Primer on Medicaid Waivers and Why We Now Worry About Them

Charles P. Sabatino

Two types of Medicaid waiver options have been in existence for many years—§1115 and §1915 waivers. Both give the secretary of DHHS broad discretion to waive Medicaid state plan requirements contained in §1902 (42 U.S.C. §1396a) of the Social Security Act. In the past two years, the secretary has announced several initiatives to solicit new waiver proposals and to streamline the submission and review process. While always perceived as doors to innovation, the current trend toward unrestrained waiver approvals by the Bush Administration could effectively shift Medicaid from an entitlement program to a block grant program, freeing the states from long-standing minimum federal rights and obligations and potentially limiting access to care by persons who would otherwise be eligible for benefits.

§1115 Waivers

Section 1115 of the Social Security Act (42 U.S.C. §1315), added to the law in 1962, provides the secretary with broad authority to authorize experimental, pilot or demonstration projects that are likely to assist in promoting the objectives of the Medicaid statute. Unfortunately, there are no objectives explicitly stated in the Act, leaving considerable room for rhetorical surmise about the legitimate objectives. One explicit limitation is that only provisions of §1902 of the Act (42 U.S.C. §1396a) may be waived. This is the section that spells out the requirements for state plans, including the federal mandates of statewideness, comparability of services, and freedom of choice. A long history of §1115 waivers affirms their (continued on page 10)
President’s Column

By Bernard A. Krooks, CELA

Hats off to NAELA Board Member Steve Silverberg and the 2002 Institute Committee for a well-done conference in Albuquerque. William H. Colby, author of Long Goodbye: The Deaths of Nancy Cruzan, shared his insights and delivered a compelling presentation about the human aspects of the Cruzan case. Gideon Rothschild and Jeffrey N. Pennell shared their expertise on trust drafting and right of election issues. Ellen Eichelbaum keynoted the meeting with communications tips for working with seniors. The program attracted 372 attorneys who came to networking breakfasts to share ideas and stayed through Sunday to hear Michael Gillix and Ira S. Wiesner talk about Future Trends in Elder Law. Putting together a superb meeting is never easy, but this committee and our NAELA staff certainly made it look easy!

There are several exciting developments in NAELA that were announced at the Institute.

First of all, beginning the first week in January of 2003, NAELA will be providing all members with a weekly e-bulletin. The e-bulletin will summarize cases, provide legislative and regulatory updates, include practice management tips and share important information on elder law issues. It will be sent to all members via e-mail; provided that we have your current e-mail address. If we do not have your e-mail address, please e-mail it to Jenifer Mowery at jmowery@naela.com. The e-bulletins will also be available on the NAELA Website at www.naela.org and will be archived in a searchable format. We will look forward to your feedback on this new member service.

Secondly, NAELA leaders, headed by State Waiver Task Force Chair Mark Heffner, continue to monitor and interact with our Connecticut members regarding Connecticut’s proposed Medicaid waiver. NAELA is working to educate legislators and their staff members on the potential dangers of changes to the Medicaid eligibility requirements on a state by state basis. Your board of directors is dedicated to seeing this issue through and has been very supportive of the strategies developed by the task force. Please let us know about any waivers in your state or if you would like to get involved in this effort.

As I reported earlier, the NAELA Board of Directors has been looking at (continued on page 4)
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our current Fellows criteria to assure that we are recognizing those members who make a difference and have an elder law presence nationally. The board approved the Fellows Selection Committee’s recommendation to give greater weight to participation in NAELA at the national level. The Fellows selection nomination materials have been revised to reflect this change.

The NAELA UnProgram is up next! This year, we are offering the program on two successive weeks in Dallas, TX. This should allow us to meet the growing demand for members to participate in an intimate program and to get the most out of it. The registration form is on the NAELA Web Site at www.naela.org and has been sent in the mail to all members. Take I is scheduled for January 31 – February 2, 2003 and Take II is scheduled for February 7 – 9, 2003. Be sure to get your reservations in early as each program is limited to 150 participants.

The 2003 Symposium will be held May 13 – 18, 2003 at the Fountainbleau Hotel in Miami, FL. Craig Reaves is the chair and the committee is about to send the program to the printer! We are trying something new at this Symposium for those of you who are experienced elder law practitioners: An Advanced Day Pre-Session will be held on May 14, 2003. This session will include roundtable discussions where you will get the opportunity to meet the experts in a variety of elder law substantive and practical areas. The topics scheduled for discussion include Supplemental Needs Trusts, Medicaid, Serving as Fiduciary, Pooled Trusts, Medicare, Technology, Practice Management and Development, Nursing Home Issues, Elder Law Litigation and Fair Hearings, Guardianship Practice, and Estate Planning. We have the premier attorneys in NAELA slated to share their experience, expertise and ideas on each of these issues. This program can be registered for separately as a one-day program or in conjunction with the Symposium. Miami is a great place to be in May, so mark your calendars now!

As we close the year, I wanted to take this opportunity to thank each of you for your ongoing support of NAELA and to wish you a wonderful holiday season. I know we are all looking forward to spending time with our families and friends. So from me and my family and the NAELA Board and staff and their families, we all wish you a very healthy, happy and prosperous New Year. We look forward to serving each of you in 2003 and beyond.

Tax SIG Corner
By Nell Graham Sale, CELA

On March 21, 2001, the United States Supreme Court ruled that ERISA (Employee Retirement Income Security Act of 1974) pre-empted the Uniform Probate Code in the state of Washington as it applied to the benefits of a pension plan and a group term life insurance policy of a divorced decedent. Egelhoff v. Egelhoff, 532 U.S. 141, 121 S. Ct. 1322 (March 21, 2001). David Egelhoff had divorced his wife two months before he was killed in a car accident. However, he failed to change the beneficiary designation forms, and his former wife was designated as the beneficiary for both plans. It was determined at the trial level that both plans were covered by ERISA.

The Uniform Probate Code in Washington directs that when a marriage is ended, any designation on a nonprobate asset in favor of the former spouse is revoked. Wash. Rev. Code § 11.07.010(2)(a) (1994). The children of Mr. Egelhoff sued for the survivor benefits, arguing that the benefits of the two plans should be distributed to them under the provision of the UPC. The documents of the pension plan itself directed that if there were no surviving spouse, the plan should be distributed to the children. The documents of the life insurance policy were silent on this issue, but the statute provided the solution to the dilemma by directing that if there were no surviving spouse, the policy benefits would go to the children. Egelhoff, at 154 (dissent).

The majority ruled that administrators of ERISA plans need to have uniformity, and that they should be able to rely on what the beneficiary designations say rather than have to know the laws of all the states on these matters. It held that the UPC in this case directly conflicted “with ERISA’s requirements that plans be administered, and benefits be paid, in accordance with plan documents.” Therefore, federal pre-emption prevailed in this case. Egelhoff at 150. The vote was 7-2.

The unfortunate result in this case was detailed by the dissent who noted that the recent divorce settlement had already awarded the former spouse her half community property interest, a business and an IRA account, leaving the pension to Mr. Egelhoff. Two months after the divorce he was killed, and now she recovered the rest of those assets, while his children received no benefit from them. Id. at 159.

Lesson: Always review the beneficiary designations for non-probate assets with your clients and make sure that the documents state exactly what the client intends. When there are changes in the circumstances of a client, make the appropriate changes on those beneficiary designations immediately.
Advocacy and Litigation SIG Column
Combatting Attorneys Who Abet Financial Abuse of the Elderly
By William J. Brisk, CELA; and Judith M. Flynn, Esq.

Extent of the Problem
It is impossible to determine accurately the extent of domestic elder abuse because it is usually well concealed within the family. According to the National Center on Elder Abuse, most perpetrators of elder abuse are related to the victims. A national study of state domestic elder abuse reports conducted by the National Center on Elder Abuse in 1996 revealed that the most frequent abusers are adult children (36.7 percent), spouses (12.6 percent), and other family members (10.8 percent).

Even more disturbing, however, is that while the number of reports of suspected domestic elder abuse made to Adult Protective Services programs (APS) steadily increased from 117,000 in 1986 to 470,709 in 2000, four to five times as many incidents of abuse and neglect go unreported. The majority of elder abuse reports are substantiated after investigation. In 1996, reports to APS about financial abuse accounted for 30.2 percent of all of the substantiated reports, and financial abuse was substantiated in 44.5 percent of the investigations. This article focuses solely on domestic financial abuse of elders and how attorneys facilitate it.

Ethical Considerations
Attorneys are guided by a Code of Professional Responsibility that ensures basic protection for clients. Some of the most basic of these protections include a duty to communicate with the client, a duty of confidentiality to the client, and a duty of loyalty to the client. While these Rules are fundamental to any attorney-client relationship, they hold even greater significance for elder law attorneys. Elder law attorneys face a greater burden in complying with the Rules of Professional Conduct (“the Rules”) because their clients often have physical or mental limitations that require an increased level of assistance and increase their vulnerability. The Rules impose an affirmative duty on attorneys to maintain as normal an attorney-client relationship as possible despite a disability. An attorney may not violate his duties of communication, loyalty, and confidentiality to accommodate his client’s disabilities.

The greater burden faced by attorneys who represent the elderly is evident in the fact that persons age 80 and older are abused and neglected at a much higher rate than the rest of the population. In fact, of the reports substantiated by APS in 1986, almost half of the victims were unable to physically care for themselves. This often presents an ethical dilemma for the attorney, who may be tempted to bend the rules somewhat for the convenience and accommodation of the elderly or disabled client. Often a family member accompanies a client to the attorney’s office, and the client insists on the family member’s involvement and participation. Even if the client insists, the attorney should only comply with such a request after taking appropriate steps to assure that the client is not under undue influence and assuring the client privately that he may confide in the attorney. The interests of family members may be in direct conflict with the interests of the client. The best interest of the client may require that most of his estate be directed toward long term care, which is contrary to the beneficiaries’ interest in asset preservation.

The Road to Malpractice is Often Paved With Good Intentions
Well-intending attorneys frequently take steps to accommodate the

Congratulations CELAs!
The following individuals have recently completed the requirements to become a Certified Elder Law Attorney by the National Elder Law Foundation. Congratulations!

For information on the certification process contact Lori Barbee at (520) 881-1076 or at lbarbee@naela.com

Leslie Barnett
Los Angeles, CA

Linda Carmody-Roberts
Katonah, NY

Michael H. Erde
Chicago, IL

Kathleen T. Whitehead
San Antonio, TX
Advocacy and Litigation

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physical or mental limitations of their clients. Sometimes these accommodations, though well intended, are contrary to the duty and spirit of the Rules. Such accommodations include conducting business with family members “on behalf of” the elder and failing to witness or notarize documents properly. Wrongful notarization includes the notarization of a signature of an individual who does not personally appear before the notary, for example, notarizing a signed document delivered by a family member. By failing to adhere to the rules of proper notarization and witnessing, the attorney can not be sure whether the resulting signature is that of the elder or a forgery. Even if the signature is that of the elder, the attorney has not ensured that it represents an informed and independent act by the elder. This practice violates the basic ethical duties that are essential to the attorney-client relationship.

It is important to realize that the attorney does not have a duty to ensure that the best interests of the client are realized (assuming that the client is mentally competent and free to make bad choices), but the attorney does have a duty to ensure that the client’s decisions are informed and independent. While most attorneys comply with the spirit and letter of the Rules, litigation may reverse transfers that result from domestic financial abuse of elders. Attorneys who do not take steps to ensure that the client’s decisions are informed and independent run the risk of being involved in time-consuming and costly litigation, whether as a deponent or, if the facts warrant, as a defendant.

Litigation Considerations

There are several strategies to consider in litigating transfers resulting from fraud or undue influence. The preliminary question may be “whom do I sue?” There is a general hesitation to sue a fellow attorney, particularly if it appears that the attorney lacked any fraudulent intent. If, however, discovery reveals evidence that the attorney willingly and knowingly participated in fraudulent transfers, he may later be added as a party. In addition, one should take advantage of any consumer protection laws that prohibit unfair and deceptive practices in business. In Massachusetts, for example, the Consumer Protection Statute provides for multiple damages and attorney’s fees in cases that are particularly egregious. We frequently depose the drafting attorney first to establish his testimony regarding who his client was, what steps were taken to ensure that his client knew the options and understood the consequences, whether the documents were executed properly, and the amount of compensation he received. We recently represented a 93 year-old woman who is deaf and nearly blind against her niece, who was accused of fraud and undue influence in causing the elder to convey her home to a trust over which she retained no control. We suspect that the drafting attorney never met with the elder and that he communicated only with the niece. Even though the attorney insisted that he met with the elder, we established other facts to help prove fraud and undue influence. It is extraordinarily time consuming for the elder to read documents because she relies on a magnifying glass. It was, therefore, helpful to establish that the meeting lasted only 20 minutes when the elder executed four documents. In that time, it is difficult to imagine that the client read the documents or that the attorney explained the documents in their entirety.

It is important to get the attorney’s testimony first in such cases because his admission that transfers were not properly made will be detrimental to the defendant family members’ case. It is equally important to know if the attorney is going to testify falsely. The attorney’s testimony will typically provide the basis for the progression of the discovery process.

Conclusion

Though most attorneys are motivated by a desire to accommodate their clients, they must take care to comply with the Rules and ensure that their clients’ decisions are informed and independent. If an attorney’s failure to comply with the Rules results in a wrongful transfer, the attorney may be subjected to costly and time-consuming litigation either as a deponent or, if the facts warrant, as a defendant. Attorneys should also insist upon adherence to the Rules by their peers because wrongful transfers will continue so long as there is a means to facilitate them.

ENDNOTES

1 National Center on Elder Abuse, The National Elder Abuse Incidence Study 1-9 (1998)
2 Id.
3 National Center on Elder Abuse, 2000 Survey of States (Forthcoming 2002)
4 National Center on Elder Abuse, The National Elder Abuse Incidence Study (1998)
5 National Center on Elder Abuse, Elder Abuse Information Series No. 3
6 National Center on Elder Abuse, The National Elder Abuse Incidence Study (1998)
7 Domestic abuse is perpetrated by family or friends, as opposed to abuse in an institutional setting.
8 Attorney ethics are guided by state law, although most states have enacted rules that adopt most or all of the American Bar Association’s Model Rules. For purposes of this article, we have referred to the Massachusetts Rules of Professional Conduct.
9 S.J.C. Rule 3:07, Rules of Prof. Conduct and Comments, Rule 1.4, Communication
10 S.J.C. Rule 3:07, Rules of Prof. Conduct and Comments, Rule 1.6, Confidentiality of Information
11 S.J.C. Rule 3:07, Rules of Prof. Conduct and Comments, Rule 1.7, Conflict of Interest: General Rule
12 S.J.C. Rule 3:07, Rules of Prof. Conduct and Comments, Rule 1.14, Client Under A Disability
13 Financial Abuse of the Elderly: Risk Factors, Screening Techniques, and Remedies, Lori A. Stiegel, ABA Commission on Legal Problems of the Elderly
14 National Center on Elder Abuse, The National Elder Abuse Incidence Study (1998)
15 Much Ado About Notarizing, Constance V. Vecchio, Massachusetts Board of Bar Overseers, Office of Bar Counsel, 2001.
16 Id. (Many attorneys have been disciplined for notarizing or causing another to notarize a document wrongly.)
17 See M.G.L. c. 93A
I Only Say This Because I Love You. How the Way We Talk Can Make or Break Family Relationships Throughout Our Lives.

By Deborah Tannen; 336 pgs; Random House; $24.95

Review by Rebecca Morgan, Esq.

Attorneys have conversations with their clients. That is what we do. It is how we get information and give them advice. Many times how we say something can be as important as (sometimes more important than) what we say. Clients have conversations, not just with us, but many times about our conversations with them. More specifically, clients have conversations with their families. These family conversations follow a pattern developed early in childhood, that continued throughout family interactions as the child became an adult, and continue through adulthood. Understanding family dynamics and how clients and their families communicate can be an important tool to aid the attorney in having effective communications with her client.

The focus of I Only Say This Because I Love You is family conversations, especially conversations among adult family members. Of particular interest to elder law attorneys is Tannen’s discussion of the conversations between adult children and their parents.

Why are family conversations more important than other conversations one may have? All conversations have the same ingredients—talk and “listening.” According to Tannen, family conversations are more important because they’re more intense—the stakes are higher, consequences are more significant, reactions are more acute, participants can be wounded (sometimes grievously) or healed by the conversation. Family conversations give us our compass, “our sense of being a right sort of person, our sense that the world is a right sort of place.”1 Tannen describes the “allure of family,” someone who knows you so well, you don’t have to explain yourself; someone who cares about you so much, that she will protect you against the world.2 Patterns formed by a lengthy history continue through adulthood and color the perceptions of conversations. Because family members know each other so well, it is so easy to continue those conversational patterns developed in childhood well into adulthood and into older age. No matter what age we are, to our parents we are still their children. Tannen describes this best: “No matter what age we’ve reached, no matter whether our parents are alive or dead, whether we were close to them or not, there are times when theirs are the eyes through which we view ourselves, theirs the standards against which we measure ourselves when we wonder whether we have measured up.”3

Tannen describes two parts to conversations. In every conversation there are messages and “metamessages” and the difference between the two is significant. The message is the meaning of the word used—that is, what one would find if one looked up the word in a dictionary. The metamessage is the unsaid meaning—the fact it was said at all, the way it was said and who said it. According to Tannen, the message is the “word meaning” while the metamessage is the “heart meaning.” The heart meaning is the one that induces a reaction in the listener.4

Although not written for elder law attorneys, Tannen’s book does offer some useful guidance. Tannen’s format is to use snippets of real conversations to illustrate her point. Remembering that a client’s family conversations will be shaped by family history and contain metamessages is useful to the elder law attorney in determining how to approach a counseling session.

Every attorney will recognize at least one client family in chapter two, “Who Do You Love Best? Family Secrets, Family Gossip: Taking Sides.” The majority of us who are baby boomers will be hard pressed to not recall the Smothers Brothers when we read chapter two (“mom always liked you best”!).

Tannen notes in this chapter that when the adult children have conversations amongst themselves about their parents, they’re strengthening their connections, becoming allies for a common cause. However, if an adult child talks to a parent about her sibling, then she is connecting with her parent to the exclusion of her sibling.5 Apply this alignment to clients in an elder law practice in the following hypothetical. If child X thinks mom needs to move into a nursing home and mom is refusing to do so, then child X would contact her siblings to get them on board with her agenda, aligning the siblings against mom. If child A thinks her sibling, B, does not appreciate her mom, then child A will be whispering diatribes in mom’s ear about that ungrateful child B.

Tannen says that a mother and child can become an impenetrable fortress to the exclusion of all others.6 So if Johnny with his extensive gambling debts is draining mom dry financially, but he has gotten mom inside the fortress, anything Johnny’s siblings or the elder law attorney might say to mom about Johnny will fall on deaf ears. Think about the elder law attorney’s discussion with mom about Johnny. The attorney might suggest some changes in mom’s estate plan or re-titling of assets. Even if the attorney can get mom to acknowledge Johnny’s bad acts, mom won’t take any action against Johnny, because, after all, mom is inside the fortress with Johnny. Tannen discusses at length the various ways alignments can be created in a family, and even includes a discussion of how the family pet is used to create, strengthen or change family alignments.7

Extremely relevant to an elder law practice is Tannen’s discussion on family rivalries for inheritances. Tannen labels sibling rivalry as the most fundamental, with children always on alert for a parental sign of favoritism for a sibling. Tannen takes the position that the “conviction of favoritism” is brought out in the extreme when a parent dies. Although a dispute can be about money, as Tannen notes, it is the “last chance to claim the [parental] love for yourself.”8

Tannen notes that marked realignments can occur when the parent is (continued on page 8)
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elderly and the adult children become caregivers. Roles reverse—the child becomes the parent and the parent, the child. Tannen relates a conversation she overheard in public where the son and granddaughter were “helping” the grandmother. Tannen observed the following metamessages from the conversation: the elderly parent was treated like a child by the child’s attempts to help the parent. Tannen described what she observed as condescension toward the grandmother.9

Although this book was not written for elder law attorneys, all of the chapters of this book have something useful for an elder law attorney. Chapter seven has particular relevance, given the statistical chances of women living longer than men. In this chapter, “I’m Still Your Mother. Mothers and Adult Children,” Tannen notes that “[n]o matter how old we are—even when we are almost old ourselves—our mothers’ disapproval causes pain.” Mothers and adult children have to struggle to find their place in what Tannen describes as the “control-connection” grid.10 Remember that comments in a conversation have meaning not only in the current circumstance but also have a context created from a long history of family communication. Tannen likens this context to barnacles on a rock—you can’t remove the barnacles.11 Sometimes the family history is wonderful and sometimes it would appear as an endless tugging by the child and the parent between wanting and disappointment.12 In large part, a parent’s power over an adult child is created by the child wanting something from the parent—approval, attention, etc. Think about how that will impact the decisions the client must make.

Tannen completes her book with recommendations for improved conversations in the final chapter on “Talking Families.”13 Tannen says the first step is to separate messages from metamessages. Be clear and explicit.14 The second step is understanding and balancing.15 Tannen offers a useful technique, “reframing.” Reframing, according to Tannen, moderates reactions and gets better results. Consider this hypothetical as an example. Assume siblings are arguing and the first demands an apology from the second for something the second did. The second sees nothing wrong with what she did and doesn’t feel she should apologize. So, instead of apologizing for the action, she apologizes for the result—causing pain to her sibling.16

Another suggestion from Tannen is to understand gender differences. Tannen in this book, but more so in previous books, has documented conversation patterns based on gender.17 Women and men do not necessarily communicate in the same style. Cultural differences can also contribute to differences in communication style. Finally, Tannen notes the roles of enthusiasm and deficit as interferences in every conversation (think about this in the context of metamessages—here is where metamessages may leak out or be erroneously conveyed).18

This book reads quickly and provides clear examples of Tannen’s points. This book is not about law practice, but it can help the reader become a better attorney. Since so much of what an elder law attorney does involves conversations with elderly clients or their families, understanding the conversational dynamics of families gives elder law attorneys valuable insights and tools to better serve their clients.

ENDNOTES
1. Tannen at xv.
2. Tannen at 3-4.
3. Tannen at 5.
4. Tannen at 7.
5. Tannen at 34.
6. Tannen at 36.
7. Tannen at 49-52.
8. Tannen at 56.
10. Tannen at 210.
11. Tannen at 211.
12. Tannen at 212.
13. Tannen at 303.
14. Tannen at 304.
15. Tannen at 308.
16. Tannen at 305-306.
17. Tannen at 305-307.
18. Tannen at 307-308.

The Forgetting: Alzheimer’s: Portrait of an Epidemic
by David Shenk; 290 pgs; Doubleday; $24.95

Review by
Jada D. L. Hodgson,

David Shenk calls his book “a biography of the disease [Alzheimer’s],” and so it is. He divides the story into (continued on page 9)
the early, middle and late stages. In each stage, we encounter the science and symptoms of that stage and patients and caregivers at that level of disease progression. The author also describes the early, middle and current (which he hopefully calls “late”) stages of the history of the disease and research toward a cure.

The author helps us to recognize the tremendous emotional, physical and financial costs to caregivers as well as patients. He states, “The unique curse of Alzheimer’s is that it ravages several victims for every brain it infects.” Support groups are important for both caregivers and patients. The end of the book includes a resource list of groups that provide information and care ranging from hotlines to safer living catalogs.

The author interweaves case studies, personal stories, and scientific and historical data in such a way that neither the personal tragedies nor the science of deterioration becomes too oppressive to allow the reader to continue. It is almost painful to the reader to watch as friends no longer recognize each other. After a long discussion months into their relationship, one patient asks the author whether they have ever met before. Yet, we see people struggling to retain themselves for as long as possible, and it gives us hope.

As time-lapse photography allows us to watch frame by frame the opening of a flower to meet the sun, David Shenk shows us line by line the unraveling of minds and lives. His “portrait of an epidemic” is just that plus the stories of human dignity maintained as best we can during times of grievous loss. Members of the early stages support group watch as their members one by one are led down the hall to the middle and late stages groups where their destiny also lies and their independence dies.

An Alzheimer’s patient does not die just once. He loses pieces of himself over time. Sometimes she knows what she has lost and can mourn that loss, but at other times does not know. A piece of a life simply disappears unremarked. The not knowing can be a blessing to the patient, but this leaves the caregiver in a state of constant grieving or so em- tied that at the death of their loved one no mourning is possible. This book shows those caregivers that they are not alone. Others have been there, are on the same path, and can help.

I came to this book with my own set of questions. How does the elder law attorney advise an Alzheimer’s caregiver concerning the legal rights of their loved ones? What kinds of liabilities does the caregiver take by becoming responsible for their failing charge? At what point does an Alzheimer’s patient lose the capacity to execute his or her own legal documents? I still have most of these questions, because this was not the focus of the book. I come away from my reading with an increased awareness of the stresses under which an Alzheimer’s family operates on a daily basis, and that awareness increases my compassion toward them. No legal answers here, but the book has made me a better elder law attorney. I recommend that you read it as well.
Primer on Medicaid Waivers and Why We Now Worry About Them

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chief function as a means by which states may test and evaluate new ideas for providing services that are otherwise not covered by Medicaid, or expanding eligibility for those who would otherwise not be eligible for the Medicaid program, or delivering services more effectively and efficiently.

Generally, §1115 waivers are approved to operate for 5 years. Projects must be budget neutral over the life of the project, although this is not statutory requirement, but rather a stricture added by the Office of Management and Budget during the Carter administration. This means that the waiver cannot cost the federal government more than it would otherwise cost without the waiver.

§1915 Waivers

Section 1915 also allows the secretary to waive requirements under §1902 of the Act. However, these waivers have additional limitations, depending on whether they are a §1915(b) or §1915(c) waiver.

Section 1915 (b) waivers, sometimes called “Freedom of Choice” waivers, permit states to make it mandatory to enroll Medicaid beneficiaries into managed care programs. They are not used to expand Medicaid eligibility.

Section 1915(c) waivers, known as “Home and Community Based Care” waivers (or HCBS waivers), permit states to develop and implement community-based alternatives to placing Medicaid-eligible individuals in hospitals, nursing homes or intermediate care facilities for persons with mental retardation. Thus, the range of target groups is limited to those who would otherwise be in institutions. Services that may be provided in HCBS waiver programs include: case management, homemaker/home health aide services, personal care services, adult day health or day care, respite care, transportation services, special communication services, minor home modifications and others.

These waivers typically target specific groups: the elderly, persons with physical disability, DD/MR or persons with specific illnesses or conditions such as AIDS. The programs must be cost neutral, meaning that on an average per-capita basis, the cost of providing HCBS must not exceed cost of care for the identical population in an institution.

Generally, they are approved for three years and then renewable at five-year intervals.

The first HCBS waiver was approved in 1981, and currently, more than 260 HCBS waiver programs are in effect. All states except Arizona have at least one, and Arizona has the equivalent of HCBS waiver program under a §1115 waiver. A list of all waiver programs – both active and pending – by state can be viewed on the web site of the Center for Medicare and Medicaid Services (CMS) at http://www.cms.gov/medicaid/waivers.

One other waiver variation combines §1915(b) and (c) waivers. These permit states, under a §1915(c) mandatory managed care waiver, to provide HCBS under a 1915(c) waiver, but they must meet the requirements of both waiver programs. The Texas STAR+PLUS program, approved in 1998 was the first concurrent 1915(b)/(c) waiver program to be implemented. It integrates acute and long-term care services for disabled and elderly beneficiaries through a managed care delivery system.

SCHIP

Alongside the waiver options, advocates need also be aware of the State Child Health Insurance Programs or SCHIPs, also known as Title XXI, enacted as part of the Balanced Budget Act of 1997. The primary goal of the SCHIP is to extend health insurance coverage to the estimated 10 million uninsured low-income children in America.

SCHIP enables states to insure children from working families with incomes too high to qualify for Medicaid but too low to afford private health insurance. The states were permitted to create separate state programs, utilize Medicaid expansions, or use a combination of both. Each state with an approved plan receives a Federal matching payment higher than Medicaid, but the SCHIP contribution is not an open-ended entitlement; rather, it is capped (as a block grant) at $40 billion nationally over 10 years; and within that amount, each state is given a fixed allotment. Lisa Dubay, Ian Hill, and Genevieve Kenney, Five Things Everyone Should Know about SCHIP (The Urban Institute, Series A, No. A-55, October 2002).

By July 2000, all the states and territories had implemented SCHIP. Of the approved state plans, 16 chose to build exclusively upon existing Medicaid programs, and 35 chose to create separate programs, using them alone or in combination with Medicaid expansions. Id. More recently, SCHIP became directly visibly linked to Medicaid waiver issues because the Bush administration gave states an opportunity to expand SCHIP coverage to parents using waiver authority.

The Bush Administration Initiatives

Historically, the waiver approval process for states was arduous, long, and often uncertain in outcome, especially with respect to research and demonstration waivers. Then, in 1990s, the Clinton administration gave more flexibility to states in designing and financing §1115 waivers. However, the Bush administration, under DHHS Secretary Tommy Thompson, has taken the goal of expanding flexibility in waivers even further, inviting fast-track, template waivers under several initiatives:

• In August, 2001, at a meeting of (continued on page 11)
the National Governors Association, Secretary Thompson announced the Health Insurance Flexibility and Accountability (HIFA) initiative to provide a fast-track §1115 waiver process to allow states to modify Medicaid and SCHIP programs to increase the number of low-income individuals with health insurance coverage. The Administration put an emphasis on broad statewide approaches that maximize private health insurance coverage options and target Medicaid and SCHIP resources to populations with income below 200 percent of the federal poverty level. The waiver guidelines and templates are available on the CMS website at http://www.cms.gov/hifa.

- The New Freedom Initiative announced by President Bush on February 1, 2001 is part of a nationwide effort to remove barriers to community living for people with disabilities. Part of the initiative is the Independence Plus waiver, which invites states to submit §1115 and/or §1915 waiver proposals to expand and innovate in providing consumer-directed HCBS options. The waiver guidelines and templates are available on the CMS website at http://www.cms.gov/independenceplus.

- The Pharmacy Plus Model waiver program was announced as part of the administration’s FY 2003 budget proposal. It encourages states to seek §1115 waivers in order to provide drug coverage for low-income seniors who are otherwise ineligible for Medicaid coverage, but with incomes below 200 percent of the federal poverty level. States may elect to provide a prescription and over-the-counter drug benefit that is similar to, or different from, the benefits provided in the Medicaid state plan. States may include a richer benefit package or one that is more limited in scope. In addition, states may choose to deliver services via fee-for-service or capitation. A CMS fact sheet on the waiver initiative can be found at http://www.cms.gov/medicaid/1115/RxFactsheet41202.pdf.

All waiver programs must be budget neutral to the federal government. That is, the federal costs of services provided during the demonstration will be no more than 100 percent of the cost to provide Medicaid services without the demonstration. Waivers that expand coverage or services are difficult to make cost neutral, but it can be done by lowering the costs the state incurs for existing covered groups through, for example, lesser service utilization, reduced periods of Medicaid eligibility, or more effective benefit management.

The broad flexibility philosophy introduced through these special initiatives appears to have been extended in practice to any §1115 or §1915 waiver application. It does not seem to make any difference whether a state calls its waiver a HIFA waiver or other special initiative waiver or not. Indeed, the Connecticut §1115 waiver proposal does not fit into any of the administration’s special waiver initiatives. The essence of the current administration’s approach is the underlying policy of enormous flexibility and speedy consideration.

Dangers of the New Waivers

The administration’s waiver initiatives are touted as ways to expand coverage, but they also make it more feasible for states to curtail their Medicaid programs by cutting optional Medicaid benefits, reducing eligibility for optional groups, and by increasing cost-sharing by participants – all in ways that were formerly prohibited, limited, or politically untenable.

Concern is especially increased because the once-rosy outlook for state budgets has deteriorated dramatically, especially since September 11th, and most states now face substantial budget shortfalls. The new waiver policy provides ways to eke out savings or at least cap some expenditures in the Medicaid programs.

Seniors are especially at risk because the majority (56%) are optional beneficiaries, i.e., “medically needy” rather than “categorically needy.” They are at risk in at least three ways.

First, under current law, a state must treat any optional beneficiary the same way it treats mandatory beneficiaries. Both must be provided same benefits and are covered by same the protections against excessive cost sharing requirements. Under a waiver, states may be permitted to provide optional beneficiaries a different benefit than that provided mandatory beneficiaries. Optional beneficiaries could be given a package of benefits that is much less comprehensive.

Second, under current law, once Medicaid sets eligibility rules, it must cover all persons who apply and meet them. Under a waiver, states can cap enrollment in optional categories, thus (continued on page 15)
Don’t Underestimate the Effect You Can Have
By Laury Adsit Gelardi, Executive Director

Wow, what a year it has been. While the nation is recuperating from September 11th and dealing with terrorist attacks around the world, a sniper attacks in Washington, D.C. Just this week, a student walked into the University of Arizona College of Nursing and shot three professors— the College is only three blocks from the NAELA office in Tucson. It has been a time of loss of innocence, of fear for our safety, of vulnerability. Having a very diverse staff, two of which are naturalized citizens from other countries, I am reminded that we often take our freedoms and our safety for granted. It is easy to become complacent. It is normal to take what we have for granted. It is hard to understand that others live in fear of their lives as part of their day-to-day routines. We are often insulated from the real tragedies of the world. Now, they are at our doorsteps and are hard to ignore.

All of us are dealing with fear in one way or another. We, our families, our staff members and our clients are mourning our loss of innocence and facing the realities that are so plainly offering themselves to us on a daily basis. The world is changing, and this time, OUR world is changing. No longer can we take things for granted. No longer can we walk around freely without paying attention to those around us. No longer can we travel without wondering what will happen next. The airports around the country are a constant reminder that we cannot forget or ignore what has happened to us.

It is a known fact that most people do not adapt to change easily or willingly. It is also recognized that fear can manifest itself in a variety of ways, making the real source of a problem difficult to understand. Being in the people business and in particular, in elder law, our members are dealing with these issues on a daily basis. Suddenly, clients are panicked. Suddenly, clients are wondering if they will be next and what will happen to their loved ones. Suddenly, clients are in disarray and don’t know why. You can take any of the above statements and replacement the word “clients,” with “family members,” or “friends,” or “staff members,” or “acquaintances” or even “I.”

Often as the business owner, the counselor at law, the bread-winner of the family, and the stealth member of our communities, we do not take time to sit down and think about the effect that the world around us has had on us personally, and we also ignore the possible impacts on those around us. It is easy to keep busy, to get the work done, to keep “things” going. It is often difficult to let go and express our feelings, but it is absolutely necessary. You must explore how YOU feel about what has happened to be able to help those around you. And it is your role to help your clients, your family and your staff members through these difficult times. Simply asking, “How are you dealing with all this stuff that is going on?” will often get someone to open up. Then, just listen. No one expects you or me or anyone else to have the answers, but we all need to talk.

I found this situation last week as I attended the National Aging and Law Conference in Washington, D.C. The conference started two days before the alleged snipers were apprehended and this situation was definitely on everyone’s mind. Many of us even admitted that we considered not attending the conference and we certainly planned to limit our activity outside the hotel. We were all angry, but there was a mournful tone to the conversations.

I was amazed to hear from our colleagues that the sniping had a larger and more detrimental effect on those living in Washington, D.C. than did September 11th. Most of our members referred to the effect it was having on their children and their inability to assure them that everything would be alright. Randomness is not something that we are used to or can explain. Being in the wrong place at the wrong time is one thing, but being killed while tending to life’s normal activities; getting gas, loading groceries, mowing the lawn or doing your job, is quite another. There was a real sense of relief that could be felt city-wide when the suspects were actually caught.

We tend to think that “talk without the ability to solve the problem” is useless. This is one time when TALK IS CHEAP. Talking makes people feel better. Talking lets people work through their own feelings. Talking exposes all of us to other ideas. Encourage those around you to talk, and don’t forget to do some talking yourself.
Who’s Who on the NAELA Staff?

There are often questions as to who is who on the NAELA staff. As you know, we have a staff of 19 people working for us, and everyone is responsible for very specific things. Our offices are located at 1604 North Country Club Road, Tucson, Arizona 85716 and are open from 8:00 a.m. to 5:00 p.m., Mountain Time, Monday through Friday, except holidays. The telephone number is (520) 881-4005. The fax number is (520) 325-7925. We also have voice mail and therefore, you may leave messages 24 hours a day, seven days a week! To help you in your endeavor to get through the maze, we are listing who you should contact for what things:

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<tr>
<th>Name/Telephone Ext.</th>
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<tr>
<td>Address Changes</td>
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<td>NAELA News/Quarterly Articles</td>
<td>Jihane Rohrbacker, ext. 115</td>
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<td>Public Policy</td>
<td>Brian Lindberg (202-789-3606)</td>
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<td>Lori Barbee, ext. 102</td>
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<td>Pam Carlson, ext. 108</td>
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<td>Tapes/Manuals</td>
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<td>Website</td>
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NAELA LEAN on us! Support Groups Forming

Feeling like a NAEELIAN in a strange land? Don’t worry any more. Now NAELA is forming support groups for its members!

NAELA has created informal, member-to-member support groups whereby members with specific “challenges” can discuss their situations.

The initial support groups for NAELIANs In Crisis (NICs) will be:

- NIC 1: Dealing with Burn-Out
- NIC 2: NAELIANS in a Family Crisis
- NIC 3: Addictions – Alcohol, Drugs, Work
- NIC 4: Dealing with Crisis in the Business

NAELA members can be part of as many support groups as they would like.

Join today by contacting Janice at jphillips@naela.com or (520) 325-1055. As soon as at least three people have signed up, the group will meet. The meetings will take place through a conference call that will be at the member’s expense. The group will then decide amongst itself how often they would like to meet and they will let the NAELA office know when they want the next meeting to be. Each group can be as active or inactive as they would like.

The group will not be limited to those who are having a crisis currently. If you have gone through something similar in the past and think the lessons you learned through your experience can be valuable to someone else, please join in.

If you have any questions or comments about the NIC groups, please contact Janice Phillips at (520) 325-1055 or by email at jphillips@naela.com.
Primer on Medicaid Waivers and Why We Now Worry About Them

(continued from page 11)

limiting the right of some seniors to enroll and receive services, even if these seniors otherwise meet all eligibility criteria. A cap essentially allows states to convert parts of Medicaid from an entitlement program to a block grant that stops new enrollment, or even rescinds enrollment, when a finite expenditure is reached.

Third, under current law, states cannot charge premiums and must limit deductibles to $2 per month for adults, copayments to between 50 cents and $3 (varies by service), and coinsurance to no more than 5 percent of the state’s payment rate for that service. Under a waiver, states may obtain a green light to charge premiums, deductibles, co-payments, and co-insurance to optional Medicaid aid groups with no limits on out of pocket costs. See Families USA, Preserving Medicaid in Tough Times: An Action Kit for State Advocates, available at http://www.familiesusa.org/ Action Kit State Advocates/ actionkit4stateadvocates. htm.

Examples of Problems

The Connecticut §1115 waiver proposal was submitted to CMS in spring of 2002. It is not a HIFA waiver, but rather a research and demonstration proposal seeking to obtain a waiver of limitations contained in 42 USC §1396p regarding asset transfers. Specifically, the states proposes:

- To commence the transfer of asset penalty period start date on the first day the applicant is otherwise eligible for Medicaid long-term care services (i.e., generally at or near the time one actually applies for Medicaid), instead of on the date of transfer under current law.
- To permit the state to look back 60 months for transfers of real property, instead of 36 months as currently permitted.

The research questions justifying the waiver, according to the state are as follows:

“Through this proposed demonstration project, the behavioral changes of applicants would be evaluated with the expectation that the revised TOA policy would encourage personal responsibility and the use of LTC insurance, while also realizing substantial savings to the Medicaid program.”


The Connecticut proposal is unique in that it bears not even a pretense of expanding services or coverage, and instead is solely targeted at saving money. As of late November, 2002, the proposal was still under consideration by CMS.

In contract to the Connecticut waiver, all the proposals submitted under the HIFA initiative combine some form of expansion with caps in optional services in order to keep the waiver budget neutral. As of November, 2002, some 13 HIFA waivers have been submitted to CMS, of which nine have been approved. Families USA, Status and Selected Provision of Submitted State-wide 1115 Waiver Applications (unpublished data, November, 2002).

The pending HIFA waiver from Washington state demonstrates the dangerous trade-off between expansion and contraction of benefits. Washington’s Medicaid and SCHIP Reform Waiver, scheduled to begin on January 1, 2003, subject to CMS approval, proposes to offer health insurance coverage to an additional 20,000 residents of the state of Washington with incomes at or below 200 percent of the federal poverty level. The target groups for expanded coverage are parents of children in Medicaid and state’s Basic Health (BH) program, as well as childless low-income adults. They will receive coverage through Washington state’s BH program. The increased coverage is to be funded by Washington’s SCHIP allotment and reallocated SCHIP funds from the federal government. The program also proposes to institute changes (cost-sharing, benefit reductions and an enrollment freeze capability) in the Medicaid program to help the state pay for the expanded program.

The waiver application itself is a fill-in-the-blank template created by CMS. Washington’s completed application can be found on the CMS website at http://www.cms.gov/medicaid/1115/waapptmp.pdf. The template is instructive to examine, because it focuses on describing the expanded benefit, eligibility criteria, costs and accounting for budget neutrality, but it never asks an obvious question: who will be hurt by these changes? The answer to that question requires a deeper understanding of the state program than the typical reader possesses.

Washington state elder law and legal services attorneys, however, do possess the knowledge to see through the template and have opposed the waiver because of its harmful impact on seniors and persons with disability. Advocates at Columbia Legal Services and Northwest Health Law Advocates, as well as NAELA members Peter Greenfield and Elizabeth Turner Smith (the latter as chair of the Washington State Bar Association Elder Law Section) have submitted detailed critiques of the waiver proposal.

Among the problems with the Washington waiver:

- The waiver would let the Department of Social and Health Services freeze enrollment in the institutional Medically Needy program as is done in Medicaid cap states – that is, at $1,635 in monthly income currently. Worse, they would prevent applicants who were affected by a medically needy enrollment freeze from making themselves categorically eligible by use of a congressionally authorized d(4)(B) trusts. Federal law currently requires states to allow the use of such trusts when nursing home care is not offered.

(continued on page 16)
The waiver would let the Department eliminate benefits that are now provided to institutional medically needy participants, including vision and non-emergency dental coverage. This would permit the following scenario: imagine two Medicaid residents sharing the same nursing home room and diagnosed with the same health conditions of similar severity, and both with the same $41.62 a month to spend as a personal needs allowance. One could be entitled to non-emergency dental coverage and one not, merely because one is categorically needy and the other medically needy.

The waiver would let the department charge a $20 monthly premium to individuals who are currently left with only a $41.62 per month personal needs allowance.

A state of Utah HIFA waiver, already approved by CMS on February 2, 2002, aims to cover 16,000 parents with incomes under 150% of the federal poverty level, and 9000 childless adults under 150% of poverty. The coverage, however, will consist only of primary care, and not specialty care or hospitalization. Thus, one can only wonder how many individuals in the newly covered group will learn of a serious, perhaps life-threatening, diagnosis from their physicians, only to be told that they are not eligible for the hospitalization or specialty care that could cure them.

Under the waiver, about 17,600 current mandatorily eligible and some optional medically needy persons will receive somewhat reduced benefits, such as limits on vision, physical therapy, chiropractic, dental, and mental health services with cost sharing increased to $3 per physician visit, $2 per prescription, and $220 for each hospitalization. See http://www.cms.gov/medicaid/1115/utpnccs.pdf. Concerns about how this will affect seniors in Utah have not been clearly addressed.

The above examples suggest a possible trend toward use of federal Medicaid waivers as a way to limit and control Medicaid expenditure. In Washington and Utah, a modest expansion of coverage becomes the key, under the waiver proposal, to obtaining authority to cap or limit expenditures for other populations who previously had been entitled to benefits under the state plan with no cap, no co-pay, nor additional strings attached. If the permissive waiver philosophy of the administration continues in this direction without restraint, then the write-your-own-rules experimental tail of the Medicaid dog could very well wag the dog of Medicaid state plans in the near future.

In response to this concern, the NAE LA Board has made Medicaid waivers a top public policy priority—especially the Connecticut waiver, since it is unabashedly a budget cutting tactic, rather than legitimate research and demonstration. A general session at the Advanced Institute in Albuquerque, NM in November focused on waiver issues, as did an informal public policy forum. A separate workshop on the “how-to” of state legislative advocacy was also led by the chair of NAE LA's waiver task force, Mark Heffner, a ten-year veteran of the Rhode Island legislature. The public policy committee also plans to set up a stronger state member network and possibly an online clearinghouse to keep members better apprized of state developments in Medicaid and other key policy matters. The poor economic conditions currently wrecking havoc on state budgets will only fuel discussion of Medicaid cuts in state legislatures during 2003 and in the coming 108th Congress.

NAELA takes seriously its special responsibility to speak up for the critical interests of elders and others in need of health and long-term care, especially in times of crisis.

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**Calendar of Events**

(continued from page 1)

**MAY 14, 2003**

National Academy of Elder Law Attorneys’ Basics Day Program, Fontainebleau Hilton Resort, Miami Beach, FL. For more information contact the NAELA Office at (520) 881-4005 or visit www.naela.org for complete registration information.

**MAY 14, 2003**

National Academy of Elder Law Attorneys’ Advanced Day Program, Fontainebleau Hilton Resort, Miami Beach, FL. For more information contact the NAELA Office at (520) 881-4005 or visit www.naela.org for complete registration information.

**MAY 15-18, 2003**

National Academy of Elder Law Attorneys’ 2003 Symposium, Fontainebleau Hilton Resort, Miami Beach, FL. For more information contact the NAELA Office at (520) 881-4005 or visit www.naela.org for complete registration information.
Nevada Mer Liens Enjoined

By James M. O’Reilly, CELA

The Nevada District Court has recently granted summary judgment on the issue of liability in the class action suit, Nevada v. Ullmer. Agnes Ullmer, an 87 year old widow, was the focus of a long and hard fought campaign to defeat Nevada’s policy of placing MER liens on the homes of surviving spouses of deceased Medicaid recipients. In a procedure much like California’s 1995 attempt in the Demille case, Nevada’s placement of post-mortem liens was unsuccessful in recovering large sums for the benefit of the state.

While Demille was decided on other grounds, there was troubling dicta that suggested that first-to-die liens were okay. That issue was not later revisited in any subsequent cases as the California Legislature quickly repealed the troubling text in section 14000.9 of the Cal Wel & Inst Code which provided the basis for these types of liens. Nevada relied heavily on the California case to support its lien policy, i.e. so long as there was no action by the state to foreclose upon their lien – the lien was solely to protect the state’s future right of recovery – there was “no technical recovery” and hence, no violation of the federal MER law.

The problems with the state’s position did not escape the judge: a lien is an interest in real property and is a present recovery of that interest – it encumbers the property so that the widow(er) cannot obtain equity loans or reverse mortgages and cannot sell the home without a release from the state (which was only granted with a hardship waiver). The judge also recognized that MCCA was enacted to support families, that liens were not in concert with Congressional public policy statements to protect spouses and that liens had a substantial chilling effect on the very persons Congress intended to protect.

The ruling was from the bench: all liens must be removed and the state is enjoined from any further MER liens until the time of the second death. AARP came in on the case about two months ago and really helped, too. Special thanks to William J. Browning, CELA and Paul Sturgul, CELA, who helped with the briefs and the development of our case strategy.
Have you sent us your e-mail address yet? This brand new NAELA member benefit will be introduced in January 2003 and will give you a weekly, substantive update on the very latest in elder law—simply by receiving one e-mail a week.

Don’t miss out on this opportunity offered EXCLUSIVELY to NAELA members. E-mail Celeste Wilson at cwilson@naela.com to be added to the list of recipients-TODAY!
NAELA’s Advanced Practitioner Pre-session Program “Meet the Experts”—will be held on Wednesday, May 15, 2003 at the Fontainebleau Hilton Resort in Miami, FL and is being offered for the first time exclusively to meet the needs of advanced elder law practitioners.

The format of this program will be different from other NAELA substantive programs, offering numerous roundtable discussions facilitated by NAELA members who are recognized as experts in their respective field. Topics will include Supplemental Needs Trust, Medicare, Serving as a Fiduciary, Technology, Pooled Trusts, Medicaid, Nursing Home Issues, Practice Development and Management, Retirement Plan Distributions, Elder Law Litigation & Fair Hearings, and Guardianship Practice. There are no set presentations, but rather the program’s content is predominately dictated by the participant’s issue, questions and comments raised with the attorney experienced in the relevant area.

Participation in the Advanced Practice Pre-Session called “Meet the Experts” is limited to those attorneys who are Certified Elder Law Attorneys or those with at least 10 years of elder law experience. This day-long program is built around participation in facilitated small group discussions, thus, we strongly recommend that participants be at the advanced level in at least six of the eleven topics.

Participation will be limited to the first 100 registrations received, so be sure to register early!

More information will be available on the NAELA website and listserv. Registration for this program, and the NAELA Basics Day will be available in conjunction with the 2003 NAELA Symposium Registration Form by mid January, 2003.

Save the Date!


Fontainebleau Hilton Resort / 4441 Collins Avenue / Miami Beach, FL 33140 / 305/538-2000 Phone / 305/674-4607 Fax

Rates $159.00 Single/$159.00 Double / 800/548-8886 Reservations Cut-Off Date April 7, 2003

Be sure to mention that you are with NAELA to receive this special conference rate. Navigant International is available to assist you with your travel needs 800/229-8731. Please note: as with all travel agencies, a service fee will apply.

A full brochure will be available by the end of January, 2003.

For more information, contact the NAELA Office at 520/881-4005 or visit the NAELA website at www.naela.org.
I have a cat for company," my demure 79-year-old client said. "My son gave him to me. He's such a great company. When he's out prowling, all I have to do is call. "Here sh..head!" (hereinafter S.H., in deference to good taste). She used the "S" word naturally and nonchalantly - so much for decorous modesty.

"My neighbors must think I'm nuts, but that's his name and it's too late to change that now. He's seven years old." Actually, I don't think that she'd change it even if the adolescent cat would adapt to a new moniker. She likes the racy name.

"A neighbor stopped in recently," my blasé client continued, "and asked where 'assh...' was." The "A" word was used this time. She spoke indifferently.

My client continued her monologue. And she repeated it. "Imagine," my wry client confessed, "all the yelling I do to get my cat home and she's tuned out, I guess, not even knowing his name! Assh...!" she repeated. "What's she thinking?"

I guess you had to be there.

"Lovely cat!" She hadn't finished. "My son gave him at the humane society." She repeated his name again. I was being entertained by my elder visitor. This was a new experience for me - no whining, no carping about her children. This meeting was an outing for her - a visit to entertain her lawyer. She's on stage and so I played audience, maintaining a somewhat distorted smile, wondering how much longer this story would continue.

Finally, a pause, the preface passed. I kept silent - no exchange of cat stories today - no comment about my family's remarkable three. Nothing I could say about them could compare with "S.H." anyway. But the visit wasn't social. She'd come for a reason. We needed to get to that, so I continued to listen. The quietness stimulated her to fill the vacuum.

"I have Alzheimers," she finally said, somewhat casually.

"You do?"

"My doctor told me so. My mother had it and so did my brother."

"You seem pretty normal to me," I countered.

"Stage one," she answered with authority, seeming to defend her right to have this disease.

"Doesn't that diagnosis require an actual peek at your brain?" I questioned.

"Nope. I've got it!" With that affirmation she arose, assuming that it was time to leave. She's forgotten what she came in for - and I didn't know. Her name was penned in on the daybook, but there was no indication of the subject, just her telephone number that the receptionist had requested in case we needed to call.

I stood up. "Still have the same house?" It was the first time I'd seen this lady, and this was a nonsense question, but it's what I blurted when I opened my mouth.

"Sure," she responded, in a tone suggesting that my question was inane. And, of course, it was a bit senseless.

"What's it worth now?" I inquired.

"$40,000."

"I looked at my well-dressed lady. "Would that be $140,000?" I quizzed.

"Yeah, $140,000," she said positively. "Cash? Do you have savings for care if you need it later?"

"Yeah," she said again.

"How much?"

"$40,000." Her comeback was immediate.

"Is $60,000 closer?" I teased. She and I were still standing.

"Yeah, 60."

"$80,000?" I ventured.

"Uh-huh," she replied.

"Kids?" I asked, wondering if I'd get the "40" number again.

"Yeah. That's why I'm here."

I chickened out; I didn't ask how many, but I was tempted. I sat down. She followed.

I love her energy. She is very social. "How about some coffee?" I asked.

"It's Starbucks®."

"Tea?" she inquired.

The drinks were poured. Her pinkie was held out as she grasped the cup's handle and quietly sipped the Earl Gray. She's in the social register - or had been, I was sure. She sat erect, modestly be-jeweled, her hair tinted a light gray-blue. And she was charming now that she was settled-in and comfortable and had my attention. She discussed the debutante ball.

"How pretty the young ladies are this year."

It's mid-March now. The local debutante ball is around Christmas. The young ladies and their escorts vacated the city weeks ago, returning to the second semester of their freshman year. But this lady knew about the social season and the debutantes and the year-end parties that had been held in the community as well. She read the local newspaper, and artfully faked stuff that she didn't know about. Accuracy of the chatter wasn't relevant, however, and this afternoon visiting with her lawyer was a happy interlude, an infrequent occasion for her. She had no nearby family or caring friends; she'd been abandoned possibly because of her iconoclastic behavior and somewhat foul mouth.

Perhaps the cat story is her offering of amuse-bouche, the pre-dinner tidbits that stimulate our palates, initiating a longing for more, preceding the treats that will follow in the dinner's main course. The story certainly got my attention. "SH" - what a name for a cat.

"Tell me more." That's what she wanted to hear - permission to continue.

Her day was made - a needed social moment for an isolated, declining, once upon a time debutante. It was an opportunity for her lawyer to listen, to be amused - and I think her cat story is true.
Molly Abshire and Wesley Wright wrote the article “State retains Medicaid technique to help preserve spousal assets” that appeared in The Houston Chronicle on September 27, 2002.

On October 27, 2002, Joan Blumenfeld of Westport, CT was awarded the Board of Director’s Special Recognition Award at the Jewish Home for the Elderly of Fairfield County, a 360 bed skilled care facility of national renown. The award honors her distinguished volunteer services and her dedicated commitment to, and compassion for, residents and their family caregivers.

Richard E. Davis was mentioned in the “Professional Notes” section of the Canton, OH newspaper The Repository for having been named one of “The Best Lawyers in America.” The article ran in the October 14, 2002 edition.

Judith Hoberman and Lea Nordlicht Shedd were awarded the New Haven County Bar Association’s Fourth Annual Pro Bono Recognition Award for their “extraordinary dedication in providing pro bono legal assistance to the needy.”

Frank Johns was quoted in The Washington Post on August 16, 2002 in “Judge Rebuffed For Ignoring Patient’s Wish.”


Harry S. Margolis was mentioned in the article “Parental Guidance” that appeared in the December, 2002 issue of SmartMoney magazine.

Kate Mewhinney, CELA has received a cross appointment with the Wake Forest University School of Medicine. She is a Clinical Professor in the School of Law, and recently was appointed as Associate in Internal Medicine-Gerontology and Geriatric Medicine, in the School of Medicine.

Eric Oalican was quoted on September 13 in Business First in “Elder care ideas should come to fore in planning.”


“State squeezes nursing home freeloaders” had a quote from Scott Severns and appeared in The Indianapolis Star on August 7, 2002 and again on September 30, 2002, in The Indianapolis Star in the article “Firm makes landlords of elderly to shelter assets.”

Randall K. Craig received the prestigious “Sagamore of the Wabash” award from the Governor of Indiana at the 28th Annual Meeting of the Southwestern Indiana Regional Council on Aging held on September 24, 2002. The award honors Mr. Craig for his many years of community service and his devoted service to the elderly and disabled through his work with the SWIRCA Area Agency on Aging in Area 16.

Scott Solkoff was mentioned in “Wanted: Caregiver for Elderly Woman; Only Family Members Need Apply” in the June 20, 2002 edition of the Wall Street Journal.

**NAELA as a resource:**

The September 8, 2002 Fort Worth Star-Telegram listed NAELA as a resource in “Resources for caregivers and loved ones.”

The October, 2002 issue of Trial magazine listed NAELA as a resource in an article entitled “Subrogation traps for vulnerable plaintiffs.”

“Finagling Medicaid Eligibility May Not Be the Best Strategy” listed NAELA and the NAELA website as a source of information in the October 13, 2002 edition of the Los Angeles Times. This same article also appeared in The Charlotte Observer on October 20, 2002.

The November 7, 2002 Fort Worth Star-Telegram listed NAELA as a resource in the article “Homeowners Need Caution When Trying to Qualify for Medicaid.”

The NAELA Web site was listed as a source of information in the article “How to Help Your Aging Parents” that appeared in the November issue of Bottom Line/Persomal magazine.

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**Call for Nominations Annual Theresa Award**

The Theresa Award is an annual community service award presented by the Theresa Alessandra Russo Foundation to a NAELA member in recognition of his or her advocacy and support of individuals with disabilities. Through the efforts of this NAELA member, individuals with disabilities are able to achieve a better quality of life, protect their rights and preserve their dignity.

The Theresa Foundation will also contribute a cash grant of $2,000 to an organization named by the recipient of the award, that assists and supports children with disabilities.

There are many NAELA members who are worthy of this community service award. It is a wonderful opportunity for a NAELA member to nominate a colleague who is “making a difference” in the lives of those in need. Please let us know who you would like us to consider. We need to hear from you!

The recipient of the award will be announced at the NAELA Symposium and honored at the Theresa Foundation’s Annual Awards Dinner, held in the Spring.

Nominations can be made by contacting NAELA Executive Director, Laury Adsit Gelardi at 1604 N. Country Club Road, Tucson, AZ 85716-3102; they can be faxed to her at (520) 325-7925. Nominations are accepted throughout the year.

For more information, call Laury Adsit Gelardi at (520) 881-4005, ext. 113 or Vincent Russo at (516) 683-171, ext. 2131. Nominations will be considered by an awards committee comprised of past recipients of the Theresa Award as well as Vincent J. Russo and Laury Adsit Gelardi, who are board members of the Theresa Foundation.
By Janette Reyes Speer

The following article is part of a series of human interest articles the NAELA Public Relations Committee has solicited from NAELA members in order to use them when communicating with the media. If you are interested in writing such an article, contact NAELA Public Relations Committee Chair Howard Krooks at hkrooks@lkrlaw.com.

As a new elder law attorney, I believed dealing with clients would be easy, at arm’s length and unclouded by any emotions. After all, we as elder law attorneys deal with what I perceived to be the stoic, detached topics such as trusts, estates, guardianship and Medicaid. My misguided perception disappeared after my first meeting with a client.

One of my initial consultations involved a wife whose husband was suffering from dementia. She immediately began the consultation by asking, “How do I protect our assets just in case my husband needs to go to a nursing home?” Despite the desire to immediately jump to the legal mechanics of asset protection, attorneys first need to understand the family dynamics in order to make a proper assessment of the situation.

So I answered her, “Well, why don’t we start by talking about your husband’s health and his daily activities?” She began explaining how her husband doesn’t speak to her, is always irritable, yells at her and believes that she is stealing from him. He no longer wants to shower, forgets conversations and has problems dressing himself. She was saddened that the man she married was no longer the same person. Furthermore, this stranger could not take care of himself nor allowed her to take care of him. As she continued with her story of her husband, I quickly realized that our job had a very human element. That we could not properly serve our clients without listening and empathizing with their emotions, confusion, pain, frustration and fears.

This initial meeting went no further than offering her some brochures of available community services that could help her in caring for her husband. She discovered that she was not alone with her emotions, but that other people in the community, i.e. other wives, children and friends, experienced the same dilemmas. She discovered that there were institutions that could help relieve her of the tremendous burden she carried from constantly attending to the growing and demanding needs of her husband, 24 hours a day, seven days a week. She left with a list of telephone numbers, names of different resource agencies and day care centers, and knowledge of available group meetings for people in her situation. She left the office with some hope, with some peace of mind.

Meeting with this woman reminded me that as attorneys we are also “counselors.” We not only guide our clients in making legal decisions but also counsel them through trying times. Elder law requires not only legal knowledge and expertise but also the ability to empathize with our clients’ mental, physical and emotional well-being. I’m proud to acknowledge that, as elder law attorneys, we touch people’s lives and we make a difference.
NAELA Announces Availability of Tuition Scholarship

The National Academy of Elder Law Attorneys proudly announces the **Vivian Cohn Smith Scholarship for Patient Advocacy**—NAELA’s first-ever tuition scholarship, to be awarded for attendance at the 2003 Symposium in Miami Beach, FL.

The scholarship, established through the NAELA Memorial Fund in memory of **Vivian Cohn Smith**, is a needs-based scholarship, covering only the tuition to the 2003 Symposium. It is available to an elder law attorney who is unable to afford to attend the NAELA Symposium, and who would use the training to assist and advocate on behalf of the disabled and incapacitated.

The **Vivian Cohn Smith Memorial Scholarship** was made possible through the generous donations of individuals to the NAELA Memorial Fund in Vivian’s name. Vivian, the sister of NAELA Fellow **Helen Cohn Needham**, passed away in November, 1997 after a 10-year fight against breast cancer. She learned the value of patient advocacy from her own experience—Vivian was a disability worker for the state of North Carolina and saw her role as one in which she used what she had learned as a patient to advocate on behalf of others.

**Application Process**
The applicant must send a statement to NAELA (no more than one page long) which explains the following:

- Applicant’s current job/position and involvement in elder law.
- Why the applicant needs the scholarship.
- How the applicant would apply the training received at the symposium to her/his advocacy on behalf of patients.

**Selection Process**
The family of Vivian Cohn Smith will review all applications and determine to whom to grant the scholarship.

**Deadline for Application**
All applications must be submitted no later than March 1, 2003. Applications must be sent to: Laury Adsit Gelardi, 1604 N. Country Club Rd., Tucson, AZ 85716. Fax: (520) 325-7925.

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NAELA Chapters Announce Annual Senior Awards

NAELA proudly announces the recipients of the third annual NAELA Senior Awards, given out by NAELA chapters. The award is intended to honor a senior citizen who has made a significant contribution to society in general or within his or her own community.

**Albert Mazo — Georgia Legal Services**

Albert Mazo was recently recognized by the American Bar Association for his pro bono service at the local office of Georgia Legal Services for his work. Although he is a volunteer, Mazo keeps regular business hours and resolves an average of 300 cases a year. In 1999, he co-authored a 26 page booklet entitled: *Legal Issues that Affect Children: A Handbook for Parents, Grandparents and Others*. In the past Mazo has been honored with the H. Sol Clark Award by the State Bar of Georgia, the J. C. Penny “Golden Rule” award by the United Way of the Coastal Empire and with the Robert E. Robinson award from the Savannah Bar Association.

**LaVere Maxfield — Utah State Bar Needs of the Elderly Committee**

LaVere Maxfield served as a paralegal with Utah Legal Services for 16 years. She has specialized in senior cases. This September she retired at age 80. Her nomination was the result of years of hard work and dedication to Utah’s seniors. Starting out as a low-income senior with the Green Thumb Program, LaVere has provided thousands of older persons with access to legal services, legal help in problems like housing, guardianship and exploitation.

**C. Michael Shalloway — Academy of Florida Elder Law Attorneys**

C. Michael Shalloway is board-certified in elder law by the Florida Bar and practices elder law with his son, Mark, in West Palm Beach in the firm of Shalloway & Shalloway, P.A. Mr. Shalloway earned his law degree from the University of Florida. He is admitted to practice before the Florida Supreme Court, the United States Supreme Court and the Trial Bar of the Federal District Court for the Southern District of Florida. He is a former judge and was selected by his fellow judges as Administrative Judge for Palm Beach County Court.

He is the current chair of the Florida Bar Elder Law Section Government Benefits. He serves on the Executive Council of the Florida Bar Elder Law Section. The section honored him with the designation “Elder Law Superstar 2000.”

He serves on the advisory board of the Florida Institute for Medicare Advocacy and on the Palm Beach County Live Alone Task Force that addresses solutions for infirm and elderly community residents. In addition, he is past co-chair of the Greater Palm Beach Area Alzheimer’s Disease Educational Conference.
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