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## Changes to the Medicaid application process

*By Shannon Conley, Attorney at Law*

Between July 2020 and February 2021, the Oregon Health Authority and Department of Human Services completed a six-phase project to change the application process for needs-based government benefits in Oregon. The two most significant changes were:

- The Aging and People with Disabilities 539 series of forms and applications are now obsolete. All future applications for cash, childcare, food and medical benefits will be done through a single paper application, the Form 7210, which can be found at <https://sharedsystems.dhsoha.state.or.us/DHSForms/Served/he7210.pdf>.
- Applications can now be completed online through the OregONEligibility portal system (Applicant Portal) located at <https://one.oregon.gov/>.

This article focuses on how these changes affect the application process for non-MAGI medical benefits, specifically Medicaid long-term care services and home and community-based services, which include waiver and K-Plan services.

### Ways to apply

As required by [42 CFR § 435.907](#), there continues to be a variety of ways to apply for medical benefits. A Medicaid application may be submitted in any of these ways:

- Completing a Form 7210 paper application, which can be faxed, mailed, or delivered by hand to the local Aging and People with Disabilities (APD) or Area Agency on Aging (AAA) offices
- Applying online through the Applicant Portal
- Calling OHA at (800) 699-9075
- Visiting a local APD/AAA office.

### Process after application is submitted

This new system is task based. There will be a number of questions in the online application and Form 7210 that will trigger a referral to the local APD/AAA office for assignment if a client applies through the applicant portal, the toll-free line, or visit to a SSP office. A task arrives at a central APD unit in Salem called the Virtual Eligibility Center (VEC) and is referred daily from VEC to the local APD/AAA offices, at which point a local staff member will contact the applicant to discuss care needs.

**Form 7210.** When completing the Form 7210, an affirmative answer to step 4, question 12 (“does anyone need help with things like walking, using the bathroom, bathing or dressing?”) will trigger a referral to the local APD/AAA office from VEC. Questions concerning the applicant’s resources, asset transfers, housing, and medical expenses now

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appear on Appendix A, which is technically optional. It appears any required information not provided in the appendix will be requested by the eligibility worker at the local office.

**Applicant Portal.** Applicants and their authorized representatives can manage their accounts via the Applicant Portal. At the Applicant Portal homepage, the client can accomplish a number of tasks, including:

1. An application for benefits
2. Management of the client's account, including reporting changes to circumstances, uploading documents, renewing benefits, etc.
3. Completion of medical pre-screening
4. General information, e.g., contact information, frequently asked questions

The online application for medical services is long and complicated. The client will be given the opportunity, if desired, to have a local medical community partner or assister support her or him with the application early in the process.

Be aware that DHS is moving away from public-facing websites for eligibility employee resources and program materials. Eligibility transformation operational procedures and ONE system resources will not be contained in the worker guide format to which we have all grown accustomed. It is challenging as a professional to obtain the information needed to properly guide clients through this new application process. It is hoped that better resources will be made publicly available in the future. ■

## Online resources for elder law attorneys

### [Elder Law Section website](#)

Links to information about federal government programs and past issues of the Section's quarterly newsletters

### [National Academy of Elder Law Attorneys \(NAELA\)](#)

Professional association of elder law attorneys

### [National Center on Law and Elder Rights](#)

Training and technical assistance on a broad range of legal issues that affect older adults

### [OregonLawHelp.org](#)

Helpful information for low-income Oregonians and their lawyers

### [Aging and Disability Resource Connection of Oregon](#)

Includes downloadable *Family Caregiver Handbook*, available in English and Spanish versions

### [Administration for Community Living](#)

Information about resources that connect older persons, caregivers, and professionals to federal, national, and local programs

### [Big Charts](#)

Provides the price of a stock on a specific date

### [National Elder Law Foundation](#)

Certifying program for elder law and special-needs attorneys

### [National Center on Elder Abuse](#)

Guidance for programs that serve older adults; practical tools and technical assistance to detect, intervene, and prevent abuse

### [Common Scams That Target the Elderly](#)

Special report on scams related to covid-19

### [Guide to Transportation for Seniors](#)

A helpful visual guide to getting older and getting around

### [Guardianship and the Right to Visitation, Communication, and Interaction](#)

Legislative fact sheet from the American Bar Association Commission on Law and Aging

### [Oregon Revised Statutes](#)

Oregon laws

### [Consumer Financial Protection Bureau \(CFPB\), Working with older adults](#)

Resources to help those who serve older adults and family members managing the finances of others.

# How should you advise your guardian clients about decisions related to the COVID-19 vaccine for a protected person?

By Theresa Hollis, Attorney at Law, and Shauna Haney, Attorney at Law



Theresa Hollis is a partner with Fitzwater Law in Portland. Her practice emphasizes legal issues unique to the elderly and their families, including guardianship and conservatorship, probate estates, trust administration, estate planning, and guardianships and conservatorships.



Shauna Haney is an attorney with Fitzwater Law in Portland. Her practice focuses on estate planning, trusts, and probate. She specializes in assisting clients who are experiencing memory challenges or declining health. She also volunteers with the Senior Law Projects in Multnomah and Clackamas Counties.

As more people in Oregon become eligible to receive the COVID-19 vaccine, attorneys who represent guardians need to be prepared to answer their clients' questions about two issues:

- Does the guardian have the authority to make decisions about the COVID-19 vaccine for the protected person?
- What considerations must shape the guardian's decision to either give or withhold consent to the vaccine on the protected person's behalf?

## First, determine whether the guardian has the authority to make the decision about the vaccine

### Does the protected person have a valid advance directive in place?

The authority of a health care representative under a validly executed advance directive for health care will supersede the authority of a guardian to make health care decisions for the protected person, so long as the protected person has not revoked the advance directive. ORS 127.545(5)(b). Be sure to check the *Limited Judgment Appointing Guardian* to confirm that an advance directive was not revoked by the court. If the protected person has a valid advance directive, the health care representative appointed in that document—not the guardian—has the authority to make decisions about the vaccine. However, the health care representative can make health care decisions for the protected person only if the protected person is incapable of deciding about the vaccine. ORS 127.510(2).

### Does the vaccine decision fall within the scope of the guardian's authority?

If a protected person has no valid advance directive, consult the *Limited Judgment Appointing Guardian* to determine the scope of the guardian's authority. Examine the judgment for the authority the court awarded to the guardian and any limitations placed on the guardian's

authority. If the guardian's authority to make medical decisions is not limited, then a general authority and duty to make medical decisions exists under ORS 125.315(1)(b) which states, "The guardian shall provide for the care, comfort and maintenance of the protected person ..."

### If the guardian has the authority to decide about the COVID-19 vaccine, what should the guardian consider in making the decision?

### Does the protected person have the ability to make or participate in the decision?

If the decision about the COVID-19 vaccination falls within the scope of the guardian's authority, the guardian must consider the extent to which the protected person is able to participate in decision-making. A guardian is required to promote the self-determination of the protected person and, to the extent practicable, encourage the protected person to participate in decisions and to act on the protected person's own behalf. ORS 125.315(g). The guardian's goal should be to maximize the protected person's involvement in the decision in accordance with the protected person's specific abilities. To the extent practicable, the guardian has a duty to support the protected person's participation in the decision, such as by providing the protected person with a clear, plain-language explanation of the risks and benefits of the vaccine.

### Use the substituted judgment standard, if possible

If the protected person is unable to make or participate in the decision about getting the vaccine, guardians must use the substituted judgment standard, if possible. Under this standard, guardians must attempt to reach the decision the protected person would have made if the protected person had been able to choose.

In other words, using substituted judgment, the guardian's decision is not

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## Guardians and COVID vaccinations *Continued from page 3*

based on whether the guardian personally would choose to get the vaccine. It is based on whether the protected person would choose to get the vaccine if the protected person were making the decision. Substituted judgment requires the guardian to identify the values and preferences of the protected person and to consider the protected person's previous or current instructions, opinions, and actions. ORS 125.315(h). Applying substituted judgment is appropriate unless the guardian reasonably believes doing so would unreasonably harm or endanger the protected person's welfare or personal or financial interests.

### If substituted judgment isn't possible, act in the protected person's best interest

Sometimes the guardian will not be able to use substituted judgment. This may be the case if the guardian does not know and cannot reasonably determine what the protected person's decision would be if the protected person were able to choose. Another example would be if the guardian reasonably believes the decision the protected person would

make would unreasonably harm or endanger the protected person's welfare or personal or financial interests. Under these circumstances, the guardian must act in the protected person's best interest. ORS 125.315(i).

To determine which decision would be in the protected person's best interest regarding the COVID-19 vaccine, the guardian should consider the following:

- Information received from medical professionals and persons who demonstrate sufficient interest in the welfare of the protected person
- Other information the guardian believes the protected person would consider if the protected person were able
- Other factors a reasonable person in the circumstances of the protected person would consider, including consequences for others

### In conclusion

Attorneys should be prepared to advise their guardian clients on the issue of the COVID-19 vaccine. Some guardians will not have the authority to make a decision about vaccinations on behalf of the protected person. If the guardian has the authority, the guardian should still support the protected person to make or participate in the decision to the extent practicable. If the protected person cannot participate, the guardian's decision must be shaped by an understanding of what the protected person would want or, if that fails, on the best interests of the protected person. ■

## Upcoming continuing legal education seminars

### [Wills, Trusts and Executing Documents](#)

MBA Zoom Seminar  
May 6, 2021/12:00–1:00 PM

### [Trust and Estate Planning for Single Clients](#)

Audio Webinar  
May 11, 2021/10:00–11:00 AM

### [2021 Trust and Estate Planning Update](#)

Audio Webinar  
May 18, 2021/10:00–11:00 AM

### [Talking About Wealth Transfer Plans: Practical Strategies to Avoid Disputes Among Beneficiaries](#)

Audio Webinar  
May 26, 2021/10:00–11:00 AM

### [Representing or Serving as a Guardian/Conservator](#)

Zoom meeting  
June 16, 2021/12:00–1:00 PM

## Instructions for posting the CLE credits for the MCLE process

1. Log on to your Member Dashboard at <https://hello.osbar.org/>
2. Click on MCLE Reporting.
3. Click Add Activity to Transcript.
4. Click Accredited Group Course.
5. Find the Program in the database search on your screen.
6. Click on the live or recorded course.
7. Answer the question regarding whether you completed all or part of the program.
8. Add the program to your transcript.

New MCLE compliance deadlines are at: <https://www.osbar.org/docs/mcle/MCLEDeadlineChangesFAQ.pdf>

# Non-disqualifying transfers to a blind or disabled child of any age

By Darin J. Dooley, Attorney at Law, and Alana J. Hawkins, Attorney at Law



Darin Dooley is a partner with the Lake Oswego firm of Draneas Huglin Cooper LLC. He practices elder law, estate planning and administration, and probate.



Alana Hawkins is an attorney and managing partner with Kueny Law LLC in Salem and Lake Oswego. She focuses her practice on long term care planning, estate planning, probate, guardianships/conservatorships, and Social Security disability.

Oregon Administrative Rules for Medicaid services impose a period of ineligibility when an individual or an individual's spouse transfers assets for less than fair-market value any time in the sixty months preceding the Medicaid application (See OAR 461-140-0210<sup>1</sup>). The purpose of such period of ineligibility is to prevent individuals from gifting away resources to qualify for Medicaid benefits. However, there are several exceptions to this general rule. One such exception involves transfers to a blind or disabled child. The purpose of these transfers is to protect a transferor who wants to benefit a child who is blind or disabled, without being assessed a period of ineligibility for the transferor's long-term-care needs.

## OAR 461-140-0242(2)(b)<sup>2</sup>

OAR 461-140-0242(2)(b) states that an individual or the spouse of the individual may transfer an asset (including a home) to a child who is blind or has a disability under the Social Security Administration (SSA) criteria, or to someone else for the sole benefit of a child who is blind or has a disability under the SSA criteria.

## Who qualifies as a "child"?

For the purposes of OAR 461-140-0242, the definition of "child" in OAR 461-001-0000 does not apply. "Child" means a natural or adoptive son or daughter who is either under the age of 21; or any age and has been determined to meet the blindness criteria of OAR 461-125-0330 or the disability criteria of OAR 461-125-0370.<sup>3</sup> Therefore, an individual or an individual's spouse may transfer an asset (including a home) to a child regardless of age so long as that child meets specific blindness or disability criteria.

**Practice tip:** Although this discussion focuses on transfers to a blind or disabled child, blind or disabled stepchildren may also benefit from such a transfer. If the stepchild's parent is no longer living, they may still receive a transfer from the stepparent under OAR 461-140-0242(2)(c) and 42 U.S. Code § 1396p(c)(2)(B)(iv) as an individual under age 65 who is disabled as defined below.

## Who qualifies as "disabled"?

OAR 461-140-0242(2)(b) describes the person's child who is blind or has a disability under the criteria of the SSA. However, this does not require that the child be receiving Social Security Disability Insurance (SSDI) or Supplemental Security Income (SSI). There may be no SSA determination of disability because the child has not applied for a SSA disability benefit, does not administratively qualify for a SSA disability benefit, or the child is receiving a disability benefit under another program like the Veterans Administration disability benefit.

**Practice tip:** It is possible to medically meet the SSA criteria for blindness and/or disability and to not meet the administrative requirements to receive SSI and/or SSDI. For example, an individual may never have worked to earn enough credits to qualify for SSDI, and yet have resources that disqualify them from receiving SSI. Such an individual may still meet the medical blindness or disability criteria of the SSA and medically qualify as a "disabled child." If the disabled child is not receiving SSI or SSDI, DHS may still make its own determination of disability. If this is the case, you need to provide documentation of the disability to DHS and, if accepted, the child would be deemed disabled for the transfer rule. (See OAR 461-125-0810 and OAR 461-125-0830).

## Direct transfers to a disabled child

Direct transfers of a resource to a blind or disabled child are permitted.<sup>4</sup> This includes but is not limited to direct transfers of cash resources, life insurance policies, vehicles, and even a home.

## Practice tips:

- It is essential to consider the impact of direct transfers on any means-tested benefits the blind or disabled child may receive.
- It is also important to consider the blind or disabled child's ability to manage the asset that is transferred.
- Often, the individual applicant may have provided financial assistance to a blind or disabled child on a regular basis. Such transfers that took place

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## Non-disqualifying transfers *Continued from page 7*

throughout the sixty months preceding the Medicaid application are all non-disqualifying transfers.

- DHS is aware that if a home is being transferred under the disqualifying transfer exception, the home cannot reasonably be expected to be “spent” for the sole benefit of the child over the child’s life expectancy. The deed transferring the home from the parent to the child would simply need to name the child as the sole grantee. Because the home would be in the child’s name at death, any valid estate recovery claim for benefits received by the child would attach to the home.

### Transfers to another for the “sole benefit” of a disabled child

Sometimes a direct transfer to a blind or disabled child is not the best option. OAR 461-140-0242(2)(b)<sup>5</sup> permits a parent to transfer resources to another for the “sole benefit” of their blind or disabled child. However, the rule prohibits the transfer from benefiting any other person and requires a spend-down of the resource during the child’s lifetime. The transfer must be arranged so that it is for the sole benefit of the child. No individual or entity except the child can benefit from the asset transferred in any way, whether at the time of transfer or for the remainder of that person’s life. A direct transfer, transfer instrument, or trust that provides for funds or property to pass to a beneficiary who is not the blind or disabled child is not considered to be established for the sole benefit of the child. For a transfer or a trust to be considered for the sole benefit of the child, the instrument or document must provide for the spending of the funds involved for the benefit of the child based on the child’s life expectancy.

### Practice tips:

- A Medicaid-compliant annuity that pays only to the blind disabled child on the child’s life expectancy would likely qualify as a transfer to another for the sole benefit of the child.
- If a trust is used, the attorney will want to include a provision regarding distribution of trust principal to meet the sole-benefit requirement. DHS has approved the use of the following: “Trustee shall distribute trust principal ... in such amounts that all trust principal will be distributed within the actuarial life expectancy of ...”<sup>6</sup>
- Other sections of OAR 461-140-

0242(2)(c) also contemplate transfers to a trust. The trust may be one qualifying as “Medicaid trust exceptions in SI 01120.200 ff. (i.e., trusts established under Section 1917(d)(4)(A) and (C) of the Social Security Act).” POMS SI 01150.121(2).<sup>7</sup> However, a transfer can be made to any trust so long as the sole lifetime beneficiary of the trust is a blind or disabled child and the trust assets are directed to be distributed within the child’s life expectancy. The trust does not have to be a first party/d4A/payback trust or d4C/pooled trust,<sup>8</sup> although those are clearly listed as being allowed.

- Non-disqualifying transfers to a blind or disabled child may also be used to prevent interruptions in Medicaid benefits when an individual who is already approved for Medicaid services receives an inheritance or settlement. It is necessary for such transfers to be planned so the receipt and transfer of resources may be completed before the end of the month in which the inheritance or settlement is received.

### In conclusion

This article was inspired by our recent experiences working with eligibility caseworkers in which non-disqualifying transfers to a blind or disabled child were made prior to submission of a Medicaid application. We found that caseworkers mistakenly applied the definition of “child” from OAR 461-001-0000(c) that defines a child as being under the age of 18, and this resulted in a period of disqualification being improperly assessed. We also found that caseworkers struggled to differentiate between direct transfers and transfers to another for the sole benefit of a blind or disabled child, which led caseworkers to improperly apply life expectancy distribution requirements to direct transfers. As you may imagine, these experiences were quite distressing for our clients and serve as good reminders (1) if your office submits Medicaid applications, be familiar with OARs that caseworkers may not see every day and perhaps consider including coversheets that describe the exceptions and cite the applicable rules; and/or (2) if your office does not submit Medicaid applications, remind your clients to communicate with your office in the event an unexpected determination is made, because sometimes case workers make mistakes.

These recent experiences highlight that a transfer to a blind or disabled child needs to be carefully thought out and planned. As elder law attorneys, we have an opportunity to explain the options, benefits, and risks associated with these exempt transfers to help clients achieve their goals. A well-developed plan will enable the recipient to receive transferred assets to improve his or her quality of life while allowing the transferor to avoid the imposition of a penalty period for a disqualifying transfer for their own long-term-care needs. ■

### Endnotes

1. See also Deficit Reduction Act (DRA) of 2005
2. POMS SI 01150.123
3. Note the definition of child in POMS SI 01150.120(B)(4) includes “stepchild”
4. 42 U.S.C. § 1396p(c)(2)(B)(iii), OAR 461-140-0242(2)(b)
5. See also 42 U.S.C. § 1396p(c)(2)(B)(iii)
6. Although this language has been reviewed and approved by DHS staff, there is no OAR authorizing its use. DHS is not bound by the use of this language and may change its policy at any time.
7. See also 42 U.S.C. § 1396p(c)(2)(B)(iii)
8. 42 U.S.C. 1396p(d)(4)(A) and OAR 461-145-0540(10)(a); 42 U.S.C. 1396p(d)(4)(C) and OAR 461-145-0540(11).

## Elder Law Section News

### CLE Subcommittee

Members of the subcommittee are Rebecca Kueny (Chair), Kay Hyde Patton (Immediate Past Chair), Jane Patterson, John Shickich, Julie Meyer Rowett, Kathryn Gapinski, Mark Williams, and Megan Fuhrer. The goal of the subcommittee is to produce continuing education for the Elder Law Section, and to create opportunities for growth, mentorship, and camaraderie among our Section members. We are currently discussing a summer series of CLE lunch events and planning for our annual Elder Law CLE program on October 1, 2021. The annual program will be virtual this year and will focus on basic elder law concepts. Our subcommittee is always interested in the feedback and participation of other Section members. Anyone interested in joining should contact [Rebecca Kueny](#).

### Newsletter Subcommittee

Members of the subcommittee are Julie Nimnicht (Chair), Darin Dooley, Brian Haggerty, Alana Hawkins, Theresa Hollis, Leslie Kay, Karen Knauerhase, and Monica Pacheco. We meet monthly with the editor to identify topics that provide practical and timely information. We also recruit authors, review articles for content, and proofread the newsletter before it is published. Those interested in volunteering for the subcommittee should contact [Julie Nimnicht](#).

### Legislative Subcommittee

The subcommittee is chaired by Christopher Hamilton. Other members are Darin Dooley, Shauna Haney, Layla McLean, and Michael Schmidt. We have been working this year to review the bills the legislature is considering, so that we are able to provide technical expertise when needed and provide the Section with a list of bills that are worth keeping an eye on. The Public Affairs staff at the Oregon State Bar maintains a list for access by all Section members at <https://www.osbar.org/pubaffairs/reports/aolbillssummary.html?aolid=23>. We will also summarize the bills that pass this session for the annual legislative highlights put out by the Public Affairs staff and likely for the Elder Law Section CLE this year. Between sessions of the legislature, the subcommittee works on law-improvement proposals based on issues section members have.

Because we are an arm of the Oregon State Bar, these proposals must be policy neutral and focus on correcting errors or improving the functioning of the law for our clients. We also attempt to monitor proposed rule changes related to Medicaid programs, but are short-handed for reviewing the volume of ongoing proposals. We welcome any Section members who would like to join us in any of these endeavors, especially those comfortable with Medicaid and interested in helping monitor proposed rule changes.

### Scholarship Subcommittee

This subcommittee allocates scholarships to attend Elder Law Section sponsored CLEs. The scholarship covers the cost of the registration fee and lunch ticket. Normally, three scholarships are allocated for the fall CLE and two scholarships for the spring unCLE. Scholarships are available to OSB members. Applicants submit brief statements about their interest in elder law, experience as an attorney, and need for the scholarship. Members of the subcommittee are Jennifer Kwon and Anastasia Yu Meisner. New members are always welcome. If you are interested in this subcommittee, please contact [Anastasia Meisner](#).

### Diversity and Inclusion Subcommittee

This new subcommittee was formed in early 2021. The members of this committee are Anastasia Meisner, Christian Hale, Kay Hyde-Patton, Monica Pacheco, and Julie Meyer Rowett. Our goals are: raising awareness of diversity, equity and inclusion (DEI) issues with our fellow elder law attorneys, creating awareness among diverse attorneys and law students of the practice of elder law, and promoting the efforts of specialty bars focused on DEI issues. The committee plans to work with the CLE and newsletter committees to provide education and information about how elder law attorneys can participate actively in this effort. This will include circulating information about job fairs and mentorship opportunities. In addition, the committee plans to engage in outreach to law schools and specialty bar groups to raise awareness about elder law as a career path. ■

## Thank-you letters received by the Section

Thank you so much for supporting our annual Partners Party event. The gift of \$500 from the Oregon State Bar Elder Law Section is very much appreciated and helps ensure Guardian Partners can continue providing our abuse prevention programs and protecting people living with cognitive disabilities. ... This is an anxious time for nonprofit organizations like Guardian Partners. Even more than usual, we thank you again for your generous support. —*Marc Kochanski, Executive Director*

On behalf of the Oregon Minority Lawyers Association (OMLA), I want to express our sincere appreciation for your generous contribution of \$1000 to the OMLA Summer Social and Fundraising Auction. We sadly weren't able to hold an in-person event in 2020 due to COVID-19, but thanks to your donation we were still able to raise \$13,750! We put ALL of those funds (and more) right back into the community by distributing 11 bar-exam grants to diverse candidates taking the February 2021 bar exam. By supporting OMLA, you are supporting diversity in Oregon's legal community. ... We greatly appreciate your support of OMLA and our bar-exam grants program.—*Suji Patel, Sponsorship Chair, 2020 Auction Committee*

# Important elder law numbers

as of  
January 1, 2021

Supplemental Security Income (SSI) Benefit Standards	Eligible individual .....\$794/month Eligible couple.....\$1,191/month
Medicaid (Oregon)	Asset limit for Medicaid recipient.....\$2,000 Burial account limit.....\$1,500 Long term care income cap.....\$2,382/month Community spouse minimum resource standard ..... \$26,076 Community spouse maximum resource standard ..... \$130,380 Community spouse minimum and maximum monthly allowance standards.....\$2,155/month; \$3,259.50/month Excess shelter allowance ..... Amount in excess of \$646.50/month SNAP utility allowance used to figure excess shelter allowance .....\$442/month Personal needs allowance in nursing home ..... \$64.94/month Personal needs allowance in community-based care.....\$177/month Room & board rate for community-based care facilities..... \$617/month OSIP maintenance standard for person receiving in-home services .....\$1,294/month Average private pay rate for calculating ineligibility for applications made on or after October 1, 2020.....\$9,551/month
Medicare	Part B premium ..... \$148.50/month* Part D premium .....Varies according to plan chosen Part B deductible ..... \$203/year Part A hospital deductible per spell of illness.....\$1,484 Skilled nursing facility co-insurance for days 21-100 .....\$185.50/day

\* Premiums are higher if annual income is more than \$85,000 (single filer) or \$170,000 (married couple filing jointly).



## Elder Law Section

### Newsletter Committee

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