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Managing Partner

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Make plans to attend the 2013 NAELA Annual Conference • Atlanta, Georgia • May 1-4, 2013

HERE IS A TASTE OF WHAT YOU CAN EXPECT:

• Educational tracks highlighting three significant practice areas of Elder and Special Needs Law:
  • Fiduciary Representation
  • Long-Term Care Planning
  • Advancing Your Practice

• The ever-popular NAELA Fellows Case Law Update

• Interactive, classroom-based learning as well as informal learning opportunities, all with a focus on engagement and connecting with your peers

• Special presentations by NAELA Past Presidents

• Latest updates on hot topics in Elder and Special Needs Law presented by nationally recognized experts including Dos and Don'ts of Social Media, Home Design in an Aging World, Protecting Your Firm’s Digital Assets, and many more hot topics

• Social activities to celebrate NAELA’s 25 Years of Sharing and Caring

• And lots of warm NAELA hospitality (including grits on the buffet)
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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.
Developing a budget for a $2.5 million nonprofit is an annual challenge. I thought you might like to see how NAELA will be concentrating its resources during the coming year. Turning first to revenue, NAELA’s 2013 budget projects $2,506,000 of revenue, primarily from $1,761,000 of annual dues, $71,000 from Section dues, and $547,000 from conferences. Turning next to expenses, the budget projects $2,430,000 in expenses, the largest of which are $1,357,000 for administration (this includes staffing, contracting out for specific services such as accounting and technology support, maintaining and upgrading the website and database, and such mundane overhead items as rent, equipment, supplies, postage, etc.), $406,000 for conferences, and $256,000 for public policy/advocacy.

All told, the budget satisfies the Board requirement of achieving a surplus of at least $75,000 that can be directed toward NAELA’s growing reserve. The reserve plays a key role for NAELA. Four years ago, our reserve was gone. Now, we have a reserve in place (estimated to be almost $900,000 at the end of 2012) that has helped to put us on a firmer financial footing and will provide us with the flexibility we need if NAELA must address a critical legislative issue (which in the coming Congress and the current focus on the fiscal cliff and entitlement programs is certainly a possibility) or move forward on a new initiative designed to enhance member value.

Let me give you a better look at NAELA’s finances through a visual.

### Revenue by Source

- **Membership**: 74%
- **Virtual Education**: 1%
- **CAP**: 3%
- **Sections**: 3%
- **Meetings**: 19%

### Expense By Program

- **Meetings**: 23%
- **Governance**: 9%
- **Sections**: 4%
- **Public Policy**: 14%
- **Administration**: 15%
- **CAP**: 4%
- **Membership**: 9%
- **Committees**: 5%
- **Public Relations**: 5%
- **Publications**: 10%
- **Virtual Education**: 2%

Note that with this chart, the bulk of Administration expenses are spread out over every program area, as NAELA allocates staff time and overhead to its various activities, whether a national conference or a specific committee, so that we know where our resources are directed. Moreover, it gives us a chance to move resources as needed based on specific initiatives or projects.

Though the budget is complete and approved by the Board for 2013, that doesn’t mean we’re done. The Finance Committee will review and revise the budget as appropriate in February, April, and May, so that we can base more of our financial decisions on reality rather than projection. Also, the Finance Committee will be turning its attention to some of the larger items that have finance and resource ramifications, so that strategies can be developed on how to address these issues going forward. These include, but are not limited to, more fully evaluating the role of public policy and advocacy within NAELA, better communicating the value of NAELA membership, restructuring NAELA’s approach to education, identifying additional nondues revenue streams, examining the integration of access to Sections and virtual education with member dues, etc., and then ensuring that the appropriate resources are directed in these areas.

If you have questions, please email me at GFrenchLaw@aol.com. The approved annual budget is available to NAELA members upon request by contacting naela@naela.org.
Overcoming Challenges

Peter G. Wacht, CAE

The fall soccer season has been a challenge for my son’s travel soccer team. In our season-ending tournament, we didn’t win a game. Yet more often than not the boys played well, focusing on possession, moving the ball quickly around the field, and making good, fast decisions. In my opinion, we often played a better game than the other team, creating several good chances. Unfortunately, we didn’t finish, failing to find the back of the net, and that was the determining factor.

I view how the boys respond to the tournament as a test for the team: Will we allow it to derail our ambitions or will it inspire us to focus and get back on track as we seek to achieve our goal of moving up to a stronger division? If nothing else, it’s a good metaphor for real life: When things don’t go your way, how do you deal with it effectively? Do you learn from it and move forward? Or do you allow it to hold you back?

NAELA had to deal with similar questions back in 2009, when the Academy transitioned during a recession from a management company to its own staff with little in the way of a financial backstop. Would we have the resources to continue to grow the NAELA membership? Would we have the ability to provide enhanced or new value to members of the Academy? Would we be able to strengthen NAELA’s financial foundation?

Looking back at 2012, I’m pleased to say that we have been able to achieve these objectives. Our final 2012 count was 4,451 members, another increase when compared to the final 2011 member count. In fact, we’ve had four consecutive years of membership increases, leading to a total increase of 8 percent over that time, which is quite an achievement when you consider that during that time frame membership in most individual membership organizations has decreased, sometimes substantially, and at best remained stagnant.

And here are just a few of the steps forward we’ve taken in the past year:

• We have recently introduced the Member Value Connection. This bi-weekly email newsletter highlights the many different NAELA member benefits. One of the educational resources featured in the Member Value Connection was the jointly produced NAELA/Stetson University videos, “National Series in Elder and Special Needs Law.” These videos, featuring some of the most respected and experienced lawyers in the field, provide basic education in key topics in Elder and Special Needs Law and serve as a stepping stone for attorneys seeking to build their practices in one of the fastest growing areas of the law. All videos and material are free to NAELA members.

• More members are connecting on NAELA’s various Listservs. In fact, NAELA currently manages more than 80 national, Chapter, and Section Listservs.

• We continue to improve the NAELA website. As an example, in the Online Member Directory, the most popular part of the NAELA website in terms of monthly hits from consumers looking for attorneys or members seeking to refer clients, you can now enhance your profile by adding your picture, a description of your firm and services, and any foreign languages you may speak. And, as a next step with the website, we’re developing an advanced search function that will allow you to search by keyword or category and find the content you need more quickly.

• NAELA launched the “Eye on Elder and Special Needs Issues” newsletter. In 2012, we published issues on the need for better solutions and more options for long-term care and reauthorizing the Older Americans Act. The target audience includes policy makers; consumers; aging and special needs network professionals; lawmepers; and members of the media. Moreover, we distribute the newsletter to all members so that you can take the content and share it with your clients or use it as part of your marketing activities.

So we have moved forward as an organization, but there’s more that we want to accomplish. Much like a soccer team, if you fail to improve from one season to the next your competition can overtake you. As we look toward 2013, which represents NAELA’s 25th anniversary, we can look back and feel good about our accomplishments as an organization, and yet also feel secure in the knowledge that we will continue to seek ways to enhance the value of NAELA membership so that we can continue to grow as an organization and meet the needs of our members.
Bridget O’Brien Swartz, CELA

A Study in Contradictions

By Robert B. Fleming, CELA

From paper route to marching band, from social work to Elder and Special Needs Law, Bridget’s life is anything but boring.

Bridget O’Brien Swartz, as her name might suggest, is a study in contradictions. This diminutive powerhouse got an early start as a high achiever. In the early 1980s, lawyers from around the country began a series of meetings that led to the formation of NAELA. And where was Bridget? In Duluth, Minn., attending high school.

OK, so Bridget is too young to have been one of the founders of NAELA. But that doesn’t mean she wasn’t busy. Her young career started with the Duluth News-Tribune & Herald, where she maintained a paper route for several years. In fact, she is in the News-Tribune’s Carrier Hall of Fame — she won Carrier of the Month and Carrier of the Year awards in 1984.

After undergraduate study at Notre Dame (Bridget, a woman of many talents, was in the marching band and she graduated cum laude in 1989), she began a career in social work. Law school and Arizona beckoned; she graduated from the Arizona State University College of Law (cum laude) in 1995. Even that was not enough academic accomplishment; two years into her law practice, she earned a Master’s degree in Public Administration.

Oh, and there was that marriage and motherhood thing along the way. She and husband Jay have two bright and beautiful daughters.

Impressive as her early history might be, it doesn’t begin to explore the contradictions. An explanatory story might be in order.

A very few years after Bridget began her law career, she served on a State Bar Board I chaired. The Bar was eager to increase minority participation, and so wrote to the chair of each entity asking what they had done to further that goal. Piqued, I fired off a snarky letter. I observed that we had tried to expand our minority involvement, but that the best we could do was Bridget O’Brien Swartz. I’m not sure, I said, whether she is Jewish or Irish, but she is the most diverse person on our board. I sent her a copy, thinking I had been very witty and she would appreciate it.

Nicely written and very humorous, she said — but did you not realize I’m Spanish?

It turns out that Bridget’s mother was born in Spain and raised in Venezuela. Bridget speaks Spanish fluently (modestly, she calls herself “nearly fluent”). In fact, her mother’s father was a famous Spanish bullfighter, exiled to Venezuela during the Franco regime. Her mother’s mother was from Mexico, and met and fell in love with her grandfather while he toured Mexico, building his reputation as a bullfighter.

Making a Name in Arizona

Bridget’s early legal career was filled with impressive accomplishments. She spent four years working for two of Arizona’s pioneering Elder Law attorneys, then set out on a new partnership with a contemporary. She quickly made a name for herself in the Arizona legal community, serving on pretty much all the relevant committees and boards and doing all the heavy lifting.

Experience with the “estate and trust” specialization in Arizona is a good indication of Bridget’s usual trajectory.
Before taking the examination to hold the specialization, a lawyer must have five years of practice in the field. Bridget took the first test offered after she met that minimum standard, and by 2001 she was certified as an Estate and Trust Specialist in Arizona. Two years later, she was on the Committee that writes and grades the certification exam, and soon she chaired the Committee. Today she sits on the State Bar Board overseeing all of the specialization certification programs.

**In Demand**

Bridget’s reputation for hard work and smart thinking on committees and boards led inevitably to her being impressed into service as chair of other groups. At various times she has chaired the state bar’s Elder Law section, the Arizona Chapter of NAELA, and the Arizona Chapter’s Public Policy Committee. That last is another good indication of Bridget’s dedication and hard work: she essentially created the position, then steered it to a position of relative authority in Arizona. NAELA Arizona now has a lobbyist (thanks to her leadership) and has successfully introduced legislation to improve administration of special needs trusts (Bridget wrote the bill) and ameliorate pushes for over-regulation of probate and guardianship proceedings.

Along the way, Bridget sat for (and, of course, passed) the Certified Elder Law Attorney exam offered by the National Elder Law Foundation. She also became a Judge pro tem for the mental health and probate courts in Phoenix. Not busy enough? She filled her spare time by teaching Wills and Estates at the new Phoenix School of Law.

Nationally, Bridget has served as President of the Special Needs Alliance and Chair of its Public Policy Committee. She is currently an officer of the NAELA SR-PAC (the Senior Rights Political Action Committee). She is a member of the NAELA Programs and Publications Committee, and also (because she has a hard time finding enough to do) Case Notes Editor for *NAELA Journal*.

**A Successful Practice**

It may seem unlikely in light of all that, but Bridget also maintains a busy and successful practice with a mid-sized Phoenix firm. She limits her cases to special needs
planning work, though that means she has to master public benefits planning (Arizona's Medicaid program is particularly difficult and peculiar to navigate), estate planning, guardianship, conservatorship, and personal injury reviews. She is something of an expert on structured settlements (I use "something of" just to limit the number of phone calls she gets from NAELA members who read this description).

Bridget O’Brien Swartz is an incredibly capable, bright and hard-working lawyer, and a credit to NAELA and Arizona’s legal community. But somehow, I’ll always think of her as a co-presenter at a seminar put on by the State Bar’s Elder Law section, just a couple years into her practice of law. I knew her reputation and had met her several times, but I didn’t yet know her very well personally, and had not presented with her before.

We had been tapped to speak in Globe, Ariz. — for those who don’t know Arizona, you go to the middle of nowhere and just keep driving. The seminar was being held in a casino on an Indian reservation, and the weather was a little dicey. Someone suggested that Bridget might not make it, or at least that she would be late. “Why?” I asked. “Is she not feeling well?” My informant looked at me, dumbfounded. Did I not know that she had given birth two weeks earlier?

She showed up, in plenty of time. Her mother was with her to take care of the baby. Somehow her Spanish lineage escaped me during that brief meeting, so I would not remember it years later. No matter — Bridget gave a great presentation, and she had prepared all the materials for both of us. That’s the Bridget O’Brien Swartz I’ll always remember.

NAELA PUBLIC POLICY

Review of H. Res. 6300: The Medicaid Long-Term Care Reform Act of 2012

By H. Amos Goodall, CELA

Some of you have been following the introduction of a bill that among other things calls for a study of the ramifications of a 10-year Medicaid look-back period.

NAELA’s Public Policy Committee and Grassroots Subcommittee have been monitoring this situation and staff have had conversations with Hill allies regarding the bill’s fate. In fact, several staff from the House Energy and Commerce Committee (where the bill has been referred) were not even aware the bill had been introduced.

NAELA opposes the bill, which could be characterized as one legislator’s opening salvo in the debate that will go on in the next Congress regarding how entitlement programs should be reformed. It is also an insurance industry bill attempting to ensure that the CLASS Act is never implemented and Medicaid becomes a program that few can use for long-term care.

House Resolution 6300 — otherwise known as the Medicaid Long-Term Care Reform Act of 2012 — was introduced this past summer by Rep. Charles Boustany Jr. (R – LA 7th). The bill makes certain “findings” on the state of the American health care system. According to the bill’s language, the Congressional Research Service Report that Medicaid long-term care spending has grown at an average annual rate of 6.5 percent and will reach $1.148 trillion in 2021.

In order to respond to this funding crisis, the bill suggests that Congress should repeal the CLASS Act, encourage middle-income individuals to purchase long-term care insurance, and allow states flexibility to change their Medicaid eligibility rules. It also requests that the Congressional Budget Office study the potential impact of a Medicaid block grant to states and a 10-year look-back period for Medicaid eligibility. You can read a more detailed summary of the bill on the NAELA website. (Look under Advocacy > Health Care Reform — Educational Materials for Members.)

The bill, which only has four cosponsors and no bipartisan support, will likely not be passed in 2012. H.Res. 6300 has not been marked up and has not left the committee since it was introduced on August 2, 2012. It appears that the publicity surrounding this bill has been created only by Stephen Moses, the President of the Center for Long-Term Care Reform and a noted opponent of Medicaid long-term care coverage.

H.Res. 6300 states that “our Nation cannot afford to overlook Medicaid’s long-term care financing crisis.” NAELA agrees that we cannot ignore this problem but we are committed to finding reasonable solutions that will not endanger America’s most vulnerable populations (the elderly and individuals with special needs). NAELA’s Public Policy Committee and the Grassroots Subcommittee are monitoring this bill and similar legislation. We will keep you informed if and when the bill is reintroduced in the 113th Congress.

H. Amos Goodall, CELA is the chair of NAELA’s Public Policy Committee.
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By all accounts, Special Needs Planning has come into its own and is a full-fledged practice just as Elder Law — its predecessor and now compatriot — is. The inception of Special Needs Planning was arguably the passage of OBRA ’93, when Congress exempted from penalty for Medicaid eligibility purposes the transfer of income and assets belonging to an individual with a disability to a trust providing for reimbursement to Medicaid aka the “special needs trust.” Admittedly, I was not yet practicing law in 1993. I had graduated from college, followed by a year of volunteer service with Covenant House, a shelter for runaway and homeless youth, which experience led me to my first job in the field of mental health, working with children and adolescents. I quickly became frustrated by my inability to effect meaningful change in “the system,” which led me back to school — law school. Ironically, I did not go to law school to be a lawyer. However, I fell upon the practice of Elder and Mental Health Law midstream, and am fortunate to have been in the practice ever since, with a focus in the past several years on Special Needs Planning.

The evolution of this practice is evident in how we refer to the practice of Special Needs Planning. In the beginning, it was merely a matter of drafting an appropriate trust agreement to comply with the very general requirements set forth in federal law. The practitioner may have said at the time that he or she “does or prepares special needs trusts” and the preparation of such trusts in and of themselves did not constitute a practice, so to speak.

As time went by, however, Medicaid developed regulations concerning the establishment and administration of special needs trusts, each state’s Medicaid program providing its own interpretation of what was intended by federal law. Some states have gone so far as to enact laws specifying how such a trust can be used, most of which are more restrictive than not. In 1999, Congress enacted the Foster Care Independence Act (FCIA), pursuant to which the Social Security Administration adopted OBRA ’93 insofar as the trust exceptions are concerned; another bureaucracy, giving its own interpretation of what was originally intended by Congress and doing so in a not-so-generous manner.

What has the evolution of the law meant for those of us who, in the early years, “merely” drafted or prepared special needs trusts? The art of drafting became much more complex, and in turn led to the quagmire of how best to administer these trusts; how to administer a special needs trust in such a way that the beneficiary who is disabled truly benefits and his or her quality of life is enhanced. Ironically, the challenge in drafting and administering special needs trusts has led us to where I believe the practice stands today.

An Option of Last Resort

Although my practice is now exclusively Special Needs Planning and has been for years, from my perspective, the special needs trust is an option of last resort. How many of us chuckle (not out loud, of course) when a prospective

Bridget O’Brien Swartz, CELA, Phoenix, Ariz., is this month’s Featured Member.
client calls and says “I need a special needs trust drafted yesterday.” Accepting that statement at face value, the Special Needs planner begins her analysis of whether indeed such an arrangement is necessary or advisable. The analysis requires a multi-disciplinary approach of evaluating the condition and care needs of the individual who is disabled; the benefits, both public and private, for which the individual is eligible and may be eligible; and projecting the future cost of the individual’s support and care needs in relation to the amount of assets at issue. Then, and only then, can we counsel a client on whether or not a special needs trust is advisable and, if it is, our attention then turns to the requirements that must be met to establish a special needs trust and how the beneficiary may benefit from it. Many Special Needs planners, like me, may thereafter be involved with the case for the life of the beneficiary.

Special needs planners are now faced with what the future will bring. Special needs planning used to be a matter of drafting a suitable trust and administering it appropriately, whereas now, our clients, who are people with disabilities, are faced with other challenges in qualifying or remaining eligible for public benefits. Even when eligible, our clients are faced with the threat of reduction in services.

It’s time to retool. We must become our clients’ strongest advocates in every sense of the word. We can no longer work around the Social Security Administration or Medicaid’s interpretation of the law in its regulations and policy as they have made it virtually impossible to do. When services are reduced or discontinued due to budget constraints under the guise of no longer being medically necessary, we cannot accept it at face value. We will have to file administrative appeals, possibly appear before an Administrative Law Judge, and, yes, maybe even litigate in a state or federal court of law. We must also delve into the public policy arena to effect change on a broader level.

How many of us feel prepared for what’s to come? I’ll confess that I do not — yet. But I am certainly willing to do what it takes, to better serve our clients during these times when budget constraints diminish our clients’ quality of life and in some instances, even put their lives at risk. Please join me and NAELA in this endeavor, and we will set ourselves apart as not only Special Needs planners, but advocates as well!

After So Many Years . . .

Ah, Jenny. After nearly eight years serving as your counselor, advocate, I’ve finally become a part of the conspiracy against you. It was inevitable I suppose. All those years I was motivated by sympathy for you and your circumstances. Yes, you were a challenge, lacking insight into your mental illness, blaming others for your circumstances, impossible to reason with. But that’s the nature of your illness, isn’t it? I often wondered why those with “experience” in dealing with persons such as yourself were repeatedly at a loss as to how to “treat” you. Talking around you, as if you weren’t present. Talking condescendingly while admittedly intelligent. The least I could do was be present, unlike your family, And stand at your side when you so often believed the world was against you. You trusted me and I gave you hope. Why? I do not know. Maybe it was because I would believe what was truth When no one else could sift through the delusions Or get beyond their frustrations. And now, even I cannot help or give you encouragement as, In your eyes, I’m “one of them.” So, it’s the end of an era so to speak. I hope your new counselor is able to do for you what I no longer can. But in my heart of hearts, I unfortunately know that the next person Won’t have the same will or desire, recognition that you have no one else who’ll accept you for who you are.

—Bridget O’Brien Swartz
January 30, 2006
A primary purpose of both self-settled and third-party special needs trusts is to keep the trust assets and disbursements from disqualifying the disabled beneficiary for Medicaid and/or Supplemental Security Income (SSI) benefits. However, another essential purpose is to provide effective management of the trust assets so as to best meet the needs of the beneficiary. The most effective trustee will be responsive to the needs of the beneficiary through communications with the beneficiary or beneficiary’s responsible family members or caregivers, coupled with instructive guidance in the trust instrument.

Permitting Family Members or Others to Occupy Trust Property
The disabled beneficiary will often reside in the same household with other family members who provide assistance and daily services to the beneficiary. The trust may be the largest source of funds in the beneficiary’s family, particularly if it is funded with a substantial gift, life insurance benefit, or lawsuit settlement, and the trustee may determine that it is in the beneficiary’s best interest to purchase an accessible home for the beneficiary. However, SSI and Medicaid law and policy require that, in order not to count as a resource of the beneficiary, the trust must be for the “sole benefit” of the beneficiary. Even so, it is advisable to give the trustee discretion to permit the beneficiary and other family members or caregivers to reside in property owned by the trust on such terms as the trustee deems proper, whether rent free or in consideration of payment of taxes, insurance, maintenance, or otherwise. This may ensure that the beneficiary continues to receive the care and support from family that will keep him or her as independent as possible in a private home. The specific terms of any such permitted living arrangement and payments from the other occupants is dependent on the particular circumstances and state Medicaid rules and must be customized for each situation.

Authority to Make a Disqualifying Distribution
Both types of special needs trusts will give the trustee sole discretion to make distributions to meet needs of the beneficiary not covered by SSI and/or Medicaid. It may also be wise to include a power to make any discretionary distribution for the benefit of the beneficiary that may have the effect of reducing or terminating the beneficiary’s governmental benefits if the trustee determines that it would be in the beneficiary’s best interest to do so. Public benefit
payments may be insufficient to fully meet a need of the beneficiary. For instance, the beneficiary’s monthly SSI payment may be insufficient to pay the cost of adequate housing and food. The trustee may determine that, in order to meet such a need, the trust should pay the monthly rent, utilities, and food costs for the beneficiary, even though this would reduce the beneficiary’s SSI payment by one-third. Without such authority, the trustee may be reluctant to make such payments and the lifestyle of the beneficiary may suffer.

Consultation with Professional Advisers
The trustee should be instructed to, at least annually, consult with legal counsel regarding the appropriate trust administration and public benefits rules that apply to the trust. Counsel should review the trust distributions and expenditures to assure that public benefits eligibility of the beneficiary are not jeopardized by the actions of a trustee who is not well versed in such rules. This will allow quick correction of an inadvertent improper disbursement practice or other action by the trustee and will prevent the accumulation of a large demand for repayment of public benefits paid in error. The trustee should also be instructed to use resources of the trust estate to employ investment counsel to develop the most appropriate investment policy for the particular trust estate and ongoing needs of the beneficiary. For instance, a beneficiary with high recurring medical expenses may be better served by investment of trust property in current income-producing securities, while a beneficiary with a modest trust estate and long life expectancy may benefit for a longer term from investment in growth securities.

Periodic Evaluation of Beneficiary
The trustee should be directed to arrange for annual or more frequent evaluation of the beneficiary’s living arrangement and social, recreational, and medical needs. The
trustee or its agent should visit the beneficiary at his or her residence to assess the treatment given to the beneficiary by caregivers and to assess needs that can be met from the trust. Such needs would include physical condition; educational, residential, vocational, and training opportunities; recreational, leisure, and social needs; appropriateness of existing program services; and the availability of governmental financial assistance and private contractual benefit programs.

Appointment of a Trust Adviser

It is often a good idea to appoint a third-party Trust Adviser (or Trust Protector or Advisory Committee), particularly where the trustee is unrelated to the beneficiary and has little knowledge of the beneficiary’s needs or is unsophisticated in the performance as a trustee. The Trust Adviser’s function may be to:

• Monitor the trustee’s responsiveness and remove and replace a non-performing trustee;
• Determine the appropriateness of retaining or obtaining certain public benefits for the beneficiary and the effects of trust disbursements on such benefits;
• Amend the trust for purposes of complying with the original intent and with changing laws and rules pertaining to such trusts; and/or
• Review and approve investment policies proposed by the trustee.

A Trust Adviser may be a single person or committee of persons who are intimately familiar with the beneficiary and his or her needs but who are not qualified to serve as trustee.

Trust Termination Upon Cessation of Public Benefits

The beneficiary of a special needs trust may become ineligible for SSI and/or Medicaid assistance as a result of improved health condition or obtaining a job or income that exceeds the benefit program’s income limit. In such a situation, maintaining the more restrictive “special needs” limitation on disbursements would no longer be beneficial for the beneficiary and would possibly deprive him or her from greater provision from the trust. For this reason, it may be advisable to include a provision authorizing the trustee to terminate the trust if such circumstances arise.

This termination could be without any court approval in the case of a third-party trust. However, since the law governing a self-settled trust requires a Medicaid pay-back upon the death of the beneficiary and most state Medicaid agencies will attempt to assert such pay-back right upon earlier termination of the trust during the beneficiary’s lifetime, caution may dictate that such provision permits such termination only upon court approval and after notice to Medicaid of such petition. Further, the amendments to SSI policies pertaining to self-settled special needs trusts, effective April 2012, at POMS SI 01120.199.F.1 states:

For the purpose of SSI eligibility, a trust that contains an early termination provision or clause may not be excepted from the resource counting rules at Section 1613(e) of the Act unless it satisfies either the requirements in Section 1917(d)(4)(A) or (C). Additionally, a trust must also satisfy the resource counting rules found at SI 01120.200D and SI 01110.100B to not be a countable resource. In order to meet those requirements, all of the following criteria must be met:

• Upon early termination (i.e., termination prior to the death of the beneficiary), the State(s), as primary assignee, would receive all amounts remaining in the trust at the time of termination up to an amount equal to the total amount of medical assistance paid on behalf of the individual under the State Medicaid plan(s); and
• Other than payment for those expenses listed in SI 01120.199F.3. in this section, no entity other than the trust beneficiary may benefit from the early termination (i.e., Period of Reimbursement to the State(s), all remaining funds are disbursed to the trust beneficiary); and
• The early termination clause gives the power to terminate to someone other than the trust beneficiary.

Conclusion

A customized and well-drafted special needs trust will provide funds that supplement the basic support and medical coverage furnished by public benefit programs. These supplemental benefits are many, and a trustee who does not have experience with caring for a person with a disability similar to the beneficiary’s will not likely be equipped to fully meet the various needs. Guidance to the trustee in the trust instrument, through provisions such as those described in this article, will more nearly enable the trustee to most effectively meet the needs of the beneficiary.
The end of the year is rapidly approaching and the budget cuts that await us in 2013 will significantly impact our clients and the programs on which they rely. Unless Congress takes immediate action during this lame duck session, sequestration will take effect on January 2, 2013.

The Impact on Older Americans

The Older Americans Act (OAA) is the foundation for the aging network, and its programs help the elderly age with dignity at home and in the community.

Approximately 5 percent of Americans 65 and older live in nursing homes and assisted living facilities. The OAA funds the Long-Term Care Ombudsman Program (LTCOP), where representatives advocate for quality care in nursing homes and assisted living facilities. Due to already limited resources, only 39 percent of all board and care, assisted living, and similar homes receive quarterly visits. Sequestration cuts will only further devastate an already underfunded but incredibly important program.

The OAA also provides funding to the states for legal services that allow the elderly to attain legal assistance on an array of important issues, such as income security, health care, housing, financial exploitation, and defense of guardianship. If sequestration occurs, it will prevent far too many older Americans from receiving necessary legal assistance.

Title III of the OAA funds numerous home and community-based services. The OAA provides grants to states for congregate and home-delivered meals to seniors who suffer from limited mobility or geographic isolation. An estimated 17 million meals will be lost due to sequestration in 2013.

Also subject to sequestration is the Senior Community Service Employment Program (SCSEP) that helps low-income older Americans who are unemployed expand their work skills while receiving a wage and supporting their local communities. Unless Congress takes action to prevent these automatic budget cuts, 6,400 fewer unemployed low-income older adults will have the opportunity to achieve minimal financial security through SCSEP.

The Impact on People with Disabilities

The federal discretionary programs that people with disabilities rely upon to remain in their communities are also subject to the automatic budget cuts scheduled for 2013. Sequestration will likely impact the Individuals with Disabilities Education Act (IDEA). Part B of this act ensures that all children with disabilities have access to a free and appropriate public education that allows for participation in the least restrictive environment. The IDEA state grants assist states in meeting the costs of providing special education and related services to children with disabilities. Sequester will likely result in a $949.7 million dollar cut for Part B of the IDEA grant in 2013.

Supportive Housing for Persons with Disabilities (Section 811 of the National Affordable Housing Act of 1990) is funded by the U.S. Department of Housing and Urban Development (HUD). Section 811 subsidizes rental housing and is currently the only federal program dedicated to creating affordable and accessible housing for low-income people with disabilities to help them live independently in their communities. If sequestration occurs, numerous individuals with special needs and disabilities could lose access to community-based housing options.

Many other programs targeted at aging Americans and people with special needs will experience cuts at the hands of sequestration. The public policy team here at NAELA is working closely with other advocacy organizations to fight against further funding cuts to these programs that allow older Americans and people with special needs to remain safely in their homes and communities.

Visit www.NAELA.org to learn more about how sequestration will impact important programs for your clients. See Advocacy > Federal Fiscal Policy and Advocacy > Health Care Reform.

What Sequestration Means for Older Americans and People with Special Needs

By Sadia Sorathia and Brian Lindberg

Brian Lindberg is NAELA’s Public Policy Adviser. Sadia Sorathia is Senior Associate for NAELA Grassroots and Public Policy.
Changes and Challenges in Social Security POMS  
“Sole Benefit” Rules for Irrevocable (d)(4)(A) Special Needs Trusts  
*By Sharon Rivenson Mark, CELA, CAP*

Recent changes to the Social Security Administration’s POMS will affect new and existing irrevocable (d)(4)(A) special needs trusts.

NAELA members should already be aware of the Social Security Administration’s (SSA) recent changes to its Program Operations Manual System (POMS). The Social Security Administration issued revised POMS effective April 3, 2012, that appears to be taking the position that it will reject any (d)(4)(A) special needs trust that allows payments to family members to, among other things, visit the beneficiary of the special needs trust. POMS Section 1120.201, subparagraph F contains the following language:

F. Policy — For The Benefit Of/On Behalf Of/For The Sole Benefit Of An Individual

1. Trust Established for the Benefit of/on Behalf of an Individual

   Consider a trust established for the benefit of an individual if payments of any sort from the corpus or income of the trust are paid to another person or entity so that the individual derives some benefit from the payment.

   Likewise, consider payments to be made on behalf of, or to or for the benefit of an individual, if payments of any sort from the corpus or income of the trust are paid to another person or entity so that the individual derives some benefit from the payment.

   For example, such payments could include purchase of food or shelter, or household goods and personal items that count as income. The payments could also include services for medical or personal attendant care that the individual may need which does not count as income.

   NOTE: These payments are evaluated under regular income-counting rules. However, they do not have to meet the definition of income for Supplemental Security Income (SSI) purposes to be considered to be made on behalf of, or to or for the benefit of the individual.

   If funds from a trust that is a resource are used to purchase durable items, e.g., a car or a house, the individual (or the trust) must be shown as the owner of the item in the percentage that the funds represent the value of the item. When there is a deed or titling document, the individual (or trust) must be listed as an owner. Failure to do so may constitute evidence of a transfer of resources.

2. Trust Established for the Sole Benefit of an Individual

   Consider a trust established for the sole benefit of an individual if the trust benefits no one but that individual, whether at the time the trust is established or at any time for the remainder of the individual’s life. However, the trust may provide for reasonable compensation for a trustee(s) to manage the trust, as well as reasonable costs associated with investment, legal or other services rendered on behalf of the individual with regard to the trust.

   In defining what is reasonable compensation, consider the time and effort involved in providing the services involved, as well as the prevailing rate of compensation for similar services considering the size and complexity of the trust.

   NOTE: This should not routinely be questioned unless compensation is being provided to a family member or the adjudicator has some other reason to question reasonableness of the compensation.

   Do not consider a trust that provides for the trust cor-
pus or income to be paid to or for a beneficiary other than the SSI applicant/recipient to be established for the sole benefit of the individual. However, payments to a third party that result in the receipt of goods or services by the individual are considered for the sole benefit of the individual. The following disbursements or distributions are also permitted:

- reimbursement to the State, after the individual’s death, for medical expenses paid on the individual’s behalf (see SI 01120.203B.1.f. and SI 01120.203B.2.g.);
- upon death of the beneficiary, retention of a certain percentage of the funds in a “pooled trust” established through the actions of a nonprofit association in accordance with the trust agreement (see SI 01120.203B.2.); and
- transfer of the remaining trust corpus to a residual trust beneficiary after the individual’s death.

**Example 1 — Trust provision that is not for the sole benefit of the trust beneficiary**
An SSI recipient is awarded a court-ordered settlement that is placed in an irrevocable trust of which he is the beneficiary. The trust document includes a provision permitting the trustee to use trust funds in order to pay for the SSI recipient’s family to fly from Idaho and visit him in Nebraska. The trust is not established for the sole benefit of the trust beneficiary, since it permits the trustee to use trust funds in a manner that will financially benefit the SSI recipient’s family.

**Example 2 — Trust provision that is for the sole benefit of the trust beneficiary**
The guardian of an SSI recipient uses the recipient’s savings to establish an irrevocable trust, naming the SSI recipient as the trust beneficiary. The trust document includes a provision permitting the trustee to use trust funds in order to pay for attendant care needed by the SSI recipient on a daily basis. The trust is established for the sole benefit of the trust beneficiary, since payments made for attendant care are considered a payment to a third party for goods or services.

The Social Security Administration is also scrutinizing trust language that allows for compensation to family caregivers, in addition to third-party caregivers. SSA’s policy now appears to limit payments to caregivers who are “medically certified, medically trained or approved to provide care.” The State Medicaid agency would be the entity that would have to grant approval to provide care and to receive payment for that care.

**New Trusts and Existing Trusts Affected**
Attorneys drafting irrevocable (d)(4)(A) special needs trusts have to now respond to these retrenchments. New trusts are immediately affected. Existing trusts may well be affected, even though previously approved, when the case comes up for review or recertification.

The SSA POMS contain amendments to SI 01120.199, SI 01120.225, and SI 01120.227, with SI 01120.199 addressing early termination provisions and trusts. SI 01120.199(A)(1) provides that a trust that is either newly formed or not previously excepted from resource counting must meet all of the criteria set forth in SI 01120.199 through SI 01120.203 and SI 01120.225 through SI 01120.227 to be excepted under section 1917(d)(4)(A) or (C). SI 01120.199(A)(2) provides that a trust that was previously determined to be exempt from resource counting under section 1917(d)(4)(A) or (C) shall continue to be excepted from resource counting, provided the trust is amended to conform with the requirements of this section within 90 days. That 90-day period begins on the day the recipient or representative payee is informed that the trust contains provisions that must be amended in order to continue qualifying for the exception under section 1917(d)(4)(A) or (C). Each previously excepted trust is permitted only one 90-day amendment period.

**Advocacy and Litigation**
These POMS affect existing trusts. Litigation is inevitable in this area. Advocacy is crucial. Cases are already in the litigation pipeline. In New Jersey alone, a case is pending in the Appellate Division in which the issue of sole benefit is in the forefront (Matter of Abigail Nebab, Appellate Docket No. A-oo5657-10T3). In arguing its objection to certain language in the Court’s Order, the Medicaid agency interjected in its brief a substantive discussion and argument as to the requirements of Federal law with respect to Medicaid requirements and special needs trusts. The Medicaid agency cited *Hobbs v. Zenderman*, 579 F.3d 1171 (10th Cir. 2009), despite the fact that the beneficiary child was not a Medicaid recipient or applicant.

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This column is provided by members of NAELA’s Council of Advanced Practitioners (CAP).
The beneficiary in Hobbs, supra, was a Medicaid recipient whose continued eligibility for Medicaid was at issue. In Hobbs, the Medicaid agency in New Mexico denied Hobbs’ application for Medicaid benefits with the denial turning on its determination that a certain trust was a “countable resource” because the trust was not being administered for Hobbs’ sole benefit. Hobbs advanced claims under 42 U.S.C. § 1983 alleging defendants violated his rights under the Medicaid Act and denied him due process by rejecting his application on the basis of unwritten, unascertainable standards. The district court agreed with defendants’ interpretation of the relevant statutes and concluded that Hobbs’ rights had not been violated, and granted summary judgment to defendants. The 10th Circuit Court of Appeals held that the statutory provisions upon which Hobbs relied did not confer private rights enforceable under § 1983 and that defendants did not violate Hobbs’ right to due process, but simply applied a “sole benefit” standard to the particular facts of his case. Exercising jurisdiction under 28 U.S.C. § 1291, the Court of Appeals affirmed the judgment of the district court.

In 1993, Congress enacted 42 U.S.C. § 1396p, which created then new federal rules for the treatment of trusts in Medicaid determinations. This statute requires, in pertinent part, that assets owned by a Medicaid applicant and placed into a trust for the benefit of the applicant by the applicant, his or her spouse or guardian, will be considered a countable resource and will disqualify the applicant from receiving Medicaid assistance until those resources are spent down below the allowable resource limit. In the case of disabled individuals, however, Congress enacted 42 U.S.C. §1396p(d)(4)(A) to provide for an irrevocable special needs trust wherein the assets of the disabled individual could be placed without adversely impacting Medicaid eligibility. See Lewis v. Rendell, 501 F.Supp.2d 671 (E.D.Pa. 2007).

Asset Restriction

The only restriction imposed by Congress on the use of assets in a special needs trust is that they be used for the benefit of the Medicaid recipient. Such assets are intended to be used to pay for the beneficiary’s educational, medical, social, recreational and transportation needs, when such needs are not being met by any private or public agency, to enhance the quality of life of the disabled beneficiary. In re Riddell, 157 P.3d 888 (Wash.App. 2007); J.P. v. Division of Medical Assistance and Health Services, 920 A.2d 707 (N.J. Super. App. Div. 2007). To meet these needs, the trustee is given discretion to make trust distributions for the benefit of the beneficiary. No authority from any source suggests that Congress intended the trustee or state welfare departments to preserve trust assets for Medicaid recovery.

The plain language of 42 U.S.C. §1396p(d)(4)(A) demonstrates that Congress intended to create a trust that would be governed by well-settled principles of trust law. There is no language in 42 U.S.C. §1396p(d)(4)(A) that requires or suggests that state trust law principles are to be ignored or that state welfare departments are to have a supervisory role over the trustee of a special needs trust. Furthermore, neither the statute nor the legislative history indicates that Congress intended federal law to preempt established state law governing trusts, which defines the powers and duties of trustees and the remedies for breach of a trustee’s fiduciary duty.

Congress elected to use trusts under state law, which would normally require a trustee to balance the interests of the life tenant with those who benefit from the trust after him. The duty of impartiality requires the trustee to take into account their interests as well as the life beneficiary’s. See generally, American Law Institute, Restatement of the Law — Restatement (Third) of Trusts, §79. “[T]he duty [requires] balancing the naturally conflicting concerns of life and remainder beneficiaries,” id. General Comment (a), in all areas of trustee performance, including, especially relevant here, in making discretionary distributions. Id. Like most general rules in the private law context, the trustee’s duty is subservient to the specific wishes of the parties, so to the extent the settlor of a trust gives priority among beneficiaries, the trustee is bound by that mandate. The trustee is to “give effect to the rights and priorities of the various beneficiaries ... as expressed or implied by the terms of the trust.” Id. Comment (b): Meaning of Impartiality. Of course, in preferring the disabled life tenant over remaindermen, Congress was giving no special status to post mortem creditors like state Medicaid agencies, and to whom trustees in general owe no duty during the life of the beneficiary. In exempting transfers for the benefit of or for the sole benefit of the disabled person, Congress was recognizing traditional trust law that the trustees disregard the interests of remaindermen and creditors.
Congress long ago rejected the skilled/custodial care distinction for Medicaid, *Newman v. Kelly*, 848 F. Supp. 228, 234-236, 239 n.4 (D.D.C. 1994), and there is no legal or logical basis for importing that distinction into the function of special needs trusts. Abigail’s severe disabilities necessitated her receiving extraordinary care and services. The actions and expenditures authorized by the Court in its January 18, 2011 Order benefitted Abigail and met all legitimate requirements for a special needs trust (*supra*, In Matter of Abigail Nebab).

The SSA, by its national Appeals Council, accepts that a special needs trust could make distributions by way of a stipend to the mother of the disabled minor trust beneficiary for caring for the child, consistent with SSI law respecting special needs trusts. In *Calef v. JoAnne B. Barnhart, as Commissioner of Social Security*, 309 F. Supp. 2d 425 (E.D. NY 2004), the minor child, a recipient of SSI, received a tort settlement that was transferred to an exempt supplemental needs trust by order of the Supreme Court of New York. That order also provided that the child’s mother be paid $1,000 a month from the special needs trust as a stipend because she was providing care for her child’s medical needs and could not work. The issue before the court was whether or not the payment was earned or unearned income in the SSI program. The child could not fire her parent or direct her work, so SSA determined that the mother was not self-employed as her minor child’s caregiver and the child’s SSI benefit was reduced without allowing for deductions that apply to earned income deemed from the parent. The court affirmed SSA’s decision. The fact that the mother was being paid for care giving from her child’s special needs trust was never at issue.
Tips for Writing a Great Newsletter

By Leonard E. Mondschein, CELA, CAP

Writing a newsletter for your clients or referral sources could be easier than you think.

Writing a great newsletter is easy! The important thing is to approach the project analytically before you approach it literally. There are many ways to write a newsletter, so it is important to understand all of your options before you start to write.

Audience

The first question to ask yourself is who is your audience? Is the newsletter for clients or professional referral sources? You may decide to write separate newsletters for each group, as client newsletters tend to be more general than newsletters written for professionals. You do not want to insult the intelligence of your good referral sources by sending them information that they find too basic, and you do not want to be too technical for your clients.

Original or “Canned” Content

Once you decide who your audience is, the next step is to decide whether to write an original newsletter or purchase a “canned” newsletter from a publisher, with your name printed on the front page. Using a “canned” newsletter becomes an image issue. If you hold yourself out as an expert in your field as well as in your community, will other professionals and/or clients wonder why you are not writing your own newsletter? On the other hand, marketing experts advise their clients to send out newsletters on a regular basis. Finding the time to write multiple articles can be difficult if you are busy practicing law all day. When you buy a monthly or quarterly newsletter, it goes out whether you have the time to write one or not. Obviously, the best of both worlds is to write your own newsletter and make sure it goes out monthly, bi-monthly, or quarterly.

Short or Long

In addition to the newsletter’s audience and frequency, you need to consider the length of your newsletter. A newsletter with multiple articles is more interesting and shows a greater effort. However, if you are the only one writing it, generating more than one article can become a problem. Again, from a marketing point of view, a single-article, monthly newsletter is probably a more effective business generator than an infrequent, multi-article newsletter.

Delivery Method

Another consideration in writing a great newsletter is delivery. Should you mail your newsletter by regular mail, fax, or email? There are proponents for each of these types of delivery. While “snail mail” is the oldest and slowest form of delivery, it is also the most tangible. Regular mail
This article is provided by the NAELA PD/PM Section.

tends to evoke a more personal message, especially if you write your own newsletter. It is also more likely to be saved by your professional referral sources, as an original document is perceived to be of greater value than other media. Fax newsletters have become synonymous with “spam” and will generally have less impact, or be thrown away by your professional contact’s staff. Email is the latest way that newsletters are delivered. It can be as graphically interesting and as colorful as snail mail. However, unless it comes from a recognized source (e.g., NAELA, ABA, Bar Section, etc.), email is usually deleted before most of it, if any, is read. An advantage of email is that it can be tied to a website or blog, which can be part of a “conversion” process to attract new clients.

Many attorneys are on “overflow” with junk mail. If you are going to use regular mail for your newsletter, you should periodically review your mailing list to add or delete names so that you are not wasting postage and printing costs. Professional referral sources tend to move around, so it is a continuous effort to keep your mailing list current.

And Finally

Here are two final suggestions for writing a great newsletter. First, keep it interesting and timely. Vary the topics from issue to issue to create anticipation on the part of your audience for the next issue. The second suggestion is to proofread your newsletter carefully. There is nothing worse than a poorly written newsletter on an otherwise interesting subject.

In conclusion, by considering the above issues, your efforts will produce a successful newsletter that will reflect positively on you and your practice.
I was honored when I received a message from NAELA President Gregory French asking me to represent NAELA as an accredited nongovernmental organization (NGO) to the United Nations’ Open-Ended Working Group on Aging (OEWGA). The request, however, was not due to any special knowledge I have of international law, but primarily because my office in the Empire State Building is one subway stop and a short walk away from the United Nations. Nonetheless, I was flattered and leaped at the opportunity to participate and learn more about the important work on the rights of the elderly being done at the international level and how NAELA can be of assistance. The third working session of the OEWGA was held at the United Nations Headquarters, August 21-24, 2012.

The substance of the discussions by the delegates from various nations and from nongovernmental organizations was whether there should be a convention or treaty on the rights of the elderly. There were also a series of presentations by experts on the status of older persons across the world including sessions on age discrimination, autonomy, independent living, health care, dignity, social security, access to resources, abuse and violence, and access to justice.

Issues Unique to Older Persons

Many of the presentations emphasized the issues that are unique to dealing with the rights of the elderly that are not necessarily covered by other protocols. On the topic of age discrimination, there was a discussion of policies for early retirement in order to promote a younger workforce. This issue also was discussed in the session on life in dignity, social security, and access to resources. Also discussed were policies that uniquely affect the elderly such as discrimination by age in health insurance, travel insurance, mortgages, and loans. The presentation on autonomy, independent living, and health care emphasized the consensus of research that finds that when older persons stay home they have a better life and live longer. There was also a discussion of health care services for persons with incurable illnesses including palliative care. There was a discussion regarding the need for a balance to be struck between drug control problems (preventing drug abuse) and the use of drugs to alleviate pain. There was a discussion of the issue of institutionalization due to age.

The session on violence and abuse talked about situations...
tions of abuse in the home and in long-term care facilities that particularly affect the elderly.

The presentation on access to justice also emphasized age-related rights such as issues of capacity and guardianship, protective services to prevent abuse and exploitation, and how delays in justice uniquely impact the elderly.

NAELA Past President Charles Sabatino, JD, Director of the ABA Commission on Law & Aging, made one of the presentations on access to justice (see sidebar).

No Consensus Among Delegates

While there are treaties or conventions on the rights of women and people with disabilities, there is no such international human rights instrument dedicated to the rights of older persons. However, from the discussion by the actual member-nation delegates at the conference, it would appear that there is still no consensus among the participating nation states regarding the need for such a convention. Many spoke saying that the rights of the elderly are protected under other UN conventions. There are existing conventions on economic, social, and cultural rights; on civil and political rights; on the elimination of racial discrimination; on discrimination against women; and on the rights of people with disabilities. All of the existing conventions (except on the rights of children) apply to older persons. These member-nation delegates did not feel the rights of the elderly were unique. Some also felt that the Madrid International Plan of Action on Aging (MIPAA adopted at the Second World Assembly on Aging in 2002 and endorsed by the UN General Assembly) covered the current need. The Madrid plan, while short of a treaty, reaffirms the commitment of member states to promote and protect human rights and calls for the elimination of age discrimination, neglect, abuse, and violence. It contains guidance on the right to work, the right to health, participation, and equality of opportunity throughout life.

It was interesting that member states are split on the necessity and wisdom of a new protocol to ensure the rights of older persons. There appeared to be more support for this among the developing nations. The African Union, Venezuela, Argentina, Uruguay, Chile, El Salvador, Malaysia, and Brazil all spoke in favor of a new protocol. They felt that the unique issues of the elderly are not covered under existing protocols such as the Convention on the Rights of Persons with Disabilities (CRPD), and the non-binding nature of the MIPAA left much to be desired.

The developed nations, including the United States, Japan, Albania, the European Union, Sweden, Switzerland, and China all spoke against a new protocol saying they were not convinced of the need for a new framework or convention and it was important first to make better use of existing legal instruments. They suggested alternative ways forward including gathering more data and making information more accessible, having the issue addressed by the existing Human Rights Council, and for existing treaty bodies to analyze obstacles to older persons. The United States emphasized that no consensus has emerged from this session of the OEWGA on whether to pursue a new convention and therefore the United States government favors exploring the other avenues and uncovering and identifying the gaps that exist in the rights of the elderly.

NAELA’s Part in This International Effort

It is important that NAELA remain a part of this important international effort. NAELA should continue to monitor international developments in this area and act as a resource for other nongovernmental organizations, for the United States, and for other member nations, particularly in the area of access to justice so that these important rights can be improved and protected.

ACCESS TO JUSTICE AS A NORM FOR INTERNATIONAL LAW

Charles P. Sabatino, JD, Director of the ABA Commission on Law & Aging, Washington, D.C., and a NAELA Past President and NAELA Fellow, took part in the United Nations’ Open-Ended Working Group on Aging. In his presentation, he discusses access to legal services in the United States:

The reason I emphasize this paradigm of the field of Elder Law in the U.S. is that it demonstrates how the legal profession has come to recognize the need for a holistic, integrated approach to addressing the rights of older persons as a vulnerable population. That is a realization that needs to be considered in determining how best to strengthen the rights of older persons on an international level. In other words, is it enough to say that existing norms and processes that derive from an aggregation of existing instruments are sufficient, or is a new integrated, holistic international strategy necessary to strengthen and secure the rights of this growing population adequately? The experience of elder law strongly suggests the latter.

You can read Mr. Sabatino’s panel statement online: www.NAELA.org/NAELANewsExtraUN.
It seems that all cases are interesting. But some teach us more lessons than others. When thinking about a case to write about, I decided to pick the next client that came to see me. What follows is a brief account involving Michael, a stroke survivor who is a long-term resident of a skilled nursing facility. Michael is single, has no children, and only one sister (Diane).

Ironically, Diane is a long-time estate planning client of mine. This is ironic because when the need arose for Diane to be appointed as Michael’s fiduciary, she was unaware (or had forgotten) of the scope of my practice. So, before coming back to me, Diane hired another attorney who did an adequate transactional job of getting her appointed as guardian and conservator to take care of Michael. As an aside, the attorney was recommended by the hospital and maybe not so coincidentally also works for the nursing home in which Michael resides.

For over a year since being appointed as Michael’s guardian and conservator, Diane was privately paying for his skilled nursing home stay at the rate of close to $8,000 per month. The conservatorship inventory lists assets of over $300,000. By the time Diane came to see me, Michael’s estate was less than $200,000. Interestingly, the probate lawyer never mentioned anything about options to preserve Michael’s estate. This makes me wonder if it was out of ignorance or divided loyalty. In any event, prior to scheduling the appointment to see me, Diane attended an Elder Law seminar put on by one of our colleagues in the area. Subsequent to the seminar she scheduled an appointment to meet with the attorney who presented.

Based on the above facts, the Elder Law attorney recommended a plan that included Diane seeking probate court authority to gift approximately one-half of Michael’s assets to her and use the other half either to fund a loan to her under an actuarially sound promissory note arrangement or to purchase a single premium annuity.1 Diane was told that this plan would allow Michael to protect his assets and become eligible for Medicaid to pay his nursing home expense. Diane was also told that it would be a simple process to obtain the desired Order from the probate Judge and that she should proceed as soon as possible to help protect Michael’s estate. That was the extent of the attorney’s recommendations.

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1 These are both commonly used Medicaid planning techniques in Michigan for a single client residing in a nursing home.
As a result of the above meeting, and before proceeding with the proposed plan, Diane recalled that I practice Elder Law in addition to estate planning. As a result, she contacted me to schedule an appointment for a second opinion. In my initial interview, I discovered that Michael is a 64-year-old Vietnam-era veteran who served in the Air Force. I also found out that his house has been unoccupied for more than a year. Further, based on the Nursing Home Compare website the nursing home he was residing in has only a two-star rating. I also asked to review the admission agreement signed when Michael was admitted and began the analysis below to determine what recommendations to make.

**Private Pay vs. Medicaid**
Since Michael is 64 years old, he can benefit from a first-party special needs trust (SNT) authorized under federal statute 42 USC 1396p(d)(4)(A). Accordingly, the plan I designed included filing a Petition in Probate Court for a Protective Order under the Conservatorship requesting approval to establish and fund the SNT. Once funded, the SNT will have title to Michael’s assets and will be an exempt resource for Medicaid eligibility purposes. In turn, this will allow Michael to qualify for nursing home Medicaid coverage, yet assure he has other assets to improve the quality of his life (i.e., SNT can pay for bed holds, cable TV, massages, etc.).

**Quality of Nursing Home**
Diane felt that the nursing home Michael was in was desirable primarily because it was recommended by her other lawyer (the one who works for the nursing home) and it is close to where she lives, which allows her to visit regularly. After making her aware of her options, Diane toured a four-star rated fully Medicaid certified nursing home located less than one-half mile away. She now believes that

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2 Michigan nursing home certification allows some nursing homes to have less than all their beds certified for Medicaid. As a result, Medicaid eligibility planning only works assuming the availability of a Medicaid certified bed.
Michael will have a chance for better recovery at the new nursing home.

**Insurability of Vacant Home**

As noted above, Michael’s house is vacant. In Michigan, it is very difficult to obtain property and casualty (homeowners) insurance for a vacant home. Most homeowners and their fiduciaries are either unaware of the lack of insurability or choose to ignore the problem. Most believe if they keep paying the premium, the insurance will pay if there is a loss. Unfortunately, Michigan policies contain language that requires the homeowner to notify the insurance company if the house is vacant for 30 days or more, and failing to notify the company will void the coverage. Since we have confronted this challenge many times, we have an insurance carrier that will provide the protection needed for Michael’s house. As a result Diane, a personally responsible fiduciary, has now secured proper coverage.

**Personal Liability Under Nursing Home Contract**

Upon review, the nursing home admission agreement was signed by Diane as Michael’s “Responsible Party.” The questions I was looking to answer were: 1) whether the agreement contained language restricting Diane’s ability to engage in the SNT Medicaid planning; and 2) whether she acquired any potential personal liability via guarantor language. Fortunately, both concerns were ruled out.

**VA Benefits**

It appears from Michael’s military service record that he was exposed to Agent Orange. His medical record indicates that he suffers from ischemic heart disease, which is one of the conditions listed as making him eligible for Compensation benefits. As a result, our VA benefits specialist is working with Diane to help her prepare to file an application for Compensation benefits.

**Summary**

Here are just a few lessons from this case:

1. How easy it is for attorneys who do not practice Elder Law (and even those who say they do) to overlook serious issues.
2. We should not take for granted that our clients really understand the scope of our practice or when to call on us for help.
3. Never underestimate the power of a secondary motivator (i.e., nursing home lawyer representing Diane in Probate Court).
4. Take the extra time to assess the client’s circumstances and offer recommendations (i.e., choice of nursing home, lack of homeowner’s coverage).
5. Do not overlook other resource eligibility availability (i.e., VA Pension or Compensation).
6. Concentrate planning options on more than just saving assets and broaden the scope to focus on improving quality of life for the person in need of long-term care and supports.

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**Calendar of Events**

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

**January 18-20, 2013.** NAELA UnProgram, Embassy Suites Hotel, Dallas, Texas.

**May 1, 2013.** NAELA Basics Workshop, Atlanta, Ga.

**May 1, 2013.** NAELA Board of Directors Meeting held in conjunction with the NAELA Annual Conference, Atlanta, Ga.

**May 2-4, 2013.** NAELA Annual Conference, Atlanta, Ga.

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

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

Carol Bertsch, CELA, San Antonio, Texas
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Help NAELA Be Heard

NAELA is an influential organization. You can increase the power of its voice by making a donation today to the NAELA Senior Rights PAC and the NAELA Foundation.

Senior Rights PAC

Help educate the new members of Congress about NAELA’s work and help solidify our relationships with our current congressional friends with your contribution to the NAELA Senior Rights PAC.

Why do we have a Senior Rights PAC?
• To assist congressional candidates who support NAELA’s goals and objectives
• To increase NAELA’s access to members of Congress
• To educate Congress about the needs of the elderly and individuals with special needs
• To promote understanding of the work of Elder and Special Needs Law attorneys

Who are our strongest supporters?
• Our strongest supporters are NAELA members who have a steadfast commitment to protecting and improving the rights of older Americans and people with special needs and who understand the importance of interacting with and supporting candidates.

How do Senior Rights PAC contributions translate into access to members of Congress?
• PACs are a major presence in the political process. NAELA’s Senior Rights PAC enables NAELA members and staff to attend fundraisers for congressional members and candidates.
• Fundraisers offer us an opportunity to meet with the members of Congress to discuss issues relating to Elder and Special Needs Law. On occasion, NAELA members have attended fundraisers in the home states of their own senators and representatives and in Washington, D.C.

To learn more about the NAELA Senior Rights PAC and to make a donation, go to www.NAELA.org/SRPAC.

NAELA Foundation

The Foundation’s mission is to promote the goals of NAELA and the Elder and Special Needs Law profession through scholarships, advocacy, research, and education. The Foundation’s initial focus is on awarding scholarships to members in financial need so that they can attend national educational events. The Foundation is also creating the Litigation Advocacy Fund with the objective of establishing good legal precedent in matters of critical importance to older Americans and people with special needs.

“The Foundation plays a critical role in allowing NAELA to improve the quality of legal services provided to seniors and people with special needs by offering financial support to help educate our members and further develop their everyday practice. Moreover, by establishing a Litigation Advocacy Fund, we hope to assist other nonprofit organizations, NAELA State Chapters, and other entities in their efforts to ensure that seniors and people with special needs benefit from the services they need and deserve.”

Vincent Russo, CELA, CAP
NAELA Foundation Chair

To learn more about the NAELA Foundation and to make a donation, go to www.NAELA.org/Foundation.

The purpose of the SR-PAC is to help elect candidates who will support the goals and objectives of NAELA. SR-PAC funds are used to make contributions to candidates for public office. The contribution amounts listed are only suggestions; more or less may be contributed (subject to a limit of $5,000 per donor per calendar year). The amount given, or the refusal to give, will not benefit or disadvantage a member. You may refuse to contribute without reprisal. Only members of NAELA may be solicited to contribute. We may not accept contributions from corporations, foreign nationals, federal government contractors, or by one person in the name of another person, nor may we accept contributions of more than $5,000 per calendar year from any one contributor. Contributions are not tax deductible. Federal law requires us to obtain and report the name, address, occupation and employer of each contributor who gives more than $200 in any calendar year.

Contributions to the NAELA Foundation, a 501c(3) nonprofit organization, are deductible as charitable contributions under the Internal Revenue Code.
The current debate about end-of-life decision making in health care is avoiding the most important ingredient, understanding the natural process of dying. It is critical that this information be provided compassionately and thoroughly before those facing a potentially terminal illness can make a truly informed decision.

Those of us who work directly with the dying understand that the body has a natural wisdom built into it, to protect itself and promote comfort. Just like a body must go through certain stages to prepare to be born, it must also go through certain stages to shut down and die. It’s knowing what the natural and normal changes are that we do not want to interfere with lest we inadvertently create more discomfort. It’s also knowing how to manage any distressing symptom.

When people don’t understand the wisdom of the body, they will make decisions based on fear, lack of information, or misinformation. This can lead to devastating physical, emotional, and financial consequences for the patient and family as they seek futile or even harmful end-of-life care. Knowing and honoring the body’s changes will lead to the best possible choices and care for our loved ones.

As health care professionals working directly with those facing a terminal illness, it is our work to excavate and correct the myths and misconceptions that may drive treatment decisions, including understanding their prior experience or knowledge of death. The following is a list of what I have seen as the most common myths about the dying process.

1. Dying is painful.
   Pain is not an expected part of the dying process. In fact, many people experience no pain whatsoever. If your loved one’s particular condition does produce any pain, however, it can be managed by medications prescribed by a properly trained clinician.

2. If people don’t eat, they should get a feeding tube or they will starve to death.
   The needs of the body and its ability to process and utilize food changes in the final months of life. People do not die because they are not eating, but rather they do not eat because they are dying. Complications due to forced feeding and the use of tube feedings can actually hasten dying. One of several reasons why your loved ones will be more comfortable when not eating is that endorphins, the

This article is provided by the NAELA Health Care Section.

By Tani Bahti, RN, CT, CHPN

A good death does honor to a whole life.

—Petrarch

Tani Bahti, RN, CT, CHPN, is the founder and Executive Director of Passages — Support & Education in End of Life Issues, and the author of Dying to Know — Straight Talk About Death & Dying. For more information on her book, visit http://pathwayseol.com. This article was previously published in the NAELA Health Care Section newsletter. For information about joining this Section, log on to www.NAELA.org and look under Membership > Member Resources > Sections.
body's natural pain killers, are released to promote a sense of well-being and comfort.

3. Not drinking leads to painful dehydration.
   Natural dehydration is comfortable and causes the release of endorphins which promote comfort. Unlike in a healthy person, providing artificial fluids near the end of life may actually increase discomfort. Natural dehydration results in less chance of nausea and vomiting, swelling, and lung congestion.

4. If I don’t make use of every possible technology available, or if I tell the doctor to stop using machines to keep my loved ones alive, I am essentially killing them.
   It is the disease that kills your loved ones, not you. They wouldn’t be on machines if they weren’t critically ill. When dealing with a progressive or terminal illness, the use of machines may only be prolonging dying rather than prolonging living. Just because we have technology doesn’t mean it’s always the best or most appropriate care.

5. If they are allowed to stay in bed or sleep as much as they want, they are giving up and will die sooner.
   Energy diminishes throughout an illness. To push people beyond their natural limit will not strengthen them and may further deplete what little energy they have left, thus putting increased strain on their already fatigued body.

6. People should be conscious until the moment of death. If they are increasingly tired or confused, they are being over-medicated.
   The dying process almost always causes the person to sleep more and more, until they drift into a coma. Sleepiness and possible confusion are often due to natural chemical and metabolic changes in the body as it begins to shut down, and they occur even when a person is not taking any medications at all. Proper management of medication can keep your loved one pain free while not contributing to confusion or hastening the dying process.

7. Narcotic pain medications will cause loss of control or even hasten death.
   Adequate pain medication can actually give your loved ones more life, providing better rest and therefore more energy and comfort to do things. Inadequate pain control can harm the body and even hasten dying due to damage from stress hormones, increased risk of clots, or complications of immobility because one has too much pain to get out of bed. Properly prescribed medications do not hasten death. They keep your loved ones comfortable during the dying process.

8. It’s too late to say goodbye if they are in a coma.
   Your loved ones can hear and benefit from touch until their final breath. Now is the time for loving actions such as reminiscing, holding them tenderly, stroking their face, telling them what they meant to you, letting them know you will be sad but OK when they die, and saying goodbye.

   In the end, most people essentially “die in their sleep” due to a coma that can last from minutes to days, depending on their disease.

10. If I’m not there when my loved ones die, I failed them.
    One of the amazing mysteries of dying is the timing of death itself. Sometimes a loved one will wait for someone to arrive or for everyone to leave the room before they die. Make no judgments about whether you were there at the final moment or not. Their knowledge of your love, not your physical presence, is what is most important.

    By understanding and honoring the dying process, we promote better decision making, preparation, and comfort on the final leg of our journey.
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“I want to congratulate the organizers and participants in last weekend’s UnProgram. It was fantastic! After attending for at least five years, I thought I knew everything I could learn from this gathering, but I was definitely wrong. This year I carried back to the office more ideas and information on marketing and client strategies than ever! ... The networking with lawyers throughout the country with better ideas on how to cope with DRA, trusts, technology — every subject of interest I had. And the camaraderie [was] reassuring. Great job!”