

## Bar Associations in Focus on Aging and the Law

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### *Bioethics/Alternatives to Guardianship/ Partnerships in Law and Aging*

#### Improving Care for Unbefriended Elderly in San Francisco

By Amy Rassen

In 2004, the San Francisco Probate Court completed a two-year project that explored the role of conservatorship and alternatives to conservatorship with regards to appropriate access to the court. The study identified a variety of situations in which a conservatorship was sought where a less restrictive alternative might have been appropriate. For example, the study revealed that approximately 30 percent of persons who became a ward of the county in the year 2002 were people with no support system, who lacked capacity, and were conserved only for the purpose of medical decision-making. Similarly, a 2002-2003 study on decision-making for the unbefriended elderly by the ABA Commission on Law and Aging concluded that “the single greatest category of problems we encounter are those that address the care of decisionally incapable patients.”

Advocates, ethicists, and professionals agree that preserving autonomy should be the highest priority in crafting protective interventions. To that end, it is generally agreed that interventions that are least restrictive of a person’s freedom should be recommended first. Conservatorship, a process by which courts appoint responsible parties to act on behalf of incapacitated people, should be considered the option of last resort.

#### Project Goal

To address this issue, San Francisco’s Jewish Family and Children’s Services proposed to look at alternatives for the unbefriended elderly who need someone to assist them with

*Continued on page 52*

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*Amy Rassen is the associate executive director of Jewish Family and Children’s Services in San Francisco.*

### *End-of-Life Care*

#### Oklahoma Attorney General Issues Legal Opinion That Eliminates Restrictions on Refusals of Nutrition and Hydration

By Charles P. Sabatino

Drew Edmondson, Oklahoma’s attorney general, issued an advisory legal opinion on April 7, 2006, that supports the use of the Five Wishes® advance directive in Oklahoma, and in doing so, his opinion targets a serious constitutional problem with the Oklahoma advance directive statute. The opinion can be found at: <http://www.oag.state.ok.us/oagweb.nsf/0/C60977EB6705A30586257149005066AE!OpenDocument>. The opinion concludes that the state’s advance directive statute (known as the Terminally Ill or Persistently Unconscious Act) is unconstitutional to the extent that it lim-

*Continued on page 57*

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*Charles P. Sabatino is the staff director of the ABA Commission on Law and Aging.*

## Inside

**Resources:** Help for Md. Adults Acting As a Health Care Proxy (p. 53); Brochure to Help Attorneys Effectively Serve Their Pro Bono Clients (p. 56)

**Practical Presentations:** Elder Law Day (p. 54)

**Awards and Honors:** Charles P. Sabatino Honored with Theresa Award (p. 55); 2006 NALC Award to Michael C. Parks (p. 55); Nancy Coleman “Advocacy in Aging Lecture” Series Established (p. 56)

**Call for Nominations:** Aging Innovations and Achievement Awards (p. 61)

## Improving Care for the Unbefriended Elderly

*Continued from page 51*

a medical decision. We proposed as one possible alternative the development of a countywide bioethics committee. Our project plan was to explore this possibility by developing a structure and recruiting members for a bioethics committee for San Francisco that could potentially result in reducing the number of unbefriended elderly currently handled in probate court who could better be served outside the court system.

### Program Participants

In April 2004, Eileen Goldman, a licensed clinical social worker and a geriatric specialist with 25 years of experience

in the field, was hired to coordinate the project. She brought together a team of project partners, including representatives from:

- Laguna Honda Hospital;
- Legal Assistance to the Elderly;
- San Francisco Ombudsman;
- Institute on Aging; and
- Jewish Family and Children's Services.

Project representatives, in turn, identified experts in existing bioethics committees who assisted the project partners in investigating the need for a countywide San Francisco committee. At the first communitywide meeting in August 2004, those joining the project partners included:

- Dr. Al Jonsen, a nationally-known ethicist;
- Doris Hawks, an elder law attorney who had played a major role in the development of the bioethics committee in Santa Clara County on the San Francisco Peninsula;
- Theresa Drought, a consultant on issues of medical ethics;
- Grant Tomioka, a private attorney who works under contract to the public defender's office representing patients in Probate Code §3200 cases;
- Mary Joy Quinn, director of the San Francisco Probate Court and an ABA Commissioner; and
- Marilyn Williams, co-chair of a hospital ethics committee.

Membership at successive meetings was expanded to include:

- Representatives from the San Francisco Medical Society;
- A medical director representing a chain of San Francisco nursing homes; and
- Chairs of most of the hospital-based ethics committees in San Francisco.

### Project Activities

#### Development of Mission Statement

At the initial meeting, the project partners developed the following mission statement:

To investigate the feasibility of creating a review mechanism for the purpose of preventing unnecessary conservatorships for people in long-term care facilities and hospitals who are in need of medical decisions regarding the withdrawal and application of medical intervention.

*Continued on page 58*

## BIFOCAI

BAR ASSOCIATIONS IN FOCUS ON AGING AND THE LAW  
NEWSLETTER OF THE AMERICAN BAR ASSOCIATION  
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## Resources/Health Care Decision-making

**I**n commemoration of the one-year anniversary of Terri Schiavo's death, the ABA Commission on Law and Aging and the Maryland Office of the Attorney General have released two self-help guides for adults in Maryland acting as a health care proxy.

The first guide is a short consumer-friendly pamphlet titled *Making Medical Decisions for Someone Else: A Guide for Marylanders*. The guide presents key information about the role of a health care proxy in Maryland.

The second guide is a more detailed, Web-based document called *Making Medical Decisions for Someone Else: A Maryland Handbook*. It includes steps for making health care decisions and resources for resolving disputes and getting additional help, as well as information addressing specific situations—such as dealing with grief, pain, emergencies, DNR orders, surgery, artificial nutrition and hydration, and medical research. It also includes hyperlinks to yet more detailed information.

A health care proxy is anyone serving as a substitute decision-maker—as an agent under a durable power of attorney for health care, as a family member or close friend (called a “surrogate” under Maryland law), or as a guardian appointed by the court.

“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 guides stress the importance of talking, explain how to talk to the patient while there is still time to learn what treatment the person would want, and explain how to talk with doctors and other medical professionals when the time comes.

It is hoped that these Maryland guides also will be a model for other states. It would be an excellent project for bar association sections or committees on aging, in collaboration with other state groups.

Both guides are on the ABA Commission Web site at <http://www.abanet.org/aging>; and also on the Web site of the Maryland attorney general at [www.oag.state.md](http://www.oag.state.md) (select “Health Policy”). The guides were funded by the Morton K. and Jane Blaustein Foundation.

**Great project idea for bar association elder law section or committee on aging: Adapt the Maryland Health Care Proxy Guide for your state.**

**Where to Get Help**

Help is available if you need it. You don't have to handle things by yourself. Talk with family members or the patient's spiritual advisor. You can also get information and help from the professionals in hospitals or nursing homes—like a social worker, patient representative, or ethics committee.

**How to Get More Information**

A much more detailed version of this guide is in a booklet called *Making Medical Decisions for Someone Else: A Maryland Handbook*. You can get this on the Internet at the website of the Maryland Attorney General at [www.oag.state.md](http://www.oag.state.md) (click on “Health Policy”). You will also find information about the Maryland law on advance directives, deciding for others, and related issues. To request a printed copy of the booklet, leave your name and address at this number: (410) 576-7000.

March 2006

**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.

Suppose nobody has named you as a health care agent. Still, you might be called upon to make medical decisions as what the law calls a *surrogate*. Under Maryland law, this is usually a family member, but possibly a friend, who can make decisions when the patient cannot and when the patient hasn't named a health care agent. (One type of surrogate is a *guardian*, appointed by a court.)

If you think you might become someone's surrogate, have a conversation about values, beliefs, and the end of life. Ask whether the person has any particular wishes about care under certain conditions. It's tough to talk about illness and dying, but it's a lot tougher making decisions without having a sense of what the patient would want.

**What to Do When the Patient Can No Longer Decide**

You have three basic things to do:

First, find out the medical facts. Ask doctors and nurses what the current situation is and what's most likely to happen.

Second, find out the medical choices. Have the doctor explain the risks and benefits of each choice.

Be prepared to get the most out of your time with the doctor:

- Make a list of questions beforehand.
- Ask the doctor about things you don't understand. But don't expect certainty or guarantees.
- Take notes.
- Think about bringing a friend or relative of the patient's along to help you talk with the doctor—and for moral support!

Third, decide as the patient would want. From what the patient wrote or told you, you might know for sure. Or you might be pretty confident because you have a sense of the patient's values. If you're still unsure what the patient would want, then do what gives the most benefit to the patient with the least burden.

Sometimes a health care professional might ask you to go over your decisions and write them on a form for the medical record. One form used in Maryland, especially in nursing homes, is called the *Patient's Plan of Care* form. The form should clearly state your decisions.

## Practical Presentations for Elder Law Day

Law Day is an ideal time for sponsoring programs to educate older Americans about their rights and to call attention to legal resources available to seniors in the community. Since May is Older Americans Month, it is also a good time to sensitize attorneys to the concerns of the elderly and to encourage them to volunteer in reduced fee or free legal programs for those with limited income.

### Program Suggestions

There are many ways to plan a special elder law day program or to incorporate seniors into ongoing Law Day programs.

- **Seminars for Seniors**  
Present a seminar, with keynote speakers and workshops. Offer seminars and materials in languages other than English.
- **Phone-In Programs**  
Sponsor a toll-free call-in just for seniors.
- **Mock Trials**  
Hold a mock trial of a case regarding termination of life support for an incompetent person.

Other program suggestions include courthouse tours, cable TV programs, special luncheons, and ask-a-lawyer programs at malls, senior centers, or nursing homes. Program topics might focus on wills, health care power of attorney, reverse mortgages, telemarketing fraud, trusts, or guardianships.

### Planning Tips

Keep in mind when planning a program that transportation can be a problem for many senior citizens. Choose a location that is well known, close to public transportation, and easily accessible for those with disabilities. Check to make sure the room has good lighting, comfortable seating, an adjustable temperature setting, and an adequate sound system.

Consider scheduling your program in the morning or mid-day rather than late afternoon or evening. Avoid programs that are too long or include too many different speakers.

If your program includes opportunities for seniors to meet with an attorney, try to arrange the room to ensure privacy for each participant and to reduce background noise.

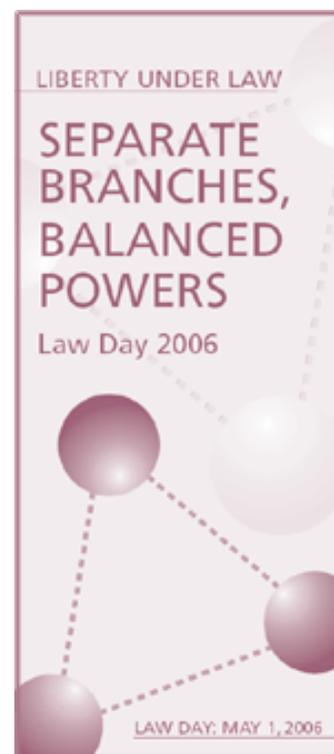
Ask volunteers to speak in a low-pitched voice and to sit so people can see their lips. Avoid having people face a source of glare, such as a window, and consider extending the length of individual conferences from 15 minutes to a half hour or even 45 minutes, if possible.

Offer handout materials in a larger typeface for participants to take after the program and include a list of area organizations that offer low-cost legal services.

Remember that age bias is deeply ingrained in our society and can interfere with your program's success. While designing materials or making room arrangements to compensate for possible hearing or vision loss, avoid adopting a patronizing attitude. Help volunteers recognize "age-ist" stereotypes and check their own pre-existing perceptions. Recruit attorneys who specialize in elder law to brief volunteers or ask someone who regularly works with seniors to address your group prior to the program.

With careful planning and enthusiastic volunteers, you can sponsor a Law Day project that will be appreciated by seniors and the community groups that serve them. An elder law program can generate positive media coverage for your organization while creating opportunities for members or potential members to serve the community. Your members may find the interaction between seniors and volunteers to be a learning experience for both groups.

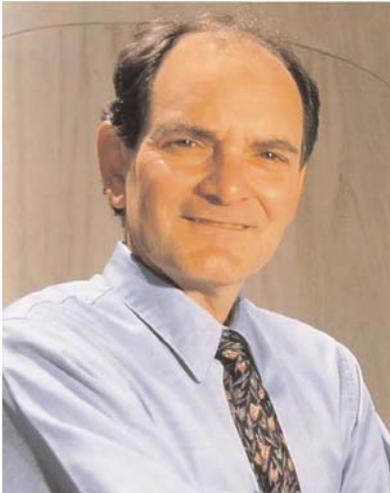
**How will your group use this year's theme of "Separate Branches, Balanced Powers" to expand knowledge about the rights of elders and to meet their law-related needs? E-mail [Bifocal](mailto:Bifocal@staff.abanet.org), at [Philpotj@staff.abanet.org](mailto:Philpotj@staff.abanet.org), with your project ideas and we'll share them in upcoming issues.**



## Awards and Honors

**Charles P. Sabatino, staff director of the ABA Commission on Law and Aging, is honored with the 2006 Theresa Award in Community Service.**

The award, presented each year to a member of the National Academy of Elder Law Attorneys, recognizes Charlie's out-



standing advocacy and support for the rights of seniors and persons with special needs. The award was presented at the NAELA symposium in April in Washington, and at the Twelfth Annual Theresa Awards Dinner in May in New York.

In tribute to Charlie's "behind the scenes" advocacy and his many achievements, his colleagues

wrote: "His dedication to people awakens in each of us the thought that we live in an affluent world, and that there is so much more to do for others. He believes that there is no better time than the present for social action and education as he continues to advocate that our country has been blessed, and we must serve the vulnerable and the growing number of people with special needs."

Charlie sums up his philosophy, thusly: "The more God gives, the more is expected of you."

Charlie began his professional career working in the field of child and adolescent development, both as a researcher with the Office of Child Development in Washington, and during a stint working as a houseparent to a group of adolescents suffering from emotional and behavioral disorders. This experience sparked an interest in the court system and juvenile justice, which lead to law school at Georgetown University. Following law school, he became a senior citizens lawyer at the Legal Aid Society of Arlington, Virginia. A two-year project for the American Bar Association evolved into what became a long-term commitment to the ABA Commission on Law and Aging, of which he is now the director. Charlie's other roles include teaching law and aging at Georgetown University, since 1987; and volunteering as public policy chair of NAELA (of which he was also past president) and in a Medicare Part D Counseling Program at George Washington University.

**Michael C. Parks, legal counsel at the Senior Citizens Law Office of Albuquerque, New Mexico, receives the 2006 National Aging and**

**Law Award.** The award, given in the spirit of the previous Arthur S. Flemming and Paul Lichterman Awards, honors individuals who have made significant contributions to justice for older persons. The award was presented at the National Aging and Law Conference, held in April, in Crystal City, Virginia.

Nominated jointly by Law Access New Mexico, the Senior Citizens Law Office, New Mexico Protection & Advocacy System, New Mexico Legal Aid, and the New Mexico Long Term & Aging Department, the nomination stated that Mr. Parks "has tirelessly and creatively advocated on behalf of seniors and persons with disabilities to



uphold their rights, maximize their autonomy, and to ensure that they receive the benefits to which they are entitled. His contributions to the practice of law have strengthened and affirmed the rights of older persons."

Mike has worked at the Senior Citizens Law Office for most of the period between 1993 to the present; however, he did spend two years with New Mexico's Protection & Advocacy System, Inc., and a short time as a private practitioner. His present focus is to promote and protect the rights of the elderly to secure adequate standards of care and access to essential benefits, goods, and services. As part of his systemic advocacy, Mike speaks at community forums to discuss and comment on rules governing Medicaid and other programs, meets with officials of the Human Services department, participates in coalitions of groups whose focus is on improved health care for New Mexico citizens, and is often the person who organizes the coalitions.

In addition to his excellent legal skills, Mike has lent his unparalleled good humor to the field of elder advocacy. In the words of one supporter, he "has made it just a bit easier to bear the tragedies we encounter as we engage with bureaucracies and statutory barriers in our efforts to make things better.

*Continued on page 56*

# Awards and Honors

Continued from page 55

For more than 25 years, Nancy Coleman has worked to promote the legal rights of older Americans and to strengthen our national understanding of law and aging. As director of the ABA Commission on Law and Aging from 1979 through 2005, and in other roles, she has been a driving



force in moving the field of aging forward, while promoting a vision of access to justice for older persons, especially those who are frail, vulnerable, and low-income. She has encouraged the development of state and local bar association sections and committees on aging and collaborations between the private bar and legal services programs, spurred improvements in the quality of legal representation,

and advocated for Older Americans Act-legal services and other elder rights programs.

**In keeping with Nancy's vision for creating a community of law and aging advocates, NALC co-sponsors will in future years select a nationally known advocate to open the conference and present the "Nancy Coleman Advocacy in Aging Lecture."**

Nancy was one of the original planners of the National Aging and Law Conference. Throughout the years she has remained one of its leaders. Nancy has a unique talent for making connections and sparking projects, and is a master at bringing groups together across professional turf lines to study issues and systems, to make recommendations, and to move forward with changes.

Nancy has been called the "midwife of elder law," as she was perhaps the first person to recognize the emergence of elder law as a specialty practice area. In 1985, as the director of the then-named ABA Commission on Legal Problems of the Elderly, she brought together 35 practitioners who were working predominantly with older clients. With Nancy's support and her participation in the first board of directors, the National Academy of Elder Law Attorneys was born.

Her vision, dedication, and determination, her generosity and her advocacy, are models for us all.

## Resources/Pro Bono

The ABA Center for Pro Bono announces a new brochure, *Pro Bono Clients: Strategies for Success*, available to pro bono programs for distribution to volunteer attorneys.

The brochure outlines eight tips to help attorneys understand and effectively serve their pro bono clients. It also identifies resources for further reading on the topic of working with low-income populations.

A limited number of printed brochures are available to pro bono programs on request by contacting Angie Shaw at the ABA Center for Pro Bono by e-mail at: [shawa@staff.abanet.org](mailto:shawa@staff.abanet.org).

You also may view and download a PDF version of the brochure for printing at [http://www.abanet.org/legalservices/probono/brochure\\_probono.pdf](http://www.abanet.org/legalservices/probono/brochure_probono.pdf).

Both the print and PDF versions of the brochure have a space on the back panel for your organization to add a sticker or stamp with your logo and contact information.

The ABA Center for Pro Bono thanks Martha Delaney and Scott Russell of the Volunteer Lawyers Network and Karen Russell for their work in developing and designing the brochure. This brochure was based on the work of Ruby K. Payne, Ph.D.

**ABA CENTER FOR PRO BONO**  
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[info@abaprobono.org](mailto:info@abaprobono.org)

**PRO BONO CLIENTS**  
 strategies for success

**7 Forestall Future Problems**

- Publicize the other legal issues and refer your clients to appropriate resources for further assistance.
- Suggest referrals to appropriate social service agencies. Your local legal services or pro bono providers can assist in making appropriate referrals.

**8 Become Culturally Attuned—see the world through your client's eyes**

- Learn about the problems your client faces daily.
- Fill out a welfare application and even ask how difficult that task would be for a person who is over 65 years old.
- Visit a homeless shelter or soup kitchen.
- If from a different ethnic background, learn about your client's culture.
- For helpful information on assessing mental illness, go to [www.aaua.org](http://www.aaua.org).

**RESOURCES**

**online**

- [www.abaprobono.org](http://www.abaprobono.org)
- [www.abaprobono.org/probono](http://www.abaprobono.org/probono)
- [www.abaprobono.org/probono/programs](http://www.abaprobono.org/probono/programs)
- [www.abaprobono.org/probono/clients.html](http://www.abaprobono.org/probono/clients.html)

**books**

- *Assessment of Understanding*, Ruby K. Payne, Ph.D., *Midwest Child Care (No) Group Inc.*, 2004; Barbara Thornquist, *The Working Poor: Inside the Welfare System*; David K. Shipler.

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to the law but to other considerations such as moral, economic, social and political factors that may be relevant to the client's situation.

—American Bar Association, *Model Rules of Professional Conduct*, Rule 1.7

**For your pro bono clients to succeed in court, you must understand their hidden rules and teach them the rules that will make them successful. We can neither measure clients nor build them. In fact, we must advise them and provide support, insistence, and expectations.**

—Ruby K. Payne, Ph.D.

**ABA CENTER FOR PRO BONO**  
[www.abaprobono.org](http://www.abaprobono.org)

Note: This brochure defines an elderly (senior) citizen, which is defined as being 65 years of age or older. This brochure is based on an understanding of public law regulations. It is always important to check on the situation, who may or may not fit within certain policies.

This brochure was based on the work of Ruby K. Payne, Ph.D., written by Martha Delaney, Ph.D., and Scott Russell for Volunteer Lawyers Network, Austin, Texas.

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## AG Opinion Eliminates Restrictions on Refusals of Nutrition, Hydration

*Continued from page 51*

its an individual's right to refuse artificially administered nutrition and hydration by means of an advance directive. The Oklahoma statute limited that right to instances where the patient is diagnosed as terminally ill or persistently unconscious. The patient's right to refuse medical treatment through an advance directive cannot be limited to those two circumstances. As stated in the opinion:

If a person has clearly expressed his or her intentions to withhold or withdraw artificially administered hydration and nutrition in advance of incapacity, those wishes must be honored under the conditions specified by the individual—not limited to a terminal condition or persistent unconsciousness.

### Get Connected to Elderbar,

the listserve 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, or 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 or committee leader; or
- ◆ National 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. It is a closed list; messages can only be posted and read by members. **To subscribe, please send your name, e-mail address, and professional affiliation to [Philpotj@staff.abanet.org](mailto:Philpotj@staff.abanet.org).**

Edmondson reiterated in a press release that the statute runs afoul of the Fourteenth Amendment Due Process Clause:

In the 1990 *Cruzan* case, the U.S. Supreme Court ruled that a competent person has a constitutionally protected right to refuse lifesaving hydration and nutrition .... Oklahoma's law limits our constitutionally protected right to make decisions about our own medical care. That's unconstitutional.

Because most state living will statutes, as well as many state do-not-resuscitate laws, contain restrictions similar to Oklahoma's, the analysis, if applied elsewhere, would have a major legal impact.

If this analysis were applied nationally, it would wipe away a number of states' restrictions on decision-making, such as requirements that refusals of life support are valid only if certain diagnoses are certified. The analysis applies not only to nutrition and hydration, but also to virtually any other form of life support. The opinion is a major affirmation of the constitutional right to refuse medical treatment, including nutrition and hydration, by means of advance directives that do not necessarily conform to the restrictions or limitations in state statutory forms.

By way of background, legal opinions issued by attorneys general are advisory in nature, normally written in response to specific questions posed by another senior state official or by a representative of an organization directly affected by the law in question. The Oklahoma opinion addresses a series of questions posed by a state senator about the use of Five Wishes® in Oklahoma and the constitutionality of certain restrictions in the Oklahoma statute. While the opinion is advisory and does not carry the force of statute or court decision, the practical response to most attorney general opinions is typically to treat it as law within the state. It has no formal effect outside Oklahoma, except to the extent that others are persuaded by the reasoning and choose to respect it as a credible precedent.

Attorney General Drew Edmondson has been a leader among attorneys general in drawing attention to end-of-life care as a health care consumer protection issue. In his tenure as president of the National Association of Attorneys General, 2002-2003, he established a first-ever initiative to examine the role of attorneys general in improving care at the end of life, resulting in a ground-breaking report. He continued efforts after his term by chairing an end-of-life care working group of attorneys general that produced a best practices report in 2004.

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## Improving Care for the Unbefriended Elderly

*Continued from page 52*

### Researching Existing Models

Telephone surveys were conducted with representatives of bioethics committees or groups that have explored bioethics committees. These included the Santa Clara Medical Association and the Midwest Bioethics Committee.

Project representatives also met with a similar group in Santa Cruz. Among the issues discussed was whether committees should serve in an advisory capacity or seek authority to make decisions. Project representatives found that most bioethics committees do not have decision-making authority.

Representatives of hospital bioethics committees in San Francisco were interviewed to address the following questions:

- What are the functions of a hospital bioethics committee?
- What challenges do hospitals face in addressing the needs of unbefriended elders?
- Would the hospital ethics committee refer cases to a countywide ethics committee?

The survey revealed that each hospital committee was different, and that attitudes about the need for a countywide committee vary. Respondents also described their statutory authority to make decisions on behalf of incapacitated patients.

### Questions Developed by the Working Group

In a series of bimonthly meetings continuing throughout the grant year, group discussions addressed the following issues:

- Is there a need for a countywide bioethics committee in San Francisco?
- What need would a countywide committee serve that is not being met by existing hospital-based committees?
- Should the focus of the project be on strengthening the use of existing legal codes?
- If a countywide ethics committee could make single medical decisions, who would monitor the ongoing medical needs of the “unbefriended elderly?”
- What is the value of an ethics committee that serves in an advisory, as opposed to a decision-making, capacity?

- Should an ethics committee set standards for care, as is currently the case in Santa Clara County?
- Who would fund a countywide committee?
- Who are the main stakeholders?
- How could the work already done by the Santa Clara County committee lend guidance to the development of a San Francisco committee?

### The Santa Clara Model

Doris Hawks, one of the crafters of the Santa Clara committee who has become a national expert on the issue of end-of-life decision-making for the “unbefriended elderly,” described Santa Clara County’s bioethics committee. It was developed within the county’s medical association by a task force assigned to develop a uniform policy for hospital ethics committees. Most of the hospitals in Santa Clara County have now adopted the policy, which allows for a small group within each hospital to act as surrogate and make decisions. Their willingness to take on decision-making using the model policy makes Santa Clara unique.

### Issues Raised

In San Francisco, fear of legal action is a deterrent to formation of a committee with decision-making power, rather than one simply making recommendation. San Francisco’s assistant city attorney conferred with the health team of the city’s and county’s legal office to ascertain whether it would be legal to make decisions based on a model policy for the “unbefriended.” Their response was that there is a difference between policy and law, and the policy would need to be tested. Every hospital’s risk management team would need to look at the policy and decide if they thought it was defensible.

In San Francisco, Cal. Prob. Code § 3200, which “allows for providers of health and medical care, neighbors, friends, and others to petition the court to order medical treatment and to select and discharge health care providers and institutions on behalf of persons who lack capacity to consent,” is being used to allow for treatment of existing medical conditions, but not for the purpose of making decisions regarding the withholding or withdrawal of life-sustaining treatment. Although Cal. Prob. Code § 3200 is helpful in resolving some medical issues, most in the group agreed that such decisions are best made in the clinical setting rather than the courts.

Within this context, discussion turned to whether a countywide bioethics committee might be helpful in addressing the question of placement and end-of-life care. Currently, dif-

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ferent hospitals handle ethics issues differently. Therefore, the group suggested a template outlining a standard of care for the unbefriended patient as a possible first step. It would be necessary to get buy-in from the major stakeholders in order to create a standard of practice, and it would be valuable to create in-services training to educate staff regarding the usefulness of such a standard.

According to ethicist Dr. Al Jonsen, it is when decisions relate to ethics and quality of life, rather than purely medicine—when there is a possibility of “damaged survival”—that the recommendations of an ethics committee would be helpful for physicians treating patients who lack capacity and who have no surrogate.

However, there may also be a role for an ethics committee in other types of decision-making. The current standard is to treat rather than to withhold treatment, even when treatment might be futile. This problem could be addressed by “changing the culture” within the medical community through provision of a countywide forum where cases could be reviewed. Members of the medical community could then look to each other for help to “do the right thing.”

### **In-Service Educational Forum**

To build on the discussions and information shared at the succession of group meetings, an educational forum was arranged at the San Francisco Medical Society to which the group invited representatives from ethics committees from all the San Francisco hospitals, as well as those from skilled nursing facilities where they exist. The forum addressed in greater depth general issues of surrogacy and surrogacy from the court perspective. In addition, the chairs of two of the hospital ethics committees presented cases for discussion.

The concept of ethics was discussed as it relates to surrogacy for the unbefriended who lack capacity. Two primary virtues that should guide surrogacy were presented:

1. Respect. Each individual is a unique person in and of themselves, and not in a class, e.g., disabled.
2. Responsibility. A surrogate must be able to explain why a decision was taken in the way it was taken. The explanation will be different in each case. The decision should be made in front of some group (ethics committee) and should involve a consideration of a person’s medical data, social situation, and quality of life (prospects).

The court’s perspective on surrogacy revolves around their need to adhere to state law and case law. Because very often a person has not put his or her wishes into writing, “substituted judgment” is used to make decisions. Ideally the

person making the decision is using the values of the person who cannot make his or her needs known. The surrogate needs to be respectful of that individual and must be accountable for their decisions and act in their “best interest,” taking into account previous lifestyle and past wishes.

The forum looked at the court process for conservatorship when medical decisions need to be made and discussed court-sanctioned methods of decision-making. In a situation where exclusive decision-making powers for placement or medication are needed, due process requires: 1) a capacity declaration determining executive capacity and, 2) an investigator’s report.

The group raised some concern that the court process may take too much time and too many resources, but all agreed that when conservatorship is the appropriate level of support, the San Francisco Court is efficient.

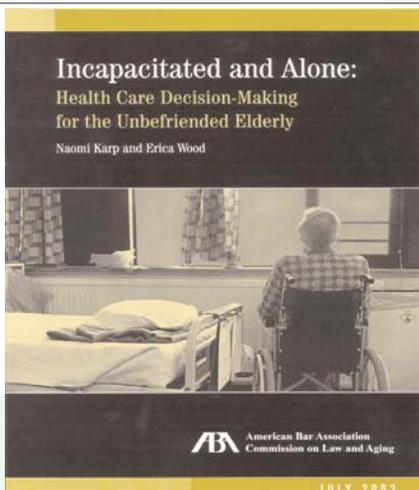
### **Follow-up Meeting**

The group met with the past president of the Santa Clara Medical Association, John Longwell, who had been involved with the development and politics of organizing Santa Clara’s countywide policy on surrogacy. Several questions and concerns were raised regarding the need and efficacy of developing such a policy in San Francisco. Several of the doctors present felt that their own hospital ethics committees were meeting their needs, and it appeared that some hospitals were more comfortable than others with the idea of a community-wide policy. In addition, some of the doctors expressed concern regarding the issue of a committee acting in a decision-making, rather than an advisory, capacity. The group agreed to continue the discussion, and to continue to evaluate the alternatives to conservatorship.

### **Conclusions**

Over the course of the project, a very dynamic and highly skilled group was formed to evaluate the need for a countywide bioethics committee. The project’s coordinator continually received phone calls from members of the geriatric care community who had heard about, and wanted to join, the group discussions and case presentations. Each meeting was attended by 20 to 25 people, and there were always several new attendees. Feedback from participants was extremely positive; they thought the meetings were instructive, and one attendee said it was like attending a high-priced conference for free. All agree that the exploration of the issues is important and that this forum has developed into a very knowl-

*Continued on page 60*



## Incapacitated and Alone: Health Care Decision-Making for the Unbefriended Elderly

By Naomi Karp and Erica Wood  
ABA Commission on Law and Aging

*Incapacitated and Alone: Health Care Decision-Making for the Unbefriended Elderly* presents the findings of a ground-breaking study aimed at improving medical decision-making on behalf of older patients incapable of making their own decisions and lacking surrogate decision-makers.

Conducted by the American Bar Association Commission on Law and Aging, in collaboration with The Samuel Sadin Institute on Law, Brookdale Center on Aging of Hunter College, this innovative study and report informs health care professionals, administrators, attorneys, regulators, advocates, legislators, and other policy-makers about existing law and practice, barriers to optimal decision-making, and cutting-edge solutions and options for the future. Specifically, the report assesses the current state of the law and practice and lays out policy recommendations on the best mechanisms for health care decision-making for this population.

Through these efforts, the report seeks to enhance medical decision-making on behalf of isolated adults, reduce over-treatment and under-treatment, and improve the quality of care delivered in acute care, long-term care, and the community.

*Incapacitated and Alone: Health Care Decision-Making for the Unbefriended Elderly* \$25. (ABA PC# 4280022). To order, e-mail the ABA Commission at [abaaging@abanet.org](mailto:abaaging@abanet.org), or order online at <http://www.abanet.org/aging/orderingpage.html#decision>

## Improving Care for the Unbefriended Elderly

*Continued from page 59*

edgeable and exciting group of people who should continue to work together.

Although all participants agreed that the bimonthly forum for case presentation and discussion has been valuable, to date the group has not agreed that a San Francisco bioethics committee and/or a policy for the unbefriended elderly (such as exists in Santa Clara County) is necessary. Instead, during the course of the grant period the group addressed the following possibilities for assisting the unbefriended elderly:

- Using Cal. Prob. Code § 3200 for medical decision-making and possible placement;
- Using temporary conservatorship to solve particular medical or placement issues;
- Providing a countywide forum for sharing of information, case presentation, and “culture building”;
- Broadening the group to include more participants from nursing homes;
- Broadening the function of the group to include addressing community-based long-term care issues; and
- Continuing research into what other communities are doing to address issues of long-term care for the unbefriended elderly.

A key factor contributing to the success of the group was the leadership of the project coordinator, who has many years of experience in San Francisco’s geriatric and medical care community, is highly respected, and has many important professional community contacts. Because of this, she was very successful at getting luminaries in their respective fields to participate fully in the group. These experts have remained active, lending a very helpful balance to group discussions.

### Next Steps

The group feels that coming together regularly is very important. Members will continue meeting to present cases, explore legal and long-term care issues (such as surrogacy and placement), and look into methods for resolving health issues that might be prevented from reaching the courts.

Through our work it has become apparent that while the hospitals in San Francisco have ethics committees, the skilled nursing facilities do not. In the coming year, we plan to work

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to increase the membership and involvement in the group of representatives from skilled nursing facilities in order to learn whether this group might welcome the development of a countywide ethics committee.

There continues to be the need for a project coordinator—to contact colleagues, arrange guest presenters who are experts in specific topics, secure meeting sites, disseminate information discussed at the meetings, and nurture the group's development. The project is pleased to have secured grants from the Foundation of the State Bar of California and the Archstone Foundation to support this work.

This continued funding also will enable the group to plan a formal training session on these issues.

The committee is now established and well-respected in San Francisco. The involvement of leaders in the geriatric and medical field will enable us to secure excellent presenters to clarify existing rules and processes and help us to move our discussions forward.

Thanks to our two new sources of funding, we will continue to deepen and broaden the committee's development and discussion of the issues of serving unbefriended elderly, including increasing our investigation and discussion of differing cultural norms in order to assure cultural competency in decision-making. We will continue to return to the issue of a countywide bioethics committee, with the possibility that such a committee may initially be established for skilled nursing facilities. We will also disseminate the information we have gathered and, through public presentations, publication of articles, and other methods of information sharing, draw interested parties from ever-broader spectrums of the community and assist other locales in developing their own bioethics working groups or committees.

## Update

One year since the Partnerships in Law and Aging funding ended, the program continues with new funding and with a focused momentum. "This is really a remarkable project," said Amy Rassen, COO of San Francisco's Jewish Family and Children's services. Rassen, along with one other JFCS staff person, focuses exclusively on this project.

"I don't know if you know anything about our city," said Rassen, "but no one can agree on anything." Prior to the seed money from the Partnerships in Law and Aging grant, "there was no forum for discussion of these of issues. Currently, we are setting up a city-wide process for skilled nursing facilities and community agencies to discuss cases. It also provides an important linkage between the agencies and the hospitals."

According to Rassen, most of the cases that the committee will advise on typically involve a patient with dementia.

Rassen notes, for example, a recent case involving a patient at an acute care hospital who was supposed to go to a skilled nursing facility. A friend of the patient showed up at the hospital and volunteered to take care of the patient at the patient's home. The hospital released the patient—who was an alcoholic and who had dementia—to the care of the friend. The patient, emphasized Rassen, was being sent back to the same difficult-to-access, unclean apartment. "There was vomit all over the floors," said Rassen. A county-based agency would have required a follow-up care plan—of some kind—which wasn't there. In addition, stressed Rassen, the friend was under no obligation to care for the patient.

"We consider that an ethical issue," said Rassen, "and that is the kind of case this committee will resolve."

## *Call for Nominations*

### **Aging Innovations and Achievement Awards**

**The National Association of Area Agencies on Aging (n4a) is pleased to launch its 2006 Aging Innovations and Achievement Awards program.** The two-tiered program highlights innovative and successful aging initiatives operated by Area Agencies on Aging and Title VI—Native American Aging Programs that improve the lives of older Americans and their caregivers.

Area Agencies on Aging and Title VI programs in communities across the country plan, coordinate, and offer services that help older adults remain in their home, aided by services such as Meals-on-Wheels, homemaker assistance, and whatever else it may take to make independent living a viable option. This award highlights exemplary model programs in a range of key service areas, including caregiving, collaborative partnerships, ethnic/cultural diversity, healthy aging, home and community-based care, housing, information technology, prescription drug assistance, and transportation.

**The award application is available at <http://www.n4a.org/aiaawards.cfm>. The deadline for receipt of applications by n4a is May 31, 2006.**

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# Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers

ABA Commission on Law and Aging  
and American Psychological Association

With the coming demographic avalanche as the Boomers reach their 60s and the over-80 population swells, lawyers face a growing challenge: older clients with problems in decision-making capacity.

While most older adults will not have impaired capacity, some will.

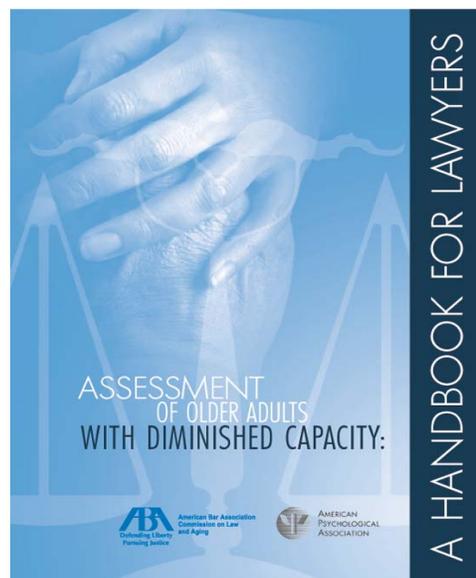
Obvious dementias impair decision-making capacity—but what about older adults with an early stage of dementia or with mild central nervous system damage? Such clients may have subtle decisional problems and questionable judgments troubling to a lawyer.

*Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers* offers elder law attorneys, trusts and estates lawyers, family lawyers, and general practitioners a conceptual framework and a practical system for addressing problems of client capacity, in some cases with help from a clinician.

Lawyers are increasingly faced with capacity issues in a rising number of cases involving specific legal transactions and, in some instances, guardianship. Whether they intend to or not, lawyers are making judgments about capacity. Even the notion that “something about the client has changed” or a decision to refer a client for a formal professional evaluation represents a preliminary assessment of capacity.

This handbook represents a unique collaboration of lawyers from the ABA Commission and psychologists from the APA. It offers ideas for effective practices and makes suggestions for attorneys who wish to balance the competing goals of autonomy and protection as they confront the difficult challenges of working with older adults with diminished capacity.

*Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers* (2005) \$25. ISBN #1-59031-497-2/ABA PC# 4280025. To order, e-mail the ABA Commission at [abaaging@abanet.org](mailto:abaaging@abanet.org) or order online at <http://www.abanet.org/aging/orderingpage.html#legalservices>.



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