. Reasonable care boils down to doing "what the law says you should do and [not doing] what it says you shouldn't."[1]

In my experience, people often view the notary's duties as simply looking at a driver's

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license and completing a notarial certificate. In fact, the reasonable care standard, which traditionally has been applied in court to notaries public, requires a higher level of involvement.[2] Following the law includes gathering information for the journal, completing it and the notarial certificate at the time of notarization, and requiring personal appearance before the notary. Taking reasonable care also involves making sure there is no obvious fraud or duress, that the signer understands the import of his or her action, and that normal precautions, such as correcting blank spaces or missing pages, are taken.

Attorney notary public issues

A notary public who is an attorney faces special challenges, and it is clear that attorney notaries are not always up to the unique problem of trying to fill both roles. One case survey[3] in 1998 found "[T]he number of cases involving attorneys who commit misconduct in their capacity as notaries or employing notaries is substantial." The survey found three main reasons for the misconduct: selfishness, a desire to obtain a just result for a client, or the expedition of a client's claim. There is no reason to believe practices have changed significantly since the survey.

There are many examples of misconduct, not all peculiar to the notary attorney. Most common infractions occur because the notary takes an ill-advised shortcut, such as not requiring personal appearance, notarizing without using a complete notarial certificate ("stamp & sign"), and partially filling out journals and certificates ahead of actual transactions.

We have often had problems with attorneys insisting on waiving the personal appearance requirement. Sometimes they direct their staff to ignore that law, sometimes they ignore it themselves, even though it is a fundamental principle of notarization and critical to the prevention of fraud. Direct, physical presence (not via phone!) is always required for every notarization.

Similarly, the law requires a complete notarial certificate for every notarized document. ORS 194.565. It is very clear that a proper notarization requires all three elements: complete certificate, official seal and official signature, yet many times a notary will stamp a document "to make it official." That is an act of misconduct. OAR 160-100-0610(54).

A busy office is often tempted to bend the law. It sometimes seems more convenient not to check ID. Perhaps the office notary is going on vacation, so a stack of pre-stamped and signed certificates is prepared "just in case." Properly filling out the journal at the time of notarization is an obvious best practice that is rarely observed in many offices.

Perhaps the most basic question is simply whether it is a conflict of interest for a lawyer to notarize a client's act. For example, is it appropriate for an attorney to draw up a deposition and then notarize it?

Impartiality is always a concern. No one wants to invite charges of fraud or collusion. It is probably unwise to both advise a client on an act and then to notarize that act. Taking a statement may or may not be a conflict. Some state bar associations have ruled that drafting a document for a client is not a problem when notarizing—but why take that chance?[4] It is simpler and safer to have someone else do the notarization. Where a conflict of interest may be construed, prudence dictates discretion.

For that reason, we usually recommend that attorneys not notarize for their clients, if they are involved in the transaction, have drafted the document, or have advised the client that the notarized act is a proper course of action. In such cases, the objectivity of the notary is called into question. Clarke and Kovach offer this rule of thumb: "when the attorney steps into the shoes of the client …the attorney may no longer be able to act as a notary public for that client."[5] Alfred Piombino, a national expert on notary law and practice, has written, "An attorney who holds a notary public commission …is not advised to perform a notarial service, including administering an oath, or taking an acknowledgment from a client in any claim, action or proceeding."[6]

For this reason, we recommend that more than one person in an office should be a notary public, so that someone less intimately involved with the client can be impeccably impartial. It's important to realize that a notary has a different perspective from an attorney. The notary is impartial; the attorney is an advocate. These roles should not be mixed.

Another common question concerns the use of company letterhead, or mentioning the attorney in the instructions portion of the document. Does this constitute official misconduct?

Notaries are prohibited from notarizing if they are signers of or "named in the document." ORS 194.158. Our department's legal counsel has indicated that letterhead does not constitute being named in the document. To violate that prohibition, a notary needs to be named in the substantive portion of the document. If your name is on the margin, it's generally okay. If your name is inside a paragraph, it's often not permitted.

In the end, where an act is not clearly an act of official misconduct, it is up to the notary to judge the risk of a possible fraud or collusion suit. My office has advocated for years that attorneys could use the considered guidance of the Oregon State Bar to ease the burden on individual practitioners, and help them sort out the ethical issues involving attorneys who notarize for their clients.

However, the Bar has been silent to date, Oregon statutes have not addressed it, and other states vary widely in their treatment of

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this situation. Therefore, except as noted, much of the foregoing advice must be considered recommended good practice, and not necessarily binding.

The role of the notary public remains as important today as it was two thousand years ago. The notary must be seen as an impartial witness or the whole procedure is called into question. As long as the attorney notaries can maintain a clear separation between the two roles, they can feel confident about their practices. ■

Footnotes

1. *State of Oregon Notary Public Guide,* 2006, p. 13.
2. Gerald Haberkorn & Julie Z. Wulf, *The Legal Standard of Care for Notaries and their Employers,* 31 J. MARSHALL L. REV. 737 (1998). See also *Meyers v. Meyers*, 81 Wash. 2d 55, 503 P.2d 59 (1972).
3. Christopher B. Young, *Signed, Sealed, Delivered…Disbarred? Notarial Misconduct by Attorneys*, 31 J. MARSHALL L. REV 1094-1102 (1998).
4. Michael L. Closen, Glen-Peter Ahlers, et al., *Notary Law and Practice: Cases and Materials*, National Notary Assn., 1999, p.368.
5. Carole Clarke & Peter Kovach, *Disqualifying Interests for Notaries Public*, 32 J. MARSHALL L. REV 982-983 (1999).
6. Alfred E. Piombino, *Notary Public Handbook: Principles, Practices & Cases,* National edition, 1996, p. 57.

Fortunately, it has never been easier or less expensive to get notary education. The Corporation Division has a free on-line tutorial that anyone, notary applicant or not, can take. To get credit, you must complete the three-hour seat time requirement, but if you are not interested in a certificate, it is a simple matter to run through the course at your own pace. If education by computer is not for you, the office also offers free classroom education throughout the state. Simply go to the Web site, **www.filinginoregon.com/notary** for more details.

Of course, if you have any further questions, you can always contact Tom Wrosch at 503.986.2371 or thomas.e.wrosch@state.or.us.

Important elder law numbers

as of January 1, 2007

Supplemental Security Income (SSI) Benefit Standards	Eligible individual.....$623/month Eligible couple.....$934/month
Medicaid (Oregon)	Long term care income cap.....$1,869/month Community spouse minimum resource standard..... $20,328 Community spouse maximum resource standard.....$101,640 Community spouse minimum and maximum monthly allowance standards.....$1,650/month; $2,541/month Excess shelter allowance..... Amount above $495/month Food stamp utility allowance used to figure excess shelter allowance.....$303/month Personal needs allowance in nursing home.....$30/month Personal needs allowance in community-based care.....$141/month Room & board rate for community-based care facilities..... $483.70/month OSIP maintenance standard for person receiving in-home services.....$624.70 Average private pay rate for calculating ineligibility for applications made on or after October 1, 2006.....$5,360/month
Medicare	Part B premium..... $93.50/month* Part B deductible..... $131/year Part A hospital deductible per spell of illness.....$992 Part D premium: Varies according to plan chosen.....average is $27.35/month Skilled nursing facility co-insurance for days 21-100.....$124/day

* Beginning in 2007, a person whose income is more than $80,000/year will pay a higher premium

Medicaid now requires documentation of citizenship and identity

By Jennifer de Jong

Since September 1, 2006, persons who apply for Oregon Medicaid and claim to be United States citizens must document their citizenship and identity. This requirement is outlined in section 6036 of the Deficit Reduction Act of 2005. The federal Department of Health and Human Services (DHHS) published an interim final regulation on July 12, 2006, saying that clients enrolled in Medicare or receiving Supplemental Security Income (SSI) are exempt from the documentation requirement.

This has caused some confusion, due to the mistaken belief that only citizens can receive Social Security benefits, and therefore enrollment in Medicare or SSI exempts *all* clients from any documentation. However, under certain circumstances, noncitizens may receive benefits from the Social Security Administration (SSA). In addition, the SSA began to verify citizenship for Medicare applicants only in recent years.

The new law does not change requirements for noncitizens, who must continue to document their qualified noncitizen status. Even if a noncitizen is enrolled in Medicare, documentation of qualified noncitizen status is necessary in order to apply for Medicaid.

The first step in the process is for the client to declare his or her status: citizen or noncitizen. Once a person has stated that he or she is a citizen, Oregon's Department of Human Services (DHS) uses the requirements as outlined in the new provision (e.g., Medicare exempts citizens from the documentation requirement). If an individual claims to be a noncitizen, however, we must follow the requirements in OAR 461-120-0125 (which does not include an exemption for Medicare recipients).

U.S. citizens who do not have the required documents at the time they apply for Medicaid or when continued eligibility is to be verified for the first time after September 1, 2006, should inform the local Medicaid agency immediately to get help. Local office staff will assist clients who are unable to gather the information necessary to verify eligibility.

New applicants will be provided with a reasonable amount of time to provide documentation. This means that the date of request will be secured as long as the client is making a good faith effort to present the documents requested. Ongoing Medicaid recipients will also be given a reasonable opportunity to cooperate while the verification is pending. Benefits will continue unless the individual is determined ineligible. Once documentation is provided, it will not usually be requested again.

An applicant or recipient who fails to cooperate with the state in presenting documentary evidence of citizenship may have Medicaid assistance denied or terminated. Adequate and timely notice with appeal rights will be given if the individual's Medicaid-eligible status is denied or terminated.

Medicaid will use a four-level process to verify citizenship. (See the list on page 8.)

The primary level provides the most reliable documents to prove citizenship and identity. Levels two to four provide additional evidence which may be used to document citizenship.

However, people using documents from levels two to four must *also* provide a separate document to show their identity. Only original and certified copies are permissible. A photocopy or a notarized copy will not be accepted.

You will note that many of the items on the list indicate that the document must include proof of birth in the U.S. These items cannot be used for clients who were born abroad and this may make the requirement more complicated. For example, clients born abroad to U.S. citizen parents must obtain verification from the U.S. State Department (Certification of Birth or Report of Birth Abroad). Furthermore, clients who immigrated to the U.S. at a young age may have derived citizenship from their parents without knowing it. Title 8 of the U.S. Code will provide the details on who might have derived U.S. citizenship. ■

Jennifer de Jong is a Medicaid Policy Analyst for the Oregon Department of Human Services (DHS), Seniors and People with Disabilities (SPD). She develops and maintains eligibility policy for Medicaid programs administered by SPD and coordinates and monitors the implementation of these programs, policies, and procedures. She has also worked as an eligibility specialist and a case manager.

DHHS List of Acceptable Documentation

Effective July 1, 2006, Public Law No. 109-171 (Deficit Reduction Act of 2005) Section 6036 requires individuals to provide satisfactory documentary evidence of citizenship or nationality when initially applying for Medicaid or upon a recipient's first Medicaid re-determination.

Detailed information can be found at: www.cms.hhs.gov/MedicaidEligibility05_ProofofCitizenship.

Acceptable primary documentation for identification and citizenship
- A U.S. Passport (originally issued without limitation)
- A Certificate of Naturalization (DHS Forms N-550 or N-570)
- A Certificate of U.S. Citizenship (DHS Forms N-560 or N-561)
- A driver's license if the State requires proof of citizenship before issuing

Acceptable secondary-level documentation to verify proof of citizenship
- A U.S. birth certificate
- A Certification of Birth issued by the Department of State (DS-1350)
- A Report of Birth Abroad of a U.S. Citizen (Form FS-240)
- A Certification of Birth Abroad (FS-545)
- A U.S. Citizen I.D. card (DHS Form I-197)
- An American Indian card issued by the Department of Homeland Security with the classification code "KIC"
- A Northern Mariana identification card
- A final adoption decree showing the child's name and U.S. place of birth
- Evidence of civil service employment by the U.S. government
- A military record showing a U.S. place of birth (DD-214)

Acceptable third-level documentation to verify proof of citizenship
- Extract of a U.S. hospital record created near the time of birth or at least 5 years prior to the application for Medicaid which shows a United States place of birth
- Life or health or other insurance record showing a U.S. place of birth created at least 5 years before the application for Medicaid

Acceptable fourth-level documentation to verify proof of citizenship
- Federal or State census record showing U.S. citizenship or a U.S. place of birth
- Other document such as Seneca Indian tribal census record, Bureau of Indian Affairs tribal census record of the Navajo Indians, U.S. State Vital Statistics official notification of birth registration, U.S. public birth record amended more than five years after the person's birth, or a statement signed by the physician or midwife who was in attendance at the time of birth if the document was created at least five years before the application for Medicaid
- Institutional admission papers from a nursing home, skilled nursing care facility, or other institution that indicate a U.S. place of birth
- Medical (clinic, doctor, or hospital) record created at least five years before the initial application for Medicaid that indicates a U.S. place of birth
- Written statement. Used in rare circumstances. A statement must be signed by at least two individuals of whom one is not related to the applicant/recipient and who have personal knowledge of the event(s) establishing the applicant's or recipient's claim of citizenship. The person(s) making the statement must be able to provide proof of his/her own citizenship and identity for the affidavit to be accepted. It must be signed under penalty of perjury by the person making the affidavit. Another statement from the client explaining why documentary evidence does not exist or cannot be readily obtained must also be requested.

Acceptable documentation to verify proof of identity
- A current State driver's license or non-driver identification card bearing the individual's picture or non-picture with personal identifying information such as name, age, sex, race, height, weight, or eye color.
- Certificate of Degree of Indian Blood, or other U.S. American Indian/Alaska Native tribal document
- Any identity document described in section 274A(b)(1)(D) of the Immigration and Nationality Act such as a driver's license, school identification card, U.S. military or draft record, identification card issued by the Federal, State, or local government, military dependent's identification card, Native American tribal document, or U.S. Coast Guard merchant mariner card. A voter's registration card or Canadian driver's license may not be used. ■

Keep rules of conduct in mind when preparing and handling documents

By Sheila M. Blackford, Practice Management Advisor, Oregon State Bar Professional Liability Fund

When preparing and handling documents, there are some specific issues and rules of conduct you must keep in mind to avoid ethics complaints and malpractice claims. Effectively representing clients who have physical limitations may require some additional planning and accommodation when it comes to documents. For example, a client may have poor eyesight, making reading documents more difficult. Hearing and memory may also be issues. Your client may not have heard clearly what you said or may have forgotten important details, but may be too embarrassed to ask you for clarification. Care in the preparation and handling of documents will be time well spent, helping you to keep your client informed and avoid violating rules of professional conduct or committing acts that subject you to claims for professional liability.

First of all, review three especially relevant Oregon Rules of Professional Conduct:

- ORPC 1.4 *Communication*
- ORPC 1.6 *Confidentiality of Information*
- ORPC 1.14 *Client With Diminished Capacity*

The rules of professional conduct can be found on the OSB Web site at **www.osbar.org/_docs/rulesregs/orpc.pdf.**

Given the requirements of professional conduct, here are some things to keep in mind.

DOs

Do provide your clients with copies of all incoming and outgoing correspondence regarding their matters. Stamp them: "Client's Copy. For your information only. No action needed." You might want to provide a file folder in which your client can keep documents, but it's a good idea to ask if it's needed. People often have their own filing systems. Some clients may prefer electronic copies in pdf format.

Do follow up important telephone conversations and client meetings with a clear memorandum summarizing what was discussed and decided.

Do provide your client with a "plain English" translation of legal documents to aid in comprehension.

Do give your client the original documents. (Repeat this advice to yourself three times daily.)

Do give your client an index or log of important estate planning documents and identify:

- the health care representatives for the advance directive for health-care decision-making and for HIPAA
- agents under power-of-attorney
- trustees of trust
- nominated personal representatives;
- nominated conservators
- nominated guardians
- **where the original documents can be found**

Do remember that your duty of confidentiality to your client requires you to get consent before providing an adult child with copies of documents.

Do use a readable typeface for documents. Serif style is generally perceived to be more readable than sans serif.

Do increase the size of the typeface for clients with low vision.

Do provide your client with a complete set of copies of all estate planning documents that are stamped: "Copy. Original document stored: [*insert site of storage*]."

Do encourage your client to keep legal papers, including executed wills and estate planning documents, in a safe deposit box. There is a misperception that a will stored in a safe deposit box is inaccessible upon the death of the box lessee. ORS 708A.655 provides for the opening of the safe deposit box for the purpose of conducting a search for the will or the trust instrument. The statute requires that the Oregon operating institution be furnished with a certified copy of the decedent's death certificate or other evidence of death satisfactory to the institution along with an affidavit stating the individual believes the box contains the decedent's will or trust instrument, documents pertaining to the disposition of the decedent's remains, or documents pertaining to the decedent's property, and that the individual is an interested person as defined in ORS 708A.655(3)(a)-(g).

DON'Ts

Don't ignore proper documentation of any concerns that arise.

Don't forget to ask whether your client understands your explanation and the documents.

Don't let your client "just sign" a document if the client shows any lack of understanding or unwillingness to listen to an explanation.

Don't have the client execute duplicate original wills. If there is a second or even third original will, how can anyone be sure that the testator did not revoke the will?

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Preparing and handling documents

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Don't store original wills for your clients. Original client documents are the property of the client and should be returned to the client for proper storage. Original wills are specifically protected by ORS 112.815, which requires that 40 years elapse before a will can be destroyed, among other requirements. To avoid burdening yourself—or your family or personal representative—with the responsibility of returning, storing, or protecting these client items, do not retain original client documents in your files. Return original documents to the client at the conclusion of your representation.

Don't forget the laws about destruction of stored wills. Attorneys who elect to store original wills find the burden onerous when it comes time to destroy those old client files. Conditions for the disposal of a will are found in ORS 112.815. ORS 112.820 provides the manner in which an attorney authorized to destroy a will under ORS 112.815 may proceed. Effective January 1, 2007, the fee for filing the affidavit with the probate court is $17.

Don't automatically assume that a "senior moment"—characterized by fuzzy thinking, rambling, forgetting words or a train of thought—means that your client is impaired. Check the definition of capacity and impairment by reviewing pertinent elder law materials listed in the Oregon State Bar CLE publications and CD-ROM catalog.

Don't forget OSB resources:

- If you need help with changing your practice to accommodate your clients' special needs or need information about how to return original wills or other documents to clients, contact the PLF practice management advisors at 503.639.6911 or 800.452.1639.
- The ethics department can help you ethically navigate the client relationship. Contact Sylvia Stevens, General Counsel, at 503.620.0222 or 800.452.8260, ext. 359, or Helen Hierschbiel, Assistant General Counsel, ext. 361.
- If you think that you may have walked out on thin ice, call a Professional Liability Fund (PLF) claims attorney at 503.639.6911 or 800.452.1639. ■

PLF Practice Aids

The Bar's Professional Liability Fund (PLF) has many practice aids for lawyers, including the following ones that will help with file retention issues.

"Why in the World Did We Ever Keep Original Wills?"
(Practice Aid Category: Closing Your Law Office)
This article, which originally appeared in the October 1994 issue of *In Brief*, describes the difficulties and expenses one attorney encountered in storing original documents for clients. It also explains how to prepare the documents for return to your clients.

Letter Returning Original Will to Client
(Practice Aid Category: Probate and Estate Planning)
Use this letter to send to clients if you have been storing original wills for them. The letter discusses the pros and cons of various storage options (e.g., client's home, a fire-proof box or safe, or safety deposit box) and cautions clients against making alterations to the will that might unintentionally invalidate it (e.g., unstapling the will, writing on the will, making corrections to the will).

File Retention and Destruction Policies
(Practice Aid Category: File Management)
Consult these policies to determine how long to keep client files and how to properly destroy them. This document also lists the requirements of ORS 112.815 for disposing of original wills.

File Closing Checklist:
(Practice Aid Category: File Management)
Use this checklist when closing a case or client matter to make sure you have completed all tasks associated with the case or matter before assigning the file to storage.

To download PLF practice aids, go to the PLF's Web site at **www.osbplf.org,** click on Practice Aids and Forms under Loss Prevention, and select the appropriate category.

The author thanks Tanya Hanson, PLF Loss Prevention Attorney, and Beverly Michaelis, PLF Practice Management Advisor, for their assistance with this article.

What to do about trusts executed before the Uniform Trust Code

By Valerie J. Vollmar, Professor of Law, Willamette University

The Oregon Uniform Trust Code became effective on January 1, 2006. An important question for Oregon lawyers and their estate planning clients is what to do about trusts executed before 2006.

Applicability of the Oregon Uniform Trust Code

The lawyer must begin by determining whether the Oregon Uniform Trust Code (Trust Code) applies to the trust at all. Because ORS 130.010(16) defines "settlor" to include a testator who creates a trust, the Trust Code may apply to a testamentary trust as well as to an inter vivos trust.

ORS 130.910(1) describes the circumstances under which the Trust Code ordinarily applies. Subsection (a) contains the general rule that the Trust Code applies to all trusts, whenever created. Under subsection (c), any rule of construction or presumption under the Trust Code applies to pre-2006 instruments, unless the trust terms clearly indicate a contrary intent. On the other hand, subsection (b) provides that the Trust Code does not apply to proceedings concerning trusts commenced before January 1, 2006. ORS 130.910 also states that the Trust Code does not affect an act done before January 1, 2006 or alter a statute of limitations that began running before that date.

There are three exceptions to the general rule that the Trust Code applies to pre-2006 trusts. Trusts that were irrevocable under prior law did not become revocable or amendable by the adoption of ORS 130.505(1). In addition, a trustee of a pre-2006 trust need not notify the qualified beneficiaries of acceptance of the trusteeship (ORS 130.710(2)(b)) or of the existence of an irrevocable trust (ORS 130.710(2)(c)).

If a trust has a connection to more than one jurisdiction, ORS 130.030 provides guidance on whether Oregon law or the law of another jurisdiction will determine the meaning and effect of the trust terms. Under subsection (1), the law of the jurisdiction designated in the trust instrument governs unless that law is contrary to the public policy of the jurisdiction having the most significant relationship to the matter at issue. If the trust instrument does not designate a jurisdiction, subsection (2) provides that the governing law is that of the jurisdiction having the most significant relationship to the matter.

Mandatory and default rules

For the most part, the Trust Code consists of default rules that are relevant only if the trust instrument is silent about an issue. In other words, the settlor generally is free to specify the rules that will govern the administration and distribution of a trust. However, ORS 130.020(2) identifies certain provisions of the Trust Code that are mandatory. Of these mandatory rules, a settlor can waive or modify only the rules on notice, information, and reports found in subsections (2)(h) and (2)(i).

Thus, the lawyer who is reviewing a pre-2006 trust with respect to a particular issue should read the trust language very carefully and then proceed with the following hierarchy of questions:

1. Does a mandatory nonwaivable rule dispose of the issue?
2. If one of the mandatory but waivable rules on notice, information, and reports applies, did the settlor waive or modify the rule in the manner required by ORS 130.020(3)?
3. If no mandatory rule applies, do the terms of the trust settle the issue?
4. If the trust instrument is silent or its language is not clear, what is the default rule under the Trust Code?
5. If the Trust Code does not settle the issue, does it help to consult the common law of trusts or the principles of equity, as permitted under ORS 130.025?

Revocable trusts and irrevocable Trusts

The options available when dealing with pre-2006 trusts depend primarily on whether the trust is revocable or irrevocable. The reason for this distinction is that a revocable living trust and a testamentary trust in the will of a living person usually can be amended, restated, or revoked, while an irrevocable living trust cannot.

Of course, the settlor of even a revocable trust generally must have capacity in order to

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Trusts executed before the Uniform Trust Code

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amend, restate, or revoke the trust. However, ORS 130.500 lowers the standard of capacity for a revocable living trust to the same capacity required to make a will, which is quite low. Moreover, even if the settlor of a revocable living trust no longer has the required capacity, under some circumstances an agent, conservator, or guardian may have the authority to act. In the case of an agent under a power of attorney, ORS 130.505(5) provides that a settlor's powers with respect to revocation, amendment, or distribution may be exercised by an agent to the extent expressly authorized by the terms of the trust. ORS 130.505(6) authorizes a conservator or guardian to exercise these powers with the court's approval.

Thus, the simplest solution to any problems presented by pre-2006 revocable trusts may well be to revoke, amend, or restate the trust or to direct one or more distributions from the trust. Another possible course of action is to enter into a nonjudicial settlement agreement pursuant to ORS 130.045. The agreement can cover a wide variety of issues, but a broad group of "interested persons" (including the trustee and any living settlor) must agree, the agreement must not violate a material purpose of the trust, and a court order is necessary if an interested person wants to obtain judicial approval of the agreement.

The options available to solve problems under pre-2006 irrevocable living trusts are much more limited. Although a nonjudicial settlement agreement under ORS 130.045 sometimes may be adequate, subsection (6) expressly provides that modification and termination of irrevocable trusts by nonjudicial settlement agreement is governed by ORS 130.200 rather than by ORS 130.045.

ORS 130.200 authorizes two different methods for modifying or terminating an irrevocable trust. Subsection (1) permits nonjudicial modification or termination with the consent of the settlor and all the beneficiaries. Subsection (2) allows modification or termination without the settlor's consent if all the beneficiaries consent and if a court finds that certain statutory requirements are satisfied. (Subsection (5) further allows a court to approve a modification or termination even if not all the required parties consent, but only if modification or termination could properly have been granted if all the parties had consented and if the interests of any beneficiary who does not consent will be adequately protected.)

Subsections (6), (7), and (8) of ORS 130.200 retain the prior procedure for filing a nonjudicial settlement agreement with the court. ORS 130.200 is different from prior Oregon law, however, when the settlor has not given consent due to unwillingness, incapacity, or death. In that situation, a court now must approve modification or termination of an irrevocable trust even if all the beneficiaries have consented. For that reason, the process for modifying or terminating a pre-2006 irrevocable trust may have been made more difficult by the adoption of the Trust Code.

A number of other provisions of the Trust Code may prove useful in the case of a pre-2006 trust that presents problems that need to be addressed. In particular, ORS 130.205 through 130.230 (all of which involve termination or some form of modification of a trust) contain many useful rules that either are new or differ from prior law. These sections cover deviation from a trust's administrative or dispositive terms due to unanticipated circumstances (ORS 130.205), application of the cy pres doctrine to charitable trusts (ORS 130.210), uneconomic trusts (ORS 130.215), reformation to correct mistakes (ORS 130.220), modification to achieve a settlor's tax objectives (ORS 130.225), and combination and division of trusts (ORS 130.230). Often, application of one of these sections will suffice to solve a problem, sometimes even without court involvement.

Possible changes to pre-2006 trusts

The purpose of this article is not to focus on the substantive provisions of the Trust Code, but more generally on how to deal with pre-2006 trusts. The lawyer can consult any of a number of sources for an explanation of the Trust Code's substantive provisions, including the following:

- *Oregon Issue: Oregon Uniform Trust Code and Comments Special Issue*, 42 Willamette Law Review 187-403 (2006).
- Philip N. Jones, *Drafting for the Uniform Trust Code*, Chapter 1, Hot Topics in Estate Planning (Oregon State Bar CLE, 2006), and 23 Oregon Estate Planning and Administration Section Newsletter 2 (July 2006).

One possible source for lawyers who need to redraft pre-2006 trusts is Professor Valerie J. Vollmar's revised will and trust forms, which were published in November 2006 as Volume II of the Oregon State Bar's Planning the Basic Estate CLE program materials. The changes from Professor Vollmar's prior forms are summarized at the beginning of Volume II, and this summary can be used as a checklist when reviewing pre-2006 forms.

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Trusts executed before the Uniform Trust Code

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- Jonathan A. Levy, *Creditor Claims and the Oregon Uniform Trust Code*, 23 Oregon Estate Planning and Administration Section Newsletter (July 2006).
- *Administering Trusts in Oregon* (Oregon State Bar CLE, 2005). Revision forthcoming.

Once a lawyer is familiar with the provisions of the Trust Code, he or she is in a position to evaluate whether and to what extent something needs to be done about a particular pre-2006 trust. Some trusts will need to be revoked, while an amendment or restatement will suffice for other trusts. Alternatively, a nonjudicial settlement agreement or court proceeding might be appropriate.

Of course, I would recommend amending the trust rather than restating it if any question presently exists about capacity, undue influence, etc. If such a question exists, it is usually more prudent to keep an earlier document that was valid when executed.

Assuming that no such question exists, my recommendation is the same no matter who drafted the original trust. I hasten to add, however, that using someone else's document and trying to review or update it can be a hazardous endeavor. I generally would prefer to use my own form and restate the whole trust rather than just amend it.

The facts of each case will determine whether it's better to restate the whole trust or just make limited amendments to it. Before making a decision, I would first analyze the differences between my prior form and my latest one. If there are substantial changes in the latest form that may be desirable in the client's situation, a restatement is probably most appropriate. If the changes are minor, or don't matter much in the client's situation, an amendment is probably fine. For example, the Oregon UTC's rules on notice, information, and reports may or may not justify the complete restatement of a trust. ■

Section members receive OSB awards

Wesley D. Fitzwater and Robert C. Joondeph were honored at the 2006 Oregon State Bar Annual Awards Dinner on December 7, 2006.

Wes Fitzwater received one of the President's Membership Service Awards in recognition of his work as a co-founder and past chair of the Elder Law Section, his development of law improvement legislation related to elder law, his contributions as one of the editors of the original OSB *Elder Law Handbook (*published in 2000 and revised in 2005), and his many excellent presentations on elder law topics at CLE programs sponsored by the section, OSB, OLI, and other organizations.

OSB President Dennis Rawlinson (L) presents a Membership Service award to Wes Fitzwater.

Bob Joondeph, longtime director of the Oregon Advocacy Center (OAC) and generous author of a number articles for our newsletter related to the ADA and other disability issues, received one of the OSB President's Public Service Awards. Bob received the award for his career in public service, beginning as a VISTA volunteer for legal aid in Klamath Falls and continuing through his leadership of OAC, whose efforts on behalf of people with disabilities have been recognized with a number of community awards for public service. Bob has also been active in the legislature and served on boards and committees to further his public service work.

Bob Joondeph (L) receives a President's Public Service Award from OSB President Dennis Rawlinson.

New Developments in Elder Law

By Cynthia L. Barrett, Attorney at Law

This is the second in a series of columns that highlight trends in the practice of elder law, both locally and nationally, and direct the practitioner to helpful resources, including recent cases, administrative rules, and Web sites.

This issue's topics:

- *Special needs trust restrictions*
- *Guardian/ conservator dispute: Astor estate court orders $2.2 million in attorney fees and costs*
- *CCRC bill proposed by Oregon advocates; CCRC contracts and elder law*

Special needs trust restrictions

At the National Academy of Elder Law Attorneys (NAELA) Fall Institute, held in Salt Lake City, Utah, in November, 2006, the focus was on special needs planning issues in the elder law practice.

One session's presenters described how states are trying to limit special needs trust (SNT) planning and administration. State restrictions on SNTs profoundly affect SNT creation and administration practice. The NAELA presenters contend that state treatment of special needs trusts must be comparable to federal SSI treatment of such trusts, and that state-by-state restrictions can be successfully challenged.

Some states try to treat a special needs trust as a resource, or distributions as countable income, ignoring SSI rules on treatment of trusts. Practitioners should argue that the states should lose federal financial participation (FFP) funds if their state Medicaid rules are more restrictive than federal SSI trust regulation. **Comparability,** not preemption, is the argument to select when challenging state restrictions. Advocates from New York and Wisconsin reported success in beating restrictions on trusts by advocacy against proposed rule changes. One NAELA presenter, Kay Drought from New Hampshire Legal Assistance, reported success challenging New Hampshire's restrictions on SNT distributions in *Appeal of Emily Huff* (N.H. No. 2005-856, Nov. 28, 2006)

Bridget O'Brien Schwartz of Arizona presented a chart comparing SNT restrictions in eight states (not Oregon, unfortunately). Some states restrict purchase of life insurance, annuities, payments to parents, etc. Interstate administration problems can be anticipated —which is why I always find out what state(s) the disabled beneficiary might live in when drafting the trust!

Special needs planning and administration is fascinating—and uncertain.

Guardian/conservator dispute in Astor case generates millions in attorney fees

I have been watching the escalating cost of guardian/conservator cases (locally and nationally) with some interest over the years. Recently, the Brooke Astor dispute in Manhattan devolved to a fight over the lawyer's fees. The main case (104-year-old socialite, and alleged elder abuse by her 83-year-old son) was resolved by agreement this fall, but the 56 lawyers submitted fee petitions for more than $3,000,000. The probate judge approved a smaller amount—only $2.22 million—in early December. See "In Aftermath of the Astor Case, How the Final Fees Piled Up," *New York Times,* Dec. 5, 2006, Section B, P. 3, Col. 1.

New protection proposed for continuing care retirement community (CCRC) residents

Oregon continuing care retirement community residents have put together a consumer protection bill, to be offered in the 2007 legislative session (LC 1217). Retired Oregon City lawyer Jack Caldwell and retired lawyer Edward Allison, with the assistance of retired Lewis and Clark Law School administrator Ann Kendrick, are spearheading the effort to enlist legislative, community, and Bar support for the bill. Former senator and governor Mark Hatfield supports the effort. (I will post the bill number on the Elder Law listserv when Greg McPherson introduces the bill later in January.)

The bill, now being polished by the Legislative Counsel office (LC 1217), will require more disclosure of facility operating expenses, expand annual disclosure to state regulators, and require resident members on facility governing boards. Oregon has little regulation of these popular retirement residences. The regulations have not been changed since 1999, and establish a minimal registration/annual report regime. See ORS 101.010-101.160 and OAR 411-067-0000.

Although the number of residents in the CCRC model of long term care is not great, the residents are sophisticated citizens who know how to use the levers of government to drive greater regulation. As residents of the nonprofit CCRCs set up thirty years ago aged, they saw bankruptcies, poor management practices, discharges of Medicaid-eligible residents, and greatly increased monthly fees threaten their expected security. CCRC residents lobbied

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New developments in elder law *Continued from page 14*

state legislators and regulators, seeking greater protection for their large investments.

However, most states have only cursory regulation of the CCRC: setting up reserve requirements (for the future care obligations set out in the contracts) and financial disclosure to residents so they can better assess the financial strength of the provider. Ohio requires that a resident serve as a member of the governing board of the facility. California has the most extensive set of regulations, providing extensive disclosure to residents, participation of residents in governance, and protection of deposited funds.

For a clear history of recent changes to California's CCRC law, check the Web site for the California Advocates for Nursing Home Reform (CANHR) at **www.canhr.org** In 2006, CANHR sponsored legislation that requires even more financial disclosure, making clearer the process for transferring a resident to a higher level of care—and allows an appeal to a state agency if the resident disagrees with the transfer decision.

Elder law attorneys are finding that their wealthier clients either live in, or request help in evaluating applications for, continuing care retirement communities (CCRC). To serve this part of the client base, the elder law attorney needs to consider particular issues raised by that living arrangement.

The continuing care retirement community (CCRC) contract requires two sorts of financial commitments from residents: a substantial entrance fee (which may or may not be refundable) and hefty monthly fees for the independent apartment. The CCRC offers assisted living and nursing care on-site, but does not guarantee that a bed will be available when needed, and does not guarantee that a particular price will be charged for that more intense service package.

Typical Oregon buy-in communities require an entrance fee ranging from $300,000 to $500,000, and charge monthly fees ranging from a low of $1,200.00 up. Applicants are screened financially and medically, and can face a long waiting list for a desired apartment. Some Oregon CCRCs are operated by large regional nonprofits. The for-profit segment of the CCRC market has been growing nationwide, and will inevitably enter Oregon. There are 14 facilities listed on the registry of CCRCs on the Oregon SPD Web site —five in the Portland area, one in Salem, one in Eugene, and the largest, Rogue Valley Manor, in Medford.

The CCRC admission agreement is developed by the management firm operating the facility, and the consumer may not be able to persuade the facility to alter the form language. The CCRC will accept guarantors for the monthly fees, and some wealthy relatives or domestic partners arrange for a buyin and assume the liability for the monthly fees of a resident. The resident should obtain, or keep existing, long term care insurance. **Most CCRCs will charge nearly market rates if the resident needs assisted living or nursing care.** Some CCRC contracts may guarantee 20 "free" days of nursing care per year, or 40 days lifetime, or set some other limit to expensive care. The CCRC usually does not guarantee a bed, but promises to give the residents priority access to nursing beds. Many CCRCs rent the nursing facility beds to non-CCRC members at full market rates to increase cash flow.

Should a resident run out of money (and if you live long enough in a CCRC, that is a distinct possibility), or should the monthly charges exceed the resident's income, then the facility *does not* have an obligation to keep the resident. Many facilities attempt to keep residents, and have a charitable entity created to pay some charges, but should the resident spend down to Medicaid levels the facility may have the resident discharged. Involuntary discharge from a CCRC for lack of funds has happened, and will happen, and the potential for that unfortunate result should not be disregarded by clients.

In a CCRC nonpayment discharge case, *Seabrook Village v. John Murphy,* 371 NJ Super. 319, 853 A.2d 280 (2004), the appellate court held that New Jersey's CCRC laws required a full hearing and discharge only for "just cause," to be held by the Commissioner of the Department of Community Affairs, or by a state administrative law judge. Mr. Murphy paid an entrance fee of $149,000, and after moving in discovered promotional materials offering the same apartment to others for a $99,000 entrance fee. Mr. Murphy's son was his agent under power of attorney, and had personally guaranteed the contract. Mr. Murphy, through his agent son, sought a $50,000 refund, complained about deficiencies in the care, and refused to pay his $1,290 monthly charge until the dispute was settled.

In *Seabrook Village*, the lawyers met to try to settle the case, and Mr. Murphy agreed to pay his back charges and move if the original unit sold for $149,000. But before a buyer could be found, the facility sent Mr. Murphy's son a 60-day notice of intention to terminate the residency and a statement of account for $47,255.64 in unpaid monthly fees. Seabrook threatened: "You must pay your father's balance by 5:00 p.m. on April 16 or pick him up. If you do not, we will drive him to your home that evening... ."

Will Oregon protect the CCRC resident from eviction under circumstances like those in *Seabrook Village*? I doubt it. We need more CCRC resident protection, and the 2007 proposed bill, LC 1217, to be introduced by Greg McPherson, will be a start. ■

Resources for elder law attorneys

EVENTS

Internet for Lawyers:
Search Strategies for the Legal Professional (a.m.) and
Investigative Research (p.m.)
Two half-day OSB CLE Seminars
February 15, 2007/9:00 a.m. to 4:00 p.m.
www.orbar.org

Probate Primer (a.m.) and
The Latest in Probate Practice (p.m.)
Two half-day OLI CLE Seminars
March 16, 2007, 2006/8:25 a.m. to 4:15 p.m.
Oregon Convention Center; Portland
law.lclark.edu/org/oli

Fundamentals of Elder Law
NAELA Pre-Symposium Program
May 2, 2007
Cleveland, Ohio

2007 NAELA Symposium
May 3 to 6, 2007
Cleveland, Ohio
Registration deadline: March 16, 2007
www.naela.com

Elder Law Section unCLE Program
May 4 and 5, 2007
Eugene
Details in April *Elder Law Newsletter*

INTERNET

Elder Law Section Web site
www.osbar.org/sections/elder/elderlaw.html

The Web site has useful links for elder law practitioners, past issues of the *Elder Law Newsletter,* and current elder law numbers.

Elder Law Section Electronic Discussion List

All members of the Elder Law Section are automatically signed up on the list, but your participation is not mandatory.

How to use the discussion list
Send a message to all members of the Elder Law Section distribution list by addressing it to: eldlaw@lists.osbar.org.

Replies are directed by default to the sender of the message ONLY. If you wish to send a reply to the entire list, you must change the address to: eldlaw@lists.osbar.org, or you can choose "Reply to all."

PUBLICATION

Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers
ABA Commission on Law and Aging and American Psychological Association

With the coming demographic avalanche as the Boomers reach their 60s and the over-80 population swells, lawyers face a growing challenge: older clients with problems in decision-making capacity. While most older adults will not have impaired capacity, some will. Obvious dementias impair decision-making capacity—but what about older adults with an early stage of dementia or with mild central nervous system damage? Such clients may have subtle decisional problems and make questionable judgments troubling to a lawyer.

Price: $25.

Order on the American Bar Association Web site:
www.abanet.org/aging/publications/publicationslistorder.shtml#legalservices