



NEWSLETTER ELDER LAW

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January 1999

Medicare+Choice

In 1997, Congress made significant changes to the Medicare program. The Balanced Budget Act of 1997 (BBA) is Congress's attempt to offer to Medicare beneficiaries the same or similar health care delivery options available to consumers in the marketplace. The BBA added new choices to the current Medicare health care delivery options. Congress and the Health Care Financing Administration (HCFA) refer to these new plans as Medicare+Choice plans or Medicare Part C plans.

It is important to understand that the BBA did not create these new health care plans and that there is no guarantee a Medicare beneficiary will have any of the options available to choose from. In order for any given plan to be available in a community, a health insurer must develop the plan, apply for and receive approval from HCFA to offer the plan, and then market the plan to Medicare beneficiaries.

The new options may be available in communities starting January 1, 1999. Medicare+Choice may offer six or more new options to beneficiaries. Some of the options are variations of health main-

tenance organizations. These new choices are in addition to original Medicare, which offers a traditional fee-for-service plan and managed, or coordinated, care plans.

Medicare+Choice Plans

Congress authorized three categories of new plans that may be offered under Medicare Part C: coordinated care plans, medical spending account plans, and private fee-for-service plans. In its implementing regulations, HCFA identified four specific types of coordinated care plans that it will approve under Medicare+Choice: health maintenance organizations (HMOs) with and without point-of-service options, preferred provider organizations, provider-sponsored organizations, and religious fraternal benefit society plans.

Each of these plans has a network of health care providers that are under contract or some other arrangement with the insurer to provide services to beneficiaries. Some plans use a gatekeeper to non-network providers to control costs. Other plans allow beneficiaries to see non-network providers, but at an additional cost in the form of either higher premiums or greater deductibles and co-payments. In an effort to broaden options, HCFA may approve other network plans not specifically listed in the regulations.

Religious fraternal benefit society plans (RFBS) will likely operate in the same way HMOs operate. Plan eligibility will be restricted to members of the religious fraternal group. The RFBS plan must agree to enroll all members who wish to enroll without regard to health status. To date, the Mennonite Mutual Aid Society is thought to be the only plan to qualify as an approved RFBS plan.

A medical spending account plan (MSA) is a combination of a high deductible (\$1,500 to

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\$6,000) insurance plan and an annual contribution by Medicare to an interest-bearing medical spending account. Once the deductible is met, services can be provided in either a coordinated care or a fee-for-service plan. This is a demonstration project, available to no more than 390,000 beneficiaries annually, and scheduled to terminate on December 31, 2002. As of the date this article was submitted for publishing, no insurer has submitted an MSA plan to HCFA for approval. The Medicare MSA is not available to beneficiaries who qualify for Medicaid.

Private fee-for-service plans (PFFS) are those that pay health care providers at a rate that the plan has established and do not place health care providers at any financial risk. Put another way, the beneficiary is responsible for paying the provider what the plan does not pay. Such plans do not provide use discounts or incentives to health care providers and do not limit a beneficiary's choice of provider as long as the provider agrees to accept the plan's terms and conditions of payment. As of the date this article was submitted for publishing, no insurer has submitted a PFFS plan to HCFA for approval.

Eligibility and Enrollment

In order to be eligible for a Medicare+Choice plan, beneficiaries must be entitled to, or enrolled in, Medicare Part A, enrolled in Medicare Part B, and not be diagnosed with end stage renal disease (ESRD). Beneficiaries must reside in the plan service area, complete and sign an election form, provide the information requested by the plan, agree to abide by the plan rules once the rules are disclosed, and belong to only one plan at a time. Medicare+Choice plans may charge beneficiaries a premium in addition to the Part B premium.

Beneficiaries enrolled in a Medicare+Choice plan who develop ESRD will not be disenrolled from the Medicare+Choice plan. With the exception of a diagnosis of end stage renal disease, beneficiaries cannot be denied enrollment in a Medicare+Choice plan for any health-related issue, including current medical condition, medical history, genetic information, and claims experience.

Beneficiaries wishing to enroll in a Medicare+Choice plan do so by contacting the plan directly. Beginning in 2002, specific initial, annual, special, and open enrollment periods will take effect. Until that time, Medicare beneficiaries can join a Medicare+Choice plan or change plans at any time,

up to once per month. Medicare MSAs are the exception. Beneficiaries who choose Medicare MSAs are locked into those plans for the calendar year.

Beneficiary Safeguards and Protections

Besides the requirement that Medicare+Choice plans accept new enrollees without regard to health status (except for ESRD), other significant safeguards are in place. Medicare+Choice plans are required to provide at least the same benefits that are available under original Medicare and are required to abide by national coverage determinations made by HCFA.

Medicare+Choice plans must disclose to beneficiaries specific information about the plans. Disclosure must be made upon enrollment in the plan and at least annually thereafter. The information must be provided in a clear, accurate, and standardized form. Plans must identify the service area, identify the services that will be covered outside the service area, and explain how emergencies are covered. The plan must explain the standard benefits offered and any optional or mandatory supplemental benefits offered, including any additional costs to the beneficiary. Names and addresses of health care providers under the plan must be disclosed as well as plan pre-authorization rules. Beneficiaries must be advised about the plan quality assurance program, grievance and appeals procedure, and disenrollment rights and responsibilities.

Beneficiaries have the right to request certain additional information from the Medicare+Choice plan in which they are enrolled. Of particular interest are plan procedures to control expenditures and use of services, the number of grievances and appeals filed and their disposition, a brief description of the method of compensating physicians, and the financial condition of the organization offering the Medicare+Choice plan.

Additional Information

It is impossible to provide one with all the information you may want to know about Medicare+Choice in this article. There are a variety of sources that contain additional information. The best starting point is HCFA's interim final rule and the provisions of the BBA. The interim final rule can be found at 63 Fed. Reg. 34968 to 35116. The relevant provisions of the BBA are codified at 42 USCA §§1395w-21 to 1395w -28.

HCFA has created two Web sites to provide

Computer & Technology Tips and Resources

HotDocs Training. A hands-on seminar on HotDocs training for lawyers and staff may be available in the Portland area if there is enough interest. Call Dee Crocker at the PLF at 503-639-6911 if you are interested. Several of the members of the section subcommittee have signed up.

E-mail List Service. The Oregon State Bar Elder Law Section will have its own e-mail list service soon! As this article is being written, the e-mail list service is being developed. More information will appear in this newsletter when the e-mail list service is operating. If you want to participate in the list, please make sure that the bar has your e-mail address.

Sharing Information in Small Law Offices. Tennessee Elder Law Attorney Timothy L. Takacs has written an article with step-by-step instructions on how to network up to five computers for a law office. Tim claims if you can graduate from law school and follow instructions, you can set up your own simple network. He makes it look and sound easy. His article is based on Windows 95 and has pictures of the hardware needed and the screens that will appear as the installation progresses. His article is available online at: <http://www.nashville.net/~ttakacs/network.html>. If you want your computers to share data, including billing and documents, you will need a computer network.

Professional Liability Fund. Our own Professional Liability Fund has consulting resources

available for Oregon attorneys. The PLF will come to your office and demo different software options for you. They have a list of software by operating system for the law office complete with phone numbers, fax numbers, and Web sites. The PLF also has a database for software information sharing between lawyers and staff. Fax a request for the sign-up form to the PLF at 503-684-7250.

ABA Tech Show. Dee Crocker of the PLF attended the spring American Bar Association Tech Show and has cited several excellent articles that summarize this year's show. One such article lists the top twenty-six tips from the tech show. Alternatively, information about the tech show is available online at <http://www.techshow.com>.

Web Page. The Oregon State Bar Elder Law Section has a Web page which is being developed as this article is written. It can be found at <http://www.osbar.org/ProDevelopment/OSBSections/ElderLaw.html>. In the meantime, the Wisconsin Bar Elder Law Section has an exemplary Web page. It can be found at www.wisbar.org/sections/elder.

Keeping Your Software Current. Software programs exist which periodically update your computer. An example is Oil Change by Cyber-Media, which will download bug fixes, patches, and updates via the Internet. You can visit <http://www.cyber.media.com> for more information.

By Margaret Phelan, Former Chair

Attention: Revised Basic Estate Planning Forms

The recent OSB Basic Estate Planning CLE program included new and revised estate planning forms from Valerie Vollmar. Valerie reports that her forms from earlier programs have been completely revised and updated. She suggests that all lawyers using her forms should substitute the new ones for the old. Changes of particular interest to Elder Law attorneys are found in the revised revocable living trust and durable power of attorney forms. These changes include a revised definition of incapacity, expanded language on the procedure for determining incapacity, and detailed quality of life provisions. The new forms are available on disk in Word Perfect, Word, and ASCII format and can be obtained by contacting CLE Orders at 684-7413 or toll-free in Oregon 1-800-452-8260, ext. 413.

Newsletter Board

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New News?

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

Email: michael @ SSWCS.com.

Phone: 503-227-1111

New Rights for Medicare Beneficiaries

A three-judge panel of the 9th U.S. Circuit Court of Appeals unanimously held that decisions by Medicare health maintenance organizations (HMOs) amount to government actions, so that patients denied specific services were entitled to "due process of law," including hearings and other protections. *Grijalva v. Shalala*, 152 F.3d 1115 (1998). The Department of Health and Human Services (DHHS) has appealed the decision. DHHS is asking a full appeals court to overturn the earlier ruling.

The decision arose from a class action lawsuit filed in Arizona on behalf of the six million beneficiaries who were enrolled in HMOs around the country. The plaintiffs specifically complained that DHHS failed and refused to (1) take effective action to implement beneficiaries' notice and appeal rights when they are denied health care services by their HMOs; and (2) provide Medicare beneficiaries enrolled in HMOs with a procedure of obtaining review of HMO denial decisions contemporaneously with the denial decisions.

The District Court issued an injunction mandating that HMOs provide timely notice of service denials with notices that are legible, in at least 12-point type; state clearly the reason for the denial; inform the enrollee of all appeal rights; explain hearing rights and procedures; and provide instruction on how to obtain supporting evidence. All hearings are to be informal, in-person communication with the decisionmaker. The injunction also required expedited hearings for acute service denials.

The Court of Appeals in reviewing the Federal District Court's decision was primarily concerned with three issues: was "state action" involved, did the due process test set out in *Matthews v. Eldridge*, 424 U.S. 319 (1976) apply and how, and whether the scope of the injunction was too broad.

With regard to state action, the Court of Appeals held that the HMOs were not making decisions to which the government merely responds. To the contrary, HMOs were following congressional and regulatory orders and were making decisions as a government proxy — HMOs were deciding that Medicare does not cover certain medical services. Therefore, the HMOs in denying services were, in effect, acting on behalf of DHHS and constitutional due process requirements did apply.

In evaluating the adequacy of the due process

provided, the Court of Appeals determined that the *Eldridge* test applied. The *Eldridge* test requires the evaluation of the probable interest affected by the official action, the risk of an erroneous deprivation of such an interest with the procedures used, and the impact of such procedures on the government.

In evaluating the private interest affected, the Court of Appeals was concerned about the ability of rejected services to be compensated at some time in the future. The Court of Appeals shared the District Court's concern that this was not simply a matter of writing a check later to properly reimburse an amount in dispute; rather, in many if not most cases, the denial of coverage may result in the total failure to receive the services. Since the private interest was whether treatment was received or not, the loss of treatment was a serious matter because it could not be easily compensated with a future reimbursement check.

The Court of Appeals also found that the current procedure had a substantial risk for the erroneous deprivation of services because the current procedure did not require HMOs to tell the enrollees seeking services why the services were being denied.

With regard to the scope of the injunction, the Court of Appeals found that many of the terms of the injunction were already required by the Medicare statute or the secretary regulations. The other regulations appeared to the Court of Appeals to be within the spirit of those rules. Therefore, the injunction was not overbroad or an abuse of discretion.

By Conrad G. Hutterli and Michael D. Levelle

AFS Develops New Manual

Adult and Family Services has developed a new Manual to provide their field staff with eligibility, service, and procedure information. The "Family Services Manual" replaces the Eligibility Manual and Worker Guide Manual. Administrative rules are not printed in this Manual. If you have questions about the new Manual, contact Jennifer de Jong at 503-945-5856 or e-mail her at jenniferd.dejong@state.or.us.

information on Medicare+Choice. The first is www.medicare.gov, a consumer-oriented Web site designed to provide basic information about Medicare+Choice and other resources to answer questions. The second Web site is www.hcfa.gov. It is intended for practitioners and contains more information.

HCFA intends to establish a toll-free number to answer beneficiaries' questions and provide information on Medicare+Choice. The toll-free number is 1-800-MEDICAR (1-800-633-4227). The number was scheduled to be operational at the end of

October, but was not operational at the time this article was submitted for publishing. Questions from the beneficiaries and practitioners can always be addressed to the HCFA Region X customer service office in Seattle, Washington. The telephone number is 206-615-2354.

--Author Trisha A. Mayhew succeeds Penny L. Davis at head of the Senior Law Project of Multnomah County Legal Aid

MESSAGE FROM THE CHAIR

It is a pleasure for me to become Chair of the Elder Law Section as it begins its second year. With 406 members, the Section had a productive and successful inaugural year. I want to personally thank the first Chair, Valerie Vollmar, for her excellent job in getting us organized and keeping us on track. I also want to thank the many elder law practitioners from around the state who have made substantial contributions to the Section through their work on the Executive Committee and/or in the various subcommittees.

The second year of the Section will also prove to a busy one. The Oregon legislature will be meeting, and the Legislation Subcommittee is monitoring several issues.

The Agency and Professional Relations Subcommittee will be continuing its ongoing dialogue with policymakers at the Senior and Disabled Services Division, including the Estate Administration Unit, and will address the problems raised by the discontinuance of the Eligibility Manual (see report elsewhere in the newsletter).

The CLE Subcommittee is already planning another CLE, with a different emphasis than the well-received Medicaid planning CLE the section co-sponsored with the Oregon State Bar last September.

The Computers and Technology Subcommittee, which has established a Web site, is already working on several other projects, including establishment of a listserv and

the possibility of co-sponsoring a session about HotDocs, a useful document assembly program.

The Public Education Subcommittee is readying to write some public service pamphlets on key elder law topics.

The Pro Bono/Access Subcommittee got off to a slow start, and we are hoping to get this important subcommittee organized and active this year.

The Section just formed an ad hoc subcommittee to look at how the conflict of interest ethics rules work in an elder law context, and to provide feedback to the Legal Ethics Committee of the Oregon State Bar.

Last, but not least, the Newsletter Board plans to continue to grow the newsletter, and plans to publish four issues in 1999.

My goal is to increase participation in and support for these subcommittees. Elder law practitioners tend to be solo practitioners or in small firms. This year many Section members will be involved in writing for the elder law treatise being published by the Oregon State Bar. No elder law lawyer has great amounts of "spare" time. But when we share the work, we accomplish our goals. Please consider joining a subcommittee, or let us know of other ways that you are willing to contribute. You'll not only help the profession, you'll meet some nice people. Elder law lawyers are fun!

Donna R. Meyer

The Elder-Friendly Law Office

The successful entrepreneur in a service business knows to focus on the client. The chances of having a senior enter your office seeking legal advice are increasingly likely. Is your office ready to meet the special challenges of the senior population?

America is aging. In 1997 the median age in America increased from 32.8 in 1990 to 34.9. At 36.6, Oregon ranks seventh nationally in boasting an older population, behind the likes of West Virginia (38.1) and Florida (38). Persons age 65 years or older represent 13.8% of Oregon's total population (1990 figure). Of these seniors, 60.5% lived in six counties: Clackamas, Jackson, Lane, Marion, Multnomah, and Washington.

Know your client. The older adult is confronted with a wide range of physical, social, and psychological challenges. Many changes are gradual and taken in stride. Seniors tend to become physically shorter, the hair thins and grays, and the skin loses elasticity. Beside these depressing alterations in the external body, the most common physical changes are limited mobility, impaired vision, impaired hearing, changes in deep sleep patterns, stiffness, and diminished mental capacity.

Seniors often find that retirement results in new roles requiring inner strength, family understanding, and community support. Economic security is a common source of concern. Memory changes may cause confusion and disorientation. The death of friends and of one's spouse can result in loneliness, grief, and the need for many adjustments.

Psychological challenges—the hidden problems. Retirement rarely equals spending one's golden years as a geriatric gypsy merrily touring the countryside or dozing contentedly in a rocking chair by the fire surrounded by an attentive and respectful extended family. Life changes resulting from retirement, loss of independence, loss of friends, and death certainly challenge the senior's ability to cope. The senior's ability to rise Phoenix-like from these emotional ashes, to bounce back, is generally much more circumscribed than in earlier life. The reason: the senior's limited resources—an ever-diminishing reserve of family, friends, funds, health, and time.

Some common emotional reactions you may find among your senior clients are:

Grief. Because the older person has more difficulty finding a substitute for losses, grief can be unusually painful. Writers such as Kavanaugh in *Facing Death* emphasize the value of friends who will listen, reflect the senior's feelings, and refrain from giving advice.

Depression and anxiety. Listening to the client, reflecting his or her concerns, and engaging in mutual problem-solving can assist the anxious or depressed client. If these feelings are overwhelming the client, help from a community agency may be useful.

Sense of helplessness. Especially for men who once held positions of power and influence, feelings of helplessness can be devastating. The highest suicide rates in the United States occur among men in their sixties, seventies, and eighties. Sometimes relatives and friends can assist the senior in finding new and meaningful activities.

Rage. The uninitiated practitioner may be surprised to find that feelings of anger and rage are common among seniors. These feelings arise naturally out of the losses the senior experiences, such as the physical aging process, the imminence of death, and feelings of worthlessness brought on by a society that values youth, vigor, and economic productivity. Perhaps simply having these feelings acknowledged or allowing the senior to express anger freely to an understanding person may help.

Physical challenges—the obvious problems. Seniors experience numerous physical changes. For example, chronic conditions affect 80% of those 65 years old and older. The most common are arthritis, heart disease, high blood pressure, partial loss of hearing, and vision impairments.

Decreased mobility. Access to your office is crucial. Often a client will choose a lawyer based on the location of the office. Provide maps and clear directions. Provide parking with handicapped spaces nearby. Make sure that outside signage is large enough to read at a distance and without glare. Be sure entrances have wheelchair ramps and that restrooms are accessible to those with wheelchairs and walkers. Eliminate uneven flooring and door thresholds. Remove loose throw rugs.

Enter the elder client. OK, so you got the client safely inside your office, but you're still not done. Take time to train the staff on how to make elderly clients comfortable and safe in the office. Don't leave a client standing, even for a few minutes. If needed, offer an arm for support, assist with the removal of a client's coat, and usher the client to a suitable chair. Have available firm, straight-backed chairs with arm supports. Avoid those low, soft sofas from which it is impossible to arise in a dignified manner. Make sure tables are high enough to reach without bending or stooping. Avoid glass-top tables which can present a tripping danger and a problem for clients with impaired depth perception.

Impaired vision. Seniors often have difficulty reading and distinguishing objects. Glaucoma, macular degeneration, stroke, cataracts, and yellowed lens can cause impaired vision. Night vision often declines. Glare can be a source of discomfort, confusion, and accidents. Arrange seating so that the client is not facing a window. Have a magnifying glass available. The Oregon Commission for the Blind (503-731-3221) has available special devices for the visually impaired for the purpose of signing documents, writing letters, etc. Design printed material using large, plain fonts. Make the margins wide and double space when possible. Use white stationery with black ink.

Impaired hearing. A client of mine once declared that hearing loss was like losing 50 IQ points. Often the client will appear not to understand when he or she simply can't hear. Make it easy for the client to watch your mouth. Speak clearly, slowly, in a low frequency and in short, simple sentences. Keep within 3 to 6 feet of the client, if possible. Avoid background noise such as traffic sounds, overhead music, or photocopiers. Be aware of the potential problem of background noise when meeting or speaking away from the office. Invite the hearing-impaired in an audience to sit in front seats. Follow up with take-home instructions or illustrations reinforcing your points.

Conclusion. Making your office elder friendly takes a little thought and a good deal of patience. Anticipate your client's needs. It will result in making your senior clients feel comfortable and safe, and help increase the efficacy of client meetings.

By Shirley A. Bass

Agency and Professional Relations Subcommittee Report

The Elder Law Section's Agency and Professional Relations Subcommittee continues to meet with agency representatives. In meetings and contacts with Senior and Disabled Services Division (SDSD), the Subcommittee has been advised of the following:

SDSD is no longer printing updates to the Medicaid Eligibility Manual. To access the rules, practitioners will need to use the Internet or contact the Secretary of State to obtain the most recent filings. (The Subcommittee is currently investigating the best methods to obtain the rules.)

Effective October 1, 1998, OAR 461-140-0296 was amended to increase the average cost of nursing home care (which number is the Medicaid transfer penalty divider) to \$3,320. However, the rule states that this divider applies to transfers occurring on or after October 1, 1998. SDSD has acknowledged that this is contrary to federal law and will amend the rule, most likely to be effective January 1, 1999. In the meantime Jeff Miller, the policy analyst for SDSD, will be sending an executive letter to local offices advising case workers to apply the new divider to **all** transfers, not just transfers occurring after October 1, 1998.

SDSD has announced the following new Medicaid numbers:

- \$216.00** *new utilities standard* – effective October 1, 1998
- \$81,960.00** *maximum community spousal resource allowance* – effective January 1, 1999
- \$16,392.00** *minimum community spousal resource standard* – effective January 1, 1999
- \$500.00** *SSI Standard* – effective January 1, 1999
- \$1,500.00** *Oregon Income Cap* – effective January 1, 1999

The Subcommittee met with Roy Fredericks, the new head of the Estate Administration Unit (EAU). Mr. Fredericks agreed to meet with the Subcommittee on a regular basis in order to keep open lines of communication. **Any mail to EAU should be sent to P.O. Box 14021, Salem, Oregon 97309.**

by Cinda M. Conroyd, Chair

Locating Oregon Administrative Rules on the Internet

The following is a procedural guide on how to locate the latest Oregon Administrative Rules on the Internet. The Secretary of State maintains an annual **compilation** of the administrative rules and all the **amendments** filed throughout the year. To be sure you have the most recent change, you need to check the updates. You should check the updates first to see if there is an amendment, and if there is no updated version of the rule, then check the compilation. The first time you conduct the search, set bookmarks at key sites so later searches will be quicker.

To find updates:

1. Go to the Web page for the Secretary of State:
2. Click on "Oregon Bulletin" - then Bookmark the Oregon Bulletin site.
3. Scroll down and click on "OAR Revision Cumulative Index."
4. Click on "400s" - then Bookmark the 400s site.
5. See if OAR 461-120-0340 has been amended since the compilation was created. You can find the rule number by scrolling down or SEARCH for it by clicking "Edit" and "Find in Page" and then typing into the box "461-120-0340" and clicking "Find Next."
6. a. If the rule is listed, find the latest listing and click on it. You now are taken to the Division's rule filing as published in the monthly Bulletin. At the Bulletin site, SEARCH (as in step 5) for the rule number, hitting "Find Next" until you get the rule.
b. If there are no updates, then the version of the rule in the compilation remains current, so you need to go to the compilation.

To find the rule in the compilation:

1. Go to the Web page for the Secretary of State (see steps 1 and 2 above; use the bookmark if you made one)
2. Click on "Oregon Administrative Rules - 1998 Compilation"
3. Click on "Numerical Index"
4. Scroll to and click on "461"
5. Scroll to and click "Division 120 Nonfinancial Eligibility"
6. Scroll to rule 0340 or SEARCH for it (as above).

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FROM THE EDITOR

ELDER LAW NEWSLETTER EDITOR SEARCH

The Elder Law Section is looking for a qualified person interested in serving as the editor of the Elder Law Newsletter. The editor position is a paid position and will require a commitment of editing six newsletters per year. The Section is looking for a person who is either a practicing or non-practicing attorney with interest or experience in the elder law field, with excellent writing and editorial skills. If you are interested, please contact Michael D. Levelle at 503-227-1111, fax 503-248-0130, or e-mail: michael@SSWCS.com.