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Journal of the American Bar Association Commission on Law and Aging

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It was a cold and rainy day when Mr. Jones tripped and fell on his driveway, fracturing his cheek and jaw, tearing the musculature, and crushing several teeth. He was taken to a local hospital’s emergency room and stabilized. In the days that followed, he required exams and procedures to repair damage and restore function to his face and mouth. Medicare covered nearly all of his treatment but denied coverage for the extractions and a crown for his shattered teeth on the basis that payment for dental care is excluded by the Medicare statute.
Similar coverage denials have been encountered by Medicare beneficiaries who need dental services to medically manage or treat an underlying and immediate injury, illness, or disease.

Background

When Congress established the Medicare program in 1965, it excluded payment for certain items and services that are not commonly associated with illness but are needed in the normal process of aging. Excluded items and services include routine check-ups, hearing and eye examinations, hearing aids, eyeglasses, orthopedic shoes, and dental treatment. However, the legislative history made clear that Congress did not intend for these exclusions to apply when the item or service was medically necessary to diagnose a specific complaint or treat a serious ailment.

Despite the strong clarification that the payment exclusions should apply only in routine situations, the Center for Medicare & Medicaid Services (CMS), which administers the Medicare program, has interpreted the statutory exclusion broadly with respect to dental services since the inception of the program. Thus, beneficiaries like Mr. Jones may be denied payment for medically-related dental services that Congress likely intended for Medicare to cover.

Medicare Policy on Dental Services

Traditional Medicare does not cover preventive dental services like exams, cleanings, and x-rays. Nor does it cover basic or major restorative services and items like fillings, extractions, root canals and dentures. When such dental work must be performed in a hospital setting due to the severity of the procedure or the patient’s underlying medical condition or clinical status, Medicare will cover the costs of hospitalization (including room and board, anesthesia, and x-rays), but not the procedure itself or fees for the dentist and other physicians.

Under CMS policy, Medicare will cover extractions needed to prepare the jaw for cancer radiation therapy, and inpatient oral examinations (but not treatment) prior to kidney transplants and, in certain settings, heart valve replacements. The Medicare Benefits Policy Manual (Policy Manual) also recognizes that payment must be made for a non-covered dental procedure when it is “incident to and an integral part of a covered service performed by the dentist.”

However, the policy requires that the dental procedure be carried out at the same time and by the same dentist who performs the primary covered service. Coverage is granted only in rare circumstances under this exacting test. An example given in the Policy Manual is that Medicare will pay for reconstruction of a ridge when performed as a result of and at the same time as the surgical removal of a tumor (a covered procedure), but not to prepare the mouth for dentures or other dental purpose.

In the case of Mr. Jones, depending on the facts, there may be an argument that the dental services he required are entitled to coverage because they were “incident to and an integral part of” the treatment involving his fractured jaw or cheek bone.
Judicial Interpretation of Medicare Dental Policy

The “same time/same dentist rule” is viewed by some as being unduly restrictive as well as flawed from a clinical perspective. The rule hinges Medicare coverage on the timing of the dental procedure, who administers it, and the anatomical location of the primary covered procedure, rather than taking into account clinical standards and protocols and whether the procedure is, medically-speaking, incident to and an integral part of a covered medical procedure or course of treatment.

Recently, in Lodge v. Burwell, 227 F.Supp.3d 198 (D. Conn. 2016), a federal district court cautioned against “a too-literal application” of the incident-and-integral coverage rule to require that services be performed by the same doctor and on the same occasion. The decision states that rigid adherence to the same-time/same-dentist rule “is not compelled by the language of the Act and could under certain circumstances lead to results at odds with the purpose of the Act[.]” It further suggests that the strict requirements of the rule “stand in tension” with the remedial ends of the Act, which would “permit payment for dental services whose primary purpose is not merely the care or treatment of teeth.”

In an earlier case, Maggio v. Shalala, 40 F.Supp.2d 137 (W.D.N.Y. 1999), a beneficiary won coverage for dental items and services needed to address nutritional deficiencies that affected his treatment for leukemia and thrombocytopenia. The court in Maggio found that the crowns and prosthesis at issue were “incident to and an integral part of” the beneficiary’s covered treatment for leukemia. A key fact was that the claimant’s primary oncologist ordered and supervised the dentist’s work. Importantly, the court refused to accept CMS’ interpretation of incident-and-integral services as limiting coverage to dental procedures performed at the same time and by the same provider as the underlying covered medical service.

Advice for Advocates

Advocates should consider the following when assisting Medicare beneficiaries who have medically-related dental issues:

1. The Medicare statute excludes from coverage services “in connection with the care, treatment, filling, removal or replacement of teeth or structures directly supporting teeth,” which CMS has interpreted to include the “gingivae, dentogingival junction, periodontal membrane, cementum of the teeth, and alveolar process.” If the primary service that the beneficiary requires or receives from a dentist falls within this description, chances are likely that Medicare will not cover it and an appeal would not be successful.

2. If the client requires treatment from a dentist that is covered under current Medicare dental policy (e.g., removal of growth or tumor for non-dental purpose, repair of jaw fracture, extractions preceding radiation treatment to the jaw, or a service that is incident and integral to a covered primary covered procedure performed by the dentist), advise the client to seek treatment from a practitioner who participates in Medicare or will accept Medicare assignment. If the client enters into a private contract to receive and pay privately for services from a physician who has formally opted out of Medicare, no claim for Medicare reimbursement may be submitted for covered services and Medicare limitations on actual charges will not apply. A listing of all practitioners who are currently opted out of Medicare is available at: https://data.cms.gov/Medicare-Enrollment/Opt-Out-Affidavits/7yuw-754z.
3. If the client is enrolled in a private Medicare Advantage plan that includes dental benefits, the plan may require prior authorization before approving coverage of needed dental services. Advise the client to engage the relevant physicians and practitioners to contact the plan directly to advocate for coverage. It may be helpful for the client’s physician to request a peer-to-peer review with a plan physician to explain the clinical justification for the prescribed dental treatment.

4. Medicare beneficiaries have the right to appeal claim denials through four levels of administrative review, and finally to judicial review in federal district courts. A beneficiary may have a better chance of getting a coverage denial overturned at the third level of review, which allows an evidentiary hearing before an Administrative Law Judge (ALJ), who is not bound by CMS policy in rendering coverage determinations. ALJs sometimes recognize that the Medicare statute should be liberally construed in favor of coverage for beneficiaries and that the facts in a particular case support coverage. Beneficiaries should be aware, however, that the agency sometimes moves to overturn favorable ALJ decisions on dental claims.

CONCLUSION

There is strong and growing public interest in expanding Medicare coverage for oral and dental care. Increasingly, older adults understand the importance of oral health on overall health. Yet a majority of Medicare recipients have no dental coverage [see sidebar]. Lack of coverage and the high cost of dental care lead many beneficiaries to delay or forgo necessary dental care altogether. Bills that have been introduced in Congress would, if passed, remove the statutory dental exclusion and add oral health benefits to the Medicare program. In the meantime, CMS should exercise its authority to expand coverage for oral and dental services that are vital to the medical management or treatment of serious underlying diseases, illnesses, and injuries.

REFERENCES

- 42 U.S.C. §§ 1395x, 1395y
- Medicare Benefits Policy Manual, CMS Pub 100-02, Chapter 15, § 150
- Medicare Benefits Policy Manual, CMS Pub 100-02, Chapter16, § 140
- Medicare National Coverage Determination Manual, CMS Pub 100-3, Chapter 1, § 260.6
- 42 C.F.R. § 411.15(i)
- The Medicare Dental Benefit Act (S.22)
- Dental, Vision, & Hearing Benefit Act of 2019 (H.R. 1393)
- Seniors Have Eyes, Ears, & Teeth Act (H.R. 576)

Wey-Wey Kwok is a senior attorney with the Center for Medicare Advocacy, a national nonprofit, nonpartisan law organization. Established in 1986, the Center provides education, policy analysis and advocacy to help older adults and people with disabilities obtain access to Medicare and quality health care. This article is an updated version of a 2009 issue brief on Medicare coverage of medically necessary dental services by the Center on Medicare Advocacy.
Most Medicare Beneficiaries Have No Dental Coverage

There’s nothing to smile about in this Kaiser Family Foundation (KFF) report: Nearly two-thirds of people on Medicare had no dental coverage in 2016, the year of an analysis, and almost one in two hadn’t seen a dentist in a year.

These figures were even higher for minorities. Among those who said they did not have a dental visit in the past year in 2016 were African-American Medicare beneficiaries (71 percent); Hispanic beneficiaries (65 percent); low-income beneficiaries (70 percent); and those living in rural areas (59 percent), according to the KFF.

In an issue brief, Drilling Down on Dental Coverage and Costs for Medicare Beneficiaries, the KFF found that overall, 10 percent of Medicare beneficiaries said they did not get needed dental care in the past year because they could not afford the expense. Those with low incomes (18 percent), in relatively poor health (24 percent), and beneficiaries under 65 with long-term disabilities (26 percent) also went without needed treatment.

For individuals with access to dental coverage through Medicare Advantage plans, Medicaid, employer-sponsored retiree or individually purchased policies, coverage varied and was typically subject to annual caps. According to the issue brief, which was published in March, nearly one in five beneficiaries who used dental services (19 percent) spent more than $1,000 out-of-pocket on dental care in 2016. To put that in perspective, about half of Medicare beneficiaries live on less than $26,200 a year, the brief said.

Leaders of 15 multidisciplinary problem-solving groups driving adult guardianship reform and promoting less restrictive options met in April in Washington, D.C., in the Second National WINGS Coordinators Forum. Sponsored by the ABA Commission on Law and Aging and funded by the Administration for Community Living, these Working Interdisciplinary Networks of Guardianship Stakeholders (WINGS) leaders spent two days learning from each other and sharing best practices for overcoming obstacles and insufficient resources.

Making guardians more accountable, addressing abuse, and highlighting less restrictive options including supported decision-making were among the topics of discussion. The leaders also shared perceptions on the sustainability of the WINGS and other problem-solving reform networks in their states. Perhaps most important, they made contacts across states to help each other in tackling needed changes.

To date, at least 25 states now have some form of ongoing multidisciplinary court-stakeholder partnership spearheading adult guardianship reform. The 15 represented at the WINGS forum showed considerable variation. For example, 10 were from groups sponsored by the state’s highest court; four were from groups outside the court such as nonprofits, a university, and legal aid; and one was from a state that had both an in-court component and an outside stakeholder task force. They were launched between 2004 and 2017. Six were funded by the ABA Commission through a grant from the U.S. Administration on Community Living (ACL) and nine developed through different paths. The participants described a variety of funding support ranging from substantial court support to a donation of $30 for bagels for each meeting. All shared a wide range of stakeholders and a commitment to improving the lives and self-determination of adults who are subject to, or potentially subject to, guardianship.
The WINGS forum was packed with discussion of problems and possible solutions, showing how states are grappling with challenges in different ways. These are a few examples:

What can courts, and WINGS stakeholders collaborating with courts, do to improve review and investigation of guardian and conservator reports?

Participants described approaches in their states for the court to track guardian reports and flag problems.

In Anchorage, Alaska, the court has been reviewing all annual reports, and WINGS aims to replicate the process in other courts, along with a redesign of the report form. In Idaho, as initiated through the WINGS Supreme Court Guardianship and Conservatorship Committee, monitoring coordinators in each judicial district review reports for “red flags” and may make in-person visits to investigate problems. A system of “differentiated case management” assesses risk either pre-appointment or post-appointment to determine frequency and intensity of review and necessity of investigations.

Minnesota has a unique conservator e-filing system and a centralized account auditing program and is sharing the application with other states, although technological adaptation has proved difficult. Nevada legislation created a Guardianship Compliance Office to provide report auditing and investigative services to the district courts. In Oregon, WINGS stakeholders and others initiated a program in which trained volunteer “special advocates” in some jurisdictions visit individuals to bring information back to the court, but the program needs to be expanded to other areas of the state. In other states, systematic review of reports is uneven or has not yet been developed, and the financial, technological, and judicial challenges are substantial.
How can we begin to develop data to spot problems and highlight systemic trends?

Alabama WINGS began by conducting an initial survey of its 68 probate courts. In Minnesota, the court’s e-filing system for conservators resulted in solid data sets that highlight needs and now the court is creating a similar e-filing system for guardians. In Nevada, the Guardian and Conservator Commission (a group similar to WINGS) reviews performance data from the largest district courts. North Carolina’s WINGS “Rethinking Guardianship” group [see sidebar] published reports with selected data and stories, focusing especially on restoration of rights. Virginia WINGS is working on case management system updates to determine the number of guardianship and conservatorship cases. All participants agreed that a lack of data is a key obstacle to driving change.

How can guardianship practices and proceedings become more consistent across the state?

Need for greater consistency was a common appeal throughout the forum. Some states are creating rules and revising forms. For instance, Alaska WINGS is working with the state Supreme Court on new rules and forms. The West Virginia WINGS is coordinating with the court on updating forms, and the Maryland Workgroup is overhauling forms as well.

How can we make it easier to get the court’s attention when there is a problem in a guardianship case?

Adults subject to guardianship are at a severe disadvantage in making their voices heard. They are generally unable to file a petition for court review and secure an attorney. Idaho has a complaint process allowing anyone to file informally, without a formal petition or need for counsel. An Idaho court rule permits the ex parte communication necessary for the court to review the complaint and make a response within a set timeframe. DC WINGS produced a complaint form.
What about training and assistance for guardians, conservators, as well as other stakeholders?

Alabama WINGS adapted the Consumer Financial Protection Bureau’s “Managing Someone Else’s Money” guide for conservators, making it specific to the state and distributing it widely. Alaska WINGS is developing an income and expense tracker app to help guardians with record-keeping. The Maryland Court’s Guardianship Workgroup developed a mandatory training program for guardians throughout the state.

In Oregon, guardian training is required, and is offered in several counties through a program called Guardian Partners, which uses the fees to coordinate its “special advocates” visitor program. The Massachusetts Guardianship Policy Institute is rolling out a Massachusetts Guardianship Academy to offer training for guardians. Minnesota has created one-page handouts on “Tips for Guardians” and “Tips for Conservators.”

Several WINGS have sponsored training aimed at additional stakeholders. Florida WINGS is creating an e-learning guardianship module for judges and attorneys. Minnesota, Idaho, and Utah have developed bench cards for judges. Virginia WINGS produced a video and set of Frequently Asked Questions (FAQs) for the public on guardian and conservator proceedings. Several WINGS such as Minnesota and Massachusetts have sponsored annual summits to educate multiple stakeholders.

How can we highlight self-determination and choice for adults who are subject to, or potentially subject to, guardianship?

Leaders at the forum acknowledged the need for WINGS to balance strategies to monitor guardians and address abuse with strategies to maximize individual autonomy and voice. Participants described varying roles of WINGS and its stakeholder groups. For example, in Alaska and Indiana, WINGS played a key role in getting supported decision-making agreement bills passed, and both offered extensive trainings in use of less restrictive options and supported decision-making. Oregon WINGS conducted a “mapping project” to identify the availability and use of a range of decision-making options, and is now following up with training and education.
North Carolina’s “Rethinking Guardianship” group has tracked and promoted cases for restoration of rights and has produced an “Introduction to Options” brochure for the public. Idaho WINGS convened a training for stakeholder groups on supported decision-making and other less restrictive options. Montana WINGS conducted a continuing legal education program focusing on less restrictive options.

**WINGS has engaged in productive activities, but the needs for guardianship problem-solving are ongoing. How can a multidisciplinary group like WINGS be sustainable?**

In some states, like Idaho and Nevada, a permanent guardianship committee or commission fulfills a role similar to WINGS. In other states, the current chief justice has placed a high priority on improving guardianship practices and supports the work that a WINGS or similar court entity does. For instance, in Maryland, the Court’s Guardianship/Vulnerable Adults Workgroup of the Maryland Judicial Council Domestic Law Committee has had the consistent support of the Chief Justice. But transitions can prove challenging. Alabama WINGS anticipated a change in its chief justice and worked to get a legislative resolution recognizing the need for WINGS.

In a few states like Montana and Kentucky, WINGS has been created legislatively but must be bolstered with appropriations to make it impactful. And in some cases, WINGS models have developed outside of court, generally with court contacts or collaboration. Among them: North Carolina’s Rethinking Guardianship group in a school of social work; Indiana’s Statewide Adult Guardianship Task Force acting as an independent stakeholder group; West Virginia’s WINGS, which is coordinated by staff from the state Legal Services Corporation-funded program and the state protection and advocacy agency; and the Massachusetts Guardianship Policy Institute, a group similar to WINGS, which is supported by a guardian community trust.

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Looking Toward the Future: A Uniform Vision

The WINGS Forum included a special “visioning” session with a long-term look toward the future, examining how guardianship reform entities could be continued over time and work toward more uniform measures nationally. In the child welfare system, a Court Improvement Program (CIP) since 1993 has consistently provided the highest court in each state with funding for systemic assessment and reform, building databases, and conducting training and education. The CIP also gives state courts technical assistance to build their capacity for improving practices. As a result, there have been marked improvements in court processes and outcomes for children and families.

Working with experts at the ABA Center on Children and the Law and the National Center for State Courts (NCSC), the session considered whether such a CIP model could be applicable to adult guardianship and WINGS or similar groups. Forum participants engaged in discussions comparing the two populations and court processes, and exploring the extent to which the CIP model could work, and what data and partnerships might be needed.

But for the more immediate future, it is important for WINGS and similar networks to evaluate how they are working. Are they effective in improving guardianship practices? Do they make a difference in increasing use of other decision-making alternatives? Are they advancing court oversight, as well as strengthening the self-determination and voice of vulnerable individuals? Do they increase stakeholder learning and synergy in ways that bring about systemic changes?

In 2015, NCSC found that the pilot WINGS funded through the State Justice Institute were “proving to be a feasible and effective means for addressing the current shortcomings of the guardianship system and process, [but should] take steps to prepare for the long-term effort that all agree will be needed.” Under its ACL grant, the ABA Commission is working with the NCSC on WINGS evaluation. The jury is not yet in, so stay tuned for findings and recommendations from the Commission project in the coming year.
Rethinking Guardianship in North Carolina

At least 25 states now have some form of ongoing multidisciplinary court-stakeholder partnership driving adult guardianship reform and promoting less restrictive options. These groups are often called WINGS – Working Interdisciplinary Networks of Guardianship Stakeholders. This series will profile several of these problem-solving guardianship groups, highlighting their accomplishments and challenges. For a complete list of state WINGS, see http://ambar.org/wings.

In an interview with BIFOCAL, Linda Kendall Fields talks about the challenges and achievements of the North Carolina “Rethinking Guardianship” group that she coordinates.

BIFOCAL: What are some of the concerns about adult guardianship practice in North Carolina that may need “rethinking”?

LKF: Like many other states, North Carolina’s guardianship system has offered limited oversight and accountability, limited information on alternatives and rights to legal counsel, and a lack of accessible education and training for guardians (particularly private guardians, including families).

When the issues are legal, the focus is on improving the relevant statute, NC Gen. Stat. 35A. When the issues involve awareness, education, and improving practice standards and accountability, the focus is on making individuals aware of their rights, including less restrictive alternatives, and restoring those rights when appropriate. Fostering community engagement by creating a knowledgeable public and a more accountable system has been central to the initiative’s success.

BIFOCAL: How did the Rethinking Guardianship group originate?

LKF: Past efforts since 2013 to examine guardianship in the state had been narrowly focused on a specific guardianship issue. In 2015, the North Carolina Division of Aging and Adult Services pursued a grant from the state Council on Developmental Disabilities to create a
sustainable infrastructure to effect long-term changes in the guardianship system, promote less restrictive alternatives to guardianship, and respect the rights of individuals in guardianship and those facing guardianship.

The Rethinking Guardianship initiative was established by a statewide, long-term workgroup representing a range of guardianship issues based on the Collective Impact model for social change used by WINGS, the Working Interdisciplinary Networks of Guardianship Stakeholders. Working with individuals affected by guardianship and the many systems, including the court system, that are involved to support individual well-being and improve accountability is the objective.

**BIFOCAL: Describe the multidisciplinary nature of the group and the stakeholders who participate.**

LKF: The Rethinking Guardianship workgroup has grown to nearly 140 members over four years. Among them: clerks and assistant clerks of Superior Court; state legislators; state employees who work on disability and aging issues; Department of Social Services directors and social workers; private and public guardians; elder law and disability attorneys; aging and disability advocacy and provider organizations; families and individuals. The Steering Committee meets monthly to discuss issues and next steps.

**BIFOCAL: What are the pros and cons of the group working outside of the court structure?**

LKF: While the group was developed outside of the court, it has always sought and fostered close collaboration with the Conference of Clerks of Superior Court (CCSC) and the North Carolina Administrative Office of the Courts (AOC). In fact, the workgroup holds its quarterly meetings at the AOC and has appointed staff from both the CCSC and the AOC serving on the workgroup and Steering Committee.

Pros to working outside of the court structure include having the freedom to explore issues and strategies without being constrained by political viewpoints or organizational limitations of time or commitment. Cons include the potential for less “buy-in” from court officials and having to “cross the divide” between the workgroup and leaders of both the CCSC and the AOC in order to make convincing arguments for changes in policy and practice.

**BIFOCAL: What have been the greatest accomplishments of Rethinking Guardianship so far?**

LKF: Among our greatest accomplishments:

1. More than 20 stories from individuals, family members, and professionals who were impacted by guardianship were collected. These stories, along with relevant state and county
data, formed the basis for a working statement of Shared Aspiration or “Common Agenda,” and will continue to drive the pursuit for effective solutions.

2. A website was created, http://rethinkingguardianshipnc.org, with Frequently Asked Questions (FAQs), stories of individuals and families and guardianship, and comprehensive resources on guardianship and alternatives.

3. An educational video, “Understanding Guardianship,” was developed for private guardians and particularly for families.

4. An informational brochure was created, “Rethinking Guardianship: An Introduction to Options.”

5. Nearly 300 guardianship stakeholders participated in a summit to learn about guardianship reform efforts in North Carolina and across the country. The aim of the summit was to build awareness and support for legislative, policy and practice changes.

6. Legislation is pending in both chambers of the state General Assembly to enact a study bill that will facilitate major changes to the statute by the 2020 legislative session.
**BIFOCAL: What have been the greatest challenges and how were they overcome?**

LKF: Gaining the interest of, and assistance from, the clerks of Superior Court in guardianship reform has been difficult. Many cite time constraints as elected officials are tasked with multiple responsibilities. What’s more, North Carolina has 100 county-based jurisdictions and 100 clerks, making it an ongoing challenge to establish uniform standards of practice across the state.

As for the Administrative Office of the Courts, preliminary conversations took place with the director, including a court data system and court oversight/monitoring in line with Rethinking Guardianship goals. But recent turnover involving leadership has stalled efforts and the future is unclear.

Rethinking Guardianship members communicate frequently with clerks and the AOC to ask for input and share recommendations and actions. A great deal of effort has gone into developing trust with these critical partners and there is some evidence of increased buy-in and motivation for change.

**BIFOCAL: What are the group’s goals for the future?**

LKF: Furthering the work and extending the reach of the Rethinking Guardianship initiative so that all stakeholders in the guardianship system are educated about guardianship, less restrictive alternatives to guardianship, best practices, and current and emerging statutory language.

1. Achieving successful legislative reform and helping individuals understand the need for such reform to engage in advocacy and self-advocacy and to address guardianship practice changes and implications.

2. Improving the court data system as well as court monitoring and oversight. Existing data systems hinder individual wellbeing, guardian accountability, and effective program planning. Ultimately, improved data systems are critical to raising performance in North Carolina’s guardianship system.

3. Leveraging momentum and specific project goals to secure additional funding for Rethinking Guardianship into the future with the possibility of transitioning placement to the Administrative Office of the Courts.
4. Pursuing a greater focus on expanding the practice of alternatives to guardianship, including supported decision making, particularly with youth transitioning into adulthood as well as other individuals of all ages.

Gaining the interest of, and assistance from, the clerks of Superior Court in guardianship reform has been difficult. Many cite time constraints as elected officials are tasked with multiple responsibilities.

Linda Kendall Fields is a Clinical Assistant Professor with the Jordan Institute for Families at the University of North Carolina School of Social Work in Chapel Hill. She has dedicated over 35 years to building communities that are responsive to the needs and contributions of older adults, people with disabilities, and families in Minnesota, Oregon, Ohio, Georgia, and North Carolina.

During her career, Linda has led numerous government and health care initiatives aimed at supporting individuals and families living in the community and transitioning to the community from long-term care facilities.

In her capacity at UNC Chapel Hill, she is facilitating the statewide Rethinking Guardianship: A Person-Centered Approach initiative as well as North Carolina’s Dementia Capable Communities Strategic Plan.

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Emeritus Pro Bono Practice Rules Update

What You Need to Know

By David Godfrey

The Commission on Law and Aging recently co-sponsored an ABA Free CLE program, “How to Navigate Emeritus Pro Bono Practice Rules,” along with the ABA Senior Lawyers Division, Standing Committee on Pro Bono and Public Services. Emeritus pro bono practice rules waive some of the usual licensing burdens for attorneys who limit their practice to pro bono only.

The rules are intended to serve as an incentive for attorneys who are retired or inactive to continue the profession’s commitment to providing free or low-cost legal service to clients unable to pay. At least 44 jurisdictions have emeritus pro bono practice rules.

Here’s what you need to know:

1. Civil legal aid programs turn away about half of clients who qualify due to a lack of resources. Pro Bono programs offer lawyers an opportunity to give back to our communities.

2. Rules vary from state to state. Each emeritus pro bono practice rule is unique. Most states allow attorneys who are retired to participate, but increasingly, attorneys who are inactive or engaged in work other than the practice of law are eligible under the rules. About half of all states allow attorneys in good standing and licensed in other states to become pro bono volunteers. Most states require the work be done through a qualified legal service provider, though the definition of qualified provider varies widely from state to state. In every state, Legal Service Corporation-funded legal aid programs are qualified providers.

3. In many states the rules apply not only to attorneys who are retired, but also to attorneys who are not actively practicing law for a living. This includes attorneys doing work outside the practice of law, and also to family caregivers.

4. Some opportunities don’t require you to leave your office or home. Technology is changing the practice of law. Programs such as ABA Free Legal Answers and legal aid hotlines connect clients with pro bono attorneys online and by phone. These innovative models limit the attorney’s commitment and deliver much needed legal help to clients.
5. Emeritus pro bono practice rules are not the answer for every attorney who wants to contribute to his or her community. Legal aid providers are limited by funding on the issues they can take on, the types of cases they can represent clients in, and the clients they can represent. An attorney who wants to help set up small businesses or do public interest class-action litigation may find that no qualified host organization is engaged in that kind of work. That does not mean these attorneys can’t do pro bono work; they just need to follow the usual licensing process to do so.

The webinar with CLE credits was recorded and will be available without charge to ABA members on the ABA website. 143 states and the District of Columbia, with a proposed rule expected to become effective in January 2020 in Missouri. https://www.americanbar.org/groups/law_aging/resources/emeritus_pro_bono/
Pro Bono Work from the Comfort of Your Living Room

Looking for a pro bono opportunity that is meaningful, quick, and convenient? The ABA Free Legal Answers is a national virtual legal aid clinic that allows low-income individuals to ask civil legal questions to volunteer attorneys licensed in their state. The website provides brief individualized legal assistance to underserved populations. And for attorneys in search of short-term volunteer opportunities, this site provides a way to do pro bono work that fits into their schedule. It also provides legal malpractice insurance for the advice provided within the site.

To date, more than 67,000 questions have been submitted by income-eligible clients since the site launch and some 5,900 pro bono attorneys have registered to respond to civil legal questions on the site.

To register, please click here [https://abafreelegalanswers.org/ “Volunteer Attorney Registration] and choose your state.

For more information, go to https://www.americanbar.org/groups/probono_public_service/projects_awards/free-legal-answers/.

Questions? Please contact Tali Albukerk at the ABA at Tali.Albukerk@americanbar.org.
What’s in a Name?

The CFPB Allows Co-Branding of Popular Guides

By Lori Stiegel

The Consumer Financial Protection Bureau (CFPB) announced in early April that it will allow entities – including not-for-profit and for-profit organizations – to co-brand its popular Managing Someone Else’s Money (MSEM) guides. The CFPB produced a web page full of information about how to do that: consumerfinance.gov/cobrandMSEM

The Commission on Law and Aging won a contract in 2012 from the CFPB that resulted in:

- Four national fiduciary guides for laypersons acting as agents under powers of attorney, court-appointed guardians of property and conservators, representative payees and VA fiduciaries, and trustees under a revocable living trust, known collectively as the MSEM guides
- Twenty-four state guides adapted from four national guides for Arizona, Florida, Georgia, Illinois, Oregon, and Virginia
- A set of tips and templates other states can use to adapt the guides

The CFPB released the national guides in October 2013 and subsequently translated the guides into Spanish. The state guides were released by CFPB between 2015 and early 2018. Other states, including Texas, Michigan, Minnesota, and Alabama have adapted or are adapting some or all the guides.

The CFPB provides information about the national and state guides, and the tips and template, at http://www.consumerfinance.gov/managing-someone-elses-money. The guides have been widely publicized and well received in national, state, and local media. The CFPB has disseminated more than 1.3 million hard and virtual copies of the national and state documents. They are among the agency’s most popular publications.
Don't Miss Out on the 2019 National Aging and Law Conference

Empowerment is the theme of the 2019 National Aging and Law Conference. With sessions like “Supporting Decision Making Across the Age Spectrum,” and “Using Trauma Informed Communications Skills,” we will explore models of communication that improve our ability to empower clients to access the programs and services that raise their quality of life.

The Administration for Community Living (ACL) will introduce new reporting standards for legal services paid for by Older American’s Act Title III-B funds, and the agenda includes what is new, and what you need to know, to comply with the updated reporting requirements. ACL will also be presenting a program on the ‘Elder Abuse Civil Legal Remedies Toolkit,” a collection of resources to empower advocates to address elder abuse, neglect, and exploitation.

With four plenary sessions and 30 workshops, the agenda has everything from basics to advanced topics, with a blend of proven speakers and new voices.

Who: The ABA Commission on Law and Aging’s 2019 National Aging and Law Conference

What: The only national conference on the legal issues that impact low to moderate-income older adults

When: October 31-November 1

Where: Marriott Crystal Gateway, Arlington, Virginia (One subway-stop from Ronald Reagan Washington National Airport)

Why: The best for Continuing Legal Education, skills training, and networking opportunities.

Registration information can be found at https://www.americanbar.org/events-cle/mtg/inperson/349894122/ Discounted early registration rate for legal aid, public interest, government attendees is $435.

This year’s pre-conference will be on Wednesday, October 30, and will cover Supplemental Social Security Income. The pre-conference requires a separate registration and fee.
Take Our Survey

The staff at BIFOCAL works diligently to provide readers with content that is timely, relevant, and valuable to help you in your work. Will you take a moment to answer a few questions to help us deliver on the content and issues that are important to you?

Here's a bonus: By taking the survey, you can win free registration to the National Law and Aging conference on Oct. 30-Nov. 1, 2019 at the Crystal Gateway Marriott in Arlington, Virginia! Make sure to include your name and contact information and we’ll include you in our raffle.

Click here to take the survey: https://americanbar.qualtrics.com/jfe/form/SV_0wghWgxmCXqCwfj

David Godfrey, a senior attorney at the ABA Commission on Law and Aging, is named a Fellow of the National Academy of Elder Law Attorneys (NAELA) at the NAELA Annual Meeting in Ft. Worth, Texas, on May 10, 2019. NAELA members select Fellows who’ve made extraordinary contributions to elder law or special needs law at the local, state, and national levels. Jennifer VanderVeen (left), an incoming president of the NAELA, and Godfrey were selected as Fellows from nearly 4,400 NAELA members.
The Commission on Law and Aging offers a variety of important resources to help you in your work. Here are a few you might be interested in:

- **Advance Directives: Counseling Guide for Lawyers**
- **Making Medical Decisions for Someone Else (proxy guide)**
- **Giving Someone a Power of Attorney for Your Healthcare (multi-state guide and form)**
- **Toolkit for Health Care Advance Planning**
- **Practical Tool for Lawyers: Steps in Supporting Decision-Making**

Go to the [Commission on Law and Aging's website](https://www.americanbar.org/aging) for more resources, tools, events, and other material to keep you informed.

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**Connect With the Commission on Law and Aging**

The Commission provides a forum for legal professionals to communicate and share ideas on four active discussion lists: Elderbar, Collaborate, Elderlink, and Aging Solo. Go to [www.americanbar.org/aging](https://www.americanbar.org/aging) or email the Commission to learn more and to subscribe. Also be sure to follow us on Facebook and Twitter.
There has not been a single significant development in the area of elder law in the twenty-five years I have been practicing in this field that does not reflect the guidance of the Commission and its able representatives.

H. Amos Goodall, Jr. Steinbacher, Goodall & Yurchak

The Commission has repeatedly played a key role in securing and protecting the rights of older adults. The Commission, we believe, truly represents a stellar facet of the American Bar Association.

Bob Stein, president and CEO, American Society on Aging

Learn more about our work at www.americanbar.org/aging

THE COMMISSION ON LAW & AGING
Changing lives through Research, Education & Advocacy

Our mission is to serve as the collaborative, interdisciplinary leader of the American Bar Association's efforts to strengthen and secure the legal rights, dignity, autonomy, quality of life and quality of care of aging persons.

What we do:
- Research Emerging Issues
- Monitor State and Federal Legislation
- Develop policy
- Provide technical Assistance
- Foster better access to legal services
- Educate lawyers, other eldercare professionals and the public

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