State Medicaid Cuts—Lack of Method to their Madness

By Gene Coffey, Esq.

Financially strapped state legislatures are dramatically reducing their Medicaid spending. A recent Kaiser report notes that every state implemented Medicaid “cost-containment” strategies during Fiscal Year 2003 and will do the same in 2004. And while cutting reimbursement rates is the most popular tactic, states have certainly targeted elderly services. Oregon, Kentucky, Colorado, Alaska, D.C and Idaho have all considered increasing the level of frailty a Medicaid applicant must demonstrate in order to receive nursing home coverage. Connecticut, Minnesota, Massachusetts and New Hampshire have asked, or plan to ask, the federal government for greater authority (through “waivers”) to punish Medicaid applicants who have previously transferred assets. Other states, such as Washington, have considered reducing their community spouse resource allowances, while Illinois will begin investigating whether Medicaid nursing home residents have hidden any assets. How can elder law attorneys prevent the cuts?

Certainly, lawsuits contesting whether the specific eligibility or service reductions are permitted by the Medicaid statute is an option. In Oregon and Kentucky, the
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President’s Message
By William J. Browning, CELA

Realistic Expectations
In October of 2003, along with our consultant, Brian Lindberg, and former NAELA President, Charles Sabatino, Esq., I visited with the aides for three senators and five congressmen. The aides for Senators Breaux and Grassley and Representatives Dingell and LaTourette were all familiar with NAELA. The meetings with aides for Senators DeWine and Voinovich and Congressmen Price and Tiberi were introductory in nature.

Some members seem to expect that NAELA can easily squash pending legislation and that we have sufficient clout in Washington to have a significant impact and to be a “player.” The reality is far different. We are an organization of approximately 4,500 members, which spends less than $60,000 per year in our lobbying efforts. The efforts of Brian Lindberg and Charles Sabatino have been particularly fruitful in regards to the Connecticut Waiver Plan; however, the success was not based upon the monies expended or the actual influence of NAELA, but rather was based upon ingenuity and the sound reasoning of our arguments.

Similar efforts at the legislative level, however, are much more difficult. Being able to go to a single source at CMS is much easier than attempting to lobby scores of congressmen and senators. There is also the small issue of the requisite campaign contributions. With limited resources, and limited influence in the legislative process, NAELA must (continued on page 4)
Advocacy/Litigation SIG Corner

What follows is an interview with Renee Reixach, who is an Ad/Lit SIG member and also a member of the NAELA Advocacy/Litigation SIG steering committee.

Rene, I understand that you have now practiced law for 29 years in Rochester, New York and that your concentration is elder law and health law. What a wealth of experience you can offer those of us with less time in the practice. What do you see as the hot areas for elder law litigation in the next 10 years?

The areas I see as hot areas for elder law litigation in the next decade are those which are always with us in times of economic downturn—cuts in public benefit programs, particularly Medicaid. We also need to keep reminding everyone that people still need care, so if services or eligibility are cut, the individuals affected will get care that is often more expensive because care may have been deferred or transferred to a more expensive site such as an emergency room.

As a seasoned litigator, what do you think of the trend away from traditional litigation and towards alternative dispute resolution? What is special and important about litigation when it comes to protecting our elders? Can’t we attorneys obtain the best outcome for our clients by taking the less expensive, and possibly less stressful, path through advocacy that does not involve litigation?

While alternative dispute resolution may work in certain types of contested cases, for example proposals that would require that the elderly mortgage their homes to purchase long term care insurance or proposals that would eliminate home and community based services are likely to fail due to the obvious deficiencies.

By contrast, proposals which grant greater flexibility to the states or which effectively terminate Medicaid, by sending “Block Grants” to the states are much more difficult to undermine. The risks of such proposals are not immediate and allow the congress to escape responsibility.

It is important for NAELA members to hold realistic expectations. The NAELA leadership fully understands the effect of the proposals upon our clients and our membership and takes these duties seriously. It may soon be necessary for us to mobilize membership to act at the state level. If you would like to become more involved at the state level, contact Charles Sabatino at SabatinoC@staff.abanet.org to volunteer.

Proposals that would require that the elderly mortgage their homes to purchase long term care insurance or proposals that would eliminate home and community based services are likely to fail due to the obvious deficiencies.

Elder law attorneys are like soldiers and mothers. We have to be prepared and armed with a lot of information about ways to help our clients, have resources at our immediate disposal, have good listening skills, insight and good judgment, and we have to be willing to protect clients from harm in whatever form. What are some of the harms that have faced your clients and how have your litigation or advocacy skills allowed you to protect your clients?

In some ways, the best protection I have been able to offer my clients based on my litigation and advocacy skills has not been the direct result of litigation. Rather it has been the very credible threat of suing and winning. It is also important to remember that, in dealing with the Medicaid program, we are dealing with a welfare program. Those who legislate and administer such programs frequently have the attitude that they are dealing with people who easily can be pushed around and will not push back. We cannot allow our clients’ rights to suffer from such an approach.

President’s Message (continued from page 3)

pick its battles very carefully and attempt to influence through offering legislative leaders expertise and discreet counsel.

If, for example, legislation were introduced which would scuttle spousal impoverishment, the underlying logic of the spousal protections would clearly be compelling and the unintended results, socially repulsive. We could give legislators examples of their constituents who would be forced into poverty. Likewise, the inherent logic of the protections for the “caregiver child” and for disabled children would enable us to defend those policies.

Should the federal government wish to extend the look-back period or eliminate “Rule of Halves” type gifts, our task becomes much more difficult. In that predicament, NAELA may not have sufficient capital to effectively lobby congress to preserve the status quo.
Advocacy/Litigation
SIG Corner
(continued from page 4)

When litigation is required, there may be a settlement that otherwise might not have occurred. Even in a fair hearing, the threat of litigation may lead to a favorable result based on unique facts that allow the State to uphold its policy but to decide it does not apply to the case. For example, New York requires that if a transfer of assets penalty period is being apportioned between spouses because both are in a nursing home, when one spouse dies before the end of the penalty period an application must be filed for the decedent even though he or she is clearly ineligible. Otherwise the penalty period will not be apportioned. I handled a fair hearing on this issue where we were prepared to litigate if the decision were adverse; the decision concluded that an application filed in January really should have been considered as filed in the prior October, thus being timely to allow apportionment where one spouse died in September. I think the State reached this decision to avoid a court challenge to its policy.

You conduct a lot of federal litigation, especially when you fight for clients’ rights to Medicaid benefits. Why do you address violation of Medicaid rights in federal court rather than state court?

Medicaid eligibility issues are frequent and often very state specific. Currently the most frequent disputes seem to concern spousal impoverishment. Many states ignore the federal statute that permits a community spouse to refuse to make her assets available to the institutionalized spouse. Some states consider a community spouse’s purchase of an actuarially sound annuity an “improper” transfer of assets. I choose to litigate these issues in federal court for a variety of reasons. First and foremost, the claims of my clients are based on federal law and regulations. I believe federal courts are more responsive to and respectful of federal law and particularly federal agency policies than are state courts. They are part of the same level of government. Federal judges are more used to dealing with complex regulatory matters than are most state judges.

While the internet has leveled the legal research playing field somewhat, citing the Code of Federal Regulations is different in a courthouse where the judge has it in his or her library and knows what it is than in a court where the nearest copy is in the nearest large city and the judge is not familiar with it.

Can you share some practice tips when challenging Medicaid eligibility determinations in federal court?

The key, in any litigation, is to keep the case simple. I once did a Medicaid eligibility case involving three different issues affecting three sets of plaintiffs. It was too complicated, and part of it was not successful. I learned from that to keep the complaint focused. You also do not want or need to include every claim you can imagine. If the judge is not convinced by the one or two good ones, how likely is it that a marginal claim will be successful?

Should more elder law attorneys take Medicaid denials to federal court?

The principal impediment is lack of experience in federal court. But the courts are not that unique. You read the local rules, file the complaint, serve the defendants, and move for summary judgment. These cases rarely involve discovery. The facts are what they are. If we conclude that the government denial of benefits stemmed from its having applied a policy which violates federal law or regulation, litigation is similar to conducting an appeal. Frequently the facts will already have been determined through a fair hearing, so the defendants will not be in any position to deny them.

Has any of your federal court experience involved class action litigation?

Federal courts are generally more favorable for litigating class actions. Case law in some states, New York among them, denies plaintiffs the right to bring class action suits against the government under the theory that you don’t need a class action because the government will obey the law. That is rather odd in a case where the government is being sued for violating the law. Class action status also does not fit very well with many state court administrative review statutes, which are based on the idea of reviewing one administrative decision involving one client. The cases which are best suited for federal court class action litigation are those where there is a clearly defined policy which also clearly affects a reasonably large number of people. Most eligibility cases fit this, but some pose quirky or unique problems that are not suited for class actions because there may not be a class. The hardest thing about a class action is that the plaintiff has the burden of proving that there is a class. So you have to be creative in showing that there are others similarly situated. For example, if you have five adverse fair hearing decisions in five counties, you can get the State Medicaid caseload report and just approximate. If there are five cases in these five counties which combined have just one percent of the caseload, then there must be 500 cases statewide. That is more than enough to have a class action certified.

Is it expensive to challenge Medicaid decisions in federal court?

It should be no more expensive, and probably less expensive, to sue in federal court than in State court. In New York the filing fees in State court are nearly twice what they are in federal court. More importantly, federal court Medicaid cases are brought under 42 U.S.C. section 1983, so when you win you are entitled to attorney’s fees under the Civil Rights Attorneys Fees Awards Act, 42 U.S.C. section 1988. Unlike some state fee shifting statutes, the government defendant cannot avoid the fee award by arguing that its illegal policy was arguably justified. If the defendant loses, the defendant has to pay the fees. It is not a two way street, however; unless the claim of the (continued on page 6)
plaintiff borders on the frivolous (in which case sanctions under Rule 11 might properly be awarded against the plaintiff’s attorney), section 1988 does not authorize a fee award against an unsuccessful plaintiff.

Do elder law attorneys, need more one-on-one training or mentoring to encourage more advocacy via the federal judiciary, and how would you propose that we get that training?

It is sometimes possible to work together on cases to learn from those of us who do federal court litigation. I have recently worked on federal court cases in three states outside New York, with local counsel. The internet helps this enormously. Pleadings, motions, briefs, all can be drafted and sent via email for final polishing and filing locally. An advantage of pursuing a claim in federal court is that most District Courts actively manage their dockets, setting time limits for time limits for discovery, motions, etc. Since appeals of benefit denials usually require no discovery or trial, a single Summary Judgment Motion (and perhaps another Motion for Class Certification) comprise the only court appearances. Under the Federal Rules of Civil Procedure, a Motion for a Preliminary Injunction may be converted to one for summary judgment, so that may speed things up even more. The biggest hurdle in federal court is that the Eleventh Amendment bars retroactive benefits from being awarded in most states. Thus getting a preliminary injunction may be critical, but what could be a more irreparable form of injury than getting no relief due to the passage of time?

In some states, the government attorney may not be terribly experienced in federal court either. In most states the case will be defended by the Attorney General’s office, but sometimes the case is left to a Department of Public Welfare attorney who is used to being in the family court or state trial court.

There are materials available to bring yourself up to speed on federal court litigation. I will present at a program on this topic at the 2003 NAELA Symposium in Miami. You can link up with a federal court practitioner in your area since you know Medicaid and the federal court practitioner knows the federal courts. Find someone in your area who does good civil rights or employment discrimination cases who understands both federal courts and the civil rights statutes. We all are, after all, attorneys. We should be able to figure out how to advocate for our clients in court. As one of my favorite law school professors used to say, “Rave on!”

Thank you, Rene, for your time and your interest in the future of elder law.

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Book Review
By Bill Brisk, CELA

Social Security Explained, by Avram Sacks; 2003

Sadly, elder law attorneys rarely counsel clients on most aspects of Social Security—other than its disability programs—for two reasons. First, many of our clients have already made their basic decisions about Social Security and Medicare before they consult us. Second, few of us know very much about the Social Security system. That is a shame, because even in a bureaucratic system as Social Security they are opportunities for fruitful counsel and even advocacy. On two grounds this highly competent book, admirable in many other respects, falls short of answering such basic questions as:

- Under what conditions should one opt to begin receiving benefits (those born in 1938 will receive their first check on the third Thursday, three months after the month they attain 65 years of age) earlier or later than the date defined as “full retirement?” (Answer: actuarially, those who choose to begin benefits at 62 receive less over the rest of their lives, but since there is no longer any set-off for earned income, few individuals defer benefits past full retirement age.)

- What do you have to do to claim Social Security benefits? (Answer: by calling 800-772-1213, you can arrange a half hour telephone interview to choose your options rather than make a face-to-face appointment at a local office.)

- How can you check SSA calculations of your benefits? (Answer: they are based on reports from the IRS and appear in annual statements mailed to most enrollees.)

- Should you postpone applying for Medicare if you are still working or are covered in a spouse’s health insurance policy? (Answer: it depends on whether the cost to you of maintaining your private health insurance is less than the $58.50 that Medicare will charge you monthly for Part B. Once your private insurance ends, however, you must apply for Medicare within three months to avoid a penalty for “buying in” to Medicare.)

- As part of CCH’s “Payroll Management Professional Series,” not surprisingly 2003 Social Security Explained L SECURITY EXPLAINED devotes nearly half of its text and many of its tables to translating into readable English regulations governing contributions to the system, who is responsible, how are they calculated, and when are they due? This is vital, of course, for employers, self-employed individuals, those who earn income in forms other than wages, such as tips and unemployment compensation, and, of course, payroll specialists. A brief chapter explains how benefits are taxed.

The other half of the book describes the kinds of benefits Social Security offers and how they are calculated. Emphasis is on retirement benefits. Abundant tables, revised annually, are of little use for the average elder law practitioner. For those who want to understand how the seemingly arbitrary amounts of benefits are arrived at, a few paragraphs explain Social Security’s formula for calculating actual retirement benefits consistent with its competing purposes as insurance (a “safety net” for those who retire with minimum lifetime earnings) and investment (to reward those who contributed more to the system because of their higher incomes). Since 1977, retirement benefits have been based on the Average Indexed Monthly Earnings (AIME) kept for each contributor to the program. Those who become eligible for retirement benefits in the year 2003, will receive 90% of the first $606 of their AIME, 32% of any AIME between $606 to $3,653, and 15% of any AIME above $3,653, up to the maximum amounts subject to Social Security taxes in the preceding years, based on the maximum annual income subject to Social Security taxes—which rose from $28,000 in 1951 to $80,400 in 2001.

Relatively brief chapters consider the two Disability programs managed by the Social Security Administration, Family Benefits, Increases or Losses of Benefits, and perhaps the most practical of all, a concluding Miscellaneous Chapter which describes how the SSA treats over- and underpayments, benefit assignments, requests for expedited benefit payments, direct deposits, and representative payees.

Given its subject matter, the book is carefully written and, in most cases, defines in plain English such terms as “primary insurance amount,” “period of disability,” and a great number of others. Annual indexing of both contributions and benefits as well as significant legal changes make timely updates essential. Avram Sacks outlines recent legislative and regulatory changes in the opening chapter of the book. Despite its many virtues, the book would appeal more to elderlaw attorneys and others upon whom retirees and the disabled depend for vital decisions, if it highlighted “practice tips” or at least explained differences of circumstances might produce different strategies.
State Medicaid Cuts—Lack of Method to their Madness

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National Senior Citizens Law Center has filed lawsuits with local legal aid programs challenging whether the changes to the long-term care functional assessments deny a mandatory Medicaid service to eligible individuals. In regard to the asset transfer waivers, the question of whether the federal government has the authority to allow a state to impose stricter penalties than the federal law allows is still open, and a court will likely be asked to resolve the matter if one is approved. Grassroots advocacy may also be very effective. When Idaho proposed making dramatic cuts in its Home and Community-Based waiver program last year, the attention drawn to the changes by advocates and beneficiaries was credited with stopping them.

However, advocates should consider a potentially less obvious, but just as effective, mode of attack. Three recent cases demonstrate that targeting the states’ methods is a very practical way of challenging cutbacks. In their rush to slash costs, states are consistently acting in a procedurally deficient manner. A suit filed in Indiana by two NAELA attorneys, Scott Severns, CELA and Robert Fechtman, Esq., serves as a prime example. In June, the state was enjoined from altering through a policy transmittal its definition of “outstanding medical expenses” for purposes of a Medicaid spenddown because the state failed to comply with Indiana’s rule-making process. Ringo v. Hamilton, Civil Case No. 29D03-0306-PL555 (Hamilton County Superior Court). Though the court noted that the proposed policy was not “contrary to [Medicaid] law,” it ruled that the policy conflicted with the regulation it purported to interpret, and was therefore a new rule which was required to go through Indiana’s rule-making procedures. The Plaintiffs’ were granted a preliminary injunction.

A federal district court enjoined Massachusetts from implementing cuts this past spring because of similar procedural omissions. Long Term Care Pharmacy Alliance v. Ferguson, 260 F.Supp.2d 282 (D.Mass.2003). Massachusetts attempted to reduce its reimbursement rate to nursing facility pharmaceutical providers through an emergency rule instead of a public regulatory process. Why an emergency rule? “Defendant admitted...that the sole motivation for the Emergency Rule was to expedite the decrease in reimbursement rates in order to address the Commonwealth’s fiscal crisis.” The court granted Plaintiffs’ motion for a preliminary injunction, ruling that the Medicaid Act mandates a “public process” for rate setting (42 U.S.C. §1396a(a)(13)(A)).

And in March, a federal district court temporarily restrained Connecticut from eliminating a category of families from Medicaid because the state failed to properly advise the group members of their appeal rights. Rabin v. Wilson-Coker, 2003 WL 1741883 (D.Conn.). Even where a state seeks to eliminate a category of recipients, the recipients must be individually notified in accordance with 42 C.F.R. §431.200 et seq. As the court noted, “Plaintiffs do not challenge the State’s right to limit eligibility for Medicaid benefits......What they do challenge is the State’s implementation of the new law.” Once again, a state had improperly advanced its desired changes.

These cases illustrate that the states’ distress over their budgets has translated into haste decision making that has exposed them to successful challenges by alert advocates, even where the proposed cuts are otherwise potentially legal and grassroots advocacy has not worked. And while the procedural challenges may only delay a state’s actions, there is the potential that they may stop the state’s plans altogether. Without any doubt that the program hits will keep coming, procedural challenges must be considered a fundamental part of any overall cutback-opposing strategy. While they are not the only option, they will in some situations be the best.

Gene Coffey is a staff attorney at the National Senior Citizens Law Center in Washington, D.C. and can be reached at gcoffey@nsclc.org.

➢ Elder Law Answers-Full page from last issue
Assembly–The Easy Way

By Joseph T. “Chip” Buxton, III, CELA

My firm purchased our first computer in the spring of 1980. As my practice grew from a general practice into one concentrating in estate planning and elder law, we were in dire need of a good document assembly system. Few were then out there that were adequate to our needs so we created our own system using a basic DOS based text editor system. We simply took client documents and converting them into forms with blanks for personal information. We realized that we could then take each component clause of a particular form and break it up into separate, smaller forms. We duplicated and varied these smaller forms to fit particular fact patterns and soon had a large collection of clauses to fit almost every situation our clients might present. We then could reassemble a selected group of those clauses into a complete document, thereby producing a highly personalized trust, will, power-of-attorney, living will, or even a pre-marital agreement.

We filled in the blanks with client information and had a completed document in a matter of minutes rather than the hours we had previously spent cutting and pasting documents together.

Then along came Window’s based Word, Word Perfect and the Internet.

By Joseph T. “Chip” Buxton, III, CELA
Pathagoras: Document Assembly—The Easy Way
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lect appropriate clauses from a larger pool of available clauses and puts them onto the drafter’s editing screen for further editing. It is truly user-friendly. It is easy for my staff to learn, and, most importantly, on that assembles “my documents.”

I found Pathagoras easy to get into and to use. Take creating Revocable Living Trusts, for example. We initially moved the trust clauses that I had written over the years into a central library or pool of clauses. Pathagoras uses a plain Word document, which it calls a “glossary” to hold these clauses. We called our first glossary “Revocable Living Trust Glossary.” (We have since broken the Glossary into “Single” and “Joint RLT Glossaries”; we have also created a Will Glossary, a Power-of-Attorney Glossary, Special Needs Trust Glossary, CRT Glossary, and several more general glossaries.) I continue to add new clauses to, and update clauses in, various glossaries as the law or my practice changes. It is very simple to do.

With the clauses in place in the glossary, the actual steps to create a Revocable Living Trust are a simple few: Using a printed paper “check sheet” of available clauses in the appropriate trust glossary, I check off those that meet the client’s situation. I give the checklist to my assistant who calls up the identical, but “virtual,” check-sheet on her screen. She clicks on the clauses that were checked on my worksheet and then presses the “Assembly” button. Instantly (okay, for very long documents it may take as long as 10 seconds) the individual clauses in the glossary are brought together as one, formatted with paragraph appropriately numbered. The trust is done.

Pathagoras also permits me to create templates of clauses called “clause-sets.” This avoids having to check off the same clause on the screen or paper check-sheet time and time again for the same document. I just order up the set and know that the final document will contain only the most up-to-date version of the desired text.

Personalizing the assembled document is the next step. This is where variables, fields, or other place holders strategically placed throughout the document are replaced with the personal information such as the client’s name, address, SSN, names of the trustee, personal representative, guardian, etc.

Pathagoras shines here too, especially for non-programmers who, like me, may be frustrated by links and databases and fields. Roy has created an “Instant Database” module that ships with the program. To replace these variables with personal client data, simply pull up the Instant Database template, fill in the variable information called for and press <Go>. The personal information is seamlessly merged into your document and it is ready to review and sign! (Pathagoras can also be tied into your off-the-shelf database, such as ACT®, Time Matters®, and Amicus Attorney®, etc., if you want, but so far I have found the Instant Database so easy to use that we have stuck with it.)

The ability to easily edit text or clauses in a library (i.e. the “glossary”) is an essential requirement of a good document assembly program. Laws change. CLE courses suggest better text. You decide there is a better way to say something. This is easily and elegantly done in Pathagoras. Getting to a clause that required editing is effortless. Editing the clause is the same as editing any text. This is a plain text, no “codes allowed” type program. When we view a glossary on the editing screen, we are looking at plain text. The variables (place holders) used by the Instant Database system are plain text as well. Because of this plain text characteristic, I can even take a glossary home, and then e-mail it back to the office to install the updated version. Since the Glossary is a simple word document, I can even edit the clauses on a computer that does not have Pathagoras installed. It could not be any simpler.

The ease by which the dreaded “omitted” or “just one more” clause can be inserted into a document speaks well of a program’s sophistication and user-friendliness. Pathagoras cannot be topped in this regard. Assume that I have drafted a complete trust but at the last minute I decide to insert a clause we have names “trj456” after the 16th paragraph. (“trj456” is one of the numerous clauses of our joint rust glossary.) I simply put my cursor at the end of the 16th paragraph, type <Alt-G>, press “g” (for “g”lossary), and the clause is inserted. No other program can do this more easily.

For an estate planner Pathagoras is just what the doctor ordered. I do not need a program that tries to do my thinking for me. I do not need a program that requires programming skills to setup or operate. I do not need a lot of sophisticated features that get more complex with every new version’s release. I just need results, and Pathagoras gives results.

Pathagoras is a Microsoft Word add-in. As such, it is “always on.” You do not have to load another program to create a document or to grab a term from the glossary. It operates entirely within Microsoft Word. Furthermore, your staff and you are always working in an environment with which you are familiar.

There is also an impressive document management side of Pathagoras. “Document Management” is that aspect of word processing that deals with the user’s ability to save and archive documents by client and retrieve them for later editing, revision, printing, etc. A full description of Pathagoras’ document management modules would be the subject of an entirely separate review. Suffice it to say that the same thoughtful, clever and unique features that permeate Pathagoras’ document assembly system exist in its “PathSmart” and “SaveSmart” modules (including fast, filtered and optionally mouseless disk navigation that is “to die for.”)

For the money, the savings in staff training and usefulness it has brought to my office, it is a definite “must have” kind of program for any document intensive practice.

The Pathagoras™ website is www.Pathagoras.com. You can read a much fuller description of the program’s features, download a trial version of the program, and get the purchasing information for this modestly priced program. Or call Roy up at 866-728-4246 (toll free.) I am sure that he would be glad to chat with you and answer your questions.

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Joseph T. Buxton, III, PC
914 Denbigh Blvd.
Yorktown, VA 23692
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NAELA Programming: 
One Size Doesn’t Fit All

By Laury A. Gelardi, Executive Director

There has been a great deal of discussion about the direction of NAELA’s programming efforts. This has been a topic among the membership and among the board of directors.

I am proud to say that NAELA has finally matured enough to face this issue as an opportunity for growth and development of all our members with more resources than ever before. The delivery of educational programs has been a constant on the radar screens of committees and boards over the years always with the intent of meeting the needs of the members. The NAELA board has been willing to try pilot programs and to re-tool the established programs if needed.

As many of you know, NAELA grew out of a symposium planned in Tucson by the staff of Bogutz and Gordon, PC in 1988. The need for programming in this area was apparent as 125 people attended this groundbreaking event and what is now known as the “NAELA Symposium” was born! The symposium was conceived as and is still seen as the “Organizational Meeting of NAELA”...an event that offers programming at all levels while incorporating the business of NAELA and providing a fun venue for all participants.

The NAELA Institute was first offered in 1991 as an “Advanced Program for Elder Law Attorneys.” It was initially done around case studies with intense discussions centered around those cases. It has continued to evolve into the premier “Advanced Program for Elder Law Attorneys” and often takes the lead on offering innovative training scenarios.

Between 1991 and 1993, NAELA experimented with Regional Programs that moved around the country. Frankly, they were not particularly successful. NAELA did not have enough of a presence in the areas that were targeted and neither attendance nor finances reached our projections.

In 1996, the first NAELA UnProgram was held. Everyone was skeptical of this “unplanned” event that relied on sharing and spontaneity. There was doubt about whether it would actually serve a purpose for attorneys or be a long term event. Eight years later, this program is one of our most popular events. We have gone through several renditions: offering an Advanced Pre-Day, offering two weekends instead of one, and in trying to balance the needs of members with established practices with the needs of members with budding practices. The success of these programs has definitely been due to NAELA members’ willingness to share with and learn from each other.

In 1997, our first program targeting programming for Staffs of Elder Law Attorneys was held as a pre-day to the Nashville Institute. While the tapes for that session continue to sell well, the session was under our attendance projections and feedback from members told us it was too expensive to bring staff to NAELA meetings around the country. This was balanced with a clear outcry for more programming for elder law staff members.

In 1998, NAELA scheduled the first “Re-Design Your Practice” seminar in Chicago. It was moved to a day prior to the Washington DC Institute due to low attendance. Many members have told us that we were about five years ahead of our members with this offering and we may see this program resurrected to take elder law attorneys into the 2000’s with new practice areas and stronger practices.

While NAELA program materials and tapes have always been available for every symposium and institute, NAELA began offering the materials on CD-rom in 2000, thus, easing the problems of storage and search capabilities for many members.

In 2001, the Program Committee noted that teleseminars had been successful for several other associations and vowed to try it as a convenient and economical way to educate members on substantive issues. These programs met with marginal success until we finally figured out that this was the ideal mechanism to deliver office staff training. We are now getting more than 1,000 attorneys and staff mem-

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NAELA Programming: One Size Doesn’t Fit All

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members on those calls!!!

So……here we are: it’s almost 2004! We have 4,400 members, 16 chapters, 6 special interest groups, 21 committees, 20 active list serves and a wonderful web site. We have members who are new to the law practice, members who have been practicing law for a number of years and are now transitioning into elder law, and members who have been in elder law practices ranging from one to twenty years! The educational needs are as diverse as are these practices. We have new members asking basic questions about establishing and running a practice or about what substantive areas are really important. Thus, we run a Basics Day at the symposium each year and encourage those members to attend that program for a basic understanding of elder law. The CELA review course is also a wonderful overview of elder law issues on a more advanced level and is open to anyone who wants to learn….not just those who intend to take the CELA exam.

We are beginning to hear from long time members that they need us to “step up” the level of the programming to allow them to continue to learn. This is a valid request: the founding members have given a great deal to NAELA in shared expertise, time and money and we need them to continue to give and receive value from NAELA.

Thus, in March of 2004, we will run our first Advanced Practice Program in Dallas. This is a pilot program that was not NAELA’s program initially, but the board has agreed to try it. It is not “the perfect program” although we are confident that it will be GREAT! The criteria that were set for attendance were a one-time shot….they will most likely change next year as NAELA takes ownership of the program and molds it to meet the needs of the members and the association.

NAELA is striving to meet the needs of all of its members. We are experiencing the growing pains of “one size doesn’t fit all.” There are more avenues open to us than ever before for the delivery of programs and more programs to do at each level. I encourage every member to “hang with us” as we try new things and see what works and what doesn’t. Our board and our programming committees are made up of volunteers just like you….and they, in conjunction with the staff, are eager to continue on this journey with each and every one of you.
Tim Takacs, CELA is Recipient of 2003 NAELA UnAward

Tim Takacs, CELA, of the Elder Law Practice of Timothy L. Takacs in Hendersonville, TN was recently presented with the 2003 NAELA UnAward for his dedicated efforts to the National Academy of Elder Law Attorneys (NAELA.)

The UnAward is given each year to a member who works diligently to bring value to NAELA. They are dedicated, innovative individuals who have shared their knowledge and expertise with the Academy and have been instrumental in the development of NAELA’s programs and activities.

Mr. Takacs has served NAELA for many years, participating on the NAELA Technology Committee, presenting at NAELA Symposia and Institutes, and chairing the 2004 NAELA UnProgram. He is also a major driving force in building the NAELA Memorial Fund.

In addition to his active involvement in NAELA, Mr. Takacs is a former chairperson of the Tennessee Bar Association Elder Law Section. He is also the author of the *Elder Law Practice in Tennessee* and the co-author of the *NAELA E-Bulletin.*
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:

<table>
<thead>
<tr>
<th>Name/Telephone Ext.</th>
<th>E Mail Address</th>
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<tr>
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<td></td>
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<tr>
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<tr>
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<tr>
<td>Certification .......... Lori Barbee, ext. 120 ........... <a href="mailto:lbarbee@naela.com">lbarbee@naela.com</a></td>
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<tr>
<td>Chapters .............. Bridget Jurich, ext. 102 ........... <a href="mailto:bjurich@naela.com">bjurich@naela.com</a></td>
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<tr>
<td>Committee Placement ... Bridget Jurich, ext. 102 ........... <a href="mailto:bjurich@naela.com">bjurich@naela.com</a></td>
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<tr>
<td>Executive Director ... Laury Gelardi, ext. 113 ........ <a href="mailto:lgelardi@naela.com">lgelardi@naela.com</a></td>
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<tr>
<td>Experience Registry ... Jenifer Mowery, ext. 114 .......... <a href="mailto:jmowery@naela.com">jmowery@naela.com</a></td>
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<td>Fellows ............... Debbie Barnett, ext. 117 .......... <a href="mailto:dbarnett@naela.com">dbarnett@naela.com</a></td>
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<td>Finances .............. Debbie Barnett, ext. 117 .......... <a href="mailto:dbarnett@naela.com">dbarnett@naela.com</a></td>
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<tr>
<td>Membership ........... Jenifer Mowery, ext. 114 .......... <a href="mailto:jmowery@naela.com">jmowery@naela.com</a></td>
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<td>Membership Directory .. Jenifer Mowery, ext. 114 .......... <a href="mailto:jmowery@naela.com">jmowery@naela.com</a></td>
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<td>Public Policy .......... Brian Lindberg (202-789-3606). <a href="mailto:bwlind@erols.com">bwlind@erols.com</a></td>
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<tr>
<td>Exhibitors .......... Pam Carlson, ext. 108 ............ <a href="mailto:pcarlson@naela.com">pcarlson@naela.com</a></td>
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<tr>
<td>Speakers .............. Pam Carlson, ext. 108 ............ <a href="mailto:pcarlson@naela.com">pcarlson@naela.com</a></td>
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<tr>
<td>Tapes/Manuals .......... Terri Anthony, ext. 107 .......... <a href="mailto:info@naela.com">info@naela.com</a></td>
<td></td>
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<tr>
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<td>Listserv .............. Jeff Goddard, ext. 122 .......... <a href="mailto:jgoddard@naela.com">jgoddard@naela.com</a></td>
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NAELA Chapters Announce Senior Award Recipients

NAELA proudly announces the recipients of the fourth annual NAELA Senior Awards, given out by NAELA chapters and state bar elder law sections. 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.

Arizona Chapter: Marian Lupu

Marian Lupu, 78, the first employee and only director of the Pima Council on Aging in Tucson, AZ, has tirelessly championed the cause of Arizona elderly during her 36 years at the Council. She has been a local, state and national leader on all issues relating to the elderly and aging. “She is the exemplary senior citizen!” according to NAELA Fellow Allan D. Bogutz, CELA.

Northern California Chapter: Betsy Carpenter and Joann Keystone

Betsy Carpenter has dedicated her efforts in promoting Advance Health Care Directives in Northern California. Her passion stems from intimate personal experiences with the deaths of loved ones and her struggle with breast cancer. She has served as a grief counselor for more than ten years, and currently lectures on ethical decision making at the end-of-life at Stanford University Medical School.

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5. Elder Law Answers- Full Page saved in Pagemaker
**Tax SIG Column**

**Understanding the New Generation Skipping Tax Allocation Rules**

*By Stephen J. Silverberg, CELA and Lisa M. Hunter, Esq.*

For years, dealing the Generation Skipping Transfer Tax (GST) struck fear in the heart of the most experienced estate planner. The 2001 Act changes dealing with the automatic allocation rules and other procedural changes brought about by the 2001 Act were intended to address a perceived problem in cases where taxpayers wished to allocate GST exemption to certain indirect skips but failed to do so on a timely filed gift tax return or submitted defective elections. The rules discussed below are retroactive to transfers occurring after December 31, 2000.

Trusts to which the new allocation rules apply are referred to in the law as “GST trusts,” and transfers to such trusts are referred to “indirect skips.” If the transferor has available GST exemption, it will be automatically allocated to property transferred in an inter vivos indirect skip so that there is a zero inclusion ratio for the transferred property. This is exactly the reverse of the prior law.¹

An indirect skip is a transfer to a GST trust that is subject to gift tax.² A GST trust is defined as a trust that could have a generation skipping transfer with respect to the transferor, unless one of six exceptions apply.³ A trust will not be a GST trust:

1. If the trust instrument provides that 25 percent of the trust principal must be distributed to or may be withdrawn by one or more non-skip persons, either before such person attains age 46, or on or before one or more dates specified in the trust instrument that will occur before the person attains age 46, or on the occurrence of an event that can reasonably be expected to occur before the date that the person attains age 46;⁴

2. If the trust instrument provides that more than 25 percent of the trust principal must be distributed to or may be withdrawn by one or more non-skip persons who are living on the date of death of another person identified in the instrument who is more than ten years older than such individuals;⁵

3. If the trust instrument provides that in the event of the death of one or more non-skip persons on or before a date or event described in subparagraph a. or b. above, more than 25 percent of the trust principal either must be distributed to such persons’ estates, or is subject to a general power of appointment held by one or more of such individuals;⁶

4. If any portion of it would be included in the gross estate of a non-skip person (except the transferor), if such person died immediately after the transfer. However, the value of transferred property is not considered to be includible in the gross estate of a non-skip person by reason or such person having a right of withdrawal with respect to so much of the property as does not exceed the gift tax annual exclusion with respect to any transferor, and it will be assumed that powers of appointment held by non-skip persons will not be exercised;⁷

5. If it is a charitable lead annuity trust, charitable remainder annuity trust or charitable remainder unitrust.;⁸

6. If it is a charitable lead unitrust and the non-charitable beneficiary thereof is a non-skip person if such person is alive when the unitrust payments for which the charitable deduction was allowed terminate.⁹

A taxpayer may elect to not have the automatic allocation rules apply to an indirect skip, or to all transfers made to a particular GST trust. A transferor may also elect to treat a particular trust as a GST trust, even if it would not otherwise come within the definition of a GST trust, with respect to any and all transfers made by such transferor to that trust. Such elections must be made on a timely filed gift tax return.¹⁰

A GST election cannot be made if the subject property can be recaptured into the transferor’s taxable estate (i.e. Code §§2036, 2037, 2038). In order to allocate GST to such property, the taint that causes tax inclusion must no longer exist. For purposes of the application

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**NAELA Chapters Announce Senior Award Recipients**

*(continued from page 16)*

Joann Keyston, chair of the Sonoma County Elder Abuse Prevention Council, founded the Court Advocacy Workgroup, which follows elder abuse cases through the criminal justice system and publicly reports them, thus educating the community. “I believe that through my strong commitment to the issue of elder abuse prevention, I have shown other seniors that a person or small group can make a difference in the quality of life for seniors in our community,” says Keyston.

**Massachusetts Chapter: Phil Mamber**

Phil Mamber is a retired union office who has turned his efforts to advocacy for the elderly. He serves as president of the Massachusetts Senior Action Council, which lobbies and advocates for various causes affecting senior citizens. “Elder law attorneys are a different kind of lawyer,” Mamber said. “I hope the Massachusetts Senior Action Council will continue to work with NAELA for common purposes.”
of the GST this is know as the “estate tax inclusion period.” (ETIP). If the ETIP rules of Code §2642(f) apply to an indirect skip, any automatic allocation will occur at the termination of the ETIP (and for allocation purposes, the property will be valued at its fair market value at the close of the ETIP).  

Under the prior law, once a GST election was made, it was irrevocable. A late GST allocation was tied into the current fair market value of the property subject to GST. The new law allows a retroactive allocation of GST exemption when an unnatural order of deaths occurs.  Such retroactive allocation may be made if:

1. A non-skip person has an interest or future interest in a trust to which any transfer has been made;
2. Such non-skip person is a lineal descendant of the transferor’s grandparent or of the transferor’s spouse’s (or former spouses’) grandparent;
3. The non-skip person is assigned to a generation below the generation assignment of the transferor; and
4. The non-skip person predeceases the transferor.

For purposes of these rules, a person has a future interest in a trust if the trust permits income or principal to be paid to such person on a date or dates in the future. If the transferor makes a retroactive allocation on a timely filed gift tax return for the calendar year in which the non-skip person died, the value of the transfer or transfers will be determined as if the allocation had been made on a timely filed gift tax return for each calendar year in which each transfer was made, and the allocation would be effective immediately before the non-skip person’s death.

The above-described relief would be available, for example, where a trust is created for a child who is to receive the trust property at age thirty. Assume that the trust provides that if the child dies before thirty, the trust property passes to the child’s issue. If the child in fact dies before thirty with issue, and the grantor of the trust is living, GST exemption could be retroactively allocated to the grantor’s transfers to the trust pursuant to Code § 2632(d). This new provision can be extremely valuable to the family of the transferor.

Prior to the 2001 Act, if an automatic allocation of GST exemption was not applicable, and if an attempted allocation relating to a particular transfer was not made on a timely filed gift tax return, the value of the property on the date of the actual allocation had to be used as there was no statutory authority allowing for relief for an inadvertent failure to make a GST tax exemption allocation on a timely filed tax return.

However, pursuant to new Code § 2642(g)(1), regulatory authority is created to grant an extension of time to allocate GST exemption or to elect out of an automatic lifetime allocation, without regard to whether any period of limitations has expired. In determining whether to grant relief under this section, the secretary is directed to consider all relevant circumstances, including evidence of intent in the trust instrument and such other factors as the Secretary may deem relevant. If the relief is granted, the gift or estate tax value of the transfer to the trust would be used to determine the exemption allocation. The procedure for requesting such relief is the private letter ruling procedure specified.

Before the 2001 Act, the IRS was not given statutory authority to deem that substantial compliance with the requirements for allocating GST exemption was sufficient to effectively allocate exemption. The severely limited the IRS’ ability to grant relief to a taxpayer where such relief would be equitable. Under new Code § 2642(g)(2), substantial compliance with the statutory and regulatory requirements for allocating the exemption will be sufficient to establish that the exemption was allocated to a particular transfer or a particular trust. If the requirements of the foregoing section are satisfied, then so much of the transferor’s available GST exemption will be allocated so as to produce the lowest possible inclusion ratio. In determining whether there has been substantial compliance, all relevant circumstances are to be taken into account, including evidence of intent contained in the relevant instrument, and such other factors as the Secretary may deem appropriate. This new provision is keeping with the trend to make the IRS “kinder and gentler.”

In all, the new GST rules set up a plan that will be applicable to the vast majority of clients without any extraordinary actions being needed. That being said, it does not mean that the conscientious practitioner let her guard down when reviewing estates where the GST may be applicable.
Are you tired of sitting on the sidelines? Are you ready to share your experience and expertise? Here’s your chance to help lead the association dedicated to furthering the profession of elder law.

NAELA is currently seeking members to serve in the following leadership positions on its board of directors: President-Elect, Vice President, Treasurer, Secretary, and eight directors. The officer positions are one-year positions, and the director positions are for two-year terms.

You can make a difference! With change occurring at fast speed this opportunity to serve on the NAELA Board of Directors will put you in the driver’s seat.

THE BENEFIT PACKAGE

- A role in advancing your profession.
- Exposure to a wealth of personal and professional contacts.
- Access to up-to-date information about the challenges facing your practice in the future.
- The chance to exchange ideas and perspectives with other volunteer leaders.

QUALIFICATIONS

- Demonstrated commitment to NAELA and the profession of elder law.
- Strong background in committee and volunteer work on a local and/or national level.
- A proven track record on affecting change.
- Ability and commitment to dedicate the time to attend three in-person board meetings per year.
- A proven team player.

WE WANT TO HEAR FROM YOU

If you are interested in serving or know of potential candidates, please send a letter of interest and a resume to: Laury A. Gelardi, NAELA Executive Director, at NAELA, 1604 N. Country Club Rd., Tucson, Arizona 85716; Fax (520) 325-7925 or by e-mail at: lgelardi@naela.com.
Peripatetic Essayist

“If You Want Out – See Cruz”

By Clifton B. Kruse, Jr., Esq.

It is a reasonable assumption, I suggest, that very few elder law attorneys have ever found themselves in the bowels of their city’s jail—as unlikely, I suppose, as an elder lawyer occupying her or his time in contemplating boolean notations. “Boolean,” as we all know, is a system of algebraic notation used to represent logical propositions by means of the binary digits (0) and (1).

In the days prior to the creation of public defender offices in our states and communities, our local bar association mandated that pro-bono services be performed by all lawyers. Judges would assign this duty to us, ignoring our inability to confidently protect our assigned clients’ personal interests. Essentially, this interest was to keep them out of the hoosegow using a deserving defense.

Not yet dry behind the ears, I was just out of law school when the mandate to defend those accused of crime, impecunious and entitled to a free defense, was ordered.

The telephone rang. I answered it. The chief judge in our county was on the line. I’d been in his court a few times. He was a good judge and not one you could refuse. “I’m assigning a case to you,” he said. “He’s in the jail.”

“Tom”—I’ve forgotten the last name—was the accused’s lawyer, but the guy in the black and white horizontally-striped jail garb didn’t like him. He wanted another lawyer, somebody good. Tom was the best criminal defense lawyer in town in those days, the early 60’s. He’d been a district attorney and was now into big-fee defense. Because this was a no-fee appointment, Tom had undoubt-
the counsel’s table so I could breathe. The smell was pungent. Of course, we lost, and this vagabond was transported back to his cage. Shortly thereafter, he was diagnosed as having syphilis of the brain. He sent me a letter from prison, having been moved from the jailhouse to the big house. I dreaded opening it assuming that I was being blamed - appropriately, of course, for the loss.

“Dear Cruz, I just [want to] thank you,” he wrote, “and the other guy for helping me.” That was it, the full letter. I memorized the contents, “thank you for helping me,” not knowing whether to attribute his thoughtful missive to the disease or not; after all, syphilis adversely affects the carrier’s brain.

Shortly after this episode, however, I was freed—no longer a servant dispensing advice to behemoths charged with crimes. The public defender system arrived in Colorado, and, fortunately for us all, well-trained defense attorneys took over—and presumably the jail walls got washed as well.

William Browning, CELA was quoted in “Living Trusts can Mean a Will Isn’t the Only Way,” published in the September 14, 2003 edition of the Chicago Tribune. He was also quoted in “States Start to Tighten Medicaid Qualifications,” published in the September 1, 2003 edition of the South Florida Sun-Sentinel. In addition, he was quoted in “On Guard Against Financial Elder Abuse,” published in the August 25, 2003 edition of the Seattle Times.

“Plan Now for Medicaid Reform,” written by Mary Alice Jackson, Esq., and Charlie Sabatino, Esq., was published in the August 18, 2003 edition of the Palm Beach Daily Business.

Joseph S. Karp, CELA, was recently quoted in the Palm Beach Post’s October 26, 2003 edition in the article “Interest Soars in Living Wills, Health Care Proxies.”

Bernard Krooks, CELA, John “Jay” Kearns, CELA, and Harry Margolis, Esq., were featured in “Ten Ways to Spot, Prevent Elder Financial Abuse,” which was syndicated in several newspapers.

Trudy Nearn, CELA, was quoted in “Nursing Home Hazards,” published online at www.abcnews.com.

Stephen Silverberg, CELA, was quoted in “Family Fortune Feuds,” published in the Registered Rep’s September 1, 2003 edition.

Mary Pat Toups, Esq., was featured in the California Bar Journal’s August edition, in “A Law School Grad at 46, Mary Pat Toups is Honored for a Career Devoted to Helping Others.”

“IRAs and Nursing Homes,” a Wall Street Journal syndicated column published nationwide featured Ira Wiesner, CELA, and Vincent Russo, CELA. Mr. Russo’s article “Who Needs LTCI,” was also published in the April edition of Trusts and Estates.

Wesley E. Wright, CELA, has been elected president of the Texas Chapter of the National Academy of Elder Law Attorneys.

Lois Zerrer, Esq., and Rebecca Pruitt, Esq., recently received the Missouri Bar’s Pro Bono Publico Award, presented in recognition of their outstanding pro bono service.

Stuart Zimring, Esq., was quoted in “Confusing Long Term Care Worth a Second Look,” published in the July 20th edition of the Boston Herald.
Finding a fellow NAELA member is a click away!

Did you know that the NAELA membership directory is available online at www.naela.org and is updated on a monthly basis?

So next time you’re looking for an address, phone number or e-mail of an NAELA member, just go online where you’ll find the most current information!

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3. Elder and disability law firm ½ Page on the back cover (7.25 w by 4.5 h)
Is the 2003 NAELA Institute over? Not for me! I am now in the process of listening to recordings of the breakout sessions that I could not attend or that I want to rehear and reading the many fine papers presented at the Institute. I am circulating the recordings and materials among the staff. For Oast & Hook, the institute will continue for many months.

Eighteen months ago, Bernard Krooks called to ask me to chair the planning committee for the 2003 NAELA Institute. Frankly, I was flattered to be asked. However, I was troubled because planning an institute is a large job when you are in private practice.

Where do you begin? I began with a vision. The NAELA membership was asking for advanced, graduate level educational opportunities. I was determined to provide it to them. I wanted highly talented presenters who were willing to prepare and present quality legal education presentations and outlines. I wanted a mixture of new presenters and old friends. The practice of elder law is changing. Some practice areas such as estate tax planning are declining. Others, such as Medicaid Asset Protection planning may be restricted due to proposed changes to the Medicaid program. I wanted to explore new opportunities for elder law attorneys.

With this vision, I assembled a first-rate planning committee including Wesley Wright, CELA, Sam Boone, Esq., Michael Cohen, Wesley Wright,加强

We Took the Bull By the Horns... at the NAELA Institute!

By Andy Hook, CELA

Members enjoyed a western-theme opening reception
We Took the Bull By the Horns... at the NAELA Institute!

(continued from page 24)

Esq.; Jo-Anne Jeffreys, CELA; Natalie Kaplan, Esq.; Ian Oppenheim, CELA; and Marie Elena Puma, Esq. The committee developed a plan to implement this vision. This plan included:

- General sessions on customer service by The Ritz Carlton, hiring talented employees by Talent Plus and proposed changes to the Medicaid program by a panel of NAELA members.

- A public benefits track that included presentations on Medicaid Asset Protection, the Medicare Secondary Payer statute, administration of Special Needs Trusts and the HIPAA privacy law.

(continued on page 26)
We Took the Bull By the Horns... at the NAELA Institute!
(continued from page 25)

- A fiduciary administration track that included presentations on fiduciary accounting, investments, taxation and duties.
- A practice management track that included presentations on software, management reports, legal ethics, and working with financial professionals.

To be honest the results of this planning exceeded my expectations. More than 360 members registered and attended the institute. All of the presentations were well attended. Many of the SIGs held meetings at breakfast meetings. The Practice Development/Practice Management SIG at its breakfast meeting developed a list of practice management tips.

Another aspect at the meeting was the presence of more than 19 exhibitors who provided valuable information to the attendees about software, research tools, and practice opportunities. Many of them gave prizes to attendees. As a first for NAELA, the institute had two sponsors, the Nationwide Provident Ins. Company and Southwestern Guaranty, whose financial support helped pay the cost of the Institute.

In addition to these educational opportunities, there were plenty of opportunities for networking and fun. The opening reception had a western theme with many members wearing cowboy hats and boots. On Saturday evening, NAELA hosted a western barbeque at Eddie Dean’s Ranch with Steve Silverberg, CELA, and Bill Browning, CELA, demonstrating their singing and dancing skills. I also found time to dine at the Mansion on Turtle Creek, which is quite a restaurant. I learn more during these networking opportunities than I do during the presentations.

I realize that while it is not cheap to attend an institute, attendance at NAELA meetings is an investment and not an expense. For that reason, my firm, Oast & Hook brought three attorneys to the Institute. We learned several new ideas that we will implement during 2004. For example, we will explore the sale of long term care insurance this year. I am confident that the ideas we learned will more than pay for the expense of attending.

What should you do if you missed the NAELA 2003 Institute? Do what I am doing. Purchase the program manual and recordings of the presentations. Take a few hours each week to review the materials and listen to the recordings. Have your staff listen to the recordings. You will find these suggestions to be a very rewarding!! Finally, plan to attend the 2004 Symposium and Institute.

(above) From the left: Helen Cohn Needham and Bruce Needham with Vincent Russo
(at left) Members were able to sign up, on-site, for the NAELA Personal Webpages
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Boston, MA 02116
(617) 267-9700 Phone
(617) 267-3166 Fax
Contact: Harry Margolis

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2 Clock Tower Pl., Ste. 230
Maynard, MA 01754
978-461-1200 Phone
978-461-1210 Fax
Contact: Christopher Bensley

Gateway Financial Distributors
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Glen Carbon, IL 62034
(866) 588-2927 Phone
(618) 288-2950 Fax
Contact: Gregory Albers

Institute of Health Care Advocacy, Inc.
1401 N. Missouri Ave., Ste. 321
Largo, FL 33770
(727) 584-4763 Phone
(727) 585-4452 Fax
Contact: Daniel C. Parri

Konica Business Technologies
7710 Kenamar Ct.
San Diego, CA 92121
(858) 348-2071 Phone
(858) 536-3330 Fax
Contact: Gene Elwell

Krause Financial Services
1120 Red Wing Trail
De Pere, WI 54115
(888) 605-4222 Phone
(877) 523-0783 Fax
Contact: Cheryl Fletcher-Krause

LexisNexis
360 Park Ave., S.
New York, NY 10010
(646) 746-6879 Phone
(646) 746-6835 Fax
Contact: Dick Smith

Medicaid Planning Systems, L.L.C.
509 S. Lenola Rd., Bldg. 7
Moorestown, NJ 08057
(856) 235-8501 Phone
(856) 235-8325 Fax
Contact: Tom Lincoln

Medicaid Practice Systems
555 French Rd.
New Hartford, NY 13413
315-793-3622 Phone
315-793-0076 Fax
Contact: David Zumpano

My Parent’s Concierge
219 Cornwall Ave.
Trenton, NJ 08618
(609) 394-7104 Phone
(609) 394-6501 Fax
Contact: Velvet G. Miller

Professional Educations Systems Institute, LLC (PESI)
200 Spring Street
Eau Claire, WI 54703
(800) 647-0799 x276 Phone
(715) 836-0031 Fax
Contact: Linda Cotton

Premier Software
1230 Brace Rd.
Cherry Hill, NJ 08034
(856) 429-3010 Phone
(856) 429-3559 Fax
Contact: Tom Caffrey

RIA
395 Hudson Street
New York, NY 10014
(212) 337-4109 Phone
Contact: Maureen Larkin

Smart Marketing
3033 Riviera Dr., Ste. 103
Naples, FL 34103
(239) 403-7755 Phone
(239) 403-7556 Fax
Contact: Mark Merenda

Stetson University College of Law
1401 61st St., South
Gulfport, FL 33707
(727) 562-7815 Phone
(727) 347-5692 Fax
Contact: Cathy Fitch

Talent Plus, Inc.
5220 S. 16th St.
Lincoln, NE 68512
(402) 489-2000 Phone
(402) 489-4156 Fax
Contact: Cydney Koukol

Gateway Financial Distributors
202 W. Main St., Ste. B
Glen Carbon, IL 62034
(866) 588-2927 Phone
(618) 288-2950 Fax
Contact: Gregory Albers

Institute of Health Care Advocacy, Inc.
1401 N. Missouri Ave., Ste. 321
Largo, FL 33770
(727) 584-4763 Phone
(727) 585-4452 Fax
Contact: Daniel C. Parri

Konica Business Technologies
7710 Kenamar Ct.
San Diego, CA 92121
(858) 348-2207 Phone
(858) 536-3330 Fax
Contact: Gene Elwell

Krause Financial Services
1120 Red Wing Trail
De Pere, WI 54115
(888) 605-4222 Phone
(877) 523-0783 Fax
Contact: Cheryl Fletcher-Krause

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