William J. Browning, CELA

The Man With the Common Touch

Also In This Issue:

• Shaping a New Social Contract
• Managing with Technology
• Representing Children with Learning Disabilities
Co-Authors Wanted

Co-author a book on Medicaid planning

I am the author of the leading consumer guide to Medicaid planning, *How to Protect Your Family’s Assets from Devastating Nursing Home Costs: Medicaid Secrets*. Currently in its sixth (2012) edition, this book has been exceptionally well received by the public as well as professionals. Since the book has a national focus, I am now seeking well-qualified attorneys to become contributing authors for their respective states. In exchange for your editing the book as to state-specific changes, and the payment of a modest fee, you will have the exclusive right to market your special state edition in your state.

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**2012 NAELA ANNUAL CONFERENCE**

April 26–28, 2012
Seattle, Washington

April 25, 2012
Basics Workshop

The Annual Conference provides professionals an unparalleled opportunity to learn, network, and engage with leaders within the field. On April 25, we are dedicating one entire day for a Basics Workshop tailored to provide a basic understanding of Elder and Special Needs Law. This workshop will be open to any Elder and Special Needs Law professional.

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**NAELA SENIOR RIGHTS Political Action Committee**

- Electing candidates to further NAELA’s public policy goals
- Protecting older adults and individuals with special needs
- Ensuring access to Congress
- Supporting NAELA attorneys

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NAELA News has two complementary purposes: to communicate the activities, goals, and mission of its publisher, the National Academy of Elder Law Attorneys; and simultaneously, to seek out and publish information and diverse views related to Elder Law and Special Needs Law.

The views expressed in the articles are those of the authors and do not necessarily reflect the policies of the publisher. Statements of fact are solely the responsibility of the author.
It’s All About Relationships

The NAELA Member Value Task Force report, approved by the NAELA Board of Directors in May 2011, included three long-term strategies to address the role of NAELA in the Elder and Special Needs Law marketplace:

1. **Present NAELA as the Elder and Special Needs Law hub within the legal marketplace** when considering potential partnerships.

2. **Consider alliances with other entities in the market space** (Alzheimer’s Association, The Arc, AARP, NSCLC, NCLC, LCPLFA, NELE, etc.) if such alliances would prove mutually beneficial.

3. **Strengthen partnerships with public law organizations** to re-establish linkages between the private and public practice of Elder and Special Needs Law.

While the strategic dialogue continues within the Member Value Task Force, the Trends Committee, and the NAELA Board, addressing the objective of presenting and promoting NAELA as the Elder and Special Needs law hub, implementation and exploration of mutually beneficial alliances, and strengthening partnerships with public law organizations has begun. Following are some examples.

A first major effort was the National Aging and Law Institute held in Boston, November 10–12, 2011. The Institute was hosted by NAELA and co-sponsored by the National Aging and Law Conference (NALC). Over 500 people attended the Institute and the NAELA Advanced Elder Law Boot Camp. If you weren’t able to attend, NAELA is offering the Institute and the Boot Camp on DVD. The recordings are audio-synced with the speaker presentations and can be purchased through the NAELA Online Store, www.NAELA.org/store.

People I spoke with after the Institute said that the Boot Camp and Institute was the best NAELA conference they ever attended. By all accounts it was a success. The next joint conference is now in the planning stages and will be held at the Omni Shoreham Hotel in Washington, D.C., November 8–10, 2012. The third is also being planned for Washington, D.C., in 2013.

What else is NAELA doing about partnering and building alliances? In Boston, the Executive Committee and NAELA Executive Director Pete Wacht met with the National Association of Legal Services Developers (NALSD) to get to know each other and our organizations and to explore possible mutually beneficial partnerships. NALSD serves as a unified voice for the development of legal service programs for the vulnerable elderly as funded by the Older Americans Act. The Legal Services Developer is the individual in each state who is responsible for providing leadership in developing legal assistance programs for persons 60 years of age and older. From a public policy perspective, NALSD and NAELA have been strong advocates for the re-authorization of the Older Americans Act. The members of NALSD at that meeting were very interested in NAELA’s public policy initiatives and NAELA’s educational programming and resources.

In Boston, Pete Wacht, NAELA President-Elect Gregory French, Public Policy Consultant Brian Lindberg, and I met with Paul Nathanson, Executive Director of the National Senior Citizens Law Center (NSCLC), to explore ways that NAELA and NSCLC might work together to mutually benefit each other. NSCLC is a non-profit organization with a principal mission to protect the rights of low-income older adults. Through advocacy, litigation, and the education and counseling of local advocates, NSCLC seeks to ensure the health and economic security of those with limited income and resources, and access to the courts for all.

We talked about common issues such as nursing home residents rights, litigation support, Olmstead, and of course public policy. We will continue to explore ways our members may benefit from the resources of each organization.

As we all know, in our professional and personal lives, it’s all about developing relationships. The same is true with organizational relationships. The NAELA Board of Directors has adopted a policy to reach out to organizations with similar interests to see if mutually beneficial relationships can be developed. This is how NAELA has chosen to proceed in the Elder and Special Needs Law marketplace. Because NAELA is the only large organization that provides programs and services in all areas of Elder Law, the results of our strategy to develop alliances and partnerships can strengthen the perception of NAELA as the hub.
I recently read *Longitude*, by Dava Sobel, which focused on the quest to solve the greatest scientific problem of the 18th century: how to measure longitude. In fact, the problem plagued the world for several centuries in a time when exploration and discovery drove economies and brought power and wealth to various nations and their colonies. Lacking the ability to measure longitude, sailors were lost at sea as soon as they lost sight of land.

The British Parliament, in its Longitude Act of 1714, named a prize equal to a king’s ransom (20,000 pounds, or approximately $12 million in today’s currency) for a practical and useful means of determining longitude. At the time, one proposed solution focused on mapping the heavens, as astronomers and other men of science believed that you could find longitude by reading the stars. In contrast, John Harrison, a watchmaker, imagined a mechanical solution: a clock that would keep precise time at sea. For some, the mechanical solution seemed ludicrous, as no clock on land could keep precise time, much less on a rolling ship at sea. Nevertheless, despite much resistance from the scientific establishment, and after 40 years of continually improving on previous designs, Harrison succeeded in building his chronometer.

As Sobel notes, Harrison pioneered the “science of portable precision timekeeping … . He invented a clock that would carry the true time from the home port, like an eternal flame, to any remote corner of the world.” Knowing that time allowed sailors to plot their longitude correctly, giving them a precise location when at sea. Obviously things have changed since then. Yet, at the time, it was an incredible achievement.

This story made me think of the Elder and Special Needs Law profession. In most respects, isn’t success defined by solving your client’s problems? It could involve a veteran in need of access to government assistance programs. It could involve an older couple in need of estate planning guidance in order to address long-term care concerns. Or perhaps the octogenarian wife having to deal with the challenge of her husband’s worsening Alzheimer’s disease. Yes, NAELA members practice the law, but it’s always in the context of finding solutions.

The same could also be said for NAELA. The Academy provides needed services to members, yet those services tend to focus on offering solutions to members’ challenges. The bulk of NAELA members are sole practitioners or own a small firm, and finding affordable health and business insurance can be a challenge. Therefore, in the last year NAELA formed a partnership with Association Health Programs to provide greater access to the insurance marketplace to NAELA members so that they could have a chance to find better, more cost-effective options.

NAELA members are seeking greater engagement, often capturing key nuggets of information in peer-to-peer exchanges. Therefore, the decision was made to begin adapting NAELA’s national programming in this direction. The UnProgram, scheduled for January 20–22, 2012, in Dallas, is the ultimate event for sharing information and exchanging ideas among NAELA members, as participants craft the program as they go. But we’re also making changes to the Annual Conference and the National Aging and Law Institute so that more interactive sessions and opportunities to brainstorm with peers are incorporated within these events. Of course, several other options also exist, with the national and state Chapter Listservs and the online Section Communities and webinars.

NAELA members are always seeking the latest information so that they can most effectively assist their clients. This could involve obtaining some data from the Housing/Residency Rights Advocacy session that’s part of the Advanced Elder Law Boot Camp, or fact patterns from an ethics seminar presented two years ago at the Institute. To help in this area, the Academy developed the Online Education Center, www.NAELA.org/store, which holds all the national meeting seminars and webinars that have been recorded in recent years for members’ use. In addition, we’ve posted many older sessions that are still relevant in the NAELA Members Community Library for free download by members.

And these are just some of the ways that the Academy is seeking to solve member problems, all with the goal of providing real value. Because that’s what it’s all about, whether it’s John Harrison solving the challenge of longitude, NAELA members assisting their clients, or the Academy providing members with the tools to run their practice and practice effectively.

All the best for a happy and healthy holiday season. ■
When I first met William J. Browning (hereafter identified as Bill), I was clerking at a private law firm that had a probate practice and Bill was working as a clerk at the Franklin County Probate Court for the well-respected and renowned Judge Richard B. Metcalf. I was three years ahead of Bill in law school and therefore our paths did not cross often at law school, but occasionally. Thus ensued our friendship of 32 years, which ultimately turned into a 16-year partnership.

Rural Roots
Bill is a product of his upbringing. He was raised in rural Ohio by two loving parents, William and Mary. He has two brothers and two sisters, all of whom are accomplished in their own fields. His mom and dad were high school educated citizens who worked hard to raise their family. Bill’s rural upbringing afforded him a country touch. From an early age, Bill learned the lessons of frugality and hard work, which have never abandoned him. He was driving a pickup truck by age 12, which he maintained through various country mechanisms showing creativity and genius early. In those days, the county sheriff did not care if you drove without a license as long as he knew your family and who to complain to in the event of an accident.

Bill’s love of basketball is renowned. He played throughout school, participating as a major contributor to his Teays Valley High School basketball team. He continues to play basketball although he repeatedly hurts himself. He also loves golf.

Bill matriculated to Capital University, a small Ohio liberal arts private college. He worked and paid his way through college as a recreation parks employee, supervising old guys who still thought they could play basketball. How the circle closes. He then matriculated to Capital University Law School from which he graduated in 1983. While Bill was in law school, his father was an usher at the Ohio State basketball games and befriended Judge Metcalf. From that meeting, Judge Metcalf hired Bill as a clerk.

Upon graduation in 1983, Bill became an associate with the law firm of Martin, Pergram and Baxter. He worked for Thomas E. Baxter, a probate and business attorney. Tom
relied upon Bill to prepare and file probate pleadings and decedent’s estate administrations with the Franklin County Probate Court. Tom is no longer a partner but remains a close and true friend.

Making a Difference
While working in the probate area, Bill became aware of the National Academy of Elder Law Attorneys (NAELA). Like many of our clients, Bill has a child with disabilities. This drew him to the public benefits arena. Bill began attending NAELA meetings in the 1980s and shortly thereafter began to participate on committees. Bill became a member of the NAELA Board of Directors, ultimately leading to his election as President of NAELA in 2003. During the same time period, he chaired the Ohio State Bar Association Elder Law Committee at its infancy, and still participates in a substantial manner.

Litigation
Although Bill often states that he is not a litigator, in the Elder and Special Needs Law area, he is well known for his litigation. As a matter of fact, our firm rarely participates in lobbying the legislature and/or regulators because of Bill’s mantra “why help them correct something that they screwed up?”

Bill’s major contributions to Ohio law via litigation are as follows:

• **Young v. Ohio Department of Human Services**

  In *Young v. Ohio Department of Human Services*, 668 N.E.2d 908 (Ohio 1996), the appellee entered a nursing facility and subsequently applied for Medicaid benefits. The Allen County Department of Human Services denied the application due to appellee being a beneficiary of an irrevocable trust. The applicant appealed and eventually the Supreme Court of Ohio reviewed whether a testamentary trust that expressly prohibits the trustee from making any distributions that would affect the beneficiary’s Medicaid benefits constitutes a “countable resource” under the Medicaid regulatory scheme. The Supreme Court noted that the primary responsibility for the support of an individual lies with that individual and a trust created for the benefit of an individual will be considered an available resource unless the applicant’s access to the trust principal is restricted. The Court noted the majority rule that if the purpose of a trust is to supplement rather than supplant Medicaid the instrument will be enforceable as drafted. The Court found

Among William Browning’s accomplishments are the following:

• Certified Elder Law Attorney by the National Elder Law Foundation since 1996.

• Past President of NAELA. Former board member for the Arthritis Foundation of Central Ohio and the Central Ohio Area on Aging.

• Guest lecturer for the Ohio State University College of Law, the Capital University Law School, and the University of Dayton Law School.

• Presenter at several national NAELA conventions; presented program on Medicaid reform at the 1992 Joint Conference on Law and Aging in Washington, D.C.; participated in a debate in 2002 at the LTC, Inc., Conference in St. Louis; participated in presentations at the 2003 Conference on Law and Aging in Washington, D.C.; and numerous state-level legal conferences throughout the U.S.

• Martindale-Hubbell rating of AV, which indicates very high to pre-eminent legal ability and very high ethical standards as established by confidential opinions from members of the Bar.

• Ohio Super Lawyer.

Publications

• Amicus Brief for U.S. Supreme Court on behalf of Ohio State Bar Association and NAELA for the *Wisconsin Department of Health & Family Services v. Irene Blumer*

• *Ohio Lawyer*, November 1997, “Trusts and the Young Case, Planning for Disabled Beneficiaries”


• *Estate Planning Magazine*, November 1992, “The Impact of Retirement Plans on Medicaid Eligibility”

the plain language of the trust at issue to mean that the
Grantor intended to provide the applicant with a source of
supplemental support that would not jeopardize her access
to basic Medicaid assistance. The Court further followed
the language of the regulation and found that the benefici-
ary, having no control over the distributions from the
trust, cannot be deemed to possess the trust corpus as an
available resource.

• Pack v. Osborn

Bill Browning presented oral arguments to the Su-
preme Court, and in January 2008, the Supreme Court
issued its decision Pack v. Osborn, (2008) 76 Ohio St.3d
547. The Court held that when a court reviews a trust, its
primary duty is to ascertain the intent of the settlor. Fur-
ther, when a trust beneficiary requests public assistance,
the state first determines the nature of the trust in which
the applicant has an equitable interest, because the nature
of the trust determines whether its assets are available to
the applicant. The Court, citing Young, held that when
a trust beneficiary makes application for Medicaid, the
Medicaid eligibility rules in effect at the time the applica-
tion is filed govern the applicant's eligibility. The Court
noted that the Court of Appeals never determined the na-
ture of the trust, and stated that such a determination is a
necessary first step in determining whether the trust assets
are countable for Medicaid. The Court remanded to the
Court of Appeals with principles to consider. The Court
reminded the lower court that if terms of a trust permit
the trustee to expend principal, corpus, or assets of the
trust for the applicant’s medical care, comfort, mainte-
nance, health, welfare, and/or general well being, then the
assets are countable. Yet trusts that give the trustee sole,
absolute, and uncontrolled discretion to make income
and principal distributions, without a support standard,
is a pure discretionary trust, the assets of which are not
considered resources. (The pure discretionary trust lacks
a mechanism to compel distribution.) Finally, the court
stated that pursuant to a request by an interested party,
the court interprets the trust, and its interpretation must
be used in the Medicaid eligibility review process. The
Court unequivocally stated, “It is through this procedure
that the nature of the trust is ascertained—i.e., whether
the trust is a pure discretionary trust or a discretionary
trust with a support standard.”

• Vieth v. Ohio Department of Job & Family Services

In Vieth v. ODJFS, an administrative appeal taken
to the Tenth Appellate District found that the Court of
Common Pleas erred as a matter of law in affirming
the decision of the department to deny Medicaid benefits
to the applicant based on O.A.C. 5101:1-39-07. The court
found that income of the community spouse was not
countable in determining Medicaid eligibility by purchase-
ing irrevocable actuarially sound commercial annuities
that fully complied with O.A.C. 5101:1-39-22.8, for
the sole benefit of the community spouse. The applicant
maintained that his spouse’s purchase of the annuities
was proper under both Ohio law (O.A.C. 5101:1-39-
22.8) and federal Medicaid law. The Court agreed. After a
detailed analysis, the court found the annuities purchased
by Mrs. Vieth were compliant with the provisions of
O.A.C. 5101:1-39-22.8, and that the department’s posi-
tion that an improper transfer occurred was inconsistent
with federal law.

NAELA Conferences and UnPrograms

Bill and I formed the law firm of Browning & Meyer
16 years ago, and then added John Ball three years ago for
the present firm of Browning, Meyer & Ball. We created
the firm from the business practices and legal knowledge
acquired from attending NAELA conferences, but most
importantly the UnPrograms. If you were to view our law
firm from a business perspective, you would see that we
have indeed incubated, grown, and sustained an Elder Law
practice that is task based and functions for the most part
in an efficient manner. It has been a great experience being
Bill’s partner.

The Common Touch

The most important aspect of my friend and my
partner is his common touch with his clients. As you
all know, most of our clients are middle class because
Medicaid is immediately available for the indigent and
not necessarily needed by the wealthy. Bill is a product
of a solid middle-class upbringing and therefore empha-
sizes with people of a similar situation. His clients feel
comfortable about their decisions because of the time Bill
takes to explain in common parlance the most compli-
cated Medicaid regulations and law. His highest and best
gift is his ability to do so.
Association Health Programs is the administrator of NAELA’s NEW and EXCLUSIVE health and business insurance program including health insurance, long-term care insurance, life insurance, disability income, professional liability, fiduciary coverage, and more. These offerings are available to all members, their families, and employees. To inquire about the program, please use the link below and/or contact us at 888-450-3040.

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Shaping A New Social Contract

Is the Boomer generation ready to sacrifice?

By William J. Browning, CELA

I am not a victim. I am an older American and am ready to take responsibility for what I, in collusion with my generation, have done. We are the descendants of the Greatest Generation. They laid their lives and fortunes on the line to create a better world for us. Are we able to become the Greater Generation for our children and grandchildren? We can, if we own up to our responsibilities.

Who created an unsustainable system of health and welfare entitlements for seniors? Who created the easy credit and no-doc mortgages that have crippled the economy? Who created the bureaucracies that can’t stop spending? Who ran up the federal deficit? We did.

If it is [to be] fixed, who will fix it? Only we can. Curbing entitlements is the “third rail,” according to conventional political wisdom. That assumes we are irresponsible.

Consider health care. Do we really expect that each of us is entitled to all of the amazing medical treatments and drugs that our scientists have and will discover? Do we really expect to get that health care without giving up anything once we reach late middle age?

Do we really think that because we paid in to a system that supported our grandparents for 10 years in retirement, we are entitled to be supported for 25 or 30 years?

We, I repeat, we have created these unattainable expectations. We must change them.


John Borrows, Columbus, Ohio.1

This is a letter to the editor published in the Columbus Dispatch. It is simple, critical, and accurate. We (the Baby Boomers) have collectively been spendthrifts. Our policies have not resulted in a socialist’s utopia or a capitalist’s wunderkind. Our debate over universal health care focused upon rights and entitlements when it should have focused upon economics and demographics. It was another missed opportunity.

Reforming the Social Contract

Both Presidents Clinton and Obama appointed “blue ribbon committees” to study the problems with Social Security and Medicare and then ignored the solutions for political expediency. If the recommendations of the Obama committee were adopted, shared sacrifice would result. Lower benefits and higher taxes are the bitter medicine that we all know is required. We have failed to reform Social Security to deal with extended life expectancies and we have failed to reforms Medicare to either deal with the costs of care, the demographics, or the technology.

We have also been involved in two wars, allowed bankers to gamble in the stock market, enacted a prescription drug program which was ill-advised, have cut taxes, and have sacrificed our manufacturing sector. The result is a less prosperous America. Will it take a more courageous generation to rebuild?

The debt ceiling debates and the Standard & Poors U.S. rating decline are neon signs that our current social contract is unsustainable. Our collective unwillingness to reform the social contract during two prosperous decades will exacerbate the suffering.

As Elder Law attorneys, many of our clients are going to face economic hardship and rationing in the near future, some of which will be orderly and some of which will be chaotic. Many will face reductions in Social Security benefits and increased health care expenditures. How do we

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1 Columbus Dispatch, August 7, 2011, Letters to the Editor.
assist and represent these citizens, some of whom will face difficult choices?

Will there be different tiers of health care? Will the wealthy get better health care? They already do. Will the best and brightest of our physicians treat those with gold-plated insurance or cash, while the youngest doctors, second tier physicians, and perhaps even interns will train and learn their skills upon the poor, uninsured, or underinsured? Will the elderly facing nursing home care receive care based upon their ability to pay? How do we, as advocates and attorneys, help our clients through this maze?

The Role of Elder and Special Needs Law Attorneys

We will serve two very different roles. One will be our traditional role as serving our clients. We will continue to advise clients and manage their assets to gain eligibility into whatever programs are available. Our more difficult task may be helping to shape new social policy.

While historically we may have relied upon our politicians to shape our social policy, the leadership vacuum may result in a slow, agonizing collapse of some of the federal programs. It is possible that Medicaid programs may revert back to the states either officially or unofficially. If so, how do we help prioritize and allocate government expenditures?

1. Basic Care

Basic care will allow access to a hospital and access to a clinic or perhaps even a doctor for emergency care. This basic foundation or level of care will likely not include blanket prescription drug coverage, specialists, or specialty hospitals. It will likely be much closer to the care provided in Cuba or Mexico. We must strive to assist our clients in avoiding institutional care for as long as possible. The effort of NAELA member Tim Takacs in creating a “life care” arrangement may be central to these efforts, but with great risk to the attorney. We must assist clients and state officials in creating home-based and faith-based waiver programs which will stretch every dollar spent and every family’s commitment to avoid the “old folk’s home.”

2. Rationing/Cost Savings

Our demographics will dictate that in order to maintain our governmental health care programs, actual costs per patient must decrease.

The health care industry, states, or the federal government will ration acute care. Rationing care can be accomplished by either denying services or requiring significant co-pays when recovery is unlikely. What role will we serve?

3. Process

Former NAELA President Judy Stein engrained into many of us the value of “process.” The “process” may assist in logically, humanely, and fairly employing cost-saving techniques, rationing, cost sharing, and cost shifting to create order out of chaos. Where policy decisions are misdirected or instituted without any apparent authority, we as attorneys are uniquely qualified to advise, cajole, and perhaps challenge those policies. The “process” ultimately may shape the policy.

While some of our colleagues see our roles in society diminishing, I believe the inevitable reformation of our retirement and health care programs will create an opportunity and obligation for us to not only help our society’s most vulnerable, but also play a part in creating and transitioning to a new social contract.

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A common statement lawyers make about practice management software is, “I’m only using 10 percent of it.” This is usually followed by the question, “What can I do to better utilize what I already own?” There are law practices, however, that go far beyond the 10 percent utilization level. Why do some succeed while others fail? This article explores some characteristics of firms successfully using practice management software and what they do to improve the return on their practice management system investment.

The first step to better utilization is for you to decide if it is worth your time, and if it is, to dedicate time to the process. The promise of greater software utilization is twofold: it can save you time and it can help you manage more effectively. Time is saved by eliminating duplicate data entry, often a result of non-integrated programs. Time is saved when routine documents are automated and by organizing all essential client data and related document, email, note, calendar, and billing records into an integrated system. Automatic records produced in specific conditions also can save time. You can manage more effectively if you have the reporting tools to measure your progress against objectives and reports that can spot exceptions. Of course, it is necessary to create the habit of actually using these tools on a regular basis to be successful.

Examples of time-saving features include the automatic creation of estate administration deadlines for each new estate administration matter or letters generated automatically whenever an appointment event record is added. Examples of using technology for more effective management would include reports to track prospects, referral sources, matter work status, and fee status. There are also calendar reports by client, matter, staff for all outstanding tasks, and upcoming events.

**Step One: Define Your Process**

The best first step to supercharge the return on your technology investment happens to be a very low-tech task: Define what you do and how you want it done. Write down your firm’s script for processing a new client from pre-intake to final invoice, even client maintenance. In short you need a client processing manual, what one outlier firm calls their *Process for Success*.

Next, review the steps in your manual for opportunities for automation. Every firm has a unique way of doing things, similar but also different from other law practices. The software simply needs to support each step of each process wherever possible. For starters, you can target the 20 percent of your most common activities which likely affects 80 percent of your clients. Outline the steps you want followed. These steps should cover everything for the marketing, production, and administration of your model client. Essentially, this is your blueprint of how you will
rebuild your firm’s practice management system, one room at a time.

Include items that define what happens when someone contacts your firm. Does your staff have a script to follow? Is there a consistent way of capturing contact information including the referral source and why they called? What kind of follow-up actions should be taken if an appointment is not made with the initial call? Will you direct most prospective clients into seminars and workshops so that they may be educated in a group which is a more efficient use of your time? Can the information entered initially be used over and over again or will it be entered multiple times in multiple software applications? When an initial consultation is scheduled, is the right letter being used consistently to confirm the appointment? How do you remind and confirm client appointments and make sure each client has completed any necessary forms?

What would this client-processing procedures document look like? Start with a table of contents which breaks down the range of client processing steps into logical sections. Each topic might have a “quickstep” summary, followed by detailed instructions of how it’s done in your office using your software. Add a sidebar with reminders of things you want to tell a staff member every time they complete a certain task. Sample screen shots can guide and reinforce your staff as they work through tasks. Train staff to consult “the book” first. Over time, this documentation allows management to only be involved to handle exceptions.

Step Two: Assess Your Existing System(s)

Quantify and qualify the status of your existing system. A few sample assessment questions are outlined below. The objective is to identify what works and what areas remain

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2012 NAELA Membership Renewals

It’s time to renew your NAELA Membership.

Please be sure NAELA has all your correct information that you wish to see printed in the 2012 Membership Directory. In order to be listed in the 2012 printed Membership Directory, you will need to renew your membership no later than January 16, 2012.

Don’t let your membership expire — you rely on NAELA for so many things:
• Online directory for referrals
• Interaction with other NAELA members at live events and through the new Online Community
• Legislative advocacy and public policy updates
• Printed directory for NAELA member contacts and referrals
• Important publications like NAELA News, NAELA Journal, and NAELA eBulletin
• Specialized information through NAELA programs, Chapters, and Sections

Important Dates to Remember
December 15, 2011: Renew by December 15, 2011, to receive your free online seminar.
December 31, 2011: End of Membership year.
January 16, 2012: Last date to renew and be included in printed 2012 Membership Directory.

For further questions about membership or your renewal, please contact Laura Munley at lmunley@naela.org or 703-942-5711 Ext. 222.

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to be solved. These questions help you gain focus on your system development efforts.

**Database, Documents, and Procedures**
- Do you have a contact database with all information needed to manage relationships?
- Do you have a matter database with adequate information to track and manage to completion?
- Are documents automated and consistently named and saved to the correct folders?
- Can you quickly find documents or keyword search the full text of any file?
- Are email, document, phone, note, and calendar records related to contacts and matters?
- Are all of these tasks integrated into one client- and matter-centric system?
- Is there a manual to train new staff and to minimize the impact of staff changes?
- Is the same information being entered more than once and in multiple sources?
- Can you easily identify and produce contact information for printed and electronic mailings?
- Can you access a client’s electronic file remotely, using a smart phone, tablet, or PC?
- Is your data backed up in case of a fire, flood, theft, storm, or unexpected external event?
- Who is responsible and when was the backup last checked and validated?

**Management Reports**
- Are they created by entering information into one or separate programs?
- Do you know how full your appointment calendar is for the next few weeks?
- Have you followed up with all initial contacts and from recent weeks?
- Will there be average, higher, or lower cash flow in the next month?
- How many new calls are you receiving and how is your conversion rate compared to last year?

The outlier firms with high utilization and better productivity consider these and similar questions and have typically implemented system-based solutions.

**Step Three: Design the Implementation Plan**
Your practice support system is either getting better or getting worse; it never remains static. Therefore, always have a prioritized list of what operational areas to improve. You don’t have to conquer everything all at once. Developing a culture of change where individual issues are identified, solved, and documented as part of an overall system can slowly turn your ship around to a more time-efficient and profitable heading. The successful firms do this and improve their practice support system incrementally.

As you work on your business, give consideration to four key factors. If you lack any one of these factors, your efforts to improve your operations will suffer. I use the acronym of **T.I.M.E:**
- **T**ime commitment
- **I**nterest to pursue better use of technology
- **M**entality
- **E**xperience in refining procedures in the practice

Remove any one of the four factors and chances are your practice management initiative may fail.

Should you lack the time, interest, aptitude, or experience, you can still succeed by following a slightly different path. Conserve your time by delegating. Decide on your course of action, delegate to someone who has the interest and aptitude to work with the software, and then disappear until the target completion date. Asking others for suggestions gets them involved in the process and helps gain their commitment. If you don’t have the time or talent within your office, seek experienced outside assistance, especially for the system design and training.

The benefits of a well-executed system are many. It will help you manage growth and respond to change. It will support management of relationships with prospects, clients, other professionals and referral sources. A good system will help move matters to completion faster and with more control over the entire process. It can liberate your time to meet with more prospective and existing clients which is the key to generating more work and profits for your firm.

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**Congratulations to the Newest Certified Elder Law Attorneys (CELA)**

Shannon Christof, Moon Township, Pa.
Leslie Yarnes Sugai, Los Gatos, Calif.
Community Basics

Tips to Help You Manage Your NAELA Community Listserv Emails

The NAELA Member Listserv is a great place to share information with fellow NAELA members or post questions regarding your practice that you would like to ask the greater NAELA membership. If you belong to a NAELA Section or NAELA State Chapter, you also have access to these Listservs for more focused exchanges. Sometimes the emails from the Listservs can be difficult to keep up with. Here are a few tips that might make the job a little easier.

You Can Keep Your Listserv Communications Separate from Your Work Email
By adding multiple email addresses to your NAELA Online Community Profile, you can select different email addresses for the delivery of your Listserv communications.

Decide How You Want to Receive Listserv Emails
You have three options:
- Have individual messages emailed to any designated email address you select
- Have a daily summary of all messages emailed to any designated email address you select
- Don’t receive any email notifications, but read all messages online by going to the Group’s Listserv archive.

Change the Auto Settings in Your Email Program
You can set up rules in your email program that will automatically move messages from the Listserv into a designated folder.
Instructions will vary by email program, but this is generally found under Tools. For Microsoft Outlook, go to Rules and Alerts and create a new rule. From there you can move messages with a specific word to a folder (the word to filter could be the Listserv address).
You can also set up rules to send certain types of messages directly to your junk folder.

This can be helpful if you have strong feelings about not receiving messages on certain topics and would rather those go right to your junk folder. In Microsoft Outlook, a rule can be set up for a subject or by sender. Go to Rules and Alerts and create a new rule.

For more information on how to get the most out of your NAELA Online Communities, visit the NAELA website. You can find a link to the User Guides on the homepage.
Ethical Issues in Representing Multiple Family Members

By Stuart D. Zimring, CAP

When you have clients who are related or connected in some other way, you must deal with the ethical issues involving potential conflicts of interest from the outset.

One of the highest compliments that can be paid to an Elder Law attorney (or any other attorney, for that matter), is to have an existing client refer a new client. If the clients are unrelated, this does not pose a problem. But where the clients are related or are connected in some other way (business partners for example), ethical issues involving potential conflicts of interest are presented. If these issues are not dealt with at the outset of the representation, serious problems for the attorney may arise well into the future, ranging from professional negligence to violations of the Rules of Professional Conduct.

This article will examine some of the more common fact patterns that occur and suggest methods, systems, and forms for avoiding problems. Since each state has its own Rules of Professional Conduct, this discussion will use the ABA Model Rules of Professional Conduct, the NAELA Aspirational Standards, and the American College of Trust and Estate Counsel (ACTEC) Commentaries on the Model Rules as its reference points.

This CAPsules column is provided by the members of NAELA’s Council of Advanced Practitioners (CAP).
Stuart D. Zimring, CAP, N. Hollywood, Calif., is a NAELA Past President and NAELA Fellow.
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1 ABA Model R. Prof. Conduct 6th ed. (ABA 2007) (hereafter “MRPC” or “Model Rules”).
2 The NAELA Aspirational Standards for the Practice of Elder Law with Commentaries (hereafter “Aspirational Standards”) can be found on www.NAELA.org.
Facts

Fred and Wilma have been your clients for years. During that time, you also represented Wilma’s sister, Minnie, as Conservator of Minnie’s friend Jane. When Jane died, your representation of Minnie ended. Fred and Wilma referred their son and daughter-in-law, Barnie and Susan, for estate planning. Subsequently, Minnie and her husband Mickey came to you to do their estate plan and thereafter referred their son, Steve, to do his estate plan.

All of them are shareholders in Widgets, Inc., a wholly owned company run by Fred and Barnie. Their respective interests in the company constitute a major percentage of each client’s estate. So far, everyone gets along fine, the company is doing well, and there is no indication that this will change in the foreseeable future. There is no Buy-Sell Agreement and each is free to do whatever he or she wants with his or her shares.

Analysis

Are there potential conflicts here? Of course. Parents argue with children, siblings argue with each other, and husbands argue with wives. In the context of this fact pattern, are these potential conflicts waivable? The author believes they are, so long as the terms of the engagement for each client are clearly delineated.

The basic rule is set out in MRPC 1.7:

a) Except as provided in paragraph b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

1) the representation of one client will be directly adverse to another client; or
2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client, or a third person or by a personal interest of the lawyer.

b) Notwithstanding the existence of a concurrent conflict of interest under paragraph a), a lawyer may represent a client if:

1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
2) the representation is not prohibited by law;
3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
4) each affected client gives informed consent, confirmed in writing.

The questions the Elder Law attorney needs to ask herself are set forth in MRPC 1.7:

• Will my representation of any of these people be directly adverse to any of the others?
• Is there a risk that representing one or more of them will limit my responsibilities to any of the others?
• Can I provide competent and diligent representation to all of them?
• Will I be asserting a claim on behalf of one of them against another?
• Have all of them given informed, written consent?

In the context of an Elder Law practice, all of these questions can be answered appropriately. The theoretical stumbling block exists in the definition of what is meant by “adverse” in the context of estate planning. For example, if Fred and Wilma decide to disinherit Jeff, or Fred decides not to leave any portion of the corporation to his brother, are you taking a position “adverse” to another client when you prepare the documents?

There is no question an argument could be made for that position. However, if the written consent and disclosure recites that each party is free to do whatever he wants with his estate, and each party acknowledges that reciprocal right, is the drafter doing anything “adverse”? The author does not think so. Contrary to the opinions of many of our children, inheriting from one’s parents is not a “right.” Each of us is free to do whatever we want with our estates.

The key ethical point here is full and open disclosure of the issue at the outset and absolute compliance with the applicable Rule. Appendix A contains the form the author uses in this situation. Again, it is signed by all parties before any work is commenced.

On the other hand, what if Barnie comes to you and says he believes Fred no longer has the capacity to run the business and wants to assume control via the Durable Power of Attorney you prepared? Ten minutes later Fred


4 MRPC 1.7.
calls instructing you to prepare revisions to his Estate Plan disinherit Barnie because Barnie is trying to force him out of the company. You now have a direct conflict.

Under MRPC 1.7(a) and Aspirational Standard B.1, even if the representations are characterized as “separate” rather than “joint” (i.e., confidences are not shared among the various parties), there is a direct conflict and your representation of the parties probably must end. As the ACTEC Commentaries to MRPC 1.7 note: “Some conflicts of interest are so serious that the informed consent of the parties is insufficient to allow the lawyer to undertake or continue the representation (a ‘non-waivable’ conflict). Thus, a lawyer may not represent clients whose interests actually conflict to such a degree that the lawyer cannot adequately represent their individual interests.”

The key takeaway here is that these issues must be investigated and discussed prior to the commencement of the representation. If they are, future problems are avoided.

Appendix A
INTER-GENERATIONAL FAMILY DUAL REPRESENTATION DISCLOSURE AND CONSENT

As you know, your son Mickey has asked me to represent him in the development of his Estate Plan and in preparing his Estate Planning documents. I am happy to do this. It is, however, important that you understand and consent to the considerations involved in that representation, since I have previously represented and continue to represent you in connection with your Estate Planning and other matters. I have not previously represented Mickey.

In my previous representation of you, I have made certain not to disclose any details of your finances, Estate Plan, or Estate Planning documents to other members of the family. There is no reason why I cannot continue to represent you and represent them at the same time, as long as everyone is aware of the potential problems regarding the preservation or sharing of confidential information and the resolution of conflicts of interest that may arise when I undertake to represent more than one unit of the family.

Duty of Confidentiality and Loyalty; Conflict of Interests

As your attorneys, we owe you a duty to preserve any confidential information you share with us unless you authorize us to disclose such information. Similarly, we owe you a duty to act solely in your best interests, without being influenced by the conflicting interests of other clients. If we represent two (2) units of the same family, we have a potential conflict of interest resulting from our conflicting duties to the separate family units. For example, in advising you regarding your Estate Planning, we would ordinarily be obliged to make known to you any information that we believe might be important to you in making your Estate Planning decisions. This could include our knowledge of decisions affecting you made by other members of the family. However, because we are under a duty to preserve the confidential information made known to us by the other family members, we cannot disclose this information to you unless the other family members consent. Also, we could not advise you that actions planned by other family members might be adverse to your own personal interests unless the other family members consent.

Each of you may have differing and conflicting interests in Estate Planning objectives. You may have different views on how property should be distributed among various family members and other beneficiaries. In some situations, it may be advisable to hold property in trust to take advantage of the available tax benefits, which may result in a reduction of control or benefit for some of you. These are just a few general examples. Each situation is unique.

In separate letters to you and to Mickey, I have addressed how each separate family unit has chosen to be represented as between themselves.

Necessity of Consent

Because we have previously represented you, and continue to represent you, and because your interests could potentially be affected by his Estate Planning decisions, it will be necessary for both you and Mickey to consent to the form of our representation of you and vice versa.

The form of our representation is known as “concurrent separate representation.” In concurrent separate representation, one lawyer represents both family units, but the representation is structured so that each family unit has the same relationship with the lawyer as if each family unit were represented by separate counsel. In such a case, each family unit receives totally independent advice. The lawyer meets separately with each family unit and does not discuss with one family unit what the other family unit has disclosed unless the disclosure is authorized in advance. Unless authorized to do so, the lawyer does not use any information obtained from one family unit in advising the other family unit in the development of its Estate Plan, even if the result is that the two plans are incompatible or the plan of one family unit is detrimental to the interests of the other family unit.

Mickey must also agree that we are under no duty to influence you to leave any inheritance to him. Mickey hereby acknowledges that you are perfectly free to leave your estate to whomever you desire.

In order for us to represent each family unit, both units must agree that in the absence of express written instructions to the contrary, our communications with each unit will remain confidential and shall not be communicated by us to the other family unit.

If we begin with representation of all of you in this manner, any

5 Aspirational Standards B.1.
6 ACTEC Commentaries, p. 93.
of you is completely free to change your mind and have separate counsel at any time. If any of you chooses to seek separate counsel, we will withdraw from representing all of you unless the persons seeking separate counsel consent to our continued representation of those remaining.

**If Conflicts Develop**

If we begin representing you and Mickey and an actual conflict of interest arises between you two so that in our judgment it would be improper for us to continue to represent both of you, we will withdraw from representing both of you unless both of you consent to our continued representation of one of you.

If the above meets with your approval, please sign one (1) copy of this document and return it to me in the envelope provided. When all parties have signed their respective Disclosures and Consents, we will be able to commence our representation.

In the meantime, should you have any questions, please feel free to call. In addition, you should feel free to consult independent counsel about the effect of signing this document.

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**Endorsement**

I have read the foregoing and understand its contents. I consent to having you represent both of us on the terms and conditions set forth. I understand the discussion of potential conflicts, and confidentiality, and agree that there shall be no disclosure of information between family units unless specifically authorized in writing. Further, I agree that each family unit is free to plan its respective estate in any way it wishes, now or in the future, without regard to its impact on the other family unit.

Dated: ________________________________

Signed: ________________________________

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The UnProgram is a unique educational meeting which offers NAELA members from across the country an opportunity to spend a long weekend learning and connecting with peers. It’s three days of brainstorming, exchanging ideas, and sharing substantive information, discussing issues relating to practice management, staffing, time management, and other relevant topics.

Find out more. Go to www.NAELA.org. Click on Meetings and Events > Live NAELA Events > UnProgram.
Representing Children with Learning Disabilities

By Brian F. Mahoney, Esq.

SPED (special education) lawyers might not get headlines or win million-dollar judgments, but the stakes cannot be any higher because a child’s early educational experience will impact his or her entire life.

“I know what it’s like to ‘feel stupid,’ because I am learning disabled and when I was younger I had trouble reading, but ….”

At age 12, my daughter, an eighth grader, wrote this in her essay seeking private high school admission. We were fortunate. Her teacher called me midway through her first-grade year and alerted me about my daughter falling behind. As an attorney and her father, I was motivated to learn how to fight for her rights. I found an attorney who helped point me in the right direction in my daughter’s seventh-grade year. Today, my daughter no longer “feels stupid.”

NAELA’s mission is to establish NAELA members as the premier providers of legal advocacy, guidance, and services to enhance the lives of people with special needs and people as they age. I write with the heart of Dad and also as an attorney with almost 30 years’ experience and who has represented children with disabilities. This area of law is often called SPED law, short for Special Education. SPED lawyers might not get headlines or win million-dollar judgments, but the stakes cannot be any higher because a child’s early educational experience will impact his or her entire life.

Imagine a child who wants to learn and tries hard every single day. She just can’t seem to get it, but all the other kids do. The child will begin to doubt herself and her self-esteem will shatter. A learning disability may also impact social skills and school can become one big ball of confusion for the child.

It’s often hard to know if a child has learning disabilities. Is there an attention or behavioral issue at home? Parents will not know what’s going on in school without input from teachers. Does a child miss a lot of school or arrive late, offering excuses to the parents of not feeling well? Is that because they fear school or feel lost? Does she suddenly “hate school”? How do report cards look? Even report cards may not be instructive because grades may be scaled and not reflective of the child’s actual academic performance level. It might also be a good thing that grades are scaled because it gives a hard-working student with learning disabilities a taste of success that might entice her to work on as opposed to saying, “what’s the use,” and giving up. If your state administers annual testing for all students, then how has he done on the standardized testing? Does she spend inordinate amounts of time on homework? Does a child seem frustrated or fatigued doing homework? Teachers and instructors know what is within the norm for learning and social interaction. Often they alert parents to a possible learning disability but not always, even though federal law encourages teachers to seek out learning disabled children. See 20 U.S.C. § 1412(a)(3)(A) and (B) (1997) and (2005).

Most Parents Need Help

I have an extensive background in criminal and civil litigation, and yet advocating for my daughter was one of the most difficult matters I’ve ever undertaken. My conclusion is most parents cannot handle SPED matters on their own and will need help. It is very emotional because it involves “their baby,” and objectivity is difficult to maintain.
A colleague of mine, Sam Schoenfeld, of the Wallace Law Office in Canton, Mass., specializes in representation of children with learning disabilities. He helped me outline the procedural guidelines in this article. Sam met with my daughter and me when she was 12. Sam was very kind and my daughter related to Sam. It is important the attorney chosen relate not only to the parents who are paying for legal fees but also to the child.

This article will discuss Massachusetts procedure but it is all predicated upon the federal law known as the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. Sec. 1401, et seq. IDEA provides special education eligibility for children age 3 up to age 22 and for the student to obtain Free Appropriate Public Education (FAPE).

Where to Start

Once a parent believes a child may have a learning disability, a written request is made to the school for an evaluation to determine eligibility for special education. Within five school days, the school is required to send a consent form to the parents to allow testing to determine whether a disability exists. Evaluations are commenced by teachers and other qualified specialists at the child’s school at no expense to the parents. The school psychologist, for example, can perform an evaluation to explore emotional or social difficulties the child may face. In Massachusetts, parents or their representative can observe the child in a classroom setting after making reasonable arrangements with the school.

Within 45 school days of the school’s receipt of the parents’ signed consent form, the district must convene a team. The team may consist of some or all teachers, guidance counselors, the school psychologist, administrators for that school, and maybe the district’s SPED director or other special education representative for that school who may chair the meeting. Parents have a right to participate in team meetings and are integral members of the team. See 34 C.F.R. § 300.344(a)(6); Notice of Interpretation of IDEA regulations, 34 C.F.R. Part 300, Appendix A, Answer to Question 9 (1999).

The team reviews the evaluation reports and the child’s academic and social experience in the school. Parents can hire advocates, typically a non-lawyer who should know the rules and can assist the parents through this nonintuitive maze. Parents, advocates, relatives, and friends serving as support can be present. Legal counsel can also be present at a team meeting, although this practice varies and would likely result in the presence of school’s counsel as well. The presence of parents’ legal counsel could inhibit a frank discussion.

The Team’s Decision

If the school district disagrees with the parents and concludes that the child is not eligible for special education services, parents should present medical/counseling records or hire specialists to conduct independent evaluations. The key is to know what types of tests should be given. A neuropsychologist might be needed. Speech and language specialists might be of help. Central Auditory Processing (CAP) testing can rule out disabilities relating to learning, hearing, and processing information. Testing typically involves IQ tests and testing in reading and writing ability. Parents should ask the school to pay for some of these evaluators’ services if the parents disagree with the findings of the school’s evaluations. Health insurance might cover some testing.

If a child is deemed eligible for special education services, parents should scrutinize the types of “individualized educational services” offered. The purpose of these services is to remediate the child’s deficits. The legal standard for eligibility is when the disability is “impeding effective progress in the general educational curriculum.”

Individualized Education Program

An Individualized Education Program (IEP) is presented to parents shortly after the team is convened. The IEP includes a comprehensive description of all diagnoses and every offered service. The IEP in part spells out what services will be provided and who will provide them. It must state the measurable goals and benchmarks for assessing progress specific to the needs of the child.

The team process should be a collaborative discussion to obtain consensus. As a practical matter, since the legal burden falls on the school to write the IEP, it is usually drafted by the school and presented to the parents at a team meeting. It is hard, if not impossible, for a parent to review and consider the IEP on the fly and to ask questions at the same time. In my case, I asked as many questions as
I could, then asked to reconvene the meeting to review and discuss the IEP.

Parents can accept offered services and reject the IEP in part. Attorney Schoenfeld advises parents to be careful not to reject the entire IEP in every case even if it is inadequate, because children will be better off engaging in at least some services. Some cases have been decided against parents solely on the grounds that the parents rejected the entire IEP, thereby absolving the school of responsibility for a child’s failure to make progress. If an IEP is rejected, the parties can reconvene the team and discuss their differences, agree to more evaluations, go to mediation, or litigate the matter.

Implementation

What if the IEP is adequate but its implementation is inadequate? For example, if a child is supposed to receive 50 minutes of speech therapy, but there is one speech pathologist helping four other children during the same time block, is that really 50 minutes or 10? What if one of the children has behavioral problems and the instructor cannot begin therapy until the behavioral problems are resolved? There can be many difficulties. Some children dislike the perceived stigma of SPED settings and do not want to be “labeled.” Many school districts face budget cuts and have slashed local aid. There may be resentment in the school district from townspeople who tell stories of parents of children with disabilities moving into their town just to take advantage of a good school system and its SPED services. It is a complex and tremendously stressful milieu for the parents and the student. Often parents will hear, “We’d like to help but we only have one SPED teacher.” Cost is not a valid consideration under the law and counsel should note any such assertion by a school district. In reality, cost is often the root of the problem with too many students with problems and not enough resources.

Mediation is an option in Massachusetts. Parents do not pay for the mediator — but it’s not binding and you can lose precious time if no deal is reached and the child toils away day after day. You can use mediation as a discovery process — but if the parent has a good claim and the school is digging in its heels, then it may expend precious resources on legal fees at this stage. On the other hand, if the parents maintain good relations with the school district, mediation may resolve the issues in a cost-effective manner.

Alternatively, parents can place their child in an appropriate, private placement without the consent of the school district and seek reimbursement of tuition from the school district. This is called a “unilateral placement.”

Due Process Hearing System

Federal law requires every state to set up a due process hearing system. See 20 U.S.C. § 1415(f) (1997) and (2005). Parents have a right to an attorney, to a record, and to present and challenge evidence before an impartial hearing officer. In Massachusetts, parents request a hearing by filing a Request for Hearing with the Bureau of Special Education Appeals.

If the parents’ Request for Hearing proceeds with a concluded hearing, a ruling will issue with findings. The parents can win some, none, or all issues. This is important because under IDEA, a prevailing parent can obtain an award of legal fees proportional to the claims won. But note that the same is not true for the advocate’s or educational consultant’s fees or for witness or expert’s fees. There is a possibility of reimbursement for privately funded evaluations if the Hearing Officer rules that the school district did not, but should have, performed these evaluations. (Caution: Prevailing party status is not granted to parents in the situation where they obtain most of what they want, but the case is settled without a Hearing Officer’s ruling. Sometimes, parents feel they cannot settle because they’ll lose thousands of dollars in legal fees.)

Parents have 90 days after the Administrative Hearing Officer’s written decision to appeal to the Federal District Court. The issues will be whether the school district has complied with the procedures set forth in IDEA and whether the IEP is “reasonably calculated to enable the child to receive educational benefits.” See Bd. of Ed. of Hendrick Hudson Central Schl. Dist. v. Rowley, 458 US. 176,206-07 (1982).

IDEA’s statute of limitations limits claims to matters arising two years prior to the due process filing date or two years from when the parent knew or should have known of the problems.

NAELA’s mission is crucial. Every day NAELA members represent both ends in the spectrum of life — the old and frail and the very young with disabilities — all of whom are clients who cannot fight for themselves.
NAELA, along with nine other organizations that make up the National Guardianship Network (NGN), held the Third National Guardianship Summit: Standards of Excellence in October 2011, at the University of Utah S.J. Quinney College of Law. The Summit was made possible by grants from the State Justice Institute, the Borchard Foundation Center on Law and Aging, and contributions made by the NGN and other national co-sponsoring organizations.

NAELA President Edwin M. Boyer, Esq., CAP, led the NAELA delegation to the Summit, which included 92 delegates, observers, authors, funders, and facilitators. Other NAELA delegates included Wendy Cappelletto; A. Frank Johns, CELA, CAP; Rebecca Morgan, CAP; Catherine Anne Seal, CELA; and K.T. Whitehead, CELA.

Standards developed as a result of the Summit offer the groundwork for nationally recognized standards for guardians of adults. The standards were broken down into six categories:

1. Core Standards
2. Guardian’s Relationship to the Court
3. Fees
4. Financial Decision-Making
5. Health Care Decision-Making
6. Residential Decision-Making

Strategies to implement recommendations of the Summit include statutory change, amendments to the Uniform Guardianship and Protective Proceedings Act, administrative rules/regulations, court rules, best practice promotion, and education.

Summit participants recommended starting a campaign to gain support for the recommendations and standards. The participants hope that by implementing the proposed items, they will build alliances with volunteer guardianship programs, the disability community, and public guardians.

The NAELA Guardianship/Conservatorship Steering Committee and Public Policy Committee will review the proposed recommendations and standards before submitting them to NAELA’s Board of Directors for review and approval in 2012.

Find more information on the Summit, background information on adult guardianship reform, and existing guardianship standards at www.GuardianshipSummit.org.

The National Guardianship Network consists of the following organizations:

- AARP
- ABA Commission on Law and Aging
- ABA Section of Real Property, Trust and Estate Law
- Alzheimer’s Association
- American College of Trust and Estate Counsel
- Center for Guardianship Certification
- National Academy of Elder Law Attorneys
- National Center for State Courts
- National College of Probate Judges
- National Guardianship Association

Other national co-sponsoring organizations that were represented at the Summit included:

- The American Bar Association Commission on Mental and Physical Disability Law
- The Arc
- The Center for Social Gerontology
- The National Adult Protective Services Association
- The National Association of State Long-Term Care Ombudsman Programs
- The National Association of State Mental Health Program Directors, Older Persons Division
- The National Committee for the Prevention of Elder Abuse
- The National Disability Rights Network
- Bazelon Center for Mental Health Law
In today’s economy, everyone can use a few tips that will save them money in their businesses. We asked the members of the Practice Development/Practice Management Section for a few of their tips. We are overwhelmed by their generosity and will run more of their tips in upcoming issues. Let’s get started.

A Penny Saved …

Angela N. Manz, Esq., Virginia Beach, Va., says, “I have a reputation around the office as being frugal, but I realize as a solo practitioner that every dollar the firm spends is a dollar I won’t take home this year.” Here are some of her top tips:

Office Supplies. When purchasing office supplies, make sure you compare the cost of shipping. Shipping really runs up those “cheap” prices. And look for vendors that offer discounts to members. NAELA Member Benefit Partner Office Depot offers discounts to NAELA members.

Advertising. “When I started my firm, I signed up for a basic yellow pages listing because everyone else had one,” says Manz. She realized, however, after a year she received zero business from this listing. Although it wasn’t terribly expensive, it wasn’t generating any revenue and she stopped the subscription. Says Manz, “Don’t keep doing it because everyone else does it. Let everyone else keep wasting their money. No reason for you to waste yours.”

Telephone Service. With a small solo practice with two staff members, Manz found that using an Internet phone service (VoIP) for their telephone system was much more cost effective than going with the local business provider. Their phone system includes free long distance, multiple lines for phones and a fax, and all voicemails are sent via email with the voice message transcribed into text so it is easy to read in the email. (Editor’s note: For member discounts on audio and web conferencing, check out NAELA Member Benefit Partner InterCall. See page 31 for their contact information and a listing of all NAELA Member Benefit Partners.)

Go Digital. Don’t waste money storing paper files for years after the matter has closed. With the paperless technology available these days, there is no reason to continue this practice. Manz’s firm scans all incoming documents for each client’s matter. After a file is closed, they rescan all documents (in case something was inadvertently not scanned earlier) and then shred the documents and reuse
the file folder. An added benefit for their clients and the business, “We can supply them with a copy of their file very easily and cost effectively if they need it in the future without paying a fee to retrieve the documents from a storage facility. Our office isn’t completely paperless, but it is pretty close to it,” says Manz.

The Magic Wand
John Zwolanek, Esq., Wanuwanke, Wis., offers this suggestion: “My suggestion is the Magic Wand, an ultra-portable scanner that scans documents. I use it daily and it saves time for me because many times a photocopier is just not available. You can find it at major retailers for about $100.”

Office Supplies and Equipment, Publications, and More
Alice Reiter Feld, CELA, Tamarac, Fla., has several tips to share:
• There is no one place with the best prices on office supplies and equipment. Always make sure you check the competition. And don’t forget to check out the online suppliers.
• If you haven’t looked at a book since the last update, send the automatic update back.
• Rent out your conference room for depositions on an hourly basis.
• Check all your phone bills, especially the bills for cell phones.
• Recycle paper into note pads.

Open a Satellite Office
“Elder Law and Special Needs attorneys should consider opening a satellite office” offers Leonard E. Mondschein, CELA, Miami, Fla. “This new location will generate additional revenue, as well as increase the attorney’s visibility in a new geographic area. The cost of a satellite office can be very reasonable compared to the benefit to be derived. Marketing the new location can be as labor intensive as the attorney wants to make it, depending on the time and financial commitment he or she is willing to expend.”

If you have money-saving business tips you’d like to share, send them to Nancy Sween, NAELA Director of Communications and Publications, nsween@naela.org.

Save Money on Insurance with NAELA Member Benefit Partner AHP

With over 20 years of experience, AHP (Association Health Professionals) is dedicated to providing greater access to more affordable health and business insurance options. AHP offers a broad knowledge of products, rate stability, buying power, and hands-on service. Here’s what a couple NAELA members have to say about their experience with AHP.

Martha C. Brown, CELA, CAP
Martha C. Brown & Associates
St. Louis, Mo.
Type of insurance purchased: Health
Brown had a difficult time finding insurance for her small law firm of 14 employees. After switching to AHP, her employees pay a significantly lower deductible, as well as premiums at 75 percent less than what was offered by previous programs.
A previous quote on coverage for Brown and her family was a whopping $2,200 a month. “That would be fine… if I didn’t have a mortgage to pay for. [AHP] compared the prices for each individual employee versus the group and showed us how we could save money,” she said.

Kelly Frere, CELA, CAP
Guyton & Frere
Knoxville, Tenn.
Type of insurance purchased: Professional Liability
Frere first read about AHP in a NAELA News article. Compared to the last insurance programs her firm had used, they saved 7 percent.
“The coverage of AHP was about the same as programs we had used before, but the price was better. Also the [representatives] we dealt with were very nice,” she said.

Find out how NAELA Member Benefit Partner AHP can help you find the best insurance plans for you and your law firm. Contact information can be found on page 31. And check out all the Member Benefit Partners while you’re there. All Partners offer NAELA members discounts on their products and services.
On November 21, 2011, the supercommittee announced it had failed to reach consensus on a plan to reduce the deficit by $1.2 trillion over the next 10 years.

Under the Budget Control Act, Congress’s failure to create a plan to reduce the deficit by $1.2 trillion means a process called sequestration will go into effect on January 1, 2013. Sequestration will enact automatic, across-the-board cuts to both defense and non-defense programs, approximately $55 billion from each. President Obama has promised to veto any attempt to undue the harsh cuts, but he is encouraging Congress to go back to work and come up with a solution to reduce the deficit by $1.2 trillion. Either way, under sequestration or a Congressional deficit plan, it is safe to say that NAELA’s policy agenda could be hindered by deficit reduction for years to come. We expect serious changes will be coming for both entitlements and the social service network on which our clients often rely. As we gear up for what is to come, we want to give you a summary of our federal activities from 2011 and provide a sense of what we are likely to be working on in the coming year.

Affordable Care Act (ACA)

The Affordable Care Act (ACA) celebrated its first birthday in March, and despite the repeal pledge of GOP freshmen, it remains the law. The Supreme Court granted certiorari to three separate cases on the constitutionality of the ACA and set aside time for oral arguments in March. The court expects to issue a decision on the following issues: 1) whether the Anti-Injunction Act applies to the ACA, 2) whether the law’s mandate that individuals purchase health care exceeds Congress’ power through the commerce clause, and 3) whether the law can survive without the individual mandate.

The Department of Health and Human Services (HHS) continues to roll out the law’s provisions, to the benefit of millions of Medicare beneficiaries.

Under the law, the Centers for Medicare and Medicaid Services (CMS) created the Office of Innovation (CMMI). This summer, it announced several new initiatives to help CMS provide better care at a lower cost. In this effort, CMS is working with the Administration on Aging (AoA) in one of the first steps to link up the Medicare fee-for-service system with the aging network.

In addition, many families were allowed to keep children up to age 26 on their health insurance plans, insurers are required to offer the same premium to all applicants of the same age and geographical location without regard to most pre-existing conditions, and the ACA created a high-risk pool program to help adults who are uninsured and have a pre-existing condition get insurance as soon as possible.

Despite HHS’s implementation progress, one of the few elements of the law to address long-term services and supports hit a major setback this fall. In September, a CLASS (Community Living Assistance Services and Supports Act, the new federal long-term care insurance program) actuary left his job and in the same week, the eight Administration on Aging (AoA) staff assigned to work on CLASS were transferred to other offices. This sparked rumors of a shutdown. On October 15, HHS Secretary Kathleen Sebelius announced that her department will not implement the CLASS Act, as HHS “does not see a viable path forward for CLASS implementation at this time.”

CLASS advocates (like NAELA) will continue to work against efforts to repeal the law. While implementation will not happen under the current Congress, advocates are determined to keep CLASS as part of the law, in hopes
that it may be improved and implemented under a different Congress. For more information on CLASS, see Brian Lindberg’s article in the December issue of the Gerontological Society of America available at http://tinyurl.com/LindbergCLASS.

Older Americans Act

The Older Americans Act (OAA) is the federal foundation for the aging network, and its programs help older Americans age with dignity at home and in the community. The OAA was last reauthorized in 2006, and its current authorization expired on September 30, 2011.

The Leadership Council of Aging Organizations (LCAO) is leading the push to strengthen the OAA in this reauthorization. NAELA currently co-chairs the Community Services Committee of the LCAO, and is working closely with the AoA and Senate staff to ensure OAA programs are protected in the current Congress and strengthened in the future.

NAELA began its OAA advocacy in 2010, when NAELA’s Rebecca Morgan, CAP, spoke about legal services and the OAA at an AoA listening session. Last spring, NAELA members travelled to Washington for Hill Day, and shared background information on the Act with Senate and House staff. In the spring, NAELA led the LCAO committee on extensive Hill visits to House and Senate staff to explain the importance of funding OAA programs. During the summer, NAELA helped organize two LCAO briefings on the OAA.

The Senate Subcommittee on Primary Health and Aging, in the Senate Health, Education, Labor and Pensions (HELP) Committee, is chaired by Senator Bernie Sanders (I-VT). The subcommittee has jurisdiction over OAA reauthorization and it is preparing a bill for reauthorization. The committee invited NAELA to present recommendations on improving legal services to the Senate staff. NAELA recommends authorizing the Assistant Secretary of Aging to: 1) establish a national legal advisory committee, 2) test new models for funding and delivery, 3) collect qualitative and quantitative data, and 4) establish uniform legal training standards for legal assistance developers.

NAELA joined the ABA Commission on Law and Aging, the National Association of States United on Aging and Disability, and the National Senior Citizens Law Center to share its recommendations for legal services.

2012 will be all about the elections. All House members, a third of the Senate, and the President will be on the ballot.

This fall, the AoA released principles for OAA reauthorization. AoA developed the key principles after compiling information from the 60 listening sessions it held around the country on the OAA. During the listening sessions, AoA heard extensively from legal services attorneys. As part of its key principles, AoA is advising the Hill to establish a minimum amount of Title III funds that states may use to fund the State Legal Assistance Development Program, and add direct legal assistance services as an option under that program. NAELA is working with other legal services advocacy organizations to refine the AoA principles.

The momentum for OAA reauthorization is building in the Senate, but the progress in the House has been slow. NAELA is committed to protecting and improving the aging network, and will continue to advocate for strengthening the OAA, particularly legal services and the long-term care ombudsman program.

Elder Justice

A new agency launched this year creates a federal voice to assist older adults in protecting themselves against financial elder abuse. The Dodd-Frank Wall Street Reform and Consumer Protection Act created the Consumer Financial Protection Bureau (CFPB). Under the law, the CFPB created an Office of Older Americans and it is tasked with
improving the financial decision-making of seniors and preventing unfair, deceptive, and abusive practices targeted at seniors. The office is led by Hubert H. Humphrey III. Mr. Humphrey addressed the NAELA membership at the National Aging and Law Institute in Boston in November, where he conducted a listening session for conference attendees and shared his office’s mission to educate older adults and inform them about their financial choices, as well as protect older adults from fraud and deception.

Another important step toward protecting older adults from elder abuse is the Elder Justice Act (EJA). Passed as part of the Affordable Care Act, this comprehensive federal elder abuse prevention law remains unfunded. Despite the efforts of NAELA and the Elder Justice Coalition to bring attention to EJA through Hill visits, briefings and hearings, EJA has not received an appropriation for fiscal year 2012. As part of ACA, EJA remains the law, and advocates are committed to finding funding for the legislation’s provisions to protect older adults against abuse, neglect, and exploitation.

Public Policy in 2012

Our work next year will continue to focus on protecting entitlement programs for older adults, working to improve legal services for the elderly and the ombudsman program in the OAA reauthorization, and fighting for funding for the EJA. We will also ramp up our communications and work with CMS in order to make the current eligibility restrictions under the Deficit Reduction Act (DRA) more manageable.

Suffice it to say, 2012 will be all about the elections. All House members, a third of the Senate, and the President will be on the ballot. During election years, and particularly Presidential election years, the amount of bipartisan policy that makes it through Congress is very limited. Many votes are taken simply to get the other party on the record on issues that their opponents believe may help defeat them at the polls. Critical areas that will remain on the agenda could include: deficit reduction, tax reform, cuts to entitlements, defunding of discretionary programs, and, of course, jobs. Many aging services programs could be in jeopardy in the coming year.

The President’s future is surely tied in large part to whether the voting public believes he has righted the economy, but also whether he has sacrificed key programs (Medicare, Medicaid, Social Security) that the Democratic Party has a history of protecting. The Supreme Court’s decision on the ACA may play a pivotal role in his reelection bid as well, and this is in no small part because of the way that older Americans have negatively perceived it. Beyond 2012, NAELA’s public policy work and threats such as another DRA-like approach to reform may depend on who has the majority in Senate and who lives at 1600 Pennsylvania Avenue. This will certainly shape our agenda for the next Congress. Please let us know if you would like to be more involved in public policy. Send an email to naela@naela.org.

You Can Help — NAELA Senior Rights PAC

Your contribution to the NAELA Senior Rights PAC supports NAELA’s public policy efforts. Log on to www.NAELA.org, then click on Advocacy > Senior Rights PAC for more information and to download a contribution form.

Calendar of Events

Go to www.NAELA.org for up-to-the-minute information.

April 25, 2012. NAELA Board of Directors Meeting held in conjunction with the Annual National Conference, Seattle Renaissance Hotel, Seattle, Wash.

NAELA Board of Directors Meetings are open to all NAELA members. Meeting announcements and minutes from past Board of Directors meetings are posted on www.NAELA.org.
Third Year Willamette Law School student Billy Dalto, Salem, Ore., used his legislative savvy, legal skills, and passion for assistance to elders to compose the winning essay “How Oregon’s Elder Abuse Prevention Act Ups the Ante in State Securities Law Cases” in the 2011 NAELA Student Writing Competition. He fueled his passion for assisting elders while developing expertise in health care legislation in the Oregon House, first as a staffer for the lead human services committee budget writer, then as Oregon House District 21 representative at age 26. He was the first Hispanic Republican elected to the House in Oregon and Chaired the House Committee on Health and Human Services focusing on their system of senior care. He then decided he wanted legal expertise to further the work he had started.

As a law clerk in the office of his “mentor,” commercial litigator Paul Connolly, Esq., he followed a complex case involving investment fraud at a large assisted living chain. He wondered if Oregon’s Elderly Persons and Persons with Disabilities Abuse Prevention Act (1995), which provides for triple damages for victims, would apply in trying to recoup investments by elderly investors. Dalto’s article focuses on the Elder Financial Abuse portions of the statute, although protection is provided for those with disabilities as well. He points out that real estate investments are interpreted as securities when the transaction is coupled with a service to be provided by a third party from which the buyer expects to profit (see SEC v. WJ Howey Co, 328 U. S. 293 (1946)). Oregon uses two tests to determine if a claim involves a security: first, the Howey test, then the risk capital test. In the case Dalto followed (Sunwest Management), elders were persuaded to invest in an operator of senior housing developments to which they were introduced through friends in a faith group, initially as 1031 exchanges. These “affinity group” investments are not necessarily developed as Ponzi schemes, but may end up with similar results. The structure of the Sunwest investment is described in the article, “as is the timing… the economic downturn influenced the ultimate loss of capital for the elders.” Dalto points out the potential exposure of CPAs, lawyers, and their firms in such transactions when involved with risky financial transactions.

Given the lack of protection available under federal law for elder financial abuse, Dalto hopes NAELA members will carefully review and use their respective state’s elder abuse statutes providing for remedies for such abuse, and where not available, encourage their legislators to look at Oregon’s statute.

He enjoys his Elder Law class taught by Susan Cook at Willamette. A course in Securities Regulation with Meyer Eisenberg, a Columbia University professor and former Securities and Exchange Commission regulator (when Professor Eisenberg was visiting at Willamette, also inspired his interest in Elder Law.

Dalto continues to live and work in Salem, Ore., and plans to finish law school and take the bar exam next summer. He has enjoyed traveling internationally in the past, visiting 22 countries, and hopes to continue these travels. He spoke of adding Elder Law services to those available at the Connolly firm in Salem, where he hopes to practice. Congratulations to Billy for his accomplishments for elder citizens in Oregon and for the winning article. And welcome to NAELA.

Doris Hawks, CAP, San Jose, Calif., is a member of the NAELA Academic Committee and a NAELA Fellow. Read Billy Dalto’s first-place essay along with the other top essays at www.NAELA.org > Publications > NAELA Student Journal.
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For information on NAELA Chapters, go to www.NAELA.org.

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Promo code for NAELA members: NAELA

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