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Choose your words mindfully when talking or writing about mental health

By Bob Joondeph, Attorney at Law

Words are the tools of the legal trade, and we generally strive to communicate in a manner that is effective, precise, and normative. Mental-health issues arise in a number of contexts in elder law. How should practitioners talk and write about mental health and chemical dependency issues? What language should be used? What words and phrases should be avoided? Is there a difference between language used for types of diagnosed mental illnesses or substance use disorders?

In answering these questions, I am not prescribing specific terms, but instead a way to think about communication. I've also asked a few long-time allies from the mental-health peer advocacy community to share their thoughts. As we say in the disability advocacy world: "Nothing about me without me."

In this issue

Four tips:

- Treat everyone as an individual worthy of dignity and respect
- Be mindful of the social consequences of your language
- Inquire about and use a client's chosen terms
- Consider that a diagnosis does not define a person, may not be life-long or debilitating, and is not synonymous with any specific treatment

Treat everyone as an individual worthy of dignity and respect

"People diagnosed with mental-health disorders are not monolithic. We have great diversity in how and what we think about our diagnoses, labels, conditions, etc.," says one peer advocate. "Some people prefer to talk about mental health issues or mental health concerns. Some people really can't stand the term 'mental illness.' Some people may feel that their diagnosis is not accurate."

This advocate notes that it is crucial to remember that a mental-illness diagnosis does not define a person and that most people diagnosed with a mental illness don't distinguish between different types of diagnostic labels. Most certainly, referring to a person by a diagnosis (e.g., Mr. Jones is a schizophrenic) must be avoided. None of us would like our entire identity reduced to a real or perceived medical or social condition, particularly one that carries a cultural stigma.

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For more than 30 years, Bob Joondeph served as the Executive Director of Disability Rights Oregon. He is presently the Chair of the Social Security Advisory Board in Washington DC.

Be mindful of the social consequences of your language

An advocate suggests that whenever possible use "person-first language." For example, an individual may be described as being "diagnosed with bipolar condition," and not as "bipolar." Precise language also lends greater credibility. Stating that a person is diagnosed with a particular mental illness conveys a fact, whereas a reference to someone being "mentally ill" is both very general and more likely to evoke false assumptions.

This advocate also notes that "the mentally ill" is a term that "is ultimately pure discrimination" because a variety of nonconforming behaviors may be labeled as signs of illness and social disapproval. As attorneys, we can reinforce or correct misconceptions about individuals and groups. Our use of terminology should be informed by that social responsibility.

Inquire about and use a client's chosen terms

For interactions with clients when they are present, this is a straightforward and intuitive approach. But perhaps a practitioner may not be comfortable bringing up the topic or communicating with someone whose cognitive abilities seem to be compromised. Nevertheless, one should inquire and proceed accordingly.

One advocate noted: "How we experience a behavioral health disorder and what leads to recovery is highly individualized. It feels unique to us, even though it really isn't. But it's our experience and our struggle. So, finding language that's comfortable for the person experiencing it can make a huge difference. … Our symptoms express themselves in our actions, words, sense of reality. And it's these things that can frustrate people. But even when we're symptomatic, we generally can distinguish between people who care and people who define us by our burden, thus seeing us as less than human."

Other advocates agree:

- "The most respectful thing to do is to ask people how they would like to be referred to and how they would like you to refer to their condition."
- "Whenever possible, ask how individuals would like to be referred to, and if a diagnosis word or label works for them or not. Self-determination and respect are very important to peers."
- "It's good to know what a person is comfortable with. Some of us are fine with saying we have a mental illness. I'm one of them. Others are comfortable with *mental-health disorder*. Others are comfortable with *mental health issue*, etc."

Consider that a diagnosis does not define a person, may not be life-long nor debilitating, and is not synonymous with any specific treatment

The science surrounding mental illness is far from precise. Law, however, sometimes demands the application of labels, and these can be determinative of criminal, civil, political, and social outcomes. The clinical and insurance worlds also strive toward precise labels that may affect a client's situation. The Diagnostic and Statistical Manual of Mental Disorders—Fifth edition (DSM-5) sets out the currently recognized disorders and treatments broadly accepted for diagnosis and insurance reimbursement. Of course, DSM-5 describes conditions and treatments, not human identities or rules for life.

Broad social perceptions may be at odds with science, so a practitioner must sometimes weigh the best way to communicate ideas without perpetuating false assumptions. For "major mental illness," "personality disorder," and "chemical dependency" recovery is not only possible, but can often be a reality. Forms of treatment are not uniform and may vary over time for any individual. The experience of a disorder that attacks one's sense of control over his or her environment and self should not be intensified by words or actions that needlessly contribute to hopelessness or passivity.

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As one advocate puts it: "Intrinsic wholeness does not go away just because it is covered over by layers of contradicting experience and the trappings of being a mental patient or having a mental illness. Instead of our looking to recover a lost self or experience, I propose an even more compelling idea: the process of 'uncovering' our true nature."

Another advocate added that "Some people have found psychotropic medication to be helpful. (Psychotropic medication describes any drug that affects behavior, mood, thoughts, or perception. It's an umbrella term for a lot of different drugs.) Others have been severely harmed by psychotropic medication. Others have found psychotropic medication to be both helpful and harmful at the same time."

In summary

The choice of words for an elder law practitioner follows from the regular practice of law and legal ethics: we ascertain a client's wishes and take appropriate direction. When precision is necessary, we should be precise. We don't presume that a behavior, capacity, or treatment follows from a particular diagnosis or label. If we do not know a client's preferences or are representing broader interests, we don't use language that reduces a person to a label or perpetuates stigma or unfounded assumptions. If we are tempted to use negative stereotypes to gain advantage over an opponent or to elicit sympathy, we should think about the broader social consequences.

Having read this, if you are thinking that I am crazy, that I'm off my meds, or that I'm likely a tweaker, you have correctly identified stigmatizing language. ■

Updates to spousal impoverishment figures and important elder law numbers as of January 1, 2022

By Darin Dooley, Attorney at Law

There were some important changes for Medicaid and Supplemental Security Income (SSI) eligibility as of January 1, 2022.

Supplemental Security Income (SSI): The SSI benefit standard increased to $841/month for an individual and $1,261/month for a couple.

Medicaid spousal impoverishment figures

The personal needs allowance increased to $68.77/month for nursing home residents and $187/month for residents in other community-based care settings.

The personal needs allowance for an individual receiving long-term care services who is eligible for Veterans Administration (VA) benefits based on unreimbursed medical expenses remains $90/month and is only allowed when the VA benefit has been reduced to $90.

The need standard for an individual who receives in-home services is the OSIPM maintenance standard ($841 per month in 2022) plus $500, which comes to $1,341.00 per month. OAR 461-160-0620. For those receiving in-home assistance with only SSI income, the need standard is $863 per month.

The minimum community spouse resource allowance (CSRA) increased to $27,480 and the new maximum CSRA is $137,400. OAR 461-160-0580. The maximum monthly maintenance needs allowance is $3,435.00. The minimum monthly maintenance needs allowance remains $2,177.50 until July 1, 2022.

The room and board rate for waivered community-based care facilities increased to $654/month. OAR 461-155-0270.

The long term care income cap for 2022 is $2,523/month.

Disqualifying transfer divisor: The average nursing home private pay rate for calculating the ineligibility period for a transfer of assets for less than fair market value after October 1, 2020 remains $9,551 per month. OAR 461-140-0296.

Medicaid home equity limits: For an individual, the equity limit in the home is $636,000. Oregon uses the minimum value as the home equity limit. There is no equity limit if a spouse or child age 21 or younger or a relative dependent on the individual for support occupies the home. OAR 461-145-0220.

Medicare updates:

- Hospital Part A deductible per illness spell: $1,556
- Skilled nursing facility co-insurance days 21–100: $194.50/day
- Part B premium: $170.10/month (income up to $91,000 single and $182,000 married couple) *However, some people who get Social Security benefits pay less than this amount ($130/month on average.*
- Part B deductible: $233/year
- Part D premium: Varies by plan ■

Social Security benefits for individuals with mental health conditions

By Emily Kaufmann, Attorney at Law

Emily Kaufmann (better known as Jenn Kaufmann) has spent her professional life as a public benefits attorney. She has worked for legal services programs in Virginia, Oregon, Pennsylvania, and South Carolina, and was a staff attorney at the National Senior Citizens Law Center (now Justice in Aging). Her current work includes serving as the head of the Public Benefits Unit at South Carolina Legal Services.

Persons with severe, chronic health conditions often struggle to maintain a sustained, full-time job and many eventually need to stop working—or at least take an extended break to heal and return to work. To achieve this, they need support, including health care and economic security. Many people living in the United States do not have the financial means to survive a health crisis without support from either their employer, their family, or the federal government. The Social Security Administration (SSA) furnishes much of that needed support to individuals who cannot work because of a medical or mental health condition. It administers two major financial programs: Social Security, or Title II, benefits, and Supplemental Security Income (SSI) or Title XVI. These programs provide cash benefits to almost 70 million people each month, but most people do not understand how the programs work and how eligibility for them is determined. It is common to hear: "I don't understand why I have been denied; I paid into the system and now they won't give me my money." Social Security is not a bank that you simply enter and withdraw funds. You have to prove you are eligible to receive them.

Many obstacles arise when applying for disability benefits, including meeting the rules about being insured for Title II benefits or the strict financial rules for SSI. This article explains these further, and—while complex—is more or less a checklist. There is, however, the larger obstacle of proving that an individual meets the "medical or vocational" rules to prove disability. An individual with a mental health condition needs a longitudinal record from an acceptable medical source to support a claim for benefits. Physical or medical conditions don't always need a longitudinal treatment record because they can be documented by objective medical tests, including radiologic studies that show compressed nerves or tumors and laboratory results that document increased glucose levels. It is much more difficult for persons with mental health conditions to prove that they really do hear voices or explain why they are unable to get out of bed every day because of depression or leave the house because of intangible fears of harm. To properly advocate for a person with a mental health condition, you need to understand the process and how SSA reaches its decision.

Social Security Disability Insurance vs. Supplemental Security Income

Advocates for persons with a mental health condition that prevents them from working need to understand how the two financial programs work in order to maximize those benefits and to help prevent overpayments. In addition to federal statutes and regulations, SSA has a policy manual that is published online at https://secure.ssa.gov/apps10. It is an invaluable resource for advocates who represent elders or persons with disabilities who receive or are applying for benefits through SSA.

Social Security is a social insurance program that is also known as Title II or OASDI (Old Age, Survivors and Disability Insurance) and is funded by payroll taxes through the Federal Insurance Contributions Act (FICA). USC §§ 402, 423 (2015). It provides benefits to retirees and persons with disabilities. It also provides financial support to survivors and dependents of those wage earners, including individuals who can prove that they were disabled prior to age 22. The latter benefits are referred to as *auxiliary benefits* and should never be forgotten. Eligibility for auxiliary benefits is only available when the wage earner is eligible for retirement or disability benefits or has died.

In December 2020, there were 1,149,967 adult children receiving benefits on another person's record.

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An individual applying for Social Security Disability Insurance (SSDI) benefits must first establish that he or she is fully insured and has 20 quarters of coverage in the last 40 quarters.

The majority of adult children were receiving benefits on a deceased worker's record. The single largest diagnostic group (basis of disability) for adult children was individuals with an intellectual impairment (44.9%). See: https://www.ssa.gov/policy/docs/statcomps/di_asr/index.html. Individuals with an intellectual impairment, in comparison, account for only 3.9% of disabled workers.

The monthly benefit for Title II is based on the wage earner's lifetime earnings. There are no income or resource limits for individuals who have reached the requisite retirement age and are receiving Social Security benefits. Social Security benefits may, however, be reduced if the individual receives workers compensation benefits or some state, local or federal pension plans. For more information on Social Security benefits, see the National Center on Law and Elder Rights chapter on Social Security: https://ncler.acl.gov/pdf/Legal-Basics-Social-Security1.pdf.

An individual applying for Social Security Disability Insurance (SSDI) benefits must first establish that he or she is fully insured and has 20 quarters of coverage in the last 40 quarters. 20 CFR 404.130. This is known as the 20/40 rule. An individual is fully insured for disability if he or she has at least one quarter of coverage for each calendar year after turning 21. 20 CFR §§ 404.130; 404.132. Special rules cover individuals under age 31. 20 CFR § 404.130(c-d).

If an individual has not worked in the past ten years, he or she is generally not insured for SSDI. There is a different rule for surviving spouses who apply for disability on a deceased spouse's wage record. The deceased spouse must have been insured. A disabled spouse must be at least 50 years old, have been married to the deceased for at least nine months, not remarried (unless there is an exception), and have a disabling condition that arose within seven years of the death of the deceased wage earner. 20 CFR §§ 404.335(c), 404.336(c).

The surviving spouse's benefits may be reduced by any benefits received on his or her own wage record. Divorced spouses may also be eligible if married to the wage earner for at least 10 years. SSA recognizes all valid marriages of same-sex couples. See *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) and POMS GN 00210.100 at https://secure.ssa.gov/poms.nsf/lnx/0200210100.

Quarters of coverage are not based on calendar quarters, but on a minimum dollar amount that must be earned in a year to obtain at least one quarter of coverage. That dollar amount in 2022 is $1,510. An individual's total earnings for the year are divided by the dollar amount to determine the number of quarters. The maximum number of quarters that an individual can earn in a year is four.

Supplemental Security Income (SSI) is a needs-based program that provides a monthly benefit to low-income elders (age 65 or older) and people with disabilities. 42 USC §§ 1381, 1383f.

Eligibility for SSI also provides eligibility for Medicaid. Oregon chose to expand Medicaid under the Affordable Care Act to provide eligibility to anyone with income under 100% of the federal poverty limit. Fourteen states did not expand Medicaid benefits under the ACA, leaving low-income individuals with a mental health condition, under age 65, and with no minor children, without dependable health care. https://www.kff.org/medicaid/issue-brief/status-of-state-medicaid-expansion-decisions-interactive-map/. This is important to understand when advising someone with Medicaid about moving to a different state.

A person under age 65 must not only meet the Social Security standard of disability, but also must have a very low income and have limited assets or resources to receive SSI. A resource is cash or any property, real or personal, that can be converted to cash that can be used to pay for support and maintenance. 20 CFR § 416.1104.

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Federal law limits the amount of countable resources/assets an SSI beneficiary can have to $2,000 for a single individual and $3,000 for a couple. An SSI beneficiary is not eligible for any monthly SSI benefit if countable resources exceed that limit by even a penny. SSA will not process an application for SSI benefits if a claimant's countable resources exceed the limit.

An otherwise eligible individual cannot just transfer resources because there is a transfer penalty that may be imposed if there was a transfer for less than fair market value within the three years prior to the date of application. The penalty can also be applied if there is a transfer during a period of eligibility. 20 CFR § 416.1246.

The maximum monthly SSI benefit (called the federal benefit rate (FBR)) is set by federal law. In 2022, it will be $841 for a single person and $1,261 for an eligible person with an eligible spouse. An eligible individual is someone who is aged, blind, or disabled and meets the financial rules for SSI. An eligible spouse is also someone who is aged, blind, or disabled. Note that the maximum federal benefit for an SSI couple is not twice the benefit for an individual. In a limited number of circumstances, it may be financially better for one spouse to take early retirement benefits and the other to receive SSI.

Some states provide a supplement to the federal benefit and moving from one of these states to one that does not provide a supplement can cause an overpayment. Oregon no longer provides a monthly supplement to all SSI beneficiaries. Some confusion arises when a person moves from a state with a generous SSI supplement to one without a supplement.

It is essential that advocates working with persons with a disability try to maximize their monthly SSI benefit. Individuals with a mental health condition are especially vulnerable to the quirks in calculating benefits given the different rules that must be taken into consideration.

The rules on what counts as income and how it reduces the FBR are not very complicated, but can be difficult for a lay person to understand and track. Because it is a needs-based program, monthly SSI benefits are reduced by earned and unearned income that the individual receives. The rules on how to count each type of income vary. Some unearned income is not counted: tax refunds and credits, SNAP benefits, Meals for Older Americans, and many more. See https://secure.ssa.gov/poms.nsf/lnx/0500830099.

SSA has issued guidance on the treatment of pandemic-related income, and has excluded most unearned income received as a result of COVID-19 pandemic legislation. (The relevant pandemic period differs depending on when a state ended pandemic-related unemployment insurance benefits.) Exempt pandemic-related income is also permanently excluded from counting as a resource. This includes economic impact payments and all unemployment insurance benefits issued during the pandemic period. Some tribal-related unearned income is also excluded. https://secure.ssa.gov/apps10/reference.nsf/links/09302021025535PM.

SSA will reduce SSI benefits by up to one-third of the FBR for in-kind support and maintenance (ISM). ISM is defined as food, shelter, or both that somebody else provides for you. POMS SI 00835.400: https://secure.ssa.gov/poms.nsf/lnx/0500835400.

It does not include support received from government programs and nonprofit agencies or to someone who is homeless. The most common source of ISM comes from family members who allow their adult child, parent, sibling, or other relative or friend to live with them for free. This complication can be avoided by ensuring that the person seeking SSI benefits has an obligation to pay rent.

The SSA definition of disability

It has always been difficult for individuals who have mental health conditions to navigate the Social Security application and appeal system. They depended on the ability to interact with claims representatives in the field office to file applications and appeals, or report changes in income, resources/assets, or living situations. Applications for any Social Security benefits are now required to be filed online or over the phone. SSA will schedule an in-person appointment for some individuals to bring in their birth certificate or immigration paperwork. It is also working on a system that will allow the field offices to use video technology to verify these documents, but it is only in the testing phase at this time.

Based on personal experience in helping clients file applications for retirement or SSDI benefits, it takes at least an hour for a simple application and can take up to two hours for a claimant with multiple providers, ER visits, and hospitalizations. SSI applications cannot easily be filed online and usually require a phone appointment in addition to the online application.

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COVID-19 made that process even more difficult after all Social Security offices were closed to the public on March 17, 2020. They remain closed and it is unknown when they will reopen to in-person services for non-emergency services. This has created delays in processing all applications and most appeals. The delay for anyone who applies for disability benefits is two-fold: the closure of the SSA field offices and state offices. SSA does not make the medical decision on whether a person qualifies for disability benefits. That decision is made by the disability determination services (DDS) in each state and the District of Columbia. https://www.ssa.gov/disability/professionals/bluebook/general-info.htm.

DDS offices have physicians and psychologists who review the medical records of the claimant. They also make the decision on whether a claimant needs an outside consultative examination. This occurs when the claimant does not have enough medical records to support a decision. 20 CFR 404.1517-1519t. DDS analysts in the southeast have told me that the COVID-19 pandemic has made it difficult for DDS staff to find medical and mental health providers who will perform the examinations, which further delays decisions.

Federal Social Security law defines disability as the inability to do any substantial gainful activity (SGA) by reason of any medically determinable physical or mental impairment which can be expected to result in death, or which has lasted or can be expected to last for a continuous period of not less than 12 months. 42 USC § 423(d)(1)(A); 20 CFR § 404.1505 and 20 CFR § 416.905.

The individual must have a physical or mental health condition that is severe enough on its own or in combination with other conditions to prevent doing work done in the past or any other substantial gainful work that exists in the national economy. This is the disability definition for adults (either SSDI or SSI). 20 CFR §§ 404.1505 and 416.920.

Children under age 18 undergo a different analysis, which is not discussed in this article. See 20 CFR § 416.924.

A physical or mental health condition is not considered severe "if it does not significantly limit [the individual's] physical or mental ability to do basic work activities." 20 CFR §§ 404.1522 and 416.922.

It is essential to understand that SSA policy provides that both the "medical or mental health condition" and the "inability to engage in SGA" must last twelve months. POMS PS 01425.041.

SGA is generally defined as work which results in earnings over a certain monthly threshold, with some exceptions. The gross wage limit for SGA for a non-blind person is $1,350 and $2,260 for a blind individual. https://www.ssa.gov/oact/cola/sga.html

Certain expenses known as impairment-related work expenses (IRWEs) can reduce those gross wages below the SGA limit. See POMS DI 10520 et seq: https://secure.ssa.gov/poms.nsf/lnx/0410520001. An essential IRWE for individuals with a mental health condition are the costs associated with a service animal. It includes the costs of food and veterinarian visits for the service animal.

If an individual returns to work and earns more than SGA within twelve months of his or her onset date, it will be difficult to prove that the person is disabled and entitled to benefits.

The disability determination process

SSA uses the same five-step sequential evaluation process for adults in determining whether a person is disabled for both programs. The first step looks at the claimant's current work activity, if any, and if the individual earns wages above the SGA limit, SSA stops the evaluation.

Step two evaluates the physical and mental health conditions to determine whether the conditions are expected either to result in death or to last at least 12 months. A physical or mental health condition is not severe "if it does not significantly limit [the individual's] physical or mental ability to do basic work activities." 20 CFR §§ 404.1522 and 416.922.

Step three examines the individual conditions to SSA's listing of impairments to determine if any meet or equal one of them. (See https://www.ssa.gov/disability/professionals/bluebook/ for links to the listings. Also see Appendix 1 to subpart P of 20 CFR § 404. https://www.ssa.gov/OP_Home/cfr20/404/404-app-p01.htm.

If a listing-level impairment exists and it meets the durational requirement, the evaluation process stops and the individual is eligible for benefits. SSA also has a list of 200 conditions that qualify as compassionate allowances and primarily include cancer diagnoses, adult brain disorders, and rare genetic conditions. https://www.ssa.gov/compassionateallowances/conditions.htm.

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SSA refers to the first three steps as screens, with the field office making the decision at step one. The medical screens, found at steps two and three, are made by the DDS. Decisions made at step one are done quickly—usually within a week.

It should be noted that the listings for mental health conditions have a common theme and one that is not easily addressed by reviewing an individual's mental health records. The mental health listings (divided into roughly the DSM disorders) have at least two "paragraphs" known as A and B and the criteria in each paragraph must be met for an individual to be found disabled. Approximately half of the mental health listings use an alternative to the B paragraph: the C paragraph.

The A paragraph is straightforward and contains the clinical criteria for the diagnosis. The B paragraph contains the functional limitations that an individual has and are generally organized by rating the severity of the functional limitation (none, mild, moderate, marked, or severe). The rating scales are much more objective and are almost impossible to pull out of any mental health records.

The functional limitations found in paragraph B are most analogous to broad activities of daily living (understanding/memory, interaction with others, concentration/pace, and adaptation). An individual must have either two marked limitations or one severe limitation to meet the listing.

The C paragraph provides an alternative to meeting the B paragraph requirements and instead looks to the seriousness and persistence of the mental health condition. An understanding of the preamble to the mental health listing is needed to fully understand how important it is to document the subjective limitations a person has in daily life, and to get a provider to complete a questionnaire that is supported by the treatment record.

The last two steps of the analysis are the most complex because they require the decision maker to consider both the medical or mental health condition and vocational factors.

Step four compares the individual's current residual functional capacity to work done in the past fifteen years. This is known as past relevant work (PRW), and if the person can return to PRW the application will be denied. In making this determination, SSA looks at whether the individual can return to the work as it is done in the national economy (POMS DI 25005.001) or how the person actually performed the work. POMS DI 25001.020. (Note that this includes the work someone did outside of the United States.) Trying to prove that applicants cannot do jobs as they "actually performed the work" has been increasingly difficult, especially as employers provide more accommodations to persons with a disability.

The claimant has the burden of proving disability through step four. The burden shifts to SSA at step five to prove that there is work in the national economy that the individual can do, taking into consideration the claimant's age, education, prior work experience, and residual functional capacity. SSA generally relies on the outdated *Dictionary of Occupational Titles* (DoT) or its grid rules to meet this burden when DDS makes the decision. 20 CFR §§ 404.1566(d)(1) and 416.966(d)(1). The DoT has not been updated since 1991. It still includes jobs such as "Elevator Operator: Operates elevator to transport passengers between the floors of an office building; pushes buttons or moves lever on instructions from passengers or others; opens and closes safety gate and door of elevator at each floor." Code: 388.663-010. Light work, unskilled.

SSA will find someone not disabled if the inability to work is based on factors such as the individual has no interest in doing that type of work, the work is not available where the individual lives, or the individual does not have transportation to get to the job. 20 CFR §§ 404.1566(c) and 416.966(c).

SSA's *Medical-Vocational Rules* or "the grids," are found at POMS DI 25025.035 or 20 CFR 404, Subpart P, Appendix 2. They provide a framework for making decisions at step five and favor eligibility for older individuals (starting at age 50) with significant physical (strength) limitations and limited education. The grids do not consider non-exertional limitations, nor does SSA policy directly address issues like time off for sick leave, being off task, or inability to maintain production quotas. This requires the use of a vocational expert and is only used at the hearing stage of the appeals process. 20 CFR §§ 404.1566(e) and 416.966(e). See Social Security Ruling (SSR) 85-15: "In more complex cases, a person or persons with specialized knowledge would be helpful." (https://www.ssa.gov/OP_Home/rulings/di/02/SSR85-15-di-02.html); See SSR 00-4p (https://www.ssa.gov/OP_Home/rulings/di/02/SSR2000-04-di-02.html). The use of vocational experts at almost every administrative law judge hearing on an adult disability case came about because of case law, not SSA policy.) Only limitations directly related to a person's mental health or medical conditions can decrease the number of jobs that an individual may be able to perform.

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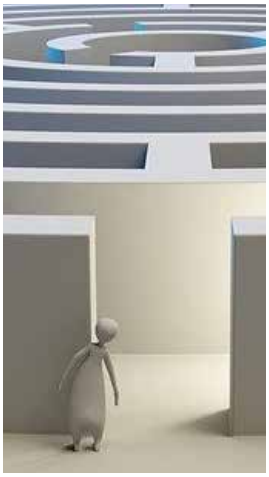

Clients with mental health conditions really do need our help to navigate a system that should be simpler than it is.

Most advocates who specialize in representing individuals applying for disability benefits know that individuals with a mental health condition often have multiple, short periods of work. Sometimes these periods will include periods of hospitalizations or medication modification between them, but more common is just a loss of employment because of a "behavior problem" or a "failure to meet production demands." Employment at a job for less than six months is an "unsuccessful work attempt" and may provide proof that an individual has a marked or severe impairment in the functional criteria found in the B paragraph. It is often difficult to get an employer to provide the actual reason for terminating an employee unless the employee files for unemployment benefits and the employer objects and provides justification for the termination.

In closing

I know this article is highly technical, but there is a reason. All these programs and rules make it very difficult for the average attorney to understand the SSA disability process. Imagine if you had problems concentrating and understanding complex instructions or heard voices that distract you constantly. Imagine trying to be able to reduce your mental health condition to 1200 characters on a page. Imagine trying to get through a two-to-three-hour application process at the public library where you may be limited to 15 minutes on the computer. SSA is more dependent than ever on the online applications and appeal filings because of COVID-19. It is an impossible situation for many elders and persons with mental health conditions. I have no answers. All I can do is help. I help file the application or appeal with both of us wearing a mask. It is a new reality.

Initially, I had trouble thinking of how to close out this article, but the answer came to me last week. I met with a client in one of our offices here in South Carolina.

The client receives concurrent SSDI and SSI benefits. She has a severe mental health condition and is still hearing voices. She was trying to deal with the cutoff of SSI benefits because of excess resources—money in bank accounts. She did the necessary homework and knew that the decision was wrong, because the money came from economic impact payments. SSA had only recently changed its policy to exempt pandemic-related payments from counting as income or a resource. It was taking the client a long time to figure out what needed to be done, and she missed the first deadline to keep benefits going and was now coming up on the final deadline. I asked one of my standard questions to help clients relax: "Where are you from?" (She had no Southern accent and her Social Security number gave that much away.) The client had moved from Oregon to South Carolina to live closer to her parents after being hospitalized for a psychotic break. A sister who stilled lived in Oregon told the client to call Legal Aid. We then had common ground because of my years in the Pacific Northwest, and the client was able to relax. She told me that she depends on her parents for emotional support. I will file the appeals for and get the SSI reinstated so full Medicaid benefits will not end.

Remembering my wonderful father who had a severe mental health condition that subjected him to some of the darkest moments of his life, including involuntary hospitalizations in a state facility, I realized once again that while all of us need someone to provide emotional support, persons with mental impairments really need a stabilizing support system in their lives. Clients with mental health conditions really do need our help to navigate a system that should be simpler than it is. Technology is a blessing and a curse. At some point, most of us will have to navigate SSA's new electronic world, but we will probably just be filing for Medicare or retirement benefits and will only have to find our birth certificates. In the meantime, just try setting up a "My Social Security" account for yourself or for someone with a flip phone and no email address. Good luck with that. ■

Temporary guardianship

By Nathan Rudolph, Attorney at Law

Nathan A. Rudolph is a partner at Smith, McDonald, Vaught & Rudolph, LLP, located in Portland. He practices in a variety of areas, including estate planning, probate, trust administration, guardianships and conservatorships, and civil litigation. Nathan represents clients in contested matters, with an emphasis in fiduciary-related litigation that involves estates, trusts, and protective proceedings. He is licensed in Oregon and Washington.

A temporary guardianship is, by definition, an emergency. A temporary guardian can only be appointed if there is an "immediate and serious danger to the life or health" of a human being. ORS 125.600(1). Most lawyers do not enjoy emergencies, as they tend to impede procrastination. Temporary guardianship cases are stressful, time-and-energy consuming, and the facts are often heartbreaking. Temporary guardianship cases are also an incredible opportunity to genuinely help people experiencing a crisis.

Intake: Is this urgent?

The first question I ask myself when I am speaking to a potential client about a guardianship is: How quickly must this situation be resolved? If, during your intake, you learn facts that lead you conclude the situation needs to be resolved in fewer than 30 days, you may be looking at a temporary guardianship. The notice period for an indefinite guardianship is 15 days from personal service on the respondent (and 15 days from mailing for other parties). Always assume the court will take at least one to two weeks to sign and enter a judgment. Therefore, assuming you can get a petition drafted, filed, and served immediately, it generally takes three to four weeks to get an indefinite guardian appointed. Therefore, if the guardian needs to be appointed in less than 30 days, consider a temporary guardianship.

The law

ORS 125.600-610 set forth the legal standards and notice periods required for temporary guardianships and conservatorships. In order to obtain a temporary guardianship you must also meet the same standards as an indefinite guardianship, which require a petition containing all the information under ORS 125.055, the appointment of a court visitor, as well as judicial findings that: (1) the respondent is "incapacitated" (as defined in ORS 125.005(5)); (2) the "appointment is necessary as a means of providing continuing care and supervision of the respondent"; and (3) the person nominated to serve as temporary guardian is qualified, suitable, and willing to serve. ORS 125.305.

Furthermore, a guardian may only be appointed for an adult "as is necessary to promote and protect" his or her well-being, and the guardianship "must be designed to encourage the development of maximum self-reliance and independence of the [respondent] and may be ordered only to the extent necessitated by the person's actual mental and physical limitations." ORS 125.300.

In addition to the above, you have the burden of showing that there is an "immediate and serious danger" to the respondent's life or health, and "the welfare of the respondent requires immediate action." ORS 125.600(1).

A temporary guardian can only be appointed for 30 days. ORS 125.600(3). The court may grant one extension for an additional 30 days. Therefore, it is common for a petition to include a request for the appointment of a temporary and indefinite guardian, because in most situations the temporary appointment is the short-term solution, and most respondents will remain incapacitated after 60 days.

Notice

Providing proper notice to the required parties is always imperative, but is even more significant when dealing with a temporary guardianship. You never want to be in a situation where you must explain to your client that the limited judgment was not signed due to defective notice. It is also important to realize that guardianships by their very nature are a process whereby a court places restrictions on a person's liberty. Any defect in the notice itself, or the timing or service, could render the appointment of a guardian unconstitutional as a violation of a person's due process rights. Therefore, attorneys should always provide as much advance notice as possible.

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The parties entitled to notice of a temporary guardianship are the same parties entitled to notice of an indefinite guardianship. See ORS 125.605(1) and ORS 125.060. The notice period for a temporary guardianship is two days. ORS 125.605(1). That is, two days from the date of personal service on the respondent, and two days from the date of mailing on other parties. Remember, weekends, holidays, and the date of service (or mailing) do not count when calculating the two days, and the notice period cannot end on a weekend or holiday. See ORCP 10(A).

The language you are required to include in your notices is set forth in ORS 125.070. Review this statute carefully, as the notices required upon respondents are different from the notices upon all other parties.

Temporary "emergency" guardianships and waiver of pre-appointment notice

ORS 125.605(2) allows the court to waive the two-day notice requirement prior to appointment if the court finds that the immediate and serious danger requires an immediate appointment. Waiving notice prior to appointment allows a temporary guardian to be immediately appointed upon filing the petition. Some attorneys, clerks, and judges refer to these types of cases as "temporary emergency guardianships," although that term does not appear in the statutes.

If, during your intake with your client, you learn facts that lead you to conclude the situation needs to be resolved in less than two days, you should consider requesting a waiver of pre-appointment notice. For instance, imagine that an elderly woman suffering from advanced dementia has been admitted to the ER due to failure to thrive in her home, where she has no support or care, and medical providers are recommending immediate placement in a memory-care unit because returning home would cause an immediate and serious danger to her life and health. The woman, against all medical advice, insists on returning home, and the hospital plans to release her tomorrow.

This might be a situation that warrants waiver of notice prior to appointment, so that a temporary guardian can find appropriate placement.

Note that if the court does waive notice prior to appointment, notice must be given within two days after appointment. ORS 125.605(2).

The court visitor

As with indefinite guardianships, the court will appoint a court visitor to investigate, interview parties, and file a report in regard to a petition for temporary guardianships. ORS 125.605(4). The court visitor is often your best witness, and his or her report is often your best evidence to support the appointment of a temporary guardian.

Objections

If an objection is made to the appointment of a temporary guardian (or an extension of the temporary guardianship), "the court shall hear the objections within two judicial days after the date on which the objections are filed." ORS 125.605(5). Therefore, you must be ready to go to a hearing within two days after filing and serving the petition, and you should clear your calendar accordingly. If an objection is filed, you must also be prepared to ensure the hearing gets scheduled, which may entail politely reminding a clerk that the hearing must be set within two days of the objection, since not all counties automatically set hearings upon receiving an objection.

Hearings

A hearing on a temporary guardianship can take many forms. Often, because these hearings are set so quickly, the judge may have a limited amount of time available. Being able to present your evidence efficiently is crucial (not to mention courteous to the overloaded judges and their staff). Take your cues from the judge. For instance, if the judge tells you that she only has 15 minutes, do not go over the allotted time. If the judge makes a point of telling you that she has read your petition and the court visitor report, you can probably dispense with an opening statement. Be concise with your questions and arguments, and prepare your witnesses so they stick with relevant facts.

You should also prepare a form of limited judgment and e-file it the day before the hearing, so it is in the judge's queue and she can (perhaps) review and sign it on the spot. You may also check with the judge or her clerk to learn whether you should email it to the judicial assistant prior to the hearing.

Some counties have historically appointed attorneys for respondents in the event the respondent objects or if the court visitor recommends the appointment of an attorney. SB578 amends ORS 125.080 to require that an attorney must be appointed for a protected person if a hearing is scheduled and the

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Guardianships should always be viewed as a measure of last resort. If there is another way to solve the problem (e.g., using authority granted to a healthcare representative under an advance directive), you must at least consider it.

protected person requests an attorney, an objection is filed by any person, the court visitor recommends appointment of an attorney, or the court determines appointment of an attorney is appropriate. The amendments under SB578 are effective in Multnomah County and Lane County on January 2, 2022, and in Columbia County on January 2, 2023, and statewide on January 2, 2024. Attorneys who represent petitioners should be prepared to present their case against experienced guardianship attorneys.

Less restrictive alternatives

Guardianships in general—and temporary guardianships especially—are drastic, expensive, and a sledgehammer in the lawyer's tool box. They should always be viewed as a measure of last resort. Investigating and considering less restrictive alternatives is not only statutorily required under ORS 125.055(2)(i); it is also prudent. If there is another way to solve the problem (e.g., using authority granted to a healthcare representative under an advance directive), you must at least consider it and explain in your petition why it is an inadequate solution.

Post-appointment

Once your client is appointed, your job is not over. You may be called on to resolve practical problems, such as referring the guardian to necessary community resources in order to better fulfill the obligations of a guardian. The estate planning and elder law discussion lists can be great resources you can use to assist your clients.

Additionally, ORS 125.082 requires that a guardian provide notice after appointment to specified parties, and the notice must include specific information about the case and the respondent's right to seek the removal of the guardian. SB 190 (which went into effect on January 1, 2022) amended ORS 125.082 and now requires that the guardian personally deliver the notice of appointment to the protected person "in a manner reasonably calculated to be understood by the protected person," and to also provide oral notice, if requested by the protected person.

Pursuant to ORS 125.610, temporary fiduciaries are required to file a report detailing their activities. The report is due upon completion of their duties, upon expiration of the appointment, or when the court orders termination of their authority. If the temporary guardianship converts into an indefinite appointment, the report can be included in the annual guardian's report.

The gap problem

If you are also seeking the appointment of an indefinite guardian, you must ensure the temporary guardianship does not expire before the indefinite guardianship begins. If there is an objection to the indefinite guardianship, you should try to get a hearing set before the temporary appointment expires. If you cannot get a hearing within 30 days, you may file for a 30-day extension of the temporary under ORS 125.600(3), which will require a motion and two-day notice. Calendar your deadlines appropriately.

Given the lack of judicial resources caused by a multitude of issues, not the least of which is clearing out the backlog from the COVID pandemic, attorneys are increasingly running into a situation in which the court appoints a temporary guardian but does not have judicial availability to schedule the hearing on the indefinite guardianship appointment within the 60-day window.

Because ORS 125.600(3) allows only one extension of a temporary guardianship, and a gap in the guardianship is likely to be dangerous for the respondent, attorneys must get creative. The most efficient solution is to try to get the hearing on the indefinite guardianship set within the 60-day window. For the most part, judges and clerks are sympathetic to this dilemma and recognize the need to resolve these cases. Start by asking if you can get the hearing moved up. This may require a motion/order for an expedited hearing under the court's supplemental local rules.

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If that does not work, a creative attorney might take a look at ORS 125.650, which allows a court to "enter protective orders…in addition to appointment of a fiduciary," which can include "appoint[ing] a fiduciary whose authority is limited to a specified time and whose power is limited to certain acts needed to implement the protective order." Before entering such a protective order, the court shall consider "whether the protected person needs the continuing protection of a fiduciary."

If you have filed a petition for the appointment of a temporary and indefinite guardian, and you have secured the appointment of the temporary guardian, but—for whatever reason—a hearing on the indefinite guardianship is not possible before the expiration of the temporary appointment, consider whether a motion under ORS 125.650 could possibly extend the appointment until the date of the hearing on the objection.

A few final tips

If this is your first (or second, third, tenth, fiftieth) time filing a temporary guardianship, you should consider doing the following:

1. Consider contacting another attorney if you need some advice or just want to bounce some ideas around. In general, attorneys are flattered when another attorney asks for guidance.
2. Consider venue. A "protective proceeding must be commenced in the county where the respondent resides or is present." ORS 125.025. The county where the respondent is "present" may be different from the county where the respondent "resides," which gives the filing attorney an opportunity to choose the venue. Venue can affect the case in myriad ways. Certain counties process petitions/judgments more quickly. Some counties require hearings on temporary appointments even if there is no objection.
3. Read the Supplemental Local Rules (SLRs). Counties have specific SLRs on temporary guardianships.

   For instance, in Multnomah County a court appearance is required before the court will sign a judgment to appoint a temporary guardian. SLR 9.075(3).

   Pursuant to ORS 125.070(1)(d), the notice to respondent and other parties must provide the date, time, and place of a hearing, if a hearing has been set. Therefore, in Multnomah County, you cannot finalize your notice for service until you have scheduled a hearing. If the hearing is going to be via phone, you must make sure the notices provide call-in information.
4. CALL THE PROBATE CLERK BEFORE YOU FILE. I cannot overstate the importance of this. Unless you are regularly filing temporary guardianship petitions in that county, it is crucial to check in with the clerk. Some counties appoint a court visitor on their own order, while other counties require petitioners to choose a court visitor from an approved list, which means you need to have that request in your petition. It is also courteous to the court clerks if you let thm know you are filing a temporary guardianship petition so they can pull it out of their normal queue. A clerk may have dozens (or hundreds) of filings in the queue waiting to be accepted. If you give the clerk a heads up, he or she may accept the petition faster, which will give you a case number sooner, which will allow you to finalize the notices and serve the required parties earlier. The clerks are often the best resources and can help you help your clients.

Conclusion

Temporary guardianships are an extraordinary opportunity to help a person in crisis. These cases often require an attorney to drop everything else and devote complete attention to a single matter, which can be a nice change of pace from staring at the stack of files on your desk that you "might get to tomorrow." Given the aging population in our community (and the seemingly inadequate mental health resources across the state), the need for temporary guardians will only grow. Good attorneys who care about helping people and solving problems are needed to handle these cases. ■

The scope of guardian liability for tortious acts by protected persons

By Emily Goodwin, Law Student, and Alana J. Hawkins, Attorney at Law

Emily Goodwin is a second-year law student at Willamette University College of Law, studying elder law and estate planning. Emily is a law clerk at Parker and Griffith, P.C., specializing in guardianships, conservatorships, and estate planning.

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.

Many people equate the appointment of a guardian to a loss of individual autonomy, even though the purpose of a guardianship is to promote self-determination and overall improvement in the life of the protected person. ORS 125.315(g). This is largely due to the nature and scope of the general powers granted to a guardian by ORS 125.315, which include: establishing a place of abode, arranging for care, comfort, and maintenance, consenting to medical care, making funeral arrangements, and in certain circumstances controlling the disposition of remains, and even making an anatomical gift. In fact, ORS 125.315 (1)(a) describes the relationship that a guardian has to a protected person as a custodial relationship where the guardian has custody over the protected person.

Given the relationship between a guardian and protected person, coupled with the general powers of a guardian that are authorized under ORS 125.315, guardians may wonder whether their custodial relationship also extends to liability for harm done to a third party by the protected person.

This article concludes that guardians may be liable for the harmful acts of protected persons against third parties, depending on the specific circumstances and several factors that include:

- the relationship or status between a guardian and protected person
- how that relationship or status creates, defines, or limits a guardian's duty
- whether the specific harm was foreseeable or should have been foreseeable by the guardian
- whether the guardian's action or inaction was unreasonable.

Considering these factors, we anticipate that the court would find a "special relationship" exists between a guardian and protected person that increases the standard of care owed to a third-party plaintiff to protect that person from reasonably foreseeable harm caused by a protected person. This article examines existing case law as it applies to a guardian's potential liability.

Protected persons are primarily responsible for their own acts

Oregon law holds protected persons primarily responsible for their own acts. ORS 125.235 provides that a fiduciary is not personally liable to third persons for acts of the protected person solely by reason of being appointed a fiduciary. Additionally, in *Schumann v. Crofoot*, 43 Or. App. 53, 55, 602 P.2d 298 (Or. Ct. App. 1979), the court adopted the Restatement (Second) of Torts § 283B (1965) and agreed that "insanity or other mental deficiency does not relieve the actor from conduct which does not conform to the standard of a reasonable man under similar circumstances." The court found that a protected person is not, as a matter of law, incapable of committing intentional and/or negligent torts.

Guardians may be liable if they are negligent

Despite ORS 125.235, there are situations where a guardian may be held liable for the harmful acts of protected persons against a third party. Guardians may be held liable for reasonably foreseeable tortious acts that are caused by their own unreasonable actions or inaction. See *Fazzolari v. Portland School Dist. No. 1J*, 303 Or. 1, 734 P.2d 1326 (Or. 1987) and *Buchler v. State*, 316 Or. 499, 853 P.2d 798 (Or. 1993).

Negligence when there exists no special relationship

In *Fazzolari*, the plaintiff was a 15-year-old high school student who was assaulted and raped on school grounds and sought to recover against the school district for its negligence in failing to provide adequate security and warnings when administrators were aware of recent similar attacks. *Fazzolari v. Portland School Dist. No. 1J*, 303 Or. at 3.

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The court in *Fazzolari* found that "unless the parties invoke a status, a relationship, or a particular standard of conduct that creates, defines, or limits the defendant's duty, the issue of liability for harm actually resulting from a defendant's conduct properly depends on whether that conduct unreasonably created a foreseeable risk to a protected interest of the kind of harm that befell the plaintiff." (*Id* at 17).

Thus, *Fazzolari* laid the foundation for general liability based on negligence. The court determined that even in the absence of a "duty," if the conduct at issue unreasonably created a foreseeable risk of harm that was in fact realized (i.e. harm to a third party), then the party whose action or inaction was unreasonable could be held liable for the harm they created.

Negligence when there exists a special relationship, status, or particular standard of conduct

Even though much of *Fazzolari* discussed the shortcomings of relying on "duty" alone, the final analysis and decision in *Fazzolari* relied on a special duty that arose from the relationship between educators and children entrusted to their care. Accordingly, *Fazzolari* also found that special relationships, like that between educators and a child entrusted to their care, increase the standard of care owed to the plaintiff. (*Id* at 19).

In *Buchler v. State*, the plaintiff sought damages from the state for harm caused by a prisoner who escaped from a state-supervised worksite. This prisoner went on to shoot and kill two victims following his escape. The prisoner used a state-owned vehicle to facilitate his escape and was able to do so because a work crew supervisor had left keys in its ignition. The families of the victims attempted to recover against the state. *Buchler v. State*, 316 Or. 499, 853 P.2d 798 (Or. 1993).

The court found it necessary first to determine if there were any special relationship, status, or particular standardsof conduct that "creates, defines, or limits the "defendant's duty." (*Id*. at 504). When examining the relationship between the work crew supervisor and prisoner, the court determined that the relationship was qualitatively different from the relationship between school officials and a student, and/or a landlord and a tenant. However, the court did find that a work crew supervisor held a status relative to a prisoner that increased the requisite duty of care. (*Id*.)

Notably, the court in *Buchler* adopted § 319 of the Restatement (Second) of Torts (1965), an exception to the general rule of non-liability for the conduct of others, which states "Duty of Those in Charge of Person Having Dangerous Propensities … One who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the other person to prevent him from doing such harm." (*Id*. at 507).

However, *Buchler* also limited the scope of foreseeability. Buchler asserts that the defendant's action or inaction must do more than "facilitate" the harm, that the "mere facilitation of an unintended adverse result, where intervening intentional criminality of another person is the harm-producing force, does not cause the harm so as to support liability for it." (*Id*. at 512, 513). Here, the prisoner had a history of committing theft-related crimes, not violent crimes, and the court found that it was not foreseeable that leaving the keys in the ignition would result in this specific type of intervening criminal activity (i.e., the prisoner shooting and killing two people). Similarly, the court in *Buchler* agreed with the court in *Fuhrer v. Gearhart By the Sea, Inc.*, which found that the duty to warn and protect extends only to warn of and protect from knowable risks, and determined that the duty to warn is predicated on the presence of reasonable foreseeability. *Buchler v. Oregon Corrections* Div., 316 Or at 516 and *Fuhrer v. Gearhart By The Sea, Inc.*, 306 Or. 434, 760 P.2d 874 (Or. 1988).

More recently, in *Piazza v. Kellim*, the court continued to examine status, relationship and standards of conduct that may heighten the duty of care based on relationships between businesses and invitees, and parents and children. *Piazza ex rel. Piazza v. Kellim*, 360 Or. 58, 377 P.3d 492 (Or. 2016). The court emphasizes consideration of the "nature and scope of the duty owed by the defendant to the plaintiff [which] can be created, defined, or limited based on, among other things, the relationship between or status of the parties." (*Id*. at 71, 72).

In *Piazza*, the plaintiff argued that if a specific relationship exists, its presence extends and amplifies the duty of care to protect the party from foreseeable harm. Specific status or relationship is measured by determining whether one party had a legal responsibility for another (i.e., schools have legal responsibilities to ensure the safety of their buildings).

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Guardian liability

Even though protected persons are primarily responsible for their own acts, guardians can be liable for the acts of protected persons.

Fazzolari, *Buchler*, *and Piazza* require us to consider: (1) the relationship or status between a guardian and protected person; (2) how that relationship or status creates, defines, or limits a guardian's duty; (3) whether the specific harm was foreseeable or should have been foreseeable by the guardian; and (4) whether the guardian's action or inaction was unreasonable.

The relationship between a guardian and protected person is more like the relationship between educators and a child entrusted to their care or a landlord and a tenant, rather than that of a work crew supervisor and a prisoner. All of which the courts determined increased the standard of care and duty of the defendant. Arguably, guardians have a special relationship, whether based in law or status, to protected persons, and therefore have heightened legal responsibilities over protected persons to ensure their safety as well as the safety of others. However, a case-by-case analysis would likely be necessary to determine what is reasonably foreseeable depending on specific circumstances (i.e., what may be reasonably foreseeable to a guardian who provides direct caregiving services to a protected person may be different when compared to a guardian over a protected person in placement.)

Buchler draws attention to a heightened duty when guardians take charge of another person who they know or should know is likely to cause bodily harm to others if not controlled, and requires that reasonable care be exercised to control and prevent such bodily harm. The exercise of such reasonable care in the context of guardian and protected person would also depend on the circumstances, but may include identifying proper placements and care for protected persons, and the duty to warn others of the protected person's potentially harmful behaviors. What is reasonable or unreasonable will depend on the specific circumstances.

In conclusion, while the law remains uncertain, guardians should continue to take reasonable care for protected persons and make decisions to prevent reasonably foreseeable harm they know or should have known could befall a third party. ■

Helpful Websites

Elder Law Section website
https://elderlaw.osbar.org
Links to information about federal government programs and past issues of the Section's quarterly newsletters

National Academy of Elder Law Attorneys (NAELA)
https://www.naela.org
Professional association of attorneys dedicated to improving the quality of legal services provided to elders and people with special needs

National Center on Law and Elder Rights
https://ncler.acl.gov
Training and technical assistance on a broad range of legal issues that affect older adults

OregonLawHelp.org
https://oregonlawhelp.org
Helpful information for low-income Oregonians and their lawyers

Aging and Disability Resource Connection of Oregon
https://www.adrcoforegon.org/consite/index.php
Includes downloadable Family Caregiver Handbook, available in English and Spanish versions

Administration for Community Living
https://acl.gov
Information about resources that connect older persons, caregivers, and professionals to federal, national, and local programs

Big Charts
https://bigcharts.marketwatch.com
Provides the price of a stock on a specific date

National Elder Law Foundation
http://www.nelf.org
Certifying program for elder law and special-needs attorneys

National Center on Elder Abuse
https://ncea.acl.gov
Guidance for programs that serve older adults; practical tools and technical assistance to detect, intervene, and prevent abuse

An interview with Monica D. Pacheco

By the Elder Law Section Diversity, Equity, and Inclusion Subcommittee

Tell us a little bit about your practice and yourself.

I am an elder law attorney, and my practice includes estate planning. Although I do get paid for my work (in most cases), I also feel that I am providing a service to our community not only by facilitating legal procedures, but by speaking to groups about the importance of planning and by volunteering with Wills For Heroes and our community at large.

My career as an attorney has been a fairy tale. Once I graduated from law school I landed in a wonderful firm, with great teachers and mentors who eventually became my partners. I didn't feel like I had to fight and prove myself based on my ethnicity or sexual orientation. I was simply accepted for who I am. I've probably been lucky in that sense.

I'm from Arizona, and I grew up in a home with three generations. My dad's parents lived with us, and my grandmother on my mother's side lived two blocks away. Family is very important to me.

My first vivid memories are of an orphanage. My family spent a lot of time helping an orphanage in Mexico. We provided donated items, food, and time and services to the nuns, children, and the orphanage. My second-most vivid memory is riding in my dad's truck to go to a baseball game. My dad was a cop and a volunteer firefighter. On our way to the baseball game, there was a house fire. He was the first firefighter on the scene. While I stayed in the truck I saw my dad pull a kid in his underwear out of the house, and then a grandma in her day coat. These are merely two examples of the environment in which I grew up, learning about service and community.

I'm also a person of first milestones: first-generation American, first in my family to go to college, and first female to coach and umpire baseball in Arizona. I've never accepted the stereotypical gender role of being female. I've always pushed the line.

Currently I serve as president of the Salem Fire Foundation (SFF), where I have had three goals. The first was to establish the Wills for Heroes Program for Salem Fire personnel. I believe I've completed more than 40 estate plans for the Salem Fire firefighters and personnel since we began the program. The second goal was to create Salem Fire Foundation Benevolent Fund. This year we hosted the second annual SFF golf tournament, where all proceeds go to the fund. The benevolent fund is well on its way to our funding goal. Finally, my third goal is to create a Firefighters Ball. We will see how that happens in the future.

Give us an example of your typical workday.

Most of my day is focused on work and community service; but I also spend a lot of time keeping track of everyone in my family. For example, I speak to my sister every day. And even though I moved away from home, I tend to be the family hub.

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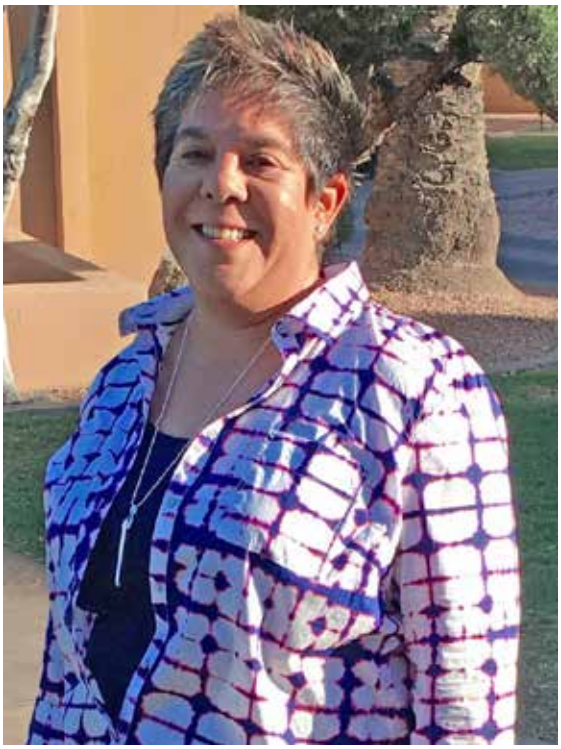

Monica Pacheco graduated from Willamette University College of Law in 2006. She is a partner at Douglas, Conroyd, Gibb & Pacheco, P.C. in Salem. Her practice concentrates on estate planning and elder law, particularly as it relates to Medicaid, VA, and disability planning.

Monica Pacheco

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A typical workday now is different from what it used to be. A typical day in the office consists of maintaining client appointments and work, as well as administrative matters for our office. I generally see three or four clients per day during the first part of the week. The last two days of the week are reserved for me to work on my projects and any emergencies that arise. Of course, if it's quiet on those last two days, there is a chance I might catch a nap or head out of town early for the weekend.

A typical workday at home can include two or three phone and Zoom conferences with clients, other attorneys, and the courts. Of course, most days there is a more relaxed feel at home, so the tempo of work is different. I find myself working on larger projects from home.

Tell us what diversity, equity, and inclusion (DEI) mean to you and why it is important.

DEI includes a host of different communities. It isn't just race. It includes gender, sexual orientation, socio-economic differences, religion, etc.

It is important to me because until there is a melting pot at the top we will always struggle with inequality. When I entered first grade I spoke Spanish. The school assumed I needed help because of language and suggested I take remedial classes. My parents fought the school because they knew I would be fine. In high school, I went to a public magnet school for gifted and talented students. Other students—and even some teachers—assumed I was there to fill a quota.

I've had to claw my way up (except in my fairy tale job) because people with power have made assumptions that a female and brown person can't make it. I've had to prove them wrong. If more people at the top who make decisions were from diverse backgrounds, then I think there would be more inclusion.

Describe the DEI issues and/or challenges that you see diverse attorneys in Oregon face.

The Oregon State Bar (OSB) has a really good program called Opportunities for Law in Oregon (OLIO). It helps diverse law students in Oregon get through law school. However, once they start their careers there isn't the same institutional support. Bridging the gap from law school to partnership and higher wages is difficult for many attorneys. And it is especially so for diverse attorneys.

Describe the DEI issues and/or challenges that you see diverse clients face.

People are often afraid of lawyers, like they are afraid of doctors. I think some diverse clients would feel more comfortable with lawyers from similar backgrounds. The shortage of diverse attorneys is simply a barrier for diverse clients.

For example, because I am a lesbian lawyer, that comfort factor is why people in the LGBTQ+ community come to me. It's not because I'm nicer or more welcoming than other attorneys, or that I may have more information specifically for this community. I think they reach out to me because they feel like I will be able to understand and connect with them. They expect to encounter no judgment (which they don't), so they seek out similarities.

Also, language barriers are a huge issue for some communities. I was invited by the Salem Keizer School District to speak to families about guardianship and conservatorship for disabled individuals about to become adults. The primary language for a majority of the families was Spanish. The families didn't know there was legal help for them. And that's because English was not their primary language.

Tell us a tip or best practice to help fellow practitioners better serve diverse clients.

Make a connection. If you find that you aren't able to connect with certain communities, then challenge yourself and broaden your horizons. ■

Professional Opportunity

Edgel Law Group
Elder Law Associate Attorney

West Linn elder law and estate planning firm is seeking an associate attorney with at least two years of experience in guardianship/conservatorship proceedings, probate and trust administration, and estate planning. Experience in planning and administering taxable estates is preferred. The successful candidate will possess excellent writing skills, a strong work ethic, and proficiency with Microsoft Office. S/he will also be eager to join a fast-paced office that prides itself on delivering high quality, efficient service. Competitive salary, benefits, and partnership opportunity. Qualified candidates should submit a cover letter and resume to the office manager at tony@edgellaw.com.

Elder Law Section 2021 Annual Report

By Julie Meyer Rowett, 2021 Executive Committee Chair

Julie Meyer Rowett is an attorney with Oregon Elder Law in Portland.

The Elder Law Section had a busy and productive year.

Committees

CLE Planning Committee

The committee provided outstanding educational opportunities, including a new summer series and the annual fall CLE program. The CLE Committee is also implementing a new January CLE program. On January 28 "Medicaid Boot Camp" will focus on the practicalities of assisting clients with the Medicaid application process, from beginning to end.

Newsletter Committee

The committee publishes a quarterly newsletter. In collaboration with the Diversity, Equity and Inclusion committee, a new feature was added that will highlight and interview attorneys from all backgrounds and experiences.

Diversity Equity and Inclusion Committee

The committee assists the Newsletter Committee with interviews. It is also exploring opportunities for promotion of the Elder Law Section to a broad and diverse cross section of new attorneys. As our population ages, the demand for elder law attorneys is only going to grow. The Elder Law Section is doing important work in encouraging members and offering outstanding education opportunities to our members.

Legislative Committee

The committee monitors statute and rule changes that may affect our Section. As needed, comments and feedback are provided for proposed rule changes or statutory changes.

Budget

The Section had an ending balance as of November 30, 2021, of $13,468. The executive committee approved an increase of $5 for the 2022 section dues.

2022 Executive Committee

The Section elected the following officers and Executive Committee members for 2022:

Officers

Chair: Anastasia Yu Meisner
Chair Elect: Julie Nimnicht
Past-Chair: Julie Meyer Rowett
Secretary: Alana J. Hawkins
Treasurer: Christopher D. Hamilton

Members at Large

Darin J. Dooley • Corey P. Driscoll
Kathryn Gapinski • Brian Haggerty
Christian Hale • Theressa Hollis
Kay Hyde-Patton • Garvin Reiter
Rachele Selvig • John F. Shickich

Introducing the new members of the Executive Committee

Garvin Reiter
Garvin is a partner with the Law Offices of Nay & Friedenberg in Portlnd. He has specialized in the many aspects of elder law for more than 20 years and has been designated as a Certified Elder Law Attorney by the National Elder Law Foundation.

Rachele R. Selvig
Rachele is an attorney with the Ashland firm Davis, Hearn, Anderson & Turner. Her practice includes estate planning, guardianships and conservatorships, trusts and wills litigation, probate, real estate, and business transactions, as well as civil litigation and appeals in state and federal courts.

Elder Law Section CLE Program

Medicaid Boot Camp

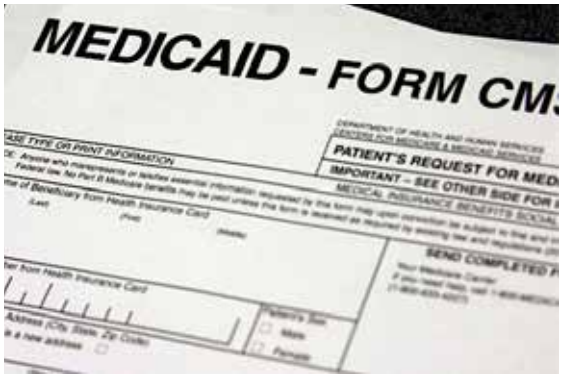
Friday, January 28, 2022

Morning session: 9:00 AM to 12:15 PM

Afternoon session: 1:00 PM to 3:35 PM

Live Webcast

CLE credits: 3 Practical Skills; 2.5 Practical Skills



This two-part series will delve into Medicaid topics essential for your clients. The morning workshop is geared toward those who are new to elder law and will cover Medicaid client consulting, including calculations, practicality of the plan, and spend-down options.

The afternoon workshop will build upon the skills learned from the morning session and will cover the Medicaid application itself as well as communications with DHS and the client, Income Cap Trust Schedule B calculations, and updates to Medicaid policy.

Program Schedule

9:00 AM–12:15 PM
A Client Walks into Your Office, Then What?
Consultation Phase

- Considerations
- Calculations (CSRA, CSIA, etc.)
- Practicality of the plan
- Spend-down options

Megan Fuhrer, Wy'East Law LLC, Portland
Rebecca Kueny, Kueny Law LLC, Salem

1:00 PM–3:15 PM:
Medicaid Application—Workshop

- Initiating with DHS
- The application itself
- Communication with DHS and the client
- Income Cap Trust (ICT) Schedule B calculations
- Practical approaches
- Appeals and denials

3:30–3:45 PM
Updates to Medicaid Policy

Moderator: Rebecca Kueny, Kueny Law LLC, Salem
Alana Hawkins, Kueny Law LLC, Salem
Julie Meyer Rowett, Yazzolino & Rowett LLP, Portland
Jennifer Trundy, Rose Elder Law LLC, Lake Oswego

Individual seminar prices:
$90 ONLD member
$105 Elder Law Section member
$115 OSB member
$125 Non-OSB member
Register for the full day and save up to $75:
$110 ONLD member
$140 Elder Law Section member $160 OSB member
$175 Non-OSB member

Download brochure https://www.osbar.org/cle/2022/ELD22.pdf

Register for morning session: https://ebiz.osbar.org/ebusiness/Meetings/Meeting.aspx?ID=4814

Register for afternoon session: https://ebiz.osbar.org/ebusiness/Meetings/Meeting.aspx?ID=4815

Register for both sessions: https://ebiz.osbar.org/ebusiness/ProductCatalog/Product.aspx?ID=4816

Planning Committee:

Megan Fuhrer, Wy'East Law LLC, Portland
Kathryn Gapinski, Gapinski Law LLC, Portland
Rebecca Kueny, Kueny Law LLC, Salem
S. Jane Patterson, Patterson Smith PC, Gresham
Kay Hyde-Patton, Leahy Cox LLP, Springfield
Julie Meyer Rowett, Yazzolino & Rowett LLP, Portland
John Shickich, The Pixton Law Group, Lake Oswego
Mark Williams, Jordan & Williams, Junction City

Important elder law numbers

as of
January 1, 2022

Supplemental Security Income (SSI) Benefit Standards	Eligible individual ..... $841/month Eligible couple $1,261/month
Medicaid (Oregon)	Asset limit for Medicaid recipient ..... $2,000 Burial account limit ..... $1,500 Long term care income cap ..... $2,523/month Community spouse minimum resource standard ..... $27,480 Community spouse maximum resource standard ..... $137,400 Community spouse minimum and maximum monthly allowance standards ..... $2,177/month; $3,435/month Excess shelter allowance ..... Amount above $653.25/month SNAP utility allowance used to figure excess shelter allowance ..... $450/month Personal needs allowance in nursing home ..... $68.77/month Personal needs allowance in community-based care ..... $187/month Room & board rate for community-based care facilities ..... $654/month OSIP maintenance standard for person receiving in-home services ..... $1,341/SSI only $863 Average private pay rate for calculating ineligibility for applications made on or after October 1, 2020 ..... $9,551/month
Medicare	Part B premium ..... $170.10/month* Part D premium ..... Varies according to plan chosen Part B deductible ..... $233/year Part A hospital deductible per spell of illness ..... $1,556 Skilled nursing facility co-insurance for days 21–100 ..... $194.50/day

* Premiums are higher if annual income is more than $91,000 (single filer) or $182,000 (married couple filing jointly).

Oregon State Bar Elder Law Section

Newsletter Committee

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

Editor:
Carole Barkley ..... carole424@aol.com; 503.224.0098

Committee Members:
Julie Nimnicht, Chair ..... julie@elderlawpdx.com; 503.548.4000
Darin Dooley ..... darin@draneaslaw.com; 503.496.5500
Brian Haggerty ..... bhaggerty@newportlaw.com; 541.265.8888
Alana Hawkins ..... alana@kuenylaw.com; 503.949.6703
Theressa Hollis ..... TheressaH@Fitzwaterlaw.com; 503.786.8191
Leslie Kay ..... leskayvida@gmail.com; 503.333.3005
Monica Pacheco ..... monica@dcm-law.com; 503.364.7000