



# Elder Law Newsletter

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## Elder law attorneys should think like litigators

By Stephen R. Owen

When I meet attorneys who practice elder law or probate law and tell them that I practice elder law and probate litigation, many times they say, "Do you have a card? I don't do litigation."

It seems that a lot of elder law and probate attorneys do not want to handle the litigation that inevitably comes up in these practice areas and do not believe it is part of their practice. They may not realize how much of their workday is already geared toward litigation, or more accurately, avoiding litigation. Rather than avoiding any notion of litigation, such attorneys need to become versed in potential litigation matters. Their ability to do so can only enhance the work they do for their clients.

An attorney's representation of a client

can later become a major component of a litigated case. It is rare to litigate a case that involves a contested protective proceeding, a challenge to an estate plan, or an elder financial abuse tort that does not touch on a previous attorney's work. Any time an attorney is involved with a document that nominates a fiduciary or changes an estate plan or has contact with certain third parties there is potential for being involved with litigation.

Most attorneys understand this and take steps to protect their clients' interests. But are these same attorneys consciously taking into account potential litigation issues—for example, the application and exceptions of privilege rules, or the elements of an undue influence claim? If not, they probably should be. If you get a phone call from an attorney involved in litigation with your former client, and you are not versed in such things, you should direct the caller to voice mail and call an attorney who is. If you are knowledgeable in such matters, however, that initial phone call may never come. This is one of the reasons that practitioners should understand the contested issues that come up in elder law and probate and attempt to anticipate potential litigation issues.

How does an attorney anticipate potential litigation? In some cases the signs are clear; in others they may not be. Many litigated cases concerning contested protective proceedings, will contests, and elder financial abuse initially were handled by competent and respected attorneys who did everything right. They simply did not know, and could not reasonably have known, what was really going on outside their offices. Because

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## Think like a litigator *Continued from page 1*



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of this uncertainty, the one action that all attorneys should take is to document every relevant matter that occurred in the representation. In litigating many elder law or probate cases, the toughest challenge is trying to go back and reconstruct history when your best witness is either dead or incapacitated. Proper and complete documentation from attorney files is among the best evidence you may find to prosecute or defend such actions.

How does an attorney know what issues are relevant to potential litigation? The key is to understand what litigation issues might affect your client. Certain types of cases make up the bulk of litigated elder law and probate cases. They are:

- disputes arising in the appointment of a fiduciary in protective proceedings
- conflicts arising in the administration of probate and trust estates
- challenges to estate plans
- legal actions regarding the abuse of the elderly and incapacitated

Within these broad categories are a multitude of specific legal issues. These include cognitive capacity, undue influence, fiduciary duties, and evidentiary privileges. Finally, as with all litigation, these matters must be presented to the court within the rules of civil procedure and subject to the rules of evidence. Therefore, at a minimum an attorney should document all relevant information regarding contact with third parties, the client's wishes and understanding of the matters at hand, and how the attorney came to know such things.

These observations and suggestions are not as daunting as they may sound. Estate planners, elder law, and probate law attorneys deal with many of these issues on a regular basis outside of litigation. Practitioners in these fields serve their clients well when they are able to identify how these issues may factor into potential litigation, document them, and know how to address

them. One suggestion on how to understand these issues in a litigation context is to take on some of these cases. Many attorneys who practice in elder law, estate planning, and probate may be simply selling themselves short when assessing their abilities in the courtroom. Most lawyers in the Elder Law Section have the skills and knowledge required to handle these matters in court.

In addition, elder law and probate practitioners may bring to litigation unique knowledge and skills of particular benefit to their clients. Many times the conflicts at issue are based more upon long-held emotional family issues than truly tortious or wrongful behavior. An aggressive litigation approach to these issues sometimes can prolong the conflict and increase expenses for all involved. Attorneys who deal with elder law, estate planning, and probate issues can be very effective problem solvers. Arguing a reasoned approach to resolving a conflict can sometimes do much more to sway a judge's decision than a stellar dissertation on how the hearsay rules preclude a witness's testimony. Remember, with rare exceptions these cases are almost always in front of a judge, not a jury. The court and your client may benefit more from your insight than from an attorney better versed in litigation matters.

Whether you are an estate planner, practice elder law, or handle probate, a thorough understanding of litigation matters can assist both you and your client. At minimum, you may be able to identify and address potential litigation issues that will protect your clients' interests over time. At maximum, you may be able to personally handle litigation matters that benefit your client by bringing your skills to the courtroom and avoiding the costs associated with transferring files from one attorney to another. Either way, it is beneficial for you to be knowledgeable about litigation issues and how to address them. You may help to avoid litigation, or if it is filed, be in a position to resolve it efficiently.

# What the attorney who drafts a will can do to avoid contests

By James R. Cartwright

The attorney who drafts a will for a client can do little to avoid a will contest, which may spring more out of intra-family grievances of long standing rather than informed, good-faith doubts about the validity of a given estate plan. A drafting attorney's diligence cannot heal a broken family dynamic. However, the drafting attorney can take steps to make it difficult for a will contest to succeed. Because attorney-client privilege protects the drafting attorney and his or her file, those steps will remain secret until a will contest is filed, unless the personal representative authorizes disclosure sooner in an effort to avoid litigation.

## What is a will contest?

ORS 113.075(1) allows filing of a will contest on the grounds that:

- (a) the will alleged in the petition to be the will of the decedent is ineffective in whole or part;
- (b) there exists a will that has not been alleged in the petition to be the will of the decedent; or
- (c) the decedent agreed, promised, or represented that he or she would make or revoke a will or devise, or not revoke a will or devise, or die intestate.

The drafting attorney's concern is with ORS 113.075(1)(a). Ensuring the validity of a client's will is a broader concern than making sure it is properly signed and witnessed. The usual allegations of a will contest are that the testator lacked testamentary capacity, was under the undue influence of another, or both. Drafting attorneys can best protect their work product from challenge by knowing the standards used to measure each of these allegations, and how trial attorneys typically seek to prove each of them.

## Does the client have testamentary capacity?

ORS 112.225 states: "Any person who is 18 years of age or older or who has been lawfully married, and who is of sound mind, may make a will."

In *Kastner v. Husband*, 231 Or 133, 372 P2d 520 (1962), the Supreme Court reiterated the

requirements of sound-mindedness or mental competency. The person must:

- be able to understand the nature of the act in which he is engaged
- know the nature and extent of his property
- know without prompting the claims, if any, of those who are, should, or might be, the natural objects of his bounty
- be cognizant of the scope and reach of the provisions of the document

This four-part test was first set forth in *In re Phillips' Will*, 107 Or 612, 618, 213 P 627 (1923), which surveyed Oregon cases from 1879 through 1922.

Practitioners should be aware that this standard is very low. It is far below the threshold of contractual capacity, for example. In practice, courts tend to be deferential to the testimony of drafting attorneys, whom judges presume to be informed and sophisticated witnesses as to their clients' cognition. The effect is that attorney-drafted wills are nearly invulnerable to challenge so long as the drafting attorney is available and willing to defend his or her work product.

However, because attorneys prefer to be faulted for doing too much rather than doing too little, they will sometimes solicit opinions from their clients' doctors regarding capacity in conjunction with the execution of an estate plan. In my experience, this effort tends to be a red flag that suggests the attorney was concerned enough about the client's capacity to seek medical reassurance. Likewise, some lawyers videotape their clients while signing a will, or videotape an interview with the client around the time of execution. Again, this can be more harmful than not when a will contest is filed. A drafting attorney who has bonded with a client may lack the objectivity to see how impaired the client appears to a neutral observer, or worse, may not realize to what extent he or she leads, corrects, and prompts the client in the taped interview. These videotapes are often Exhibit One for the contestant.

Another double-edged sword is the choice of attesting witnesses to a will. The ideal

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## Avoid will contests

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attesting witness, of course, can not only testify that the testator identified the will as his own and signed it, but can also provide valuable testimony supporting both testamentary capacity and lack of undue influence. However, such witnesses are few and far between. The choice of witnesses should be guided in part by what the attorney senses might be the avenue of later attack on the will. If there is an issue as to capacity, the attorney should carefully use open-ended questions and no prompting to demonstrate before witnesses at time of execution, that the testator has testamentary capacity. An excellent witness along these lines might be an experienced probate paralegal who has witnessed hundreds of wills and is experienced in providing services to elderly clients. An inexperienced legal assistant who is called in to meet the testator for the first time when the will is executed would, of course, be much less valuable.

If the attorney anticipates an attack on the ground of undue influence, a longtime friend or business colleague of the testator may be a useful witness. The drafting attorney should carefully vet such prospective witnesses beforehand, however, because their testimony may be turned to the advantage of the will contestant—the witness might testify to the testator’s mental or physical deterioration, increasing reliance on a beneficiary of the will, or a change in the testator’s attitude toward previous beneficiaries.

Practitioners should be aware that when an attorney serves as an attesting witness, there is no attorney-client privilege as to “communications relevant to an issue concerning an attested document to which the attorney is an attesting witness.” ORS 40.225(4)(d).

A tool that can be very effective in defeating a claim of lack of capacity is a letter from the client “to whom it may concern,” written at the lawyer’s request and kept on file, in which the client explains, in his or her own words and handwriting, the provisions of the will and reasons for making the chosen testamentary dispositions. This can be a potent weapon to deter or defeat a challenge. The client’s voice “speaking from the grave” can have great persuasive value. There is reason to be wary if your client cannot write such a letter.

### Is the client subject to undue influence?

The vast majority of successful will contests are grounded in proof that the testator was subject to the undue influence of another. A comprehensive discussion of undue influence jurisprudence is beyond the scope of this article. However, every drafting attorney should read and periodically review the seminal case of *In re Reddaway’s Estate*, 214 Or 410, 329 P2d 886 (1958), which sets forth the template for proof in undue influence cases, as well as the “Litigation” chapter in the OSB *Administering Oregon Estates* CLE materials. The key for drafting attorneys is to understand that undue influence does not have to manifest itself as duress or coercion. Obviously, no attorney will participate in the drafting of an estate plan for a client held at gunpoint by an interested beneficiary. Undue influence is marked not by lack of consent on the part of the testator, but “want of conscience” on the part of the beneficiary who exercises influence. The drafting attorney should inquire as to the client’s reliance or dependence upon anyone who receives money or property under the estate plan, and be alert to “yellow flags” that may suggest an abuse of trust by a beneficiary. The following checklist may be helpful in identifying a potentially abusive situation:

- Is the new estate plan consistent with the old estate plan?
- Are you the brand-new attorney, or have you had a longstanding relationship with the client?
- Who made the appointment? Who accompanied the client to the meeting?
- Does the will have a typical “equal shares among the children” provision, or is one heir substantially favored over others of like status?
- If the distribution scheme is unequal, how recently did the majority beneficiary become directly involved in the life of the testator?
- Is the majority beneficiary providing care, support, or services?
- Is the attorney being provided with “drafts” or handwritten notes of the proposed estate plan?
- Is the majority beneficiary also a party to one or more bank accounts?
- Is the majority beneficiary assisting the testator in the management of his or her financial affairs?
- Has there been a gradual relinquishment of responsibility by the testator to the beneficiary?
- Have there been any recent transfers to the majority beneficiary, including gifts or loans, or has the beneficiary been added to a joint account or designated as the beneficiary of life insurance or other death benefits?
- Does the majority beneficiary know about the pre-existing estate plan and what it contains?

The drafting attorney must be mindful of his or her obligation to prepare an estate plan that reflects the true intent of her client, not an intent warped or twisted by the influence of someone in whom the client places special trust. By asking questions like those above, you will better perform your gatekeeping function and be a better advocate for your client’s true wishes. When warning flags are present, so is the obligation to advocate for the client’s overall well-being, including the duty under RPC 1.14(b) to take other actions to protect the client. When indicators of undue influence are present, the attorney’s duty to his or her client is not satisfied simply by having the undue influencer wait in the lobby.



# Elder abuse and the civil justice system

By Derek C. Johnson and Marilyn Heiken

Elder abuse is the infliction of physical, emotional, or psychological harm on an older adult. Elder abuse also can take the form of financial exploitation or neglect by a caregiver. Most incidents of abuse take place at home, and family and paid caregivers are usually the abusers. The vast majority of cases of elder abuse will never enter into the civil justice system. There are many reasons for this. Reluctance to take legal action against family members and caregivers upon whom they depend, fear of further abuse, and fear of being placed in a nursing home are just a few. Sometimes victims do not recognize they are being abused, or that the civil justice system can help them with their problem. Even if a victim pursues a case against the abuser and wins, the abuser may not have the resources to satisfy the judgment.

Oregon has enacted a special elder abuse statute to make it easier for older people to address these problems through the civil justice system. The law provides for restraining orders, mandatory abuse reporting, and a civil cause of action. ORS 124.100-140 (amended in 2005). The law helps elders obtain compensation by requiring the court to award treble damages for economic and noneconomic losses sustained as a result of the physical or financial abuse. ORS 124.100. The law also requires the court to award the elder reasonable attorney fees. ORS 124.100. The court may impose injunctive relief, which may not be available in a civil action. ORS 124.120. The statute of limitations in the statutory civil action is seven years from discovery of the wrongful conduct. ORS 124.130.

However, the statute has a huge exception. It does not apply to abuse that takes place in nursing homes, residential care facilities, and home health agencies. An action cannot be brought against these institutions under the statute unless the institution or its employee is convicted of a financial crime or one of the crimes listed in ORS 124.105 (assault, menacing, reckless endangerment, rape, sodomy, unlawful sexual penetration, sexual abuse, or strangulation). ORS 124.115.

Because of the practical considerations of collecting judgments and limitations of the statutory remedies, most civil cases against

nursing homes and similar residential facilities to compensate elderly victims of physical and emotional abuse are brought under common law theories of negligence. Negligence claims against nursing facilities are somewhat more complex than most negligence claims. Such claims are similar to medical malpractice claims in that expert testimony as to standard of care and causation is usually required. In addition, nursing facilities are subject to extensive federal and state regulations that dictate the medical care that must be provided and the procedures that must be followed. Plaintiff's counsel must become familiar with these regulations and the standard of care to effectively evaluate and prosecute a claim against a nursing home.

Documentary evidence is key in claims against nursing homes. First and foremost is the facility's treatment chart for the elder, which will provide the road map (or lack thereof) for the investigation of the claim. Usually the patient's chart is voluminous, and should contain certain records mandated by state and federal regulations. In addition, the state surveys nursing facilities on an annual basis, and these surveys are available to the public. The state also often investigates the particular circumstances of the abuse and creates a report of investigation. The report of investigation contains a summary of facts and statements of witness interviews. State agencies and nursing homes often withhold the complete report of investigation based on statutory privileges, but some of the asserted privileges can be overcome by court order. For example, OAR 411-020-0030 provides that the "information regarding the identity of the complainant, the alleged victim, and all witnesses, shall remain confidential, unless otherwise dictated by judicial process." Other privileges asserted by the nursing home, such as the peer review privilege in ORS 41.675, may not actually apply to the documents in question.

As in any negligence claim, both economic and noneconomic damages are recoverable. Economic damages are often limited in elder abuse cases because economic damages include wage loss, and elders are not typically wage earners. When an elder is already a



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# Elder abuse litigation

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resident of a nursing home, often there are no additional medical bills attributable to abuse and neglect. When elder abuse results in death and a wrongful death case is brought, the statutory cap of \$500,000 on noneconomic damages applies. See ORS 31.710. The statutory cap on noneconomic damages does not apply in a common law personal injury case. *Lakin v. Senco Products, Inc.*, 329 Or. 62 (1999) held that a statutory cap on noneconomic damages violates the constitutional right to jury trial in a common law negligence action.

There are occasions, however, where neglect can result in substantially increased medical bills. Neglect of incapacitated persons can cause severe pressure ulcers that lead to emergency interventions, hospitalization, and surgery to combat the injury. Sometimes abuse or neglect destroys a victim's independence and forces an elder to move from a low-skill or short-term facility into a much more expensive skilled, long term care facility. In those cases the increased cost of care over even a relatively short period can result in dramatic economic damages.

Unlike claims brought under ORS 124.100, attorney fees are not provided for in a common law negligence claim. However, if an elder is abused but dies of other causes before bringing a cause of action, the personal representative of the decedent's estate may bring a sur-

vival action to recover damages for the injuries the elder suffered. ORS 30.075. This statute allows for an award of reasonable attorney fees to the prevailing party.

If your client has a potential claim for elder abuse, you may want to contact one or two personal injury attorneys with experience in this area of law and explain your client's situation. There are many legal, factual, and business reasons why a personal injury attorney may or may not recommend that your client go forward with a civil action against the abuser.

Whether brought under ORS 124.100 *et seq.* or as a common law tort claim, these cases must be pursued aggressively with qualified experts and thorough discovery and trial preparation. The elderly victims of abuse or neglect deserve no less.

<b>Supplemental Security Income (SSI) Benefit Standards</b>	Eligible individual ..... \$603/month Eligible couple ..... \$904/month
<b>Medicaid (Oregon)</b>	Long term care income cap ..... \$1,809/month Community spouse minimum resource standard ..... \$19,908 Community spouse maximum resource standard ..... \$99,540 Community Spouse Minimum and Maximum Monthly Allowance Standards ..... \$1,604/month; \$2,488.50/month Excess shelter allowance ..... Amount above \$481/month Food stamp utility allowance used to figure excess shelter allowance ..... \$292/month Personal needs allowance in nursing home ..... \$30/month Personal needs allowance in community-based care ..... \$136/month Room & board rate for community-based care facilities ..... \$468.70/month OSIP maintenance standard for person receiving in-home services ..... \$604.70 Average private pay rate for calculating ineligibility for applications made on or after October 1, 2004 ..... \$4,700/month
<b>Medicare</b>	Part B premium ..... \$88.50/month Part B deductible ..... \$124/year Part A hospital deductible per illness spell ..... \$952 Skilled nursing facility co-insurance for days 21-100 ..... \$119/day
<b>Social Security</b>	Social Security and Supplemental Security Income (SSI) beneficiaries will receive a 4.1 percent COLA for 2006.

## Important elder law numbers as of Jan. 1, 2006

# The intersection of bankruptcy law and elder abuse

By Julia I. Manela

Bankruptcy law and elder abuse intersect in a number of areas. Issues can arise when an abuser goes bankrupt and when an elder considers filing for bankruptcy as a result of abuse. In addition, if an elder is considered an "assisted person" under the bankruptcy code, both the elder and his or her attorney are subject to certain requirements.

## Issues when the abuser declares bankruptcy

The first instance where bankruptcy law and elder abuse intersect is when the elder is the victim of predatory lending or some other type of fraud and the perpetrator files for bankruptcy. The elder becomes a creditor in the bankruptcy case and may have to submit a proof of claim or try to prevent a discharge based on fraud. For example, I had a case recently in which an alleged abuser spent tens of thousands of dollars of an elder's money. The victim was able to get help and filed suit for elder abuse, among other things. The alleged perpetrator immediately filed a Chapter 13 bankruptcy.

Under the old version of the Bankruptcy Code, if the elder abuse victim did not succeed in getting the bankruptcy dismissed or the debtor denied a discharge, the elder's claim could be discharged. The Bankruptcy Code as revised by the Bankruptcy Abuse and Prevention and Consumer Protection Act of 2005 (generally effective October 17, 2005) has changed the discharge provisions in Chapter 13. Now civil damages against the debtor for willful or malicious actions that caused personal injury or death, as well as fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny, cannot be discharged. 11 USC § 1328(a). The new language may provide a stronger basis for an elder abuse victim to prevent a discharge, especially where a fiduciary relationship existed between the victim and the perpetrator.

An elder may also become a creditor in a bankruptcy case filed by an entity or individual involved in negligent or predatory lending or investing practices. For example, see *In re Smith*, 321 BR 75 (M.D. Florida 2005), in

which a claim was allowed for the amount that would have been earned but for negligent recommendations regarding investment.

## Issues when the abused elder files bankruptcy

Another intersection between bankruptcy law and elder abuse occurs when someone close to the elder commits financial abuse and the elder ends up bankrupt. Elder abuse issues may underlie a bankruptcy, but the concept of elder abuse and state statutes protecting against elder abuse may not be addressed in the bankruptcy proceedings.

In some instances, someone may have encouraged an elder to file for bankruptcy when it was not warranted, thus causing the elder to incur unnecessary expenses. A bankruptcy filing may be unnecessary if the elder has no nonexempt equity in any assets. See ORS 18.345-428 for exemption limitations. (Note: the amount of exemptions will increase at the beginning of 2006.) Consumer protection laws like the Fair Debt Collection Practices Act may provide enough protection from debt collection so that a bankruptcy filing is unnecessary. In all situations, an experienced bankruptcy attorney should be consulted before filing.

Another consideration is the effect of a bankruptcy filing on the elder who is the debtor. Bankruptcy rule 1004.1 permits a guardian or conservator to file a petition for an incapacitated person. The local bankruptcy court usually wants to appoint a guardian ad litem for the purpose. It may be possible to file bankruptcy with a power of attorney that specifically grants the power to file. However, it is not clear-cut that the bankruptcy court will accept a power of attorney as a basis for filing a petition for an incapacitated person. *In re Eicholz*, 310 B.R. 203 (W.D. Washington, 2004)

A bankruptcy filing creates an estate, and a trustee is appointed to administer assets of the estate. The activities of a financial abuser could cause the trustee to investigate fraudulent transfers and preferential transfers (both



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## Bankruptcy and elder abuse

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terms of art defined by the code), thus increasing the elder's attorney fees and other costs associated with the bankruptcy. The financial abuser's activities could also create a cause of action for the trustee to obtain a denial of the elder's discharge, thus negating almost any beneficial effects of the bankruptcy filing. However, one could argue that the actions that give rise to a denial of discharge require specific intent on the part of the debtor. If the debtor is incapacitated, the specific intent to act may be impossible and therefore a denial of discharge would not be appropriate.

The bankruptcy code, 11 U.S.C. *et seq.*, does not directly address the issue of an elder's guardian or representative being a bad actor in his or her representative capacity. In this area the practitioner is faced with an overlay of agency law and the bankruptcy crime law. Agency law may apply to the relationship of the incapacitated person and the guardian/conservator and define what the agent can and cannot do and the extent to which the agent may be liable. See Restatement 2d Agency. There are many Oregon cases discussing the Restatement 2d Agency, and a practitioner may be able to raise those issues in the bankruptcy setting or through a separate proceeding in state court. Bankruptcy crimes and criminal procedure are addressed in 18 U.S.C. 151 *et seq.* Title 18 describes criminal actions of "a person," who can be any person—not just a debtor. A guardian or conservator acting on behalf of an incapacitated person may still be found to have committed a bankruptcy crime for actions such as concealment of assets, false oaths, embezzlement against the estate, and bankruptcy fraud. Both bankruptcy judges and trustees can report suspected bankruptcy crimes to the U.S. attorney's office for investigation and prosecution.

There are some situations where it might make sense to try to discharge debts incurred by a financial abuser. As part of the analysis to decide whether a bankruptcy is a good option, a number of factors must be considered. These include:

- what assets there are to protect
- whether the debt is dischargeable (the discussion of what is and is not dischargeable would take another article, so I direct you to the code)
- whether there are nonexempt assets that would become part of the bankruptcy estate

The Bankruptcy Court in the District of Oregon applies Oregon law that defines exempt property and the exemption amounts. See ORS 18.345-428.

Finally, an elder who meets the definition of "assisted person" will be subject to new hurdles in bankruptcy, including a possible presumption that he or she should be in a Chapter 13 instead of a Chapter 7 if his or her net income exceeds certain average levels.

### The new bankruptcy code and the concept of the "assisted person"

The revised Bankruptcy Code defines an assisted person as "any person whose debts consist primarily of consumer debts and the value of whose nonexempt property is less than \$150,000." 11 U.S.C. §101 (3). If you have a client who meets this definition, you may be subject to the provisions of 11 U.S.C. §§ 526, 527, and 528 if you offer counsel with respect to a bankruptcy case. The code does not specify

that you must be representing the client for any particular purpose, only that if you represent an individual who meets the definition of an assisted person, you may be required to jump through a number of new hoops. Under the plain language of the code, it does not matter if your client is a creditor or a debtor; he or she may still fall under the definition of assisted person and trigger the code sections applicable to representation of an assisted person.

Under the new code, even the mention of the word bankruptcy may necessitate the various disclosures required under the new law. The disclosure requirements of the code are triggered by a "debt relief agency" rendering "bankruptcy assistance" to "assisted persons." Except in the state of Georgia, attorneys appear to fall under the definition of a debt relief agency. 11 U.S.C. 101 (12A). See *In re: Attorneys at Law and Debt Relief Agencies*, AO 72A, United States Bankruptcy Court for the Southern District of Georgia (October 17, 2005). Bankruptcy assistance is defined as:

"any goods or services sold or otherwise provided to an assisted person with the express or implied purpose of providing information, advice, counsel, document preparation, or filing, or attendance at a creditors' meeting or appearing in a case or proceeding on behalf of another or providing legal representation with respect to a case or proceeding under this title." 11 U.S.C. 101(4A).

As you can see from this discussion, elder abuse in the bankruptcy setting can take on many forms. For an elder law practitioner who does not practice in the bankruptcy area, this article should provide a few ideas to think about and raise awareness of some basic issues under the new bankruptcy law. Until there is clarification from the courts regarding attorneys who provide "bankruptcy advice" to assisted persons, an elder law attorney may want to refer clients to a specialist for even the most basic discussion of bankruptcy concepts. In any case, when in doubt about the effect a bankruptcy filing will have, the elder law attorney should refer the client to an experienced bankruptcy attorney.



# How to work with a personal injury litigator to protect a settlement

By Cinda Conroyd

In my practice as an elder law attorney, I have worked with personal injury (PI) litigators whose clients are receiving government benefits and want assistance in protecting the award or settlement proceeds. I have found that there are some particular aspects of this interaction that one must keep in mind.

First of all, PI attorneys often know even less about government benefits than elder law attorneys know about personal injury actions. For the most part we speak different languages and may have different goals. The PI attorney sees his or her job as primarily trying or settling a lawsuit and obtaining the largest award or settlement for the client. When that goal has been met, his or her inclination is to wrap up the case and close it as soon as possible. The elder law attorney, on the other hand, is focused on the best way to manage the money most effectively for the client—which may take time to determine and implement.

Despite these different goals, discussing the issues before accepting the case can minimize the potential for conflict.

## Ask about benefits the client receives

When a PI attorney calls and asks you to help maintain a client's government benefits, the first question should be "What government benefits is the client receiving?" As we all know from our own experience, the client frequently does not know what benefits he or she is receiving, and it is unlikely the PI litigator knows. Avoid doing work on the case until this question is answered.

If the client is receiving only Social Security Disability Income and Medicare, there is no need to protect the assets for the individual, because those programs are not needs-based. If the client is receiving only food stamps or HUD housing and the settlement proceeds are not large, perhaps a supplemental needs trust (SNT) or other protection is unnecessary.

If the PI attorney cannot provide information about benefits the client receives, you

should obtain a release from the client and/or schedule a meeting with the client to determine the answer to the benefits question.

## Determine the client's age

The second question to ask is "How old is the client?" The PI attorney may assume that an elder law attorney who successfully created and funded an SNT for a prior client should be able to do it for all of his or her clients who want to have their assets protected. Make sure the PI attorney knows that an SNT is an option only for clients under age 65 (unless a pooled trust for persons 65 and over can be located). Unfortunately, the PI attorney may have made promises to the client that the elder law attorney cannot keep.

## Identify your client

The next important issue to resolve is "Who is your client?" Is your client the PI attorney who asks you to give him or her advice or prepare documents? Is your client the injured person, or is your client the injured person's parent or spouse? In general, I find that acting as a consultant to a PI attorney is not a satisfactory relationship, unless the case involves only a small amount of money and a simple spend-down. Functioning only as a consultant makes it difficult to obtain all the needed information from the injured person or the injured person's family.

If a PI attorney contacts you before a settlement is reached, keep in mind that he or she is probably working under a contingency arrangement. If the injured person is your client and there is no recovery, it would be unlikely you would collect your fees, because the client probably has no money. However, if the PI attorney is your client, the attorney pays you regardless of recovery. Once the case settles, the PI attorney then becomes your *former* client and the injured person or a family member becomes your client.



*Cinda M. Conroyd is a partner in the Salem firm Douglas Conroyd & Gibb. Her practice emphasizes estate planning and elder law, particularly as it relates to Medicaid and disability planning.*

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## Working with a PI attorney

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### Divide the tasks

You should confirm with the PI attorney which tasks each of you will complete. Problems may arise if duties are not clearly defined in writing.

One of the biggest issues is determining which attorney is responsible for handling the medical liens. The best practice is to require that the PI attorney be responsible for resolving the medical liens, including liens by Medicare and Medicaid. By the end of the few cases in which I agreed to deal with the Medicare and/or Medicaid liens, I regretted that decision. I never knew enough of the background information that become important when resolving lien issues – details of the accident, the type of injuries, what injuries were specifically related to the accident, what was the insurance coverage, etc. Another reason to avoid handling medical liens is that an attorney may have statutory liability to the medical provider if liens are not resolved. See ORS 87.581.

Confusion may result if it is not clear which attorney is handling court approval of the settlement for the disabled person or minor, presentation to the court of the distribution schedule, and the dismissal of the lawsuit. A discussion with the PI attorney early in the process, followed by a confirmation letter, easily resolves these issues.

### Establish how you are to be paid

Some PI attorneys pay the elder law attorney from his or her contingent fee, considering it a part of the “attorney fees” for the case. Others require the client to pay the elder law attorney’s fee from the client’s portion of the settlement. In either case, you will need to discuss the fees with the client and enter into a fee agreement.

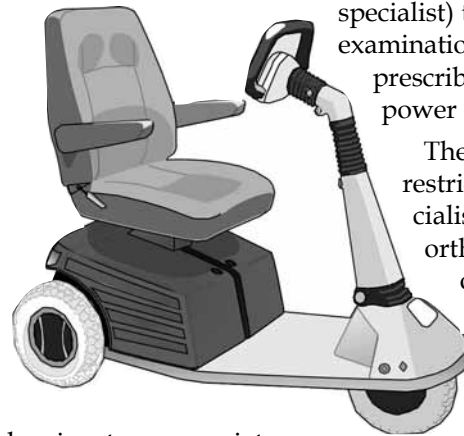
Working with PI attorneys can be an enjoyable or not so enjoyable experience. You can increase the odds of the experience being enjoyable if the above issues are discussed and resolved prior to beginning work on the case.

## CMS changes rules for power wheelchairs and scooters

The Centers for Medicare & Medicaid Services (CMS) took a step to streamline and ensure appropriate access for people with Medicare to power operated “scooters” and wheelchairs.

CMS is eliminating the requirement that a Certificate of Medical Necessity (CMN) signed by the prescribing physician or other treating practitioner accompany claims for power wheelchairs and scooters. In place of the CMN, clinical documentation from a patient’s medical record must be submitted along with a written prescription to the supplier before the supplier delivers a power wheelchair or scooter to the beneficiary.

The change implements provisions in the Medicare Modernization Act of 2003 (MMA) that affect power wheelchairs and power scooters, including a provision that requires a physician or treating practitioner (who can be a physician assistant, nurse practitioner, or clinical nurse specialist) to conduct a face-to-face examination of the beneficiary before prescribing a power wheelchair or power scooter.



The new rule also eliminates a restriction that allows only a specialist in physical medicine, orthopedic surgery, neurology, or rheumatology to prescribe a power scooter. This restriction, which no longer reflects current standards of care, has creat-

ed barriers to appropriate prescribing of equipment to meet a patient’s needs. Both physicians and treating practitioners can now prescribe a power wheelchair or power scooter.

Finally, before billing Medicare a supplier must obtain a written prescription, signed and dated by the physician or treating practitioner who performed the face-to-face examination, within 30 days of the examination.

For more information regarding wheelchair coverage, visit the CMS Web site at [www.cms.hhs.gov/coverage/wheelchairs.asp](http://www.cms.hhs.gov/coverage/wheelchairs.asp).

# Court proceedings that involve persons with disabilities

By Hon. Claudia M. Burton

State and federal statutes prohibit state and local government entities from discriminating against people with disabilities, and require them to insure equal access to governmental services. Title II of the Americans with Disabilities Act, 42 U.S.C. §§ 12131-12134; ORS 659A.142(4). In *Tennessee v. Lane*, 541 U.S. 509 (2004), a case which concerned the accessibility of a state courthouse to a criminal defendant and to a juror, the Supreme Court rejected a claim that Title II violates the Eleventh Amendment. A policy of the Oregon Judicial Department that implements the statutes details how they apply to courts and court-related services. The policy, including information about how to file a grievance for violation of the policy, is available at [www.ojd.state.or.us/accessibility/ADAComplianceNotice.htm#policyofnondiscrimination](http://www.ojd.state.or.us/accessibility/ADAComplianceNotice.htm#policyofnondiscrimination). See also 28 C.F.R. Part 35, especially §§ 35.160, 35.104, 56 Fed. R. 35694 (July 26, 1991).

Attorneys involved in cases that will go to a formal trial or hearing in court will most probably make the requests for accommodation on behalf of their clients or witnesses with disabilities. It is important to anticipate needs for accommodation and to give the courts time to make the necessary arrangements.

## Assessment

The first step is assessment; that is, recognizing who will need assistance and what type of assistance they will need. In some cases, this will be obvious, as when your client is in a wheelchair. Other needs may not be so obvious. Your client may be reluctant to tell you that he or she has difficulty hearing. You may be relying on the testimony of witnesses you have not met. Discuss thoroughly with your client and witnesses whether they have any issues with mobility, vision, hearing, or anything else that might make it difficult for them to be in court. This will include whether it is physically difficult for them to sit for several hours, whether they require food or medication on a strict schedule, and whether they need frequent access to a restroom.

If the proceeding will be held in a courthouse you will be able to visit before the proceeding, you should investigate to see if there are elevators and wheelchair access.

## What kind of help is available?

A variety of accommodations may be appropriate, and Oregon's courts endeavor to provide what is needed. The Oregon Judicial Department policy cited above provides specifically:

*Each court will provide, at state expense, appropriate auxiliary aids and services, including sign language interpreters and assistive devices, to participants in court proceedings who are deaf, hard of hearing, or have other communications disabilities.*

If the courthouse is simply not physically accessible, or a party is not physically able to get to the courthouse, it may be possible to hold the proceeding in an alternate location. For example, courts in several counties conduct commitment hearings at various hospital locations. Occasionally courts also conduct guardianship proceedings at these locations as well. Witnesses can and do testify by phone.

## Who you gonna call?

Requests for accommodation should be made to the ADA coordinator of the court or office that provides the relevant service, program, or materials. Contact information for the ADA coordinators in each court is available at [www.ojd.state.or.us/accessibility/ADACoordinators.htm](http://www.ojd.state.or.us/accessibility/ADACoordinators.htm).

As a practical matter, in many counties the simplest route is to contact the office of the judge who will be hearing the case, since the judges deal directly with requests for hearing assistance devices, sign language interpreters, appearance by telephone, and other accommodations.

## Timing is everything

The most important thing to recognize is that the court will need time to arrange for



*Claudia M. Burton practiced in California for three years and Hood River, Oregon, for eight years. Her first bench position was as an administrative law judge, after which she spent four years as a full-time pro tem judge for the Marion County Circuit Court where her primary responsibility was probate. In January of 2004 Judge Burton took office as a regular circuit court judge for Marion County.*

*Continued on Page 12*



## Accommodating persons with disabilities

*Continued from Page 11*

accommodation. It can take several weeks to schedule a sign language interpreter. If you need a witness to testify by phone, keep in mind that, in the absence of a stipulation from the opposing side, your motion must be filed 30 days before the proceeding, although the court can shorten that period for good cause. ORS 45.400. Let the court know as soon as you know.

### Other considerations

If you plan to have a witness testify by phone, in addition to making sure you have a timely stipulation or motion, be sure to check with the court as to the mechanics of this. Some courts will place the phone call for you. Some courts will place the call, but require you to use a long-distance calling card. Some courts will require that the witness call in, in which case you need to provide the phone number and time for him or her to call. Witnesses who are calling in should be advised that it is difficult to predict the exact time the court will be ready for them, and they should be prepared to keep trying if they do not get an answer at the scheduled time.

### Task force studying issue

The Oregon Supreme Court/Oregon State Bar Task Force on Access to the State Courts for Persons with Disabilities is currently studying this issue. As I write this, they are in the process of conducting a survey. Although responses were due by December 16, it is a reasonably safe bet that they will still be in the inquiry process when this article appears. If you have concerns in regard to this issue, this would be the time to direct them to the attention of the task force. Contact person for the task force is:

Debra Cohen Maryanov  
Legal Services Department  
Oregon State Bar  
5200 SW Meadows Rd.  
Lake Oswego, OR 97035  
dmaryanov@osbar.org

## What's available at the courthouses

Here is what is available at some of the courts around the state, according to the ADA coordinators.

### Multnomah County Circuit Courts

All of our courtrooms and the jury assembly room have assistive listening devices (ALDs) built into the sound system. In addition we have walk-around type ALDs and conference-room ALDs. These devices may be checked out by an individual or by the courtroom clerk if needed.

In addition, we can arrange for various modes of interpretation or real-time reporting for people with a hearing impairment.

For people with a visual disability we offer a larger-type version of the material, or a reader, or the material may be put on tape or CD.

For people who are mobility impaired we have an entrance on Fifth Avenue. There is one fully contained restroom on the first floor that will accommodate large scooters, and the public restrooms are wheelchair or scooter accessible.

*Brad. A. Green, ADA Coordinator*

### Tillamook County Circuit Court

We have assistive listening devices (aka headphones) for hearing impaired. We are also, with advance notice, able to make arrangements for real-time interpreters. Interpreters for Spanish or other languages as well as sign language interpreters are also available with advance notice.

*Bev Lutz, Trial Court Administrator*

### Umatilla and Morrow Counties Circuit Courts

Pendleton: Assistive listening devices, sign language interpreter with advance request, reserved handicapped parking near wheelchair ramp, ADA accessible, ADA restrooms

Hermiston: Assistive listening devices, sign language interpreter with advance request, reserved handicapped parking near wheelchair ramp, partially ADA accessible, no ADA restrooms

Heppner: Assistive listening devices, sign language interpreter with advance request, reserved handicapped parking near wheelchair ramp, ADA accessible, ADA restrooms

*Bill Jones, Trial Court Administrator*

### Union County Circuit Court

ASL interpreter and hearing devices are readily available. We will do our best to provide any other accommodations that may be requested.

*John DeNault, Trial Court Administrator*

## Agency and Professional Relations Subcommittee report

By Sam Friedenberg

The Agency and Professional Relations Subcommittee met with DHS representatives on October 21, 2005. Several issues were discussed.

### Medicaid and the Medicare prescription drug benefit

DHS representatives explained how the new Medicare prescription drug benefit, Medicare Part D will work for Medicaid recipients ("dual eligibles").

A current Medicaid client will be automatically enrolled in Part D for January 1, 2006, eligibility. There is no enrollment cost. Each Medicaid client will be randomly assigned to a provider group, which may or may not be the best fit among the 12 provider groups available to dual eligibles. To choose the best plan, the client should compare his or her prescription list with that of each plan. The Medicare Web site ([www.medicare.gov](http://www.medicare.gov)) provides a way to do this. Although DHS is training caseworkers to assist dual eligibles with the Part D application, budgetary cut-backs at DHS have limited the number of available caseworkers.

Medicaid will pay the monthly Part D premium. The client is expected to use personal funds to make any required co-payments when prescriptions are filled. These will range between \$1 and \$5 per medication, depending on whether the medication is generic or a brand name. However, if the Medicaid client is in a nursing home for one full calendar month, there will be no co-payments for the rest of the calendar year. This does not apply to persons in settings other than a nursing home.

If the Medicaid client has better prescription coverage through a private health insurance company, he or she may retain it and opt out of Part D. However, if he or she later wants to enroll in Part D, a penalty applies in the form of a higher premium. This penalty can be avoided if the current private insurer has provided a letter stating that its coverage is "credible," which means at least as good as Part D. A person who receives such a letter should keep it for future reference.

### Annuities

DHS gave notice of changes to OAR 461-145-0020 and related annuity rules—the fourth proposed annuity change in 2005. The latest proposed rules state an annuity is considered an available asset unless:

- the annuity is irrevocable
- the annuity pays out in equal payments (is not "back-end loaded")
- the annuity is issued by a commercial insurer
- the annuity names the state as death beneficiary (for the unmarried client) and names the client as beneficiary (for the community spouse)

There are exceptions for blind and disabled children.

Our committee filed a strong objection to these proposed rules, arguing that an attempt to control who receives the death benefits of annuities goes beyond the federal rules. Our position is that it is wrong to treat a stream of income as a "resource." Annuities should continue to be treated as unearned income.

### Pre-1993 irrevocable trusts

DHS gave notice of changes to OAR 461-145-0540(2) that affect irrevocable trusts which antedate the Omnibus Budget Reconciliation Act 1993 trust rules. These are usually special needs trusts. Because the proposed language of the rule appeared restrictive, the committee asked DHS's Joanne Schiedler whether the change reflected a change in policy on the treatment of those trusts. She responded that there is no change in the law and the additional language just clarifies existing policy. Therefore, an otherwise properly drafted pre-October 1, 1993, trust where the trustee may only distribute for special needs should not be an available asset.

*A current Medicaid client will be automatically enrolled in Part D for January 1, 2006, eligibility. There is no enrollment cost. Each Medicaid client will be randomly assigned to a provider group, which may or may not be the best fit among the 12 provider groups available to dual eligibles.*



## DHS spells out rules for Medicare Part D surrogate decision-makers

The Oregon Department of Human Services (DHS) has adopted temporary rules, effective from Nov. 28, 2005, through May 26, 2006, for identifying who may make Medicare Part D decisions on behalf of people who are eligible for both Medicare and Medicaid and who are incapable of making their own decisions. OAR 407-050-000 through 407-050-0010.

The rules include a process for resolution of disputes over the designation of an alternate decision-maker and over the decisions of such a decision-maker.

The rules say that if a client has a "personal representative," that person should make the decision. A personal representative is

- a guardian with authority to make medical, health care or financial decision,
- a health care representative under an advance directive for health care or a mental health care representative under a declaration for mental health treatment,
- an attorney-in-fact, or
- any other entity authorized by state or federal law or by a court.

If the person does not have a personal representative, he or she may designate someone verbally or in writing to make the decisions required by Part D. If he or she does not designate anyone, the rules establish a priority list for who will be the alternate decision maker:

- the "closest available relative," then
- a "friend or advocate," then
- a DHS case manager or DHS designee, and finally
- the owner, operator, or employee of a DHS-licensed or certified residential care facility, nursing home, foster home, or brokerage.

These terms are defined in the temporary rule.

The decisions of an alternate caretaker chosen from this list "must be clearly guided by the Part D-eligible individual's expressed wishes or in the Part D-eligible individual's best interest in the drug benefit that will appropriately meet their pharmaceutical needs." OAR 407-050-0010(7).

The full text of the temporary rule is available at [www.oregon.gov/DHS/policy/dwss/temp/407\\_050.pdf](http://www.oregon.gov/DHS/policy/dwss/temp/407_050.pdf)



## Elder Law Section Resources on the Internet

**Elder Law Section Web site:**  
[www.osbar.org/sections/elder/elderlaw.html](http://www.osbar.org/sections/elder/elderlaw.html)

The Web site has useful links for elder law practitioners, past issues of the *Elder Law Newsletter*, and current elder law numbers.

## Elder Law Section Electronic Discussion List (listserv)

All members of the Elder Law Section are automatically signed up on the list, but your participation is not mandatory.

### How to use the discussion list

Send a message to all members of the Elder Law Section distribution list by addressing it to: [eldlaw@lists.osbar.org](mailto:eldlaw@lists.osbar.org).

Replies are directed by default to the sender of the message ONLY. If you wish to send a reply to the entire list, you must change the address to: [eldlaw@lists.osbar.org](mailto:eldlaw@lists.osbar.org), or you can choose "Reply to all."

### How to make changes to your subscription

Send a message to [listserv@lists.osbar.org](mailto:listserv@lists.osbar.org) with the following in the body of your message for each type of change:

- To remove yourself from the list: unsubscribe *eldlaw your name*
- To receive your message in digest form (combined into a single message sent once each day): set *eldlaw digest your name*

### The fine print

Include a subject line with messages.

Sign your messages with your full name, firm name, and contact information.

Do not send attachments.

Obtain permission from the original sender before forwarding a message from this list to someone who does not subscribe to this list.

Political fundraising messages, position statements, candidate endorsements, and all other announcements or messages of a political nature are strictly prohibited.

## Resources for elder law attorneys

### EVENTS

#### **Medicare Part D Extra Help Basics: What Every Legal Advocate Should Know**

January 9, 2006/7:00 AM PST

On the Web

The AARP Foundation National Legal Training Project is hosting Web trainings for legal service staff on the new Medicare Prescription Drug benefit. The training will explain how people on Medicare who have limited incomes can get extra help to pay for prescription drugs. Training will include a basic overview, the latest updates on this new health benefit, and FAQs from and for advocates. Participation is free, but space is limited. Register online at [aarpltp.grovesite.com](http://aarpltp.grovesite.com).

#### **2006 NAELA UnProgram**

January 20 - 22, 2006

Grapevine, TX

NAELA members gather for a long weekend of uninterrupted sessions of brainstorming, networking, and exchange of ideas/forms. The UnProgram offers the opportunity to discuss substantive issues, practice and staffing issues, time management, and more. Have your questions answered by your fellow NAELA members who are willing to openly share information about their practices. The UnProgram schedule and content is determined by the participants, and has no pre-selected speakers. This is your chance to pick the brains of your colleagues from all over the US who are facing the same challenges that you are.

Registration Deadline: January 7, 2006

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

#### **MBA Young Lawyers Section Young Litigators Forum**

Fridays from January 13 through March 10, from 12 to 1 p.m.

Standard Insurance Center auditorium  
900 SW Fifth Avenue; Portland

Multnomah Bar Association presents a series of nine weekly one-hour seminars on trial issues for novice litigators.

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

#### **Family Limited Partnerships: Problems in Recent Case Studies**

Wednesday, January 25, 2006/ 3:30 PM PST

Teleconference

Presented by the American Academy of Estate Planning Attorneys  
Free. Register online at [www.aaepa.com](http://www.aaepa.com)

#### **Probate Primer**

Oregon Law Institute Seminar

March 3, 2006/8:30 AM

Oregon Convention Center, Portland

[www.lclark.edu/org/oli/calendar.html](http://www.lclark.edu/org/oli/calendar.html)

#### **The Latest in Probate Practice**

Oregon Law Institute Seminar

March 3, 2006/1:15 PM

Oregon Convention Center, Portland

[www.lclark.edu/org/oli/calendar.html](http://www.lclark.edu/org/oli/calendar.html)

#### **OSB's 13th Annual Litigation Institute & Retreat**

March 10 & 11, 2006

Skamania Lodge, Stevenson, Washington

8 General CLE credits

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

#### **Joint Conference of National Council on the Aging and American Society on Aging**

March 16 to 19, 2006

Anaheim, California

[www.agingconference.org/agingconference/jc06/index.cfm](http://www.agingconference.org/agingconference/jc06/index.cfm)

#### **2006 NAELA Symposium**

April 19 to 23, 2006

Washington DC

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

#### **2006 National Aging and Law Conference**

*Elder Rights: Building on the Past, Strengthening the Future*

April 20 to 23, 2006

Crystal City, Virginia

Presented by the American Bar Association

[www.abanet.org/aging](http://www.abanet.org/aging)



## Remember your Section dues

Oregon State Bar member fee statements were sent out in early December. Although the deadline to avoid suspension for nonpayment of Bar membership fees is July 3, 2006, you must rejoin the Elder Law Section before March 2006 to avoid being dropped from the Section's discussion list and newsletter distribution list.

Dues for the Elder Law Section are \$25 per year. You can renew online at [www.osbar.org/sections/sections.html](http://www.osbar.org/sections/sections.html)

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### Newsletter Board

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