



Elder Law Newsletter

Volume 7
Number 2
Spring 2004

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An overview of alternative dispute resolution

By Michael Levelle

Like the practice of elder law, alternative dispute resolution (ADR) is sometimes difficult to define. Generically speaking, ADR refers to a wide variety of alternatives to litigation, the purpose of which is to manage and quickly resolve disagreements at lower cost and with as little adverse effect as possible on the relationships of the parties involved.

ADR's historical roots

Although it was not until the 1970s that the academic community became substantially aware of the need to study and teach non-judicial methods of dispute resolution, many immigrant segments of the United States developed their own community dispute resolution mechanisms as a reaction to perceived

hostility from the broader society. ADR has greatly expanded over the last several years to include many subjects and is used in almost every area of conflict resolution.

American society has generally used the judicial system as its primary form of dispute resolution. Our judicial system is a rights-based system and structured on an adversarial method of adjudication where a neutral decision-maker adjudicates disputes, after the adversaries have argued the matter in a contested proceeding. It is only recently that our society and courts have turned to ADR methods that are non-adversarial and designed to reconcile the disputants' interests, rather than focus only on the disputants' rights.

Dispute resolution methods

There are basic differences between adversarial and non-adversarial methods of dispute resolution. In the adversarial system, if one disputant wins, the other must lose, and disputes may be resolved through application by a third party of some general rule of law. However, when the non-adversarial method of mediation is used, all parties can benefit through a creative solution to which everyone agrees. Each situation is unique and therefore need not necessarily be governed by any general principle other than acceptance by the parties, and possibly court approval.

A variety of non-adversarial methods of dispute resolution such as negotiation, conciliation/facilitation, and mediation have come into increasing use. The following factors may be considered in the determination of whether one of these methods can be used

In this issue...

Alternative Dispute Resolution

Overview of ADR	1
Elder mediation	3
Mediation in probate	4
Role of the attorney in mediation ..	7
Mediation brochures & Web sites ..	9
Interview with Bill Carter	10
Plus...	
New laws on judgments	11
Call for articles	12
"unCLE" program	13
APR Subcommittee report	14
Resources for attorneys	15

Continued on page 2

Overview of ADR *Continued from Page 1*

for the particular dispute:

- The nature of the relationship between the parties
- The environment in which the dispute exists
- The issues involved
- The present posture of the dispute
- The further costs of resolving the dispute through litigation
- The concern for privacy
- The relationship of the parties with their attorneys
- The likelihood of settlement/resolution

Also to be considered is whether the procedure will affect subsequent litigation, if settlement/resolution is not achieved.

Negotiation

Negotiation is the process of parties conferring with each other so as to arrive at a settlement of some matter, and lawyers commonly use negotiation. However, the downside to the parties' lawyers handling negotiations is the fear of counsel that the first party to propose settlement weakens its negotiating position and that this may be viewed as a lack of confidence in one's case. As a result, both sides concentrate on discovery and preparation for trial, so as to strengthen their cases for future negotiation while legal costs mount. The "catch-22" to this approach is that after so much energy and financial resources have been put into a case, the party then has little incentive to settle. One suggested approach is to have a third-party facilitation of the negotiations. This way the parties retain control over the process, decide what the important facts are, and together decide the best solution.

Conciliation/Facilitation

The terms conciliation and facilitation are not always clearly distinguished. Generally, conciliation refers to an unstructured process of facilitating communication between the parties. Facilitation, however, is a formal process of meeting first with both parties and then possibly separately. A neutral intervenor ("facilitator") manages the discussion process. The facilitator's primary focus is on having the participants identify problems and procedures for resolving the problems. However, the facilitator refrains from offering settlement suggestions.

Mediation

Mediation is the ADR process by which a neutral third party works with disputants to reach a mutually agreeable resolution. Consequently, it appears mediated agreements (and facilitated negotiation) have greater durability. The past decade has seen significant expansion in the acceptance and use of mediation as a process for handling disputes in the legal and business sectors. Mediation works well for disputes that have multiple issues that may be integrated with one another, or where the resolution of one issue depends on the resolution of another.

There are numerous advantages to the use of mediation in probate, trust, and guardianship and conservatorship matters. Some of these advantages are:

- Maintenance of at least some, if not all, privacy
- Opportunity to deal with the emotional issues of a case
- Best opportunity to preserve family and other ongoing relationships
- Flexibility to construct a resolution the parties perceive as "fair"
- Efficiency

Another advantage to the use of mediation is that the parties retain a significant amount of control over the procedure and outcome of the case. However, this advantage can also be a disadvantage. Because the parties retain control, there is the potential for a more powerful party to overcome a weaker party. A power imbalance may arise in a variety of ways. The mediator must resist the urge to stereotype any given situation.

There are various models of mediation. One form of mediation, possibly the most recognized, is a model frequently called "transformative mediation." In this form of mediation, the mediator's entire role is to facilitate a conversation without a predetermined end. Under this model, the mediator offers no advice or substantive direction as to either content or process. The mediator's focus is not on settlement per se, but on support for deliberation and enhanced perspective. The belief is that if the mediator supports communication between the parties, settlement will take care of itself.

"Facilitative mediation" is another model frequently used. It is similar in many ways to transformative mediation, but there are significant differences. First, the object of facilitation is specifically a resolution or settlement of the dispute. Second, in order to attain that goal, the facilitative mediator routinely offers both advice and substantive direction on matters of process.

A third type of mediation that is becoming more widely used is referred to as "evaluative mediation." Under this model, the mediator provides expert case evaluation (assessing strengths and weaknesses of each party's case), substantive settlement recommendations, and strong pressure to accept those recommendations. Thus, there is a clear step beyond the transformative and facilitative models, which both maintain the mediator should have no role in influencing the ultimate outcome of the process. The use of the evaluative model is controversial, because of a historical belief that mediation is by definition a facilitative rather than an evaluative process.

Continued on page 9

Elder mediation is useful in many situations

By Pat E. Medford

What do we mean by the term “elder mediation”? Like elder law, elder mediation is defined by the client served. Elder mediation is mediation of any conflict that involves elders, their family members, or others in their lives. The individual who first contacts the mediator may be, but often is not, the elder involved.

The mediation process can help preserve, restore, or even improve relationships. The process provides a non-adversarial model of communication with which to approach disputes. The mediator can be an attorney or another professional with training in mediation. It is important to choose a mediator who is familiar with the aging process, someone who understands that not all people experience decreased mental capacity as they age. A mediator who is connected with the network of local resources and service providers can provide the parties with valuable information about options available to elders in the community.

Mediation can occur in a variety of settings and conflicts that involve elders. Situations that may benefit from mediation include:

- Housing and landlord/tenant issues
- Issues that involve family or professional caregivers
- Issues related to the involvement of substitute decision makers to manage health care or finances
- Payment for substitute decision makers and other financial arrangements
- Trust and estate planning and administration issues
- Placement and treatment issues
- Guardianship and conservatorship matters
- Consumer issues
- Social life and activities
- Spirituality and aging
- Access for communication and visits

If capacity is in question, elder mediation is particularly effective in exploring the least restrictive forms of, or alternatives to, court appointment of a fiduciary. If there is a question as to whether the evidence would support the appointment of a guardian for an elder, or whether the proposed guardian

is the most suitable person to serve in that role, mediation can assist the parties in exploring more options than would be presented at a hearing before a judge.

Mediation provides an opportunity for elders to talk frankly about their values and the risks they are and are not willing to take. By being part of a mediation, they can exercise more control over the process and the resolution. When necessary, the mediator can recommend that an elder be represented by an attorney or other advocate in order to participate in the mediation to the fullest extent possible. The Center for Social Gerontology in Ann Arbor, Michigan, has devised and tested a decision-making tool that is helpful in determining when and to what extent an elder can participate. More information is available on its Web site at www.tcsg.org.

Elder mediation is not a substitute for legal advice. It can help the elder and the others involved to identify the underlying needs and interests that will affect the resolution of the legal issues. If the parties reach an agreement, one or more attorneys are usually involved in writing the agreement or reviewing it before it is signed. In this time of state budget cuts and fewer court and judicial resources, elder mediation can be a cost-effective alternative to litigation, particularly in ongoing disputes.

More attorneys who serve elders are moving toward mediation as a resource to deal effectively with family history and dynamics, issues of autonomy and safety, and choices involving quality of life. It can be a valuable tool to resolve a dispute or to move a complex case forward.

The author very much appreciates the contributions to this article by fellow elder mediators Holly Wells and Judith A. Chambliss.



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Mediation in probate

By Susan N. Gary

Although mediation will not be desirable in every case, the personal and family aspects of probate make this area of the law particularly appropriate for mediation. Lawyers who practice in this area should familiarize themselves with the benefits of mediation and be prepared to recommend it to their clients when appropriate as an alternative to litigation or a court-directed settlement.

The Larson case

The Larson case – *Larson v. Naslund*, 73 Or App 699, 700 P.2d 276, 277-78 (1985) – presents an excellent example of the kind of situation that could have benefited from mediation.

Gladys Larson died in 1981 with a will that left seven-eighths of her estate to her son William, and one-eighth of her estate to her other son, Ben. Gladys had revised her will in 1973, changing the dispositive plan she and her husband had followed in their earlier wills. Those wills had left the Larsons' estates to each other and, on the death of the survivor, equally to their two sons.

After his mother's death, Ben contested her 1973 will, alleging that she lacked mental capacity when she executed it and alleging undue influence by his brother. After four years of litigation, the Oregon Court of Appeals held that the will was valid and also enforced a no-contest clause included in the will. The no-contest clause provided that anyone who contested the will would receive \$1.00 in lieu of a bequest under the will.

The results of the litigation were that Ben lost his one-eighth inheritance, spent considerable sums in pursuing the litigation, and lost any familial relationship he had had with his brother. William, the "winner" of the litigation, died in 1983 before the final resolution of the case. He died estranged from his brother, after having spent a significant amount of money to defend the litigation.

In 1981, probate lawyers did not consider mediation as a way to resolve the conflict. Twenty years later, the potential for a better result to this dispute through mediation is obvious. The opinion itself points to issues that cannot be addressed through litigation. Shortly before his mother's death Ben learned of the 1973 will and wrote his moth-

er a letter, which the opinion reproduces in its entirety. The letter strongly conveys Ben's emotional pain:

I wonder if you truly realize the hurt you have dealt me and the girls by not including me in discussions of your affairs. As I have told you, Bill should be compensated for his excellent attention to your needs, but it is difficult to understand that you care so little for me that you have chosen not to discuss matters or arranged for us to be represented *equally* in the balance of the estate. That is saying that you do not care for us equally. If this is the case, I think an explanation is in order that led to this decision. *Id.* at 281. (*Emphasis in original letter.*)

The opinion also gives us information about William's situation. William lived in Oregon near his parents, while Ben lived in San Francisco. William likely helped during his father's final illness and clearly helped his mother following his father's death. The opinion states that "Gladys depended on William for assistance in caring for her property and in some financial matters . . ." *Id.* at 278. Ben's letter refers to the "excellent attention" William provided, and expresses regret that due to distance Ben himself was unable to be "close at hand." *Id.* at 281.

Ben's letter expresses his concern that "[a] lop sided estate not only leaves me with the feeling that you do not care, but makes things very difficult between Bill and me." Ben then tells his mother that "[t]he greatest heritage any of us can leave is the love of a family." The conflict Gladys created and her unwillingness to address the conflict before her death contributed to the loss of this heritage, but the will contest exacerbated the problem. Mediation might have helped the brothers work through the dispute and regain the familial love they lost through this dispute.

Benefits of mediation in the probate context

Confidentiality

Although the level of confidentiality depends on agreement between the parties, and in some cases state law, much of what is discussed in mediation may be kept out of the public record. If the family is airing "dirty laundry" or describing an older person's eccentric behavior, everyone will benefit from privacy. Further, assurances of confidentiality may make family members more willing to speak freely and to address messy relationship issues in crafting solutions to the dispute.

Emotional benefits

Emotional benefits can be significant. Mediation gives parties a chance to be heard. For some family members, being able to air grievances, receive an apology, or get an explanation for troubling behavior may be more important than receiving a property settlement. In addition, giving parties more control over the outcome may increase psychological well-being.

Mediation also helps families avoid some of the emotional costs of litigation. Mediation may be less stressful and traumatic than litiga-

Continued on page 5

Mediation in probate

Continued from page 4

tion, since litigation pits parties against each other and tends to escalate the conflict.

Ongoing relationships

Mediation can repair, maintain, or improve ongoing relationships. Probate disputes involve family members and, in most cases, ongoing relationships will benefit the families. Since the parties must work together during the mediation to develop a solution to their conflict, the parties may develop communication and problem-solving skills that will aid them in the future. Mediation is less likely to drive family members further apart than litigation.

Unique solutions

Mediation allows the disputants to forge their own solution. The remedies available to a judge in the resolution of a dispute over property are limited, but mediation allows the parties to take nonlegal as well as legal interests into consideration. The division of property with sentimental value may best be handled in this way.

Financial savings

Mediation may also be more cost effective than litigation. Particularly in small estates, litigation costs may be disproportionate to the amount at issue. More parties may be able to protect their interests if a less expensive alternative is available.

Potential problems in the probate context

Although mediation is appropriate in many situations, some characteristics of probate disputes may make mediation difficult or even inappropriate.

Grief

If the dispute involves a decedent's estate, the family may still be grieving over the death of a loved one. Grief may be a factor in the dispute itself, since one family member may blame another for the death. For example, if parents of a decedent have not accepted the fact that the decedent was homosexual, grief over the death may be misdirected as anger at the decedent's partner. Grief may also affect the parties' ability to mediate. Delaying the mediation to allow the parties to progress through the grieving process may be necessary.

Power imbalance

Power imbalances are always a concern in mediation, but may be of particular concern in probate disputes. An elderly surviving spouse may be intimidated by younger family members, particularly if they are his or her stepchildren. Preexisting power imbalances between siblings may also adversely affect the mediation. For example, a younger sibling may have deferred to an older sibling throughout their lives. A skilled mediator will be aware of potential power imbalances and manage them during the mediation so that all parties are protected. An advocate may be able to assist an older person who still has capacity, but who may have difficulty expressing his or her concerns. If an older person cannot participate effectively, then mediation is inappropriate. Certainly, if the situation indicates physical or mental abuse, mediation will be inappropriate.

Long-term dispute

Although triggered by a family death, some probate disputes may develop due to a long-standing family conflict. If the parties have become entrenched in their positions after years of animosity, mediation may not work.

Guidelines for the use of mediation

In contemplating the use of mediation in resolving probate disputes, a lawyer should consider a number of factors. The presence of some factors makes mediation more appropriate, while other factors may mean that it should not be used. Each case is unique and should be reviewed individually.

Desire for an ongoing relationship

If the parties would benefit from an ongoing relationship – the case with most family relationships – mediation may help. Further, if the parties express concern about maintaining an ongoing relationship, they are likely to work together constructively in mediation.

Parties are willing to mediate

Mediation works best if all parties want to participate. Mandatory mediation has been criticized and is inappropriate in probate. If the parties have entrenched positions due to a long-standing dispute or moral or religious beliefs, then a negotiated or litigated resolution will be more appropriate than mediation.

Parties are competent and able to mediate

All parties must be able to participate effectively. It may be important to make accommodations for older persons who may have restricted mobility, have difficulty hearing, or may be confused by new settings. Arranging the mediation to take personal concerns into consideration and allowing an advocate to participate when necessary may make mediation possible. If any party is mentally incapacitated, so overcome by grief that they cannot function, or physically unable to attend, mediation should not be recommended.

Continued on page 6

Mediation in probate

Continued from page 5



Susan Gary, an Associate Professor of Law at the University of Oregon, serves on the Executive Committee of the Estate Planning Section and as co-chair of the Oregon Study Committee on the Uniform Trust Code. She developed a role play that demonstrates the use of mediation in probate for use by professors who teach Trusts and Estates, chaired a panel on the topic at an annual meeting of the Association of American Law Schools, and published "Mediation and the Elderly: Using Mediation to Resolve Probate Disputes over Guardianship and Inheritance," 32 Wake Forest L. Rev. 397 (1997).

Nonlegal as well as legal issues are important

If the dispute involves nonlegal issues, mediation may benefit the parties. Mediation permits parties to create their own solution to the dispute and allows them to address nonlegal as well as legal issues in reaching that solution. Mediation also allows parties to express their personal concerns, their anger or their grief. Some disputants may want or need other family members to hear them.

Confidentiality is desirable

If the parties want confidentiality because of the sensitive nature of the dispute, mediation will provide greater privacy than litigation. In family disputes, minimizing the public record may benefit the parties. If one of the disputants is a public figure, this factor may be of particular importance. If the dispute involves relationships outside society's accepted norms, the privacy associated with mediation may also be desirable.

Power imbalances are minimal

If there is little or no evidence that some parties have grossly unequal influence over others, mediation is more likely to succeed.

The Larson case revisited

In a review of the facts of Larson against the guidelines, the potential usefulness of mediation is striking.

The legal issues in Larson were whether Gladys had capacity to execute her will and whether William had unduly influenced her to leave him more than half of her estate. Through litigation only two possible results existed: William would take the whole estate if Ben lost or Ben and William would split the estate if Ben won.

The Larson opinion suggests that issues beyond the division of Gladys's estate mattered. Ben needed to feel that his mother loved him equally, and William may have wanted recognition for the time and effort he had spent caring for his mother. Allowing the brothers to fashion their own solution to the dispute with the assistance of a mediator could have had a number of benefits. One can imagine that Ben would have benefited from hearing William say that their mother

spoke fondly of Ben but wanted to reward William monetarily for his efforts on her behalf. William might have benefited by being able to talk with Ben about how difficult it had been for him to provide that care. The brothers could have compromised in a division of the property. Ben might have been satisfied with some amount between one-eighth and one-half of the estate, so long as he understood that the smaller share did not reflect a lack of love from his mother.

By talking through these issues together, William and Ben might have been able to reestablish their sibling relationship. In his letter Ben notes, "[o]ur family is small enough without creating animosity between brothers." He seems anxious to maintain family ties, and William, who had recently been through a divorce, would also likely have wanted a relationship with his brother. Using mediation to resolve the dispute could have had emotional benefits and led to an ongoing relationship for the brothers. It would almost certainly have cost less than four years of litigation. A solution crafted by the brothers could have compensated William for his work, and left Ben feeling loved by his mother.

Mediation and estate planning

In addition to the use of mediation to resolve probate disputes – disputes that arise after the death of one of the central players in the conflict – mediation is also valuable in the estate planning process. A mediator can help family members work through issues involving the distribution of property while everyone is able to participate. In Larson, Ben let his mother know of his unhappiness while she was still alive. The court opinion reports a visit, a phone call, and then the letter. The opinion does not describe Gladys's response to these pleas that she reconsider the changes to her will and does not discuss the status of her health within that last year before her death. However, if she had been willing to meet with her sons and a mediator before her death, her family might have avoided the dispute that afflicted them after she died.

The role of the attorney in elder mediation

By Josh Kadish

Because it offers an alternative to adversarial conflict resolution, mediation should be the first choice for dispute resolution in most elder law situations. It provides a model in which parties do not oppose each other, but seek resolutions with a minimum of conflict. Particularly when families are involved, many clients will benefit from a less confrontational approach. Mediation tends to preserve relationships within the family. It is private and thus shields the family from the scrutiny which might occur in open court. It is generally less expensive than litigation, particularly when it results in early resolutions of conflict. Finally, mediation is frequently creative, because clients may achieve resolutions much more closely tailored to their situations than those a judge might order.

The attorney as mediator

Before selecting a mediator, clients and their attorneys should devote considerable thought to what type of mediator would be most appropriate. It should not be assumed that a mediator must be a lawyer. Mediation is not the exclusive province of lawyers. Historically, many family mediators have been mental health professionals. There are some advantages to hiring a lawyer as a mediator, however. Lawyers possess analytical skills useful for sorting through issues and creating options to resolve points of disagreement. They are familiar with the process of negotiation that is often at the core of mediation. Many are comfortable with a relatively high level of conflict and can help parties in mediation assess positions and make necessary trade-offs to arrive at consensual agreement. Lawyers are familiar with the law and can help interpret legal guidelines so the parties can make decisions that meet their own sense of fairness and do not violate minimal societal standards of fairness reflected in the law. Although a lawyer-mediator is ethically not allowed to give legal advice to individual parties, he or she can provide considerable information about legal issues in a case. Finally, a lawyer can produce a proposed agreement in a form that might be acceptable for incorporation into a court order.

Clients should be aware that different mediators approach mediation in different ways. Some mediators could be classified as facilitative. Facilitative mediators believe their central contribution to the process is to help the parties communicate. They see themselves as being in charge of the discussion, but not in any way responsible for the outcome. Evaluative mediators tend to be more concerned with outcomes. An evaluative mediator will tend to express opinions about a case and meet with parties separately in caucus and perhaps lean on them to resolve the case in a particular manner. A mediator who is a retired trial lawyer and trying to help parties resolve an automobile accident case is likely to be evaluative. A therapist who is hired as a mediator to help resolve a parenting dispute is likely to be facilitative. Mediators often borrow elements from each set of styles. Clients and their attorneys would be well advised to discuss these issues with mediators so they can anticipate how a mediator will approach a particular type of problem.

Another important set of questions to ask potential mediators is what standards of practice they adhere to. Apart from guidelines set forth in Oregon's Disciplinary Rules, a number of different standards of practice can govern lawyer-mediator behavior, including those set

forth by the Oregon Mediation Association (OMA), the ABA Model Rules, and the Standards set forth by the Association for Conflict Resolution. Under current OMA Standards, for instance, a mediator must refrain from exerting pressure on a party. It is unlikely that a retired plaintiff's lawyer acting as mediator would accept such a standard. Whether a mediator will exert pressure on a party is a fairly basic question that a party would be well advised to understand in advance of a session.

Attorneys as advisors to clients

It is advisable for participants in the mediation process to retain outside counsel. Many clients make the mistake of consulting with an attorney for the first time at the end of the mediation process. This often means having to return to the table after agreement is reached, which can be extremely upsetting from an emotional standpoint. It is preferable for clients to consult with independent counsel throughout the mediation process, even before the formal mediation process begins, for a number of reasons.

First, an advising lawyer can assist the client in understanding how mediation functions as part of the legal procedure in question, and can inform the client about substantive and procedural legal issues.

Second, the advising lawyer can help formulate the client's goals and identify issues to be mediated. The lawyer can furnish the client with information regarding the legal rights and responsibilities associated with each issue. This can help a client reach an informed decision in mediation.

Third, if full financial disclosure in mediation is necessary, the attorney can review information provided by other parties to determine its completeness and assist in its interpretation.

Fourth, an advising lawyer may help a client understand the boundaries that the law sets and develop proposals based on that understanding. Thus, if a client needs to know how a judge might decide his or her case, a lawyer can provide guidance in this regard.

Fifth, there is an important psychological

Continued on page 8

The role of the attorney in elder mediation

Continued from page 7



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reason for having an advising lawyer involved from the outset and available for consultation. Clients involved in mediation feel empowered when they have someone who is "on their side," whom they can consult confidentially for advice about when to compromise and when to hold firm.

Finally, if an advising lawyer is involved throughout the mediation process, the review of any documents is more likely to be uneventful.

No matter at what stage of the mediation process the advising lawyer becomes involved, the lawyer must keep in mind his or her difficult role. A lawyer has an ethical duty to zealously represent the interests of his or her clients within the bounds of the law. However, a client's interests cannot be stated solely in terms of dollars and cents. Whoever negotiates an optimal financial settlement for the client, but in the process manages to alienate other family members so the client is doomed to struggle with them forevermore, is not necessarily acting in the client's best interest. Thus, throughout the mediation process the advising lawyer should be guided by the concept of client-directed decision making and the client's need for autonomy. The lawyer's initial goal must be to help a client figure out what his or her financial and non-financial interests are, and then to assist the client in prioritizing those interests. He or she should be able to respect the client's need for self-direction in resolving issues, recognizing that a client may wish to compromise certain interests in order to maximize others.

There is the significant question of whether a lawyer should attend actual mediation sessions. Although it is difficult to generalize, in most cases the presence of lawyers will tend to make the process more legalistic and formal. This may be a good or bad thing. Mediation without attorneys present can be less legalistic. Attorneys should carefully consider with their clients how desirable results may be achieved and how this bears upon the issue of whether attorneys should attend.

An attorney must also consider his or her client's abilities to negotiate in any particular situation. A client with memory loss or other cognitive impairments may not be able to

communicate his or her concerns effectively. A significant difference in the perceived power or negotiation skills of the parties can interfere with the process. Mediation is not a good alternative if the client has been abused or intimidated by another party, or if the client has concerns about safety.

Finally, an attorney should consider what might be done to empower an elderly client. If an elder is at her best in the morning, the mediation should be scheduled for the morning. Perhaps the meeting should be at the elder's home, rather than an office. Frequent breaks may be advisable. It may be desirable for a trusted friend or advisor to be present. In sum, all of the standard principles of representing elders are present in the mediation context.

Disciplinary rule on mediation

From the Oregon Code of Professional Responsibility

DR 5-106 Mediation

- (A) A lawyer serving as a mediator:
 - (1) shall not act as a lawyer for any party against another party in the matter in mediation or in any related proceeding, and
 - (2) must clearly inform the parties of and obtain the parties' consent to the lawyer's role as mediator.
- (B) A lawyer serving as a mediator:
 - (1) may prepare documents that memorialize and implement the agreement reached in mediation,
 - (2) shall recommend that each party seek independent legal advice before executing the documents, and
 - (3) with the consent of all parties, may record or may file the documents in court.
- (C) Notwithstanding DR 5-105(G) [Vicarious Disqualification of Affiliates], when a lawyer is serving or has served as a mediator in a matter, a member of the lawyer's firm may accept or continue the representation of a party in the matter in mediation or in a related matter if all parties to the mediation consent after full disclosure.
- (D) The requirements of (A)(2) and (B)(2) shall not apply to mediation programs established by operation of law or court order.

Brochures describe mediation and its use in decision making

Two useful brochures are available on the Web from the Center for Social Gerontology (TCSG):

*Considering Guardianship for Someone You Care About?
Consider Mediation*

*Caring for an Older Person and Facing Difficult Decisions?
Consider Mediation*

TCSG is a pioneer in the use of mediation in cases where guardianship is being considered for older persons. In the past few years, TCSG has broadened the use of mediation to include situations in which caregivers encounter difficulties making decisions with and for older persons, particularly when a number of family members are involved.

The two brochures were developed as part of pilot projects that use mediation in caregiver situations, under a grant from the federal Administration on Aging. They address several issues, including:

- What is mediation and how does it work?
- What kinds of issues can be mediated?
- Why try mediation?
- What are mediators and what are their roles?
- Examples of the use of mediation
- Frequently asked questions

The brochures are available for download in pdf format, on TCSG's Mediation & Aging Web site at www.tcsg.org/med.htm.

ADR Web sites

Oregon State Bar Alternative Dispute Resolution Section
www.osbadr.homestead.com

Oregon Mediation Association
www.mediate.com/oma/index.cfm

The Center for Social Gerontology
www.tcsg.org

Conflict Resolution Information Source
www.crinfo.org

Willamette University Center for Dispute Resolution
www.willamette.edu/wucl/cdr

Mediate.com/Americans with Disabilities Act (ADA) Section
www.mediate.com/adamediation

Overview of ADR

Continued from page 2

Conclusion

Mediation has become an accepted part of the practice of labor law, business law, civil litigation, and family law. The use of mediation as an alternative to litigation in contested elder law matters offers a host of advantages and should be explored as an option. The integration of mediation into disputes concerning society's elder population would offer attorneys, their clients, and all other interested parties the opportunity to work together and avoid unwanted, unnecessary, and expensive litigation.



Michael D. Levelle has been in private practice in the Portland area since he earned his law degree from Willamette University College of Law in 1990. Michael's practice emphasizes estate planning, probate, trust and estate administration, legal capacity and ethical issues, elder law, guardianships and conservatorships, and mediation of contested matters. Michael is a member of the National Academy of Elder Law Attorneys, the

Council of Portland, and the Oregon Mediation Association. He has written many articles about minimum standards of legal capacity, ethical issues that involve clients with diminished capacity, and substituted decision-making. Michael is the author of the chapter "Representing Clients With Diminished Capacity and Disability" in The Ethical Oregon Lawyer legal handbook; and co-author of the chapter "Substituted Decision Making: Responding to Declining Capacity" in the OSB Elder Law legal handbook. In April 2004, Michael joins Sussman Shank LLP as Special Counsel.

THE RESOURCE CORNER

An interview with Bill Carter

By Alexis J. Packer, Attorney at Law, Ashland

Bill Carter, president of the Oregon State Bar, spent most of his 35-year legal career as a civil litigator in Jackson County. Now, he spends most of his non-Bar-related time as a mediator and arbitrator.

Although arbitration and mediation are both forms of dispute resolution and are commonly referred to in one breath, they are very different processes. Unlike arbitration, which has many of the same characteristics as traditional litigation, mediation is more informal, private, and confidential, and no third party imposes a decision that the participants must live with. Bill notes that even when parties don't reach an agreement, mediation often helps them develop a better understanding of each other's position, concerns, and goals—which can narrow the issues that must be addressed by a court.

Bill cites the Internet search engine Google (www.google.com) as one resource readily available and helpful to a mediation practice. To enter a query into Google, just type in a few descriptive words and hit the enter key (or click on the *Google Search* button) for a list of relevant Web pages. Google returns a list of Web pages that contain all the words in your query. To visit any page on the list, you just click on its name.

To demonstrate, Bill typed in "elder law mediation," and the first two items listed were attorney-authored articles about mediation in guardianship cases. These articles explained mediation, gave specific examples of the authors' experiences with mediation, and provided a bibliography of relevant federal statutes, state cases, and rules, books, manuals, and articles that explain the mediation process, the guardianship process, and how the two can develop a partnership. There were also links to useful organizations, online services, and videotapes dealing with guardianship and the mediation alternative.

Bill agrees that guardianship and conservatorship cases are well suited to mediation. A litigator who represents the petitioner in a guardianship case, he explains, must put in evidence all of the "crazy" things the respondent has done to try to show he or she is incompetent. This often emotional and embarrassing public airing of a family's intimate affairs can be humiliating for the respondent. In mediation, the setting is private and informal. In Bill's experience, medi-

ation is a much kinder and gentler way to help a respondent see he or she may need assistance, and a much healthier environment for a family, than a courtroom. It gives the parties a chance to air feelings which otherwise stand in the way of reaching a satisfying result in a reasonable and nonabusive process.

Bill says he has found mediation helpful with feuding heirs. He says that often these feuds are not really about the money at all, but ancient, unresolved sibling issues. He finds that when the parties are given the chance to privately air the underlying issues, the current issues often resolve themselves. Bill thinks that within a probate, the use of mediation as a first step to problem resolution seems a natural fit, and of course the parties remain free to seek a court process if mediation does not adequately resolve the issues.

Bill also finds mediation helpful in estate planning. He cites a case in which a man wanted to disinherit two children from his first marriage, but his second wife didn't want that. After one mediated meeting, the four people worked out a plan that satisfied everyone.

Bill can think of many reasons mediation often works well. He's noticed that although the parties often think it's the result they care most about, what they really want is to be heard, and when they are, the result seems to become secondary. The voluntary nature of the process and the fact that the result does not have one "winner" and one "loser" is also very appealing. In Bill's experience, a public adversarial process is not the kindest, most efficient, or most economical way to resolve many legal disputes. In terms of efficiency, he cites an example from his days as a litigator. Because of all of the rules one has to follow, it can take up to six weeks to get the documents needed from the other side. In his mediation cases, he simply asks the parties to bring the documents to the next meeting.

Bill has become a real believer in mediation, and feels confident that most of the people he has worked with in mediation have been more satisfied with the process and results than were the people he represented in litigation. He is much more satisfied with his work as a mediator and arbitrator than he was as a litigator. Bill emphasizes that being a mediator is not as easy as some might think. He stressed the importance of proper training and certification as a mediator (Bill completed a 40-hour course) and working knowledge of the disciplinary rules related to mediation.

Another Web site Bill recommends is that of the Oregon Mediation Center (www.internetmediator.com). In addition to the Internet, Bill relies on the OSB continuing legal education publication *Arbitration and Mediation*. The Alternative Resolution Dispute Section of the OSB, which publishes a newsletter twice a year, is also a good resource for current laws, issues, and information.

Recommended Resources

Google Internet search engine: www.google.com

Oregon Mediation Center: www.internetmediator.com

Arbitration and Mediation (1996)

1 vol. with 2001 supplement and forms on disk: \$190

To order, call OSB CLE at 503.684.7413 or 800.452.8260, ext. 413. You can also order online at the OSB Web site:

www.osbar.org.

Recent legislation changes form and effect of judgments

By Brian Haggerty, Minor, Bandonis & Connell, P.C., Newport

In Xanadu did Kubla Khan

A stately pleasure-dome ~~decree~~ establish by General Judgment

—apologies to Samuel Taylor Coleridge

Kubla Khan is probably far enough removed in time and jurisdiction to go ahead and use a decree to order the building of his stately pleasure-dome. For Oregon lawyers and judges, however, after January 1, 2004, the decree is largely relegated to poetry, and decisions of courts will be embodied in judgments general, limited, or supplemental.

HB 2646 / Oregon Laws Chapter 576

In the session just past, the legislature enacted HB 2646 into *Oregon Laws 2003, Chapter 576*. This had several goals:

- To bring into one chapter of the Oregon Revised Statutes provisions that relate to the form, entry, and effect of judgments
- To eliminate procedural distinctions between suits in equity and actions at law
- To clarify when judgments can be appealed and enforced.

The new law makes many changes to the form and effect of judgments, and although a complete description of these changes is beyond the scope of this article, I will try to present an overview and a few points of interest to elder law and probate practitioners.

Chapter 576, Section 1(1) begins by defining an “action” to be “any proceeding commenced in a court in which the court may render a judgment.” The law then defines a “judgment” as “the concluding decision of a court on one or more claims in one or more actions, as reflected in a judgment document.” *Section 1(9)* A “judgment document” is the writing that embodies a judgment, and the law sets forth certain requirements for the form this writing must take. *Sections 1(10) and 4* Judgments now come in three types: general, limited, and supplemental.

• General judgment

According to Jim Nass, appellate legal counsel to the Supreme Court and Court of Appeals, who prepared a very helpful summary of the law, a general judgment is “the judgment entered by a court that decides all claims in the action except: (a) a claim previously decided by a limited judgment; and (b) a claim that may be decided by a supplemental judgment.” *Section 1(8)* General judgments are essentially those we would think of as final judgments. “Final,” Nass explains, has acquired multiple meanings when applied to judgments, and the new terminologies are intended to clarify the effect of given judgments.

• Limited judgment

“A limited judgment is functionally what is now an ORCP 67B judgment that disposes of fewer than all claims in the action—leaving some claims unresolved,” Nass says. Limited judgments

also include interlocutory partitions and foreclosures of real property.

• Supplemental judgment

Examples of supplemental judgments are requests for attorney fees following a general judgment, and modification of judgments of dissolution of marriage.

Before a judge can sign it, every judgment document must now be clearly labeled “general,” “limited,” or “supplemental.” *Section 7*. The court administrator is to return an improperly labeled judgment document to the judge and may not note it in the separate register of judgments (which is to replace the judgment docket, another term that, according to Nass, had too many meanings and generated confusion). *Section 8*.

The new law also sets forth requirements for the form of a judgment document that includes a “money award” in order to create a judgment lien. These requirements are similar to, and basically replace, ORCP 70.

Upon entry of a judgment in the register of judgments, it “[b]ecomes the exclusive statement of the court’s decision in the case and governs the rights and obligations of the parties” It also can be enforced and appealed. Upon entry of a general judgment, any claim not decided that cannot be decided by a supplemental judgment is dismissed with prejudice unless the judgment provides otherwise. *Section 11*.

Chapter 576 changes the practice in probate cases by amending ORS 116.083 et seq., which relates to the document formerly known as the Decree of Distribution. According to *Section 379*, which amends ORS 116.213, that document is now the General Judgment of Distribution. The emerging consensus among lawyers participating in the Elder Law Section’s Internet discussion list favors using a longer title, *Order Approv-*

Continued on page 12

Changes in judgments

Continued from page 11

ing *Final Account and General Judgment of Distribution*. An interim decision in a probate case, such as one that allows partial distribution, should be set forth in an order. The document that closes the probate and discharges the personal representative is now either the Supplemental Judgment (under Section 379) or Supplemental Judgment of Discharge (based on comments posted on the list). In ORS Chapter 128, a court decision creating a trust will be a judgment rather than a decree of the court.

Chapter 576, *Oregon Laws 2003*, does not amend ORS Chapter 125, which governs guardianships and conservatorships. According to many probate courts, "order" is still the appropriate title for a document that sets forth a decision in a protective proceeding.

SB 64/Oregon Laws Chapter 395

Oregon Laws Chapter 395 contains a number of provisions relating to escheat and missing heirs. Petitions for probate must now include a statement "that reasonable efforts have been made to identify and locate all heirs of the decedent." If the will devises property to a person who did not survive the decedent or is otherwise unable to take, the petition must set forth why the devise failed. *Oregon Laws Chapter 395, Section 10*.

This chapter amends ORS 112.055 to provide that if a devisee or heir is not identified or found, that share escheats to the state. The Division of State Lands (DSL) has all the rights of the missing heir for purposes of the probate laws, including that individual's preference for appointment as personal representative, the right to information relating to the probate proceeding, and the right to contest any will. Title to property in that person's share vests in DSL just as it would in the missing person. *Oregon Laws Chapter 395, Section 2*.

Section 4 of the new law sets forth specific criteria relating to a presumption that a missing person has died.

Any person who has knowledge that a person who owns Oregon property has died wholly intestate and without known heirs must notify DSL within 48 hours. No one may "dispose of or diminish any assets" of the estate of such a decedent without prior written approval of DSL—specifically including guardians and conservators. *Oregon Laws Chapter 395, Section 8*. DSL must be notified if a personal representative, upon appointment, has not identified or found all heirs and devisees of the decedent. If an heir or devisee disappears during administration, the personal representative must notify DSL. *Oregon Laws Chapter 395, Section 11*.

A claim for property that escheated to the state must now be made within ten years of the death of the decedent, "or within eight years of the entry of a decree or order escheating property of an estate to the state...." *Oregon Laws Chapter 395, Section 18*.

Elder Law Section Pro Bono Subcommittee Call for articles

Heard about a scam that targets seniors? Know handy tips to make health-care directives more effective? Have sage advice about adding names to a bank account? Want to relate a cautionary tale?

A wide audience eager to hear from you is Oregon's most vulnerable elders. The State Unit on Aging is developing a periodic one-page newsletter to accompany home-delivered meals statewide and to appear in existing newsletters produced by many of the state's 136 senior centers. Submissions of very brief (no more than 3-4 paragraphs) issue-spotting articles are needed.

Your articles will include your byline and contact information. Material can be sent directly to Janay Haas, OAA legal services developer, at janay.haas@state.or.us. Send questions to the same address or call 503.945.8999 for more information.

Back by popular demand

Elder Law Section sponsors second "unCLE"

For the second year, the Elder Law Section is sponsoring a unique program that gives elder law practitioners the opportunity to get together for a day of brainstorming, networking, and the exchange of ideas and forms.

There are no formal speakers. Sessions are small group discussions with topics moderated by elder law attorneys, who share their experiences and encourage questions and exchange of ideas among peers. Two sessions take place in the morning and two in the afternoon. Breakfast and lunch are included.

The program will be held **Saturday, May 15, 2004, from 8:00 a.m. to 5:00 p.m. at the Valley River Inn, 1000 Valley River Way, Eugene, Oregon.** You are also encouraged to attend a get-acquainted reception on Friday evening, May 14.

Take advantage of this chance to mix and mingle with your peers in the elder law community, discuss substantive issues, and get nuts-and-bolts practice tips. Attendance is limited to 75, so register early. Registration fee for this members-only event is \$75.00. (Add \$25 for Section dues if you are not already a member.)

To register for the unCLE, use the registration form below or contact the Oregon State Bar order desk at 800.452.8260, ext. 413 or 503.684.7413.

Overnight accommodations are available at a special conference rate of \$72 for singles and \$92 for doubles. Make reservations directly with Valley River Inn by calling 800.543.8266. Reserve by April 15 to guarantee the conference rate.



What they said about last year's unCLE

"I was able to ask specific questions germane to topics of concern and receive input from many different practitioners. I loved the informal debate forum. Great topics. One of the most enjoyable CLEs I have attended! More, more!!"

"Enough structure to be useful, enough informality to give and receive great feedback. Great balance."

"This sort of sharing is one of the best forms of lawyer education."

"Great exchange of experience, practical tips, forms and ideas and...good mix of attorneys from around the state."

Elder Law "unCLE" Program Saturday, May 15, 2004

Name	Bar #	
Firm Name		
Phone	Fax	E-mail
Address		
City	State	Zip Code

PROGRAM REGISTRATION:

Registrants must be Elder Law section members.

Enrollment limited to 75 registrants.

- \$75 Registration \$ _____
- \$25 Join Elder Law Section \$ _____
- (no fee) Friday Night Reception

TOTAL REGISTRATION FEES (SEL04) \$ _____

THREE WAYS TO REGISTER OR ORDER:

Registrations and orders will not be processed without payment.

1. **MAIL with check:** Oregon State Bar, Order Desk, PO Box 1689, Lake Oswego, OR 97035
2. **FAX with VISA or MasterCard number:** 503-968-4456
3. **PHONE:** 503-684-7413, or toll-free in Oregon at 1-800-452-8260, ext. 413

PAYMENT OPTIONS:

- Check Enclosed: Payable to Oregon State Bar
- Credit Card (VISA or MasterCard only)

**** All information below required when paying by credit card. ****

Credit Card Number		
Expiration Date		
Name on Credit Card (please print)		
Credit Card Billing Address		
City	State	Zip
Authorized Signature		

Update from the Elder Law Section Agency and Professional Relations Subcommittee

By Sam Friedenberg, Nay & Friedenberg, Portland

The Elder Law Section's Agency and Professional Relations Subcommittee met recently with representatives of the Oregon Department of Human Services (DHS). The discussion covered many topics. Some highlights are detailed below.

Measure 30

Elizabeth Lopez discussed the effect of the defeat of Measure 30. The most important information is:

- a. The significant changes to the Oregon Health Plan (OHP) will probably not occur until the summer due to the requirements of the federal waiver.
- b. Eligibility for Medicaid long term care will stay at service priority level 11 and will not be extended to levels 12 and 13 as was planned.
- c. All proposed DHS reductions in programs must be approved by the Governor. Hence, everything that is proposed now is only tentative.
- d. Clients on OHP Plus will probably lose dental, vision, and therapeutic services. This will affect many developmentally disabled clients.

Medicare prescription drug bill

Ms. Lopez also walked us through the effect of the new Medicare Drug Bill on DHS.

- a. The discount cards that go into effect in May of 2004 will be handled by the federal Center for Medicare and Medicaid Services (CMS) and private contractors. DHS will play no role.
- b. The discount cards will be available for Medicare beneficiaries with incomes less than 135% of the federal poverty level and will provide a subsidy of up to \$600 per year. They may be able to carry over any unused subsidy. However, this will not apply to Medicaid-eligible applicants.
- c. On January 1, 2006, Medicare beneficiaries will have the option to sign up for Medicare D, a prescription drug benefit. It is expected that the premium will be \$35 per month. According to Ms. Lopez, each Medicare beneficia-

ry will receive the application in the mail. She expects that our clients will have questions about whether or not to participate in the benefit.

- d. While the benefit is available to everyone, those with incomes less than 135% of the poverty line will have no premiums. Medicare expects DHS to screen individuals for financial eligibility. This will be an additional job for our local offices.
- e. Apparently Medicare beneficiaries who are also on Medicaid will be able to apply for this program. This raises issues about the paying of the premium and the Medicaid estate claim. At this point, it is unclear how the state is going to handle these details.

Annuities

Roy Fredericks and Rick Mills of the DHS Estate Administration Unit (EAU) noted that right now the state makes estate claims against the client's annuities and not against annuities owned by the community spouse. It is possible that there will be changes in the distant future but none are in the making. CMS has been studying the issue.

Real property records notice

Per the 2003 legislature, the EAU can record notices in the real property records for property owned by Medicaid beneficiaries. The notice requests information about the transfer of the fee interest. Proposed forms of notices can be found in the Oregon Administrative Rules at OAR 461-135-0847. As of January 1, 2004, EAU has been using these notices. EAU does not plan to record notices on the real property of a community spouse, unless the property is jointly owned.

Post-eligibility transfers by community spouse

In a recent case, a community spouse transferred an asset to an adult child after the institutionalized spouse was on Medicaid. Per the local office, this triggered a period of ineligibility for the institutionalized spouse. This case is similar to one discussed last year where a community spouse transferred assets to a revocable trust creating ineligibility for the community spouse. Our committee will investigate these cases with the agency.

Member News

Congratulations to Claudia Burton, who was invested as a Circuit Court Judge of the State of Oregon on January 16.

Davis & Pagnano, P.C. and the law firm of Mark M. Williams have merged to form Davis, Pagnano & Williams, LLP, also known as The Elder Law Firm. The firm's address is:
1890 US Bancorp Tower
111 SW Fifth Ave. • Portland, OR 97204
Telephone 503.452.5050 • Fax: 503.452.5054

Resources for elder law attorneys

Events

Mediation and Arbitration in Oregon Oregon Law Institute CLE

Friday, April 2, 2004
8:45 a.m. to 4:15 p.m.
Oregon Convention Center
Portland, Oregon

This program will provide an opportunity to explore every aspect of mediation and arbitration with a faculty that represents diverse points of view, ranging from plaintiff's lawyers to defense lawyers to commercial litigators to judges and neutrals. Professor Richard Birke, Director of Willamette University's Center for Dispute Resolution, will lead off with a description of ADR options.

6.25 General MCLE Credits

Call OLI to register: 503.768.6580 or 800.222.8213

Web site: www.lclark.edu/org/oli/04_04_02.html

2004 Joint Conference of the American Society on Aging and the National Council on the Aging

April 14 to 17, 2004
San Francisco, California

Topics to be covered at this ASA/NCOA joint conference, under the theme *The Road Ahead – Taking the Journey Together*, include: Adult Day Services, Aging Network, Alzheimer's Disease and Related Dementias, Assisted Living, Assistive Technology, Business Issues, Care Management, Consumer Direction, Information and Empowerment, Cultural and Ethnic Diversity, Culture Change, Disability and Rehabilitation, Education and Training, Education for Older Adults, Elder Abuse & Neglect, Emerging Issues, End-of-life Issues, Family and Caregiving Issues, Gay and Lesbian Aging Issues, Grandparenting, Health Promotion and Wellness, Healthcare, Housing and Aging in Place, Humanities, Arts and Creativity, Images of Aging, Information Technology, Intergenerational Programs and Issues, International Issues, Leadership and Organizational Development, Legal and Ethical Issues, Leisure and Recreation, Long Term Care, Marketing and Communications, Men and Aging, Mental Health, Outcomes, Measurement and Evaluation, Public Policy and Advocacy, Religion and Spirituality, Research and Demonstrations, Retirement Issues and Financial Planning, Rural Issues, Senior Centers, Sexuality, Relationships and Intimacy, Transportation, Urban and Suburban Issues, Volunteering, Women and Aging, and Workforce Issues.

Web site: www.agingconference.org/jc04/index.cfm

Adult Guardianship/Family Caregiver Mediation Training

May 16 to 18, 2004
Ann Arbor, Michigan
Registration deadline: April 9, 2004

The Center for Social Gerontology presents a two and one-half day training designed for trained, experienced mediators who wish to expand their practice to include mediation of issues or disputes that arise when guardianship over an adult is being considered, and/or when elders and their families are being confronted with difficult decisions regarding the care of a vulnerable family member. The training is also available to a limited number of persons who are

interested in establishing such service programs. Included is an extra half day specifically on developing case referral sources and on setting up guardianship and caregiver mediation services so they are effective and well coordinated with the courts, the private bar, and the aging and disability networks. Web site with registration form:

www.tcsg.org/mediation/training2004.htm

Questions: Penny Hommel, TCSCG

Phone: 734.665.1126

E-mail: phommel@tcsg.org

National Aging and Law Conference

October 20 to 23, 2004
Arlington, Virginia

Advocacy in Action – Still Responding to Challenges, sponsored by the AARP Foundation with the ABA Commission on Law and Aging, the National Senior Citizens Law Center, The Center for Social Gerontology, the Center for Medicare Advocacy, the National Academy of Elder Law Attorneys, the National Consumer Law Center, and the National Association of State Units on Aging. This year's conference includes advanced substantive topics and discussion, more than 50 workshops, and opportunities for networking with legal services and aging advocates from across the country.

More information: NALC@aarp.org or call Ada B. Albright, 202.434.2197

The Elder Law Discussion Group (ELDG)

A monthly CLE sponsored by Legal Aid Services of Oregon's Senior Law Project. ELDG is held on the second Thursday of every month from 8:00 to 9:00 a.m., at the offices of Legal Aid, located at 700 SW Taylor, Suite 300.

Upcoming ELDG topics include:

- May 13, 2004: SSI & GA Update
- June 10, 2004: VA Benefits Update
- July 8, 2004: Subsidized Housing Issues for Seniors

If you would like more information about the Elder Law Discussion Group, please contact Maya Crawford at 503.224.4086 or maya.crawford@lasoregon.org.

Elder Law Section "unCLE"

Attorneys helping attorneys



Saturday, May 15, 2004
Valley River Inn, Eugene, Oregon

- **No formal speakers**
 - **Small group discussion format**
 - **Brainstorming • Networking • Forms exchange**
- See page 13 for details**

Newsletter Board

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

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