AALS Section on

Law & Aging

Fall 2008 Newsletter

Edited by Nina A. Kohn

2008-2009
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Chair's Column

Margarite Angelari, Goedert Elder Law Professor, Loyola Univ. Chicago School of Law

The topic of this year's AALS conference is institutional pluralism. As previous chairs have noted, we have quite a bit of pluralism right here in the Aging and the Law Section. A quick scan of our panel topics over the past few years illustrates this--we've covered elders in the criminal justice system, employee benefits, powers of attorney for property, interviewing and counseling, mediation and the elderly, and, most recently, international issues. With the addition of this coming year's panel on consumer fraud, I think you will agree that we are continuing our tradition of incorporating our Section's wide range of interests.

The Aging and the Law Section's panel presentation, "Consumer Protection Law and the Elderly: What's New - What's Needed," will be held on January 4th from 4:00pm to 5:45pm. While schemes to defraud consumers have always existed, they have, in recent years, become increasingly complex and difficult to prosecute. Anyone can be a victim of consumer fraud, however research indicates that perpetrators of consumer fraud often target the elderly. Our panel will begin with an introduction to the problem and overview of the psycho-social issues that predispose particular subgroups of the elderly to consumer fraud by Marcia Spira, a professor of social work and the director of the Institute on Intergenerational Study and Practice at Loyola Chicago's School of Social Work. Next, Sy Moskowitz from Valparaiso will provide us with an overview of the development of consumer protection law with an emphasis on legislative efforts to afford the elderly special protections or enhance penalties for fraud committed against the elderly. Carolyn Dessin from Akron will discuss insurance and annuity fraud targeting the elderly. Kurt Eggert from Chapman will present his very interesting work on gambling. Lea Krivinskas Shepard from Loyola Chicago will provide an overview of fraud in the consumer counseling/ bankruptcy "industries." Lastly, San Diego Deputy District Attorney Paul Greenwood, a national leader in the prevention and prosecution of consumer fraud against the elderly, will provide an update on the challenges facing his office and his innovative approaches to combating consumer fraud against the elderly.

I am very excited about this year's panel and am looking forward to seeing you at AALS. The section will be going out to dinner on January 7th, the night before our panel presentation. I hope that you will join us for both the panel presentation and dinner--as always, you can expect lively conversation and great company!

First Person: An "Old" Clinician Tries to Learn New Tricks

Mary Helen McNeal
Professor and Clinical Director
Syracuse Univ. College of Law

How does one teach law students to practice elder law? The clients' problems – or those their caregivers present – are often complex scenarios, replete with intricate family dynamics, financial quagmires, and sometimes confusing facts. The clients are often experiencing significant health problems and cognitive decline. The scope of the relevant law is vast.

Last spring, I launched a new elder law clinic at Syracuse University College of Law.
Although I have been involved in clinical teaching for many years, and currently serve as a Clinical Director of a large program**,** the elder law clinic posed new challenges in part because it required me to confront this fundamental question – how to use a clinical forum to teach students to practice elder law – head-on. Now, ten months later, there is a steady flow of incoming cases, and the students are grappling with challenging legal issues and bureaucratic mazes. As the start of the new semester beckons, I once again contemplate what, of the many skills and areas of law encompassed in an elder law practice, is essential for the students to know.

As in any course, these are tough choices. Should the class address the eligibility criteria for various Medicaid programs providing home health care? Should we focus on learning basic principles of administrative law? Should the students practice direct examinations, to better represent clients in administrative proceedings, or should they grapple with drafting effective powers of attorney?

Recognizing that the distinguishing factor of any clinical course is the presence of clients, I decided to focus much of the clinic seminar on effective interviewing, counseling, and education of clients who are elderly. The course began, as do many clinical courses, with the students recording mock interviews of an elderly client presenting issues concerning either Medicare or advance directives. Together we critiqued the interviews, focusing in part on unique aspects of interviewing elderly clients. In the classroom, we addressed interviewing and counseling skills, using readings supplemented by spontaneous and "rolling" role plays.

To address the more specific issues that may arise in interviewing elderly clients, I invited an experienced professional who coordinates Alzheimer's services at a local hospital to talk with the students about cognition and aging. This presentation provided valuable scientific information. More significantly, it provided a basis for helping students think through specific strategies for working with aging clients, including the critical necessity of developing trust in the attorney-client relationship, the importance of reading client "cues" to adapt our communication styles, and how to support clients in making the decisions they are able to make. Complementing this class was a collection of short, provocative essays written by an elderly man with Alzheimer's which yielded rich discussion. More role plays and weekly case rounds offered opportunities to reinforce this discussion, and assess our abilities to effectively assist specific clients with their legal issues.

Correspondence also presented ample opportunities to address effective written communication to elderly clients. Medicare and Medicaid regulations can confound all of us; how do we translate them for our clients? Students, after two years of being taught to think and write "like a lawyer," sometimes failed to recognize the challenges of explaining legal concepts to lay people. As in almost all of their communications with clients, the students had to grapple with the assumptions we make about the elderly, straddling the line between providing assistance and inappropriate caretaking or enabling, and effectively communicating without being condescending.

While I tried to prepare the students for the challenges of representing elderly clients, and to enable them to develop as knowledgeable and compassionate counselors at law, this was simply background for the lessons the clients, and their cases, taught the students. These included the strengths and limitations of using the legal system to address complicated medical and emotional issues affecting families, the complexity of the network of social programs designed to assist the elderly, and the necessity of involving other professionals in our work. Perhaps most importantly, the clients taught the students how to be respective and attentive to their clients' needs, sensitive in their approach, and mindful of the challenges of growing old and the wisdom their clients offer.

AALS Annual Meeting Events At a Glance

Wednesday, January 6th (8:00pm) – Dinner
The annual Dutch Treat Dinner will be held on the evening of January 7th at a local restaurant. If you would like to join, please RSVP to Nina Kohn at nakohn@law.syr.edu at your earliest convenience.

Thursday, January 7th (4:00pm - 5:45pm) – Panel Presentation
This year's panel is entitled "Consumer Protection Law and the Elderly: What's New – What's Needed." A description of the panel can be found in the Chair's Column.

Elder Law Study Group Seeks Help With Survey

The Elder Law Study Group, a group of legal academics and elder law experts brought together by the Borchard Foundation Center on Law and Aging and the Institute for Laws of Health and Aging at Pacific McGeorge School of Law is currently conducting a study on elder law in academia. Surveys were mailed out in early fall to persons teaching or writing in the area of elder law.

If you teach or write in the field of elder law and have not already done so, please consider taking a moment to fill out the survey. A copy of the survey and more information about the project can be found online at: www.law.syr.edu/faculty/ninakohn/survey.

Are you interested in being on our section's executive committee?

- or -

Would you like to nominate someone else to serve?

If so, please email Marguerite Angelari at mangela@luc.edu and let her know.

Teaching Tips: Elder Law Goes to the Movies

At last year's Aging and the Law Section dinner, there was discussion of using movies as teaching tools in elder law courses. Your editor decided to follow-up on this discussion by asking some fellow section members to identify movies they have found useful in their teaching. Here are some of the resulting recent movie suggestions:

The Savages (2007)*:* Depicts adult siblings confronting the needs of their aging father. Provides fodder for discussing family care giving.

Away From Her (2006)*:* A husband and wife struggle with Alzheimer's and placement of a spouse in a long-term care facility. One professor suggests having students critique the movie's presentation of both Alzheimer's disease and long-term care: Is the movie's depiction accurate? Would the restrictions placed on the spouse residing in long-term care be permissible under US federal law?

The Sea Inside (2004): Based on a true story, the movie portrays a quadriplegic's quest to end his own life. Can be used as part of a discussion of right to die issues.

Iris (2001)*:* Tells the story of Irish novelist Iris Murdoch (played as a young woman by Kate Winslet and as an older woman Judi Dench) and depicts her deterioration from Alzheimer's disease.

For a more thorough look at using film in to teach elder law, and a discussion of five specific films (*Driving Ms. Daisy, Waking Ned Devine, On Golden Pond, The Straight Story,* and *Iris*) and their pedagogical value, see Israel Doran, *Bring the Law to the Gerontological Stage: A Different Look at Movies in Old Age*, 62 Int'l J. Aging & Human Development 237 (2006).

We're on the Web!
http://law.wfu.edu/aals

Announcement: Student Writing Competition

The National Academy of Elder Law Attorneys is sponsoring a student writing competition. To be eligible, articles must address legal issues affecting seniors or persons with disabilities, must not exceed 35 pages in length, must be written by a current law student, and must be submitted no later than June 1, 2009. The competition carries with it cash awards, a membership in NAELA, and publication of the winning articles in a special issue of the NAELA Journal. More information can be found at ww.naela.com/pdffiles/2009WritingCompetitionflyerfinal.pdf.

The 2008 winners of the writing competition are: (1) First Place: Marc Adler (Seton Hall Law School), The Government's Cap on Dying: Why Is the Medicare Hospice Benefit Cap Being Exceeded and How Should This Problem Be Addressed?; (2) Second Place: Genevieve Jie-Ying Essig (U. of Virginia School of Law), *Finding the Keys to the Problem of Aging Driver;* and (3) Third Place: Emily Demiray (U. of Akron School of Law), Taking Great Pains: The Role of Palliative Care in the Legal Competence Analysis.

Member News

Marguerite Angelari (Loyola Chicago) received the Leonard Jay Schrager Award of Excellence from The Chicago Bar Association and The Chicago Bar Foundation. She published "Access to Health Care for Elderly Immigrants," in the Annals of Health Law this past spring. In addition, she participated on a panel discussion sponsored by the Association for Conflict Resolution, "Mediating Elder Law Disputes," in November and on a panel co-sponsored by the Chicago chapter of the American Constitution Society and the Public Interest Law Initiative titled "Safeguarding our Seniors: Perspectives on Elder Law and Nursing Home Litigation," in June and was cited in a Wall Street Journal article "Dealing with the Cost of Alzheimer's," also in June.

Susan Donovan (Alabama) was hired to be the new staff attorney for the University of Alabama's Elder Law Clinic.

Jason A. Frank (adjunct, Maryland) has been named a Super Lawyer for 2009. He has also authored a new work entitled Maryland Medicaid: Long-Term Care, updated his book Elder Law in Maryland, and written two articles for the Maryland Bar Journal: "Global Analysis: Social Insurance to Pay for Long-Term Care," and "Level of Care Standard: Maryland Medical Assistance Long-Term Care and Medical Eligibility Issues." He also published an article for the Elder Law Advisory entitled "The Case for Asset Protection."

Tom Gallanis (Minnesota) has been named an Associate Reporter of the Restatement 3d of Trusts. He continues his work as Assistant Executive Director of the Joint Editorial Board for Uniform Trust and Estate Acts and Reporter for the Uniform Real Property Transfer on Death Act. His forthcoming publications include *Reasonable Doubt and the History of the Criminal Trial*, 76 U. CHI. L. REV. (forthcoming 2009), and *Frontiers of Succession*, REAL PROP., TR. & EST. L. J. (forthcoming 2009).

Sally Hurme (adjunct, George Washington) was awarded the Treat Award for Excellence by the National College of Probate Judges at its fall conference held in Savannah, GA, on November 14. Named in honor of Judge William W. Treat, founder and President Emeritus of NCPJ, the award goes to an individual who has made a significant contribution to the improvement of probate law. While most of the prior recipients have been judges, academics who have recently been given the Treat Award include Amy Morris Hess, Mary Radford and John Langbein. Justice Sandra Day O'Connor was the 1983 recipient. Sally, a Senior Project Manager at AARP, has taught Elder Law at George Washington Law School as an associate professorial lecturer for the past eight years. She serves on the boards of the National Guardianship Association and the Center for Guardianship Certification. Her recent writings have focused on interstate guardianship jurisdiction and the rights of persons under guardianship to vote.

Member News continued . . .

Richard Kaplan (Illinois) reports two new publications: *A Law and Economics Approach,* chapter 6 in THEORIES ON LAW AND AGEING: THE JURISPRUDENCE OF ELDER LAW (Springer eBooks 2008; Israel Doron, editor) and *A Guide to Starting Social Security Benefits,* J. RETIREMENT PLAN., July-Aug. 2008, at 33-38, 48. The latter has been selected for republication in CCH's FINANCIAL & ESTATE PLAN. REP. ¶ 33,181 (Sept. 30, 2008) and is available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1192902.

Marshall Kapp (Southern Illinois) completed a book manuscript entitled "Legal Aspects of Elder Care" that will be published in February 2009 by Jones and Bartlett Publishers. This is a textbook to be used in teaching health care and human services professional students about caring for older people. In addition, he has a number of new articles, including:

Ninny Clients of the Nanny State? Selective Paternalism in Public Benefit Programs for Older Americans, 6 GEO. J. OF L. & PUB. POL'Y 191-218 (2008).

Biobanking Human Biological Materials: Issues Surrounding the Collection of Samples for Use in Future Research, 22 PHARMACEUTICAL MEDICINE 75-84 (2008).

Legal Issues in Dementia, 20 INT'L J. OF RISK & SAFETY IN MED. 91-103 (2008).

Resistance to Nursing Home Restraints Reduction Revisited: Introduction to a Symposium, 20 J. OF AGING & SOC. POL'Y 279-285 (2008).

Regulating Payment for Home Care Companionship Services: Legal Authority and Public Policy, 9 J. OF LONG TERM HOME HEALTH CARE 122-127 (2008).

Nina Kohn (Syracuse) has two new publications: *Designating Health Care Decision-Makers for Patients Without Advance Directives,* 42 GA. L. REV. 979 (2008) (co-authored with Jeremy Blumenthal) and *Cognitive Impairment and the Right to Vote*, 1 CAN. J. OF ELDER L. 28 (2008).

Hugh Lee (Alabama) has co-authored with Jo Alison Taylor the Alabama Elder Law Hornbook, published as part of West's Alabama Practice Series. It is a 1500 page text which covers many of the issues faced by elder law attorneys in Alabama and elsewhere.

Mary Helen McNeal (Syracuse) is collaborating with the SUNY Upstate Medical University, Department of Medicine, Division of Geriatrics, to offer legal assistance to their patients. Modeled after the successful medical-legal collaboratives originally developed to assist children, her elder law clinic will meet with Upstate's patients on a regular basis.

Kate Mewhinney (Wake Forest) is co-planner for the annual CLE of the Dispute Resolution Section of the N.C. Bar Association. Mewhinney, who is a Certified Superior Court Mediator, is on the governing council of the Dispute Resolution Section. Mewhinney also chairs a committee of the National Academy of Elder Law Attorneys (NAELA) which works to attract law students to this growing field of practice. The NAELA Academic Subcommittee is pleased that over fifty law students from all over the country are coming to NAELA's annual institute in Kansas City, Missouri for a "Law Student Day." In addition, the NAELA committee is sponsoring the Student Writing Competition mentioned earlier in this newsletter.

Kathryn Tucker (Affiliate Professor of Law, Lewis & Clark) was the principal author of a measure enacted in CA in 2008 designed to ensure that all terminally ill Californians will have the opportunity to receive counseling on a full range of end of life care options accepted in law and medicine in that state. She also argued in the District Court in Helena MT, on 10/10/08, that mentally competent terminally ill Montanans have a right to aid in dying, protected by the State constitutional guarantees of privacy, dignity and equal protection.

Linda Whitton (Valpariso) was appointed as: ABA representative, National Conference of Lawyers and Corporate Fiduciaries; Commissioner, ABA Commission on Law and Aging; and Academic Fellow, American College of Trust and Estate Counsel. In addition, she reports two new publications: *The Uniform Power of Attorney Act: Striking a Balance Between Autonomy and Protection*, PHO. L. REV. (forthcoming) and EVERYDAY LAW FOR SENIORS (Paradigm Publishers, Spring 2009) (co-authored with Larry Frolik).