Oregon State Bar

Elder Law Newsletter

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Former clients and conflicts of interest

By Elizabeth Jessop, Attorney at Law

In an elder law practice, it is not uncommon to be contacted by a family member of a former client once that client has become incapacitated. The family member is often looking for legal advice or assistance related to your former client's matter. This article discusses the issues raised in these situations by analyzing two hypotheticals.

Hypothetical #1

Several years ago, you prepared an estate plan for a client, including an advance directive, power of attorney, and will. The former client's adult child, who is the health care representative and agent under power of attorney you prepared, has now contacted you because a doctor said it is no longer safe for your former client to live alone at home due to advanced dementia. They tell you your former client does not want to hire in-home caregivers and refuses to voluntarily to move out of the home into a facility. They ask you for advice.

The Oregon Rules of Professional Conduct (ORPC) define your duties to your former clients. According to ORPC 1.9:

> "a lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless each affected client gives informed consent, confirmed in writing."

Here, the adult child is asking for advice related to their role as agent and health care representative, and they have conveyed that your former client does not agree with the options proposed. In this situation, it is not advisable to counsel the adult child because you would be giving advice that appears to be counter to the expressed wishes of your former client.

ORPC 1.9 does state that the conflict can be overcome if both your former client and the adult child give informed consent. If you want to explore this route, you could try to obtain informed consent from your former client. Informed consent requires that you communicate "adequate information and explanation about the material risks of and reasonable available alternatives to the proposed course of conduct." ORPC 1.0(g). The consent must be confirmed in writing.

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While you are always to assume that your former client has capacity, ORPC 1.14, Client with Diminished Capacity, is the rule to consult in this situation. That rule states at 1.14(a) that you, as far as reasonably possible, are to maintain a normal client-lawyer relationship with the client. This would include maintaining confidentiality, remaining loyal to your client, and all other duties you have to clients in general. For an overview of the ethical issues involved in working with clients with diminished capacity, see the May 2004 Oregon State Bar Bulletin article entitled "Impaired Clients," by Helen Hierschbiel: https://www.osbar.org/publications/bulletin/04may/bar-counsel.html.

You can take into consideration the medical provider's diagnosis and professional opinion on your former client's capacity. You may conclude that your former client is unable to currently give informed consent to your representation of their adult child, and therefore you are unable to provide advice.

Could you have obtained your client's informed consent during the initial representation? Nothing in the ORPCs prohibits the waiver of a future conflict. See also OSB Formal Ethics Op No 2005-122: https://www.osbar.org/_docs/ethics/2005-122.pdf. However, for the waiver to be effective, it must have dealt with the issues that are now presented. A general or non-specific waiver is not adequate. Future conflict waivers are discussed in detail in ABA Model Rule 1.7, comment 22: https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_7_conflict_of_interest_current_clients/comment_on_rule_1_7/.

If you determine that your former client is incapacitated, can you take any action to protect them? ORPC 1.14(b) states that if you reasonably believe that the client has diminished capacity, is at risk of substantial physical, financial, or other harm unless action is taken, and the client cannot act in their own interest, then you may take action to protect the client. This can include seeking the appointment of a guardian or conservator, so long as this is the least restrictive protective action and is the only remaining option. See OSB Formal Op. No. 2005-41: https://www.osbar.org/_docs/ethics/2005-41.pdf.

While you can be the petitioner who requests the appointment of a fiduciary, you may not represent a third party who is petitioning for appointment of the guardian or conservator. *In re Snell*, 15 DB Rptr 166 (2001): https://www.osbar.org/_docs/dbreport/dbr15.pdf.

Whether you could obtain the former client's informed consent to represent a third party for the appointment is a topic for debate. There are non-waivable conflicts, and the imposition of guardianship does restrict an individual's rights. Due to the significant liberty issues involved, I would err on the side of this being a non-waivable conflict.

Due to the conflict of interest in this hypothetical, could you give the adult child any information? Regarding revealing information and client confidences, you still have the duty of confidentiality. However, ORCP 1.14(c) states that you can reveal information, but only to the extent reasonably necessary to protect the client's interests. In my own practice, I have added a disclosure statement as part of the representation agreement for estate planning:

> *To best serve your interests upon disability or death, you may want to authorize us to disclose information to your nominated personal representatives, agents, health care representatives, and trustees. By signing this agreement, you agree that we may disclose information to those persons or entities that you name in your estate planning documents as your fiduciaries, which includes your personal representatives, agents, health care representatives, and trustees, in the event of your disability or your death. In every instance, we will only divulge the*

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absolute minimum amount of information required. You can revoke this portion of our agreement at any time by written notification to our office.

Hypothetical #2

Several years ago, you prepared an estate plan for a married couple. At that time, both spouses were healthy and living together in their home. Spouse No. 1 is now in memory care, while Spouse No. 2 still resides at home. Spouse No. 2 contacts you to discuss the situation.

As before, you look to ORPC 1.9 for the rules related to a conflict of interest between a current and a former client. You would consider whether the requests of the current client, Spouse No. 2, are materially adverse to the interests of Spouse No. 1. If Spouse No. 2 wishes to update choice of fiduciary due to the incapacity of Spouse No. 1, the interests of the two parties do not appear to be materially adverse and there is no conflict. But what if Spouse No. 2 wants your assistance with Medicaid planning?

Medicaid planning generally involves transferring assets from the ill spouse to the healthy one, in order to maximize the assets for the healthy spouse. For these kinds of transfers, Spouse No. 2 will generally be acting in a fiduciary capacity, according to their authority under the estate plan. By transferring assets to Spouse No. 2, you are impoverishing Spouse No. 1 with the result that they no longer have any funds for their care needs and nothing in the future will pass according to their estate plan. The current client and former client may have materially adverse interests at this point.

If Spouse No. 1 still had capacity, you could obtain informed consent from the parties. The discussion in hypothetical #1 about dealing with a client with diminished capacity applies. Because Spouse No. 1 is in memory care, it is unlikely in this scenario that they can waive any conflict of interest.

What if you prepared the clients' original documents with Medicaid planning in mind, and the estate planning documents clearly give the healthy spouse the authority to transfer funds away from the ill spouse? What did you and your clients discuss in relation to these provisions related to Medicaid planning? Did you have your clients sign a conflict waiver related to future Medicaid planning and the representation of the healthy spouse in a fiduciary role? A thorough review of ABA Model Rule 1.7, comment 22 could help you determine whether the documentation in your file is sufficient for the purposes of informed consent.

In the situation raised by hypothetical #2, many elder law attorneys refer Spouse No. 2 to another lawyer for Medicaid planning. A referral to another law office errs on the side of caution as far as conflicts of interest are concerned. For an example of what the Oregon State Bar considers an inadequate waiver of a conflict of interest involving a married couple and elder law issues, you can review the Elder Law Newsletter from Summer 2002, at page 12: (https://elderlaw.osbar.org/files/2016/05/elder_sum02.pdf). In that issue, elder law attorney Mark Williams shared a letter of admonition he received from the Oregon State Bar Professional Responsibility Board, relating to his continuing representation of an incapacitated spouse. Altough Mr. Williams had obtained the written informed consent of the healthy spouse to continue to represent the ill spouse, he only obtained oral consent to the representation from the ill spouse. This failure to obtain written informed consent resulted in the admonition.

In conclusion

When your former client has diminished capacity, determining whether you can disclose information to a family member, represent another family member, or continue to represent a healthy spouse involves careful consideration of the ORPC rules relating to conflicts of interest.

If you wish to obtain a former client's informed consent, or if you wish to have a client sign a future waiver, it is critical to be detailed and specific in regard to current or foreseeable future material risks and adverse consequences.

A general or open-ended consent will not be effective. And any informed consent must be confirmed in writing. ■

Attorney and fiduciary fees within a court proceeding and the ethical duties when Medicaid is involved

By Rebecca Kueny, Attorney at Law

Rebecca Kueny is an attorney with Kueny Law LLC, in Salem. She represents clients in estate planning, guardianships and conservatorships, Medicaid and VA long-term care planning, special-needs trust planning, probates, and administration of trusts. She is accredited with the Veterans Administration and is a member of the Special Needs Alliance.

When a protected person is receiving Medicaid benefits, or will soon be applying for them, an important question that attorneys and/or fiduciaries should often consider is: How do they get paid for their services? In our office, this is a strategic question that looks at assets, timing, goals, anticipated fees and costs, and the needs of the protected person.

Let's start with the basics. ORS 125.095(2)(b) and (c) state that an attorney and/or appointed fiduciary must receive court approval prior to payment of fees from the funds of a protected person. ORS 125.098 defines the factors in determining an award of attorney fees. If you do protective proceedings and do not know these rules, please review them immediately. Some counties consider all attorneys to be subject to this rule if a protected person's funds are involved. For instance, family law, personal injury, or criminal defense attorneys may also be required to request court approval of attorney fees in the protective proceeding prior to being paid. It is our office's practice to have all attorney and fiduciary fees approved by the court, even if the funds are coming from trusts for the benefit of the protected person. That conversation is a whole different newsletter article, because many attorneys handle this differently based on their county's expectations. Bottom line: review and follow ORS 125.095 and ORS 125.098.

In some cases, attorneys and fiduciaries may want to request court approval to set aside funds in a client trust account: an Interest on Lawyers' Trust Account (IOLTA.) When making such a request, our office files the following:

- Motion of conservator for authority and approval; Request for set-aside
- Declaration in support of motion of conservator for authority and approval; Request for set-aside
- Notice of time for objection to motion of conservator for authority and approval; Request for set-aside
- Order approving motion of conservator for authority and approval; Request for set-aside

The request for funds to be set aside and held in an IOLTA is intended to preserve funds for administrative costs, including attorney and fiduciary fees. A party may want to make such a request for any of the following reasons:

- The protected person has minimal assets, such as less than $30,000
- The protected person is about to apply for Medicaid benefits and needs to spend down funds, but the attorney and/or fiduciary wants to ensure payment of fees
- The protected person is on Medicaid benefits and receiving a one-time lump-sum payment that needs to be spent down to continue on benefits, but the funds could be used to ensure payment of attorney and/or fiduciary fees in the future

Based on our office's experience, the Oregon Department of Human Services (DHS) has always honored the set-aside funds as part of the spend down, so long as the funds cannot be spent without court order. It is our practice to always provide notice to DHS as an interested party, even if the protected person is not yet on Medicaid benefits.

Declaration in support of motion of conservator for authority and approval; Request for set-aside

The factors and analysis of the need for funds to be set aside can be laid out for the court. Some factors for the court to consider include:

- The need for funds to be set aside to ensure payment of administrative expenses and as a condition for continuing to provide attorney and/or fiduciary services in the protective proceeding
- The limited assets that protected person owns to continue to pay for future administrative expenses

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Attorney and fiduciary fees *Continued from page 4*

- The protected person's need for high-cost care, because of which the protected person will likely run out of funds and be placed on Medicaid benefits. The set-aside requested will be used as part of the spend-down for Medicaid benefits
- The protected person's age and life expectancy, diagnosed and/or according to the Social Security Administration actuarial life table
- The protected person's limited income, most of which will be used to pay for care per Medicaid rules
- The calculation that the protected person's cost of care will deplete assets within a specified time frame, thus requiring the need to set aside funds

Further points to present to the court

The nature of the requested payment to attorneys and/or fiduciaries would be the same as payment to any other creditor who required payment of a deposit or retainer before agreeing to provide, or continue to provide, services. As with any similar deposit or retainer, the funds from the payment would belong to the IOLTA, subject to the protected person's right to a refund of any unused portion of these funds after payment of all administrative expenses approved by the court in the proceeding.

The deposited funds would be held in the IOLTA. The funds would only be disbursed for administrative expenses as approved by the court. It is anticipated that the deposited funds would be used to pay administrative expenses only after there are no other funds available in the protective proceeding to pay these administrative expenses—although that would not be a prerequisite for using the deposited funds.

Upon the death of the protected person, any set-aside funds remaining in the IOLTA after attorney fees and administrative costs have been paid, the claim of the Oregon Estate Recovery Unit would have priority.

The amount requested for payment is based upon the amount of work that has been expended thus far in the protective proceeding, the amount of work that is anticipated for the future, the size of the conservatorship estate, and the total value of the estate.

Cite the current fees of the attorney and/or fiduciary.

Relevant Oregon statutes to cite

- ORS 125.095(1) provides that funds of the Protected Person may be used to pay reasonable compensation to a fiduciary or attorney who provides services in the protective proceeding.
- ORS 125.095(2), subject to 125.495 payment of claims against a protected person, requires that the court approval be obtained before compensation can be paid to a fiduciary or a fiduciary's attorney.
- ORS 125.425 (3) provides that a fiduciary may pay any person in advance for expenses for the benefit of a protected person if the conservator believes that the services will be performed and if advance payments are customary or reasonably necessary under the circumstances.
- ORS 125.450 provides that any transaction that is affected by a substantial conflict of interest is voidable unless the transaction is approved by the court.

Relevant case law

In 2010, the Oregon Court of Appeals made an important decision on this matter in *Robert Dorszynski v. Department of Human Services*. In *Dorszynski*, a court-appointed fiduciary deposited funds into the IOLTA from a lump-sum payment received by a protected person. This deposit into the IOLTA was done without court approval.

DHS claimed that the set-aside funds in the IOLTA were countable resources under OAR 461-140-0020(2)(a). Specifically, DHS claimed that under Medicaid rules the set-aside funds in the IOLTA were countable resources because the set-aside was available if the "client has a legal interest in the resource" and "the client is able to gain possession of it." Here, DHS argued that funds were deposited without court order and thus were refundable to the Medicaid recipient upon demand. The Court of Appeals ruled that under OAR 461-140-0020(2)(a), the IOLTA funds are available if not deposited under court order. The Court of Appeals went on to say that the payment of fiduciary fees is required by court order under ORS 125.095 (3). Lastly, the court cited ORPC 1.15-1, which states that a "lawyer shall promptly deliver funds or other property that the client or third person is entitled to receive."

In conclusion

In short, the request to set aside funds is a helpful way to ensure payment of attorney and fiduciary fees, while also honoring Medicaid rules and keeping Medicaid benefits intact. When requesting a set-aside, make sure to review the statutes and rules cited within this article to ensure that all parties are protected. If there is a court accounting required in the proceeding, lawyers should remember to account for the funds in the IOLTA in addition to any other assets requiring an accounting. Finally, these funds should always be reported to DHS for eligibility purposes, but as a non-available asset under OAR 461-140-0020(2). ■

Navigating the maze of ONE

By Julie Meyer Rowett, Attorney at Law

Julie Meyer Rowett is an attorney with Oregon Elder Law in Portland. She started her legal career as a staff attorney at Legal Aid Services of Oregon, where she assisted her clients with maintaining eligibility for essential housing and medical benefits. Working with elders on Medicaid issues inspired her to further specialize in elder law. Julie's expertise includes estate planning and administration, protective proceedings, special needs planning, Medicaid, and planning for long-term care.

Since its rollout in early 2021, ONE—the new online application for Medicaid—has fundamentally changed how clients and lawyers apply for long-term care benefits. The dramatic changes have resulted in widespread delays, headaches, and improper denials of benefits. Due to the systemic issues with ONE, it has become increasingly important that elder law attorneys be involved in and directly assist with Medicaid applications. This article is intended to provide guidance on how best to navigate this new application process. However, please read this with the understanding that best practices are constantly evolving as we try to find the most efficient way to process Medicaid applications. I do not pretend to have all the answers or even the best practices. What I can share is what I have learned since 2021 and how my practices are evolving to best address some of the challenges presented by ONE. With that disclaimer, we can walk through a Medicaid application from beginning to end.

The process

The very first step the client or attorney must take is the initiation of the Medicaid application. Ostensibly, ONE allows a client to apply in person by written application, online, or by telephone. The initial contact with Medicaid is referred to as the "date of contact." OAR 461-115-0030 defines date of contact as one of the following:

- The date the individual reports a change requiring a redetermination of eligibility
- The date the Department of Human Services initiates a review, or
- The date the individual establishes a "date of request" by contacting the Department orally or in writing or by submitting an application

Before ONE, I would ask clients to initiate the application by calling the county screening line. Since ONE, I have evolved my practice to always initiate the application. I document the date of the call as well as the content of the message.

In early 2021, I attempted to initiate the application with an online application through the ONE website. Applications submitted online were either not processed at all, or if processed were done incorrectly. Currently, I *do not* use ONE online. I also no longer use the paper application because I find the new paper application overly complicated. I also do not use the statewide hotline to initiate an application. Wait times often exceed one hour.

My new standard practice is to call the local office and leave a message with my client's name, Social Security number, and date of birth—stating that I am calling to initiate an application for long-term care Medicaid benefit. Some counties, including Multnomah County, have dedicated screening lines. Smaller counties do not necessarily have screening lines. After leaving a message, you should receive a callback in 24 to 48 hours. We are observing an improvement in returned calls, but it is not universal. If you do not receive a callback in 24 to 48 hours you will have to call again.

If you, or your client, do not receive a callback after the initial contact, you can contact Bill Brautigam (bill.h.brautigam@dhsoha.state.or.us) or Nate Singer (Nathan.m.singer@dhsoha.state.or.us) about the matter. Recently, Amber Kelsall from Senator Merkley's office has reached out to offer assistance with ONE issues. Her direct line is 503.326.2900. Her email is amber_kelsall@merkley.senate.gov.

The initial callback is from a scheduler to establish a time for the financial interview. I participate in the financial interview. I ask the screener to call my office and then include my client in a conference call. Interview times vary from fifteen minutes to 1.5 hours. This depends on the skill and expertise of the eligibility worker. I always obtain the screener's email address and email any follow-up documentation post-interview. Ideally, the worker takes the

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ONE

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The most common issue is a client minimizing care needs, which results in an improper denial.

relevant information and inputs the data into ONE after the interview.

Currently, Medicaid assigns a different eligibility worker to conduct the functional assessment. This is the assessment that reviews activities of daily living and assigns a service priority level. Anecdotally, I am hearing about improper denials based on an incomplete interview. If there is any question about eligibility or about the number of in-home hours assigned for a home-based plan, consider attending this interview. The most common issue is a client minimizing care needs, which results in an improper denial. Many counties are behind on this portion of the application.

After the interview, documents necessary to complete the application must be provided to the eligibility worker. Previously, if the attorney or client did not provide adequate information, we could reliably count on a "Notification of Pending Action." This was a notice that listed the specific documents needed and a deadline to submit them. These notifications were helpful in clearly identifying our client's remaining obligations to finish an application. Since ONE, I have not observed reliable notifications. Instead, the burden has shifted to the attorney to calendar cases and follow up with workers on the opening of a Medicaid case.

If a worker fails to respond, the best practice is first to email the manager. If you are unable to locate a manager email, then Bill Brautigam would be an appropriate contact. I do not recommend calling and leaving a message. Calls are not reliably logged in ONE and do not create an adequate record. Instead, touching base with the workers should be done by email.

If the Oregon Health Authority (OHA) fails to timely process the application, a request for administrative hearing for failure to process the application is appropriate. Because the application is incomplete, OHA will send the case back to the local office with instructions to process the application. The form to request a hearing is DHS 0443 and can be found easily online. The claimant or the attorney for the claimant can sign the request for administrative hearing. Once signed, it should be sent to the local office for processing. I often send the request for hearing by email, postal mail, and FAX, and then follow up with the eligibility worker to confirm that the local office has forwarded it for processing.

Although frustrating at times, assisting our clients with Medicaid applications has never been more important. It is imperative that we continue to press OHA to properly and timely process our clients' applications. ■

CLE Seminars

Demystifying Pro Bono

Tuesday, October 25, 2022
1:00p–2:30 p.m.
Remote attendance via Zoom

The Multnomah Bar Association Solo & Small Firm Committee is partnering with Oregon State Bar Referral Services, Legal Aid Services of Oregon, St. Andrew Legal Clinic, Habitat for Humanity, and the Victim Rights Law Center to bring you a CLE that offers practical advice about how to add pro bono opportunities to your practice. Speakers will offer some little-known but valuable tips about pro bono resources. In breakout sessions you can learn about specific opportunities to volunteer in different practice areas. Free. Register at https://mbabar.org/calendar/2022-10-25/mba-solo-small-firm-workshop--demystifying-pro-bono.html.

Overview of Oregon's Elder Persons and Persons with Disabilities Prevention Act Protective Order

Tuesday, November 8, 2022
12:00-1:30 p.m.
Remote attendance via Zoom

Join the Oregon Law Center and Legal Aid Services of Oregon's Domestic Violence Project for a training, in which attorneys Debra Dority and Trena Klohe will present an overview of the statute and recent case law decisions.
To register and submit questions for the presenters, email brett.cattani@lasoregon.org.

Guardianship and Conservatorship

Friday, February 3, 2023
Details TBA

Long term care insurance: Advising clients who have policies

By Cynthia Barrett, Attorney at Law

Cynthia Barrett is a retired Portland elder law attorney. She is a volunteer with Oregon's SHIBA program, which provides health insurance counseling statewide on Medicare, health insurance issues, and long-term care.

When significant premium increases for long term care insurance (LTCI) policies are presented to state regulators for approval, regulators are likely to approve the rate increases to keep the insurer's block of business stable. But the regulators will concurrently mandate that the insurer include reduced-benefit options (RBOs) in a rate increase notice. Without RBOs, policy holders who cannot afford the higher premiums might just drop the policy. How is a consumer to weigh the pros and cons of keeping an existing long term care insurance policy and paying the higher premiums, or accepting a reduced-benefit option?

Sources of helpful information.

The National Association of Insurance Commissioners (NAIC) and individual state insurance commissioners created a LTCI task force charged with improving consumer options and guiding regulatory oversight. In late 2020, its task force adopted guidelines regarding RBOs associated with LTCI rate increases. The document can be downloaded here: https://content.naic.org/sites/default/files/inline-files/Three_RBO_Communication_Principles_Adopted_TPR.pdf

Although the NAIC guidance does not have the force of law, it does outline what the consumer needs to know to evaluate keeping the policy as is (and paying the higher premiums) or choosing a particular RBO.

If clients call about an LTCI rate increase notice, you can use the NAIC guiding principles during a consultation (or just give the document to the client as a resource). However, many clients will not think to call a lawyer about the rate increase and reduced benefit options, so preparing a client-friendly article about the issue for the firm's website or newsletter is a good client-outreach option.

In November 2021, the NAIC Task force adopted "Checklist for Premium Increase Communications" to guide both insurers and regulators. It can be downloaded here: https://content.naic.org/sites/default/files/inline-files/LTC%28EX%29TF_RBO_Communication_Checklist_11.19.21%20final.docx.

This checklist makes both technical and substantive suggestions to insurers, and is a good compendium on what might be in a consumer-friendly rate increase letter. Most insurers will NOT prepare rate increase/RBO notices to the NAIC's standard, but a lawyer who uses the NAIC Checklist will be able to make more sense of the client's policy options.

Oregon's Department of Financial Regulation (DFR) has online information about LTCI rate increases and RBOs at https://dfr.oregon.gov/insure/health/long-term-care/Pages/long-term-care-rate-review.aspx.

Washington's Insurance Commissioner website also has information for consumers facing long term care insurance premium increases.

Your client's options

Before making any decisions, the consumer can try to reach out to the insurance company or agent to discuss the options. These are the usual choices:

- The policy holder can pay the price increase and keep the original policy.
- The policy holder can cancel the policy and thus lose all benefits of the policy.
- The policy holder can accept reduced benefits offered by the insurer.

What to do if the increase is more than the policy holder can afford?

Depending on the amount of the increase, your client may have several options:

- Reduce the daily benefit. Coverage does not end, and the client keeps some of the benefit of the policy. If

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LTC insurance

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Neither Oregon nor Washington regulators are prepared to advise individual consumers how to weigh the reduced-benefit options. Therefore, clients who want help with their decision may reach out to their elder law attorneys.

the client has high income (from pensions and Social Security), this lower daily benefit option may make sense.

- Reduce the benefit period duration. For example, decrease the period from five years to two. If the client is already frail and would likely die before the two years end, then this reduced duration period option may make sense.
- Increase the elimination period, say from 30 days to 180 days. This delay in starting policy payout may make sense if the client has sufficient funds (from both savings and income) to pay for six months of needed care.
- Reduce the amount of optional inflation protection.
- Choose the contingent non-forfeiture option. This option allows one to keep the policy in force and stop paying premiums. Coverage does not end, and the company provides benefits for qualified long term care services covered under the policy—generally equivalent to the premiums paid.
- Cash out the policy and get a refund of some or all of the premiums paid.

Unfortunately, neither Oregon nor Washington regulators are prepared to advise individual consumers how to weigh the reduced-benefit options. Therefore, clients who want help with their decision may reach out to their elder law attorneys.

No consumer information online, for example, appears to discuss how the consumer can evaluate a reduced-benefit option which removes the inflation protection that permits a policy to qualify under Oregon and federal law as a "partnership policy." These policies permit asset protection from estate recovery should the insured ever need help from the state long term care Medicaid program.

OAR 836-052-0531 (6) requires the insurer to inform the policy holder about the consequences of changing the inflation protection:

"When an insurer is made aware that a policyholder has initiated action that will result in the loss of partnership status, the insurer shall provide an explanation of how such action impacts the insured in writing. The policyholder shall also be advised how to retain partnership status if retention is possible. If a partnership policy subsequently loses partnership status, the insurer shall explain to the policyholder in writing the reason for the loss of status."

SHIBA counseling

One source of consumer help may be your local Senior Health Insurance Benefits Assistance (SHIBA) volunteer. Since 1990, the Centers for Medicare and Medicaid Services (CMS) has funded consumer health insurance advisory services. Federal funds flow to the states, which train volunteers to provide information, counseling, and assistance related to Medicare, Medicaid, and long term care insurance.

In a recent SHIBA counseling case, the consumer's monthly premium was doubling to $290 per month. The company rate increase notice said she could pay the increased premium to keep the policy as issued, or select from an array of reduced benefit options.

SHIBA counseling for her situation included the pros and cons of the following:

- Keep existing policy and double her premium to $290/month
- Policy buyback: return of all premiums paid and cancellation of contract
- Reduce inflation rate from 5% to 0.20%, lowering her premium
- Reduce lifetime maximum benefit from current $360,993 to $300,828 (+no inflation feature), lowering her premium
- Reduce lifetime maximum benefit from current $360,993 to $150,000 (+ no inflation feature), lowering her premium

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LTC insurance

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Your intake process should include asking the client to bring in an existing long term care insurance policy for review.

Significant considerations were the client's age, health condition, need for long term care, and of course her ability to afford the doubling of her policy premium. Evaluating the options is time consuming, but with the SHIBA counselor the consumer can eventually work through the relevant considerations and decide whether to keep the policy and pay the increased premium or accept one of the reduced-benefit options.

Multnomah County SHIBA volunteer Cynthia Chilton described situations in which a lawyer might refer a client to the SHIBA program for a counseling appointment:

> "If a client mistakenly assumes that Medicare will cover long term care or needs help with the magnitude of a premium rate increase notice or wants help understanding how the policy works with reduced benefit options, call the state SHIBA office: 800.722,4134. We provide education, and we are not selling anything."

Planning engagements and long term care insurance

In planning engagements—sometimes estate-focus, sometimes care cost/Medicaid focus—your intake process should include asking the client to bring in an existing long term care insurance policy for review. If the client accepted a reduced benefit-option rather than a premium increase, ask for that paperwork as well.

When a client brings in a long term care insurance policy, ask:

a. Is the policy in force? The quickest way to find out is to look at payment history and any recent billing or rate increase notices. How are premiums paid—EFT or by mailed check or automatic withdrawal from a separate annuity or investment account held by the issuing company?

b. Who is the person designated to receive notice before lapse for nonpayment of premiums?

c. Have the policy terms changed over time because the client selected a reduced benefit option rather than a premium rate increase?

d. What insurer forms allow a family member or fiduciary to help file and manage claims if the client is ill?

e. How does the client initiate a claim?

f. What is the current monthly or daily benefit?

g. Is the policy a "partnership policy" under OAR 836-052-0531, protecting some assets from Medicaid spend-down and estate recovery? Look for issuance after 2008 and inflation protection features and compare policy to the OAR requirements. ■

Coming in February: Purchasing a long term care insurance policy.

Professional Opportunity

Beaverton area small firm has an immediate opening for a part-time associate.

Some experience in guardian/conservatorship and probate is required.

Partial in-office and part remote.

Possibility of practice transition.

Send cover letter and resume to westsideattyresume@gmail.com.

No calls, no recruiting/employment agencies.

Residency requirement for medical aid in dying now unenforced under specific conditions

By Kevin Díaz, Attorney at Law

Kevin Díaz is the chief legal advocacy officer and general counsel for Compassion & Choices. His work focuses on improving healthcare and expanding choice for the end of life throughout the United States. Previously Díaz served as the legal director for the American Civil Liberties Union of Oregon.

On March 28, 2022, the parties in a federal lawsuit reached a settlement not to enforce the residency requirement of Oregon's Death with Dignity Act (the Act). Because of this settlement, the Oregon Health Authority (OHA), Oregon Medical Board, and Multnomah County District Attorney will not enforce the residency restriction. The OHA will initiate a legislative request to permanently remove the residency restriction from the statute in the forthcoming legislative session. Out-of-state residents may now seek care under the Act but should take care to do so consistent with the terms of the settlement.

What is medical aid in dying?

The Act authorizes and regulates medical aid in dying, the process by which a terminally ill, mentally competent adult with a prognosis of six months or less to live may lawfully request, be evaluated, and ultimately be written a prescription from their doctor for medication they may opt to self-ingest to hasten their death. Passed by ballot initiative in 1994, the Act also contains language restricting the practice to residents of Oregon.

In *Gideonse v. Brown, et al.*, a Portland physician, Nicholas Gideonse, asserted that he regularly treats patients from Washington State while practicing in Oregon and that medical aid in dying was the only care that he could not provide to these individuals based solely on their residency status. The residency restriction required his Washingtonian patients either to find a new physician during the dying process or to go without the option of medical aid in dying. Dr. Gideonse argued that the residency restriction violated the privileges and immunities clause and the commerce clause of the United States Constitution.

Implications of the settlement agreement for patients

Though the Act's residency requirement remains codified until—at minimum—Oregon's upcoming legislative session, practitioners should feel confident in advising out-of-state patients who seek medical aid in dying that there exists no risk of civil or criminal liability from Oregon authorities if they complete the entire process within Multnomah County. This means that all steps in the somewhat lengthy process must take place while both the patient and healthcare providers authorized under the Act are physically in Multnomah County. This includes all requests, evaluations, writing and filling the prescription, and self-ingestion.

Risk factors outside of Multnomah County

Nonresidents who opt to use medical aid in dying outside of Multnomah County should know the district attorneys presiding in those counties are not bound by the settlement. Although the appetite for prosecuting the use of medical aid in dying in Oregon appears to be slight, practitioners ought to advise their clients of this narrow possibility outside of Multnomah County. Attorneys should consider seeking an advisory opinion from prosecuting authorities outside of Multnomah County before advising non-residents of their risk of prosecution. Practitioners should feel free to contact Compassion & Choices for further assistance with such outreach.

If a non-resident wants to self-ingest in their home state

For those who access medical aid in dying in Oregon, but who reside in a jurisdiction where the practice is also authorized, there is some risk in going through the process—filling a prescription in Oregon, but self-ingesting at their home in Washington State, for example. Arguably, that risk is so low that it would not be a barrier in most people's cost-benefit analysis. California, Colorado, Hawaii, Maine, Montana, New Jersey, New Mexico, Vermont, Washington State, and Washington, D.C., are the other jurisdictions where medical aid in dying has been authorized.

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Medical aid in dying *Continued from page 11*

The most significant risks associated with non-residents accessing medical aid in dying in Oregon arise with the potential application of criminal law of foreign jurisdictions that have not authorized the practice. Many states have statutes specifically criminalizing assisting in a suicide. For example, Idaho's criminal code authorizes injunctive relief to prevent anybody "reasonably believed" to be assisting in the "act or instance of taking one's life." Idaho Code Ann. § 18-4017. Indeed, criminal statutes like the one in Idaho appear to intentionally encompass the practice of medical aid in dying. *Id*. Thus, it is a distinct possibility that a district attorney who is unfriendly to the practice of medical aid in dying, with authority in a jurisdiction that criminalizes assisted suicide—and thereby medical aid in dying—could attempt to apply these laws to an individual helping a friend or family member travel to Oregon to access the option.

Because of the possibility of liability from foreign jurisdictions, these considerations should be discussed with nonresidents considering travel to Oregon to access medical aid in dying.

Advise clients that the protections enumerated by the settlement agreement reached in this case do not extend beyond Oregon. Nonresidents interested in accessing medical aid in dying should be encouraged to complete all portions of the process, from intake appointments to the ingestion of the medical aid in dying medication, in a jurisdiction where the option has been authorized. Individuals who complete any steps of the process out of state add a heightened risk of liability for their physicians and anybody else who assists them with the process

Practitioners should engage an attorney licensed to practice in the foreign jurisdiction in question to determine the applicability of criminal and civil liability for any friends or family members who might assist the terminally ill person outside of Oregon. These attorneys must consider whether the state's courts would have territorial jurisdiction over this conduct. Practitioners must know that states which have adopted the model penal code are likely to have a statute directly addressing whether the state has criminal jurisdiction over conduct legal within the state where it occurred but illegal within the home state. Under § 1.03 of the Model Penal Code such prosecutions would be impermissible. Territorial Applicability, Model Penal Code § 1.03, reads, in pertinent part:

> *(1) Except as otherwise provided in this Section, a person may be convicted under the law of this State of an offense committed by his own conduct or the conduct of another for which he is legally accountable if:*
>
> > *(a) either the conduct that is an element of the offense or the result that is such an element occurs within this State ...*
>
> *(2) Subsection (1)(a) does not apply when either causing a specified result or a purpose to cause or danger of causing such a result is an element of an offense and the result occurs or is designed or likely to occur only in another jurisdiction where the conduct charged would not constitute an offense, unless a legislative purpose plainly appears to declare the conduct criminal regardless of the place of the result.*

Attorneys must also consider whether the state has specific laws that criminalize assisting in a suicide and whether these laws could be applied to this situation.

Oregon law stipulates that use of medical aid in dying shall not affect a person's will, contracts, or insurance policies. Whether this protection applies in a person's home state should be examined.

Also to be considered is the existence of an affirmative defense under federal law in the event of criminal prosecution. The existence of precedent within the jurisdiction on applying the full faith and credit clause and privileges and immunities clause may be instructive in determining the success of raising affirmative constitutional defenses in the event of a criminal prosecution.

Hospice care can help

If possible, it is highly recommended that any patient who will self-ingest in Oregon be enrolled in local hospice care. Doing so helps ensure they receive the care needed during the requisite evaluation and waiting periods and will also help reduce any potential interventions from law enforcement regarding the cause of death.

Ultimately, the ability of terminally ill patients to travel significant distances and to insulate their health-care providers and loved ones from any legal liability by self-ingesting medication away from home creates a significant hurdle that many will not be able to overcome. But for those in adjoining states, the ability to maintain the continuum of care with their existing Oregon physicians is a welcome relief when grappling with end-of-life decisions.

More information

Additional public education materials about residency requirements can be found on the Compassion & Choices website: https://compassionandchoices.org/legal-advocacy/residency-restrictions.

Practitioners are welcome to contact Compassion & Choices attorneys for a free consultation. ■

Update on Long Term Care Ombudsman program

By Fred Steele, Attorney at Law; Director, Office of the Long-Term Care Ombudsman

Individuals who live in licensed long term care facilities are experiencing a new set of challenges coming out of the COVID-19 pandemic. Of most relevance, significant caregiver shortages are leading to increasing resident complaints about the delivery of care and services in nursing homes, assisted living, residential care facilities, and memory care communities throughout Oregon. The Long Term Care Ombudsman continues to support and advocate for the rights of residents in care settings to the greatest degree possible, but additional volunteers are needed.

Long Term Care Ombudsman (LTCO) programs exist throughout the country as a primary source for residents in these settings to call and have their concerns heard, investigated, and addressed. LTCO programs investigate complaints that involve concerns over care, quality of life, dignity, respect, and resident rights.

In Oregon, the LTCO program is built on a foundation of community volunteers who are trained and certified and assigned to care facilities to serve as ombudsmen for the residents. The goal is to ensure quality of care and quality of life for those living and receiving services in these settings. In general, Oregon's LTCO volunteers are the only regular presence in long-term care facilities.

COVID-19 effects on LTCO

Before the pandemic, Oregon's LTCO program averaged more than 1,000 visits to residents in care facilities every month, mostly through our certified ombudsman volunteers. With a commitment of four hours per week, LTCO volunteers generally have an enormously positive impact on the overall environment for those in long term care. Ombudsman volunteers become trusted individuals with whom residents can confidentially share their concerns. Volunteers can then work on behalf of, and at the direction of, residents to address a problem.

However, given the direct effect COVID-19 had on long-term care settings, the ability for community volunteers to regularly visit was dramatically altered. During the initial months of the pandemic, LTCO visits dropped nearly to zero. Until vaccines became available, public health mandates prohibited volunteers from visiting facilities. Program staff were never prohibited from visiting, but LTCO staff only entered care facilities to investigate select complaints. A majority of LTCO work became remote.

Once COVID-19 vaccines became available in early 2021, LTCO visits increased almost immediately—but not to anywhere near the pre-pandemic levels. LTCO visits currently hover around 400 per month. For a number of reasons, many of our community volunteers have not been able to return to the same visitation rates as before the pandemic. A large number of our volunteers are older adults themselves, with their own health concerns and an interest in minimizing their exposure to the virus.

With the drop in visits, the number of complaints addressed has also dropped. Prior to the pandemic, LTCO was handling more than 5,000 complaints annually on behalf of residents in care facilities. Complaints over the past two years have been around 2,700 each year.

Volunteers needed

Over the course of the pandemic, the number of Oregon LTCO volunteers has dropped from approximately 160 to 125. Each lost volunteer results in about 130 residents who do not have a certified ombudsmen they know and trust to hear their concerns. Volunteer recruitment and training has not stopped over the past two years, but, not surprisingly, it has become more difficult to recruit community volunteers to serve in long-term care settings.

Currently, there are facilities all over Oregon without a volunteer ombudsman assigned, leaving many residents without the advocacy they need.

Oregon LTCO seeks dedicated individuals who desire to make a difference, have a caring spirit, and a willingness to learn. The time commitment is four hours per week. Should the elder law community know of individuals who might be seeking meaningful volunteer opportunities, let them know that residents in long-term care settings could benefit if they were to volunteer with LTCO.

Whether to inquire about potentially volunteering or to convey a concern about a resident, LTCO can be reached at 1.800.522.2602, or at oltco.org. ■

Oregon Attorneys with Disabilities Association

The first affinity bar organization in Oregon for attorneys and law students who experience disability

By The Honorable Adrian Lee Brown, Multnomah County Circuit Court Judge

Four Oregon attorneys with different backgrounds and different disabilities met for lunch in the summer of 2019. Each was seeking a place to share their experiences as an attorney with a disability—a place that embraced and fostered disability as a diversity value and a place to join with other attorneys with disabilities to "find a way to get in the way."[1]

The four attorneys—Emily Cooper, Disability Rights Oregon Legal Director; Barbara Diamond, Arbitrator; Miranda Summer, Washington County Circuit Court Judge; and me—knew that establishing a new affinity bar organization for attorneys with disabilities would not be an easy task.

With the personal and professional challenges COVID-19 brought upon us over the past two years, Oregon Attorneys with Disabilities Association (OADA) is still a fledgling organization. We continue working to build a solid foundation from which to grow, keenly aware that we attorneys with disabilities are no strangers to facing and overcoming a range of barriers that still exist today and prevent full integration into the legal community. Indeed, every person with a disability has experienced a common struggle.

Our society—whether in structure, policy, profession, or social construct—was not made to accommodate, let alone embrace, individuals who experience disability. This includes the legal profession. Attorneys and law students experience discrimination at law schools, in the bar exam testing, and Bar admission process, as well as in the legal profession as a whole.[2] Intentionally or unintentionally, continued discrimination furthers the stigma that it's okay not to fully include those of us with disabilities.

A history of discrimination

Examining the long history of discrimination and exclusion of individuals with disabilities from our society is worth one's time to appreciate why integration of individuals with disabilities is a civil right. It also stresses the importance of the establishment of OADA, along with our unofficial motto: "We Exist!"

While educational resources abound about the civil rights history of disability, an easily accessible place to start is the video "The Promise of *Olmstead*: 15 Years Later." It is a tribute to the individuals with disabilities who were isolated in institutions for most or all of their lives, just because they had a disability. The video connects the work of the attorneys who advocated for change, eventually prevailing in a landmark Supreme Court decision, *Olmstead v. L.C., et al.*, 527 U.S. 581 (1999); and the individuals affected by the advocacy efforts of their attorneys. Be ready with tissues—for both tears of sadness at the historical widespread discrimination and tears of joy for the hope of change.

Progress is inconsistent

While the law has progressed in many ways to promote integration of persons with disabilities since *Olmstead*, including the Americans with Disabilities Amendments Act of 2008 (ADAA), the practical application and enforcement is complaint driven. In short, barriers faced long before *Olmstead*, or the ADAA, may continue to exist unless there is a complaint filed (or an entity conducts a self-evaluation and makes modifications to structures for universal accessible design and program access).

Unfortunately, even as lawyers trained in issue spotting, many of us do not recognize what the barriers to access are—whether structural or program access—unless we or someone we love experiences disability. Thus, people with disabilities must "find a way to get in the way," to make it known that we exist.

When structures, programs, and policies are modified to accommodate and embrace those with disabilities, the benefit is universal. A common example of the benefit of universal design is accessibility ramps, either in addition to or in replacement of steps. Certainly a person who uses a wheelchair will now have access to entering a structure via the ramp (assuming the ramp meets

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Even when there is an acknowledgement of access for persons with disabilities, it often comes with the continuation of stigma against full and equitable inclusion.

design standards for accessibility). In addition, all individuals with mobility limitations will face less of a barrier than with steps—people who use canes, walkers, or crutches; people with children in strollers; and people who have leg or foot injuries, just to name a few.

Even when there is an acknowledgement of access for persons with disabilities, it often comes with the continuation of stigma against full and equitable inclusion. Continuing with the ramp example, if a structure is modified to include a ramp, where previously there was none, and the ramp is placed at the back of the building, rather than at the front or main public entrance, individuals using the ramp continue to face an access barrier by not being allowed to use the public entrance that everyone else uses. They also experience the societal barrier of inequitable treatment and stigmatization that comes from an attitude that says treating people with disabilities differently is acceptable, even if it is against the law.

Another example we may appreciate as lawyers and law students is accessibility issues at social networking events—whether it's an in-person event or a Zoom social. How many of us who have attended, or perhaps were involved in the planning of, such an event, ever gave a moment's thought to how the event would be inclusive of persons with mobility, seeing, or hearing disabilities? In any of the meetings to prepare for the event were these questions asked:

- Can a person who uses a wheelchair enter, move about, interact, and exit the space, with the same access as persons not using a wheelchair?
- Can a person attending who experiences deafness or hearing loss, participate in the conversations or understand the speaker?
- Is there a process for persons to request an accommodation (such as access for a service animal)?
- Are the individuals tasked with responding to such requests trained on the law and best practices in providing accommodations for persons with disabilities?

If these questions have not been asked, start asking them, and engage in a dialogue that will both help educate others and destigmatize disability.

OADA's mission

OADA exists to promote full integration of lawyers and law students with disabilities by promoting universal access and destigmatization through navigating change with the Bar, our profession, our practice, and the public we serve. As an affinity bar we strive to provide a space for lawyers and law students who experience a disability to connect, listen, and support one another. Our current list of law students and attorneys involved in OADA includes more than 50 individuals statewide and continues to grow.

Meeting information

We currently meet at noon on the first Tuesday of each month via Zoom. Our Zoom meeting ID is: 799 691 4214. All are welcome!

We hope to announce our first social gathering soon. Check out OADA's Facebook page for updates and details. ■

Endnotes

1. A civil rights call to action championed by the beloved Congressman and Civil Rights Hero, John Lewis. See Rep. John Lewis speech, 2015 CARE National Conference. Full transcript available at: https://www.care.org/news-and-stories/ideas/rep-john-lewis-find-a-way-to-get-in-the-way/.
2. See, Summary Report, Oregon Legal Community Climate Assessment, Slides, 30-37: https://www.osbar.org/_docs/resources/ClimateSurvey/2019ClimateSurvey_Final.pdf.

The Oregon Attorney Assistance Program: Providing confidential help for 40 years

By Bryan R. Welch, Attorney at Law

Bryan Welch joined the Oregon Attorney Assistance Program as an attorney counselor in 2015. He is a Certified Alcohol and Drug Counselor and former family law attorney. He speaks regularly on topics related to lawyer well-being.

The past couple of years have been stressful for many people, and that certainly includes lawyers. On top of the usual demands of practicing law, changes to home and office work environments, managing family and work responsibilities—all while trying to get work done and care for ourselves and those we care about—have added more stress. Fortunately, the Oregon Attorney Assistance Program has been there throughout to help lawyers adjust.

What is the OAAP?

The Oregon Attorney Assistance Program (OAAP) is a free, voluntary, confidential service provided by the Oregon State Bar Professional Liability Fund (PLF) to assist members of the legal community with well-being and personal challenges. This can include stress management, career dissatisfaction or transition, depression, anxiety, and other mental health issues. We also help with substance misuse, adjusting to retirement, trauma and vicarious trauma, and relationship stress. The OAAP helps by providing short-term individual counseling, referrals to community resources, support groups, workshops, CLE seminars, and other educational programs. Our services are available to all lawyers, judges and law students in Oregon, and we can also provide limited services to family members and staff.

One thing that sets the OAAP apart from other support services is that the professionally trained counselors here have also practiced law. We've been where you are and have experienced what you've experienced. Frequently, lawyers will tell us that it's often difficult for friends, family members, and sometimes therapists or other sources of support to understand the pressures that lawyers face, or the language and environment in which they work, and that it's helpful to be able to talk to someone who understands what it's like to be a lawyer. We have a lot of experience to draw from to help. During 2022, the OAAP is celebrating 40 years of providing quality service to the Oregon legal community, making us the third-longest-serving lawyer assistance program in the country.

Challenges within the legal profession

If you are concerned about your personal or professional well-being, you are not alone. In 2016, the American Bar Association, in conjunction with the Hazelden Betty Ford Foundation, surveyed more than 13,000 U.S. lawyers about their well-being. The survey found problematic substance use among lawyers at the rate of 20%—nearly twice as high as that of the general public. Rates of depression were reported at 28%—more than three times that of the general U.S. adult population. Reported rates of anxiety (19%) and stress (23%) were also considerably higher than that of the general population. In addition, 61% of lawyers surveyed reported challenges with anxiety during their career, and 45% reported having depression at some point. And that was before the pandemic.

In 2021, both Bloomberg and the Institute for Well-being In Law conducted surveys that reported high levels of "burnout" across the profession, with Bloomberg reporting 51% of lawyers feeling "burned out," and IWIL reporting 61%. Because of the concerns mentioned in these surveys, in 2021 the OAAP had more than 2,000 contacts with members of the legal community for personal assistance. In addition, we presented more than 40 CLE seminars and workshops, which reached more than 1,500 people. Topics included lawyering during the pandemic, secondary trauma in the time of COVID, awareness of mental health and substance use issues, managing stress in the practice of law, burnout, and healthy solutions for lawyer well-being.

What OAAP counselors do

On any given day, an OAAP counselor might take a call from a lawyer who is looking for a referral for a personal therapist, meet with someone (over Zoom, by phone, or in person) to discuss challenges with work-related stress, help connect a law student with substance abuse recovery resources, or meet with a lawyer at their office to help with overcoming procrastination. We might make arrangements for a person to enter treatment (and perhaps drive them there), help a lawyer make a plan to find more

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The OAAP provides three confidential recovery meetings per week for lawyers, judges, and law students who are interested in changing their relationship with alcohol, THC, opiates, stimulants, or other substances. These meetings are currently available by teleconference, and soon, in person as well. For more information contact Bryan Welch at 503.226.1057 Ext. 19, bryanw@oaap.org or Doug Querin at 503.226.1057 Ext. 12, douglasq@oaap.org.

meaningful work, take a call from a judge who is concerned about the well-being of a colleague, or hear from someone who just needs to vent because of a difficult interaction with a client or colleague. We might help someone experiencing extreme anxiety because of a potential malpractice issue, or someone having a mental-health crisis.

Many legal professionals who have reached out to us over the past two years have called for help with the effects of the pandemic. Often, they report feeling isolated and disconnected from their work. For some, alcohol, THC, or opiate use has increased as they looked for ways to help mitigate the stress. For others, it might be problematic internet use like phone addiction or pornography, or increased challenges with personal or professional relationships. And yet, for each person who calls, we know that there are many others who find it too difficult to ask for help.

The OAAP is confidential

One problem that was highlighted by the 2016 ABA survey and the subsequent report of the National Task Force On Lawyer Well-being that developed as a result was that lawyers face significant barriers to accessing help for themselves or others when they need it. According to the task force report, concerns about confidentiality and fear of professional repercussions were high on this list of obstacles. Therefore, it is imperative to know that **all communications with the OAAP are completely confidential and will not affect your standing with the PLF or the Oregon State Bar**. No information can or will be disclosed to any person, agency, or organization (including the Oregon State Bar and employees of the PLF) outside of the OAAP, without your consent. Contacts with us are kept strictly confidential pursuant to PLF policies, Oregon State Bar bylaws, and Oregon Rule of Professional Conduct 8.3(c)(3). In addition, under ORS 9.568, contacts with the OAAP are neither discoverable nor admissible in any OSB disciplinary action or civil proceeding. The only exceptions to confidentiality are to avert a serious, imminent threat to your health or safety or that of another person and to comply with legal obligations such as child abuse and elder abuse reporting. All this ensures that you have a safe and confidential place to seek assistance when needed.

Helping others

We often get calls from those who are concerned about the well-being of a colleague, family member or staff member. When you call us because you are concerned about someone else, we can collaborate to decide the best way to approach the situation and help the person about whom you are concerned. Sometimes, people hesitate to call with a concern because they don't want to "get someone in trouble." Remember: we don't report information that is given to us. All information you provide is confidential, and we will take no action without your consent.

If you prefer, we can help you develop the skills and confidence to approach the person yourself. Outreach is often more effective when it comes directly from someone the person knows. Compassion, candor, and patience can go a long way toward opening a door for a person to get help.

If instead it seems best that the OAAP communicate directly with the person, we can discuss effective ways for us to do that. We will also confer about whether you want us to reveal your specific concern to the person. If you don't want us to reveal your name, we won't. We will reach out confidentially and offer our services.

Helping ourselves

We know that there are things we can do to help support our individual well-being. Being intentional about maintaining our social network, reconnecting to our sense of purpose and meaning, recognizing and celebrating successes (both ours and that of our colleagues), and having a gratitude practice are all evidence-based techniques for improving our mental health. And of course, attending to the basics like getting good sleep, moderate exercise, making healthier food choices, accessing health care, and moderating substance use are all important as well. Now is a good time to do a "well-being checkup" to see if there are any changes you might want to make. And if you find that you have developed some patterns that you need help in changing, give us a call or visit www.oaap.org. We can help. ■

Portland-area elders need you! Volunteer with the Senior Law Project

By Shelby Smith, Attorney at Law

Shelby Smith is a staff attorney and pro bono coordinator in the Portland Regional Office of Legal Aid Services of Oregon. Shelby's portfolio includes the Senior Law Project, Expungement Clinic, and Family Law Forms and the Self-Represented Litigant Assistance project.

Elders in the Portland need access to legal services now more than ever, and in a few short hours each month you can be part of the solution. Since 1978, the Senior Law Project (SLP)—a free legal service for elders offered by the Portland Regional Office of Legal Aid Services of Oregon (LASO)—has been an essential part of the pro bono services LASO provides. Often, the elders who receive help through SLP would go without legal advice if not for this program.

How it works

The SLP is a large-scale pro bono program that operates approximately twenty legal clinics per month in eight locations in Multnomah County. Volunteer attorneys commit to three-hour shifts, during which they provide 30-minute sessions of free legal advice on a variety of issues. Due to the scale of the program, widespread support is needed from the legal community to staff the clinics.

Multnomah County residents who are age 60 or older—or are married to someone 60 or older—are eligible for these free 30-minute consultations, regardless of their income.

However, pro bono services beyond the 30-minute consultation are available only for those participants who meet LASO's financial eligibility requirements. A participant whose income is too high to qualify for continuing pro bono services may choose to hire the attorney to continue work on their legal issues, if both attorney and client are agreeable to that option.

While the legal issues facing elders often involve drafting simple wills, powers of attorney, and consulting on other minor property issues, some issues with which SLP attorney volunteers have aided have been truly transformative. For example, volunteers have helped unhoused clients obtain unclaimed inheritance and property that helped them obtain housing.

The challenge of providing services during the pandemic

Elders in our community have been one of the demographics most affected by the COVID-19 pandemic. Healthcare issues, the economic consequences of market downturns, and increasing inflation have seriously affected the elder population. Community shutdowns to help prevent the spread of Covid-19 often had unintended negative effects on the well-being of elderly people, leaving them isolated and without the resources to which they previously had access.

To help ease the social isolation of the pandemic, many people turned to virtual tools and resources, but virtual options were less available to elders. Throughout the pandemic, providing much-needed legal advice to elders in the most effective way possible continued to be a LASO priority. True to their nature as problem solvers, our volunteer lawyers dug into the work of continuing to serve elders. In consideration of the vulnerability of elderly clients and the technology challenges, LASO switched from in-person clinics to telephone consultations. Senior-center staff assisted with document gathering between clients and attorneys, and some truly inspiring, life changing work was done on behalf of elders in our community.

A return to in-person legal clinics

Unsurprisingly, elders often tend to prefer analog technology and face-to-face meetings. To meet the needs of the elderly clients and to reduce the social isolation caused by shutdowns, LASO worked with senior-center staff this year to safely bring back in-person clinics. In-person weekly clinics are available at the Center for Positive Aging (formerly known as the Hollywood Senior Center) on Fridays. Several other clinics—including the Urban League of Portland and YWCA in Gresham—offer at least one in-person clinic per month. While slow, the return to in-person clinics has been well received by elders in the community and the attorneys who volunteer with them. Some elders and volunteer attorneys still prefer to continue with virtual meetings, so several of the clinics currently operate virtually or on hybrid virtual and in-person models.

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Legal Aid has launched a new pro bono website: probonooregon.org. Through the website, LASO will post pro bono opportunities throughout the state. Attorneys can email probono@lasoregon.org for comments on the site or for more information.

Attorneys who want to refer members of the public to self-help resources, may give them www.oregonlawhelp.org which has a lot of information for pro se or self-represented litigants.

The effects of COVID-19 continue

Access to free legal services is vital, and the demand for SLP appointments has increased. Despite the reopening of many businesses and services, elderly people continue to feel the impact of the COVID-19 pandemic—especially the economic effects. For many older people the ensuing economic crisis exacerbated existing inequality. Elderly people are spending more on daily essentials while living on a fixed income. More than ever, they are relying on public benefits and services.

"What's in it for me?"—Benefits for volunteers

There are so many benefits to attorneys who volunteer with LASO. For example, volunteering gives new lawyers the opportunity to work with diverse clients, have one-on-one client interaction, gain litigation experience, help with a broad range of legal issues, and make a positive difference in someone's life.

As a certified pro bono program, LASO also provides Professional Liability Fund (PLF) coverage for volunteers.

LASO provides mentorship, training, resources, and support on pro bono cases. LASO is thankful for the attorneys who choose to volunteer and recognizes the service and efforts of our volunteer lawyers each month in the Multnomah Bar Association's Multnomah Lawyer publication. Pro bono service hours are reported to the Oregon State Bar.

Volunteer attorneys who provide access to justice through the SLP aid the most vulnerable in our community. Now more than ever, elders in our community need your help. While the SLP has some truly dedicated volunteers, during the pandemic we saw many of our long-time volunteers retire, move out-of-state, or step back from volunteering as often.

To sign up for a shift with the Senior Law Project, email Pro Bono Coordinator Shelby Smith at shelby.smith@lasoregon.org. ■

Important elder law numbers

as of
October 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 ..... $2,288.75/month; $3,435/month Excess shelter allowance ..... Amount above $686.53/month SNAP utility allowance used to figure excess shelter allowance ..... $452/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).

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

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

Common Scams That Target the Elderly
Special report on scams related to covid-19
https://www.seniorliving.org/research/common-elderly-scams/

Guide to Transportation for Seniors
A helpful visual guide to getting older and getting around
https://www.seniorliving.org/research/transportation-guide/

Guardianship and the Right to Visitation, Communication, and Interaction
Legislative fact sheet from the American Bar Association Commission on Law and Aging
https://www.americanbar.org/groups/law_aging/publications/bifocal/vol-40/issue-2-november-december-2018/guardianship-visitation/

How to add a Legacy Contact for your Apple ID
A Legacy Contact is someone you choose to have access to the data in your Apple account after your death.
https://support.apple.com/en-us/HT212360#:~:text=On%20your%20iPhone%2C%20iPad%20or,ID%2C%20or%20your%20device%20passcode

Oregon State Bar Elder Law Section

Newsletter Schedule Change

To avoid article deadlines in the midst of year-end and holiday activities, the newsletter subcommittee recommended changing the dates for publication of the newsletter. The Executive Committee approved the change. As of 2023, the quarterly newsletter will be published in February, May, August, and November.