



NAELA *News*

National Academy of Elder Law Attorneys • Volume 26 • Issue 6 • Dec 2014/Jan 2015



Susan H. Levin, Esq. Massachusetts Chapter Most Valuable Player

Improving Medicaid
Law by
State Legislation

Bad Parents
and Their Helper
Children

NAELA Aspirational
Standards
Who's the Client?

**Allowing
Doctors to
Discuss**
End-of-Life Plans

Aggressive
Marketing and
Public Policy

Save the Dates

The 2015 Annual Conference is designed to keep you current with sessions offering the latest in Elder and Special Needs Law including legislative and case law updates.

2015
NAELA
ANNUAL
CONFERENCE

May 14–16, 2015

JW Marriott Orlando Grande Lakes
Orlando, Florida

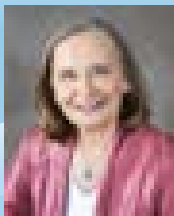
Preconference Programs

May 13, 2015: Essentials Practicum
May 14, 2015: VA Accreditation Workshop
May 14, 2015: NAELA Tax School

Special Guest Speakers

Natalie B. Choate

Co-sponsored by NAELA's Council of Advanced Practitioners (CAP)



Natalie Choate practices law in Boston, Mass., with Nutter McClennen & Fish LLP. Her practice is limited to consulting on estate planning and retirement benefits matters. Her two books *Life and Death Planning for Retirement Benefits* and *The QPRT Manual* are leading resources for estate planning professionals. Ms. Choate will make two presentations:

- Death and Taxes: The Inherited Retirement Plan — How to Advise Executors and Beneficiaries (Estate Taxes, Disclaimers, Rollovers, and Cleanup Strategies)
- Marking Retirement Benefits to Trusts: Pros, Cons, and Pitfalls of Naming a Trust as Beneficiary, Including the IRS “MRD Trust Rules”

Meryl Gordon

Meryl Gordon is the author of *The Phantom of Fifth Avenue* and *Mrs. Astor Regrets: The Hidden Betrayals of a Family Beyond Reproach*. She is an award-winning journalist and a regular contributor to *Vanity Fair*. She is on the graduate journalism faculty at New York University's Arthur L. Carter Journalism Institute. She is considered an expert on elder abuse and has appeared on NPR, CNN, and other outlets whenever there is a high-profile case.



Registration will open in late January at www.NAELA.org.



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NAELA News has two complementary purposes: to communicate the activities, goals, and mission of its publisher, the National Academy of Elder Law Attorneys; and simultaneously, to seek out and publish information and diverse views related to Elder Law and Special Needs Law. The views expressed in the articles are those of the authors and do not necessarily reflect the policies of the publisher. Statements of fact are solely the responsibility of the author.

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This Year I Resolve to ...

Bradley J. Frigon, CELA, CAP



This time of year, I always consider what positive steps I should take in the New Year. I have a few resolutions for my business this year including purging old files, freshening my website, and encouraging clients to update their estate plans.

Try Some New Things

Also, I have a few “personal perennials,” such as cleaning out the basement and the garage, and helping out in the kitchen.

This year, I’m adding to my list to get out and try a few new things. To kick off the New Year, I’m going to attend the 2015 NAELA Summit, January 29–31, in Newport Beach, Calif. The Summit is a new event for NAELA where you’ll get hands-on learning under the guidance of top experts in Elder and Special Needs Law. There’s still time to register if you haven’t already done so. A few not-to-be-missed Summit highlights:

- Keynote speaker Teepa Snow, dementia expert and advocate for those living with dementia, will kick things off with “Working with Clients with Diminished Capacity—Dealing with the Roadblock of Denial.”
- Medicaid and VA Irrevocable Trust Drafting

- When Capacity Issues Present: Helping the Attorney Build Skills and Deal with Distress
- Practice Idea Sharing (speed-dating style)
- Timing Social Security Applications: Maximizing Benefits for the Worker, Spouse, and Adult Dependent Children
- There will be plenty of time for networking with fellow attendees and session leaders.

There’s much more. For more information and to register go to www.NAELA.org/2015Summit.

Membership Includes Free Access to Archived Meeting Seminars, Webinars, and Publications

Starting in 2015, NAELA members have free access to thousands of archived meeting seminars and webinars. Access to the archives of *NAELA Journal* and *NAELA News* continue to be free. How do you locate the content you need? With the NAELA Knowledge Base (www.NAELA.org/Knowledgebase). After signing in to the website using your NAELA username and password, you can use the Knowledge Base to search NAELA archives by content category, keyword, type of content, author/presenter, date range, and more. New material is added continuously.

So make sure you include exploring NAELA in your New Year’s Resolutions for 2015. ■

Have you renewed your NAELA membership for 2015?

Renew today and continue to receive the benefits of NAELA membership you rely on!



Sign in with your NAELA username and password to www.NAELA.org. Go to Membership > My Account > Billing.

Looking Back to Move Forward

Peter G. Wacht, CAE



As President Brad Frigon notes in his column, this is the time of year to focus on resolutions. It's also the right time to look back at some of what NAELA has accomplished in 2014, as well as consider some of the challenges facing the Academy in 2015.

With that in mind, here are just a few of the accomplishments:

- The NAELA Knowledge Base, which was first made available to members in 2013, continues to expand the resources available to NAELA members. You can find articles from current as well as past issues of *NAELA News* and *NAELA Journal*. Recorded webinars and seminars are being added continuously. Much of the content is available to members without additional charge. You can search by content category, keyword, type of content, author/presenter, date range, and more.
- NAELA's publications — *NAELA News*, *NAELA Journal*, and the weekly *NAELA eBulletin* — all remain key member benefits bringing members the latest in Elder and Special Needs Law.

Turning to advocacy:

- In the 113th Congress, NAELA drafted its own legislation, the Special Needs Trust Fairness Act, which would allow individuals with disabilities, who have capacity, to create their own special needs trusts.
- The Disabled Military Child Protection Act would allow a military survivors benefit plan to name a special needs trust as a beneficiary.
- Through NAELA's contacts with the Government Accountability Office, the Academy was able to provide a dozen members who could offer a legitimate perspective on methods used to become eligible for Medicaid for nursing home care. Thankfully, the report, *Financial Characteristics of Approved Applicants and Methods Used to Reduce Assets to Qualify for Nursing Home Coverage*, described the methods, but did not recommend any changes to Medicaid eligibility.
- NAELA is engaged in coalition efforts to reform "observation status."
- The NAELA Foundation has awarded two grants this year: \$5,000 to Neighborhood Legal Services to assist NAELA members John Ford and Judith M. Flynn in

their efforts to obligate MassHealth to follow Centers for Medicare and Medicaid Services guidance in *Harrington v. Dougherty*; and \$25,000 to the Center for Medicare Advocacy to support litigation to prevent erroneous denial of Medicare coverage, provide access for beneficiaries to an effective appeals system, and, therefore, access to Medicare coverage and necessary health care.

- After years of litigation, the Supreme Court of New Jersey held that the survivor benefit plans of police and firefighters could designate a Special Needs Trust as a beneficiary. The Court made a point of noting that the amici — that included NAELA, the NAELA New Jersey Chapter, the Guardianship Association of New Jersey, and the Special Needs Alliance — were "true friends of the court."

NAELA began implementing its new education plan in 2014, which includes:

- Building programming specific to member's needs. The new 2015 Summit in January focuses on interactive hands-on learning and online development classes. The 2015 Annual Conference maintains its focus on a broad-brush review of those topics essential to Elder and Special Needs Law.
- Introducing the new NAELA Essentials, a two-part program that incorporates an eight-module Essentials Online course that concentrates on the core practice areas of Elder and Special Needs Law, followed by the NAELA Essentials Practicum, a face-to-face workshop that helps attendees put into practice those core areas of law featured in the online component.
- Focusing on distance learning, in 2014, NAELA hosted eight national webinars including a three-part series on Social Security presented by Avram Sacks. NAELA also hosted six Section-only webinars and launched the popular, free Lunch & Learn sessions where members can get together to discuss articles published in *NAELA News* and *NAELA Journal*.
- NAELA continues to enhance the most important part of the website for our members, the Online Member Directory. Not only is it the most visited part of the NAELA website in terms of monthly hits, often exceeding 21,000 a month, from consumers looking for attorneys or members seeking to refer clients, but it also serves to enhance the member's profile by allowing

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Susan H. Levin, Esq. A Massachusetts Chapter MVP

Massachusetts Elder Law attorney Susan H. Levin, Esq., is a Massachusetts Most Valuable Player whose impact has been inspiring.

By William J. Brisk, CELA

Although Susan H. Levin is not as well known to NAELAns nationally as she should be, she would be a leading candidate for the position of Most Valuable Player of the NAELA Massachusetts Chapter. One of the first Elder Law attorneys in Massachusetts, presenter at key conferences dating back to the 1980s, a legendarily effective advocate for her many clients and, most important, a key to the Massachusetts Chapter's impact on public policy, Susan's attention to detail, policy, and people has produced unparalleled benefits to her clients, Massachusetts elders in general, and hundreds of colleagues. She is as unassuming as she is inspiring. Her practice skills have consistently earned her SuperLawyer status.



Susan H. Levin, Esq.

A Long-Time Player in MassNAELA's Public Policy Initiatives

An early member of the NAELA Massachusetts Chapter, she has served (without respite) on its Board since 1994 and for almost as long has been either the Chair or a Co-Chair of the Chapter's Committee on Public Policy. Almost every month, she reports to Chapter members on new public policy developments. Often with the Chapter's professional lobbyist, Deb Thomson, Susan spends considerable time educating legislators and government administrators on how to improve MassHealth's ability to serve

elders better and more fairly.

A partial list of policies she helped establish reflects the breadth of Elder Law:

- Successfully advocating against "income first" before the DRA;
- Enhancing spousal shares of a couple's assets when a spouse enters a nursing home;

William J. Brisk, CELA, is a NAELA Fellow, past member of the NAELA Board of Directors, and past NAELA Journal Editor in Chief.

- Requiring banks and other financial institutions to accept validly executed Durable Powers of Attorney;
- Eliminating the Commonwealth’s authority to recover Medicaid expenses from non-probate assets; and
- Requiring MassHealth annually to adjust its estimate of the “average cost of a nursing home” that determines the length of some transfer penalties.

Other far-reaching changes for which Susan has advocated include maintaining MassHealth’s commitment to pay for up to 10 days to hold nursing home beds for persons when they are hospitalized (so that when their hospital stay ends, they can return to “home” rather than seek out a new nursing home) and allowing conservators to establish special needs trusts (despite a federal law that seemed to limit that authority to guardians).

A typical achievement, which might be emulated elsewhere, was in promoting almost a decade ago legislation that now requires banks and financial institutions to compile at no cost up to five years of records for persons applying for Medicaid. This relatively small burden on banks allows hundreds, perhaps thousands, of applicants each year, who have run out of money, to satisfy MassHealth’s requirement, a precondition for obtaining Medicaid coverage for long-term care. Susan has been involved in many more complicated lobbying efforts, some on a regional or even national stage, but this achievement, which involved nearly three years of crafting a simple solution and then selling it to banks as well as legislators, is a stunning example of how Susan analyzes a problem, finds a relatively simple but effective solution, and sells it to legislators or administrators—always keeping in mind what best serves most elders.

Committed to Social Change

If Susan wasn’t born to be an Elder Law attorney, her training and initial jobs prepared her to be a leader in our field. As a history and sociology major in college in the early ’70s, she was drawn to the politics of the day. She accepted an administrative position at the Harvard Law School that brought her into contact with the critical legal studies movement, which saw law as an instrument for social change. Social and career goals coincided when she enrolled in Boston University’s law school where she participated in a clinical program at Greater Boston Legal Services, and, during the summers, worked on bringing a class action suit that promoted fair housing in Boston.



Susan Levin (right) with Emily Starr, fellow Mass NAELA attorney, mentor and friend.

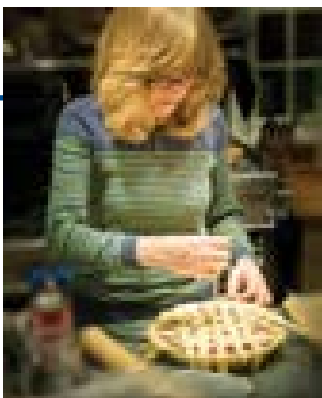
After graduation, she took a position funded under the Older Americans Act at Central Massachusetts Legal Services in Worcester where she met Emily Starr who was its managing attorney. Around 1980, Susan experienced her first Medicaid Fair Hearing. She convinced a Hearing Officer not to disqualify an applicant whose son had withdrawn money from a joint account because her client did not make the “gift” and the son was not acting on her behalf. That early victory launched a career in Medicaid planning that included writing, with Emily Starr, one of the first articles on the subject for a leading legal publication.¹ Susan eventually turned this article into the key chapter, “Medicaid and Resource Planning,” in the Elder Law treatise, edited by Emily Starr and Donald Freedman, *Estate Planning for the Aging and Incapacitated Client in Massachusetts* (1998–2011).

A Perfect Fit

Elder Law was “a perfect fit,” combining her passion for advocacy on behalf of needy persons with a sensitivity that would have made her a successful therapist. She enjoys resolving complex family situations that bedevil a great number of estate and Medicaid planning situations.

continued on next page

¹ Emily remembers that asking Susan to co-author the article “was the best professional decision [she’d] ever made.” Susan’s sense of detail and analysis induced Emily to recruit Susan to a new law firm in Worcester, Mass. Still, Boston-based, Susan moved to Newton, Mass., where she has worked with Don Freedman, another NAELA icon, for the past 22 years.



Susan, a passionate baker, prepares a pie for Thanksgiving.

When I told colleagues that I had been tapped to write an article about Susan, they responded unanimously that Susan's commitment to NAELA deserved this recognition. One commented that Susan is "tenaciously protective of her clients ... has the knowledge, analytical skill, and creativity to [find] the

subtle complexities of a case and to plan an appropriate response to every potential obstacle. Diligence and thoroughness are her hallmarks." Another commented on not only Susan's work ethic, but also her "warm and thoughtful personality, which is well received by legislators and state agency employees."

Outside Work

Deb Thomson marveled that Susan's commitment to NAELA and our profession "somehow" has not kept her from raising and maintaining contact with two accomplished daughters—the younger lives in New York City while the elder, who resides in London, has made Susan a "doting grandmother" of a one-year-old. She is, as Ian Oppenheim told me, an inspiration whose pleasant personality does not, for a moment, detract from her commitment to people who need her (and our) help.

Susan's passions include her husband, a retired history professor and author, baking pies with the same attention to detail she applies to analyzing Medicaid regulations, and observing the Jewish Sabbath with family and friends. Somehow, she finds time to travel and garden. None of these pursuits have slowed her down, however, in her pursuit of a just society that cares for and honors elders. ■

Executive Director's Message continued from page 5

a member to add a picture, a description of the firm and services offered, and any foreign languages spoken in the office.

Building alliances:

- NAELA is building a new relationship with the National Multiple Sclerosis Society, and NAELA continues its close relationship with the Alzheimer's Association on a national level, having joined the Alzheimer's Early Detection Alliance.

And what's on tap for 2015:

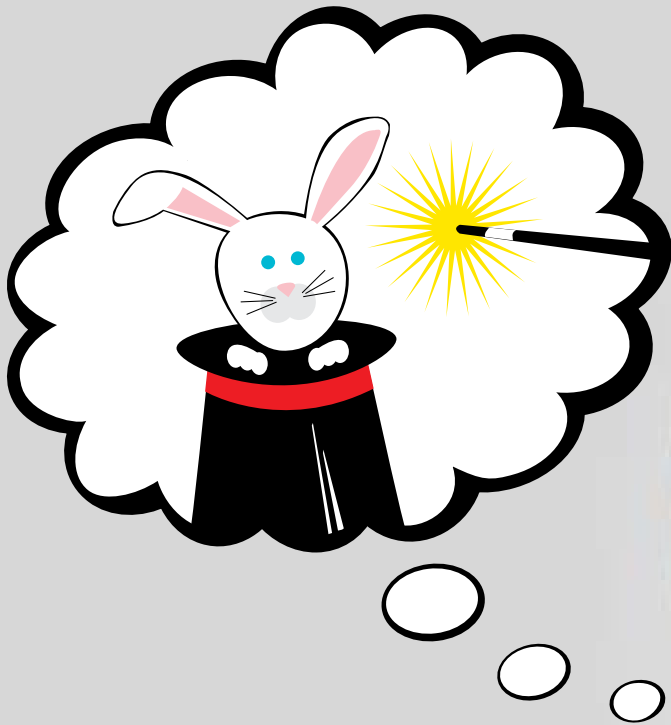
- Ethics remain a key concern for NAELA. NAELA's Professionalism and Ethics Committee has begun the process to update the Aspirational Standards for the Practice of Elder Law and the Commentaries.
- Unauthorized Practice of Law remains an important issue in many states. NAELA is working to provide resources for attorneys and consumers to combat Medicaid planning mills, living trust scams, VA pension poachers, and other unscrupulous activities.
- NAELA will continue to add new titles to its free archived program materials, both seminar and webinar presentations and articles. This puts high-quality content at members' fingertips whenever they need it.

- Most seniors and persons with disabilities would prefer to live in their communities and with the greatest amount of independence and autonomy possible. In addition, studies have shown home and community-based services to be less expensive over time than nursing home care. NAELA will make it a priority to ensure that those receiving long-term care can do so in the least restrictive environment, including through legislative, regulatory, and legal actions.
- The Republican take-over of the Senate, additional victories in the House, and wins at the local level could bring increased pressure to reduce the social safety-net benefits that many members' clients rely upon for their health and well-being. Some Republicans have stated they would use a legislative technique called "budget reconciliation" in order to reform entitlement programs. Over the last six years, under the forward-thinking leadership of the Board of Directors, NAELA has built up reserve funds in case of such emergencies.

As you can see, NAELA has accomplished a great deal in just the past year, but there is still more to do. ■

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DALE M. KRAUSE, J.D., LL.M.

Improving Medicaid Law by State Legislation

By Susan H. Levin, Esq.

An inside look at MassNAELA's successful legislative advocacy strategy.

As Elder Law attorneys, we are accustomed to advocating on behalf of our clients based on existing federal and state law. When the state agency denies a Medicaid application, we file appeals to right the wrong. The litigators among us design cases to challenge a state's interpretation of Medicaid law in court. Such appeals are essential to representing a client zealously and an effective means of controlling inappropriate overreaching by state officials.

In Massachusetts, while we have had several victories through litigation, our courts have become increasingly unsympathetic to applicants attempting to protect assets while seeking Medicaid eligibility, regardless of the strength of the legal arguments. In 2003, we decided to expand our advocacy to the Massachusetts legislature, where we encountered many legislators willing to listen to our public policy arguments on behalf of the elderly. MassNAELA hired Deb Thomson as a legislative advocate to represent our clients' interests. Where the Medicaid statute is ambiguous or CMS defers

to the states and our administrative advocacy and litigation strategies fail us, we now consider a legislative solution.

Expanded Estate Recovery

Beginning with OBRA '93, the federal Medicaid statute gave states the option of expanding estate recovery claims beyond the probate estate.¹ In 1994 and again in 1995,

Massachusetts Gov. William Weld proposed Massachusetts legislation to expand estate recovery beyond the probate estate. MassNAELA members garnered the support of all major Massachusetts bar associations to oppose expanding estate recovery. Clients let their legislators know how strongly they felt about protecting their homes. The proposals failed to pass. In 2003, however, a budget shortfall emboldened Gov. Mitt

Romney to include language in the FY '04 state budget adopting the OBRA '93 expanded estate recovery provisions; this time they passed. Implementation of the new law turned into an administrative and legislative night-



Susan Levin (left) with Deborah Thomson, the lobbyist who has guided MassNAELA to its legislative successes.

Susan H. Levin, Esq., is this month's featured member.

¹ 42 U.S.C. §1396p(b)(4).

mare. Through the leadership of our legislative advocate Deb Thomson and the concerted efforts of MassNAELA members, we were successful in having language included in the FY '05 budget repealing expanded estate recovery. Within a year, MassNAELA had achieved its goal of limiting estate recovery to the probate estate.²

Community Spouse Resource Allowance Increased to Federal Maximum

In 1998, Massachusetts adopted through regulation the federal maximum community spouse resource allowance (CSRA) to minimize the number of appeals seeking a higher CSRA. When budget problems struck in 2003, however, the State reduced the CSRA to the federal minimum. In response, we drafted a bill requiring the State “to adopt the maximum CSRA permitted” under federal law. From 2003 until 2006, we lobbied hard and eventually our proposed language was included as an outside section of the State budget in 2006.³ Although our language made it in the final Senate and Conference Committee budgets, it was vetoed by Gov. Romney. Due to the persistent advocacy of MassNAELA members, the legislature overrode the governor’s veto. As a result, community spouses in Massachusetts are required by state law to receive the maximum CSRA.⁴

Bank Fee Waiver Bill

When filing a Medicaid application for long-term care coverage, applicants must submit financial records to prove they meet the asset and income requirements and have not transferred assets within the look-back period. Most clients do not keep the bank records needed to satisfy Medicaid’s requests for information. As a result, many clients must request copies of account statements from their banks. We noticed the banks were charging substantial fees for this research. After the Deficit Reduction Act (DRA) passed, we anticipated the need for an exponential number of research requests due to the increase to five years of the look-back period. The fees were often \$300 to \$500, just to obtain the bank records required to qualify for a poverty program. Something was wrong with this picture!

2 See M.G.L. c. 118E §31(c).

3 Outside Section 58 of Chapter 139 of the Acts of 2006.

4 See M.G.L. c.118E §21A(a)(2)(v).

We drafted a bill to require banks to waive research fees when an applicant for Medicaid requests records from the bank. Legislators were sympathetic with the goals of the bill. Best of all, there was no cost to the state if the bill passed. It was a win for Medicaid applicants and it was a win for the state Medicaid agency, because the bill would assist applicants to obtain the records they needed to review the applications. With the skills of our MassNAELA legislative advocate and the support of Chapter members, we were able to get the bill passed by the Massachusetts legislature. The bill states:

Upon written request signed by an authorized employee or agent of the division, the treasurer of a financial institution shall provide, without charge, the deposit and withdrawal records of the preceding five years for an applicant for or recipient of medical assistance under this chapter to any authorized employee or agent of the division or to the applicant or recipient.⁵

We drafted a bill to require banks to waive research fees when an applicant for Medicaid requests records from the bank. Legislators were sympathetic with the goals of the bill. Best of all, there was no cost to the state if the bill passed.

The next step was to devise an easy way for an applicant to prove to a bank that the records being requested were for a Medicaid application. MassNAELA advocates and Medicaid agency officials worked cooperatively to create a state Medicaid form an applicant could easily download from the Medicaid website. The form bears the electronic signature of the Medicaid Director, thereby complying with the legislation’s requirement that the records be “requested by a Medicaid employee.” Allowing the form to be downloaded before the application was filed was a critical factor so ap-

5 M.G.L. c. 118E § 23A.

Elder Law attorneys would advise clients not to use their long-term care insurance for home care if they wanted their insurance to protect their homes upon nursing home placement, admonishing: if you use it, you'll lose it!

plicants would be able to obtain the bank records as part of the preparation of the application and potential transfers could be identified *before the application was filed*. Banks, when confronted with the new “Financial Information Request” form, quickly complied with the new law. As a result, Massachusetts applicants for Medicaid no longer pay research fees to their banks to provide the bank account history required to support a Medicaid application.⁶

Long-Term Care Insurance

Massachusetts law protects the home from estate recovery if the applicant purchased long-term care insurance that meets statutory requirements. The state initially took the position that the applicant had to have long-term care insurance that met state requirements as of *the time of admission to the nursing home*. If the applicant used the long-term care insurance to pay for home care, by the time the applicant entered a nursing home, the policy would no longer meet the minimum coverage requirements. Elder Law attorneys would advise clients not to use their long-term care insurance for home care if they wanted their insurance to protect their homes upon nursing home placement, admonishing: if you use it, you'll lose it!

We filed a bill in 2008 to require protection of the home as long as the applicant bought long-term care insurance that met state requirements *as of the time of purchase*. The bill states:

No claim for costs of a nursing facility or other long-term care services shall be made by the division under section 31 or

6 <http://www.mass.gov/eohhs/docs/masshealth/membappforms/fir-1.pdf>.

32 if the individual receiving medical assistance was permanently institutionalized, had notified the division that the individual had no intention to return home and, on the date of admission to the nursing facility or other medical institution, had long-term care insurance that, when purchased, met the requirements of 211 C.M.R. 65.00.⁷

We were able to convince our legislature that the state's interpretation of the law was discouraging individuals from buying long-term care insurance. Individuals needed to be certain they were protecting their homes if they bought long-term care insurance that met the requisite requirements and would not be jeopardizing that protection if they actually used the coverage. It took several years to have those two words inserted into the statute, but it was signed into law in 2012.

Current Legislation

As this article is being written, we are hopefully in the last stages of advocacy to pass a bill that would enable individuals who would otherwise qualify for Medicaid coverage of care at home through a home and community based services (HCBS) waiver, but for their income exceeding 300 percent of the federal benefit rate (FBR). The bill would allow the individual to pay a premium equal to the amount by which the individual's income exceeds 300 percent of the FBR. Currently, if an individual's income exceeds the limit by one dollar, he or she must meet a deductible based on the arcane state income standard of \$522 per month. This policy forces individuals who might otherwise receive care at home to enter a nursing home for financial reasons.

We are still working on passing a number of bills to: 1) provide Medicaid-acceptable terms for a personal care contract that will be considered a fair market value exchange; 2) exclude from countable assets a retirement account of a community spouse who is taking regular income distributions from the account or who is still working; 3) establish criteria for Medicaid hardship waivers; and 4) establish specific criteria used to determine intent to transfer assets for the purpose of qualifying for Medicaid.

With our courts granting ever more deference to the tortured interpretations of Medicaid law put forward by Medicaid's attorneys, NAELA State Chapters may want to consider legislation in addition to litigation to improve access to the Medicaid program. ■

7 M.G.L. c. 118E, § 33.

Bad Parents and Their Helper Children

By April D. Hill, CELA, CAP

How Elder Law attorneys and their staff can help adult children struggling with their aging abusive parent.



One of our peers shared a link to an article about child-caregivers of abusive parents.¹ The article reminded me of the many children of abusers I have helped to care for their parents over the years. They have their own unique set of issues. Reading that article brought up many different feelings for me; mostly that it was time for me to advocate for this group. You see, I am one of those adult children.

Few will openly tell anyone their history. Unless you tune in to the signs, you may never know. Yet that information may be valuable and helpful to the Elder Law attorney as you seek to serve this group. As the adult child of an abusive parent, I want to share with those of you who cannot imagine being a caregiver for someone with such a difficult history.

Adult Children of Abusive Parents

Abuse is an interestingly broad term. The *Merriam-Webster Dictionary* definition of abuse includes: “Language that condemns or vilifies unjustly, intemperately, and angrily, and physical maltreatment.”² Adult children rejecting their

April D. Hill, CELA, CAP, is the founder of Hill Law Group, PA, in St. Petersburg, Fla.

This article is provided by members of the NAELA Council of Advanced Practitioners (CAP).

- 1 Paula Span, The New Old Age Blog – The New York Times, A Risk in Caring for Abusive Parents, http://newoldage.blogs.nytimes.com/2014/01/20/a-risk-in-caring-for-abusive-parents/?_php=true&_type=blogs&_r=0 (Jan. 20, 2014).
- 2 Merriam-Webster, abuse, <http://www.merriam-webster.com/dictionary/abuse> (accessed Jan. 20, 2014).

parents because of abuse is not unusual. Two examples come to mind. Early in my legal career, I observed a case in probate court where an attorney sought to deposit funds of an estate with the clerk because the decedent's only son refused to accept his inheritance. The judge, who grew up with supportive parents, found it hard to believe and so required live testimony. The son calmly and unemotionally testified that he and his mother had parted ways many years ago and he wanted nothing of hers; he had closed that door many years ago. He offered no more but I wondered, what actually happened to cause a son to totally disown his mother?

I had seen a similar situation when I worked in a nursing home before law school. One of my responsibilities was to increase family involvement. One resident, Rosie, had family close by who never visited. Rosie was this tiny little woman who called each of us "Honey" in her sweet way. She said little but was always very appreciative. I contacted her son, who said that his mother and her boyfriends had done horrible things to him and his two siblings before Rosie left them on the doorstep of an agency years ago. He said, sadly, "Even though we spent most of our childhoods in foster care and had little contact with her, Rosie names us on contact sheets as next of kin." "No," he told me, neither he nor his siblings intended to ever visit her again.

Although some children of abusers close the door, many others choose to stay or return. These children choose to help even though the parent may not deserve their kindness, often struggling through each step. Some help with the support of the family, others in opposition to the family, and still others without any support.

I am that child who chose to help. I had distanced myself from my abusive father before I turned 18. My father has been married to his current wife, not my mother, for more than 40 years and she is nine years his junior. Until the past five years, I saw them once every five to 10 years or during a family event. My six siblings and I have good lives and few would ever guess that we were abused as children. We have well-covered scars, that we hide for many reasons; including worry that someone will judge us as flawed, act in a condescending way out of pity, or somehow confirm that we really did deserve that treatment.³ Few understand or even acknowledge psychological abuse, including the

3 Roberta Satow, *Doing the Right Thing Taking Care of Your Elderly Parents Even If They Didn't Take Care of You* 4 (Penguin Group 2005).

victims. The first time I understood I was a victim of abuse I was in law school when I watched a man plead guilty to child abuse for the same things my father had done.

I secretly hoped my father would die before needing any help from me. I did not wish him dead, just me free of a heavy burden. Unfortunately, my secret wish did not come true. During the past five years, I have helped him. Recently, I have made several trips over to see my father to provide assistance. Every time I drive the three hours to the nursing home, I feel like Alice falling down the rabbit hole.⁴ Although I am totally exhausted from each visit, I provide life-care planning services and deal with Medicaid issues. I accept this as part of my journey. My saving grace is the incredible support and gratefulness of my siblings, which can be rare in many families.

Choosing to Stay

Children continue in these relationships for a variety of known and unknown reasons. Studies have shown the reasons include: the deep roots of the parent/child relationship,⁵ a chemical reaction in the brain that drives

Although some children of abusers close the door, many others choose to stay or return. These children choose to help even though the parent may not deserve their kindness, often struggling through each step. Some help with the support of the family, others in opposition to the family, and still others without any support.

4 Lewis Carroll, *Alice's Adventure in Wonderland* Ch. 1 (Macmillan 1865).

5 Grace Lebow, Barbara Kane, *Coping With Your Difficult Older Parents: A Guide for Stressed-Out Children* 7, (Avon Books 1999).

the child to continue,⁶ a commitment to be better than the parent, avoidance of moral criticism,⁷ or feeling entrapped.⁸

Knowing that so many children continue to help their abusive parents, Elder Law attorneys and their staff should consider the following suggestions.⁹

- 1. If someone tells you her parent abused her, believe her, even if the parent seems like the most adorable person you ever met.** Yes, there are some people who will exploit every opportunity for attention, but I assure you, most adults with this history wish they had a different story to tell. By sharing with you, they are being courageous. Adults of abusive parents are much more inclined to be indirect saying, “we had a difficult relationship,” or “it wasn’t always easy at home.” Psychiatrist Marc Argonin says, “Sometimes the most telling sign is the absence of a detailed personal history from family members.”¹⁰
- 2. Understand that any activity carried out for the parent takes considerable mental energy.** These children may not be as quick to complete tasks. Even going through and finding bills can be overwhelming. You may need to build in more time to get the work completed.
- 3. Give the adult child tasks in clearly defined terms and limited amounts.** When asked to go into a parent’s home or personal belongings and collect information, this individual may not know how to begin. These children may have distanced themselves with no idea about their parent’s finances or health and do not know where to begin. They will need direction from you.
- 4. Recommend outside support.** While you may need the adult child’s involvement to represent your client, the adult child does not have to do the hands-on work. You can inform him or her about many services avail-

6 Regina M. Sullivan *The Neurobiology of Attachment to Nurturing and Abusive Caregivers*, 63(6) *Hastings L.J.* 1553-1570 (2012).

7 Heleana Theixos, *Adult Children and Eldercare: The Moral Considerations of Filial Obligations*, 17 *Mich. Fam. Rev.*, Issue 1, 65-73 (2013).

8 Satow, *supra* note 3, at 10.

9 This list is particularly helpful for those who grew up with supportive loving parents.

10 Marc E. Agronin, *The New Old Age Blog – The New York Times, Struggling With an Abusive Aging Parent*, http://newoldage.blogs.nytimes.com/2014/01/20/a-risk-in-caring-for-abusive-parents/?_php=true&_type=blogs&_r=0 (August 13, 2012).

Children continue in these relationships for a variety of known and unknown reasons. Studies have shown the reasons to include: the deep roots of the parent/child relationship, a chemical reaction in the brain that drives the child to continue, a commitment to be better than the parent, avoidance of moral criticism, or feeling entrapped.

able including geriatric care managers, home health agencies, estate sale services, etc. One of our client’s daughters could only tolerate visiting her father in an assisted living facility once every two months though she lives only a few miles away. She was relieved when, with our help, she hired a professional to visit him and report.

Additionally, clients have benefited when we agreed to accept the role of agent on a power of attorney or trustee of a trust in cases where the child is unwilling or unable to act in this role.

- 5. If the adult child tells you he will be relieved when the parent is dead, don’t judge that person or be offended.** A woman recently told me that the best day of her life was the day her father died because she no longer had to struggle with wishing he would treat her well and knowing he would not. She felt no one would understand and she was right. We do not want to believe a parent really does not love his child or that psychological abuse exists. But it does.

Why an article about the child when the elder is the client? We know the answer: Interacting with the client’s child is the rule, not the exception. A better understanding of the challenges faced by that child may assist you and your staff to effectively represent the elder. ■

Why You Might Want to Consider Hiring a Practice Coach

By Patricia Elrod-Hill, CELA

An experienced Elder Law attorney identified a few problem areas in her practice. Could a practice coach be the solution?

I'm not a great tennis player. In fact, I'm pretty bad. Yet, for 10 years I paid a tennis coach for bi-weekly tennis lessons. I needed someone to teach me the basics of the game, help me refine my strokes, figure out the "head game," and keep me accountable for practice. I never made a cent playing tennis. However, at the end of those 10 years, I had gained more than money. I gained skill at the game of tennis, confidence in my ability to play at a higher level, and the freedom to have fun playing.

Finding Help

I've been practicing law for 25 years; 11 as a solo Elder and Special Needs Law practitioner. I'm good at the law part, but I struggled to figure out how to manage the practice, how to make money at it, and how to have fun practicing. I talked with other attorneys who had coaches,

Patricia Elrod-Hill, CELA, founded the Elrod-Hill Law Firm, LLC, in Atlanta, Ga.

This article is provided by the NAELA Practice Success Section. Learn more about NAELA Sections at www.NAELA.org.

and attended events to listen to practice and life coaches.

I thought a coach was an expense my practice could not afford. A few years ago, while struggling

with tough staffing issues I could not handle without help, I attended a presentation by Steve Riley, a Certified Practice Advisor with Atticus, where he offered an assessment of my practice to determine whether I would benefit from a coaching program with him. During our initial call, I told him that in order to stay in practice, I desperately needed help with staffing, especially hiring, firing, and retention.

We began twice-monthly coaching calls focused on helping me hire, train, and retain staff, and I joined a quarterly group-coaching program led by Riley. The agenda for the group sessions that year was hiring, training, and compensating staff, with the ultimate goal to learn to delegate much of the firm management to a key assistant.

By the end of my first year of coaching, I had hired and trained three assistants, with one identified as the team



leader. I continue to work on staffing issues, but our coaching sessions now focus on other issues. Currently, we are working on building a strong referral base and learning to handle cash flow issues.

Why Would an Attorney Hire a Practice Coach?

Shouldn't we already know how to practice law? What can a coach add to your practice? If my law school offered practice management, marketing, or staff training classes, I'm pretty sure I did not take any of them.

A coach can help with one specific aspect of the practice, or can work with you to develop the general skills necessary to manage a practice. Michele P. Fuller of Michigan Law Center, PLLC, a nationally known Special Needs Law attorney, initially thought her greatest need was for a coach to help her with marketing and joined a practice-coaching group that included a marketing professional. Working with the group coach, she developed and executed a marketing plan that helped her grow her business. Once her business grew, she needed help with staffing and practice management to service her growing client base. Michelle believes that the group energy helped her develop skills in the areas she needed to manage the practice and thinks the most important reasons to hire a coach and to work in a group-coaching program are for the structure and accountability.

John Holliman, formerly of Bailey & Holliman, now with Holliman Estate Planning & Elder Law, LLC, hired a practice coach when he and his former law partner decided to form a law firm. Their styles of practice differed,

and they needed the help of someone outside the firm to help them work together. Their coach served as a mediator when the partners disagreed on practice management and helped them set and keep their marketing and staffing goals.

How Do You Find a Coach?

First, identify the specific area or areas of your life or practice that cause frustration or need improvement. Good practice coaches are able to help with time management, business development, staffing, cash flow, and profitability.

Think about how you want to work with a coach. Are you okay with conference calls or group coaching, or do you need someone who can meet with you individually in person?

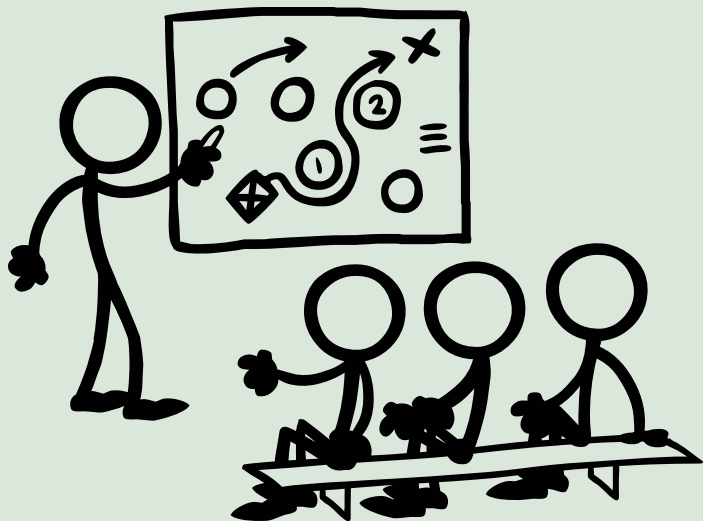
Does the coach need to be an attorney with expertise in a particular subject matter or skill? For instance, do you need another Elder or Special Needs Law attorney trained as a coach who has had a successful practice and is a great marketer?

The best way to find a good coach is to talk with others to get referrals.

How Do You Work With a Coach?

Coaches have unique coaching models based on their personalities and the needs of their clients. Each quarter, my coach and I set my personal goals and business and productivity goals for the firm. I report progress on those goals in monthly calls, which keeps me accountable for moving ahead on productive projects and prevents me from working on fruitless projects. My coach talks me through specific issues that come up in the firm, asks me questions to help me develop solutions, and gives suggestions and resources to handle problems.

Since hiring a coach, I enjoy the business of law more; I've increased my referral business, and hired and retained great staff. I recommend that other attorneys consider hiring a business coach if there are problem areas in their practice. ■



Confronting Ethical Questions That Practitioners Ask

Are NAELA's Aspirational Standards of Professionalism for the Practice of Elder Law Practical for Answering “Who is the Client?”

By Professor Roberta K. Flowers

The identification of the client is a unique ethical issue in Elder Law and an essential first step in representation.

As NAELA celebrates the 10th year of the Aspirational Standards of Professionalism for the Practice of Elder Law in 2015, the Professionalism and Ethics Committee is feverishly working to update the Aspirational Standards. This seems like the perfect time to talk about a real practical use for the Standards in this issue's Practical Ethics column. Who better to talk about the Aspirational Standards than NAELA Past President Stuart (Stu) Zimring, Esq., CAP, who, in 2004, had the foresight to make implementation of the Standards a cornerstone of his presidency.¹

Zimring explains it this way. “The [American Bar Association] Model Rules of Professional Conduct are essential-

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¹ For a complete history of the *NAELA Aspirational Standards of Professionalism for the Practice of Elder Law*, see 2 NAELA Journal 1 (2006).

ly written for litigators and do not really focus on the kind of holistic practice that is Elder Law.” Zimring sees the difference between the Model Rules and the Aspirational Standards like the difference between “an atlas and a map.” Nowhere is this difference more evident than in the way the Aspirational Standards point out the need to identify the client.

The identification of the client is a unique ethical issue in Elder Law and the essential first step in representation. Zimring explains the real value of intentionally identifying the client as an act that forces the attorney to slow down the action in emotional first meetings. “When a client comes into the office, they may be in a crisis that is felt by the entire family, including the person who may have accompanied the client there. Taking deliberate time to identify the client with all those present allows the attorney to step out of the emergency and regain objectivity that the client needs. By taking a breath and allowing everyone else to take a breath, I am able to bring some sense of order to the chaos, which is the true value that Elder Law attorneys bring to the table. By setting the ground rules, I focus myself and everyone else on the client.”

The Aspirational Standards act as “guideposts that point in the right direction,” says Zimring.

1. The Elder Law attorney gathers information necessary to determine whom the client is.²

The identification of the client is a fact-specific inquiry. When a client arrives, it is not always initially clear whom the attorney will be representing. Therefore, the attorney must gather information from a variety of sources. The commentary to Aspirational Standard A-1 suggests the attorney consider information from the initial call for the appointment, intake forms,³ and referral sources. Although an attorney might presume who the client is from the intake forms and contacts, after further conversation, it may become clear that the attorney will be representing someone else or have multiple clients. The attorney should consider, for example, who called for the appointment; who came to the meeting; who is paying the bill; whose interests are being protected; and who is signing the documents.

2. The Elder Law attorney identifies the client at the earliest possible stage.⁴

The Aspirational Standards suggest that the timing of this decision is crucial. The attorney must “understand and identify whose interests are being addressed in the legal planning and legal representation process, and to whom the attorney has professional duties of competence, diligence, loyalty, and confidentiality.”⁵ By identifying the client as soon as possible, the attorney can protect the client and his or her confidential information sooner.

3. The Elder Law attorney communicates the identity of the client to all people involved.⁶

Not only identification but also communication is critical. The Aspirational Standards remind the attorney that it is not enough that he or she clearly knows whom he or she

represents. It is imperative that everyone involved in the representation understands as well. The only way to ensure that everyone is on the same page is to convey that information as soon as possible.

4. The Elder Law attorney attempts to meet in private with the client at the earliest possible time.⁷

It is imperative that the attorney knows the client’s objectives and desires. The Aspirational Standards remind the attorney that the best way to ensure understanding and to judge the client’s capacity is to meet with the client privately. If a private meeting is not in the client’s best interest, the attorney must “take other steps to ensure that the client’s wishes are identified and respected.”⁸

5. The Elder Law attorney utilizes an engagement agreement, letter, or other writing(s) that identifies the client.⁹

Finally, the Aspirational Standards encourage that the identification of the client be in writing. The importance of a clear writing cannot be overemphasized. The Aspirational Standards remind the attorney that communicating the significant message of who is the client in multiple ways is an effective way to ensure that everyone understands who *is* the client and who *is not*. ■

2 NAELA Aspirational Standards of Professionalism for the Practice of Elder Law, Standard A-1. http://www.naela.org/App_Themes/Public/PDF/Media/AspirationalStandards.pdf.

Gathers 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.

3 The creation of intake forms and other documents to identify the client is the subject of a workshop at the 2015 NAELA Summit. Roberta K. Flowers, *Who’s on First: Strategies to Identify and Document Who the Client Is* (Jan. 30, 2015).

4 NAELA Aspirational Standards, *supra* note 2, Standard A-2.

5 *Id.*

6 *Id.*

7 NAELA Aspirational Standards, *supra* note 2, Standard A-2. Meets with the identified prospective or actual client in private at the earliest possible stage so that the client’s capacity and voice can be engaged unencumbered. If the attorney determines that it is clearly not in the best interest of the client for the attorney to meet privately with the client, the attorney takes other steps to ensure that the client’s wishes are identified and respected.

8 *Id.*

9 NAELA Aspirational Standards, *supra* note 2, Standard A-3. The Elder Law attorney utilizes an engagement agreement, letter, or other writing(s) that:

- 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); and
- explains when and how the client-attorney relationship may end.

NAELA Member Benefit Program



The National Academy of Elder Law Attorneys (NAELA) Member Benefit Program provides special offers to NAELA members on a variety of products and services.

You can receive information directly from these vendors by contacting them. NAELA will announce new partners as they are approved. Meanwhile, we encourage you to take full advantage of this member service and reap the benefits of your NAELA membership!

NAELA does not imply warranties to the products or services offered by Member Benefit Partners.

AgingCare.com

www.agingcare.com/portal/elderlaw/naela-members

239-594-3222

Product Information: Each year, six million families rely on AgingCare.com for information, answers, and support on elder care topics, including Elder Law. The Elder Law Attorney Directory provides families with a convenient way to find and contact a local Elder Law attorney. Advertising in the Elder Law Attorney Directory will give your firm the opportunity to connect with these families.

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www.aspenpublishers.com

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- NAELA Member logo included in your listing at no cost.
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- As a NAELA member, special pricing is available to you for a featured listing.

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321-252-0100

Product information: A collection of Elder Law, estate, and tax planning software designed to assist lawyers with strategic development and document generation.

Benefit to Members: NAELA members receive a 10 percent discount on their first year subscription to Elder Law & Special Needs Planning™ (promo code NAE11).

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NAELA CareerCenter

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Product information: Highly specialized career center provides focus to Elder and Special Needs Law firms with free search function for applicants.

Benefit to Members: NAELA members receive 25 percent off a single 30-day job posting and 30 percent off multiple (three, five, and 10) 30-day job postings.

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Benefit to Members: SFP and NAELA have put together a special members-only program that will reduce the cost of your monthly processing expenses while improving your level of service and support.

Aggressive Marketing Can Affect Public Policy

By William J. Browning, CELA

Aggressive marketing tactics could result in legislation that is contrary to the best interest of our clients.

NAELA was built upon the concept that our membership would diligently serve the needs of the people as they age and people with disabilities in a professional and compassionate fashion. The motto of “doing well by doing good” resonated with the membership. This culture encourages the sharing of concepts through continuing legal education and by encouraging the development of public policy through litigation and legislative lobbying. While NAELA is modest in size and financial capabilities, the organization has been well received by the public. NAELA is viewed as a positive factor and as a resource when selecting a lawyer. NAELA lawyers have been involved in nearly every significant litigation effort and legislative effort over the past 20 years that affect seniors and people with disabilities.

This good will and public policy may be undermined by aggressive marketing efforts. Radio advertisements boasting of helping the well-to-do elderly become eligible for Medicaid and mailbox invitations for seminars that are intended to scare the recipient diminish the organization, and the field of Elder and Special Needs Law.

While society has grown accustomed to the aggressive marketing of personal injury attorneys and Social Security disability attorneys, is that the example that Elder and Special Needs Law attorneys wish to follow? Based upon the vulnerability of our client base, shouldn't we take a different route?

Many of our clients depend upon the Medicaid program for health care. While the social issues relating to the effects

of a long-term nursing home stay are well noted, only those who truly are millionaires can afford such care, and thus by nature, our client base is typically middle class or lower-middle class with limited education and limited financial acumen. The Medicaid program as revised under President Reagan and President Clinton created planning vehicles so that a community spouse may avoid impoverishment. Even the Deficit Reduction Act (DRA), which was intended to restrict Medicaid eligibility in many circumstances, created protections for retirement plans for those in the private sector. The safety net was not intended to protect those of great wealth nor was it intended to create separate but inherently unequal treatment between public sector retirement plans and private sector retirement plans. Our role as attorneys is to protect clients. I am sure that many of us have seen clients with \$2-3 million in assets and whose spouse has entered into a nursing home. On every occasion in my practice, the end result of the consul-



Aggressive marketing, which is often boastful and not entirely accurate, is often intended to scare the audience into action.

William J. Browning, CELA, is a NAELA Past President and a NAELA Fellow. Statements of fact and opinion are the responsibility of the authors and do not imply an opinion or endorsement on the part of the officers or directors of NAELA unless otherwise specifically stated as such.

tation is that the well spouse understands that they can pay for the care out of interest and dividends without resorting to the Medicaid program. This author's experience is that those clients, when given all the information and advice, choose to pay for care privately.

Aggressive marketing, which is often boastful and not entirely accurate, is often intended to scare the audience into action and create revenues for the attorney and other "sponsors." These are inherently different from presentations given by attorneys to other attorneys, accountants, or financial planners, or even those presentations made at the request of a priest, minister, or rabbi. Based upon this author's experience, those who utilize this approach are often successful in generating clients, but the impact upon the profession and upon public policy may be quite different. There are many NAELA lawyers who successfully build

a practice, but do so in a humble and reserved fashion. A small percentage of NAELA members, however, go beyond the realm of good taste. The result of these marketing efforts correctly labels the person doing that advertising as an "ambulance chaser." It tarnishes the reputation of the entire organization as well.

Aggressive Marketing Can Negatively Impact Public Policy

This type of marketing also has an impact upon public policy. The Deficit Reduction Act restricted the "Rule-of-Halves gifts" due to attorneys and financial planners in several states abusing the process, which, even though perfectly legal, led to an act of Congress that harmed many middle-class families who would like to have saved a small portion of their modest estate for their children or their



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The NAELA Team

NAELA staff members can help you with any questions you might have about your NAELA membership.

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NAELA's chief executive officer responsible for strategic planning and implementing policies and procedures.

grandchildren. Aggressive marketing may result in another act of Congress that further limits the ability of our clients to protect their most basic interests.

Many of our clients have limited financial acumen and generally have not been adventuresome in their investing. In marketing to this population, attorneys should be cognizant of the vulnerability of this population and not utilize advertising or statements during presentations that are intended to scare the client or potential client into action.

One must assume that any advertising, whether it be by radio, newspaper, seminars, or mailbox hangers, results in policymakers being exposed to Elder Law attorneys and to public benefits planning. As a rule of thumb, we should not make statements in these advertisements that we would not make directly to a judge in oral arguments. In 2008, during oral arguments at the Ohio Supreme Court, Justice Paul Pfeifer commented that he had received advertisements from attorneys promoting “Medicaid eligibility schemes.”

In a recent U.S. Sixth Circuit case, where an individual annuitized a rather modest IRA, Judge Raymond M. Kethledge asked as his first question during oral arguments, “Couldn’t someone with \$3 million purchase one of these annuities?” Will someone in NAELA, pursuing a share of a large commission actually engage in a \$3 million annuity plan? Did this Judge or someone in his family receive a mailing from one of our members?

Perhaps the most meaningful service is the advice we provide to the elderly man or woman who has just placed his or her spouse in a nursing home. For families with limited resources and income, we further the legislative intent under the Medicare Catastrophic Cover Act (MCCA) passed in President Reagan’s second term, by helping these clients avoid utter impoverishment. For those clients with a small home, modest savings, and/or fixed income, our services help the well spouse survive into old age with some semblance of dignity.

Aggressive marketing tactics could result in legislation that is contrary to the best interest of our clients. If, for no other reason, this should make aggressive marketers hesitate.

I was the President of NAELA approximately a decade ago and was an active board member for a decade. I am familiar with many of the active NAELA members who attend conferences annually, and as such, I am confident in saying that a small percentage of NAELA lawyers would

be categorized as aggressive marketers. It is, however, this small percentage that can and will cause damage. NAELA is a voluntary organization that does not have a policing capability. It is up to state bar associations to enforce the ethical practice in that jurisdiction. Our organization adopted the Aspirational Standards for the Practice of Elder Law and each member acknowledges adherence to those Aspirational Standards by continuing to be members. Anyone who does not wish to follow those Aspirational Standards should not continue membership with NAELA. Although some may use the NAELA brand as part of their marketing efforts, if that is the only reason to maintain NAELA membership, then perhaps this is not the best organization for them. Simply put, it is very possible to “do well by doing good” without being boastful, misleading, or employing scare tactics. ■

NAELA Calendar of Events

Visit www.NAELA.org for more information.

January 27–28, 2015. NAELA Advanced Elder Law Review, NAELA Summit, Newport Beach, Calif.

January 28, 2015. NAELA Board of Directors Meeting, NAELA Summit, Newport Beach, Calif.

January 29–30, 2015. NAELA Summit, Newport Beach, Calif.

May 13, 2015. NAELA Essentials Practicum, Annual Conference, Orlando, Fla.

May 13, 2015. NAELA Board of Directors Meeting, Annual Conference, Orlando, Fla.

May 14–15, 2015. NAELA Annual Conference, Orlando, Fla.

NAELA Board of Directors Meetings are open to all NAELA members. Meeting announcements and minutes from past Board of Directors meetings are posted on www.NAELA.org. Using your NAELA username and password, sign in and look under Membership > Member Resources > Board of Directors.

The CELA Exam: No Harder Than it Needs to Be

By *H. Amos Goodall Jr., LLM, CELA; and Marilyn G. Miller, LLM, CELA*

Everything you always wanted to know about the Certified Elder Law Attorney exam.

In order to obtain certification as an Elder Law attorney from the National Elder Law Foundation,¹ a candidate must achieve several goals. One most often discussed is the certifying examination. This six-hour exam has 300 possible points. In prior years, the pass rate has been as low as 14 percent; for the most recent exam, the pass rate was 33 percent.

There are at least three not necessarily consistent perceptions about this test:

- The Certified Elder Law Attorney (CELA) exam is impossible to pass;
- A candidate should be able to study designated materials and pass the CELA exam;
- If a candidate is conversant with, or proficient in, Medicaid asset protection planning, he or she should pass the CELA exam.

There is a small kernel of truth in each of these state-

H. Amos Goodall, Jr., LLM, CELA, practices in State College, Pa. A former NAELA Board member and a NAELA Fellow, he is a member of the Board of the National Elder Law Foundation and is chair of the NELF Exam Writing Committee. Marilyn G. Miller, LLM, CELA, practices in Dripping Springs, Texas. She is a member of the Board of the National Elder Law Foundation and is chair of the NELF Exam Grading Committee.

1 The National Elder Law Foundation (NELF) is a nonprofit organization founded in 1993, dedicated to the development and improvement of the professional competence of lawyers in the area of Elder Law. The purpose of the certification program is to identify those lawyers who have the enhanced knowledge, skills, experience, and proficiency to be properly identified to the public as Certified Elder Law Attorneys.

ments. The exam is pedagogically sound, but it is also rigorous and not graded on a curve, so depending on the effectiveness of candidate's own self-selection process, the passing ratio may be low.

There is a body of literature, including treatises, NAELA publications and other materials, and information exchanged among practitioners that comprises authority in the field of Elder Law, but a test question — like practice itself — is not simplistic. Questions typically combine interrelated issues that may have been emphasized in different ways in different publications. So even though brushing up on the law is necessary, it is virtually impossible to master the breadth and depth of the information required simply by reviewing academic materials.

Qualifications to Sit for the Exam

In addition to passing the test, there are other qualifications. A candidate must have spent an average of at least 16 hours per week practicing Elder Law during the three years preceding their application, handling at least 60 Elder Law matters during those three years with a specified distribution among subjects as defined by the Foundation. In addition, the attorney must have participated in at least 45 hours of continuing legal education in Elder Law during the preceding three years. Finally, a candidate must have achieved a reputation among the legal community that will support professional recommendations.²

Most CELAs are familiar with Medicaid qualification processes, but that is only one part of the field of Elder Law, and not always the largest part of the certification exam.

2 A more complete summary of the requirements for certification is found on the NELF website. <http://www.nelf.org/becoming-a-cela/qualifications-summary>.

Elder Law is defined by NELF as the “legal practice of counseling and representing older persons and their representatives about the legal aspects of health and long-term care planning; public benefits; surrogate decision-making; older persons’ legal capacity; the conservation, disposition and administration of older persons’ estates; and the implementation of their decisions concerning such matters, giving due consideration to the applicable tax consequences of the action, or the need for more sophisticated tax expertise.”³ In addition, in order to be certified, attorneys must be capable of recognizing issues of concern that arise during counseling and representation of older persons, or their representatives, with respect to abuse, neglect, or exploitation of the older person, insurance, housing, long-term care, employment, and retirement. The CELA also must be familiar with professional and nonlegal resources and services publicly and privately available to meet the needs of the older persons, and be capable of recognizing the professional conduct and ethical issues that arise during representation.⁴

Certainly there are fine lawyers who choose not to become certified, but the problem is generally how to find and identify them. The rationale behind offering a certification is to provide a register of attorneys who have demonstrated a level of competence such that any practitioner should be able to refer matters to a geographically remote, unknown CELA with confidence that the CELA is well prepared to handle the referral or should at least recognize the issues and be able to pass the case to someone in their area who is conversant. Our hope is that in time, the general public will recognize this as well.

The qualification process for certification was developed by the NELF board; it has been approved by the American Bar Association Standing Committee on Specialization and is recognized by state bar associations throughout the United States.⁵ Each NELF exam is written by a committee of five attorneys, four CELAs (including at least one member of the NELF board), and an academic representative. The certifying exam itself is periodically evaluated by independent experts,

including most recently by a psychometrician who, in addition to academic credentials, was co-founder and chief scientific officer of a web-based provider of employee assessment services responsible for administering more than 20,000 pre-employment tests each month, on a national level.

Test questions are designed to fit within the 12 Elder Law categories defined by NELF. There are five “core” areas and seven “non-core” areas. Generally, essay questions (200 of the 300 total points) address core areas, and multiple-choice questions (100 of the 300 total points) address non-core areas. Questions relating to each of the five core areas are assigned at least eight percent of the total points, and questions relating to each non-core area are assigned no more than eight percent of the total points. Occasionally there are multiple-choice core-area questions, and, since essays are based on real-life situations that do not always fit neatly in a single area, there may be non-core issues in essay questions.

Where Do the Questions Come From?

Questions come from two sources. There are “banks” of questions from prior exams. In addition, Test Writing Committee members prepare new questions based on recent matters in their own practices and/or current legal events. Each question from the bank is analyzed based on past performance data if available, feedback from the Grading Committee, and any changes to the law. We work continually to make the “call of the question” as specific as possible, to direct candidates to areas they need to address.

Multiple-choice questions are graded by, or under the supervision of, the NELF Executive Director using the answer key provided by the Test Writing Committee. The essay questions are graded by a committee consisting of the grading chair and volunteer CELAs. The members of the committee come from all over the country and have varying degrees of grading experience. There is no overlap between the writing and grading committee memberships.

The Grading Committee meets in person over a weekend approximately one month after the test is administered; the multiple-choice scores are not shown to the committee prior to grading. Each question is assigned to a team of graders, who use the answer suggested by the Writing Committee. All answers to the question are read independently and an initial grade assigned; the team members then meet, compare grades, and, if there is more than a two-point spread between the two team members, they review the answer

3 §2.1, Rules and Regulations of the Board of Certification of the National Elder Law Foundation; <http://www.nelf.org/randregs.htm>.

4 §2.2, Rules and Regulations of the Board of Certification of the National Elder Law Foundation; <http://www.nelf.org/randregs.htm>.

5 At least two states require a local law component as well.

together.⁶ If after this review there remains a spread greater than two points, the question is given to another committee member to grade and make a final determination.

While the approach to essay grading is as much art as science, there are certain pitfalls that will guarantee a less-than-impressive result:

- It is important to read and answer the actual question that is asked. A candidate will gain no credit (and prob-

⁶ Although the grading committee has the suggested answers from the test writers, they are sensitive to the fact that there may be other responses that are just as worthy of credit.

Advertisement

NAELA Can Help You Advance Your Knowledge

2014 Advanced Elder Law Review Recording

This advanced course presents 14 sessions and is designed for NAELA members who want to advance their knowledge in the field by learning from experienced attorneys.

Topics covered:

- Dealing with Advanced VA Issues
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- Administrative Appeals
- Ethical Alligators...Don't Get Bitten
- Complex Planning with IRAs
- Pre- and Post-Mortem Tax
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- Special Needs Counseling
- Today's Advanced Medicaid
- Long-Term Care Insurance

This package includes online access to the "CELA Exam Overview," which includes test review, samples, questions, and answers, how to take the CELA exam, requirements for application, and the appeal process. Presented in 2011 by Edwin M. Boyer, Esq., CAP; Robert B. Fleming, CELA; and Ian S. Oppenheim, CELA.



NAELA Member Price: \$595

Nonmember Price: \$795

Order online at www.NAELA.org/store

ably lose credit) for discussing Medicaid planning strategies in an end-of-life counseling question, for example. Or if capacity is not an issue stated in the question, there is no reason to say that you would administer a "mini mental examination."

- Don't pad your answer. No examiner gives credit for the quantity of words written. Also, if you "shotgun," it is difficult for the grader to know whether you really know the correct response.
- Read and follow the instructions.
- Apply your knowledge to the facts. Do not simply regurgitate what you have studied in a review course; use what you know in a manner that is appropriate and relevant to the question.
- Use complete sentences and proper grammar. We realize that this is a timed test, but the ability to communicate your understanding of the law and its application to the facts is a key factor in being a good attorney.
- Although you will not be penalized for handwriting your exam, you cannot get credit for answers that we cannot read.

A disappointed appellant may appeal in writing to the NELF Executive Director. The first stage is to review the appellant's graded exam and examples of exam answers of those who took the examination with the appellant that are considered to be more appropriate concerning questions for which the appellant may have been scored low.

An examinee whose score is within 10 points of passing has a right to a hearing before a three-person Appeals Committee, made up of two NELF directors and one CELA who is not a NELF director or officer. None of the appeals committee members may have taken part in grading the exam being appealed or served on the Appeals Committee of a prior appeal taken by the appellant. The Appeals Committee has authority to overturn any graded results. The decision of this committee is final.

Elder Law certification is not easy to achieve, but for a knowledgeable practitioner, it is worth the effort. NELF provides education and support, and other CELAs are a valuable resource (and sometimes inspiration). However, the other qualifications noted above have been promulgated for a reason. An applicant should consider meeting those qualifications as a self-imposed condition to sitting for the exam. ■

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The Politics of the Personal: Allowing Doctors to Discuss End-of-Life Plans

By David Goldfarb, Esq.

Doctors are among a person's most-trusted advisers. NAELA supports allowing doctors to be reimbursed for time spent discussing end-of-life plans with their patients.

In 1969, Carol Hanisch used the slogan “the personal is political,” as an attempt to combat the notion that feminists were engaged in mere “therapy” to help women solve immediate personal problems. In the United States at least, our work, our marriage, and even our parenting all come under the rule of law, developed through the political process or by a judiciary that is either appointed or elected. And, it applies to perhaps the most taboo personal subjects of them all: our deaths.

For instance, many have sought for years to pass laws in Congress that would require Medicare to pay doctors for discussing advanced care plans with their patients. They have failed.

This year, doctors groups, with support from NAELA, sought to have the Centers for Medicare and Medicaid Services (CMS) act on its own. The effort had some success. On October 31, 2014, CMS agreed to recognize the service codes, called current procedural terminology codes (CPT), for doctors performing these services. While CMS won't be reimbursing these codes in 2015, it does plan to go through the formal rulemaking process on this issue sometime in the future.

A Matter of Words

Advanced care planning last captured the politico-media complex during the battle over the Affordable Care Act (ACA), primarily as a result of Sarah Palin's use of the term “death panels.”

David Goldfarb, Esq., is NAELA's Public Policy Manager.

Revisiting her initial statement, which *Politifact* dubbed “lie of the year,” it's interesting to see that her concern arose as a parent of a child with special needs:

Government health care will not reduce the cost; it will simply refuse to pay the cost. And who will suffer the most when they ration care? The sick, the elderly, and the disabled, of course. The America I know and love is not one in which my parents or my baby with Down Syndrome will have to stand in front of Obama's “death panel” so his bureaucrats can decide, based on a subjective judgment of their “level of productivity in society,” whether they are worthy of health care. Such a system is downright evil.

Politics is personal and although unwarranted, Gov. Palin's statement captured the real fear of those who distrust government involvement in their lives. As Harold Pollack noted in a July 6, 2014, *Politico Magazine* article:

The “death panel” charge stuck because it tapped into the primeval fears of millions of Americans. It's only human to worry that we might someday be abandoned when we are old and sick, and thus judged to be a social burden. Such worries run especially deep among senior citizens, who had the most reason to feel vulnerable, and who perceived that they had the least to gain from the ACA.

In the end, Gov. Palin's outrage along with the media and political storm that followed won the day. Those provisions were not included in the final version of the ACA.

Moreover, the passing of the ACA came at a high political cost. House Democrats lost a total of 63 seats, due in

part to trying to pass the ACA. That's the worst mid-term loss since 1938 when FDR thought the Depression had ended, and he could cut back on government spending.

Attempts Since the Affordable Care Act

Previous Administrative Attempts

With those provisions removed from the ACA, the Administration tried to act more unilaterally. In 2011, CMS issued a rule that allowed for voluntary advanced care planning discussions during annual wellness visits under Medicare. But, several days after the rule went into effect, CMS retracted that portion of the rule due to a "wide range of views on this subject held by a broad range of stakeholders."

Congressional Attempts

Since passage of the Affordable Care Act, several in Congress continue to push for reimbursing advanced care planning. For instance, Reps. Earl Blumenauer (D-OR) and Phil Roe (R-TN), both doctors by training, introduced the Personalize Your Care Act this Congress.

The Act would provide coverage of voluntary advanced care planning consultation under Medicare and Medicaid. It's gotten the support of 51 Democrats and eight other Republicans. But it's unlikely it will pass anytime soon.

Doctors Groups and NAELA Take Action

Recently, doctors groups took on a new strategy — get CMS to recognize and reimburse service codes for advanced care planning.

In 2013, the Illinois State Medical Society requested the American Medical Association to develop current procedural terminology codes for physicians "to report services related to advanced directive plan discussions with patients."

The AMA agreed and submitted those codes for reimbursement under Medicare Part B for 2015. After learning of the AMA's submission, NAELA sent a letter urging CMS to adopt these codes and to pay doctors adequately for these services. "Proper planning helps to reduce stress among family members and allows people to spend their last moments in a manner that meets their wishes," says NAELA President Bradley J. Frigon, CELA, CAP.

On October 31, 2014, CMS issued its physician fee schedule for 2015. It officially recognized those codes, but



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said it will go through the formal rulemaking process to determine reimbursement.

Your Practice: It's Political, Because It's Personal

Elder and Special Needs Law attorneys who work on advanced care plans with their clients handle one of the most emotional, existential issues an individual faces in their lifetime. Sometimes it's easy to take the current state as a given. But as the effort to allow doctors to discuss these issues shows, NAELA's advocacy efforts cannot be separated from the deeply personal issues your clients face. Because at the end of the day, if it's personal, it's political. ■

So... you haven't registered for the first ever NAELA Summit yet?

It's not too late to join us in Newport Beach, Calif., for the 2015 NAELA Summit. If you haven't already registered, here are some reasons to register online now!

NEED TO GET SOME SUN AND FUN?

The Island Hotel in Newport Beach, Calif., is our home for the NAELA Summit for its first three years. Surrounded by the shopping and dining of Fashion Island, minutes from hiking in Southern California's canyons, or soaking up the sun on gorgeous Pacific beaches, this location truly offers something for everyone.

WANT TO ENGAGE IN MEANINGFUL DIALOGUE WITH NAELA EXPERTS?

The structure of the Summit is designed to allow attendees to not only get hands-on, interactive experience in any one of the 21 breakout sessions, but to continue that learning after the sessions are over with lunches and receptions. Before the day starts, we have unstructured discussion sessions scheduled to allow attendees to set the topic to be explored over coffee or a stroll in the sunshine.

NEED TO JUSTIFY THE COST?

Tax Section Past Chair and NAELA Treasurer Hyman Darling, CELA, CAP, sent us the following explanation of the tax benefits of attending the Summit:

If the only reason holding you back from attending is the cost of travel and being out of the office, consider the following.

Hypothetically speaking, airfare, attendance, and other miscellaneous expenses would be approximately \$1,500, so many would normally think that the cost of attending is really \$1,500. But consider this — the \$1,500 is a full tax write-off for education purposes of attending The Summit. If you did not spend the \$1,500, then this would normally be profit that would be taxed to you at federal income tax rates, Medicare tax, Social Security tax, and state tax, which would be approximately in the vicinity of 50 percent. Therefore, you would only make \$750 net if you did not spend the \$1,500.

In addition, consider all of the educational learning opportunities you will have by attending, not counting the camaraderie, contacts, relationships you will make, and even some fun in sunny California, and this conference will provide you with many opportunities to make far in excess of the cost of attending.

In short, you probably can't afford to miss attending the inaugural Summit, which is destined to be the event of the year. So, take into consideration the tax and non-tax benefits of making this investment in your future. We look forward to seeing you in January in California. ■



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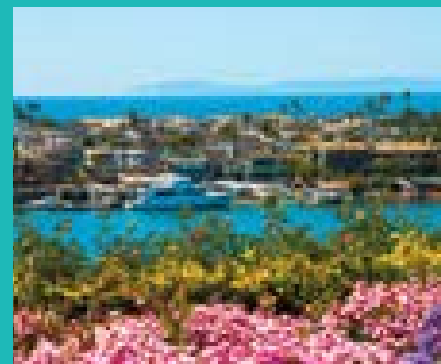
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