

Winter '95

From the Chair

by Thomas V. Trainer

At last count, our Section had 385 members, a remarkable number for a group just entering its second year. According to our membership list, we come from almost all sectors of the private bar, from the public sector bar, and from the judiciary. We include legal assistants and some very hardworking associates from the aging network. We are a diverse body, and undoubtedly have a variety of goals and expectations.

The Elder Law and Advocacy Section Council and I ask you to let us know what you wish to gain from your association with the Section. You can let us know through letters to the Editor or to me. In turn though, we want you to be aware of the purpose behind forming the Section. As stated in our bylaws:

The purpose of this Section shall be to advocate for the rights of elders and educate members of the State Bar, as well as the public, so that all elders can have access to quality legal services.

The goals of the Section shall be to serve the elder population and advocate on behalf of their interests concerning professional practices, legislation, and public policy which affect the practice of elder law and related issues; provide education and pro bono services to elders with regard to legal practices, rights, and consumer issues; advocate and serve as an education resource for members of the State Bar for the purpose of fostering professional development and the advancement of "best practice" elder law standards; recognize the diversity and serve the specialized needs of the elder population; establish and maintain viable working relationships with the aging network and the human services system; and promote awareness and involvement of State Bar members, human service professionals and the general public regarding the purpose and work of the Elder Law and Advocacy Section.

As noted above, one goal is to advance "best practice" standards in the field of elder law. Our Proposed Practice Standards have twice been published, with little response. If you wish to comment on the Standards, please send your remarks to Tony Kogut.

Q: I have an elderly client who is seriously ill. He wants to provide for his elderly spouse and preserve his assets for his children. Is there any way to achieve both of these goals while permitting the surviving spouse to qualify for Medicaid if she requires nursing home care?

A: The client may wish to consider a testamentary trust for the benefit of his surviving spouse that distributes the trust corpus and any accumulated trust income to his children upon the surviving spouse's death. The principal of a testamentary trust is not a countable asset in the Medicaid program. Care should be taken in drafting the trust to include unambiguous provisions which make it clear that 1) payments from the trust may be made to supplement, but not replace Medicaid, 2) the trustee may not make payments for any purpose that would disqualify the beneficiary from Medicaid, and 3) the trust terminates if any governmental agency seeks to invade it to pay for the costs of care otherwise payable under Medicaid. Note, however, that the surviving spouse's elective share in the deceased spouse's estate may be considered as an available resource by Medicaid. To the extent the testamentary trust does not allow for payment of such an amount to the beneficiary, the state may seek to compel the surviving spouse to elect that amount from his estate because it is a resource to which she is entitled. Failure to do so could cause her to experience a penalty period of ineligibility for Medicaid coverage of her nursing home care based on the amount of her elective share. This problem may be averted by setting aside the elective share and creating the testamentary trust from the residue of the estate. As with all Medicaid issues, the practitioner should proceed with caution because of the complex and ever-changing rules which govern this program.

Answer provided by David Shatiz

Committee Report: Pro Bono

by Gary Hayden, Chair

The *Pro Bono* Committee of the Elder Law and Advocacy Section was launched during the summer of 1994. The former Chair Dick Molloy, sent letters to all members of the Section, inviting them to join the committee. Twenty-four members of the Section joined the committee and a kickoff meeting was held in Dearborn on August 24, 1994.

At that meeting, we discussed the mission of the *pro bono* committee and we attempted to identify attainable goals. The members agreed that the purpose of the *pro bono* committee is not to provide *pro bono* services to seniors ourselves (although all committee members are encouraged to provide such service on their own). Rather, the committee's purpose is to find ways to increase the supply of free or reduced-cost legal services to seniors and inform seniors of the availability of these services.

At the kick-off meeting, members discussed several potential projects, including:

identifying programs in Michigan that are interested in referring seniors to *pro bono* lawyers and publishing in the *Michigan Bar Journal* a comprehensive listing of these programs, contacting large law firms and corporations and encouraging them to create a *pro bono* program (emphasizing elder law) if they do not have a program, or, if they already have a *pro bono* program, encouraging them to direct their efforts toward elder law; and increasing seniors' awareness of *pro bono* resources by 1) attending local law fairs, 2) preparing written materials for distribution to seniors, or 3) asking Elder Law and Advocacy Section members to make presentations to senior groups.

The committee members agreed that initial projects should be focused in two general directions:

- o increasing lawyers' participation in *pro bono* programs for seniors and
- o identifying need in the senior population and increasing seniors' awareness of *pro bono* resources that are presently available.

Dick Molloy and I are leading a project to identify the present providers of services to seniors who are interested in referring seniors to *pro bono* lawyers and to publish a list of these providers in the *Michigan Bar Journal*. Cherie Mollison offered to lead a project to identify seniors in need of *pro bono* legal services and to inform those seniors of available resources. Joyce Brown and Cheryl Warren offered to assist Cherie on this project.

To make it easier for law firms and corporate law departments to do *pro bono* legal work for seniors, Kate Martin, managing attorney of the Legal Hotline for Older Michiganians (the Legal Hotline), is developing a comprehensive package of materials that she calls "*Pro Bono* in a Box." This package is designed to allow an interested firm to set up an in-house *pro bono* project to serve seniors who have called the Legal Hotline for help.

When this package is available (in mid-spring 1995), the committee will work with Kate to present the materials to large law firms and corporate law departments. "*Pro bono* in a Box" should make it easier for the committee to convince lawyers to provide *pro bono* services to seniors, because it will provide them with a ready-made avenue to channel their efforts. At the same time, the committee's involvement will assist Kate by giving her the opportunity to contact more prospective participants faster.

The pro bono committee is still in the embryonic stages, but we are enthused by the opportunities that we see and are committed to achieving our goals.

1994 Laws of Interest to Seniors

Last year, over 3,000 bills were introduced in the Michigan Senate and House of Representatives, and 440 were enacted into law. Following is a summary of several of these new laws of interest to you and your clients. Reprinted with permission from Aging Alert.

MEDIGAP POLICIES

Public Act 40: Requires Medicare supplemental policies sold by Blue Cross Blue Shield of Michigan to conform with federal standards already required of commercial insurance companies. (Effective Mar. 11, 1994.)

WHEELCHAIR LEMON LAW

Public Act 54: Requires manufacturers to provide warranties for new and used wheelchairs, and to repair or replace wheelchairs that don't comply with those warranties. (Effective Mar. 30, 1994.)

NURSING HOMES

Public Acts 73 & 74: P. A. 73 prohibits homes from requiring patients (or their families) to pay privately for a specified amount of time, before applying for Medicare or Medicaid benefits. P. A. 74 requires homes withdrawing from participation in the Medicaid program to keep patients already on Medicaid. (Effective April 10, 1994.)

HANDICAPPER PARKING

Public Act 103: Imposes stricter standards to qualify for the use of special parking spaces and the free use of metered parking. Requires a medical evaluation by a physician. (Effective April 17, 1994.)

VULNERABLE ADULTS

Public Acts 149 & 150: P. A. 149 institutes criminal penalties of up to 15 years imprisonment for the abuse or neglect of vulnerable adults, whether by facility staff or informal caregivers. P. A. 150 increases penalties for operating an adult foster care home without a license and prevents abusers from receiving a state license to operate a home. (Effective June 6, 1994.)

PAIN MANAGEMENT

Public Acts 232, 233, 234, 235, & 236: Creates an advisory committee in the Dept. of Public Health on pain management, requires insurers to offer hospice care as a benefit, and requires continuing education for health professionals on pain management. (Effective June 30, 1994.)

PROBATE

Public Act 274: Allows the probate court to turn over estates of up to \$15,000 to the surviving spouse, or other heirs. The previous limit was \$5,000. (Effective July 10, 1994.)

MEDICAL CARE SAVING ACCTS

Public Acts 289 & 290: Allows state tax deductions for medical care savings accounts, similar to IRA accounts. Accounts may be set up by employers and individuals. (Effective July 13, 1994.)

ABA Bulletin News

A new *Elder Law Policy Research Program* was established at the Government Center of Albany Law School. The Program, an outgrowth of an Elder Law pilot program initiated in 1993, will conduct research, produce analytic studies, develop legal and policy options and present conferences and seminars addressing key Elder Law and policy issues such as income security, kinship care, elder abuse, health and housing. A Kinship Care Conference in February 1995 will examine the financial, legal and social issues pertaining to the care of children by a relative other than a parent and has been designated as a White House Conference on Aging event. Policy recommendations from the conference will be forwarded to Washington for the 1995 National White House Conference on Aging in May, 1995.

The American Association of Retired Persons (AARP), the Consortium for Citizens with Disabilities (CCD), and the National Institute for Dispute Resolution (NIDR) are cosponsoring *A Conference on Disability, Aging, and Dispute Resolution* on March 30-April 1, 1995, in Washington D.C. Attendees will learn how mediation and other forms of dispute resolution can be used in the fields of disability and aging and explore the benefits of collaborative problem solving for a range of conflicts.

The ABA Commission on Legal Problems of the Elderly has compiled a bibliography of guardianship training and educational materials. The bibliography lists handbook, curricula, and videos by state and by target audiences (judges, attorneys, guardians ad litem, professionals, and the public).