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Ethical issues can challenge elder law attorneys

By Jeffrey D. Sapiro, OSB Disciplinary Counsel, and Mary A. Cooper, OSB Assistant Disciplinary Counsel

Oregon's population is getting older. In the last decade, the number of Oregonians over the age of 65 increased by almost 17 percent. In the next decade (according to estimates by Oregon's Office of Economic Analysis), the number of elderly Oregonians is expected to increase by 57 percent—four times that of the overall population. The demand for lawyers with elder law expertise will rise accordingly, and even non-specialists will find themselves representing older clients who need advice and assistance with estate planning, conservatorship and guardianship proceedings, probate administration, and other elder law issues. This article is intended to highlight some of the ethical issues that frequently arise in this area.

Ethics complaints about elder law practitioners (unlike complaints in the domestic relations and criminal defense areas) are not a disproportionately large portion of the complaints submitted to the Oregon State Bar. However, over the years we have noticed certain recurring fact patterns and situations. The rules most often implicated in elder law disciplinary complaints are those that prohibit conflicts of interest. Perhaps this is because this area of practice often involves multiple clients, concerned family members and friends, and fiduciaries, any of whose respective interests may differ.

Multiple-client conflicts of interest

Under Rules of Professional Conduct (RPC) 1.7(a), a conflict of interest exists when a lawyer undertakes or continues to represent two or more clients whose interests are directly adverse to one another, or when there is a significant risk that the representation of one of more clients will be materially limited by the lawyer's responsibilities to another client.

Concurrent-client conflicts have a nasty habit of sneaking up on a practitioner. Part of the problem is that a lawyer may think she is representing only one client, but if she acts in such a way that other involved individuals can reasonably (and do) conclude that she also is representing their interests, an attorney-client relationship with these other persons may be inferred from the circumstances. See, *In re Weidner*, 310 Or 757, 801 P2d 828 (1990).

By way of example, we often see the following situation: an elderly person has lost some cognitive capacity and ability to function and his well-meaning family or friends ask the elderly person's long-time lawyer for assistance in seeking the appointment of a conservator or

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Cases published in the Disciplinary Board Reporter can be found on the Oregon State Bar Web site.

guardian. The lawyer considers herself the elderly person's attorney and RPC 1.14, the rule addressing a client with diminished capacity, permits a lawyer to act for such a client. See, also, *OSB Legal Ethics Opinion No. 2005-41*. In what she genuinely considers her client's best interests, the lawyer files a petition to appoint one of the family/friends as the client's conservator or guardian. In filing the petition, the lawyer becomes attorney of record for the prospective fiduciary—and therein lies the conflict. The legal interests of the elderly client in retaining control of his own affairs are (viewed objectively) adverse to the legal interests of a prospective fiduciary in removing some or all of that control. By representing both the prospective protected person and the prospective fiduciary, the lawyer has inadvertently violated RPC 1.7(a). See, e.g. *In re Misfeldt,* No. 09-121, 24 *Disciplinary Board Reporter* __ (2010). Thus, in situations involving an elderly person and other parties who seek to direct the representation, the lawyer is well advised to identify the client—both in her own mind and to all interested parties—as explicitly as possible, and preferably in writing. Otherwise she might inadvertently find herself representing multiple clients with adverse legal interests. The *ABA Formal Ethics Opinion Op. 96-404* (1996) contains a comprehensive discussion of the various ethics issues that can arise under this type of scenario.

Better alternatives are to encourage or support an appropriate family member or friend to file a petition through separate counsel; file a petition but state clearly therein that the lawyer is doing so for the elderly client pursuant to RPC 1.14 and is not representing the prospective fiduciary; or contact a professional guardian or conservator to initiate the filing.

Unpleasant surprises can also occur when one represents a married couple. In *In re Freudenberg,* 20 *Disciplinary Board Reporter* 190 (2006), an elderly couple's adult son retained a lawyer to represent the couple's interests in estate and Medicaid planning. The wife was residing in a long term care facility, and the husband was spending a significant part of the couple's income paying for her care. Although the lawyer later said that he was representing only the husband, he did not make that clear to the adult son, and his file identified both wife and husband as clients. Thus, when the lawyer filed a petition on the husband's behalf asking for support payments and a transfer of assets from the wife pursuant to ORS 108.110, he was acting contrary to his other client's (wife's) objective legal interests.

Of course, there have been other multiple-client conflicts cases in which the adversity between clients was more sinister—that is, in which one client sought to defraud or take advantage of an elderly client and the lawyer was caught up in the process. In *In re Lafky*, 17 *Disciplinary Board Reporter* 208 (2003), a lawyer defended a client (Client A) accused of financial abuse of elderly persons. While that matter was still pending, Client A asked the lawyer to represent an elderly man (Client B)—previously unknown to the lawyer—and to create documents that named Client A the successor trustee of Client B's living trust. The lawyer undertook the representation and suggested to Client B that a relative would be a more appropriate successor trustee, but ultimately drafted the trust as requested, despite the obvious adversity between the clients' respective interests. On the one hand, Client B was entitled to know (and the lawyer was ethically required to tell him) all significant facts known to the lawyer about the qualifications of, and any risks associated with, the person Client B had chosen to serve as his successor trustee. On the other hand, Client A had a right to confidentiality, which required the lawyer to preserve confidential and secret information concerning Client A's financial elder abuse case. The conflict was plain and led to significant injury when Client A predictably misappropriated some of Client B's funds.

Due diligence and competence

Of course, whenever a person purports to speak for an elderly client in setting the goals of a representation, the lawyer should be alert to a possibly controlling or even abusive relationship between that person and the client herself. Lawyers who rely entirely on another person for information concerning an elder person's mental capabilities and goals may not be rendering competent services to the client. For instance, in *In re Zanotelli,* 23 *Disciplinary Board Reporter* 124 (2009), a lawyer was retained by an elderly couple to revoke the wife's powers of attorney and modify her estate planning. If the lawyer had made sufficient inquiry, he would have learned that the

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wife (who was significantly older than husband) suffered from dementia, that her husband was a recently convicted felon, that the marriage was only three weeks old, and that the husband's and wife's interests were adverse. The lawyer in that matter not only had a concurrent-client conflict of interest, but also committed a competence violation (RPC 1.1).

Similarly (although it did not involve a conflict), in *In re Nawalany*, 20 *Disciplinary Board Reporter* 315 (2006), a lawyer was called on an emergency basis by a person he did not know to draft testamentary documents for a 93-year-old woman suffering from dementia and congestive heart failure. Unaware that the referring party operated an adult foster home to which the client had been transferred only a few days earlier, the lawyer created a will that left all of the client's possessions (including her house) to the foster home operator and named the operator's 19-year-old son as personal representative. By law, the foster home operator was not allowed to accept gifts from the facility's residents. The will was later invalidated when a judge found that the home operator had used undue influence. The operator also was criminally prosecuted and convicted of criminal mistreatment. Although the lawyer's participation in the scheme was unwitting, his failure to make sufficient inquiry and to devote sufficient time with the client to determine her mental state, the extent of her affairs, and her relationships with the beneficiaries of the testamentary documents he was drafting, resulted in a competence violation under RPC 1.1. See also *In re Britt,* 20 *Disciplinary Board Reporter* 100 (2006), involving a similar fact pattern.

Self-interest conflicts

Conflicts of interest do not have to involve multiple clients. Sometimes a lawyer's own self-interest will pose a significant risk of materially limiting the lawyer's responsibilities to his clients. RPC 1.7(a)(2). This can occur in elder law situations when a client asks a lawyer to draft a testamentary document that includes the lawyer as a beneficiary. Oregon's disciplinary rules have long prohibited lawyers from soliciting substantial gifts (including testamentary gifts) from clients, and also from preparing instruments on behalf of clients that give the lawyer or a person related to the lawyer any substantial gift—unless the clients and the lawyers are relatives or otherwise in a close family relationship. See, RPC 1.8(c) and its predecessor DR 5-101(B). However, the Bar still sees lawyers running afoul of this prohibition, usually by misconstruing what constitutes a "substantial gift." In *In re Schenck,* 345 Or 350, 194 P3d 804, mod on recon 345 Or 652 (2008), a lawyer prepared a will for an elderly client that included a gift of furniture to the lawyer's wife and also made the wife a residual beneficiary. The lawyer claimed that the furniture was only worth $1,000 and the residual interest was unlikely to result in any benefit, so the gift was therefore not substantial. The Supreme Court disagreed, found a violation, and sanctioned the lawyer.

The lawyer in the Schenck case had another personal conflict of interest in that he had borrowed money from his elderly client. The loan was originally secured by a trust deed but the lawyer renegotiated it several times, on terms increasingly favorable to the lawyer. After the client died, the lawyer claimed that the client had forgiven the loan entirely prior to her death. The Supreme Court found that, by borrowing money from the client and then renegotiating the loan, the lawyer engaged in an improper business transaction with a client. See, RPC 1.8(a) for the current rule.

Fees

Akin to the self-interest conflict cases are complaints about lawyers who have charged elderly persons (or their estates) illegal or clearly excessive fees. A fee is "illegal" under RPC 1.5(a) if it violates a statute. Lawyers who accept attorney fees from a probate estate, conservatorship, or guardianship without first obtaining court approval do so in contravention of ORS 116.183 and ORS 125.095, and are therefore collecting an illegal fee. See, *In re Alstatt*, 321 Or 324, 331-34, 897 P2d 1164 (1995). A fee is "clearly excessive" within the meaning of RPC 1.5(a) if after a review of the facts a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. See RPC 1.5(b). Fees have been found to be clearly excessive in a probate case when the lawyer claimed fees that were grossly disproportionate to the estate's assets (fees of $100,000 for an estate worth only $132,000), *In re Stauffer,* 327 Or 44, 956 P2d 967 (1998); when lawyers billed the estate for time they spent defending against objections to their fees, *In re Potts*, 301 Or 57, 718 P2d 1363 (1986); and when the lawyer billed for hundreds of hours spent on an elderly client's behalf before her death, but much of that time did not involve legal work, *In re Isaak,* 23 DB Rptr 91 (2009).

Conclusion

There are other ethical issues that face the elder law practitioner. However, those described above repeat themselves on a regular basis. Because elder law often involves a lawyer's relationship not just with the clients, but with concerned family members and friends who want to speak for, or speak up for, the clients, it perhaps is true that there are more "moving parts" in an elder law practice than in some other areas of the law. This is all the more reason for a practitioner to analyze carefully the "who is the client" question and the other authorities cited above before getting too far into any representation. ■

Dealing with deadlines

By Dady Blake, Attorney at Law

The recent Supreme Court case In Re Hartfield *described on page 9 originated in the Multnomah County Probate Department. In light of that case, elder law attorney Dady Blake revisited that court's view on attorney-court communications and the very important issue of deadlines. The following information is based on her interview with Helga Barnes, Team Leader of the Multnomah County Probate Department*

Helga Barnes, Team Leader of the Multnomah County Probate Department, gets a daily report that lists all case matters that are late in some respect. She then determines what needs to be done in each case—whether courtesy notices, show-cause orders, or other action by her or the probate staff.

Court Deadlines

Here are some of the court's trigger points at which court-appointed fiduciaries and attorneys will receive notice from the court unless the court has received prior communication:

- 30 days from date of filing: if no order or objections have been filed, you'll receive notice from the court requesting the filing of a limited judgment of appointment or closing.
- 30 days from the date of a court order an acknowledgment of restricted asset (for each account) is due; if it is not filed, you'll receive a show-cause order.
- 60 days from the date of appointment of fiduciary for estates—or 90 days for conservatorship—an inventory is due. If it is not filed, you'll receive a show-cause order.
- 60 days from the anniversary date of appointment, an accounting is due. If it is not filed, you'll receive a show-cause order.
- 30 days from the anniversary date of the appointment of a guardian, an annual guardian's report is due. If it is not filed, you will receive a courtesy notice. If the guardian's report is not filed within 30 days of the courtesy notice, you'll receive a show-cause order. Ms. Barnes notes that if there is more than one guardian, all must sign.
- 30 days from the date of reaching the age of majority (for conservatorship for a minor), a final accounting is due. If it is not filed, you'll receive a show-cause order.

Common mistakes in handling deadlines

#1: No effective tickler system

Many attorneys appear to use the court's tracking (or what the court calls its "pend" system) as their own tickler system. All attorneys should have a tickler system of their own and not rely on the court's system. When you get a notice from the court, it is because your client is already late.

#2: Failure to communicate with court before deadlines

The court understands that often the court-appointed fiduciary can't meet the deadlines. In these cases, the court wants to hear from you before the deadline.

The best way to communicate with the court is by phone. In Multnomah County, call Ms. Barnes directly at 503.988.3538. If she is not available, it is appropriate to call the department's probate auditor, Deborah Thompson at 503.988.3545. Again, communication should occur before the deadline.

Most matters can be extended by communication with the court. However, once you have received notification of a show-cause order, the court will not allow extension by phone or letter. You will be required to file a motion and order for extension of show-cause hearing date and pay a $10 fee. This motion/order must be filed a full week before the show-cause date and you will be allowed to file only one motion/order for extension for any given show-cause hearing date.

When a client is "missing in action" (MIA), attorneys often are reluctant to contact the court. There are obvious ethical concerns, and often there isn't any way to inform the court when you expect to have an accounting or an inventory filed. The court understands this. In these situations, it may be appropriate to use the court to compel your MIA client to shape up. The court realizes that many attorneys who

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show up for a show-cause hearing are doing so not because they have failed to inform the court, but because their clients have not kept them informed.

On this note, I'll add that Ms. Barnes prefers that you have your client appear at any show-cause matter. The show-cause order is issued to both the attorney for the court-appointed fiduciary and the fiduciary. Both parties have an obligation to appear.

#3: Treating "courtesy notices" casually

Ms. Barnes reports she has the frequent impression that attorneys who receive courtesy notices do not take them seriously. When you receive a courtesy notice, your client is already late. If action is not taken in the indicated time period, you and your client will both receive a show-cause notice. Again, the court will be less flexible in dealing with extensions once it has issued a show-cause notice.

How to avoid problems

Counties vary in their approach to handling deadlines. Although most of these deadlines are statutory, how and when a court reacts to a missed deadline will vary. To avoid problems:

- Have a tickler system and use it religiously.
- Keep the court informed.
- Don't wait until something is late—be proactive.
- Contact and inform the court before you've missed the deadline.

Mediation deadlines for Multnomah County only

Typically, the process starts after filing of objections to a matter before the court. The court will then send out an initial notice that states that an objection or other documents have been filed which place the case at issue and may be subject to mediation pursuant to SLR 9.016 & 12.045. Some deadlines thereafter include:

- 21 days after court's notice of mediation, the court will send out an order to require mediation and set a hearing. During the 21-day period, attorneys have communicated to court by letter or telephone call and have notified the opposing party. The important thing is to take immediate action to resolve the issue before court. Any objections to mediation must be served on the opposing party within this time frame (i.e., 21 days of service of court notice).
- If no action has been taken on mediation 15 days after the order to require mediation and set a hearing (unless otherwise extended by communication with court), the probate judge will decide the "fate" of the case and issue an order for mediation (or hearing). Most cases will be required to go to mediation.
- 16 days after the order requiring mediation, the court will issue a show-cause order if the parties do not set mediation and a hearing date (unless otherwise extended by communication with the court).

Ms. Barnes very much appreciates that the mediation process is new and the court's staff as well as attorneys before the court still have training wheels on. She thanks you for your patience and commitment to trying this new program. As with all matters, keep the court informed when problems arise with meeting deadlines. Prior to show-cause notice, deadlines may be extended through communication with the court before the deadline.

In addition, the court would appreciate your general comments on the mediation program. Send your comments to Helga Barnes at her email address at Helga.M.Barnes@ojd.state.or.us. (Do not use this address for case-specific communications.) ■

Dady Blake is a Portland-based Elder Law Attorney and member of the Elder Law Section's newsletter advisory board. She can be reached at dady@q.com.

OSB resource for practice-management systems

Free and confidential assistance with office systems is available to all Oregon lawyers through the Professional Liability Fund (PLF) Practice Management Advisor (PMA) program.

Practice management advisors Dee Crocker, Beverly Michaelis, and Sheila Blackford answer practice-management questions and provide information about effective systems for conflicts of interest, mail handling, billing, trust accounting, general accounting, time management, client relations, file management, and software. View the wide range of services available at **www.osbplf.org.**

Contact the practice management advisors at 503.639.6911 or 800.452.1639 or by e-mail at deec@osbplf.org, beverlym@osbplf.org, or sheilab@osbplf.org.

Income cap trusts and Medicaid eligibility

By Andrea Ogston, Attorney at Law

Andrea Ogston is a staff attorney at Legal Aid Services of Oregon where she focuses on cases that affect elders and housing law.

There has been a lot of talk about health care reform, but little of it has included a comprehensive discussion about the cost of long term care. The average life span has been increasing for many years and few people are able to plan adequately to cover the increasing costs of the long term care they are going to need. Even those individuals with significant monthly income can find themselves forced to apply for Medicaid to pay for their long term care. Under current federal law, a Miller trust (or income cap trust) is used to help higher-income individuals qualify for Medicaid. 42 USC 1396p(d)(4)(C). This type of trust can only be used to qualify an individual who needs Medicaid to help pay for his or her long term care costs.

If you find yourself with a client who needs Medicaid to help pay for long term care services, but his or her gross income exceeds three times the federal benefit rate (FBR) for SSI—$674 per month in 2010—the client will need your help to establish an income cap trust (ICT). The client must meet all of the other resource requirements and also qualify under one of the covered service priority levels for Medicaid eligibility. For an individual, this means he or she can have no more than $2,000 in resources—or $3,000 for a couple. Not all resources are counted and you should refer to the SSI rules for excluded resource at **https://secure.ssa.gov/apps10/poms.nsf/lnx/0501110210**.

Assess need and identify trustee

To assess whether a client needs an ICT, identify the client's total gross monthly income. Medicaid uses the same exclusions from income as the SSI program in the determination of initial eligibility.The list can be found at CFR 416.1103 et seq. (See **www.ssa.gov/OP_Home/cfr20/416/416-1103.htm**.) If your client's countable gross income is above $2,022 per month it is likely he or she will need an ICT. Note that income that may be excluded for determining eligibility may be used in calculating any liability the client will have for long term care services provided.

An example of an ICT can be found at **www.dhs.state.or.us/spd/tools/program/osip/incap.pdf**.

Identify someone who is willing to function as the client's trustee. The client cannot serve as the trustee and if you cannot find someone willing to serve, your client may not be able to set up an ICT. Another reason to find someone willing to serve as the trustee is that this individual may also be able to provide you with the information you need about your client's finances, which makes the process move much more smoothly. If your client does not have someone who is willing to serve as a trustee, you will need to look at community resources. It may be difficult to find an appropriate agency willing to act as the trustee.

In reviewing your client's financial resources, ask whether or not he or she has a burial or funeral plan in place. OAR 461-145-0540(10)(c)(E) provides that the distribution plan can include deductions for a burial up to $5,000. Medicaid, Social Security, or the Department of Veterans Affairs do not generally cover funeral expenses

Ask also whether or not your client has any outstanding medical debts or income taxes that need to be paid.

Drafting Schedule B

The majority of the attorney's work, after assessing income and resource issues, is drafting what is alternately called the distribution plan or Schedule B.

Schedule B is usually attached to the trust as an exhibit. This is for convenience in the event that changes are needed to the schedule should the client's finances change. The order for distributing a client's income is set forth at OAR 461-145-0540(9)(c)(A)-(I) and includes the items listed below in their order of payment.

- **Personal needs allowance and applicable room and board standard**

  This amount varies depending on the type of facility in which the Medicaid applicant resides and whether he or she is blind. The personal needs allowance (PNA) for nursing home residents is $30 per month, although it is $90 for veterans who are eligible for VA benefits based

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on unreimbursed medical expenses and whose benefits are actually reduced to $90 per month. The PNA for community-based care is $152 per month for individuals whose income exceeds the FBR for SSI plus $1.70. The PNA is either paid directly to the resident or is used to purchase clothing or incidentals for the resident. These numbers are updated regularly on the Elder Law Section's Web site.

Nursing home residents do not pay room and board. Individuals living in community-based care must pay room and board of $523.70, which is paid directly to the facility.

- **Reasonable administrative costs of the trust**

  These costs, which are not to exceed a total of 450 per month, must cover bank service charges, check printing fees, copy charges, postage, income taxes attributable to trust income, preparation of tax returns, and any trustee fee. Guardianship or conservator fees approved by the court can be distributed from the trust as administrative fees but cannot exceed $50 a month.

- **Community spouse and family monthly maintenance needs allowance**

  The distribution plan may include a monthly payment from the trust (referred to as the minimum monthly maintenance needs allowance or MMMNA) to the Medicaid recipient's spouse to bring the spouse's monthly income up to a minimum standard of $1,822—or if there are excessive housing costs up to a maximum of $2,739. The Senior and Persons with Disabilities Department (SPD) can authorize a payment in excess of $2,739 if there are exceptional circumstances that result in significant financial distress, or pursuant to a court order. To calculate the MMMNA, the caseworker uses a worksheet found at http://dhsforms.hr.state.or.us/Forms/Served/SE0450.pdf

  To calculate the MMMNA for a community spouse, first total the mortgage or rent, property tax, homeowner's insurance, and supplemental nutrition assistance program's (SNAP) utility allowance of $397 (even if the only utility being paid is for a phone). From this total subtract $547 (the OSIP shelter standard). What remains is called the excess shelter allowance, which is added to the minimum spousal allowance of $1,822 to reach the MMMNA.

  The community spouse's income is then subtracted from the MMMNA to determine the amount of the client's income that can be diverted. SPD commonly calls this the LDS or "less diverted to spouse" support. A more thorough breakdown of this calculation can be found at OAR 461-160-0620(3). Deductions are also permitted for dependent children living in the home with a community spouse as long as their income is below $1822 per month. Note that under current law, this rule applies only to individuals who are lawfully married. A divorced spouse or domestic partner cannot receive an LDS payment

- **Medicare and other medical insurance premiums**

  The distribution plan should account for payment of all the Medicaid recipient's health insurance premiums, in addition to those of the spouse that are not paid by Medicaid or a third party. Medicare Part B premiums will be paid by the state once the applicant qualifies for Medicaid (usually two months after the applicant qualifies)

  There is no deduction for Part B premiums for individuals who are receiving waivered services, because SSA will reimburse the client for the premiums that are withheld while the state is processing the payments it owes. The Part B premium effectively reduces a client's PNA for the first month or two. Nursing homes residents have insufficient PNA funds to pay the Part B premium, so it should be listed under health insurance premiums in the trust distribution plan. The trustee must pay the Part B premium until the State takes over but for the vast majority of clients, the premium is withheld from the client's SSA benefits. This may change over the next year if there continues to be no COLA increase, but Part B premiums continue to rise and approach $152 per month.

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- **Other incurred medical costs as allowed under OAR 461-160-0030 and 461-160-0055**

  Nearly all medical expenses incurred by the client prior to Medicaid eligibility can be built into Schedule B. If they cannot be paid off in one month, they can be built into the schedule and paid over a period of time. This sometimes requires the creation of more than one schedule that reflects the payment of medical costs. Ongoing medical expenses for the client, spouse, and dependent child not covered by Medicaid or a third party can also be built into the schedule.
- **Contributions to reserves or payments for child support, alimony, and income taxes**
- **Monthly contributions to reserves or payments for the purchase of an irrevocable burial plan with a maximum value of $5,000**
- **Contributions to a reserve or payments for home maintenance if the client meets the criteria of OAR 461-155-0660 or OAR 461-160-0630**

  If a client plans to return home, the Schedule B can include payments to maintain the home. The inclusion of this allowance requires verification from a health care provider that the client is likely to return home within six months.
- **Patient liability not to exceed the cost of waivered services or nursing facility services**

After the above distributions and reserves, the trustee pays directly to the care facility either the rest of the Medicaid recipient's monthly income, or the cost of services provided for his or her care, whichever is less. For clients who live in a community-based care facility, this is in addition to the room and board payment of $523.70. Typically, a trustee will write one check which includes both amounts.

Finalizing the income cap trust

Before having the trust signed and made effective, the distribution plan should be submitted to the caseworker handling the client's Medicaid eligibility portion of the application. A caseworker can be an invaluable resource in negotiating any final changes that need to be made to the distribution schedule.

The effective date for Medicaid is normally the first day of the month in which the trust is signed. OAR 461-180-0044.

Advising the trustee

Once the distribution plan has been approved, the trustee should apply for an employer identification number for the trust. Some banks, but not all, will require an EIN. Once the EIN has been established, the trustee should open a bank account for the trust.

The attorney's job is completed with a letter to the trustee explaining how the monthly distribution plan works in practice, and advising the trustee on his or her obligations.

Health care reform

Finally, the Patient Protection and Affordable Care Act, Pub. L. 111-148, does include a provision for a voluntary, government-run long term care insurance program that will be funded through a payroll tax. The program is known as Community Living and Assistance Services and Supports (CLASS) (Section 3203 of the PPACA) and it will include an average cash benefit between $50 and $75 per day to help pay for long term care services. However, it will be at least six years before any one realizes a benefit from CLASS. ■

Rule change will affect income cap trusts

An upcoming administrative change will affect distribution plans for income cap trusts. It will also affect the calculation for the community spouse income allowance in some cases

Effective November 1, the Oregon Department of Human Services (DHS) is changing how the Medicare Part B premiums will be paid for some of the people who receive Medicaid assistance. The Medicaid program has been paying the Medicare Part B premiums for Medicaid recipients who would otherwise pay the Part B premiums through automatic deductions from Social Security or Railroad Retirement benefits or by making quarterly premium payments. This will change for most Medicare beneficiaries, but not for the ones with the lowest incomes and not for those who have a patient/service liability that is lower than the amount of their Medicare Part B premium.

Beginning November 1, most Medicare beneficiaries who become eligible for Medicaid assistance will continue to have the Part B premiums paid through automatic deductions. The Medicaid worker will include a deduction in the amount of the Part B premium when the patient/service liability is calculated. DHS is sending a letter to Medicare beneficiaries who already receive Medicaid assistance and who are affected by the change, explaining that the amount of their patient/service liability will be reduced in November and that their Social Security checks will be reduced by the same amount in December. ■

Court decision underlines importance of following rules

By Claudia Burton, Trial Court Judge, Marion County Circuit Court

In its September 23, 2010 decision *In Re Hartfield*, the Oregon Supreme Court approved a reprimand for an attorney that arose out of the attorney's handling of a conservatorship matter.

The attorney failed to file an inventory and then failed to appear at a show-cause hearing. Subsequently, he appeared and told the court the protected person had passed away. He was ordered to file an inventory and final accounting. He failed to do so and failed to appear for a subsequent show-cause hearing. The court then issued a show-cause order for contempt, at which the attorney also failed to appear. The court then removed the conservator and appointed a successor, and reported the attorney to the Bar.

The Supreme Court found that counsel's failure to file required documents and appear for show-cause hearings "created an unnecessary burden on court resources." In addition, the inaction of the attorney made it necessary for the court to appoint a successor conservator, which resulted in additional legal fees to the estate. The Supreme Court found that that the attorney's conduct prejudiced the administration of justice.

The case is, of course, a reminder of the importance of following statutory deadlines and responding to court notices. Court time spent chasing down delinquent filings is time not spent processing accountings and other documents that were timely filed and are awaiting approval. As courts struggle with staff cutbacks and furloughs, the burden of multiple reminders to counsel that filings are due—not to mention holding show-cause hearings—becomes proportionally greater. Attorneys should keep in mind the lesson that failing to meet statutory deadlines and respond to notices can constitute conduct which is prejudicial to the administration of justice.

A transcript of the court's decision can be found online at **www.publications.ojd.state.or.us/supreme.htm#sept10**. ■

Marion County Circuit Court memo on special needs trusts

On August 5, 2010, Judge Claudia Burton published a memo to inform practitioners how, as a general rule, the Marion County Circuit Court will treat petitions to create special needs and income cap trusts. Judges, of course, maintain discretion to make appropriate determinations based on the circumstances of individual cases.

The text of the memo is as at right.

1. Pursuant to ORS 125, the court may authorize either a conservator, or a special limited conservator, to create a trust, including a special needs trust (SNT). ORS 125.440(2), 125.650(4), (5). In addition, the court may create the trust without the appointment of a conservator pursuant to ORS 125.650 (1) and (5). If a protective proceeding already exists, the fiduciary (or other interested person) may petition for creation of the trust within the protective proceeding and a new file is not required. If there is no protective proceeding, a new file is required; i.e., the court will not authorize creation of an SNT as a distribution vehicle in a decedent's estate or personal injury case.
2. A new petition to create a SNT is a Chapter 125 proceeding and Chapter 125 filing fees apply. (If you believe there is authority other than Chapter 125 for the court to create a special needs trust, you will need to clearly cite the authority in your petition.)
3. All notice provisions of Chapter 125 must be complied with. Pursuant to ORS 125.060(2)(m), the court will require notice to any relevant benefit-paying agency; typically DHS and/or Social Security.
4. Unless it is a small amount of money, the court will require an ongoing conservatorship with normal conservatorship protections, ie fiduciary and fiduciary's attorney can't be paid without court approval, annual accountings in UTCR 9.160 form, and bond. Here is the court's reasoning: generally these are funds that normally would be in a conservatorship (e.g., developmentally disabled person receives personal injury accident settlement). The only reason the funds are going to a trust rather than conservatorship is to achieve eligibility for some program. We know from experience that fiduciary misappropriation of funds is a common problem. The court is not prepared to strip a protected person from the protection they would otherwise have against misuse of their funds in order to qualify them for public benefits. In addition, the SNT takes funds that otherwise would replace public funds or be taken by a public benefit agency to fund services. If the court allows those funds to be diverted improperly by a fiduciary then the public is adversely affected.
5. The court will require a complete copy of the trust approving attached to the order as Exhibit A. The order should specify that the trust is approved in the form set forth in Exhibit A. ■

Major accomplishments of the Elder Law Section in 2010

By Sylvia Sycamore, Elder Law Section Chair

The Elder Law Section Executive Committee meets for about three hours every other month with the aim of developing activities that support all Section members in the practice of elder law.

Continuing education programs

The most important of Section activities is the sponsorship of continuing legal education events. For many years, the Section has presented a day-long OSB-sponsored CLE program specifically devoted to elder law issues. It is held at the Oregon Convention Center and is open to anyone eligible for OSB presentations. The traditional date is the first Friday in October, and this year's October 1 CLE, *Elder Law Roundup: Substance and Practice* reinforced the Section's reputation for CLE excellence.

Approximately six years ago, the Section started a new tradition: the unCLE program, held each May in Eugene. Section members are given priority to attend a limited-seating, day-long series of workshops with peers, where those similarly engaged in the practice of elder law discuss, question, debate, and generally hash out issues of importance with their colleagues.

This year, recognizing that not all practitioners can easily attend events in Portland or Eugene, the Section offered two CLE presentations in other parts of the state.

On October 14, Penny L. Davis of The Elder Law Firm traveled to Medford for a 1½ hour presentation to the Southern Region Estate Planning Council: *Medicaid Eligibility Issues: Eligibility Issues in Relation to Long Term Care.* Elder Law Section members and others interested in the topic were in attendance.

On October 26, Steve Owen of Fitzwater Meyer LLP traveled to Bend to present *Elder Abuse: Recognition and Responses* at a noontime CLE program sponsored by the Deschutes County Bar Association.

Creating and monitoring legislation

Executive Committee members help to develop new legislation, critique and revise existing laws, and review legislation proposed by other entities, with the goal of ensuring that Oregon laws are clearly written and are of benefit to the clients we serve.

This year, the Section has been actively involved in amending ORS 125.012, to clarify terms and procedures necessary to protect confidential medical information filed by the Department of Human Services in protective proceedings.

The Section also actively engaged in negotiations on amendments to ORS 114.675, attempting to ensure fairness and common sense in the application of the new spousal elective share laws, when applied to decedents' estates which establish special needs trusts for Medicaid beneficiaries.

The *Elder Law Newsletter*

The Section continues to produce and deliver four newsletters every year, once a quarter. An incredible amount of work behind the scenes goes into this project, from developing each edition's theme, to rounding up a sufficient number of writers, to editing and final production. This year's newsletter subcommittee members are: Dady K. Blake, Hon. Claudia M. Burton, Penny Davis, Brian Haggerty (Chair), Prof. Leslie Harris, Phil Hingson, Leslie Kay, Karen Knauerhase, Daniel Robertson, and Prof. Bernard F. Vail. The editor is free-lancer Carole Barkley. None of them get anywhere near the recognition deserve, and many of us just take the online arrival of the newsletter for granted. Each of us, on reading this, should post a quick "thank you" on the Section discussion list for the dedicated work those committee members have done this year.

Other notable accomplishments

The Section provided packets of information about the Elder Law Section and the practice of elder law for all interested new practitioners when they became members of the Oregon State Bar.

The Section volunteered Geoff Bernhardt to the OSB as "on-air talent" for a video produced for the Bar's *Legal Links* television show.

The Section made cash contributions to The Campaign for Equal Justice and to the Oregon Minority Lawyers Association.

The Section is in continuing discussion about useful ways to reach out to the Hispanic community and to attorneys who serve elders in that community. ■

Important elder law numbers

as of
October 1, 2010

Supplemental Security Income (SSI) Benefit Standards	Eligible individual.....$674/month Eligible couple $1,011/month
Medicaid (Oregon)	Long term care income cap.....$2,022/month Community spouse minimum resource standard ..... $21,912 Community spouse maximum resource standard .....$109,560 Community spouse minimum and maximum monthly allowance standards .....$1,822/month; $2,739/month Excess shelter allowance ..... Amount above $547/month Food stamp utility allowance used to figure excess shelter allowance .....$397/month Personal needs allowance in nursing home.....$30/month Personal needs allowance in community-based care .....$152/month Room & board rate for community-based care facilities..... $523.70/month OSIP maintenance standard for person receiving in-home services.....$675.70 Average private pay rate for calculating ineligibility for applications made on or after October 1, 2010 .....$7,663/month
Medicare	Part B premium ..... $96.40/month* Part B deductible..... $155/year Part A hospital deductible per spell of illness.....$1,100 Part D premium: .....Varies according to plan chosen Skilled nursing facility co-insurance for days 21-100 .....$137.50/day * For those already enrolled. $110.50 for new enrollees. A person whose income is more than $85,000/year will pay a higher premium.

Bar to implement mentoring program for new lawyers

By M. Kay Pulju, Oregon State Bar Communications Director

The issue of how law students make the transition from school to the legal profession has long been a concern among Oregon State Bar (OSB) leaders. Many elements of a successful law practice are difficult to address in a law school setting, leaving new lawyers with a steep learning curve as they launch practices.

The Oregon Bench and Bar Commission on Professionalism learned of innovative new-lawyer training programs implemented in Utah and Georgia to much acclaim, and opened discussion of a similar model in Oregon. In early 2010, Chief Justice Paul De Muniz and OSB President Kathy Evans agreed to make this a priority, and formed a task force chaired by Eugene attorney and former OSB President Gerry Gaydos.

At this point, the court and OSB appear poised to adopt and implement the program for incoming lawyers beginning in May 2011.

Although the task force has not yet issued its recommendations, the general concept is clear. The program would assign an experienced mentor to most newly admitted Oregon lawyers. Together they would establish a set of tasks, some required and some elective, to be completed during the new lawyer's first year of membership in the OSB. During this first year, the new lawyers would be fully licensed to practice law, and the renewal of their licenses for their second year would depend upon successful completion of the training program.

The Bar will have a system in place to apply for extensions for new lawyers who are unable to complete the program due to extenuating circumstances. Lawyers admitted to Oregon from other states who have two years of practice experience would be exempt.

Mentors will receive training and MCLE credit for their participation. ■

Resources for elder law attorneys

CLE seminars

23rd Annual Ethics CLE Program
Oregon Law Institute seminar
November 5, 2010
Oregon Convention Center
777 NE MLK Jr. Blvd.; Portland
www.lclark.edu/law/continuing_education

Time Mastery for Lawyers: Agenda for Success
OSB "Quick Call" Teleseminar Series
November 29, December 6, December 13
www.osbar.org

Estate Planning for Family Businesses
OSB "Quick Call" Teleseminar Series
December 1 & 2, 2010
www.osbar.org

Probate Litigation: Key Issues for Lawyers Who Work with Wills and Trusts
Oregon Law Institute seminar
December 3, 2010
Oregon Convention Center
777 NE MLK Jr. Blvd.; Portland
www.lclark.edu/law/continuing_education

Family Feuds in Trusts
OSB "Quick Call" Teleseminar
December 21, 2010
www.osbar.org

NAELA Telephonic Training Programs

More for Me, Less for Uncle Sam: Tax Planning for Seniors
November 16, 2010
11:00 a.m. to 12:30 p.m. PT

What to do When Your Client Has Died: A Tax Guide to Administration
December 16, 2010
11:00 a.m. to 12:30 p.m. PT
www.naela.org

Conference

NAELA Fall Institute
Protecting your Clients; It's a Zoo out There
November 4 to 6, 2010
Sheraton San Diego Hotel & Marina
San Diego, California
www.naela.org

Conferences

2010 National Aging & Law Conference
The Changing Face of Aging
December 9 to 11, 2010
Westin Hotel
Alexandria, Virginia
new.abanet.org/aging

NAELA unProgram
January 21-23, 2011
Embassy Suites - Outdoor World
Grapevine, Texas
www.naela.org

Web Sites

Oregon State Bar Professional Liability Fund
Free and confidential assistance with office systems
www.osbplf.org

ABA Journal Elder Law Prof Blog
Covers elder law, elder care, government resources, and related legal news and issues
www.abajournal.com/blawg/elder-law-prof-blog

National Institute of Justice
Preventing and Prosecuting Elder Abuse
Audio recording and transcript of discussion by panel of experts about innovations related to elder abuse prevention and prosecution
www.ojp.usdoj.gov/nij

Multnomah County Aging & Disabiliy Services
Preventing Elder Abuse
www.multco.us/elderabuse

Elder Law Section electronic 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." ■

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Oregon State Bar

Elder Law Section

Newsletter Advisory Board

The *Elder Law Newsletter* is published quarterly by the Oregon State Bar's Elder Law Section, Sylvia Sycamore, Chair. Statements of fact are the responsibility of the authors, and the opinions expressed do not imply endorsement by the Section.

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