Aging in the 21st Century

by Marcos Acle Mautone
See page 63

Using Mediation to Find Solutions
North Carolina Medicaid Appeals Program

by Erica Wood
See page 76
63 Aging in the 21st Century
by Marcos Acle Mautone

69 The Dual Eligible Demonstration
Making the Policy Meaningful for Consumers
by Fay Gordon

72 Defining Undue Influence
A Look at the Issue and at California's Approach
by Mary Joy Quinn

76 Using Mediation to Find Solutions
North Carolina Medicaid Appeals Program
by Erica Wood

79 Book Excerpt
Ethics in the Practice of Elder Law
by Roberta K. Flowers and Rebecca C. Morgan

84 The Work of a Volunteer Fiduciary
Arlington County's Volunteer Guardianship Program
by Randy Feliciano and Barbara K. Green

87 New Free Resource
The Physician Orders for Life-Sustaining Treatment (POLST) Legislative Guide

89 Commission Intern Profiles

90 Commission Publication
Checklist for an Elder-Friendly Law Office

90 Engage Your Community!

91 CLE Webinar
Health Care Decision-Making and the “F” Word—Futility

92 World Congress on Adult Guardianship

93 Borchard Foundation Center on Law & Aging
Applications Due for 2014-2015 Fellowship

94 Upcoming CLE

96 New National Aging and Law Conference
The world is facing today an unprecedented demographic shift: The global population, besides growing in number, is aging. Increased human longevity combined with the reduction of child mortality and the reduction of birth rates in many countries—among other factors, is causing the population of those older than 60 to steadily grow relative to other age groups.

Within a few decades, the number of people globally over age 60 is expected to outnumber those between the ages of 18 and 60 for the first time. One estimate of the overall trend indicates that the proportion of people over 65—which was less than 8% in 1950, may reach a record 26% by 2050. In an exact reversal of the situation in 1950, the population aged 65 and over is projected to be 2.5 times that of the population aged 0 to 4 by 2050.1

In the United States, the Administration on Aging has estimated that in the year 2011, people over 65 years old represented 13.3% of the population, a percentage expected to grow to 21% by 2040.2 In Latin America and the Caribbean, people over 60 now make up about 8% of the population, and it is estimated that by mid-century that demographic will exceed 22%. On the other side of the scheme, population under age 15, which was over 40% in 1990, is projected to represent close to 18% by 2050.3

This demographic shift may inevitably impact the economic and social reality of states. A shrinking labor force will bear the cost of basic services and pensions for an increasingly dependent population;


this scenario worsens in countries with informal labor markets and higher youth unemployment. Some quarters are already calling for an inevitable reform of the social security systems in various countries in order to prevent their collapse.

In addition to these projections, numerous studies at the regional and global level have shown that many older people are systematically exposed to situations of profound inequality and discrimination, many times reflected in violence, neglect, abuse, lack of opportunities, inadequate and poor basic services, and limited participation in public life, among other situations. In Europe, for instance, research has shown that age discrimination is the most widely experienced type of discrimination.

Apart from suffering inequity in most areas of their daily life—from education and health services to access to justice and public participation—seniors are victims of prejudice and negative stereotypes that equate old age with disability. Some of these stereotypes are so pervasive that older people may internalize them.

**Increasing Involvement of the International Community**

In response to this reality, and with awareness that such a demographic forecast may only worsen the situation of older people if nothing is done, the United Nations (UN) and other organizations worldwide have begun to undertake actions to promote the rights of older persons. At the heart of this movement are the principles of equality and non-discrimination in old age, with the concepts of active aging and

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6 Roqué, M. (2009), Informe DINAPAN “La percepción sobre la discriminación, el abuso y maltrato por parte de las personas mayores”, presentación de relevamiento nacional realizado en el marco del Programa de prevención de la discriminación, abuso y maltrato hacia las personas mayores, Buenos Aires, in ECLAC Los derechos de las personas mayores en el siglo XXI: situación, experiencias y desafíos, Sandra Huenchuan (editor), Santiago, 2012.
intergenerational solidarity as keys to a more democratic, just, and inclusive society.

A first World Assembly on Ageing was held in Vienna in 1982; the UN General Assembly adopted in the “UN Principles for Older Persons” in 1991. These Principles for Older Persons encourage governments to introduce provisions in their policies that take into account the principles of independence, participation, proper care, self-fulfillment, and dignity of older people. The second World Assembly on Ageing was held in 2002 in Madrid. Following this Assembly, the “Madrid Plan of Action on Aging” was adopted; its goal is to remove all forms of violence and discrimination against older people. This document currently stands as the main reference for the international efforts in this field.

In 2010, the UN Open-Ended Working Group on Aging was created at the proposal of the Secretary General Ban Ki-moon. The task of the group is examining the existing international legal framework in this area, the study and determination of possible gaps in this legal framework, and the definition of possible mechanisms to correct those gaps.

At the regional level, the African Union is moving towards a draft Protocol to the African Charter on the Rights of Older Persons in Africa which sets down obligations and duties of states parties in promoting and protecting rights of older persons. The Council of Europe is preparing a recommendation on the promotion of human rights of older persons, which seeks to provide specific guidance and practical examples based on good practices in the region. In the Americas, the Organization of American States’ member states are negotiating a draft Inter-American Convention on Human Rights of Older Persons with active support of regional organizations such as the Economic Commission for Latin America and the Caribbean and the Pan-American Health Organization.

Last but not least, many non-governmental organizations (NGOs) across the world have begun to take action to raise awareness of the need to protect the rights of older people and assert their role in community improvement and development progress. In the global sphere, international advocacy groups such as Global Alliance on the Rights of Older People and Global Action on Aging bring together the main NGOs in the world which share the objective of promoting this subject.

In the United States, the American Bar Association—through its Commission on Law and Aging and its staff—actively seeks to contribute to strengthen and secure the legal rights, dignity, autonomy and quality of life of older persons, both nationally and internationally. For that reason, in 2011, the ABA adopted Resolution 106C, which urges “the United States Department of State and the United Nations and its member States to support the ongoing processes at the United Nations and the Organization of American States to strengthen the protection of the rights of older persons, including the efforts and consultations toward an international and regional human rights instrument on the rights of older persons.”

The Call for an International Convention

The general system of human rights recognizes the right to equality before the law to all people. Nevertheless, over the decades since the adoption of the Universal Declaration of Human Rights, the international community has recognized that certain social groups are particularly vulnerable and has legislated to eliminate all forms of discrimination affecting them. That has not been the case for older people. The prohibition of discrimination by virtue of old age is largely absent from most universal and regional human rights treaties.

For that reason, many countries have asserted that it is necessary to reaffirm the principle of

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11 Martín, Claudia y Diego Rodríguez-Pinzón (2006), “El estatus internacional de los derechos humanos de los ancianos”, en Claudia Martín (comp.), Derecho internacional de los derechos humanos, México, DF.
non-discrimination in regard to older people. To be effective, the provisions should be binding and unequivocal, leaving no room for divergent interpretations—namely, an international convention. International human rights treaties serve as a reference for governments when they design public policies and social programs, and for NGOs in advocating for their issues of concern. Further, they are a tool for awareness creation and education to society in general, as they establish minimum international standards to fight discrimination through the elimination of prejudices, negative stereotypes, and stigmatization.\(^\text{12}\)

Despite the call for a convention from various quarters, recent discussions held in the framework of the UN made it clear that while almost all countries agree on the overall situation analysis of human rights of older persons and the urgent need for improvement of that situation, there are still diverging views on how to address these shortcomings. Two opposed positions are now clearly identifiable. On the one hand, some countries argue for a legally binding instrument to promote and protect the rights and dignity of older persons and call for moving negotiations forward to discuss the main elements of an international convention. On the other hand, others believe that existing international human rights instruments apply to older persons and that current deficiencies in the protection of the rights of older persons are due to poor implementation.\(^\text{13}\)

In view of these clashing points of view and in order to further assess the reality of older population in both developed and developing countries and the challenges of an imminent demographic change, the UN Human Rights Council mandated the three-year appointment of an Independent Expert on the Enjoyment of All Human Rights by Older Persons.


The main task of the independent expert will be to “assess the implementation of existing international instruments with regard to older persons while identifying both best practices in the implementation of existing law related to the promotion and protection of the rights of older persons and gaps in the implementation of existing law”\(^{14}\) in dialogue with all the relevant stakeholders. This assessment will be submitted as a report.

**OAS Efforts**

At present, the OAS is the only forum where a draft convention is being actively negotiated. The current draft under discussion is very detailed, with an extensive preamble and precise definitions. The document states the purpose of the convention “to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms of all older persons, without distinction of any kind,” while promoting respect for their inherent dignity and their full inclusion, integration, and participation in society. The current OAS draft recognizes that “as he or she ages, a person should continue to enjoy a full and autonomous life, in health, safety, integration and with active participation in the economic, social, cultural and political spheres of his or her society,” and that “the need to address matters of old age and ageing from a human rights perspective that recognizes the valuable current and potential contributions of older persons to the common good, to cultural identity, to the diversity of their communities, to human, social, and economic development, and to the eradication of poverty…”\(^{15}\)

However, as promising as this may sound, some OAS Member States still remain unconvinced that a convention on the rights of older persons is needed. A footnote to the OAS General Assembly resolution of 2012 reads: “The United States has consistently objected to the negotiation and adoption of a new regional convention on the rights of older persons, and reiterates that such a convention is not needed at this time...” Similarly, Canada has noted its concern by the prospect of duplication of international work in this area and believes it prudent to await clarification from the outcomes of the work being carried out within the UN before moving ahead with an inter-American convention.\(^{16}\)

The outcome of the OAS negotiations alongside the UN independent expert’s conclusions will be important in inspiring and committing the global community of states to move the process forward. Moreover, the contribution of civil society is essential to any national and international legislative processes. The inclusion of such stakeholders’ perspectives will give greater legitimacy, and above all, enrich the debate.

**A Suggested Approach to Human Rights and Development: The Need for an “Age Perspective”**

The demographic projection of population aging is a fact. As such, it should be met with actions. These actions should be designed following a two-fold approach: as a human rights issue and as a key element of development.

First, as a human rights issue, population aging implies that the need to respect, protect, and promote the rights of older people increases as this group grows in relation to others. Old age is a factor that already exacerbates vulnerability and may become a bigger problem in the context of demographic change. Therefore, it justifies a special consideration for the situation of older people and those around them, especially from the state.

Second, the approach to the topic of aging from this development perspective assumes that this is a matter of social and cultural consideration, in addition to being a human rights matter. The issue of aging involves the entire society—not just elders—and has as its backbone a new paradigm that recognizes older people as a potentially active and productive part of society.

Older people are often seen as beneficiaries of social programs and charity and not always as active participants of society. However, the substantive contribution that this group of people is capable of making to the social, economic and cultural heritage of their communities must be recognized. Far from being a burden to national economies, this mass of workforce, intellectual capacity, rich experience and culture, and wisdom should be seen as a valuable resource.


\(^{16}\) Ibid. vii.
for countries to take advantage of when planning development strategies.

Finally, taking into account that the rights of the elderly is a overarching issue, the time has come for national governments and international organizations to consider the adoption of an age perspective when designing, implementing, and evaluating public policies, especially those of economic and social character. An age perspective involves not only a change in language and terminology, but requires full consideration of age when designing activities aimed at promoting all other rights—the rights of migrants, refugees, people with disabilities, victims of natural disasters, etc—and when planning programs—to promote democratic governability, access to justice, sustainable development, etc. This strategy must be implemented through specific action plans, manuals, workshops, and guidelines, guiding public officials in the overarching incorporation of this perspective. It must be applied within national governments and international organizations when producing statistics, designing cooperation projects, drafting regulations, or generating indicators.

In light of a proven projection of population aging, we must strive to promote the new paradigm of active aging and intergenerational solidarity and bring the issue to the discussion table at all levels—addressing it not only as necessary for the advancement of human rights, but also as a key element for integral development in the coming decades. Such a strategy is a fact-based approach, not an arbitrary desire. The question we have to ask ourselves is no longer just: “What can we do to assist older people?” It is also: “What can we do to re-involve older people in the process of development of our societies? How can we seize their abilities, unique wisdom, and experience?”

That is the challenge ahead.

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If everything goes as planned, by January 1, 2015, hundreds of thousands of individuals could be enrolled in new delivery systems where combined Medicare and Medicaid services are provided through managed care plans. Of course, nothing ever happens exactly as planned. However, nine states are on tap to implement a dual eligible demonstration within the next year, making this a critical time in both planning and implementation of the new systems.

The changes, called dual eligible demonstrations, will significantly alter the way that low income older adults and persons with disabilities receive their Medicare and Medicaid services. Participating dual eligibles will be able to receive both sets of benefits through a managed care plan that will get a combined stream of capitated payments for all covered services. Individuals will be passively enrolled into the plans but can opt out at any time. The demonstrations have the combined goals of providing more coordinated care and reducing costs.

In the past year, advocacy around the dual eligible demonstrations has started to shift from shaping their design to monitoring the implementation. In this early implementation period, issues like provider outreach, beneficiary communication, and care continuity require lawyers and consumer advocates to engage with their state while monitoring client transitions.

Demonstration background

The dual eligible demonstrations are a product of Affordable Care Act (ACA). The ACA granted the Centers for Medicare and Medicaid Services (CMS) the authority to develop new structures to coordinate the way that Medicare and Medicaid deliver care for dual eligible individuals (beneficiaries who participate in both programs). In the past year and a half, CMS approved new demonstrations in nine states (Massachusetts, Ohio, Illinois, California, Virginia, New York, South Carolina, and Washington) aimed at streamlining both programs. Proposals from several other states are still pending. These states are planning to implement what CMS is calling the financial alignment model. The model allows states to contract

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1 The following states received federal approval to implement a dual eligible demonstration: Massachusetts, Illinois, Ohio, Virginia, California, New York, South Carolina, Minnesota and Washington.
with private managed care plans to coordinate Medicare and Medicaid benefits for dual eligible individuals.

The one unifying feature of dual eligible individuals is poverty. Dual eligible individuals are low-income older adults and individuals with disabilities with a wide range of health and long-term care needs. As states began crafting new delivery systems, they were overwhelmingly drawn to models that placed responsibility for benefit coordination in private, managed care plans. Consumer advocates responded with concerns about managed care plans limiting access to services and care for the Medicare and Medicaid beneficiaries.

As a result of united advocacy from aging and disability groups, states and CMS addressed many of these high level concerns in their implementation agreements and guidance. The policy today is much stronger and consumer oriented than anticipated in the original state proposals a year ago. All state demonstration programs will include an independent, conflict free ombuds program, an initial voluntary enrollment period, protections against enrollment in poor performing plans, a person-centered care planning process, and aid paid pending during plan level appeals.

In addition to the above list, advocates worked with states to develop important enhancements to care delivery. For example, in New York, the state developed a streamlined appeals process. For the first time, dual eligibles will be able to follow a single path for Medicare and Medicaid appeals. In California, the demonstration will offer some additional transportation and dental benefits previously unavailable to dual eligibles under traditional Medicaid and Medicare.

### Monitoring implementation and assisting consumers

Current policy guidance establishes baseline consumer protections. The next challenge is the actual real life transition to the new system. Early lessons from state implementation highlight four areas consumer advocates should actively monitor in the weeks and months leading up to state enrollment.

#### Meaningful and clear notices

Dual eligible individuals will receive at least two notices informing them of the opportunity to enroll in a managed care plan or opt-out of passive enrollment in the demonstration. They will also be receiving information from the plans into which they are passively enrolled and other communications about plan changes. Drafting notices that communicate the complexity of the program in an easy to navigate, consumer-friendly manner and coordinating all notices so that they work together is a challenge. Notices should be drafted at a sixth grade or below reading level, and tested with consumers to ensure readability. They need to be available in accessible formats for individuals with disabilities and to be translated into the key languages of beneficiaries. The process takes time and careful planning. States need to allow enough time to consult with advocates and share drafts for comment. Experience to date has shown that some states have underestimated the time and resources needed to do the job right.

#### Trained enrollment assisters

All states will use an independent third party entity, called an enrollment broker, to facilitate enrollment into the demonstration. States will also rely on State Health Insurance Programs (SHIPs) to provide unbiased counseling. Adequate funding for the SHIPs and training for both SHIPs and enrollment brokers are essential to an enrollment process that is smooth and that honors consumer choice.

#### Continuity of care

The demonstration agreements all include provider network adequacy standards generally on par with Medicare and Medicaid programs.

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4 Information detailed in CMS-state Memorandum of Understanding. For more information, see www.dualsdemoadvocacy.org/state-profiles.
Simply contracting with an adequate network of providers is critical, but not enough. It also is very important that individuals transitioning into the plans do not experience any gaps in coverage. All demonstration programs have care continuity protections that allow individuals to continue to see their providers for some period of time until they can transition to new providers. Making sure that those policies work smoothly for consumers and for their doctors and other providers requires a great deal of provider education. Plans must also establish clear and simple systems so that consumers joining the plans can make the transition smoothly and safely without risk to their health or well being.

Assistance with appeals and transitions
All state agreements include a commitment to ensuring Medicare and Medicaid appeals rights. But the appeals system is complex and many dual eligibles find that they cannot navigate it on their own. To make this protection meaningful, dual eligible individuals need access to independent, conflict free ombuds assistance. The ombuds also is uniquely situated to spot systemic problems early and get them fixed before large numbers of consumers suffer. CMS has provided some funding for the ombuds program and it is one of the more exciting elements of the demonstrations. The challenge for states is to design an ombuds program that is robust and serves all plan members, particularly reaching out to those who are least able to advocate for themselves.

Resources for more information
The demonstration is constantly evolving and CMS frequently issues new policies and contracts. Monitoring the demonstration and providing appropriate information to consumers is challenging with many moving pieces. The National Senior Citizens Law Center is tracking the demonstration progress and monitoring implementation. For more information, please see our website, [www.dualsdemoadvocacy.org](http://www.dualsdemoadvocacy.org) or contact our office for more information.

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The following states received federal approval to implement a dual eligible demonstration:
- Massachusetts,
- Illinois,
- Ohio,
- Virginia,
- California,
- New York,
- South Carolina,
- Minnesota, and
- Washington.
A Growing Problem Without a Consistent Definition

Understanding undue influence, dissecting it, defining it, and understanding the term, has proven elusive in social service and legal settings. Some people have said, “I know it when I see it,” making the term a matter of personal interpretation. Some state probate laws reference the term, and a few states have definitions that can be summarized as: Undue influence occurs when a fiduciary or confidential relationship exists in which one person substitutes his own will for that of the influenced person’s will. Other states have definitions in criminal or other codes. Of course, judicial decisions on individual cases exist but they are usually known only in legal circles.

Most undue influence cases are seen in probate courts with petitions for guardianships, conservatorships, and with disputed wills and trusts. Undue influence situations are also seen in contract law with documents such as deeds, powers of attorney, and contracts. It may also be present in some criminal cases. In all those situations, courts consider evidence indicating that undue influence may or may not have already happened.

With the emergence of elder abuse and mandatory reporting of elder abuse over the last three decades, community practitioners such as Adult Protective Services staff, hospital discharge planners, physicians, and public health nurses who work directly with elders have identified situations where it seems that undue influence is currently taking place. Community professionals encounter circumstances where they believe it is happening, where families feel helpless to intervene, and where elders are left penniless by scams, sometimes by lottery scams initiated in other countries.

The issue is particularly important because the number of people over 65 is increasing nationwide. According to federal statistics (see: http://www.aoa.gov/AoAroot/Aging_Statistics/), in the year 2000, people 65+ represented 12.4% of the population. That number is expected to grow to 19% of the population by 2030. With this demographic shift comes increased focus on the telemarketers and lottery scams that target these vulnerable adults.

Legislating the Definition

Definitions of undue influence have been difficult to legislate for many reasons. Undue influence usually takes place behind closed doors and there are no witnesses. And, adults are legally able to make decisions about their affairs unless a court has appointed a guardian or conservator. For instance, an elder who is unduly influenced has the legal right to spend his money on telemarketers even though it may jeopardize his assets. Complicating the matter is that undue influence is often linked to impaired cognitive capacity even though it frequently occurs when the elder clearly has capacity.

Complicating the matter even further, undue influence is present in many other circumstances such as hostage situations, families, telemarketers, domestic violence, prisoners of war, cults, and white
collar crime. It could even apply to totalitarian regimes that act to control populations since the elements are similar. Such a variety of complex circumstances with varying levels of intensity have made it difficult to formulate an overarching definition of undue influence.

**California’s Approach to Defining Undue Influence**

In California, there have been two responses to the lack of a definition of undue influence in the probate code where it is mentioned over 25 times. The first response was a research study which focused on conservatorships of estate because undue influence is specifically mentioned in Probate Code section § 1801 as one of the reasons to appoint a conservator of estate. In 2009, the San Francisco Probate Court, aided by the California Administrative Office of the Courts, undertook a research study with funding from the Borchard Foundation Center on Law and Aging.

The design of the project included a review of California law for definitions of undue influence, a review of other states’ probate codes searching for definitions of undue influence, and a literature review of social service and psychological publications on undue influence. Focus groups composed of various professional groups including Adult Protective Services professionals, Public Guardian professionals, and private bar attorneys discussed their perspectives on undue influence.

The project also included a review of 25 court files where a conservatorship of estate was established within the previous year because it was thought that undue influence had occurred. In 2010, the California Administrative Offices of the Courts (AOC) electronically published the results of that research study (see: www.courts.ca.gov/documents/UndueInfluence.pdf).

Surprisingly, the review of state law revealed that the only definition of undue influence in state law was in California Civil Code § 1575 which had been enacted in 1872. The elements of that definition which are still in effect for contract law are:

1. The use, by one in whom a confidence is reposed by another, or who holds real or apparent authority over him, of such confidence or authority for the purpose of obtaining an unfair advantage over him;

2. In taking an unfair advantage of another’s weakness of mind; and

3. In taking a grossly oppressive and unfair advantage of another’s necessities or distress.

The research study prompted the second response: landmark legislation modernizing the definition of undue influence. The new definition took effect January 1, 2014, and affects probate matters such as conservatorships, wills, and trusts. The new definition was also placed in the state’s Welfare and Institutions Code, addressing

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**Undue Influence Case**

A petition was filed for the Public Guardian to be appointed the guardian of person and estate for Ms. R. The Western Union office had contacted Adult Protective Services with concerns about the amount of money Ms. R. was wiring to another country. Her sister in Canada received notice of the petition and was certain that Ms. R. was being “railroaded” into a guardianship. She immediately came to visit Ms. R. and observed her speaking on the phone in a secretive manner several times a day. Ms. R. would not tell her sister who the caller was or what the call was about.

Later it was learned that Ms. R. was talking to her “dear friend” who lived in a different country and who was going to make certain that Ms. R. received a million dollars if only she would send more money now—it was a Jamaican lottery scheme. Ms. R. thought she was making investments. The sister became convinced that Ms. R. needed the guardianship because she could not be talked out of speaking with her “dear friend” and sending the money. She was on the way to impoverishing herself.

The court appointed a public guardian to serve as guardian of person and estate.
the financial abuse of an elder or a dependent adult. The language is the same in both codes and consists of the following:

“Undue influence” means excessive persuasion that causes another person to act or refrain from acting by overcoming that person’s free will and results in inequity. In determining whether a result was produced by undue influence, all of the following shall be considered:

1. Vulnerability of the victim. Evidence of vulnerability may include, but is not limited to, incapacity, illness disability, injury, age, education, impaired cognitive function, emotional distress, isolation, or dependency where the influencer knew of, or should have known of, the alleged victim’s vulnerability.

2. The influencer’s apparent authority. Evidence of apparently authority may include but is not limited to, status as a fiduciary, family member, care provider, health care processional, legal professional, spiritual adviser, expert, or other qualification

3. The actions or tactics used by the influencer. Evidence of actions or tactics used may include, but is not limited to, all of the following:
   A. Controlling necessaries of life, medication, the victim’s interactions with others, access to information or sleep.
   B. Use of affection, intimidation, or coercion.
   C. Initiation of changes in person or property rights, use of haste or secrecy in effecting those changes, effecting changes at inappropriate time and places, and claims of expertise in effecting change.

4. The equity of the result. Evidence of the equity of the result may include, but is not limited to, the economic consequences to the victim, any divergence from the victim’s prior intent or course of conduct or dealing, the relationship of the value conveyed to the value of any services or consideration received, or the appropriateness of the change in light of the length and nature of the relationship. Evidence of an inequitable result, without more, is not sufficient to prove undue influence.

The new law requires that judges and juries consider the law when making determinations about undue influence. The four factors are weighted equally, which means that no factor is more important than another. In addition, all four are not required to determine if undue influence has occurred. In fact, a judge or jury could decide that undue influence has taken place where the four factors are not present. While this is not likely, it is possible because the new definition and factors merely requires that the judge or jury consider them.

Undue Influence Case
A daughter was living with her father who was in his 80s and in poor health. She convinced him to give her $8,000 per month because “I’m taking care of you.” She would not allow the other children to visit saying their father was too ill and weak to receive visitors. She also told her father, “Well the other kids won’t help. They never visit. I’m the only one who cares about you. You’d end up in a nursing home if I wasn’t here.”

After the father died, it was learned that the daughter had induced her father to make a will leaving the family home to her as well as all his stocks and bank accounts. A will contest took place. A jury found that undue influence had taken place, but that the father would have wanted to leave something to his daughter. Eventually, it was determined that the assets should be split between the four children.
Definition Implementation and What the Future Holds
With this new statutory definition of undue influence, courts, attorneys, and community practitioners have guidelines to assist them in determining if undue influence has occurred or is occurring. The definition was purposefully written in lay terms so community practitioners can utilize it more easily. Since specific examples of evidence are included, undue influence may be more easily detected.

Implementation of the new definition, “where the rubber hits the road,” remains to be seen. Education and training will be needed for the various professionals who encounter undue influence. Attorneys will likely begin including the definition in their petitions for conservatorship, wills, and trusts. Courts will then consider if undue influence has taken place and if the decision is that it has occurred, will reflect that finding in court rulings and opinions. Community practitioners may better able to articulate what undue influence means and to describe the specific circumstances in individual cases. The new law represents a sea change in defining undue influence. Time will tell how the definition will be implemented.

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Contact the Division for Media Relations and Communication Services for expert contacts at abanews@americanbar.org or (202) 662-1090.
Using Mediation to Find Solutions
North Carolina Medicaid Appeals Program

by Erica Wood

Medicaid Appeals Mediation Scenario: In-Home Personal Care Scenario
Medicaid beneficiary A is an 88-year-old who had been receiving 42 hours of in-home personal care assistance per month. An annual assessment of her Activities of Daily Living was conducted by an independent contract vendor for the North Carolina Department of Health & Human Services, Division of Medical Assistance (DMA). Beneficiary A suffers from mild to moderate dementia, severe hypertension and Type 2 diabetes. She was alone when the assessment was conducted.

The assessment results reduced the beneficiary’s in-home assistance from 42 hours to 24 hours. When the beneficiary was notified of the reduction and was advised of her appeal rights she requested that her grandson assist her with an appeal. As her appeal was timely filed, the beneficiary would continue to receive 42 hours as “maintenance of service” during the pendency of the appeal. The beneficiary’s appeal was assigned to a mediator.

Medicaid Appeals Mediation Scenario: Home Modification
Medicaid beneficiary B is a seven-year-old male diagnosed with autism—his mother requested that Medicaid pay for a Home Modification to install a fence with a lockable gate.

After a review of the request conducted by DMA, the request was denied because it did not meet the test for medical necessity and the mother was properly advised of her right as legal guardian to appeal the decision.

The appeal was filed and assigned to a mediator. The mediation was scheduled and conducted with the mother and a representative from DMA.

These scenarios are among thousands of Medicaid appeals that arise in North Carolina. Appeals might concern personal care services, payment for an adult care home or group home, behavioral health services, dental services, individual or group therapy, durable medical equipment, prescription drugs, eyeglasses, and much more. Beneficiaries have the right to appeal an adverse determination under federal and state law.¹

In North Carolina, a Medicaid appeal request goes to the Office of Administrative Hearings, where it is heard by an administrative law judge. This Office does not hear Medicaid eligibility cases, only appeals. Even so, the Office processed close to 13,000 recipient appeals last year. But North Carolina has found a unique approach to appeals that is timely and allows beneficiaries to state their case directly to the Department of Medical Assistance Services: mediation.

The North Carolina Medicaid statute provides that upon receiving a request for appeal, the Office of Administrative Hearings must “immediately notify the Mediation Network of North Carolina, which shall contact the recipient within five days to offer mediation in an attempt to resolve the dispute.”

If the beneficiary agrees to go forward with mediation, the mediation must be completed within 25 days of the date it was submitted for appeal. When the mediation is completed, the mediator informs the Office and the Department within 24 hours. If the parties have resolved the problem, the Office dismisses the case. If not, the case goes on to the formal appeal. Participating in mediation “shall not restrict the right to a contested case hearing.”

We interviewed Jody Minor, Executive Director of the North Carolina Mediation Network, as well as Robin Anderson, Administrative Law Judge, to find out how this unusual approach to Medicaid appeals works. They explained that there are 14 participating mediation centers in the Network. Most of the Medicaid appeals mediation is by mediation center staff, with a small portion by volunteers, mostly retired attorneys and judges.

When the Network receives a case for mediation from the Office of Administrative Hearings, Mr. Minor examines it and selects one of the 14 mediation centers to conduct the mediation. Even though almost all of the mediations are by telephone, there is a right to attend in person, and he often assigns the case to the center closest to the person. Some beneficiaries have transportation or mobility problems and opt for a phone session. He also considers the volume of cases and the type of case. The case is assigned the same day he gets it.

In the large majority of the mediations, there is a beneficiary and also a representative or support person for the beneficiary. The representative does not have to be a legal representative, and could be a family member, friend, attorney, or someone else. Besides the beneficiary, the other party in the mediation is a Medicaid staff person.

In the mediation, each party is offered the opportunity to explain the case. The mediator will ask questions and try to reframe the issues. If there is any new evidence since the original adverse determination, it can be heard in the mediation. Mr. Minor noted that the mediator might, for example, ask the beneficiary to talk about a normal day and why he or she needs the services. Everyone, said Judge Anderson, “gets their day in court.”

Usually the mediation resolves the matter and a formal hearing is not needed. The rate of resolution in Medicaid appeals mediations is 81%. In the other 19% of cases, there is an impasse, or the beneficiary does not show up at the appointed time for the mediation, and the case goes on to appeal. Partly as a result of the mediations, the Office currently has no backlog of appeals cases. However, from mid-December 2012 to the end of March 2013, a change in Medicaid personal care regulations resulted in the filing of 11,000 appeals, many of which were resolved through mediation.

Since the inception of the mediation program in 2008, 7,600 appeals cases have been mediated.

This has saved the state more than $25 million dollars in “maintenance of service” costs.

\[^2\] N.C. Gen Stat. § 108A-70.9B(c).
Scenario Resolutions
Here is how mediation worked in the scenarios presented at the beginning of the article:

Mediation Outcome
The mediation was scheduled five days after the appeal was filed. Participants in the mediation were the beneficiary, her grandson, a registered nurse representing DMA, and the mediator. The discussion guided by the mediator revealed that the beneficiary could not independently test her serum glucose levels daily. This was a service conducted by the CNA assigned to aid the beneficiary daily. During the initial assessment the beneficiary had stated that she managed her own medications but did not reveal that the CNA prepared the daily dosages for her.

With this new evidence the DMA nurse was able to modify the original allocation of in-home hours from 24 hours per month to 35 monthly hours. The beneficiary and grandson agreed that 35 hours would be sufficient assistance to allow the beneficiary to continue to safely live in her own home.

The beneficiary withdrew her appeal and the case was closed seven days after it was filed thereby saving lengthy “maintenance of service” and costly court time.

Mediation Outcome
The mediator asked the DMA representative to explain the required criteria necessary to qualify for Home Modification. The beneficiary’s mother confirmed that her son’s needs did not meet the level of medical necessity for the modification but was able with the guidance of the mediator to articulate her fears and frustrations.

Armed with a more complete understanding of the child’s needs, the DMA representative was able to provide the mother with the appropriate information to request In-Home Care for Children which would more completely address all of her son’s needs.

With the information about the correct service to request, the mother withdrew the appeal for Home Modification.

Since the inception of the mediation program in 2008, 7,600 appeals cases have been mediated. This has saved the state more than $25 million dollars in “maintenance of service” costs—under federal law, Medicaid monies must continue to be paid in a case pending the outcome of the appeal. Thus, if the appeal is heard sooner, funds are saved. The funding for the program comes through the Department of Medical Assistance Services, which includes both state and federal dollars. Mediators receive initial training, and must co-mediate five Medicaid appeals cases before mediating a case on their own. Mediators are supervised by the director of the mediation center.

While at first blush, the idea of mediating in an administrative entitlements case might appear to jeopardize basic beneficiary rights, the program is structured as a win-win. The mediation is fast, free, informal, and accessible. It allows the person to talk directly with the Medicaid staff, state the case, submit any new evidence, and get a resolution quickly.

If beneficiaries do not agree to the outcome, they can still appeal, so no rights are lost. The state addresses any case backlog and saves scarce Medicaid dollars. Medicaid staff find out more about real world problems routinely faced by beneficiaries. Mediators learn first-hand about Medicaid issues, which will continue to be of critical importance with changes in the program under the Affordable Care Act.

Erica Wood is the Assistant Director of the American Bar Association’s Commission on Law and Aging in Washington, DC.
This book features a useful and practical approach to guiding an attorney new to elder law through potential ethical issues. With the inclusion of practitioner checklists, the book provides a framework for analyzing the day-to-day issues that elder law attorneys encounter.

Chapter 2: Who Is the Client?
An elderly woman walks into an elder law attorney’s office accompanied by one of her three children, a daughter. The daughter made the appointment by telephone for her mom to obtain a new will in light of her husband’s death.

PRACTICAL QUESTION CHECKLIST

Identifying the Client
1. Who will be signing the documents you draft?
2. Whose confidential information will be obtained in order to perform the services requested?
3. Who are the other parties impacted by the decisions of the identified client?
4. Who arranged the meeting and came to the attorney’s office?
5. Who will be paying for the services?
6. Who has the right to terminate the attorney?

Defining the Roles of Others in the Representation
1. Is there more than one client?
   • Is this a joint representation?
   • Did any participant become an accidental client?
   • Is any participant entitled to the protection of a prospective client?
2. Are the other people going to be involved in the decision making?
3. Are there beneficiaries to the representation?

Interacting with Non-clients
1. Do I allow them in the conversation?
2. Do I explain to them the nature of my relationship with them?
3. Do I accept payment from them?
4. Do I consult with them?
5. Do I give them advice?
Why Do We Need to Identify the Client?

Although many of the Rules of Professional Conduct refer to the attorney’s conduct in relationship to the client, nowhere in the rules is the term “client” defined. In every representation the client is central; however, outside of the elder law area, the issue of identifying the client will usually not be difficult or even arise. Elder law is different because, unlike other areas of the law, the first question the attorney must explore, answer, and communicate is who the client will be. In elder law, the client is not always easily identifiable because of the presence of other people. People who are identified as third parties to the representation can be present because they are a potential beneficiary of the elderly person’s decisions or based on their role in the elderly person’s decision making.

A non-client may be the person who initially sought the attorney’s services, as in the above hypothetical in which the first call comes from the daughter. In this situation, there is involvement of additional individuals from the very beginning of representation. Many times, children, spouses, or friends will accompany the elderly person to the attorney’s office. Additionally, the elderly person may ask that the person bringing him to the office actually accompany him into the meeting. Finally, the attorney’s services may be paid for by someone other than the elderly client, from either the client’s funds, or the non-client’s own funds.

The third person can also be “present” in the representation because of the direct impact of the elderly person’s decision on that party, for example in drafting a will. The beneficiaries of the will have a direct interest in the decisions of the elderly client. Additionally, as we will discuss in Chapter 6, the attorney representing a fiduciary will need to take into account the desires and needs of the principal in his representation.

Finally, third parties are “present” in the representation because of the involvement of family members in the elderly person’s decisions. Many times elderly people may involve non-clients in decision making. An elderly client may explicitly or implicitly defer to her spouse or child in making decisions. Occasionally, the family member will attempt to interject into the decision making, or at least believe he should be part of the decision making, even over the objection of the elderly client. Because of the “presence” of other people in elder law representation, it becomes imperative that the attorney answer the question “who is the client” when undertaking representation.

The identification of the client is essential because it is to that person that the lawyer owes the duties of representation. The comment to the NAELA Aspirational Standard A.1 states that:

[i]t is to the client that the lawyer has professional duties of competence, diligence, loyalty and confidentiality. This is especially important in Elder Law, because family members may be very involved in the legal concerns of the older person or person with disabilities, and they may even have a stake in the outcome.

It is to the client that the attorney owes a duty of communication, loyalty, and confidentiality. These are the core values of representation, but it is only the client who is entitled to these obligations and protections. The client is entitled to complete and consistent communication from the attorney. The attorney needs to inform the client of decisions and circumstances as they occur. He or she must consult with the client about the means of obtaining the client’s objectives and, most important, explain matters to an extent reasonably necessary for them to make informed decisions.

Additionally, the attorney owes a duty of loyalty to his client. A conflict can occur with the interests of another client, a former client, or the personal interests of the attorney. This duty to refrain from conflicts of interest can be fulfilled only by identifying the client. It is important for the attorney to then place the interests of all non-clients and himself behind the interests of the identified client.

Finally, all attorneys owe their clients the duty to keep all confidential information secret. Although many times in the elder law area confidential information may be shared with family members, those disclosures are permitted only under an exception to the confidentiality provisions of the Model Rules of Professional Conduct.

2 NAELA Aspirational Standard A.1 cmt., at 7.
3 See generally MODEL RULES OF PROF'L CONDUCT R. 1.1–1.18.
4 Id. at 1.7 cmt. 1.
II How Do We Identify the Client?

As the attorney begins to talk to the elderly woman and her daughter, the daughter begins to ask questions about the will and a power of attorney. She is also interested in the property settlement that mom recently received from the sale of some business property owned by her late husband. The attorney begins to discuss with the daughter the tax liability on the settlement.

NAELA Aspirational Standard A.1 states:

The Elder Law Attorney . . . [g]athers all information and takes all steps necessary to identify who the client is at the earliest possible stage and communicates that information to the persons immediately involved.5

However, the standards are not specific about what information should be gathered and what steps should be taken to identify the client. The comment to the standard explains:

Accordingly, the identity of the “client” must be clarified at the earliest stage so that the attorney (a) understands and identifies whose interests are being addressed in the legal planning and legal representation process, (b) understands and clarifies to whom the attorney has professional duties of competence, diligence, loyalty, and confidentiality, (c) clarifies what steps can and cannot be taken after an initial consultation if the client is not present, and (d) arranges at the earliest possible time for private, direct and personal communication with the client, preferably face to face.6

Therefore, the client is the person whose interests are being addressed in the representation. However, that is not clear, because other people in the planning process might believe that they also have an interest in the representation. For example, if an elderly individual is attempting to preserve assets by gifting them away in order to qualify for Medicaid, the children or other people who receive the gifts also have an “interest” in the representation.7 Additionally, defining the client to whom the attorney owes a duty is rather circuitous. The NAELA Aspirational Standards give very little guidance as to how to define who is the client; however, they direct the attorney to gather information in order to make that determination.8

Therefore, the attorney must look elsewhere for guidance on how to isolate the client from the other “interested” people. There are six categories of information that the attorney should gather. First, information should be gathered about the nature of the services requested, including what documents will be created and who will sign them. Second, the attorney must consider whose confidential information will be obtained in order to perform the services requested. Third, the attorney must explore and determine the relationship of different parties to the services being rendered in the representation. Fourth, the attorney should gather and consider information about how the individuals came to the attorney’s office. Fifth, the attorney needs to determine who will be paying for the services. Finally, the attorney should identify and consider who has the right to terminate the attorney.9

The initial information that will help identify the client is the service requested of the attorney and the person who will sign any drafted documents. For example, if a fiduciary retains an attorney to guide him in administering a trust and preparing the annual reports, then the client is the fiduciary, not the trust or the beneficiaries.10 If the individuals seek assistance in setting up a trust to benefit a third party, then the grantor of the trust is the client. On the other hand, if the person seeking the attorney is the beneficiary of the will and wishes to dispute the trust, then the client is the beneficiary, not the grantor. Of course, the confusion comes when the people approaching the attorney are seeking a service that benefits different

5 NAELA Aspirational Standard A.1.
6 Id. at cmt. at 7–8.
7 See Rosenfeld, supra note 1 at 387.
8 NAELA Aspirational Standard A.1 cmt. at 7–8.
9 Succession of Wallace, 574 So. 2d 348, 352 (La. 1991); ABA MODEL RULES OF PROF'L CONDUCT R. 1.16(a)(1); see also Rec-ommendations of the Joint Conference on Legal, Ethical Issues in the Progression of Dementia, 35 GA. L. REV. 423, 442 (2001). These recommendations suggest the following questions be considered:
1. Who has the legal problem?
2. Who benefits from the proposed course of action?
3. Who needs special protection?
4. Who made the appointment?
5. Who communicates with the lawyer, attends meetings, makes phone calls?
6. Who perceives themselves as the client(s)?
7. Who provides the substantive information relevant to the decision making?
8. Who paid the bill?
9. Who is the focus of the proposed action?
10. Who signed the retainer agreement?
10 The issue of who is the client in fiduciary representation is discussed more fully in Chapter 7. See, e.g., Borissoff v. Taylor & Faust, 93 P.3d 337, 340 (Cal. 2004); Wells Fargo Bank v. Superior Court of L.A. County, 990 P.2d 591 (Cal. 2000); First Union Nat'l Bank of Fla. v. Whitener, 715 So. 2d 979 (5th Dist. Ct. App. 1998).
people and the benefits are somewhat in conflict, or at least not consistent. In the situation described above, the initial meeting was set up to create a will for the elderly mother; therefore, when the meeting started, the client would clearly be the mother. However, as the attorney and parties continued to talk, the daughter began to seek advice about her individual tax consequences, and those services or answers would be for the daughter and might, in fact, be in conflict with the mother’s desires.

The clearest indication of who is the client is the consideration of who will be signing any documents that are created. The person who will be required to sign the documents in order to complete the service being sought is usually going to be the client, regardless of who is seeking the document. If the document will be transferring property, then the individual who must sign the documents to complete the transfer is the client. However, not every representation will involve documents.

The attorney must also consider what information will be needed to carry out the representation and who that information is about. Both the confidentiality rules and client/attorney privilege rules recognize the importance of candid information to the client/attorney relationship. By identifying whose information the attorney needs, he or she can identify who is the client. For example, if the attorney needs a full picture of all the individual’s assets in order to complete the representation, then the individual who owns those assets will normally be the client.

Another factor is how the appointment was set up and who has come to the meeting. Although not a definitive factor in who is represented, how the individuals came to be in the lawyer’s office can be valuable information. The attorney needs to gather information on who suggested that they consult an attorney, who decided on this attorney, and who called the office to schedule the appointment. Recognize that it is important not only who the attorney thinks is the client, but also who the other people in the attorney’s office think is the client. Additionally, the attorney needs to understand the role and relationship of each person who is present in the meeting. He needs to gather information as to what each person believes is his or her part of the attorney’s representation. Although how the appointment came about and who is at the first meeting are not defining factors, they certainly give the attorney an understanding of the expectations of everyone involved in this representation. An attorney must understand those expectations before he can explain to the people present in his office whether those expectations are accurate or inaccurate.

Another important issue in determining who is the client is to know who is paying for the attorney’s services. Although this is not definitive to the client inquiry, it is another factor in understanding the interrelationship of all those “involved” in the representation. Although Model Rule of Professional Conduct 1.8(f) allows representation to be paid for by a non-client, it has three requirements, which will be discussed later in this chapter.

Finally, who will have the authority to terminate the relationship is a prime example of a right of a client. The Louisiana Supreme Court, in Succession of Wallace,11 found that the client is permitted to terminate the client/attorney relationship for any reason or no reason.12

The Wallace court found a statute unconstitutional that stated attorneys named by the testator could be terminated only for “cause.”13 The court held that the executor of a will could terminate the attorney named in the will because she was the client.14 By determining who must sign the engagement letter15 and who can terminate this relationship, the attorney will be able to answer the question “who is the client?”

In the area of Medicaid planning, identifying the client is paramount.16 When the attorney is contacted by individuals who do not own the assets to be transferred or the purported recipients of the

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11 574 So. 2d 348 (La. 1991).
12 Id. at 352.
13 Id. at 355.
14 Id.
15 NAELA Aspirational Standard A.3 suggests the engagement letter:
   • identifies the client(s);
   • describes the scope and objectives of representation;
   • discloses any relevant foreseeable conflicts among the clients;
   • explains the lawyer’s obligation of confidentiality and confirms that the lawyer will share information and confidences among the joint clients;
   • sets out the fee arrangement (hourly, flat fee, or contingent);
   • explains when and how the client/attorney relationship may end.
transfers, the attorney must make it clear who she represents. The case of McMichael v. Flynn is a sad example of the inherent conflict. In Flynn, the elderly mother transferred her 114-acre farm to her daughter in exchange for the daughter’s agreement that she would care for her mother for the remainder of the mother’s life. When the mother successfully sued to set aside the transfer, the daughter appealed and claimed that the mother had acted with “unclean hands” because she had transferred the property for purposes of defrauding the government, even though the daughter was the mastermind behind the original transfer. The elderly client ultimately won, however this case exemplifies the need to represent the elderly client without involvement from the recipient of the property.

17 Patricia B. Rumore, Elder Law: Pitfalls for the Unwary, 58 ALA. LAW., at 160 (1997) (suggesting that a conflict of interest arises when an attorney represents both the person transferring the property and the people receiving it). See also Lynch v. Hamrick, 968 So. 2d 11 Ala. (2007) (court found a waiver of client/attorney privilege because beneficiary was present during the meeting and was not necessary to the representation).


19 Rosenfeld, supra note 1, at 391–392.


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The Work of a Volunteer Fiduciary
Arlington County’s Volunteer Guardianship Program

by Randy Feliciano and Barbara K. Green

The Arlington County Volunteer Guardianship Program in Virginia has been around for over 28 years. Created in 1986 to address the growing need for more court appointed fiduciaries for the county’s human services clients, this program is one of a small number of volunteer-based guardianship programs in the entire country. Currently, it is the only one of its kind in the state.

Although there are a number of public guardianship programs in the state of Virginia that are authorized to serve a specific number of clients, the beauty of Arlington’s program is that it makes a tremendous impact in meeting the needs of incapacitated individuals through the power of volunteerism.

History

Until the creation of the Volunteer Guardianship Program, Arlington County’s Human Services Case Managers relied heavily on the Sheriff’s office to provide “guardians of last resort” to individuals who had no one to take on the fiduciary responsibility as a court-appointed guardian of the person or conservator over finances and assets (or sometimes both).

This is not ideal because Sheriff’s offices are not in the business of managing individual medical and financial affairs. Plus, they do not have the manpower to manage the ongoing needs of a client. Luckily for the Department of Human Services in Arlington, the Volunteer Guardianship Program is now able to provide volunteers to take on these roles—volunteers like Barbara Fenton!

In the mid 1980’s, Barbara Fenton chaired Arlington’s Commission on Aging and was a strong advocate for serving the needs of older adults. Her advocacy work at that point in time and belief in the importance of these issues led her to become the legal guardian of an aging World War II veteran.

The experience moved Fenton so much that she was compelled to share her experience with the Arlington Agency on Aging as well as the Arlington County Bar Association and the County Board. In part due to Fenton’s experience and zeal for her new role as guardian, a collaborative effort and eventually a program were born!

Since the mid 1980’s, the program has had a strong pool of volunteers following Fenton’s legacy, including attorneys serving pro bono. Over the years, these volunteers and attorneys have served incapacitated individuals from the Arlington community in the role of guardian of the person as well in the role of conservator over finances and assets.

Although most of these incapacitated individuals were, and still are, disadvantaged clients of the Department of Human Services, some were later discovered to have significant assets that needed management.

The following two case vignettes from Barbara Green, program volunteer and Certified Public Accountant, show the difference that a volunteer can make in the life of an individual who needs help.
Case example 1:

When Randy Feliciano, the program coordinator of Arlington County’s Volunteer Guardianship Program, first asked me to serve as guardian and conservator for one of his clients, I had no idea what to expect. My first appointment was as conservator for a 79-year-old woman with dementia who had not filed a tax return in nine years. The IRS had a lien on her property and had been regularly emptying her bank account to pay amounts they thought were due. The client hoarded and was a heavy smoker living in unsafe conditions. She had a life-threatening health condition that had received no medical attention. Despite all this, she still held a full-time job and had been going to work every day until recently when her condition became unmanageable.

Talk about jumping right in! During my first nine months as conservator, I moved this client to an assisted living community, got her overdue tax returns filed (most of which had refunds coming), got the lien removed from her property, fixed up her condo (painted, re-carpeted, replaced fixtures, repaired appliances, and removed all the clutter), sold the condo, and filed the forms necessary for her retirement from the federal government.

When I went through all the unopened mail (some back as far as 2003), I saw all the overdraft fees and late charges and penalties that the client had been paying and realized how much she could have saved if she’d had someone helping her earlier. Her apartment was full of cigarette butts, beer cans, and old takeout containers: evidence of the way she had been living.

This client now lives safely in her new apartment at a local assisted living residence. There is now staff to help and keep her surroundings clean and orderly. She seems much more relaxed and is always happy to see me. It is very gratifying to me to be able to tell her that all her finances are straightened out now!

Created in 1986 to address the growing need for more court appointed fiduciaries for the county’s human services clients, Virginia’s Arlington County Volunteer Guardianship program is one of a small number of volunteer-based guardianship programs in the country.
Case Example 2:

My second appointment, as guardian and conservator for an 89-year-old client, resulted when Adult Protective Services (APS) found her living in a fourth floor walk-up apartment in a building that was about to be gutted. She was the only remaining tenant and was required to vacate the premises. Only days before the start of construction work in her building, APS moved her (with much protest) to an assisted living community. In the absence of any relatives, I was appointed by the court two days later and encountered a very angry lady who felt she had been tricked into moving.

Because most of her belongings had been disposed of during the move and because of her cognitive impairment, APS and I could provide little help with locating items and, more significantly, her important documents. I had to play detective to figure out what assets she had and where they were.

The movers had also found over $30,000 in cash in the client's apartment, hidden in various places, and they were honest enough to turn it over to APS. My first job as her guardian was to take the many bags and purses full of money (in small bills) to the bank and sit with the tellers for hours as they counted it all out and filled out the required forms to deposit the cash. In the weeks that followed, I slowly discovered her assets and negotiated with the holders of the funds to transfer them to the new conservatorship account I set up for her.

The client is happy today and no longer the angry person I initially encountered, a person who had mainly eaten takeout pizza because she had no other way to get food. She eats three nutritious meals a day now and is an active participant in community activities. Despite her memory challenges, she asks me for assurance that her bills are being paid and tells me that she's always paid her bills and wants them all paid now. She is very frugal and never wants me to buy her anything or to spend any money because she says she worked hard for that money and doesn't want me to spend it. The client is happy to see me when I come to deliver the many magazines she gets (that now get forwarded to me with the rest of her mail). She has many new friends and only rare episodes of anger over her move to the new assisted living community.

These experiences are personally very gratifying and the clients are both grateful to me in their own ways. Their lives are better now because of my skills and what I’ve been able to do for them, and I’m happy that the Arlington guardianship program brought us together. I initially told Randy that I like complex financial cases (given my background) and I guess he took me at my word!

Conclusion

Barbara's experiences are a good example of some of the challenges faced and the great benefits garnered while serving in the capacity of a guardian—specifically as a volunteer guardian. Being able to impact a person’s life in such a deep way is a rare opportunity, and one that has a long-lasting effect on both parties.

The volunteer guardians and conservators in Arlington’s program share a strong desire to improve the quality of life of the individuals they serve. And, many of the volunteers form a personal bond with their clients (a secondary benefit of their volunteer service). What better way to enrich the lives of two people than to match them up in this way. And for these reasons, the program has enjoyed many years of success!

Randy Feliciano, MPA, is Arlington County’s Volunteer Guardianship program coordinator and Barbara K. Green, CPA, is a program volunteer.

These experiences are personally very gratifying and both clients are grateful to me in their own ways. Their lives are better now because of my skills and what I’ve been able to do for them, and I’m happy that the Arlington guardianship program brought us together.

-Barbara Green
Program Volunteer
The American Bar Association’s Commission on Law and Aging collaborated with the National POLST Paradigm Task Force (NPPTF) and a team of legal experts to produce the **POLST Legislative Guide**, a free publication released in February 2014, for states engaged in the development of Physician Orders for Life-Sustaining Treatment (POLST) programs. It can be downloaded from the website of the NPPTF at: [http://www.polst.org/educational-resources/legal-and-policy/](http://www.polst.org/educational-resources/legal-and-policy/).

POLST programs are known by a variety of names, including Medical Orders for Life-Sustaining Treatment (MOLST), Provider Order for Scope of Treatment (POST), and others. These programs all involve a common clinical process designed to facilitate communication between health care professionals and patients with serious illness or frailty (or their authorized surrogate).

The process is intended to encourage shared, informed medical decision-making. It results in a set of portable medical orders that respects the patient’s goals for care in regard to the use of cardiopulmonary resuscitation (CPR) and other medical interventions, is applicable across health care settings, and can be reviewed and revised as needed.

Integrating POLST into state health systems in light of state laws, regulations, and accepted practices has generated a range of legal/regulatory questions that have been answered in a variety of ways by states—by clinical consensus, by legislation or regulation, and by guidance. Drawing upon the experience of the states that have implemented POLST Paradigm by 2013, the legislative team produced the **POLST Legislative Guide** which NPPTF hopes will facilitate a better understanding of the issues, options available, and best practices.

The Guide is organized around 12 legal/regulatory questions and issues that have been most recurrent across the states implementing POLST Programs. It suggests a preferred outcome to each issue, based upon the collective learned experience of states with POLST Programs endorsed by the NPPTF. The Guide provides a description and analysis of each issue—and sub-issues where indicated—and offers options to guide response strategies that may range from clinical practice consensus to legislation.

The NPPTF has not attempted to provide a model POLST act because experience to date has demonstrated that the frameworks and
complexities of each state’s existing state health care decisions laws are unique. Every legislative approach requires substantial customization to work within any particular state. It is expected that any of the options described here will need some degree of adjustment to fit with or modify state law.

The National POLST Paradigm Task Force is comprised of one representative chosen by each state that has an *endorsed* program and includes legal and emergency medical service consultants.

Commission Director Charlie Sabatino serves as a legal consultant to the Task Force.

See the NPPTF webpage at [www.POLST.org](http://www.POLST.org).

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The issues addressed in the legislative guide are set forth in its Table of Contents as follows:

<table>
<thead>
<tr>
<th>Issue 1: What is the definition of POLST?</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Is POLST Another Form of Advance Directive?</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Issue 2: Is Legislation Needed to Establish POLST?</th>
</tr>
</thead>
<tbody>
<tr>
<td>• When is Legislation Needed?</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Issue 3: Who should have a POLST Form?</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Should specific medical preconditions in state advance directive laws be required for POLST?</td>
</tr>
<tr>
<td>• Should medical preconditions in state out-of-hospital DNR order statutes be applied to POLST?</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Issue 4: Who has responsibility for the language of a state’s POLST form?</th>
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<tr>
<td>• Must one uniform POLST form be used throughout the state?</td>
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<td>• Should we include the POLST form within a statute?</td>
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<td>• What is the most successful method for creating a uniform process and POLST form?</td>
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<tr>
<th>Issue 5: Which health care professionals can execute a POLST form?</th>
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<tr>
<td>• How should scope of practice regulatory issues be handled with respect to authority to execute POLST?</td>
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<tr>
<td>• Can POLST counseling and preparation be delegated in part to health care professionals not authorized to sign a POLST?</td>
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<th>Issue 6: How should patient preference be elicited and documented on a POLST form?</th>
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<tr>
<td>• Is a patient or surrogate signature or attestation necessary on a POLST?</td>
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<th>Issue 7: What authority should surrogates have?</th>
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<tr>
<td>• Surrogates cannot sign an advance directive. Why should they sign a POLST?</td>
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<tr>
<td>• If a patient agreed to a particular care plan set forth in POLST, should a surrogate be allowed to change the plan later when the patient no longer has decisional capacity?</td>
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<th>Issue 8: Is offering and completion of a POLST mandatory?</th>
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<tr>
<td>• Should every nursing home resident be deemed within the appropriate group to whom POLST is offered?</td>
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<tr>
<td>• Is completion of POLST mandatory?</td>
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</table>
Issue 9:
Is health care professional compliance with POLST mandatory?
- Is compliance with POLST required or prohibited in the emergency department or at hospital admission when the prescribing health care professional is not credentialed at the receiving hospital?
- When is POLST review and possible modification necessary or advisable?

Issue 10:
Does POLST raise liability or immunity concerns?
- Is legislative immunity preferable, analogizing to advance directives?
- Can health care professionals presume validity of a POLST form presented to them?

Issue 11:
Administration, monitoring, and evaluation—what infrastructure and process should be in place for POLST Programs?
- What is an appropriate administrative structure needed to establish a POLST Program?
- How do we best evaluate whether the POLST Program is genuinely determining patients’ values, priorities, and goals of care and translating them into accurate orders?

Issue 12:
Are POLST forms portable across jurisdictions?
- What is the source of authority for recognition across jurisdictions and applicability of immunity?
- Where there is variation of substantive POLST provisions or health decisions laws, which law applies (originating state or receiving state)?

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Commission Interns

The Commission’s robust internship program hosts students year-round in Washington, DC. To learn more, contact David Godfrey, Senior Attorney, at David.Godfrey@americanbar.org.

Fall 2013 Intern Profiles

Karna Sandler is a second-year law student at American University Washington College of Law in Washington, D.C. Ms. Sandler received her B.A. from Tulane University in New Orleans, LA, with a major in sociology and a minor in Spanish.

After her first year of law school, Ms. Sandler interned at the U.S. Attorney’s Office in Washington, D.C., in the Sex Offense and Domestic Violence Section.

At the Commission, Ms. Sandler is currently working with Assistant Director Erica Wood to research limitations on medical decision-making by guardians.

Katie Gorski is a third year law student at George Mason University School of Law in Arlington, Virginia. She will graduate in May 2014. Ms. Gorski received her B.A. in English from the Catholic University of America. Last year, Ms. Gorski interned with Jean Galloway Ball, P.L.C., an elder law firm in Fairfax, Virginia. In the Fall of 2013, she interned with another elder law firm in Arlington.

Ms. Gorski is currently researching the state Adult Protective Services statutes under the supervision of Senior Attorney Lori Stiegel. She is also researching guardianship bonds under the supervision of Assistant Director Erica Wood.
Engage Your Community!

As the American population ages, accommodating the needs of older Americans becomes more and more important to a myriad of businesses.

An elder-friendly law office is one that provides spatial and social accommodations for disabilities prevalent among older persons such as hearing loss, visual impairment, and mobility limitations.

By complying with the American with Disabilities Act (ADA) Accessibility Guidelines and making the other practical design decisions highlighted in this 22-page publication, you can improve an older client's experience in your office.

Product Code: 4280031PDF
Publication Date: December 2013
Price: $19.95
Visit www.shopABA.org to order!

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National Health Decisions Day (April 16, 2014)

National Healthcare Decisions Day exists to inspire, educate, and empower the public and providers about the importance of advance care planning. National Healthcare Decisions Day is an initiative to encourage patients to express their wishes regarding healthcare and for providers and facilities to respect those wishes, whatever they may be.

Visit http://www.nhdd.org/ for more information.

Law Day (May 1, 2014)

As we approach the 50th anniversaries of the Civil Rights Act of 1964 and the Voting Rights Act of 1965, the 2014 Law Day theme, *American Democracy and the Rule of Law: Why Every Vote Matters*, is a call to reflect on the importance of a citizen’s right to vote and the challenges still faced in ensuring the opportunity to participate in our democracy.

Visit www.lawday.org for updates and information.

Older Americans Month (May 2014)

Each May, the nation celebrates Older Americans Month to recognize older Americans for their contributions and provide them with information on staying healthy and active. This year, the theme focuses on injury prevention: *Safe Today. Healthy Tomorrow.*

Information from the Administration for Community Living is available at http://bit.ly/1cC7IV3.
CLE Webinar

Health Care Decision-Making and the “F” Word—Futility

Counseling clients about medical futility in health care decision-making

Wednesday, April 23, 2014
1:00 – 2:30 Eastern time

Recent cases involving brain dead patients and resulting disputes over continuing organ-sustaining treatments have reignited debate over the appropriate use of medical technologies. The family of Jahi McMath in Oakland, CA, fought to keep their daughter connected to a ventilator, while a hospital in Fort Worth, TX, sought to keep Marlise Muñoz, fourteen weeks pregnant, on a ventilator over the objection of her husband and family. For terminally ill patients who are not brain dead, a family's desire to "do everything possible" sometimes leads to insisting on medical interventions that medical professionals may deem inappropriate or "futile."

This program will:

• Provide you with an understanding of the range of policy and practice issues concerning medical futility
• Enable you to be accurate and supportive in counseling clients on these issues in the context of advance planning
• Enable you to be more effective in counseling and dispute resolution when conflicts arise in end-of-life decision-making concerning the limits of care

The focus is not on litigation.

Faculty:

• Robert L. Fine, MD, FACP, FAAHPM, Clinical Director, Office of Clinical Ethics and Palliative Care, Baylor Health Care System, Dallas, TX
• Bernard "Bud" Hammes, Ph.D, Director of Medical Humanities, Gundersen Lutheran Medical Foundation, La Crosse, WI
• Thaddeus Mason Pope, JD, PhD, Director, Health Law Institute & Associate Professor of Law, Hamline University School of Law, St. Paul, MN
• Charles P. Sabatino, JD (Moderator), Director, ABA Commission on Law and Aging, Washington, DC

And, coming this summer, a webinar from the Commission focusing on timing and other issues in Social Security retirement. To be notified when more details are available, please contact Andrea.Amato@americanbar.org.

National Legal Resource Center

The National Legal Resource Center provides in-depth substantive legal information and expertise, case consultation, technical support on legal service development and legal hotlines, and training on issues in law and aging to attorneys, advocates, and professionals in the fields of law and aging.

Find out about the programs and services of the NLRC at www.NLRC.AoA.gov.

Register Now!

• Phone: 800-285-2221 and select option “2”
• Online: http://apps.americanbar.org/cle/programs/t14mfh1.html
• Event code: CET4MFH
The American Bar Association Commission on Law and Aging is a proud supporter of the 3rd World Congress on Adult Guardianship, which will be held May 28-30 in Arlington, VA. This unique event will bring together 120 speakers from 21 countries on six continents to discuss promising practices in the area of adult guardianship. This is the third World Congress on Guardianships; the first and second were held respectively in Japan and Australia.

The event is hosted by the National Guardianship Network (members include, among others, the National Guardianship Association, the ABA Commission on Law and Aging, the Alzheimer's Association, the National Academy for Elder Law Attorneys, the National College of Probate Judges and AARP).

Anyone who is involved with guardianship regularly faces challenges at some point. While many state and national organizations offer ways for guardianship professionals to share challenges and solutions, rarely do they have the opportunity to interact with peers from other countries. The World Congress presents shared problems from new perspectives and offer ideas and solutions from multiple viewpoints, cultures and guardianship systems.

This three-day event features 42 general and breakout sessions, including a keynote presentation from Kathy Greenlee, Administrator for Community Living and Assistant Secretary for Aging.

Complete details, including the full program, registration information and hotel details, can be found at www.worldcongressguardianship.org.

Register now for an early discount! http://worldcongressguardianship.org/

World Congress on Adult Guardianship

May 28-30, 2014

Crystal Gateway Marriott
Arlington, Virginia

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Subscribe by sending an email to Trisha.Bullock@americanbar.org with “Subscribe to Bifocal” in the subject line.
Borchard Foundation Center on Law & Aging Invites Applications for the 2014-2015 Fellowship in Law & Aging

Fellowship Information

The Borchard Fellowship in Law & Aging affords three law school graduates interested in a career in law and aging the opportunity to pursue their research and professional interests for one year.

During the fellowship period, the center’s Co-Directors and Fellows Coordinator stand ready to assist each fellow with the further development of knowledge, skills, and contacts. A legal services or other non-profit organization involved in law and aging must supervise a fellow’s activities and projects. In addition to the fellow’s planned activities and project, the fellow must also provide some pro bono direct legal services to older persons under appropriate supervision.

The fellowship period runs from July 1 to June 30 each year, or for the calendar year beginning the month after the fellow’s completion of a state bar examination.

Applications are due on April 15, 2014.

Applicants must submit a completed online application including an information form, an explanation of the applicant’s planned activities and projects, a current curriculum vitae, a law school transcript, a letter of support from the proposed supervisor, and two other letters of support.

All fellowship application information and the required online application are available at http://www.borchardcla.org/fellowship-program.

Examples of activities and projects by Borchard Fellows:

- Working with an established legal services program to enable vulnerable, isolated, low-income seniors to age-in-place by addressing their unmet legal needs;
- Implementation of a courthouse project to help elderly pro se tenants achieve long-term housing stabilization through the interdisciplinary use of legal representation and social services, allowing more elderly tenants to “age in place” at home;
- Development of an interdisciplinary elder law clinical program at a major public university law school;
- Development of a mediation component for a legal services program elder law hotline;
- Development of an interdisciplinary project for graduate students in law, medicine, and health advocacy to foster understanding and collaboration between professions;
- Writing and publication of state specific, consumer oriented handbooks on legal issues affecting older persons;
- Analysis of Medicare policies or SSI non-disability appeals;
- Teaching elder law and related courses at law schools where fellows reside.
This three-day APA/ABA national conference will address the broad range of issues related to the exposure of children, youth, and families to violence in and around the home, community, and society. This conference will provide an opportunity to examine how psychologists, attorneys, judges, legal scholars and others can support healthy children and families in a safe society.

**Conference Objectives**

1. Provide professional education and training on the issue of family and community violence
2. Share information and explore coordinated approaches to addressing family and community violence.
3. Strengthen understanding of practice principles, guidelines, and standards for addressing family and community violence across the fields.

- Appropriate for psychologists, attorneys, judges, legal scholars, behavioral and social science scholars, social workers, and other professionals in legal, mental health, social service, and education fields
- Nearly 40 sessions addressing prevention and intervention
- Focus on violence across individual, family, community, and society contexts
- Continuing education credits available
- Attorney General Eric Holder invited as keynote speaker
- Networking session to close out the conference

**Conference Website:** [http://bit.ly/1c9sK2n](http://bit.ly/1c9sK2n)

**For Inquiries, Email:** APAABAViolenceConf@apa.org

**Registration Ends:** 3/31!
Upcoming ABA Webinar

Retirement Expectations and Trends for 2014

- March 26
- Free to ABA members
- $50 for the general public
- Register at: http://bit.ly/1fHZWJn

Retirement has many different meanings these days. And, if you are just starting your career or are preparing to leave the working world, this webinar is designed to give the guidance you need to have the retirement you want. Gain insights on the emotional, financial, and logistical components that will help you tailor your goals for a comfortable retirement.

Our faculty will go beyond the basics of retirement planning and financial planning and discuss other factors that can make your retirement what you want including goal-setting, making the transition to retirement, determining whether a second or part-time post-retirement career is right for you and dealing with the emotions of being retired. Faculty will also provide guidance on the ethics of transitioning out of your practice, transitioning your clients, and selling your practice.

Faculty

- Sally Hurme
  Project Advisor, Education & Outreach
  American Association of Retired Persons (AARP)
  Washington, D.C.
- Edward Poll
  Principal
  Law Biz Management Co
  Venice, CA
- Deanell Reece Tacha
  Duane and Kelly Roberts Dean and Professor of Law
  Pepperdine University School of Law
  Malibu, CA
- Linda Yows Leitz, CFP, EA
  Colorado Springs, CO
- Susan A. Berson (Moderator)
  Partner
  Berson Law Group
  Leawood, KS

Premier Speaker Series

The CLE Premier Speaker Series is a monthly program where ABA members can earn FREE continuing legal education credits while listening in on substantive content. Earn up to 18 hours of FREE CLE credit every year through ABA programs featuring today's most influential legal practitioners. Just one of the ways that we're increasing the value of ABA membership and advancing the legal profession.

Live Webinar Tuition

ABA Members: FREE
General Public: $195

Special Value to Solo and Public-Service Lawyers

If you are a licensed attorney in the U.S. and are a solo practitioner in private practice, judge, or lawyer in government or legal/public service (working for not-for-profit organizations engaged primarily in legal-or policy-based advocacy on behalf of low income persons), you are eligible for a special rate.

Bar Admittance and Annual Dues

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<th>Year</th>
<th>Annual Dues</th>
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<tr>
<td>2014-2013</td>
<td>Free</td>
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<tr>
<td>2012-2010</td>
<td>$100</td>
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<tr>
<td>2009-2008</td>
<td>$125</td>
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<td>2007-2004</td>
<td>$145</td>
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<td>2003 and Earlier</td>
<td>$225</td>
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With up to 18 free hours of CLE credit a year, ABA membership is a great value to solo or public-service lawyers. Find out more online at: www.AmericanBar.org/membership.

Unable to Attend?

As an added member benefit, archive recordings of CLE Premier Speaker Series programs from the past three months are now available for FREE CLE credit. Upcoming programs will be posted five days after their broadcast date.
This October 16-17, the American Bar Association's Commission on Law and Aging will sponsor the New National Aging and Law Conference in Washington, DC.

This year's conference theme will be: 50th Anniversary of the War on Poverty: Progress & Challenges for the Future.

For information, contact the Commission's David Godfrey at: David.Godfrey@Americanbar.org.

Stay Updated!

Conference website: www.ambar.org/nalc2014

Facebook page: http://t.co/fWDko0uL1R

Twitter @NtlAgingLawConf

National Aging and Law Conference

Conference Attendees will enjoy:

• A unique agenda focusing on substantive core issues in elder law
• A track focusing on legal service development and delivery
• High-quality written materials
• Very low registration rates and an agenda designed to minimize travel costs
• Limited conference size, with opportunities to get to know your fellow attendees

Interested in Presenting?

• Download the Speaker Proposal: http://bit.ly/1b53qKX
• Submit your Proposal by March 15.