



# NEWSLETTER ELDER LAW

Published by the Elder Law Section of the Oregon State Bar • August/September 1998

## Oregon State Bar Elder Law Section Notice of Section Annual Business Meeting and Annual Report to Section Members

by Valerie J. Vollmar, Chair

The annual business meeting and election of officers and Executive Committee members of the Oregon State Bar Elder Law Section will be held at 4:10 p.m. on Friday, September 11, 1998, in the Eugene O'Neill Room at the Eugene Hilton in Eugene, Oregon.

The following persons have been nominated for election:

Chair-Elect . . .Richard A. Pagnano  
Secretary . . . .Cinda M. Conroyd  
Treasurer . . . .S. Jane Patterson

Members-at-large (2-year term):

Shirley A. Bass  
Dady Kathryn Blake  
Jon A. Iverson  
Michael D. Levelle  
Mark M. Williams

Additional nominations may be made from the floor during the meeting. The following individuals also will continue to serve on the Executive Committee during 1998-1999:

Immediate Past Chair . . . .Valerie J. Vollmar  
Chair . . . . .Donna R. Meyer

Members-at-large (1-year term):

Lisa N. Bertalan  
Wesley D. Fitzwater  
Heather O. Gilmore  
Helen B. Hempel  
Tim Nay  
Jennifer L. Wright

**The following annual report is made pursuant to Article III, Section 5, of the Section bylaws:**

An organizational meeting was held in

August 1997 to discuss formation of a new Elder Law Section. Following the meeting, petitions signed by 116 active members of the Oregon State Bar were submitted to the Board of Governors, requesting approval of the new section, section officers, and Executive Committee members. The Board of Governors approved formation of the section at the September 1997 Oregon State Bar annual meeting. Section dues were fixed at \$20 per year. As of May 1998, the new section had 400 members.

The Elder Law Section Executive Committee, consisting of 15 members, met five times during 1997-98: in October (Lake Oswego), December (Lake Oswego), February (Salem), April (Lake Oswego), and June (Bend). The annual meeting will be held on September 11, 1998, at the conclusion of an Oregon State Bar co-sponsored CLE program in Eugene.

The activities of the Executive Committee have been conducted through subcommittees. The six subcommittees and their chairpersons are Agency and Professional Relations (Donna R. Meyer), Computers and Technology (Margaret Madison Phelan), CLE Programs (Heather O. Gilmore), Legislation (Lisa N. Bertalan), Pro Bono/Access (Penny L. Davis), and Public Education (Shirley A. Bass). Michael D. Levelle serves as editor of the section newsletter and chair of the newsletter Editorial Board.

The Agency and Professional Relations

Subcommittee has concentrated its initial efforts on beginning a dialogue with the Senior and Disabled Services Division of the Oregon Department of Human Resources (SDSD). Meetings have been held with various SDSD representatives to discuss SDSD policies and procedures and raise various issues of concern to clients of elder law attorneys.

The Computers and Technology Subcommittee is developing a section web page through the Oregon State Bar (<http://www.osbar.org/ProDevelopment/OSBSections/ElderLaw.html>) and investigating establishment of a listserv for the section.

The CLE Programs Subcommittee is planning an all-day CLE program on basic Medicaid planning and selected advanced topics, which will be co-sponsored with the Oregon State Bar. The program will be presented at the Eugene Hilton on Friday, September 11, 1998, and repeated at the Oregon Convention Center in Portland on Friday, September 18, 1998. Four Section members-Cindy Barrett, Penny Davis, Wes Fitzwater, and Mark Williams-are serving as editors of an elder law treatise to be published by the Oregon State Bar.

The Legislation Subcommittee has reviewed proposed changes to Oregon's civil commit-

ment system and is preparing for the 1999 Oregon legislative session. The Pro Bono/Access Subcommittee is being formed to help improve access to legal services for persons unable to afford a private attorney. The Public Education Subcommittee is looking into authoring Oregon State Bar public service pamphlets on topics such as long-term care. Two issues of the section's newsletter have been published, in December 1997 and April/May 1998.

*Respectfully submitted,*

Valerie J. Vollmar, Chair; Donna R. Meyer, Chair-Elect; Richard A. Pagnano, Secretary; S. Jane Patterson, Treasurer; Michael Arant; Shirley A. Bass; Wesley D. Fitzwater; Cinda M. Conroyd; Heather O. Gilmore; Helen B. Hempel; Tim Nay; Margaret Madison Phelan; Mark M. Williams; Jennifer L. Wright; Richard C. Baldwin, BOG Liaison; Keir Karson, Staff Liaison.

## NEWSLETTER NEWS

*By Conrad J. Hutterli*

### ***Update On "Granny's Advisor Goes To Jail."***

In 1996, Congress enacted a law that became commonly known as the "Granny Goes to Jail Act," which provided criminal sanctions for Medicaid applicants who transferred assets if the disposition of assets resulted in a period of ineligibility for benefits. The law produced such outrage among senior citizens and their advisors that Congress amended the law to remove criminal sanctions for the applicant, and in its place provide for it to be a crime to counsel or assist for a fee an individual to become eligible for Medicaid under certain circumstances (See 42 U.S.C. §1320(a) - 7b(a)(6)). The new law took effect September 5, 1997.

The National Academy of Elder Law Attorneys undertook a sustained effort to secure the law's repeal. In addition, the New York State Bar Association filed an action seeking an injunction against enforcement of the law in December, 1997.

On March 11, 1998, Attorney General Janet

### ***Newsletter Board***

#### ***Editor***

Michael D. Levelle

#### ***Advisory Board***

Shirley A. Bass  
Conrad Hutterli  
Tom Pixton  
Helen Hempel

#### ***New News?***

If you have any news to report that would be of interest to other elder law attorneys, please contact the Editor

Email: michael @ SSWCS.com.

Phone: (503) 227-1111

Reno advised the Speaker of the House and the Vice-President by letter that the law was plainly unconstitutional under the First Amendment and that the Department of Justice would not defend its constitutionality or bring any criminal prosecutions under the current version of this law. However, the Attorney General did offer the services of the Department of Justice to assist Congress in drafting new legislation that would address the concerns and policy objectives of Congress and the Executive Branch in a manner that comports with contemporary First Amendment jurisprudence.

In an April 15, 1998 (Vol. 14, No.6) ABA/BNA publication (Lawyer's Manual on Professional Conduct) the New York State Bar Association's lead counsel is quoted as stating that Reno's letter does not obviate the need to continue the action because "[a]s long as that law is on the books, there is a chilling effect on free speech." The April 1998 issue of The Elder Law Report quoted an attorney for the New York State Bar Association who stated that despite Reno's letter, the Department of Justice continued to oppose the injunction on the ground that in view of its decision not to enforce the statute, the court need not enter an injunction. On April 9, 1998, the U.S. District Court for the Northern District of New York granted the New York State Bar Association a preliminary injunction against the law. (New York State Bar Association v. Reno, 999 F.Supp.710 (N.D. N.Y.))

In a telephone conference, David Schraver, an attorney with the firm of Nixon, Hargrave, Devans and Boyle which represents the New York State Bar Association in this case, stated that the Bar Association has begun the process to obtain a summary judgment. The motion for summary judgment seeks a declaratory judgment that the law is unconstitutional and a permanent injunction. He is not sure what position the Department of Justice will take now that the preliminary injunction has been granted. If the motion is opposed and a hearing is

scheduled, Schraver anticipates that it will occur this fall.

Even if a permanent injunction is granted, attorneys still may have reason to be concerned. The injunction may protect only a limited group of persons and the protection from prosecution provided by the injunction and Reno letter may be short-lived.

An attorney outside the jurisdiction of the Northern District of New York (and not a party to the lawsuit) may not be protected by the injunction if the Justice Department for some reason should reverse its decision not to prosecute. The United States, unlike a private litigant, may relitigate the same legal issue decided against it involving a different party in a different jurisdiction. *U.S. v. Mendoza*, 464 U.S. 154, 160 (1984).

Also, a new administration will be in office by January 20, 2001. The new administration may not share the same political views as the current administration. It is also possible that a new attorney general could reconsider and reverse Reno's nonenforcement policy and those not protected by the injunction could face prosecution. Finally, the Reno letter provides no assurance that State Medicaid Fraud Units will not enforce the law.

### ***Intentional Interference With Inheritance Question Certified***

On March 19, 1998, the Ninth Circuit Court of Appeals certified to the Oregon Supreme Court the question of whether Oregon recognizes the tort of intentional interference with prospective inheritance. *Allen v. Hall*, 139 F.3d 716 (9th Cir. 1998).

The plaintiffs argued in U.S. District Court that they had an expectancy with which the defendants intentionally interfered. The District Court dismissed on the ground that Oregon has not recognized such a tort. It appears that the Oregon Supreme Court has never ruled on the question.

The Court of Appeals certified these questions:

Does Oregon recognize the tort of

intentional interference with prospective inheritance?

If a tort for intentional interference with prospective inheritance is available, what are the elements of that tort?

## Agency and Professional Relations Subcommittee Report

*By Donna R. Meyer*

The Elder Law Section's Agency and Professional Relations Subcommittee has continued to meet to discuss ways to maintain and improve the relationship between the elder law community and the agencies with which elder law attorneys work. Also, members of the Subcommittee have continued to meet with Jeff Miller, who is policy analyst with the Senior and Disabled Services Division (SDSD), and Joan Larsen, interim head of the Estate Administration Unit (EAU). The most recent meeting, held in April, also included Sharon Schooley, who is the Assistant Attorney General assigned to SDSD. The Subcommittee has been pursuing the following issues of interest.

### ***Senior And Disabled Services Division***

**1. Petitions for Support.** The last Elder Law Section newsletter included a practice tip encouraging practitioners to send Petitions for Support, along with a notice and opportunity to object, to Jeff Miller at SDSD. The Subcommittee strongly encourages lawyers representing petitioners in these proceedings to provide notice to SDSD in order to protect their clients from potential post-judgment challenges. Notices should be sent to Jeff Miller, Human Resources Building, 2nd Floor, 500 Summer Street NE, Salem, Oregon 97310-1015.

In an age of heightened scrutiny of Petitions for Support, some practitioners are reviewing and revising the procedural steps they follow in these proceedings. The latest practice tips will be reviewed at the joint

Oregon State Bar/Elder Law Section CLE, which will be held in September in Eugene and Portland. The Subcommittee encourages anyone who files Petitions for Support to attend.

Over the years, there has been discussion about SDSD adopting informal guidelines so that practitioners would know which cases would be likely to invite challenge. However, at this time it appears that guidelines will not be adopted. Rather, Petitions for Support will continue to be reviewed on a case-by-case basis.

The Sixth Circuit Court of Appeals recently held that the "income first" rule used by the State of Ohio was a valid interpretation of federal law (see, *Chambers v. Ohio Department of Human Services*, 145 F.3d 793 (6th Cir. 1998)). Under an income first approach, the institutionalized spouse must transfer income before he or she may transfer resources to the community spouse. The "resource first" approach, which has been upheld in other courts, allows transfer of resources to the community spouse prior to the transfer of income from the institutionalized spouse. The Sixth Circuit Court of Appeals case held that the statute does not clearly express whether states are required to follow the resource first approach or the income first approach, and that Ohio's use of the income first rule was not invalid.

Oregon's current administrative rule has employed the income first approach, and SDSD has indicated that it will "continue to consider the income of the institutionalized spouse prior to allowing additional resource transfers as a means to create eligibility." This is a continuation of current policy.

**2. Average Cost of Care.** The current average monthly cost of care in Oregon used for determining Medicaid ineligibility based on transfer of assets is \$2,595. It is expected that this figure will change effective October 1, 1998. The new average cost of care figure will be \$3,320/month.

**3. Criminalization.** At the April meeting



## Around Oregon

By Shirley A. Bass

Many counties are establishing informal elder law discussion groups. The groups can be an invaluable source of the latest information as well as camaraderie. If your area has a discussion group or has information to share, please contact the Editor. A number of areas contacted are dormant for the summer but plan to start up in the fall. Here's a sampling:

### **Multnomah County**

Contact: Anne Stacey, Senior Law Project  
(503) 224-4094

#### ***Elder Law II (Basic) Discussion Group***

1st Thursday each month - 8:30-9:30 a.m.,  
Multnomah County Legal Aid, large conference room, 700 S.W. Taylor, 3rd floor,  
Portland

#### ***Elder Law (Advanced) Discussion Group***

2nd Thursday each month - 7:45-9:00 a.m.,

Irvington  
Room, 2nd floor, 825 N.E.  
Multnomah, Portland

### **Washington County**

Contact: Jerold Hilary (503) 639-4108

### **Clackamas County**

Contact: Sherrie Lyn Stangell (503) 655-7659

### **Salem - Marion County**

1st Tuesday each month - 12:00-1:15  
p.m. (brown bag), Commercial Bank,  
Board Room, 301 Church Street NE,  
Salem. Contact: Heather Gilmore (503)  
378-7813 or Cinda Conroyd (503) 364-7000

### **Eugene - Lane County**

Contact: Jane B. Stewart (541) 342-5587

### **Medford - Jackson County**

Contact: David Seulean (541) 773-5830 or  
Jon Iverson (541) 772-3477

with SDSA, the Subcommittee suggested that SDSA adopt a rule clarifying that if an applicant applies after the penalty period of ineligibility has expired, for purposes of state policy no penalty period of ineligibility will have been imposed. In other words, the "Granny's Advisor Goes to Jail" law would not apply if a client applies for assistance after the penalty period of ineligibility has expired.

It appears that SDSA is unlikely to adopt such a rule. However, SDSA is aware of the preliminary injunction obtained in New York State and the "no prosecution" approach taken by the Department of Justice.

### ***Estate Administration Unit***

Roy Fredricks has been hired to head the Estate Administration Unit. Joan Larsen, who was the interim head of EAU, will continue her work at SDSA in another capacity. The

Subcommittee has a meeting scheduled with Mr. Fredricks and Ms. Larsen in late August, with the goal of continuing discussions regarding various issues, including the burial allowance and hardship exception.

## SDSD NEWS

By Michael D. Levelle

### ***New Brochure for SDSA Estate Administration Unit.***

Senior and Disabled Services Division has updated and revised the Estate Administration Program brochure (SDS 9093). The brochure is designed to provide an overview of the collection process when a Medicaid client dies. The brochure is in a question and answer format. Copies of the brochure are available at local SDSA offices or by contacting Joan Larsen, (503) 378-3133.

***Changes to Reimbursement Rates for Adult Foster Home/Residential Care Facility Reimbursement.***

SDSD implemented a new adult foster home residential care facility reimbursement system effective March 1, 1998. SDSD recently produced a newsletter summarizing information about the reimbursement system. SDSD mailed the newsletter and a "point system" document to all non-relative adult foster homes, relative adult foster homes and residential care facility providers. More information about the newsletter and "point system" brochure can be obtained by contacting Julia Huddleston, (503) 945-6392.

***Revised Rates for Community Based Programs.***

Service rates for relative foster home, assisted living facilities, companion hours in the client employed program, home delivered meals and nursing facilities have increased. See OAR 461-155-270. Contact Person: Jane Ambrosek (503) 945-5855.

***Oregon Project Independence.***

SDSD implemented a new OPI fee for service schedule effective July 1, 1998. The schedule can be found at OAR 411-032-0044. Contact person: Pat List (503) 945-6413. (Note: The Secretary of State has implemented a new OAR numbering system that has an extra digit. SDSD will add the extra digits as rules are reprinted.)

## Upcoming CLE Counseling Elderly Clients

**Friday, 9/11/98**

Eugene Hilton  
Eugene, Oregon

**Friday, 9/18/98**

Oregon Convention Center  
Portland, Oregon

The Oregon State Bar and Elder Law Section are co-sponsoring two live CLEs in September. The Portland CLE will be a repeat of the Eugene CLE. The OSB Elder Law Section Annual Meeting will be held after the Eugene CLE.

*Counseling Elderly Clients* features topics such as tools of the elder law attorney, basic Medicaid rules (in plain English), forms and drafting tips, and current information. The program is designed to provide the practitioner with the knowledge and skills to recognize elder law issues as well as information to advise and represent the elderly client. The program will cover Medicaid transfers, estate recovery, the new POLST forms, and planning for the single person and married couples. An ethics credit can be earned from a lively panel discussion on thorny ethical issues. A special feature will be vendors' booths hosted by local government and service organizations.

To register call OSB CLE today: (503)684-7413, or toll-free in Oregon at (800) 452-8260, ext. 413.

## CALENDAR

- September 9, 1998 - (Sponsored by Practising Law Institute) *Basic Elder Law*, NYC-PLI Conference Center, NY York. Telephone: (800) 260-4754.
- September 11, 1998 - CLE: *Counseling Elderly Clients*, Eugene Hilton Hotel. Co-sponsored by Elder Law Section and OSB, followed by Section annual meeting. (See announcement, page 6).
- September 18, 1998 - CLE: *Counseling Elderly Clients*, Oregon Convention Center, Portland (Repeat of September 11th program).
- October 4-7, 1998 - CLE: *10 Years—Making a Difference*, Sheraton National, Washington, D.C. Sponsored by National Guardianship Association. Contact Jenifer Mowery, (520) 881-4005, ext. 114; or e-mail: [hyperlinkmailto:mowery@naela.com](mailto:hyperlinkmailto:mowery@naela.com).
- November 18-19, 1998 - CLE: *Redesign Your Elder Law Practice*, Crystal Gateway Marriott, Arlington, VA. Contact Jenifer Mowery, (520) 881-4005, ext. 114; or e-mail: [hyperlinkmailto:mowery@naela.com](mailto:hyperlinkmailto:mowery@naela.com).
- November 20-22, 1998 - CLE: *Advanced Elder Law Institute*, Crystal Gateway Marriott, Arlington, VA. Contact Jenifer Mowery, (520) 881-4005, ext. 114; or e-mail: [hyperlinkmailto:mowery@naela.com](mailto:hyperlinkmailto:mowery@naela.com).
- December 4, 1998 - CLE: *Basic Estate Planning*, Oregon Convention Center, Portland, Oregon. Telephone: (503) 684-7413 or (800) 452-8260, ext. 413.
- December 10 - 13, 1998 - CLE: *Care/Case Management at the Crossroads: Which Way to Quality?*, San Diego, CA. Contact American Society on Aging, (415) 974-9600.

## RESOURCES

### **Internet:**

The Secretary of State office maintains all Oregon Administrative Rules on-line. You may access them at <http://arcweb.sos.state.or.us>.

### **Publications:**

A new book by Lawrence A. Frolick entitled *Housing Options for the Elderly and Disabled* is designed to assist attorneys, financial planners, social workers and geriatric case managers whose clients have special needs for residential housing. It includes sections on the housing needs of older or disabled clients, independent living, transitional housing, and high level personal care, such as nursing homes and hospice. Published by Warren, Gorham & Lamont, the book sells for \$165. Professor Frolick, a frequent contributor in the elder law arena, has also authored a casebook entitled *Elderlaw: Cases and Materials* (The Michie Company, 1992).

## Elder Law Section Member Information

The Section Executive Committee is looking for members who are interested in becoming involved in Section activities. Please take a moment to fill out and return this form to:

**Michael D. Levelle, Sussman Shank Wapnick Caplan & Stiles LLP, 1000 SW  
Broadway, Suite 1400, Portland, OR 97205. Fax: (503) 248-0130**

Name \_\_\_\_\_ Bar Number \_\_\_\_\_

Firm name \_\_\_\_\_

Address \_\_\_\_\_

Phone \_\_\_\_\_ Fax \_\_\_\_\_ Email \_\_\_\_\_

Are you willing to help? If so, please indicate your preference. If you have questions, please feel free to call the person listed for more information.

- |   |  |
|---|--|
| <input type="checkbox"/> <b>Newsletter Editorial Board</b><br>Editor: Michael Levelle, (503) 227-1111 | <input type="checkbox"/> <b>Agency and Professional Relations</b><br>Chair: Donna Meyer (503) 236-5152 |
| <input type="checkbox"/> <b>CLE Programs</b><br>Chair: Heather Gilmore (503) 378-7813                 | <input type="checkbox"/> <b>Computers and Technology</b><br>Chair: Margaret Phelan (503) 243-7810      |
| <input type="checkbox"/> <b>Pro Bono/Access</b><br>Chair: Penny Davis (503) 224-4094                  | <input type="checkbox"/> <b>Public Education</b><br>Chair: Shirley Bass (503) 241-9455                 |
| <input type="checkbox"/> <b>Legislation</b><br>Chair: Lisa Bertalan (541) 382-4331                    |  |

Bulk Rate  
US Postage  
PAID  
Portland, Oregon  
Permit No. 341

Oregon State Bar  
Elder Law Section  
5200 SW Meadows Rd  
Lake Oswego, OR 97035-0889

