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## Introduction to VA benefits: Are your clients getting what they deserve?

By Kathy Belcher, Attorney at Law

In a 2003 press release, Secretary of Veterans Affairs Anthony Principi said, "America's veterans deserve the best health care and compensation system we can provide." Yet very few veterans—including many elders in need of assistance with both medical expenses and the cost of long term care—receive the benefits to which they are entitled. As elder law attorneys, we can help our clients obtain benefits that will help defray the cost of long term care at home, in assisted living facilities, and in nursing homes.

The United States Department of Veterans Affairs (DVA), or "VA," as it is commonly called, has two main branches: the Veterans' Health Administration (VHA) and the Veterans' Benefits Administration (VBA). The VHA's purpose is to provide health care benefits, including acute care services, hospital care, nursing home care, low-cost prescription drugs (creditable coverage under Part D), dental care, geriatric evaluations, home-based primary care, skilled home health care, homemaker and home health aide services, adult day health care, respite care, hospice, and palliative care.

The VBA administers monetary benefits programs for eligible veterans, including vocational rehabilitation and employment, education and training, home loan guaranties, Disability Indemnity Compensation (DIC) for surviving spouses and dependents, specially adapted housing, life insurance benefits, and burial benefits. In addition, the VBA administers two major disability benefits programs for veterans: service-connected disability compensation (generally referred to as "Compensation") and a disability pension for conditions not service connected (generally referred to as "Pension") for disabled wartime veterans with limited income and resources.

### Compensation

Compensation is a monthly payment made to an eligible veteran with a physical or mental disability that incurred in or was aggravated by the veteran's service. The severity of a service-connected disability is rated on a scale from 0 to 100 percent in increments of 10 percent. In order to receive compensation, the disability must be rated at least 10 percent. The VA Schedule for Rating Disabilities is found in the Code of Federal Regulations (CFR). 38 C.F.R. Part 4. The benefit amount varies based upon the veteran's disability rating and number of dependents. It is not based on financial need. [www.vba.va.gov/bln/21/Rates/comp01.htm](http://www.vba.va.gov/bln/21/Rates/comp01.htm)

A veteran with a service-connected disability is given priority in terms of services.

38 U.S.C. § 1710. If a veteran has a service-connected disability rated at 70 percent or more, the veteran is also entitled to have his or her long term care costs paid by the VA (The Veterans Millennium Health Care and Benefits Act of 1999).

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## Introduction to VA benefits

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Kathryn Belcher's Salem law practice focuses on all areas of estate planning with emphasis on the planning needs of the elderly and their families—including wills, trusts, powers of attorney, advance directives for health care, long term care issues, Medicaid planning, guardianships, conservatorships, and probate.

For a condition to be service connected, there are three requirements:

1. The disability must have been caused or made worse by the military service.
2. The disability must be one that the VA has assigned a disability rating.
3. The veteran must have a general or honorable discharge.

Through the application of statutory presumptions, established by law or regulation, some conditions are considered presumptively service connected if the condition appears within a certain period of time after the conclusion of service. This is called the "presumptive period." Depending upon the condition, presumptive periods under VA rules range from one year to at any time after service. As long as a veteran can show that the disease was severe enough to warrant a compensable disability evaluation (10 percent or higher) within that period, he or she should get service-connected disability compensation. Generally, to be eligible under a presumption, the veteran must have served on active duty for at least 90 continuous days.

An example of a VA presumptive service connection is "Agent Orange" exposure. If a veteran served in Vietnam between January 9, 1962, and May 7, 1975, and has any of the following conditions, the VA will presume that the condition was caused by exposure to Agent Orange:

- Hodgkin's disease
- Multiple myeloma
- Non-Hodgkin's lymphoma
- Acute and subacute peripheral neuropathy
- Prostate cancer
- Respiratory cancers
- Soft-tissue sarcoma
- Diabetes Mellitus (Type II)
- Spina bifida (for the children of Vietnam veterans)
- B cell leukemias, such as hairy-cell leukemia
- Parkinson's disease
- Ischemic heart disease

The following website provides an overview of Agent Orange benefits and general information about filing claims for service-connected compensation for these conditions: [www.publichealth.va.gov/exposures/agentorange/benefits.asp](http://www.publichealth.va.gov/exposures/agentorange/benefits.asp)

In addition to direct service-connected disability, it is possible to get compensation

benefits for a secondary condition that develops because the service-connected condition causes a new disability or makes a pre-existing or non-service-connected disability worse. For example, a veteran who injured his leg while in service might develop a back condition later in life through favoring one leg over the other. Or, suppose a veteran has both a service-connected anxiety condition and hypertension that is not connected to military service. If the service-connected anxiety condition aggravates the hypertension, the increase in the hypertension can be connected. If the hypertension then causes a heart condition, the heart condition can be service connected. If the heart condition eventually causes the veteran's death, his or her survivors may be eligible for service-connected death benefits. The secondary disability need not appear until years after the original service-connected disability.

In order for the secondary condition to qualify for benefits, the veteran must meet three criteria:

1. Already have a condition deemed to be service connected.
2. Currently be suffering from a second condition.
3. Obtain a physician's statement that says the physician has reviewed the veteran's "Service Medical Record" and has concluded that it is "as likely than not" that the veteran's current condition was caused by the original service-connected disability.

Any physician can provide this statement; it does not have to come from a VA physician.

Unfortunately, the process of obtaining VA benefits is long, difficult, and incredibly complex, leading to uncountable denied veterans' claims and an absence of attorneys practicing in the area of veterans' benefits law. If an initial claim filed with the VA Regional Office is denied, the veteran must appeal the denial to the Board of Veteran's Appeals (BVA) by filing a notice of disagreement. There is a one-year time limit to file this notice. If the appeal deadline is missed, the veteran must file to reopen the claim. The only way the claim will be re-opened and reconsidered by the VA Regional Office is if the veteran submits "new and material evidence."

If the BVA denies the claim for benefits, the

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veteran appeals the claim to the United States Court of Appeals for Veterans Claims. This appeal must be filed within 120 days from the date of the BVA decision. If the claim is again denied, the veteran can appeal the claim to the U.S. Court of Appeals for Veteran Claims (CAVC). If the claim is unsuccessful, the final level of appeal is to the United States Supreme Court.

Pursuant to 38 CFR §14.629, effective June 23, 2008, any attorney who assists a claimant in the preparation, presentation, and prosecution of claims for benefits must be accredited by the Department of Veterans Affairs. The initial accreditation process consists of an application to the General Counsel (VA Form 21a). During the first 12 months after initial accreditation, an attorney must certify to the VA's Office of the General Counsel that the attorney has completed at least three hours of qualifying continuing legal education. Further ongoing education is also required to maintain accreditation. (See Marcus Whitney's article on page 8 for more details.)

### Pension

In addition to service-connected compensation, the VA has a non-service-connected Special Monthly Pension (SMP) available to certain wartime veterans, their spouses, and surviving spouses who have limited income and are permanently and totally disabled or age 65 or older. The Veterans' SMP benefit regulations are found at 38 C.F.R. § 3.3.

While the application process for SMP can be agonizingly slow – some applications take up to a year before the VA makes a decision – the benefit is retroactive to the month after application submission. These pension benefits can be very important in elder law planning as you develop a strategy to help the aging or disabled veteran remain in the community or receive nursing-home care with access to services paid for through Medicaid, Social Security, and the Veterans Administration. Unlike Compensation, the Pension benefit does not require that the disability be connected to the time period during which the veteran was on active duty. To qualify, veterans must have served in the military for at least 90 days or more with at least one day during a period of wartime and have a discharge from service under other than dishonorable conditions. Wartime veterans who entered active duty on or after September 7, 1980, must have completed at least 24 continuous months of

military service or the period for which they were ordered to active duty. They also must meet income and asset guidelines.

There are three levels of pension eligibility and payment rate:

- Low Income Pension
- Housebound
- Aid and Attendance (A&A)

Housebound benefits and Aid and Attendance (A&A) benefits are an improved pension paid in addition to the base pension and based upon the claimant's level of disability. A&A provides the greatest income benefit, but the required level of disability is also greater. A disability rating is not required for people age 65 or older, who are presumed to be disabled. However, the VA will require a physician's statement that includes current diagnosis, medical status, prognosis, name and address, ability to care for self, ability to travel unattended, etc. (VA FORM 21-2680).

Housebound benefits are available to a veteran, spouse, or surviving spouse who is disabled and is essentially confined to the home. The VA considers a claimant housebound if the claimant is independent at home, but needs assistance in getting out and about for physician visits, grocery shopping, etc. The VA evaluates a claimant for Aid and Attendance if one of these conditions applies and the disability was caused without willful misconduct of the claimant:

- The claimant is disabled and requires the aid of another person to perform activities of daily living.
- The claimant is bedridden, in that his/her disability or disabilities require that he/she remain in bed apart from any prescribed course of convalescence or treatment.
- The claimant is a patient in a nursing home (also includes other community-based care facilities) due to mental or physical incapacity.
- The claimant is blind, or so nearly blind as to have corrected visual acuity of 5/200 or less, in both eyes, or concentric contraction of the visual field to 5 degrees or less.

A claimant cannot receive both housebound benefits and A&A benefits at the same time. Nor can he or she receive both Compensation and Pension benefits at the same time. There-

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## Introduction to VA benefits

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fore, it is important to determine which benefit is of the greatest value to the claimant.

The maximum annual benefit amounts for the veterans' pension benefit payable to a veteran or surviving spouse are set by statute and referred to as the Maximum Annual Pension Rate (MAPR). The MAPR is based on the presence of a spouse or dependent child (or children) and the level of disability, and is adjusted by a cost of living adjustment (COLA) equal to the COLA for Social Security benefits. 38 U.S.C. §1521& §1541. To be eligible, a claimant's countable income must be below the MAPR.

The A&A Pension can provide up to \$1,704 per month to a veteran without a spouse or dependent child, \$1,094 per month to a surviving spouse, or \$2,020 to a veteran with a spouse or dependent child. A veteran filing with a sick spouse is also eligible for up to \$1,338 per month. Many families overlook the A&A Pension as it pertains to a surviving spouse or a veteran who is still healthy but has a sick spouse.

Countable income is the claimant's annual income after deducting all unreimbursed, recurring health care expenses. This includes assisted living costs, home health care, insurance premiums, Medicare premiums, ongoing prescriptions, and more. Unlike Medicaid, if the claimant is married, the spouse's income is also considered in the eligibility calculation. Countable income does not include any Supplemental Security Income (SSI) payments received. But, since the SSI program includes veterans' benefits as unearned income, it is important to be aware that receipt of a veterans' pension could reduce the claimant's SSI benefit. A claimant who meets these requirements and satisfies the net worth requirement will get the difference between his or her income and the MAPR. Here are links to the current MAPR rate tables:

- for veterans: [www.vba.va.gov/bln/21/rates/pen01.htm](http://www.vba.va.gov/bln/21/rates/pen01.htm)
- for survivors: [www.vba.va.gov/bln/21/rates/pen02.htm](http://www.vba.va.gov/bln/21/rates/pen02.htm)

Like Medicaid and other means-tested programs, in addition to an income test, there is also a resource test. The resource test for the VA is referred to as the "net worth" requirement and has certain similarities with Medicaid's resource eligibility requirements.

Like Medicaid, the VA considers the assets of the claimant, and it also considers the assets of the claimant's spouse, if married. The VA also allows certain exempt assets, such as personal property, a vehicle, and a home. However, important differences exist between Medicaid's resource eligibility requirements and the VA's net worth requirement. Unlike Medicaid, the VA considers the home an exempt asset whether or not the claimant resides in the home. Net worth is also considered on the date of application, and there is currently no look-back period as in Medicaid, or penalty for transfers prior to application. It is important to remember, however, that some actions taken to qualify for VA benefits may create a penalty period later when applying for Medicaid. Tax issues and potential future need for Medicaid must be carefully considered, along with potential changes in how the VA treats uncompensated transfers.

The uncompensated transfer of assets to qualify for VA pension benefits was the recent subject of a U.S. Government Accountability Office (GAO) report that recommended that the VA consider establishing a look-back and penalty period for pension claimants who transfer assets prior to applying for VA pension benefits. Following the release of this report, Senator Ron Wyden (D-OR) and Senator Richard Burr (R-NC) introduced a bill that would require the Secretary of Veterans Affairs to look back 36 months for any uncompensated transfers that a veteran, spouse, surviving spouse, or child otherwise eligible for a pension may have made. S. 3270. The bill has been referred to the Committee on Veterans' Affairs for hearings.

Calculating the appropriate net worth level can be complex. A common misunderstanding is that the claimant, whether married or single, cannot have net worth greater than \$80,000. This figure is referenced in the VA procedures manual. However, it is not a fixed number; there is no specified limit on how much net worth a person may or may not have. The standard as to whether a person will be eligible for benefits is whether the person has "sufficient means" to pay for his or her own care.

The decision as to whether a person has sufficient means depends on the facts of each individual case. In recent years, the VA has been applying a life-expectancy analysis to the value of the applicant's net worth, which makes "sufficient means" a very fluid figure. In one case, a 95-year-old veteran was denied benefits even though he had little more than \$30,000, while in another case, a 78-year-old veteran with \$74,000 was found eligible.

Details on calculating income and net worth are found in Part V, subpart iii, Chapter 16 of the VA *Adjudication Procedures Manual* and *M21-1 Manual Rewrite* (Manual M21-MR). These manuals can be found at the VA website. ■

**More than a third of persons over the age of 65 are eligible to receive some form of assistance from the VA, yet only five percent are receiving benefits.**

# Forks in the road: Medicaid and VA

By Monica D. Pacheco, Attorney at Law



Monica Pacheco's practice focuses on long term care planning, specializing in Medicaid and VA A&A planning, disability planning, fiduciary cases, estate planning, and probate practice.

The intersection between benefits from the U.S. Department of Veterans Affairs (VA) and state Medicaid programs requires some careful navigation. Since I do not have little kids to listen to me think out loud, my dog Sunny and I have great discussions about my clients. He doesn't share our stories, so there are no ethical issues. He raises his eyebrow, cocks his head just right, or simply runs away with a toy in his mouth as I go through decision trees. So now what? Each client's situation has to be individually analyzed to determine what to do to help him or her obtain what is needed.

This is a discussion of what I have personally been able to use or successfully develop in my practice, and is in no way a guarantee that VA adjudicators or Medicaid caseworkers are created equal. The information presented is current and valid, but as is usually the case with benefit programs, some things may change in the future.

## How VA Aid and Attendance and Medicaid intersect

The VA's Improved Pension with Aid and Attendance (A&A) program is available for living veterans, whether they are single or have dependent spouses or minor children, as well as for the surviving spouse of a veteran. Depending on who is living and who needs care, benefit amounts range from a maximum of \$2,019 per month (married veteran needing care) to \$1,094 (surviving spouse). The matrix then includes a single veteran or a married veteran where the veteran's spouse needs care. It is important to note that this benefit program is not solely for veterans, but extends to surviving spouses. 38 USC §5121(a). It is one of the few VA programs that extends benefits to the surviving spouse. The benefits often enable a person to pay for care when no other resource is available.

When Medicaid is obtained for an individual receiving care in a setting other than a nursing home, the VA A&A benefit amount increases the applicant's gross income. 38 USC §1503(a). However, the amount of the VA A&A benefit is excluded when determining whether the Medicaid (OSIPM) applicant is over the income cap. OAR 461-145-0580(2). This increase causes the amount of money that is paid by the applicant for care to increase, and the Medicaid

amount to decrease. If a veteran's spouse is receiving care, then the income of the veteran as the community spouse is increased, which affects the community spouse income allowance. It is important to note that once a VA A&A claimant is in a nursing home and qualifies for Medicaid, the VA A&A benefit drops to \$90. The \$90 then becomes an enhanced personal incidental funds amount allowed by Medicaid to the applicant. OAR 461-160-0620(3)(c)(B).

## Regular assistance with the activities of daily living

Here, both Medicaid and VA travel mostly on the same road. As practitioners in the Medicaid arena know, a person must have sufficient care requirements in order to qualify for Medicaid for long-term care. OAR 411-015-0000 et seq. I leave the specifics to the CLE materials available. Generally speaking, though, individuals must need assistance from others with their activities of daily living (ADLs), including (but not limited to) mobility, dressing, bathing, managing incontinence issues, eating, medication management, and dealing with cognitive disability/limitations. If an individual requires a certain level of assistance, he or she is eligible from a service perspective for Medicaid benefits. When applying for Medicaid benefits, a service eligibility worker from the Oregon Dept. of Human Services (DHS) Seniors and People with Disabilities (SPD) visits with the individual, caretakers, and family members, and assesses the needs of the individual.

Similarly, the VA A&A program stipulates that a claimant must require the regular assistance of others with his or her ADLs. 38 CFR § 3.351. There is no prescribed level of assistance that is needed, though it is my understanding that the VA A&A program gives high ratings to ADLs that involve dignity issues, e.g., incontinence and bathing. The VA requires a couple of different verification documents. The first is a statement from the claimant's physician on the VA-prescribed form to affirm that an individual requires assistance. If assistance is required in a given area, then the physician must explain how and why the assistance is required (e.g., "not able to dress oneself" or "needing the assistance of another to bathe.")

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## VA and Medicaid benefits *Continued from page 5*

In addition to the physician's report, a caregiver or care community must certify that it is providing assistance with the ADLs. It helps if the two forms are consistent with one another.

### Income issues

We start on the same road: both programs require limited income. From there, however, the road forks into different paths. DHS will look only at the gross income of the person who needs care. Income must be less than \$2,094 per month (2012 figure) in order to qualify. OAR 461-155-0250(2). Of course, if the income is higher, the individual can meet the income test by creating an income cap trust that meets the requirements in OAR 461-145-0540(9)(c).

The VA income requirement is different. The VA considers income net of regular ongoing medical expenses. Begin with the gross income or combined gross income of both spouses if the veteran is married. See 38 USC 501. Then deduct all regular medical expenses, such as Medicare premiums, health insurance premiums, regular monthly prescription bills, care bills, etc. The resulting number is the net income.

The available benefit is the maximum benefit for the relevant category minus the net income. For example, a couple that has \$3,000 of combined gross income and combined medical expenses of \$2,000 has net income of \$1,000. Assuming the veteran needs care, the maximum benefit amount is \$2,019. In this case, the benefit is \$1,019 (\$2,019 maximum benefit minus \$1,000 net income). In most cases, if a spouse is in a care facility, the net income is a negative number. Therefore, the veteran is entitled to the maximum benefit amount.

### The fork in the road: available resources

The Medicaid rules state that an individual applying for Medicaid benefits must have less than \$2,000 in available resources to qualify. OAR 461-160-0015(3). In the case of a married couple, the community spouse (the spouse not needing care) is entitled to half of the couple's countable resources as of the beginning of the continuous period of care up to a maximum of \$113,640, and the applicant \$2,000. OAR 461-160-0580(2). Any countable resources above these amounts must be spent down.

As a side note, houses are an issue for VA purposes. According to the Medicaid rules, the personal residence of the applicant is exempt,

if there is a community spouse living in the house or the applicant intends to return to the home. OAR 461-145-0220(2). This is subjective and does not work well for a single individual who is in a care facility. The VA states that the claimant's house is not an asset. There is no requirement for the claimant or spouse to live in the house. 38 CFR §3.275. However, if the house is subsequently sold, the proceeds of sale may cause an issue for VA purposes if the assets exceed \$80,000. For Medicaid benefits, a second property is not exempt. However, it is not an available resource if it is actively listed for sale or if it is co-owned with someone other than the spouse. OAR 461-145-0420(3); 461-140-0020(2). These are exceptions and Medicaid caseworkers vary in how they interpret the rules.

Without a detailed discussion on the pros and cons, there are still some planning tools and options available to our clients, such as purchasing or improving exempt assets, funeral/burial planning, annuities, and gifting. Of course, gifting is discouraged by the Medicaid program and most transfers for less than fair market value within the five years prior to the application result in a disqualification period. OAR 461-140-0210(5)(b); 461-140-0242. The disqualification period depends on the size of the gift and the disqualification divisor. Today, a gift of \$150,000 results in a disqualification of 19.6 months. See OAR 461-140-0296(2). This means that if clients have made such a gift, the applicant will be disqualified for the prescribed time and must pay privately for care, even though the applicant is otherwise eligible for Medicaid.

The VA does not ask whether any gifts have been made. In other words, there is no penalty for gifting for VA purposes. The VA resource requirement is "less than \$80,000." Presumably, if a claimant has \$79,900 in resources, he or she should qualify. However, there is an adjudicator's handbook and a private ruling that indicates that an 80-year-old person does not need as many resources as a 65-year-old person. This means that there is no bright-line rule on resources and the asset levels are subject to the discretion of the adjudicator on whose desk the application lands. In other words, it's vague. I generally make sure my clients in their 80s have between \$50,000 and \$55,000 in assets before applying. Or my clients in their 70s have about \$65,000 to \$70,000. My younger clients—around 65—can have \$79,000. It's as clear as mud.

### Choosing the right road

The VA A&A can help with emergency catastrophe reactive planning, or with long-term planning. I'll discuss the two sides of the road.

On one side are the low-to-moderate-income clients with few assets. There may not be sufficient income to provide the community spouse with the MMMNA (minimum/maximum maintenance needs allowance) when the ill spouse becomes eligible for Medicaid. The Medicaid program permits a community spouse to receive an allowance from the ailing spouse's income to raise the community spouse's income to \$1,892 per month (effective July 1, 2012), plus an amount for above average housing expenses. OAR 461-160-0620(3)(d). Of course, one must remain mindful of any other planning techniques used for Medicaid. For instance, if the spend-down is accomplished by purchasing a Medicaid-compliant annuity, this increases the income level for the community spouse. See OAR 461-145-0022. I have had clients who purchased a moderate annuity for a young community spouse. The monthly income

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## VA and Medicaid benefits *Continued from page 6*

did not rise to the Medicaid standard, so VA A&A was a good option.

On the other side are the clients with high assets and moderate care costs. Assuming they gave some assets as gifts (either as part of planning or with no planning), the VA A&A program does not penalize for this. Assuming the earlier example for Medicaid (a 19.6-month penalty for a \$150,000 gift), then the VA A&A may be a way to help pay for care privately during the penalty phase. Assuming care costs of \$3,500 per month, a 19.6-month penalty means that \$68,600 in assets (from somewhere) will be needed to pay for care during the penalty period. If this was a married couple and the veteran needed care, then the \$2,019 per month VA benefit would cover \$39,572 of the penalty – a net savings of those gifted monies, or the community spouse's allowed resources, of more than \$29,000.

Finally, the Medicaid application asks about veteran status and whether an application has been submitted to the VA. The Medicaid caseworker may require an applicant to pursue potential benefits by submitting an application for VA A&A. OAR 461-120-0330. I can foresee this becoming more common because the state Medicaid program saves money by paying less toward the cost of care if the Medicaid recipient is getting VA A&A. The eventual claim by the Estate Administration Unit (the state program that works to recover assets after the death of the Medicaid recipient and spouse as reimbursement for benefits received) also will be smaller.

### **The road may be under construction**

But wait...the fork in the road is about to turn into a roundabout. This May, the U.S. Government Accountability Office (GAO) submitted a report to Congress: *Veterans' Pension Benefits: Improvements Needed to Ensure Only Qualified Veterans and Survivors Receive Benefits* (GAO-12-540). The 65-page report essentially states that the pension benefits program needs improvement. The GAO recommended that "Congress should consider establishing a look-back and penalty period for pension claimants who transfer assets for less than fair-market

value prior to applying, similar to other federally supported means-tested programs. VA should (1) request information about asset transfers and other assets and income sources on application forms, (2) verify financial information during the initial claims process, (3) strengthen coordination with VA's fiduciary program, and (4) provide clearer guidance to claims processors assessing claimants' eligibility."

Then, in June, U.S. Senator Ron Wyden (D-OR) submitted a bill to Congress "to amend title 38, United States Code, to require the Secretary of Veterans Affairs to consider the resources of individuals applying for pension that were recently disposed of by the individuals for less than fair-market value when determining the eligibility of such individuals for such pension, and for other purposes." The bill has not yet been published for comment, but essentially calls for the imposition of a 36-month look-back period for VA A&A applications, and implementation of the new rules one year after the bill is enacted. The penalty divisor appears to be the amount of the benefit that would be received – currently between \$1,094 and \$2,019, depending on the claimant's place in the matrix. Of course, this will mandate a change to planning techniques, whether the bill is enacted as drafted or with changes to the look-back period or the penalty divisor.

### **Know the rules of the road**

In summary, the intersection between Medicaid and VA benefits is not for the faint of heart. The application process for both can be quite labor-intensive. Adjudication of the VA award often requires additional communication with the VA that can be frustrating, especially for the clients. Many clients have come into my office with inaccurate or incomplete information on VA benefits and Medicaid. Just as common are clients who have been instructed on how to apply for VA benefits or Medicaid, but have not analyzed which may be the best scenario in terms of their long term care planning. It is important for practitioners to explain to clients what the qualifications and disqualifications (or penalties) are for both Medicaid and VA programs. It is equally important to explain why a certain path may be more beneficial, since many clients do not know or understand how lack of proper planning can have a detrimental effect on their assets or the loss of valuable income.

Most important in our role as elder law attorneys is to be aware and be able to explain to our clients how a decision may affect their benefit eligibility today – and more importantly – tomorrow. There are many local and national organizations and insurance agents who advise the elderly to restructure assets to apply for the VA A&A. This may seem like a good deal, until the family realizes that what they may have done to obtain the A&A benefits will now have a detrimental effect on obtaining additional needed benefits from Medicaid. An analysis of both benefit programs and how they intersect with a given client's situation is needed to be able to provide information and advice to our clients that does not put them in a worse situation than when they contacted us. ■

# Accreditation and ethical considerations when representing veterans

By Marcus R. Whitney, Attorney at Law



Marcus Whitney is an associate at Douglas, Conroyd & Gibb, P.C., a Salem law firm. He is an accredited attorney with the VA and his areas of practice include VA benefits, elder law, protective proceedings, estate planning, and business law.

The Department of Veterans Affairs (VA) provides significant benefits to qualifying veterans. Of particular interest to elder law attorneys is the VA's non-service-connected Pension with Aid and Attendance. This benefit can provide income to veterans who have served during wartime and are in need of regular aid and attendance in the activities of daily living. These benefits are also available to the surviving spouses and dependents of the veteran. It is important that we not only know of these benefits, but are in a position to help veterans acquire them. Unfortunately, this is not simply a matter of filling out and submitting the forms for our clients.

## Accreditation

To represent clients before the VA, an attorney must be accredited. 38 CFR §14.629(b). An attorney is qualified for accreditation if the attorney is of good moral character and in good repute, is qualified to render claimants valuable services, and is otherwise competent to assist claimants in presenting claims. 38 U.S.C. §5904(2)(A). At 38 CFR §14.629(b)(ii), the VA rule provides that "the General Counsel will presume an attorney's character and fitness to practice before VA based on [the attorney's] state bar membership in good standing unless the General Counsel received credible information to the contrary."

To pursue accreditation, an attorney must submit to the VA's Office of General Counsel VA Form 21a – self-certifying the attorney's admission information concerning practice before any court, bar, or state or federal agency – and a certificate of good standing from each bar association where the attorney is licensed. (VA Form 21a is available at [www.va.gov/va-forms/va/pdf/VA21a.pdf](http://www.va.gov/va-forms/va/pdf/VA21a.pdf)). Certificates of good standing are available from state bar associations upon request. The Oregon State Bar provides an online form at [www.osbar.org/members/goodstandingcert.asp#](http://www.osbar.org/members/goodstandingcert.asp#). The cost in Oregon is \$10.00 and takes one to two business days.

The Assistant General Counsel will determine whether the applicant meets the requirements for accreditation and will notify the applicant of its determination. If the Assistant General Counsel denies accreditation, the notification will include the reasons for disapproval, opportunity to submit additional information, and any restrictions on further application. Applicants may submit further evidence and the Assistant General Counsel will consider that evidence and issue a final decision. The applicant has 30 days to appeal that decision in writing to the General Counsel. For purposes of review under the Administrative Procedure Act, the General Counsel is the final agency action.

Once accredited, an attorney has the authority to prepare, present, and prosecute claims before an agency of original jurisdiction or the Board of Veterans Appeals. 38 CFR §14.629. However, the attorney is required to complete three hours of [VA] qualifying continuing legal education during the first 12-month period following the date of initial accreditation by the VA. 38 CFR §14.629(b)(iii). To maintain accreditation, the attorney must also complete another three hours within the first three years after accreditation and every two years thereafter. See 38 CFR §14.629(b)(iv).

In terms of the rules of professional conduct when representing clients before the VA, attorneys will be familiar with the general rules. Pursuant to 38 USC §5904(2), the VA has prescribed regulations consistent with the Model Rules of Professional Conduct of the American Bar Association.

## Ethical Considerations

Great, the procedural tedium is out of the way and now you are accredited. You have just expanded your business, increased your value to the client, and tapped into a whole new source of revenue, right? Wrong! 38 CFR §14.636(c) states that attorneys may charge fees only for representation after an agency of original jurisdiction has issued a decision on the

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## Representing veterans

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All work involved in filling out the forms, assembling verification exhibits, and advocating with the VA for the claim to be approved is mandatory pro bono work.

claim and the notice of disagreement (NOD) has been filed with respect to that decision.

The corollary is that an attorney may not charge for any work involved in the preparation, presentation, and prosecution of the claim. All work involved in filling out the forms, assembling verification exhibits, and advocating with the VA for the claim to be approved is mandatory pro bono work. So, if you choose to represent clients before the VA, you have just expanded your business and greatly increased your value to the client and should now be eligible for a pro bono award. Nevertheless, you can ethically derive revenue from this business model. Clients often come to us who do not currently need Medicaid or VA benefits, but need long-term planning so that when they do need benefits, they will qualify.

Accordingly, attorneys representing clients who are or will be eligible to apply for VA benefits can charge fees for their work in advising clients on how to plan for these benefits and structure their affairs to stretch their resources as far as possible. Naturally, this will involve establishing trusts, powers of attorney, and wills – as well as analyzing and coordinating the benefits that will best meet the specific needs of the clients. The time spent on the analysis, planning, and drafting of legal documents that establish an integrated long term care plan – one that incorporates VA Aid and Attendance and/or Medicaid benefits – is all billable. However, once an attorney puts pen to paper to complete the VA application, the time spent on preparing the application itself and all supporting documents is not billable. Because of the ethical requirement to provide VA application assistance on a no-charge basis, the careful attorney should adapt her case management practices to track the time separately – for instance as separate files or matters. This practice will help to insulate against potential allegations that the attorney is illegally charging a fee for the services. Moreover, she should scrupulously review her bills to ensure she billed the VA time to the pro bono file.

As suggested above, accredited attorneys may collect a fee to represent claimants before the VA, but only for representation after the VA has denied a claim and an NOD has been filed. However, before an attorney can collect a fee for this work, he must have a fee agreement

in writing that complies with 38 CFR §14.636 (g). The attorney must file this fee agreement with the VA's office of General Counsel within 30 days of execution. 38 CFR §14.636 (g) (3).

As with other areas of law, when it comes to collecting fees, the elusive reasonable person reappears. 38 CFR §14.363(e) provides that fees for representation before the VA must be reasonable and sets out the traditional list of factors to consider in determining whether fees are reasonable. Fortunately for those of us who have never been innately reasonable, the VA has provided presumptions to guide us. Fees which do not exceed 20 percent of any past due benefits awarded shall be presumed reasonable; fees which exceed 33 1/3 percent of any past due award shall be presumed to be unreasonable. 38 CFR §14.636(g). So, as an example, for a year of past-due fees for a veteran with a living spouse, the presumed reasonable fee is \$4,845.60. However if your client is a surviving spouse, the presumed reasonable fee is \$2,625.60. In terms of economic theory, these fee rules create an agency problem – the tendency for an agent to pursue his own best interest rather than the best interest of the principal. This agency problem stems from the fact that attorneys may be compensated to correct problems created by their subpar work for which they are not compensated. However, professionalism, reputation, and rules of ethics provide sufficient counter incentive for ethical lawyers to present well-supported and valid claims for their clients.

VA Aid and Attendance benefits are a valuable planning tool for elder law attorneys and are an important benefit for our clients. The ethical considerations in representing veterans before the VA are, by and large, no different from those dictated by Oregon's Rules of Professional Conduct, except for the prohibition on charging fees for preparing claims. But see ORPC Rule 1.5(a) (prohibiting illegal fees). However, VA claim preparation can be a loss leader by attracting clients who could benefit from VA pensions, but who also need the many other services you can provide for a fee. While some clients will need no billable work, others may generate significant fees. Consequently, incorporating VA claim preparation into your practice necessitates a volume model. ■

## VA fiduciaries: Their appointment, their role, and the relationship between the federal and state systems

By Scott W. McGraw, Attorney at Law



Scott McGraw conducts a practice focused on fiduciary cases: long term estate planning and administration, probates, protective proceedings, trusts, and representation of nonprofit and charitable organizations.

A federal fiduciary (also sometimes referred to as VA fiduciary) is a person or legal entity authorized by U.S. Department of Veterans Affairs (VA) to serve as payee of VA benefits for a beneficiary unable to manage his or her financial affairs.

The VA can appoint a fiduciary, called the payee, for a veteran it determines “incompetent” after psychiatric examination. (Incompetent is a VA term of legal art which roughly equates to “financially incapable” under Oregon law). The role is much like that of a conservator, but as it is exclusively federal jurisdiction, it is probably more equitable to a statutory form of trust with the payee as a supervised trustee.

The fiduciary is typically appointed through a VA field examiner, who supervises payees as part of his or her caseload management for veterans in need of such help.

### The role of the payee

Upon accepting appointment, the fiduciary establishes a typical budget with the field examiner to use the monthly benefits in certain ways, such as paying room and board expenses, providing personal spending money to the veteran, and making other regular payments which are expected to arise (such as transportation expenses to the VA Medical Center). The payee also has discretionary spending control over any available funds not committed in the monthly budget.

For these fiduciary services, the payee, who may elect to serve pro bono, is paid up to four percent of the monthly benefit at the time it is regularly disbursed to the payee. The payee also accounts to the VA at least annually for his or her use of the administered funds. The accounting requirements include submission of all financial institution statements and other vouchers. Additionally, the job entails setting up one or more dedicated bank accounts to receive ongoing benefits and any large lump sum benefit payout pending at the time of the payee’s appointment. The payee is not paid a percentage fee for large lump-sum payouts – e.g., for retroactive benefits.

A VA payee can be removed from his or her role, but if this happens, it is usually because the payee has misused VA funds. A payee with more than ten VA “clients” is also routinely

audited as part of the accounting process. This consists of a site visit with advance notice to review files, and is required by federal law. The law is the Veterans Benefits Improvement Act of 2004, and public law 108-454 is the relevant fiduciary portion of it, a part of Title 38 of the U.S. Code.

All fiduciaries are also subject to credit and criminal checks as part of pre-appointment screening. The Act also provides for the investigation of misuse allegations and the on-site screening/auditing mentioned above.

### Relationship between the federal and state systems

If the only financial involvement is the administration of monthly VA benefits, the state system is not involved. Federal jurisdiction over VA benefits is exclusive. As an aside, there are both significant similarities, and significant differences, with regard to establishing and carrying out the role of a Social Security representative payee. If the veteran is deemed “incompetent” by the VA, and is also receiving Social Security benefits, the VA typically will suggest that their payee also apply to become the Social Security representative payee. It may also be possible for the payee to receive a small monthly fee from the Social Security benefits.

One of the goals of the VA administrative system is to minimize state system involvement, if possible. Therefore, the VA payee is sometimes asked to help make placement and other related decisions, including obtaining legal assistance for the veteran, housing, and the like. There are VA Medical Center social workers assigned to assist “incompetent” veterans, and the VA encourages the use of a veteran’s benefits to pay for private social services and aides to assist with all of these needs.

Usually, payees are legally responsible only to administer funds, but they are also occasionally asked to volunteer some time to provide other help when it is needed. Payees help do what is needed to address health and safety issues, which can involve the police, ambulances, medical appointments, neighbors, landlords, behavioral disturbances, short-term housing issues, etc. Disabilities might range from post-traumatic stress disorder to schizoa-

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## VA fiduciaries *Continued from page 10*

fective disorder to other mental illnesses and dementia. The work is not wine and roses, and sometimes the veteran turns confrontational. Taking on this work is more about assisting and honoring our veterans for their sacrifices than it is about earning income.

If the veteran has significant other assets (typically at least \$10,000 in investments, and/or real property holdings or significant personal property values/issues), the policy of the VA is to also encourage the establishment of a formal conservatorship. This creates some intersection between the state and federal systems, and it also often entails some level of tension.

The state judiciary zealously guards its authority and duties with regard to protected persons, and this is appropriate. Since the federal system of administering VA benefits is also an exclusive federal jurisdiction, the VA is not bound to make the conservator also the payee of the VA benefits. And, even if there is a conservatorship in place, and the conservator is also the VA payee, the payee will have to produce an annual state-court accounting plus the annual VA accounting.

Technically, a conservator who is also the payee is not required to treat the VA benefits as part of what is administered and accounted for under the state side of the case. Not surprisingly, this is where tensions between the systems can become strained. Since the VA is also a statutory recipient of notice and accountings within the state system, the fiduciary should fully account to both entities. If the fiduciary can persuade the state court and VA to share the end-of-accounting-period date, that puts much less accounting burden and expense upon the fiduciary. The actual cost savings relate to the production of the transactional accounting; it does not simply entail use of the state system accounting as the VA accounting. Using the state system accounting is often impractical from a cost standpoint, because VA rules require submission of a court-certified copy of the entire state court accounting. For those who have relaxed their procedures to no longer incorporate notarized verifications for the fiduciary, the VA also requires notarized affidavits to accompany such a format of accounting. It is easier and much less expensive overall to complete the VA forms (see below) and submit copies of all the bank statements for the entire accounting period. While this requires an accurate transactions list, the VA

does not require a copy of each check or receipt generated during the accounting period.

A further difference between the federal and state court accounting systems is that the VA requires submission of its accounting only to its relevant fiduciary hub. In other words, there are no further notice requirements as in an Oregon court accounting. The Western Area Fiduciary Hub, which covers all of Oregon and several other states, is located at P.O. Box 58086, 550 Foothill Drive, Salt Lake City, UT 84158-8086. Its telephone number is 888.407.0144. This is the same location to which one typically sends the VA's copy of an annual conservatorship accounting for the state system, the VA's copy of a petition to start a protective proceeding, and the VA's copy of other motions/notices as required under ORS 125.060 and subsections.

Another distinction between the state and federal accounting requirements has to do with the format for the VA accounting. Transactions reporting is transactions reporting. But see VA form "21-4718a" and its attached instructions, for providing the depository bank representative's signed verification of sums on deposit as of the end date of the VA accounting period (for each financial institution; accounts at one institution can be combined), and the form also provides for the payee's permission to the VA to inquire directly of the bank should he or she have questions. (See also, VA form "21-4706b," for the summary data to be submitted with the annual VA accounting.) The VA accounting forms can be downloaded for reference via the VA's Web Automated Reference Materials System (WARMS): [www.benefits.va.gov/WARMS](http://www.benefits.va.gov/WARMS).

If the VA has questions of the payee, it sends a letter of disapproval and its questions. When the VA is satisfied, it typically provides written confirmation of its approval. The VA promises timely action on its part, but its bureaucracy is so large that timely is a relative term.

Finally, if there is also a common state proceeding, the VA always requires that the payee/conservator provide a court-certified copy of each of the fiduciary bond as it exists from time to time, and the eventual order or limited judgment that approves each of the conservator's annual accountings. This is true whether or not a court-certified copy of the accounting is submitted to the VA in lieu of its accounting format.

### Getting help

Persons who are interested in becoming a VA Fiduciary should contact the VA with a letter of introduction and a resume showing their money management and related skills via the Western Fiduciary Hub at 800.407.0144, or through a field examiner.

For those who need to enquire about services for a given veteran, a local VA representative has suggested contacting the Fiduciary Hub and asking to be put in contact with the field examiner for that area, or the field examiner who may already be involved in the case.

### Online resources

For further information, take a look at [www.vba.va.gov/bln/21-Fiduciary/index.htm](http://www.vba.va.gov/bln/21-Fiduciary/index.htm). This link can also be found on the home page of the VA website, searching under "Fiduciary Program," and then "Responsibilities of a VA Fiduciary."

See the VA's Web Automated Reference Materials System (WARMS) at [www.benefits.va.gov/WARMS/Site\\_Map.asp](http://www.benefits.va.gov/WARMS/Site_Map.asp), for a PDF booklet (Title 38 CFR, Book F, bottom of the Web link page) that gives very useful information. ■

## The ODVA conservatorship program

# More veterans need assistance as population ages

By Kelly Breshears, Oregon Dept. of Veterans' Affairs Conservatorship Manager



Kelly Breshears is the Conservatorship Manager for the Oregon Department of Veterans Affairs. She serves on the Board of Directors for the Guardian/Conservatorship Association of Oregon. Prior to her current position, she worked as a Veterans Service Officer for ODVA.

As the Baby Boomers pass into retirement age, Oregon is about to see the largest group of veterans ever to need conservator and guardian services. The United States Census Bureau reports that, as of 2009, there were nine million veterans over the age of 65 in the country. Combine the aging population with the growing number of soldiers returning from Iraq and Afghanistan with traumatic brain injury and other severe health conditions, and the fiduciary systems currently in place are sure to be overburdened.

The Oregon Department of Veterans' Affairs long ago recognized the need for fiduciary services. In 1964 the Oregon Legislature created by statute the Oregon Department of Veterans' Affairs (ODVA) Conservatorship Program. This program allows the director of ODVA to act as conservator without bond for veterans, their dependents, or survivors as defined in ORS 406.050(8)(a) and (b).

In 1965 ODVA was appointed conservator for the first veteran accepted under this new program. Now, more than 45 years later, we have served 1,634 veterans, dependents, and survivors. Our program currently serves 152 protected persons, including veterans from World War II to post-9/11, spouses, and adult children who before the age of 18 became permanently incapable of self-support. We accept appointments statewide.

Our staff is made up of three trust officers, two assistants, a secretary, a half-time administrative assistant, and the conservatorship manager. We have more than 130 years of combined experience and knowledge in areas such as probate, estate planning, banking, CNA, insurance, accounting, and veterans' claims.

Although we work as a team to serve each protected person, the trust officer is the primary point of contact for our clients. The trust officer sets up initial budgets, marshals all assets for new cases, coordinates care with guardians or case managers, performs home visits at least once each year, and is responsible for the day-to-day management and decisions made on each of the cases in his or her caseload. One of these trust officers is also our property manager and is responsible for the additional duties

of managing the 46 real properties owned by our protected persons.

ODVA's trust officers have extensive knowledge of Oregon laws and administrative rules, as well as United States Department of Veterans Affairs (USDVA) laws and regulations. They work with a network of contacts to address issues and obtain benefits from other programs such as Social Security, Medicare, and programs for elders, low-income individuals, and persons with disabilities. They investigate income sources for which the protected person may be eligible and work closely with family and other interested parties when planning for the welfare of the protected person.

As with any other service provider, whether public or private, it is necessary to charge a fee for these services. However, ODVA's rate is significantly less than that of private conservatorship services, in order to assist as many veterans as possible. The fee for ordinary services is fixed by statute at five percent of income. Additional fees may be charged for unusual services provided, such as home remodeling projects. Fees may be waived in individual cases if circumstances warrant such action.

There are many benefits to a protected person coming under the ODVA conservatorship program:

- Low conservatorship fees
- Director is allowed to serve without bond
- No charges for mileage when visiting protected persons
- No filing fees for inventory or other legal documents
- No fees to obtain letters of conservatorship and most vital records
- No postage or office fees
- Low attorney fees when filing annual accountings. The standard charge for an accounting with no issues is \$42.90: 0.3 hours at the current rate of \$143 per hour.

In addition to these benefits, one member of the conservatorship unit is a USDVA accredited representative, which allows her to submit benefit claims on behalf of conservatorship clients. ODVA also has seven other accredited representatives,

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## ODVA conservatorship

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### For more information:

Kelly Breshers  
 Conservatorship Manager  
 ODVA  
 700 Summer St NE  
 Salem OR 97301  
 503.373.2099 or  
 800.692.9666  
 breshkek@odva.state.or.us

who are able to assist in filing claims for disability benefits with USDVA when needed.

Veterans have a culture all their own. ODVA staff members understand this culture and are able to help most veterans see the services our program offers as a benefit just like any other service. We understand the challenges veterans face and are able to better serve them because of that understanding.

It goes without saying that the world of fiduciaries—guardians, conservators, elder law attorneys, and even case managers—has changed during the past few years. It seems as though there are too many in need of help, and not enough fiduciaries to serve. Like everyone else who works in a fiduciary capacity, we are trying to keep up with the growing demand.

We are in the process of expanding our program to include representative payee services. In these cases, ODVA will be appointed by either the USDVA or the Social Security Administration to receive funds and pay bills on behalf of veterans, dependents, and survivors.

It should be noted that ODVA does not act as petitioner when filing for a conservatorship. A third-party petitioner must be willing to file. If you are interested in learning more about the ODVA conservatorship program or obtaining information on how we can help a veteran in your community, please see below for contact information.

To all veterans reading this article, allow me to say on behalf of everyone here at ODVA, thank you for your service. ■

## Life Insurance Finder Tool (LIFT)

The Oregon Insurance Division can help you search for the life insurance policy or annuity contract of a deceased person. The division maintains a database of all the life insurance companies that sell policies in Oregon. If the person lived in Oregon at some point, the Insurance Division will relay your request for a policy search to see if there is a match.

This will be a resource for cases in which the potentially insured person is deceased (probates, small estates, post-mortem trust administrations, etc.) rather than conservatorship cases or other cases in which the potentially insured person is alive.

The search is for individual and not group policies. (The former employer of the deceased may have information on group life coverage.) Also, unclaimed property, including paid-up life insurance policies, must be turned over to the Oregon Division of State Lands after a specified period, often three years.

### The process

- Complete and print the submission form, which can be found online at: [www4.cbs.state.or.us/exs/ins/lift/index.cfm?fuseaction=home.life\\_form](http://www4.cbs.state.or.us/exs/ins/lift/index.cfm?fuseaction=home.life_form)
- Have the form notarized
- Submit a copy of the death certificate with the form
- Mail the notarized form and death certificate to:  
 Life Insurance Finder Tool (LIFT)  
 State of Oregon Insurance Division  
 350 Winter Street NE  
 Salem, Oregon 97301

Once the division receives a complete and notarized submission form, along with the death certificate it notifies all companies that sell life insurance in Oregon.

The division also sends you a link to a Web page where you can find search results. Companies will tell you whether they found an active policy, an inactive policy, or no policy. *Pending* means the company is still checking.

The Insurance Division is not directly involved in the search. However, if a company response still shows pending after 60 days, you may file a complaint with the Consumer Advocacy section. An advocate will look into the issue. ■

# Where to find regulations, policy manuals, forms, and more to help clients who are veterans

By J. Thomas Pixton, Attorney at Law, and Christopher P. Young, Attorney at Law

Many clients who consult elder law attorneys for long term care planning may be eligible for a pension from the United States Department of Veterans Affairs (VA)—a benefit they didn't know was available. Elder law attorneys should consider this possibility when advising a veteran or surviving spouse on issues related to paying for long term care and should educate themselves about VA benefits and how to apply for them.

The VA Pension (sometimes referred to as Aid & Attendance) is intended to assist with unreimbursed medical expenses incurred for disabilities unrelated to military service. (Payments for service-related disabilities are "Compensation," and a veteran may generally receive either Compensation or Pension benefits, but not both.)

Unlike Medicaid, VA Pension benefits can be spent for care from any provider. Benefits range up to a maximum of \$1,094 for a surviving spouse of a veteran, \$1,704 for a single veteran, \$2,019 for a married veteran.

Because the eligibility rules between VA Pension and Medicaid are quite different, care must be taken not to unintentionally prejudice a client's chance at later Medicaid eligibility through the VA qualification process. The planning process must also take into consideration legislative action, such as SB 3270, introduced in June by Oregon's Senator Ron Wyden, which in its current form would implement a 36-month look-back period and otherwise curb efforts by clients to hasten VA pension eligibility.

The following are resources regarding the VA Pension, the benefit we most commonly see in our office.

## Accreditation

In order for an attorney to assist with the preparation, presentation, or prosecution of any claim for VA benefits, he or she must be accredited. The process of becoming accredited is fairly straightforward and more information can be found at [www.va.gov/ogc/accreditation.asp](http://www.va.gov/ogc/accreditation.asp).

## General VA Pension information

Additional general information about VA Pension can be found on the VA website [www.vba.va.gov/bln/21/pension](http://www.vba.va.gov/bln/21/pension) as well as in a benefits booklet published by the VA and available

at [www.va.gov/opa/publications/benefits\\_book.asp](http://www.va.gov/opa/publications/benefits_book.asp).

## Rules and Regulations

For those interested in reviewing the rules and regulations governing VA Pension and its availability for clients, see Title 38 of the Code of Federal Regulations, Part 3, Subpart A: [http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?c=ecfr&sid=ce7509e928fccd91b794de950da1beca&tpl=/ecfrbrowse/Title38/38cfr3\\_main\\_02.tpl](http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?c=ecfr&sid=ce7509e928fccd91b794de950da1beca&tpl=/ecfrbrowse/Title38/38cfr3_main_02.tpl)

Of even more practical value is the M21-1MR (*The Manual*) used by Veterans Service representatives to evaluate pension applications: [www.benefits.va.gov/warms/M21\\_1MR1.asp](http://www.benefits.va.gov/warms/M21_1MR1.asp). Choose Part V to access pension regulations. The entire Web Automated Reference Material System (WARMS) site is an invaluable resource for learning about the spectrum of VA benefits and how they are obtained: [www.benefits.va.gov/WARMS](http://www.benefits.va.gov/WARMS).

Finally, General Counsel Opinions and Board of Veterans Appeals decisions can be helpful in guiding the advice given to clients concerning areas of potential confusion in the regulations. General Counsel opinions are available at [www.va.gov/ogc/precedentopinions.asp](http://www.va.gov/ogc/precedentopinions.asp) and the Board of Veterans Appeals Decisions search page is accessible at [www.index.va.gov/search/va/bva.html](http://www.index.va.gov/search/va/bva.html).

## Offices

The Oregon Department of Veterans Affairs (ODVA) is an excellent resource for Oregon veterans for information regarding the spectrum of benefits available. Each county has at least one Veterans Service Officer (CVSO) in a local office available to meet with clients. To find a local CVSO, visit [www.oregon.gov/ODVA/VSDIRECT/LOCATOR.shtml](http://www.oregon.gov/ODVA/VSDIRECT/LOCATOR.shtml). Additionally, there are state veterans service officers in Portland and Salem.

## Application Information

You can get PDF application forms (searchable by form number or keyword) at [www.va.gov/vaforms](http://www.va.gov/vaforms).

## Software

Our firm has joined ElderCounsel ([www.eldercounsel.com](http://www.eldercounsel.com)), a sister firm to WealthCounsel and a valuable resource for educational information and planning tools. While ElderCounsel membership includes access to the ElderDocx document drafting system, it does not include software for preparing a VA Pension application.

The most common software for assisting with application forms is VisPro, published by Veterans Information Services, Inc., and Georgia attorney Victoria Collier: [www.info4vets.com/VisPro.html](http://www.info4vets.com/VisPro.html). VisPro is a comprehensive guide to preparing forms for all VA benefits, not just VA Pension.

## Other materials

For VA benefits other than Aid and Assistance, we found materials accompanying the June 28, 2012, Oregon State Bar CLE seminar "Handling VA Benefits Claims" to be a helpful resource. We have also heard positive feedback about Victoria Collier's book *47 Secret Veterans' Benefits for Seniors*, which is written for clients and is widely available. ■

## Elder law attorneys share experience, wisdom at annual unCLE program

The ninth annual Elder Law Section unCLE program was held in Eugene at the Valley River Inn on May 4, 2012. The capacity crowd of elder law attorneys from all over the state enjoyed a productive exchange of ideas. This year's hot topics included determining the right time to file for guardianship and conservatorship, the intersection of VA Aid and Attendance and Medicaid benefits, and cloud computing for lawyers. The opportunity to meet colleagues and to share information remains the biggest draw.

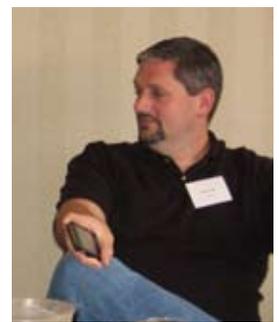
If you are interested in having that opportunity, reserve the first Friday in May (May 3, 2013) on the calendar system of your choice for next year's unCLE. Registration information is sent to Elder Law Section members by e-mail. Remember to act quickly when you get the information because attendance is limited to 75 people. ■



(L to R) Section Chair Geoff Bernhardt of Portland and Mark Williams of Eugene, CLE Subcommittee, welcome the program participants.



(L to R) Wes Fitzwater of Portland, Don Dickman of Eugene, Marcus Whitney of Salem, Monica Pacheco of Salem, law clerk Rebecca Pitts of Salem, Eric Kearney of Portland, Mark Williams of Eugene, Kelly Ford of Beaverton



Ryan Gibb of Salem



(L to R) Banafsheh Nazari of Portland, Sibylle Baer of Portland, Alice Harman of Keizer



(L to R) Erin Evers of Hillsboro, Victoria Blachly of Portland, Pat Chor of Wilsonville, Phil Hingson of Portland

## Resources for elder law attorneys

### Websites

#### Elder Law Section website

[www.osbar.org/sections/elder/elderlaw.html](http://www.osbar.org/sections/elder/elderlaw.html)

The website provides useful links for elder law practitioners, past issues of *Elder Law Newsletter*, and current elder law numbers.

#### OregonLawHelp

[www.oregonlawhelp.org](http://www.oregonlawhelp.org)

This website, operated by legal aid offices in Oregon, provides helpful information for low-income Oregonians and their lawyers. A lot of the information is useful for clients in any income bracket. The articles are collected and grouped by category, e.g. *Seniors, Disability, Government Benefits and Taxes*.

#### Administration on Aging

[www.aoa.gov](http://www.aoa.gov)

Provides information about resources that connect older persons, caregivers, and professionals to important federal, national, and local programs.

#### alzheimers.gov

<http://alzheimers.gov>

The federal government's free information resource about Alzheimer's disease and related dementias.

#### Oregon Legal Research blog

<http://oregonlegalresearch.blogspot.com>

Written by Oregon public law librarians. Legal research tips, advice to the legal blogger, commentary on reading material, etc..

#### BigCharts

<http://bigcharts.marketwatch.com/historical>

Provides the price of a stock on a specific date.

#### National Clearinghouse for Long Term Care Information

[www.longtermcare.gov/LTC/Main\\_Site/Index.aspx](http://www.longtermcare.gov/LTC/Main_Site/Index.aspx)

Information and resources to help plan for future long term care needs.

#### Social Security administration Spanish-language website

[www.segurosocial.gov](http://www.segurosocial.gov)

This website provides online application for retirement and Medicare benefits. Information and publications are written in Spanish.

#### Washington County Law Librarians

[www.co.washington.or.us/LawLibrary](http://www.co.washington.or.us/LawLibrary) ■

### CLE seminars

#### Oregon State Bar Programs

<http://osbarcle.org>

##### Special Needs Trusts

July 31, 2012

Quick Call program

##### OSB Elder Law Section Annual CLE Program

October 5, 2012

Oregon Convention Center, Portland

Topics include: Communicating with Individuals with Disabilities, Financial Abuse by a Fiduciary, Litigating Capacity for Contested Guardianships, Marriage, Un-Marriage, & Medicaid, Medicaid Transfers, Legislative Update

##### Disclaimers Practice in Estate Planning

October 23, 2012

Quick Call program

##### Post-mortem Estate Planning

December 14, 2012

Quick Call program

##### Picking the Right Trust

December 19, 2012

Quick Call program

#### NAELA Programs

[www.naela.org](http://www.naela.org)

##### Medicare Home Health Coverage for People With Long-term and Chronic Conditions

September 12, 2012

Webinar

##### Medicare Hospice Coverage Can Really Help At the End of Life

October 24, 2012

Webinar ■

### 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](mailto: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](mailto:eldlaw@lists.osbar.org)—or you can choose "Reply to all."

#### Guidelines & Tips

- Include a subject line in messages to the list
- Try to avoid re-sending the entire message to which you are replying. Cut and paste the relevant parts when replying,
- Sign your messages with your full name, firm name, and appropriate contact information.
- In the interest of virus prevention, do not try to send graphics or attachments. ■

# Important elder law numbers

as of July 1, 2012

|   |  |
|---|--|
| <b>Supplemental Security Income (SSI) Benefit Standards</b> | Eligible individual.....\$698/month<br>Eligible couple .....\$1,048/month  |
| <b>Medicaid (Oregon)</b>                                    | Long term care income cap .....\$2,094/ month<br>Community spouse minimum resource standard ..... \$22,728<br>Community spouse maximum resource standard ..... \$113,640<br>Community spouse minimum and maximum monthly allowance standards.....\$1,892/month; \$2,841/ month<br>Excess shelter allowance ..... Amount above \$567/ month<br>Food stamp utility allowance used to figure excess shelter allowance .....\$395/ month<br>Personal needs allowance in nursing home.....\$30/ month<br>Personal needs allowance in community-based care.....\$155.30/ month<br>Room & board rate for community-based care facilities ..... \$542.70/ month<br>OSIP maintenance standard for person receiving in-home services ..... \$698<br>Average private pay rate for calculating ineligibility for applications made on or after October 1, 2010 .....\$7,663/ month |
| <b>Medicare</b>   | Part B premium ..... \$99.90/ month*<br>Part B deductible..... \$140/year<br>Part A hospital deductible per spell of illness ..... \$1,156<br>Part D premium: ..... Varies according to plan chosen<br>Skilled nursing facility co-insurance for days 21-100.....\$144.50/ day<br><br>* The standard Medicare Part B monthly premium is \$99.90 in 2012, a \$15.50 decrease over the 2011 premium of \$115.40. However, most Medicare beneficiaries were held harmless in 2011 and paid \$96.40 per month. The 2012 premium represents a \$3.50 increase for them. Premiums are higher if annual income is more than \$85,000 (single filer) or \$170,000 (married couple filing jointly).   |



## Elder Law Section

### Newsletter Board

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

**Editor:**  
 Carole Barkley ..... carole424@aol.com; 503.224.0098

**Advisory Board:**  
 Erin Evers, Chair ..... erin@evers-law.com; 503.640.1084  
 Dady K. Blake..... dady@q.com; 503.249.0502  
 Hon. Claudia M. Burton ..... claudia.m.burton@ojd.state.or.us; 503.378.4621  
 Penny Davis..... penny@theelderlawfirm.com; 503.452.5050  
 Prof. Leslie Harris ..... lharris@law.uoregon.edu; 541.346.3840  
 Phil Hingson ..... phil@oregontrustattorney.com; 503.639.4800  
 Leslie Kay ..... leslie.kay@lasoregon.org; 503.224.4086  
 Karen Knauerhase ..... karen@knauerhaselaw.com; 503.228.0055  
 William J. Kuhn ..... kuhnandspicer@windwave.org; 541.567.8301  
 Monica Pacheco ..... monica@dcm-law.com; 503.364.7000  
 Daniel Robertson ..... drobertson@allermorrison.com; 541.673.0171  
 Barbara Smythe ..... barbaras@myattandbell.com; 503.641.6262  
 Mary Thuemmel ..... marythuemmel@gmail.com; 503.318.8393  
 Prof. Bernard F. Vail ..... vail@lclark.edu; 503.768.6656