

Bar Associations in Focus on Aging and the Law

Partnerships in Law and Aging

The ABA Commission on Law and Aging and the Borchard Foundation Center on Law and Aging are pleased to announce the 2006-07 Partnerships in Law and Aging Program Awards.

The program is co-sponsored by the ABA Commission and the Borchard Foundation, with support from the Marie Walsh Sharpe Endowment of the ABA Fund for Justice and Education. This year, there was additional support from FJC, a Foundation of Donor Advised Funds.

This year the program made 10 awards of \$7,500 grants to encourage the development of collaborative, law-related projects that promote elder rights and improve elder access to the justice system. The 12-month grants address needs identified by the applicants.

This is the eighth year for the Partnerships in Law and Aging Program. The request for proposals for the next funding cycle will be available in December 2006.

Following are brief profiles of this year's grantees.

Lakeshore Legal Aid, of Clinton Township, Mich., and project partner Safe Horizons, will conduct culturally competent and linguistically accessible outreach and community legal education, and provide direct advocacy for limited-English proficiency, undocumented and under-documented senior victims of abuse, domestic violence, and sexual assault.

Elderserve, Inc., of Louisville, Ky., will help homebound and medically fragile seniors to take out emergency protective orders from their homes via speakerphone and fax connections to the judge, avoiding the necessity of personal courtroom appearances. Project partners include the Jefferson County Circuit Court Clerk, Adult Protective Services, and the Jefferson County Sheriff's Office.

Chicago's Equip for Equality, and its project partner the Illinois Department on Aging, will develop self-advocacy and disability rights fact sheets and other materials for seniors with disabilities, reach out to Chicago-area agencies serving seniors, conduct a minimum of seven seminars for seniors on disability rights and advocacy strategies,

Continued on next page

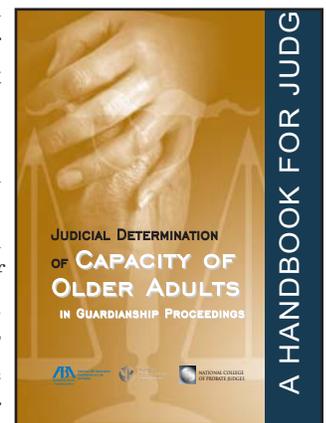
Resources/Guardianship

What Every Judge Needs to Know About Capacity Assessment in Guardianship Proceedings

The ABA Commission on Law and Aging and the American Psychological Association, with the National College of Probate Judges, have published a handbook specifically for judges on capacity assessment in guardianship proceedings, highlighting the use of assessments in crafting limited guardianship orders.

The handbook, titled *Judicial Determination of Capacity of Older Adults in Guardianship Proceedings* maintains that a comprehensive assessment of capacity for guardianship proceedings

requires collecting information on six key factors. These factors, referred to as the "Six Pillars of Capacity Assessment," include the medical condition, cognitive impairments, functional evaluation, values, risk of harm, and means to enhance



Continued on page 68

Inside

Resources: New Guide Helps Adults Faced with Making Medical Decisions for Someone Else (p. 65); Reports Describe Medicaid Eligibility, Managed Long-term Care for People with Dementia (p. 66)

In the News: Reauthorization of OAA, WHCoA Final Report (p. 66)

Inside the Commission: Staff Changes (p. 67)

Practice Tips: Advance Planning for Lawyers (p. 70)

2006-07 Partnerships in Law and Aging Program Awards

Continued from page 63

and promote increased provision of legal advocacy services to seniors with disabilities.

Community Dispute Settlement Center, Inc., of Cambridge, Mass., will help elders and their families prevent and resolve conflict through mediation—including outreach and skill-building workshops for service providers; establishment of a referral network; and provision of mediation services. Project partners include Greater Boston Legal Services/Somerville Legal Services Office, Somerville-Cambridge Elder Services, and Central Boston Elder Services.

Legal Assistance of Western New York (Monroe County), of Geneva, N.Y., will conduct a medical-legal

conference focused on a new advance directive, Medical Orders for Life Sustaining Treatment (MOLST), being piloted in two counties, and will train leaders in the health care and legal communities who, in turn, will educate providers in the broader health care community in hospitals, nursing homes, and long-term care facilities. Project partners include Excellus BlueCross BlueShield, the Monroe County Bar Association, and the Monroe County Medical Society.

The state of Montana's Legal Services Association, in partnership with the Montana State Bar's Elderly Assistance Committee, will create automated templates of common legal forms and an interactive questionnaire for use by low-income Montana seniors.

The Texas RioGrande Legal Aid, Inc., of Westlaco, Texas, will raise awareness, understanding, and access to the legal rights and remedies that protect elders, through targeted education and outreach directly to audiences of elders and by building expanded networks among elder-serving organizations. Partners include Family Eldercare, ADAPT, and the Austin Resource Center for Independent Living.

The PACE Women's Justice Center, of White Plains, N.Y., will partner with the Grandparent Coalition and the Family Services Society of Yonkers, to create a telephone hotline to assist grandparents and older caregivers with various governmental systems in order to receive the benefits and support they need to care for the children in their care.

Northwestern Legal Services, of Erie, Pa., with the Greater Erie Community Action Committee, will create a community legal education and outreach initiative on issues confronting older residents in Erie County. The project will develop free workshops on topics such as advance directives, retirement benefits, nursing homes, and consumer fraud targeting the elderly; and produce television programs on civil legal topics confronting older individuals for broadcast on the community access television station.

New York City's MFY Legal Services, and partner Project Home, will train neighborhood-based social services staff to educate low-income seniors on avoiding debt, identity theft, and financial schemes so they can live with dignity and autonomy.

BIFOCAI

BAR ASSOCIATIONS IN FOCUS ON AGING AND THE LAW
NEWSLETTER OF THE AMERICAN BAR ASSOCIATION
COMMISSION ON LAW AND AGING

Commissioners

Larry McDevitt, Chair
James Carr
Stuart R. Cohen
Michelle Grant Ervin, M.D.
Scott M. Geron
Jorge J. Lambrinos
Jennifer Moye
Mary Joy Quinn
Mark Schickman
Jack Schwartz
Anna Williams Shavers
Nancy G. Shor
Ann Soden
Pamela B. Teaster
Hon. Sandra Thompson

Board of Governors Liaison

Carol E. Dinkins

Commission Staff

Charles P. Sabatino, Director
Erica F. Wood, Assistant
Director
Lori A. Stiegel
Leslie B. Fried
Holly Robinson
Ellen VanCleaveKlem
Jamie Philpotts
Sonia Arce
Trisha Bullock

Editor

Jamie Philpotts

Interns

Abigail Petersen
Nisha Thakker

BIFOCAI, ISSN 0888-1537, is published bi-monthly (six times a year) by the ABA Commission on Law and Aging, 740 15th St., N.W., Washington, DC 20005. The views or opinions expressed herein do not necessarily represent the policies of the American Bar Association unless specifically adopted as such. Questions? Contact the Commission at (202) 662-8690, or see our Web page at: <www.abanet.org/aging>. © 2006 American Bar Association.

n4a 31st Annual Conference

*Shaping Communities
for a Mature America*

August 6-10, 2006, Chicago, IL

Go to <http://www.n4a.org>

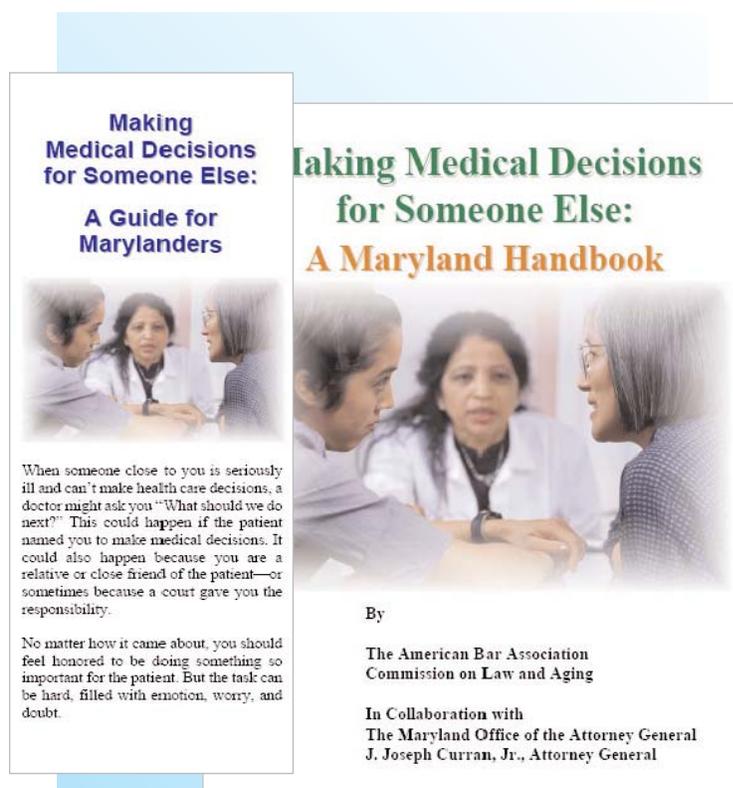
Finally, a Guide for the Toughest Job Each of Us Will Eventually Face, But Know Little or Nothing About—Making Medical Decisions for Someone Else

Sooner or later, most of us will be called upon to make medical decisions for someone else, either because we have been appointed as agent or proxy under a Health Care Advance Directive, or appointed as a guardian by a court, or are the closest family or friend at the bedside when difficult decisions need to be made. In whatever way you fall into the job, you are, or will be, a health care proxy.

As the population grows older and more people with disabilities are living longer, there will be more individuals who can't make health care decisions for themselves at some point in their lives. Being a proxy is one of society's most challenging jobs, but it can also be a profound act of love. Individuals serving in that role deserve all the help they can get.

The American Bar Association and the Maryland Office of the Attorney General have published two self-help guides for adults faced with making difficult medical decisions for loved ones.

The first is a detailed, Web-based document titled *Making Medical Decisions for Someone Else: A Maryland Handbook*, designed to provide practical guidance to family members and others faced with making health care decisions for a loved one or friend.



**Making
Medical Decisions
for Someone Else:
A Guide for
Marylanders**



When someone close to you is seriously ill and can't make health care decisions, a doctor might ask you "What should we do next?" This could happen if the patient named you to make medical decisions. It could also happen because you are a relative or close friend of the patient—or sometimes because a court gave you the responsibility.

No matter how it came about, you should feel honored to be doing something so important for the patient. But the task can be hard, filled with emotion, worry, and doubt.

**Making Medical Decisions
for Someone Else:
A Maryland Handbook**



By
**The American Bar Association
Commission on Law and Aging**

In Collaboration with
**The Maryland Office of the Attorney General
J. Joseph Curran, Jr., Attorney General**

**Developed by the experts at the:
American Bar Association
Commission on Law and Aging
and Maryland Office of the Attorney General**

“The health care proxy role never existed before the advent of modern medical technology,” said Charles P. Sabatino, director of the ABA's Commission on Law and Aging. “There's no job description and no familiar models for how to be a good proxy decision-maker. This pair of guides tries to fill that vacuum by describing in simple terms what it's like to be a health care proxy, what to do while there's still time to think about it, how to make the hard decisions, and where to get help.”

The second is a short pamphlet titled *Making Medical Decisions for Someone Else: A Guide for Marylanders*. The pamphlet condenses key information from the longer handbook to help those who have an immediate need to know the bare essentials of decision-making, typically in the midst of a medical crisis.

The guides were funded by the Morton K. and Jane Blaustein Foundation, a Maryland-based foundation.

The pamphlet and the handbook were created for Marylanders, but they can be used as a model for other states. Contact Erica Wood at ericawood@staff.abanet.org if you are interested in developing these guides for use in your state.

The pamphlet and online handbook are available for free on the Web sites of the Maryland Office of the Attorney General at <http://www.oag.state.md> and the ABA Commission on Law and Aging at <http://www.abanet.org/aging>

In the News

Reauthorization of the Older Americans Act passes House of Representatives without dissent. On June 21, 2006, the U.S. House of Representatives, on a voice vote and without dissent, passed the reauthorization of the Older Americans Act, known as the Senior Independence Act of 2006. The bill, H.R. 5293, will now go to the Senate for consideration. The Senate Health, Education, Labor and Pensions (HELP) Committee is drafting its own version of the bill and is scheduled to do mark-up on their version on June 28.

To access a summary of the bill, go to <http://edworkforce.house.gov/issues/109th/education/oa/oaabillsummary.htm>

Final Report of the 2005 White House Conference on Aging. On June 14, 2006, the Final Report of the 2005 White House Conference on Aging (WHCoA) was approved to be transmitted by the Policy Committee of the WHCoA. The final report will consist of a narrative that contains an executive summary, a list of the 50 resolutions adopted by the delegates, along with the strongest and strong implementation strategies suggested by the delegates who attended individual implementation strategy sessions on a particular topic at the WHCoA.

The narrative will also include a listing of the names of all the delegates, as well as the names of the members of the Policy Committee and Advisory Committee. An Appendix (in CD format) will follow the narrative. It will include all of the Resolutions and Implementation Strategies developed by the delegates in breakout sessions they elected to attend, as well as all the proceedings from the WHCoA and pre-WHCoA events, and other WHCoA-related information. The 2005 White House Conference on Aging took place December 11 to 14, 2005, in Washington.

The report will be transmitted to the president, Congress, and the conference delegates upon printing, and be posted on the WHCoA Web site at <http://www.whcoa.gov/>

New Resources

Alzheimer's Association Examines Medicaid Eligibility Issues, Managed Long-term Care for People with Dementia

Medicaid Eligibility Criteria for Long-term Care Services: Access for People with Alzheimer's Disease and Other Dementias

In the face of tight Medicaid budgets, states may try to reduce costs of the number of people who are eligible for long-term care services by tightening the level-of-care criteria used to determine eligibility for nursing home and home and community waiver services.

This public policy issue brief describes Medicaid functional eligibility issues for people with dementia and discusses how six states determine eligibility for Medicaid-funded long-term care services. Based on an analysis of these states' provisions, the Alzheimer's Association makes recommendations (1) for appropriately assessing the long-term care needs of people with dementia, and (2) for setting level-of-care criteria that treat people with physical and cognitive impairments equitably. Access the brief at:

<http://www.alz.org/Health/Care/Medicaideligibilityissues.pdf>

Medicaid Managed Long-term Care for People with Alzheimer's Disease and Other Dementias

A growing number of states are turning to managed long-term care in their Medicaid programs for younger adults and elderly people with disabilities, including those with Alzheimer's disease and other forms of dementia. More attention to this group of beneficiaries is warranted because they represent a large proportion of those using Medicaid long-term care services and because their diseases create a unique and difficult constellation of care challenges which, if not managed appropriately, result in poor care and excessive cost.

This issue brief describes how two states, Massachusetts and Wisconsin, have addressed the special needs of beneficiaries with dementia in the design and implementation of their Medicaid managed long-term care programs and makes policy recommendations for states that are considering implementing or modifying such programs. Access the brief at:

<http://www.alz.org/Health/Care/MedicaidManagedLTCPolicyBrief.pdf>

—Leslie Fried, Director
ABA/Alzheimer's Association Medicare Advocacy Project

Inside the Commission

Commission staff said goodbye in May to long-time Associate Staff Director Stephanie Edelstein. For nearly 16 years, Stephanie represented the Commission on issues concerning housing, economic security, and legal services delivery. Stephanie will begin a new career adventure with the Legal Services Corporation Office of Program Performance in Washington.

In June, staff welcomed Holly Robinson as a new associate staff director of the ABA Commission on Law and Aging. Holly moved 3,000 miles to join the staff! She will serve as project director for the Older Americans Act-funded National Legal Assistance Support Project and administer the Partnerships in Law and Aging Mini-Grant Program.



Holly Robinson

Prior to leaving Portland, Oregon, Holly most recently worked as deputy legislative counsel for the Office of Legislative Counsel of the Oregon Legislative Assembly, specializing in health and human services issues. She also served as Oregon's legal assistance developer.

In addition to her lawyering, Holly writes flash fiction and non-fiction pieces. Her work has been published in online literary journals, including *Long Story Short*, *Word Riot* and *Toasted Cheese*, and in *The Oregonian*, a Portland, Oregon, newspaper.

As the first-ever Nancy Coleman Summer Intern, Abigail Petersen is assisting ABA Commission Director Charles P. Sabatino with developing a database of surrogate decision-making standards across the 50 states. She is also writing a paper for publication reviewing those surrogate decision-making standards.

Abigail Petersen is a rising third-year law student at St. Louis University School of Law. While at SLU, Abigail is pursuing a health law certificate from the school's #1 ranked health law program. In addition, she has been involved in leadership positions in the Public Interest Law Group, the Health Law Association, and the Women Law Students' Association.

Abigail will graduate in May 2007 and is seeking opportunities to advocate for the health and legal needs of elders.

Bozard Foundation intern Nisha Thakker is a rising third-year law student at the Washington College of Law at American University. This summer, she is working on a paper involving veterans' guardianship issues around the

country. In particular, she is examining the various laws that exist to protect veterans and their estates, including the Uniform Veterans Guardianship Act and state adaptations, as well as the Department of Veterans Affairs Fiduciary Program. The goal of this research is to lay the foundation for future field work and more in-depth studies in this area.

Prior to attending law school, Nisha attended The George Washington University, during which time she also worked in the public affairs office at the Federal Trade Commission during her senior year. Upon graduating, Nisha took one year off and worked in the public affairs office at the U.S. Department of Housing and Urban Development. She currently writes for the *Sustainable Development Law and Policy Journal*, an environmental journal at WCL, and teaches criminal law to high school students through the Marshall-Brennan Project.

What Every Judge Needs to Know

Continued from page 63

capacity. Information about these factors may be obtained from healthcare professionals, court investigators, guardians ad litem, family members, adult protective services workers, and other involved parties. The book describes in-depth the six pillars of capacity assessment and how they inform each judicial action step in adult guardianship proceedings.

Intended for a wide judicial audience, the handbook provides practical tools for capacity determination and resources useful in identifying less restrictive alternatives and in fashioning limited guardianship, while recognizing that plenary guardianship often may be appropriate. Links to model forms, work sheets, and resources are provided throughout the book and are available online to download for ready use and modification.

The handbook was written by ABA Commissioner and psychologist Dr. Jennifer Moye, of the department of psychiatry at Harvard Medical School; ABA Commission on Law and Aging Director Charles Sabatino and Assistant Director Erica Wood; and psychologist Dr. Dan Marson, of the department of neurology at the University of Alabama at Birmingham. The project was guided, and the book was reviewed, by the executive committee of the National College of Probate Judges. In addition, the book received

additional review by a panel of three judges who agreed to participate in a one-day review session.

In May 2006, Drs. Moye and Marson, along with Erica Wood, presented the handbook at the meeting of the National College of Probate Judges. The two-day session included a dramatization of capacity issues facing judges (and starring judges in the role play), a walk-through of the handbook, a focus on each of the six key elements of capacity determination as they play out in the steps of a guardianship proceeding, and video clips showing examples of various conditions resulting in cognitive impairment—for which a guardianship or limited guardianship may or may not be necessary.

Financial support for the project was provided by the Borchard Foundation Center on Law and Aging and the Farnsworth Foundation.

A concise print version of the judges handbook is available for \$25 from the ABA Commission on Law and Aging (see page 69 in this newsletter or on the Web at <http://abanet.org/aging>). An online and expanded version is available for free on the ABA Commission's Web site.

The book is the second work product of the joint ABA/APA Assessment of Capacity in Older Adults Project Working Group, established in 2003 under the auspices of the interdisciplinary Task Force on Facilitating APA/ABA Relations. The first product of this unique collaboration of lawyers and psychologists was *Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers*, published in 2004 (on the Web at <http://abanet.org/aging>).

The Elder Abuse Listserve provides professionals working in fields related to elder abuse with a free forum for raising questions, discussing issues, and sharing information and best practices related to elder abuse. The goal of the listserve is to enhance

- efforts to prevent elder abuse;
- delivery of adult protective services; and
- responses of the justice and social services systems to victims of elder abuse.

The following professionals working in elder abuse or allied fields are eligible to subscribe to the listserve: adult protective services practitioners and administrators, aging services providers and administrators, educators, health professionals, judges, lawyers, law enforcement officers, prosecutors, policymakers, and researchers.

A request to subscribe must come from the individual who wishes to subscribe; no one will be subscribed at the request of another person. Your request must include all the following information in the body of the message: your e-mail address (even if it will appear in the "from" line of your e-mail), your name, your profession, a statement of your interest/expertise in adult protective services/elder abuse, the name of the organization for which you work (if applicable) and its address, and your phone number so that you can be contacted in the event of an e-mail problem. To subscribe, send an e-mail to the list manager Lori Stiegel at lstiegel@staff.abanet.org.

What Every Judge Needs to Know About Capacity Assessment in Guardianship Proceedings

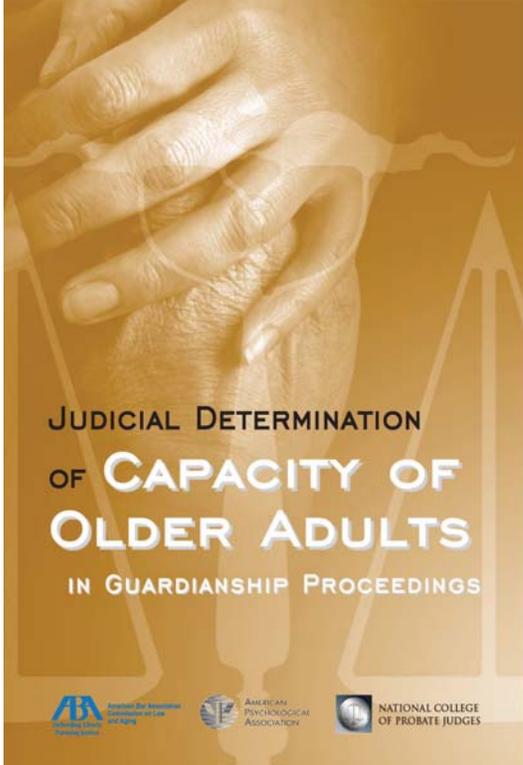
What This Handbook Gives You:

- A quick guide to the “Six Pillars of Capacity Assessment,” essential to a full and accurate assessment of capacity.
- Practical explanation of the “Five Key Steps in Judicial Determination of Capacity.”
- An easy to read, 42-page, 8.5” x 11”, coil-bound for flat-page-opening, format.
- Links to expanded information, work sheets, model forms, and fact sheets available online at no charge. The format provides a layered information approach that enables you to go as far as you need to on any aspect of capacity assessment.
- Practical tools that will equip a wide audience of judges to conduct any form of guardianship proceeding more effectively, improve communication with healthcare professionals, creatively use less-restrictive alternatives and limited guardianships, and accommodate disabilities of older adults in ways that will enhance capacity.

An online, expanded version of the book is offered on the Web site of the ABA Commission on Law and Aging at <http://www.abanet.org/aging>. The online book is in an MSWord format, with “live” links throughout to related model forms and additional resources ready to download for use.

A print version of the book is available for \$25 from the ABA Commission on Law and Aging. Bulk rates are also available. E-mail your request to abaaging@abanet.org; phone (202) 662-8690; or send a check with completed order form, below.

A User-Friendly Handbook Written Especially for Judges



Developed by the experts at the:
 ABA Commission on Law and Aging,
 American Psychological Association,
 and National College of Probate Judges

A HANDBOOK FOR JUDGES

Please send me _____ copy/copies of :

Judicial Determination of Capacity of Older Adults in Guardianship Proceedings (PC #4280026)

I have enclosed a check for \$25 per copy (payable to the American Bar Association) for \$_____

Please charge my Visa Mastercard American Express

Card #: _____ Exp.: _____

Name: _____ Signature: _____

Mail to (Name): _____

Mailing Address: _____

Phone or Email*: _____

(*In the event we need to contact you regarding your order.)

For Office Use Only: Invoice # _____

Mail your order with check to:

ABA Commission
 on Law and Aging
 740 15th St., N.W.
 Washington, DC 20005-1022
 Attn: Publication Orders

Questions?

Call: (202) 662-8690 or
 E-mail: abaaging@abanet.org

The ABA Commission on Law and Aging has been a leader in helping lawyers help their clients with, and understand the importance of, advance planning. But how many lawyers have done advance planning for themselves? In this article, Peter Geraghty stresses the importance for legal professionals to have a plan in place to protect their clients' interests in the event of the lawyer's ill-health or death.

Advance Planning/Practice Tips

When a Lawyer Dies

By Peter Geraghty

A lawyer who has a large solo practice dies suddenly. The lawyer has hundreds of client files. Some of these files concern probate matters, others involve civil litigation and real estate transactions. Most of the files are inactive, but some involve ongoing matters. While the lawyer kept the active files at his office, he kept the inactive ones in storage at his home.

- 1) *What steps should a lawyer take to ensure that his or her clients' matters will not be neglected in the event of the lawyer's death?*
- 2) *What obligations does a lawyer for the estate of a deceased lawyer have with regard to the deceased lawyers' client files?*

In 1992, the ABA Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 92-369, Disposition of Deceased Sole Practitioners' Client Files and Property. This opinion addressed the need for a lawyer to have a plan in place that would provide for the protection of a client's interests in the event of the lawyer's death, and provided guidance for the lawyer who assumes responsibility for the deceased lawyer's files. The opinion states:

Peter Geraghty is director of EthicSearch of the ABA Center for Professional Responsibility.

"Eye on Ethics: When a Lawyer Dies" by Peter Geraghty, published in *Your ABA*, March 2006. © 2006 by the American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or downloaded or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

The death of a sole practitioner could have serious effects on the sole practitioner's clients . . . Important client matters, such as court dates, statutes of limitations, or document filings, could be neglected until the clients discover that their lawyer has died. As a precaution to safeguard client interests, the sole practitioner should have a plan in place that will ensure insofar as is reasonably practicable that client matters will not be neglected in the event of the sole practitioner's death.

The opinion drew support for its conclusions from ABA Model Rules of Professional Conduct (MRPC) 1.1 (Competence) and 1.3 (Diligence), and from lawyers' fiduciary duties to their clients:

According to MRPC Rule 1.1, competence includes "preparation necessary for the representation," which, when read in conjunction with Rule 1.3 would indicate that a lawyer should diligently prepare for the client's representation. Although representation should terminate when the attorney is no longer able to adequately represent the client, the lawyer's fiduciary obligations of loyalty and confidentiality continue beyond the termination of the agency relationship (ABA Formal Opinion 92-369 (1992)).

The opinion notes that lawyers have been disciplined for the neglect of client matters due to the lawyer's ill health or personal problems. It further suggests that lawyers who have failed to make preparations to protect their clients' interests in the event of the lawyer's death should be sanctioned, both in the hope of encouraging other lawyers to make such preparations, and to restore confidence in the bar, though the sanctions would obviously have no deterrent effect on deceased lawyers.

See also Recommendation 111 of the Senior Lawyers Division to the ABA House of Delegates that was approved at the 1997 ABA Annual Meeting.

In 2002, pursuant to the ABA Ethics 2000 Commission's recommendations, the ABA House of Delegates approved adding a paragraph to the Comment to MRPC Rule 1.3 that states as follows:

To prevent neglect of client matters in the event of a sole practitioner's death or disability, the duty of diligence may require that each sole practitioner prepare a plan, in conformity with applicable rules, that designates another competent lawyer to review client files, notify each client of the lawyer's death or disability, and determine whether there is a need for immediate protective action. Cf. Rule 28 of the American Bar Association Model Rules for Lawyer Disciplinary Enforcement (providing for court appointment of a lawyer to inventory files and take other protective action in absence of a plan providing for another lawyer to protect the interests of the clients of a deceased or disabled lawyer).

There are several state bar associations that have issued opinions on this general topic. Arizona State Bar Opinion 04-05 (2005) addressed what should be included in a plan for the protection of clients' financial interests in the event of a sole practitioner's death. It also stated that such a plan should be a part of a larger plan to protect clients' interests in the event of the lawyer's death or disability. The opinion stated:

...strictly from the perspective of complying with a lawyer's ethical responsibilities, a prudent lawyer should take the following into consideration:

First, a lawyer should choose a means that is not only legally effective, but also fair to, and expeditious for, the clients who are entitled to the funds in the account. That favors identifying and reaching agreement with an identified person who is willing to assume the responsibilities of administering the trust account, and not leaving it to a court at a later date to find a suitable candidate. The lawyer also is ethically obligated to select someone whom the lawyer reasonably believes is competent to discharge those responsibilities. See Ariz. Sup. Ct. R. 43(d) ("Due professional care must be exercised in the performance of the lawyer's duties under this Rule."). Consistent with this requirement, the designee should be a lawyer because the distribution of funds in a client trust account necessarily requires an understanding of, and accountability under, ER 1.15.

Second, a lawyer should plan for both death and disability. Making a provision in a will for the handling of a trust account may satisfy a lawyer's ethical obligations if he or she dies, but such provisions are useless in planning for possible disability. Similarly, granting a power of attorney to another lawyer might be an effective way to anticipate the possibility of disability, but it is an ineffective tool in planning for a lawyer's death because such a power automatically terminates upon the grantor's death.

Continued on page 72

Get Connected to Elderbar, the listserv that brings together public sector law and aging advocates and the private bar. Elderbar is for you if you are a:

- ◆ Title IIIB legal services provider or developer;
- ◆ Long-term care ombudsman;
- ◆ Other OAO-funded advocate;
- ◆ Legal Services Corporation, other non-profit, or public sector legal advocate;
- ◆ Law school elder law or clinical staff;
- ◆ Bar association elder law section/committee leader; or
- ◆ Nat'l law and aging advocate.

Elderbar will give you the opportunity to communicate across the boundaries of the law and aging networks and the public and private sectors. You will be able to share ideas and information about bar sections and committee structures and activities, and to learn what others are doing in the face of funding shortages and practice restrictions to meet the legal needs of older people. Elderbar is a project of the ABA Commission's National Legal Assistance Support Center. Messages can only be posted and read by members.

To subscribe, send your name, e-mail address, and professional affiliation to RobinsoH@staff.abanet.org.

When a Lawyer Dies

Continued from page 71

Third, a lawyer's plans for the disposition of his or her client trust account should be made in concert with a broader plan for the disposition of the lawyer's practice in the event of his or her death or disability. Prudence dictates that arrangements should be made with another lawyer to notify clients of the lawyer's disability or death, and to review the lawyer's files for the limited purpose of determining whether any immediate action needs to be taken to protect those clients' legal interests. See, e.g., ABA Formal Op. 92-369 at 4 (such arrangements do not violate ER 1.6 because they are impliedly authorized in order for the lawyer to carry out a representation).

Florida Opinion 81-8M (1981) involved a situation where a lawyer was anticipating termination of his practice because of a terminal illness. A digest of the opinion reads as follows:

After a diligent attempt is made to contact all clients whose files he holds, a lawyer anticipating termination of his practice by death should dispose of all files according to his client's instructions. The files of those clients who do not respond should be individually reviewed by the lawyer and destroyed only if no important papers belonging to the clients are in the files. Important documents should be indexed and placed in storage or turned over to any lawyer who assumes control of his active files. 801 ABA/BNA Lawyers' Manual on Professional Conduct 2502.

In 1986, the ABA General Practice Section, Sole Practitioners and Small Firms Committee, sponsored a pro-

gram titled, Preparing for and Dealing with the Consequences of the Death of a Sole Practitioner. One of the papers presented at this program, *A Sole Practitioner's Letters of Instruction Regarding Things to Be Done Upon His or Her Death*, listed the following as items the sole practitioner should mention in a letter to the personal representative of his estate:

- The need to engage a lawyer to wind up the law practice;
- Notifying clients of the sole practitioner's death;
- Transferring active files to the client or to the successor lawyer designated by the client;
- Disposition of closed or inactive files;
- Making arrangements to complete work on active files; and
- Securing agreements with the successor lawyers as to the handling of open files.

The second part of ABA Formal Opinion 92-369 discusses the obligations of a lawyer who assumes responsibility for a deceased sole practitioner's client files:

A lawyer who assumes ... responsibility (for the deceased sole practitioner's client files) must review the client files carefully to determine which files need immediate attention; failure to do so would leave the clients in the same position as if their attorney died without any plan to protect their interests. The lawyer should also contact all clients of the deceased lawyer to notify them of the death of their lawyer and to request instructions, in accordance with Rule 1.15.

Because the reviewing lawyer does not represent the clients, he or she should review only as much of the file as is needed to identify the client and to make a determination as to which files need immediate attention. ABA Formal Opinion 92-369 (1992).

***Bifocal* invites the submission of news about your section's activities, as well as brief articles of interest to elder law and other professionals in the aging advocacy network.**

Share news about your entity's initiatives towards the delivery of direct legal assistance to older persons in your particular area; pro bono and reduced fee programs; community legal education programs; multi-disciplinary partnerships; and new resources that are helpful to professionals and consumers.

Also welcome are substantive law articles on legal issues of interest to state area agencies on aging, bar association entities, private attorneys, legal services projects, law schools, and others in the law and aging network.

Bifocal is published bi-monthly (six times a year). E-mail Jamie Philpotts at philpotj@staff.abanet.org for both general and deadline information for upcoming issues. *e-photos are especially welcomed!

Earlier ABA opinions touch peripherally on the issues presented in the second question. Informal Opinion C475 (1961) discussed the appropriate form an announcement may take when sent by a lawyer who is temporarily acting as an associate counsel of an incapacitated lawyer to clients of the incapacitated lawyer. Informal Opinion 648 (1963) discusses the propriety of an agreement between a lawyer and his associate, whereby the associate would agree to take over the lawyer's practice upon the lawyer's death.

Several state and local bar association ethics opinions discuss the obligations of a lawyer who assumes responsibility for a deceased sole practitioner's client files. Most of them address the duties of lawyers who are either the executors of the deceased lawyers' estates, or who are partners of or shared office space with the deceased lawyers. These opinions stress the importance of the executor/partner/office-mate's careful review of the files in order to determine if any action need be taken to protect client's interests.

For example, Ohio State Bar Association Opinion 00-02 (2000) states:

...What then, is required of the person who assumes responsibility for these files? First, the attorney should make, in light of the age of the files, a reasonable effort to locate the client for whom he or she has files. If the client can be located, then he or she should be notified and asked to pick up the material or authorize its disposal. If this effort is unsuccessful, and given the age of some of these files, it seems likely that it will be, then the question arises as to the proper disposition of the files.

If the effort to locate the clients of the deceased lawyer is unsuccessful, the attorney should nevertheless review the files and remove and retain "items that clearly or probably belong to the client." In particular, care should be taken to preserve original documents, other similar materials, in the client files, the return of which could reasonably be expected by the client.

See also New York County Lawyers' Association Opinion 709 (1996), (partner of deceased attorney must give notice of the death to clients for whom the deceased attorney was handling ongoing matters); Connecticut Bar Association Opinion 95-13 (1995), Nassau County Opinions 89-43, (1989), 92-27 (1992) (lawyer who received all active and closed files of deceased attorney has the same ethical obligations for the files as if they were his or her own files or if designated a "guardian" of the files by agreement with the deceased attorney or estate); and Mississippi Opinion 114 (1986).

A digest of Maryland Opinion 89-58 (1989) states:

A lawyer who shared office space with another lawyer and handled that lawyer's cases when he died ... has the following responsibilities ... (1) the lawyer must review every file in his possession and notify clients or third parties if the lawyer has property belonging to them; (2) the lawyer may dispose of files in cases he handled for the deceased lawyer as he would dispose of his own client files; (3) the lawyer must turn over all other client files to the representative of the deceased's estate and explain the legal significance of retaining those files; (4) the lawyer must keep information contained in all the files confidential regardless of whether or not he handled the cases. 901 ABA/BNA Lawyers' Manual on Professional Conduct 4327.

See also, Kentucky Opinion E-405 (6/98)[PDF], Wisconsin Opinion E879 (1987).

Many of the state and local bar opinions cite to ABA Informal Opinion 1384 (1984) (Disposition of a Lawyer's Closed or Dormant Files Relating to Representation of or Services to Clients) for authority on the issue of retention and disposition of the deceased lawyer's client files.

These opinions stress that any lawyer reviewing client files must take steps to preserve client confidentiality and may not disclose client confidences without the client's consent. See, Maine Board of Bar Overseers Opinion 143 (1994) and Philadelphia Bar Association Opinion 97-4 (1997).

Some states have statutory guidelines for the appointment of a receiver to manage a deceased lawyer's practice in the event that no partner, associate, executor, or other responsible party capable of conducting the lawyer's affairs is known to exist.

See, e.g. Illinois Supreme Court Rule 776, Appointment of Receiver in Certain Cases, Ill. Ann. Stat. ch. 110A, Par. 776 (SmithHurd 1991). See also Rule 28 of the ABA Model Rules for Lawyer Disciplinary Enforcement (1989). This rule also outlines procedures for the appointment of a receiver after the lawyer's death.

Rule 28. Appointment of Counsel to Protect Clients' Interests When Respondent Is Transferred to Disability Inactive Status, Suspended, Disbarred, Disappears, or Dies.

A. Inventory of Lawyer Files. If a respondent has been transferred to disability inactive status, or has disappeared or died, or has been suspended or disbarred and there is evidence that he or she has not complied with Rule 27, and no partner, executor, or other responsible

Continued on page 74

When a Lawyer Dies

Continued from page 73

party capable of conducting the respondent's affairs is known to exist, the presiding judge in the judicial district in which the respondent maintained a practice, upon proper proof of fact, shall appoint a lawyer or lawyers to inventory the files of the respondent, and to take such action as seems indicated to protect the interests of the respondent and his or her clients.

B. Protection for Records Subject to Inventory. Any lawyer so appointed shall not be permitted to disclose information contained in any files without the consent of the client to whom the file relates, except as necessary to carry out the order of the court, which appointed the lawyer to make the inventory.

Every lawyer should have a plan in place that will protect his or her clients' interests in the event of the lawyer's death. This is especially true for sole practitioners, who do not have partners or associates who can manage the practice in their absence. Lawyers who assume responsibility for a deceased lawyer's client files should review them carefully to determine which files need immediate attention. The lawyer should also make all reasonable efforts to contact the deceased lawyer's clients, notify them that their lawyer has died, and request instructions. Depending on the nature and contents of the client files, the lawyer may have an obligation to preserve them. As ABA Informal Opinion 1384 (1977) states, the obligation arises if there are items in the files that clearly belong to the client and contain information that "the lawyer knows or should know may still be useful in the assertion or defense of the client's position in a matter for which the applicable statutory limitations period has not expired."

CLE/ABA Annual Meeting

The Commission on Law and Aging is co-sponsoring three programs this year at the ABA's Annual Meeting, August 3-8, in Honolulu, Hawaii. Following is a brief description of those three programs:

Presidential CLE Centre Showcase Program: Getting Older Just Got Harder: Healthcare Challenges for the Elderly.

Fri., Aug. 4, 2006, 9:30 a.m. to 11:00 a.m. Primary Sponsor: Health Law Section. The baby boomers are about to turn 65 and meanwhile their parents are still very much in the picture. The world has never seen an elderly population of this size and durability. We are no longer dealing with life spans of 70 years, but instead with life spans of 80, 90, and 100 years. This session will focus on the practical challenges of serving this aging population, including the physical and procedural accommodations needed to serve this population, the creative and innovative planning necessary to deal with the special issues, and nuts-and-bolts planning for end-of-life decision-making.

Gonzales vs Oregon—Lessons for States, Terminally III, and Schiavo. Fri., Aug. 4, 2006, 11:30 a.m. to 1:00 p.m. Primary Sponsor: Section on Tort Trial and Insurance Practice. Not too many years ago, the U.S. Supreme Court told us that as Americans, we do not have a federally protected Constitutional right to be assisted in our demise if we are terminally ill. Embedded within that decision was an observation that, "Americans are engaged in an earnest and profound debate about the morality, legality, and practicality of physician-assisted suicide," as well as a directive that the "laboratory of the states" should be where efforts and analysis to assist such individuals in their last days should be undertaken. The state of Oregon took up this "gauntlet" and passed its Death With Dignity Act, which has now withstood all legal challenges through the January 17, 2006, decision by the U.S. Supreme Court in *Gonzales v. State of Oregon*. The Court has now declared that the attorney general was not given any statutory authority under the federal Controlled Substances Act to declare it is not a legitimate medical purpose to prescribe drugs to assist a person who is terminally ill. The case clears the path for states to enter this legislative arena, as Oregon did. Is this appropriate?

When "No Pets Allowed" No Longer Applies—Laws Impacting Senior Citizens and their Companion and Service

Animals. Sat., Aug. 5, 2006, 7:30 a.m. to 9:00 a.m. Primary Sponsor: Section on Tort Trial and Insurance Practice. Now that the Baby Boomers are joining AARP and more Americans live with animals than children, there is a need to address the legal intersection between the elderly and animals. This program will examine laws that support elder interests as they apply to animals: be it a traditional service animal, such as a seeing-eye dog; an emotional service animal that provides psychological benefits, such as companionship; or the companion animal. Using a hypothetical case scenario, a panel comprised of a law professor, litigators, a lawmaker, and a veterinarian, will give special attention to tort and insurance issues pertaining to seniors residing with animals and their ability to care for them in the event of their death or hospitalization.