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Elder law attorneys strive to balance zealous advocacy and personal ethics

By Donna Meyer

Author's note:

This article grew out of a series of discussions with other elder law practitioners regarding advocacy in the context of Medicaid planning. The author thanks Cynthia Barrett, Cinda Conroyd, Penny Davis, Wesley Fitzwater, Sam Friedenber, Richard Pagnano, and Ruth Simonis.

For further discussion of zealous advocacy refer to the following sources: Course materials, Oregon Law Institute, *Zealous Advocacy: Oversold or Underrated?* November 5, 1999; Course materials, Oregon Law Institute, *Can a Good Person Be a Good Lawyer? Can a Good Lawyer Be a Good Person?* October 30, 1998; George A. Reimer, "Zealous Lawyers, Saints or Sinners?", Oregon State Bar Bulletin, October, 1998.

One of our profession's guiding ethical rules is the principle of zealous advocacy, which requires the lawyer to represent the client zealously within the bounds of the law. However, we occasionally face conflicts between professional duties and personal ethics. Sometimes we simply feel uneasy about a situation but go ahead with the expected course of action while ignoring the uneasiness. In the area of Medicaid planning, for example, we may be confronted with an ethical dilemma that puts zealous advocacy in conflict with a concern for the good of society as a whole.

We are sometimes contacted by clients with large estates who seek to qualify for Medicaid assistance. To some extent, the availability of certain Medicaid planning techniques developed by elder law lawyers depends on the goodwill of the state agency that administers the program, the Senior and Disabled Services Division. If these techniques are used for individuals with very large estates, the availability of the same techniques for those with modest and small estates may be jeopardized.

In this context, can zealousness go too far? Is it proper to consider the impact of the strategy employed in one client's case on other clients or on public policy? Should a lawyer's personal ethics have a legitimate professional role?

Zealous advocacy reexamined by legal profession

Disciplinary Rule Seven of Oregon's Code of Professional Responsibility specifies that the lawyer must seek the lawful objectives of the client through reasonably available means permitted by law. Section 1.6 of the General Guidelines in Oregon's Statement of Professionalism says: "We will represent our clients zealously within the bounds of the law and the ethical standards approved by law or the Oregon Supreme Court, vigorously protecting the interest of our clients in a responsible manner."

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The principle of zealous advocacy is intrinsic to our system of justice, with a long and honored history; but in the last two decades the effect of the term “zealous” in the ethical code has been questioned and examined. Much of the national debate has centered on aggressive and offensive tactics employed by lawyers in the course of representation. The concept of “professionalism” has been widely debated, and lawyers have been encouraged to use more civil behavior.

Sufficient concern has been raised about overzealousness that reference to it has been officially minimized. The American Bar Association’s 1969 Model Code of Professional Responsibility, which contained a clear obligation of zeal, was replaced by the 1983 Model Rules of Professional Conduct, which mentioned zeal only in the preamble and in a comment referring specifically to advocacy situations. The Rule itself states only that “a lawyer shall act with reasonable diligence and promptness in representing a client.”

In 1998 the Oregon Supreme Court/Oregon State Bar Professionalism Commission requested the Board of Bar Governors to study whether to amend DR 7-101 of the Code of Professional Responsibility to delete any reference to zealous representation. This was later referred to the Legal Ethics Committee for study. While this proposal has been tabled, it illustrates the profession’s concerns about how zealous representation intersects with civil behavior, honesty and personal ethics.

Zealous advocacy in Medicaid planning

Consider the following hypothetical scenario. Client Jones has \$700,000 in liquid assets, and substantial monthly income. His wife is in an adult foster care home. Client Jones wants Lawyer Smith to help him obtain Medicaid assistance benefits for his wife. Lawyer Smith prepares a spousal annuitized trust, and transfers the bulk of the assets into the trust. Immediately after the wife receives Medicaid assistance, Client Jones asks the trustee to distribute all of the trust assets to him and terminate the trust. The size of the assets involved prompts the Senior and Disabled Services Division to explore ways to challenge future similar trusts, which could eliminate this strategy for all clients in the future, including those with few assets.

Lawyer Smith might have had misgivings about proceeding with this plan because of the possible negative effect on future clients with fewer resources who might find this strategy foreclosed. However, once a

case is accepted, zealous advocacy requires a lawyer to pursue the client’s interests as the client perceives them, if legal, regardless of the effect on other people and on public policy.

Was this plan within the bounds of the law? Yes. Did Lawyer Smith zealously advocate for her client? Certainly. Did Lawyer Smith violate any ethical rule? If she disclosed all the relevant information, no. Once Lawyer Smith accepted this case, and her client directed her to take this course of action, she had an ethical duty to proceed. Did Lawyer Smith have any other choices? Yes.

Declining representation is an option

If she was uncomfortable with the strategy, Lawyer Smith could have chosen not to accept this client. Generally speaking, a lawyer is not required to accept a client matter. This is a key point, argues Professor Monroe H. Freedman, a leading commentator on legal ethics and a strong proponent of zealous advocacy. In *Zealous Representation: the Pervasive Ethic*¹, he states:

No lawyer is required to represent a client who owes a debt but who seeks to resist paying it solely on the ground that the statute of limitations has run. The lawyer who is offended by such a cause can simply decline to take it on.

Further, Professor Freedman argues that this allows the lawyer to exercise “moral accountability” in choosing clients.

The lawyer’s decision to take or to reject a client is a moral decision for which a lawyer can properly be held morally accountable. Indeed, there are few decisions that a lawyer makes that are more significantly moral than whether she will dedicate her intellect, training, and skills to a particular client or cause.

Acknowledging the lawyer’s influence

We all know that each lawyer brings his or her own proclivities and preferences to the table. In the context of Medicaid planning, a client could visit several different lawyers and make a different decision after seeing each one. One lawyer might do a large number of trusts in which assets are transferred ultimately to the children of the client. A second and equally capable lawyer might do few or no trusts of this type, but file Petitions for Support for Transfers of Assets with the

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court. One lawyer filing a Petition for Support might commonly request that the respondent be awarded \$25,000-\$40,000 to spend down, feeling this will be perceived as more fair by the Senior and Disabled Services Division and by the court, thus minimizing risk. Another lawyer might ask the respondent be awarded a minimal amount, to obtain immediate eligibility.

The recommendations to a client represent a synthesis of the lawyer's judgment and intuition, experience and knowledge, an assessment of risks and rewards, and the lawyer's own individual temperament and preferences. If one lawyer has numerous clients who are "telling her" to obtain Medicaid assistance to protect large estates, and another elder law lawyer has none, it is reasonable to assume that the lawyers have something to do with it. Attorneys often say, "the client made me do it," without acknowledging their own role in the decision-making process, including explaining the options and counseling the client.

Explaining the options

To explain options effectively, the practitioner must identify underlying issues, as well as those initially presented by the client.

For example, an anxious and upset client will say: "My spouse is in a nursing home. I'm worried that I will lose my house and everything we worked for."

The attorney may respond by reassuring the client that options exist to obtain Medicaid assistance and proceed to review them. Primed to help, the elder law practitioner may jump into "superhero" mode, rushing to fix the initially identified problem. Without more information, this may be a disservice to the client.

An underlying goal of most Medicaid planning clients may be to alleviate stress and to feel like they have "taken care of things." What often prompts them to come in is fear and confusion. The elder law lawyer has the challenging task of providing the client with sufficient information about the available options in an accessible manner, while trying to help the client identify what would truly be most helpful for him or

her. This will encompass factors well beyond financial considerations.

The lawyer cannot withhold reasonable and good options from the client, based on the lawyer's preference or intuition. To do so would be patronizing and would deny the client the opportunity to make an informed choice. If the lawyer immediately identifies her preferred option as the solution, without taking the time to identify underlying concerns and explaining all reasonable alternative options, then the client

is not being given the opportunity to make an informed choice. (Of course, as every Medicaid planning lawyer knows, in an initial conference the lawyer must also exercise judgment when reviewing options, so that the client is not overwhelmed. If every pro and con of each possible approach were discussed, the initial appointment would stretch to four hours and the client would collapse from exhaustion and confusion!)

Among the options a lawyer giving Medicaid planning advice can suggest to a client with a large estate is to "do nothing." She can discuss the pros and cons of forgoing Medicaid planning, and treat this option as a legitimate and worthy approach along with the other options. She can look at the true financial impact of the private-pay approach on the estate. She can discuss the bureaucratic aspects of

receiving Medicaid, and the fact that not all care options and facilities will be available. She can explain that the higher the value of the assets involved, the greater the risk of the agency balking at the application, which could result in an initial denial and additional stress for the client. Of course, the lawyer won't be serving her client if she presents this information in a way that expresses disapproval of the Medicaid planning options. The goal is to allow the client to make an informed decision that looks at all of the factors, not just "the numbers."

While the do-nothing option may appear to be stating the obvious, it is not necessarily obvious to clients who are experiencing extraordinary stress and are being bombarded by advice from helpful friends, family, neighbors, bridge partners and bank tellers.

"An advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and amongst them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others. Separating the duty of a patriot from that of an advocate, he must go on reckless of consequences, though it should be his unhappy fate to involve his country in confusion."

Lord Henry Brougham, 1820

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Clients often appreciate the information and perspective. In one of the author's cases, the son of the client, who was participating in the initial appointment, said with relief, "It's obvious, but we got so caught up in worrying about what we thought we were supposed to do that we weren't thinking clearly. We don't have to do anything!"

Counseling the client

While a lawyer who accepts a case cannot impose her own moral view on the client, or make decisions contrary to what is in the interests of achieving the client's objectives because of the lawyer's own moral philosophy, she can go beyond mere recitation of options and dry recommendations. Many clients want to see the larger picture and their part in it. Two of Oregon's local experts on legal ethics, Peter R. Jarvis and Bradley F. Tellam, have written about this.

In fact, and as Professor Freedman has noted, one of our principal failings as a profession is that we do not talk nearly enough to our clients about right and wrong or about the long-term consequences of what the client proposes to do. We figure out on our own what we think the client wants and then we fashion a strategy to get it. If nothing else, most clients like to think of themselves as moral, fair and thoughtful human beings.²

And:

It is always proper for lawyers to discuss the moral or ethical consequences of a proposed course of action with a client. In fact, lawyers should be encouraged to do so.

Nothing in the disciplinary rules prohibits a lawyer from discussing not only tactical but also ethical and moral considerations with a client. In fact, there is a substantial body of literature to the effect that the discussion of such considerations is at least implicit in the rule of the lawyer as "counselor."³

In our example, Lawyer Smith could have talked about the purpose of the Medicaid program, described the people it helps, and described the impact of possible challenges to the currently available planning strategies. This could be done without moralizing, but rather in a manner that invites Client Jones to consider these issues from his point of view

as well. He could be put off—but he could be relieved. He could leave pleased that he understands the options and the larger context in which he is making his decision.

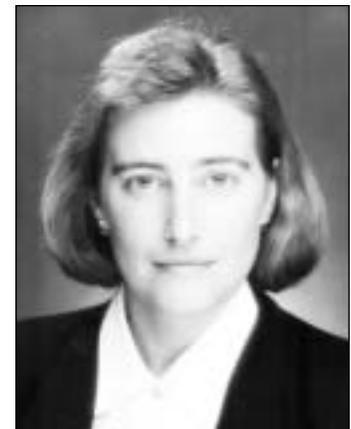
Finding the balance

To be a zealous advocate a lawyer need not leave personal ethics at the door. When approached by a client with a large estate who wants information regarding Medicaid planning, the attorney has several approaches to consider. First, she can choose to accept the client and zealously represent him or her to obtain Medicaid assistance. Second, she can refuse to take a case if she is not comfortable with it. Third, she can look beyond financial and technical considerations to any initially unstated goals of the client. Fourth, she can provide the pros and cons of all the options to the client in an efficient and helpful manner, including the option to forgo Medicaid planning. Finally, she can provide counseling about the larger issues and consequences of the proposed action.

Footnotes

- 1 Oregon Law Institute course materials for *Zealous Advocacy: Oversold or Underrated?* November 5, 1999
- 2 Peter R. Jarvis and Bradley F. Tellam, "Professionalism in the Late 1990s," Oregon Law Institute, *Ethics at the Millennium: Can a Good Person Be a Good Lawyer? Can a Good Lawyer Be a Good Person?* course materials, October 30, 1998, 2-34, referring to Freedman, "Understanding Lawyers' Ethics" at 50-52.
- 3 Peter R. Jarvis and Bradley F. Tellam, "Negotiation Ethics," *The Ethical Oregon Lawyer*, Oregon State Bar Continuing Legal Education Handbook, also citing Freedman

Donna Meyer, JD, has practiced law in Oregon for more than 23 years. She is a partner with the firm of Baker & Meyer. Donna is the immediate past chair of the Elder Law Section of the Oregon State Bar, and still serves on its Executive Committee. She is also an active member of the Agency and Professional Relations Subcommittee, which was organized to strengthen communication between elder law attorneys and the agencies and other professionals with whom they work. Donna is a frequent author and lecturer on elder law topics.



Spousal support orders must be used responsibly

By Richard A. Pagnano

One of the most important long-term-care planning tools available to the elder law practitioner is the spousal support order. To ensure it will continue to be an option, we must use it responsibly.

The spousal support order provides a method to protect assets and income for the healthy spouse (the "community spouse") of someone needing long-term care (the "institutionalized spouse"). Family members can retain a sense of dignity and the ability to maintain themselves when dreams for their golden years are crumbling.

For families whose countable assets are below \$100,000, this planning tool can literally be a lifesaver. Without an increase in monthly income to more than the current Medicaid minimum of \$1,383, it is often extremely hard to maintain a home and meet current expenses. In addition, saving \$20,000 to \$60,000 from spend-down can generate the extra income needed. It can also provide funds for the community spouse to fall back on at the death of the institutionalized spouse, whose income will be no longer available or drastically reduced.

A significant threat to the continued availability of support orders is their irresponsible use. For example, a support order might be an attempt to protect significant countable assets – say \$200,000 or more – and an attempt to increase allowable income well beyond what the community spouse might be expected to need.

Medicaid is not the only option for paying for long-term care. For some clients it is simply inappropriate. Paying privately for long-term care puts wealthier clients in charge of the type of care that their spouses receive and preserves independence by leaving them in charge of their own funds. Schemes to divest Mom or Dad of assets to impoverish them artificially, so they will qualify for assistance usually place Mom or Dad at risk. Indeed, although Medicaid discrimination is against the law, elder law practitioners have all heard stories that confirm discrimination does occur – from having difficulty getting the Medicaid patient into the nursing home of his or her choice to outright discrepancies in the level of care received by Medicaid patients. Elder law attorneys must be prepared to counsel clients to look for ways to generate income to pay for care expenses.

Wealthier clients should be encouraged to purchase long-term care insurance. If that option is impractical, ways to produce income to pay for care with little or no reduction in principal should be examined. What comes to mind here is the client I recently saw who had more than \$500,000 in countable assets and available income of more than \$3,000.00 per month, but who was afraid that because her spouse would likely need long-term care, she had to engage in Medicaid planning.

If abused, today's technique may not be available tomorrow for those clients who desperately need it. The quickest way to lose the option of the spousal support order is to cause Medicaid officials to believe it is being abused by members of the Bar. Please remember that with the knowledge of planning tools that elder law attorneys share at CLEs and in publications comes an added burden: to act responsibly.

Richard A. Pagnano is a shareholder in Davis & Pagnano, P.C., d.b.a. The Elder Law Firm in Portland, and a member of the Oregon State Bar since 1989. His areas of practice are estate planning and probate with an emphasis on elder law. He is the chairman of the Elder Law Section Executive Committee and co-chair of the Estate Planning and Administration Section Legislative Sub-Committee. He has been honored by the Multnomah County Senior Law Project for pro bono services to the elderly; and frequently speaks to both professional and non-professional groups on probate, estate planning, and elder law issues.

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Must a lawyer move against a client to protect her?

As a way of discussing one of the ethical dilemmas faced by elder law attorneys, we asked Eugene attorney Helen Hempel to develop a hypothetical but not unlikely scenario. We then asked Mark Williams to comment. Mr. Williams has been a frequent speaker at Continuing Law Education seminars, and has written articles on the subject of ethics. He was formerly Disciplinary Counsel with the Oregon State Bar.

The scenario

Mrs. Worth is a 96-year-old widow who lives alone in her own home. She has no children, and her only relatives, an elderly brother and sister in fragile health, live in another state.

Because of her physical impairments, she is quite isolated, but over the years she has developed a friendship with her immediate neighbors, the Friendlys. Her only other social contact is with her mail carrier, Mr. Postal, who has delivered her mail for seventeen years.

One day, Mrs. Friendly brings Mrs. Worth to the office of lawyer John Cage. Mrs. Worth states that she wants to change her will, but the lawyer who drew her original will has refused to make the requested changes, saying that she lacks capacity. Mrs. Worth appears frail, but she answers questions appropriately, and agrees to have her long-time physician submit a written evaluation of her capacity. She reads and signs a medical release. The physician's evaluation states that Mrs. Worth does have the requisite capacity and outlines a specific conversation that demonstrates it.

Mrs. Worth, whose estate is valued at approximately \$490,000, then executes a new will, which includes several gifts—one of them to Mr. Postal.

Mrs. Worth also gives a limited power of attorney to Mrs. Friendly, so she can then help with handling finances. It is agreed that Mr. Cage will review monthly bank statements and a copy of the check register.

Several months later, Mr. Cage sees that Mrs. Worth has written a \$1500 check to Mr. Postal. Also, Mrs. Friendly calls to tell him she overheard Postal ask Mrs. Worth for money to help pay for his daughters' orthodontia, and Mrs. Worth's check register shows three checks totaling \$6,500 made payable to Postal.

Since Mrs. Worth is a very frugal person who never gave gifts and made only small charitable contributions, Mrs. Friendly asked her about these checks. She replied that she could do what she wished with her money.

After that, Mr. Postal—sometimes accompanied by his wife—is a frequent visitor, and becomes defensive when Mrs. Friendly questions what is going on.

Mr. Cage reports these incidents to Adult Protective Services, and to the postmaster. An investigation finds Postal guilty of misusing his position to obtain money.

Although the offense is punishable by dismissal and loss of pension, Postal's union enters into a mediation process and the matter is settled. Postal is ordered to repay Mrs. Worth.

Shortly thereafter, Mrs. Worth suffers a series of small strokes. Mr. Postal continues to visit, and a home health nurse observes that during these visits, Mrs. Worth is agitated, confused and upset. On one occasion, the nurse arrives as Postal and a female companion are leaving the house. Mrs. Worth is crying and upset and confides to the nurse that she is very confused, that the mail

carrier and his companion asked her to sign a paper that had numbers on it and had talked to her about the loan that she had made to him. She tearfully says that she can't remember if there was a loan and if there was, whether it was for \$20 or \$200.

The postmaster calls Mr. Cage to say that he has received a document signed in a "shaky handwriting" and witnessed by the mail carrier's union steward stating that Mrs. Worth had been repaid in full. When Mr. Cage checks, he learns Mrs. Worth doesn't remember getting a check and a careful search of the house and Mrs. Worth's accounts shows no evidence of a check or of a deposit.

At Mr. Cage's suggestion, the postmaster then writes a letter saying the check has been lost and requests that Postal put a "stop payment" order on the check and issue a new one in guaranteed funds. No replacement check has been received.

Mr. Postal continues to visit Mrs. Worth outside of his work hours, and she always appears confused and agitated after his visits.



... The ethics of a hypothetical case

Commentary by Mark M. Williams

Lawyers are problem solvers by training and the virtuous inclination to solve the problems of this 96-year-old client is very strong. Is the failing widow in this scenario freely making generous gifts or being pressured and unduly influenced?

The issue is this: at what point is it appropriate for a lawyer to step over the line from giving advice to clients to making decisions for clients? When clients make choices we don't agree with? When clients make bad choices? When clients make harmful choices? When clients are clinically unable to make competent choices?

A family law attorney would not find it appropriate to file a dissolution petition because he has seen enough and makes the decision on his or her own that it's time to file, regardless of what the client thinks.

Yet elder law attorneys are called upon to make these kinds of decisions frequently. Why? Perhaps because our relationship with our clients is different and because we're given an exception in the Code of Professional Responsibility that allows us to act in special circumstances. DR 7-101 (C) states that "[a] lawyer may seek the appointment of a guardian or take other protective action which is least restrictive with respect to a client only when the client cannot act adequately in the client's own interest, whether because of minority, mental disability or some other reason."

There is no Oregon case law interpreting the ethical rule. The Oregon State Bar has given us Formal Ethics Opinion 1991-41, which does little more than recite the above rule. The American Bar Association has given us ABA Formal Ethics Opinion 96-404.

The ABA analysis is this: Attorneys should not bring an action against a client to seek the initial appointment of a fiduciary in a protective proceeding; but may assist others in doing so and, once a court has made a determination that the client is incapacitated, may represent the fiduciary appointed by the court to protect the client. The altruistic view of this posture is that it allows the attorney to ensure that the proceeding is fair and the client has every opportunity to avoid the imposition of authority against him or her, but it allows the attorney with a long-term relationship with the client to remain in the role of advisor and protector of the client.

Ultimately, this may be the heart of what distinguishes the elder law attorney's ethical duties from the rest of the bar: fidelity to the client may mean not defeating the legal process brought against the client.

Losing may be winning. That legal process may objectively be the best thing for the client, even if it's not what the client subjectively expresses and the advocate must seek.

I suspect that is why there is not a petitioner's bar versus respondent's bar dichotomy in the Elder Law section. At any given time in any given case it may be the elder law attorney's role to petition or respond and then, after a judicial determination, be available to continue serving the client in a new way.

Given the dynamic nature of our roles, there is great potential for abuse of the elder attorney-client relationship, but little evidence the relationship is actually abused. In practice, it seems that lawyers have not been aggressive in asserting the right to use DR 7-101(C) as an excuse to file a guardianship or other protective proceeding against their own clients. This may be because most protective proceedings really are needed—or lawyers have thoughtfully avoided the ethical conundrum by referring interested petitioners to other counsel and have drawn clear lines around continued representation of the protected person.

Lawyer Cage in the scenario has taken all the right steps up to now: assessing and confirming capacity, monitoring the activities, and serving in an ongoing capacity as advisor. If the mail carrier is now agitating Mrs. Worth and she no longer has the ability to defend against him, it may be time for additional protection of her and her assets. A trust may be the next step if Mrs. Worth is still capacitated. A conservatorship may be warranted to ensure that she will not be intimidated into revoking trust or power of attorney provisions.

What if the lawyer does nothing now? Has he violated DR 6-101 by not providing competent representation or neglecting the legal steps that could protect the client? Mr. Cage cannot avoid the hard questions about how far a lawyer should go in seeking the least restrictive action that will adequately protect the client's interest by taking no action and allowing harm to occur. These are difficult decisions, but they are the very core of the elder law attorney's role in advising the aged or disabled client.

Mark M. Williams, J.D. is an attorney in private practice in Portland. He focuses on estate planning, probate, and elder law and legal ethics. He served as Assistant General Counsel to the Oregon State Bar, where he prosecuted and appealed attorney discipline cases and wrote legal ethics opinions.

Introducing our new editor

By Shirley Bass

With this issue of the Elder Law Newsletter the baton is passed from Michael Levelle, our first editor, to free-lancer Carole Barkley. For more than two years Michael not only ran the good race, but also successfully reached the Section's goal of establishing a voice for elder law in the legal community.



Carole Barkley

Thank you, Michael, for your vision, your time, and your dedication. You are our trail blazer!

We are indeed fortunate to have Ms. Barkley at the helm as we launch the Newsletter into the new millennium. A Phi Beta Kappa graduate of the University of Colorado, she has expertise and experience in writing, editing, designing, and producing publications for a variety of organizations. She earned a certificate in Web site development at Portland State University, and is the Web site coordinator for the Association of Telemedicine Service Providers. You can send her e-mail at carole424@aol.com. Welcome, Carole!

Joining me on the Newsletter advisory board this year are: Helen Hempel, Tom Pixton, and John Sorlie. I am serving as liaison, and can be reached at sbass@europa.com.

This issue features a professional ethics theme. Later issues will from time to time also be constructed around themes. Section members are encouraged to submit their ideas, concerns and articles to Carole or a member of the board.

We all look forward to continuing Michael's good work.

Want to comment on anything in this newsletter?

Editor:

Carole Barkley carole424@aol.com
503.796.0351

Advisory Board Chair:

Shirley Bass sbass@europa.com
503.241.9455

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