

AALS Section on Aging and the Law

Fall 2007 Newsletter

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Marguerite Angelari, Editor

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Section Website www.law.wfu.edu/aals.xml

AALS Events

Thursday, January 3, 2008—Join fellow section members for dinner! Contact Marguerite Angelari at mangela@luc.edu to RSVP.

Friday, January 4, 2008 at 8:30 a.m.
“Grays’ Autonomy: How International Law Advances The Rights Of Older Adults.” Hilton, Murray Hill A room

Election of Officers and Executive Committee will follow the program. Please email your nominations to sgary@law.uoregon.edu

My Neighbors Were Barefooted!
Kate Mewhinney, Section Chair



My student warned me. She said her client follows current affairs. Sure enough, when we arrived at the nursing facility and found the client’s private room, the morning paper was spread out on the bed while she carefully read each page, seated in her wheelchair. “I’m going home soon!” she told us, cheerfully. Healed up after a fall, she was soon to move in with one of her daughters.

The problem? Our client is the subject of a pending guardianship action. Her daughters filed the case when they noticed “financial mismanagement,” including many contributions to a group that would “save Social Security.” “Roosevelt stepped in when we had no food to eat, and were going bare-footed in the cold,” she explained. “We can’t let the current government put at risk the security of older people and those in need!”

Poor judgment or prescient? Activist or abuse victim? As my student put together the facts, she faced one of the challenging aspects of advocacy for older clients - at what point should family and the government be allowed to step in and take over for an impaired older person? Fortunately, in this case, the student, as court-appointed guardian ad litem, seems to have gotten the family to resolve the issues so that the case will be dropped.

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This is not to imply that financial abuse was absent in this situation. There are many clear-cut cases of exploitation and neglect which go unaddressed by our legal system. I would ask each member of this Section to consider supporting the **Elder Justice Act**, which is languishing in Congress. If you review the website www.elderjusticecoalition.com/ and find this bill worthy of your support, please join the Coalition! Better yet, drop a note to your Congressional delegation letting them know that our federal government should take this baby step in the direction of stopping elder abuse and exploitation.

So, what have we done as a Section this year? We have a new website with useful links, upcoming program information, sample syllabi, and lots more! Check it out at www.law.wfu.edu/aals.xml. Our members now receive the weekly e-bulletin from the National Academy of Elder Law Attorneys and, thanks to **Marguerite Angelari** (Loyola-Chicago), we received two excellent newsletters. I'd especially like to thank **Phebe Sauders Haugen** (William Mitchell), **David English** (Missouri) and **Sally Hurme** (GW) for their excellent articles in the newsletters. **Jon Forman** (Oklahoma) has also done a terrific job as our listserv webmaster. **Nina Kohn** (Syracuse) has generously agreed to take over as the newsletter editor next year.

I hope to see you at the AALS Annual Meeting in New York City, where we have an exciting program planned for our Section. The title is "**Grays' Autonomy: How International Law Advances The Rights Of Older Adults.**" So, mark your calendars for Friday, January 4 at 8:30 a.m. Co-sponsoring the program is the Section on International Human Rights.

Our panel is comprised of an impressive group of scholars and engaged activists. **Dr.**

Alexandre Sidorenko, whose title is United Nations Focal Point on Aging, will tell us about the role of the U.N. in advancing the rights of older people. An expert on the international aspects of elder law, **Professor Israel ("Issi") Doron** will also be on our panel. He teaches at Haifa University in Israel, and is well-published in our field. To bring us up to date on developments in the U.K and European Union, we have invited **Professor Luke Clements** of Cardiff University Law School in Wales. And many of you will know the fiery advocate **Professor Arlene Kanter**, from Syracuse University College of Law.

The U.S. legal system has developed a growing awareness of international legal standards. As we become more comfortable in considering international norms of human rights, we face the challenge of a graying population. These trends coincide to make our Section's program timely and valuable.

Our international panel has impressive experience both in the academic arena and in such activities as NGO's, litigation in international courts, and legislative commissions. Attendees will gain a better understanding of how international human rights laws, European Union law, and mental disability law can be used to enhance the rights of our aging communities. As attorneys, policy makers and academics, come ready to learn how international law advances the rights of increasing numbers of senior citizens.

I look forward to seeing you on **Friday, January 4, 2008 at 8:30 a.m.** Come ready to learn about an exciting perspective on law and aging, and to catch up with other Section members. We'll be at the Hilton New York, in the "Murray Hill A" room on the 2nd Floor. Elections for officers and the Section's executive committee will follow the program. And be sure to join us for **dinner** the evening before! ■

End of Life Choice: Using Appropriate Language

Kathryn L. Tucker

What ought we call the choice made by a mentally competent terminally ill patient to self administer medication for the purpose of hastening death in cases where the patient finds the dying process intolerable?

This option is currently legal in the state of Oregon, under the Oregon Death with Dignity Act, and is widely practiced covertly in other states. The Oregon Department of Human Services, which reports on the Dignity Act, adopted a policy in 2006 that it will no longer refer to this as "assisted suicide" or "physician assisted suicide". As recognized by a medical epidemiologist at the DHS, "[it] probably has not been correct for us to be using this language all along." Kevin B. O'Reilly, *Oregon nixes use of term "physician assisted suicide,"* *amednews.com*, Nov. 6, 2006 (quoting Katrina Hedberg, MD, MPH, a DHS Public Health Division medical epidemiologist). See, <http://www.oregon.gov/DHS>; <http://www.ama-assn.org/amednews/2006/11/06/prsc1106.htm>.

This is consistent with the Dignity Act itself, which clearly states: "Actions taken in accordance with ORS 127.800 to 127.897 shall not, for any purpose, constitute suicide, assisted suicide, mercy killing or homicide, under the law."

A growing number of medical and health policy organizations are adopting policy on this topic. The American Public Health Association recognizes that "The term 'suicide' or 'assisted suicide' is inappropriate when discussing the choice of a mentally competent terminally ill patient to seek medications that he or she could consume to bring about a peaceful and dignified death." The APHA policy emphasizes "the importance to public health

of using accurate language" and, accordingly, urges: "That health educators, policy makers, journalists, and health care providers recognize that the choice of a mentally competent terminally ill patient to choose to self administer medications to bring about a peaceful death is not "suicide", nor is the prescribing of such medications by a physician "assisted suicide.""

The APHA further urges "That accurate, value-neutral terms such as "aid in dying" or "patient directed dying" be used to describe this choice." APHA policy, "Supporting Appropriate Language Used to Discuss End of Life Choices", 11/08/2006, LB-06-02.

Medical experts have discussed in detail why the term "suicide" or "assisted suicide" is inappropriate when discussing the choice of a mentally competent terminally ill patient to seek medications that he or she could consume to bring about a peaceful and dignified death. See e.g. American Medical Women's Association Position Statement on Aid in Dying ("The terms "assisted suicide" and/or "physician assisted suicide" have been used in the past, including in an AMWA position statement, to refer to the choice of a mentally competent terminally ill patient to self administer medication for the purpose of controlling time and manner of death, in cases where the patient finds the dying process intolerable. The term "suicide" is increasingly recognized as inaccurate and inappropriate in this context and we reject that term.

Kathryn Tucker is the Legal Director at Compassion & Choices, a group dedicated to upholding patients' end-of-life rights and personal control over such decisions. Ms. Tucker is also an Affiliate Professor of Law at Lewis and Clark Law School.

We adopt the less emotionally charged, value-neutral, and accurate terms 'Aid in Dying' or 'Physician Assisted Dying.' American Academy of Hospice and Palliative Medicine Policy on Physician Assisted Death, adopted February 2007, available at <http://www.aahpm.org/positions/suicide.html> (rejecting the term Physician Assisted Suicide as "emotionally charged" and inaccurate). See also, J. Straton, *Physician Assistance with Dying: Reframing the Debate*, 15 Temp Pol. & Civ Rts. L. Rev. 475(2006) (Co Director of Symptom Management and Palliative Care in Dept of Family Medicine at Univ Penn writes "The process of permitting people to actively end their life before their life-ending disease completely runs its course" ought to be referred to as 'physician assistance with dying', and rejects the term 'physician assisted suicide').

Those with expertise in mental health readily appreciate that "suicide" and the choice of a dying patient to hasten impending death in a peaceful and dignified manner are starkly different from a mental health perspective. Profound psychological differences distinguish suicide from actions under the Dignity Act. As one psychiatrist recently summarized: "The term 'assisted suicide' is inaccurate and misleading with respect to the Dignity Act. These patients and the typical suicide are opposites:

- The suicidal patient has no terminal illness but wants to die; the DWD patient has a terminal illness and wants to live.
- Typical suicides bring shock and tragedy to families and friends; DWD deaths are peaceful and supported by loved ones.
- Typical suicides are secretive and often impulsive and violent. Death in DWD is planned; it changes only timing in a minor way, but adds control in a major and socially approved way.
- Suicide is an expression of despair and futility; DWD is a form of affirmation and empowerment." Lieberman, E.J.,M.D., Letters to the Editor, *Death with Dignity*, Psychiatric News, 2006 Aug. 41 (15):29.

A working group of the American Psychological Association has recognized: "It is important to remember that the reasoning on which a terminally ill person (whose judgments are not impaired by mental disorders) bases a decision to end his or her life is fundamentally different from the reasoning a clinically depressed person uses to justify suicide." Brief of Amicus Curiae Coalition of Mental Health Professionals, WL 1749170 at 17, *Gonzales v. Oregon*, 126 S. Ct. 904 (2006) (No. 04-623); see also, Rhea K. Farberman, *Terminal Illness and Hastened Death Requests: The Important Role of the Mental Health Professional*, 28 Prof. Psychol.: Research and Prac. 544 (1997); Smith and Pollack, *A Psychiatric Defense of Aid in Dying*, 34 Community Mental Health Journal 547 (1998).

The inappropriateness of the term "suicide" or "assisted suicide" has been recognized by legal scholars as well:

"The word 'suicide' is well suited to the description of a distraught individual with his whole life ahead of him, who in a moment of despair, commits a completely senseless and utterly tragic act. In contrast, "suicide" is not well suited to describe an elderly cancer patient who in the final days of a horrible and agonizing struggle simply wishes to avoid more needless suffering and indignity. The first individual's act destroys what could be a long and productive life. The elderly cancer patient does not extinguish the hope of a bright future, but rather avoids the last painful and undignified moments of a life already fully lived. ...Use of the word "suicide... arouses the images of tragic loss of life in a situation where the tragedy may be the continuation of life." J. Dallner and S. Manning, *Death with Dignity in Montana*, 65 Mont. L. Rev. 309, 314-15 (2004).

Terminally ill patients, some of whom choose aid in dying, express that use of emotionally charged terms such as “suicide” or “assisted suicide” to refer to the choice seek medications to allow them control over the time of impending death is hurtful and offensive to them, their family members, and their physicians.

Using value neutral, accurate language to discuss this end of life option, enables a robust debate about enacting laws like Oregon’s elsewhere. It was after a careful review of the decade of experience in Oregon, that the American Medical Women’s Association concluded, as have many outside observers, that the availability of aid in dying has posed no harm to patients, vulnerable populations, or physicians.

Aid in dying provides an option for patients who find themselves trapped in a dying process marked by such progressive loss of bodily function and integrity, deterioration and suffering that the patient concludes that hastening impending death in a peaceful way is their best choice. Aid in dying empowers patients suffering horrific deaths to avoid extended suffering. For patients determined to avoid such suffering, aid in dying provides an alternative to violent deaths or uncertain attempts at self-help. When death is imminent, it is entirely respectful of patient autonomy and medical ethics to empower a patient decide for himself or herself whether to endure continued suffering or act to hasten death in a peaceful and dignified manner.

A murky legal landscape in every state other than Oregon keeps aid in dying covert and clandestine, leaving physicians caring for suffering dying patients who seek aid in dying trapped between providing care of uncertain legal status or rejecting their patient’s request. A growing number of groups, such as AMWA, are speaking out against leaving dying patients with no choice but to seek help in the back alley. ■

Did You Know?

Teaching materials, useful links, and upcoming programs are available on your Section website!

www.law.wfu.edu/aals.xml

RECENT MEMBER ACTIVITIES

Marguerite Angelari (Loyola Chicago) co-presented at The National Association of Aging and the Law Conference, in Washington, DC in October. The topic of her presentation was "Therapeutic Jurisprudence and Mandated Reporting: Collaboration in Services to Older Adults."

Jonathan B. Forman (Oklahoma) recently authored a chapter in *The Future of 401(k) Plan Fees*, in *New York University Review of Employee Benefits and Compensation-2007*, Chapter 9, pp. 9-1 to 9-18 (Alvin D. Lurie ed., 2007).

Professor Forman also wrote an August 6, 2007 op-ed in *The Journal Record* titled "America is building a better retirement system."

Professor Forman recently published "Encourage the Old and Young to Work" in the April 12, 2007 edition of the *Norman Transcript*, which was subsequently published in the *Butler Eagle*, the *Mobile Alabama Press-Register* and the *Spokane Spokesman Review*.

Additionally, Professor Forman has given several presentations. The first is titled "Defined Benefit versus Defined Contribution," and was presented at Canada Cup of Investment Management, Toronto, Canada, June 13, 2007. The second is titled "Social Security Reform," and was given for the Ardmore Optimist Club, Ardmore, Oklahoma, January 11, 2007 and for the Lucent Retiree Association, September 5, 2007, Oklahoma City, Oklahoma.

Larry Frolik (Pittsburgh) gave a series of lectures in Japan during the week of September 17th. Professor Frolik addressed the Congress of Japanese American Society for Legal Studies held at Kobe University on "The United States Approach to Economic Assistance to the Elderly: Cultural Values in Conflict." He also gave a talk at Tokyo University sponsored by the Faculty of Law on "Solving the 'Financial Crisis' in the American Social Security Program. At Waseda University in Tokyo, he was a presenter at the Waseda Institute of Comparative Law where he talked on "Will the American Social Security Program be Privatized?" His paper will be published in Volume 10 of the *Waseda Proceedings of Comparative Law Journal*. He also was a participant in a workshop on the use of Alternative Dispute Resolution in Elder Law held at Tsukuba Law School in Tokyo.

Tom Gallanis (Minnesota) was the Herbert Smith visiting professor at Cambridge University from May to August 2007. He has recently published "The Trustee's Duty to Inform," 85 *North Carolina Law Review* 1595 (2007) and has a forthcoming article, "Death by Disaster: Anglo-American Presumptions, 1766-2006" in R.H. Helmholz and D. Sellar, eds., *The Law of Presumptions (Comparative Studies in Continental and Anglo-American Legal History)*, Berlin: Duncker & Humblot). He will speak on "Frontiers of Succession: Examples from Domestic Partnerships" in February 2008 at the UCLA Conference on Succession in the 21st Century.

Marshall Kapp (Southern Illinois) recently published "Geriatric Patients," in *Legal Medicine (Seventh Edition)*, edited by American College of Legal Medicine Textbook Committee, Mosby: Philadelphia, PA, pp. 559-563 (2007). Also, Professor Kapp has published "Ethical and Legal Issues," in *Practice of Geriatrics*, 4th Edition, edited by Edmund H. Duthie, Paul R. Katz, & Michael L. Malone, Philadelphia: Saunders Elsevier, pp. 61-68 (2007).

Professor Kapp has also authored "Consumer-Driven Health Care: Implications for the Physician/Patient Relationship," Vol. 70, No. 2, pp. 12-15, *PHAROS* (Spring 2007).

He has also published "The Business Case for Medical Informed Consent," Vol. 19, No. 1-2, pp. 57-64, *International Journal of Risk and Safety in Medicine* (2007), "Consumer-Driven Long Term Care: Shaping the Government's Role," Vol. 8, No. 2, pp. 199-214, *Marquette Elder's Advisor* (Spring 2007), and gave a presentation titled "Consumer-Directed Long Term Care" and "Can Resident Safety and a Homelike Environment Be Compatible in Long Term Care?" at the Annual Convention of Life Services Network, Chicago, March 30, 2007.

RECENT MEMBER ACTIVITIES, continued

Richard L. Kaplan (Illinois) published "Honoring Our Parents: Applying the Biblical Imperative in the Context of Long-Term Care," 21 Notre Dame J. L. Ethics & Pub. Pol'y 493-515 (2007), an article on how the biblical commandment to "honor your father and your mother" is best implemented regarding this nation's long-term care policy for older Americans. He presented this paper at the Notre Dame Law School Symposium on "Long-Term Care for America's Elderly: Who is Responsible, and How Will it Be Achieved?"

He also published "Retirement Planning's Greatest Gap: Funding Long-Term Care," 11 Lewis & Clark L. Rev. 407-450 (2007), an article on the unanticipated threat of long-term care expenses to a financially secure retirement, especially in light of the February 2006 reforms of Medicaid's eligibility criteria. He presented this paper at the Lewis & Clark Law School Business Law Forum on "The Aging of the Baby Boomers and America's Changing Retirement System."

In addition, Professor Kaplan published "The Inheritance Threat of Long-Term Care Expenses," 41st Ann. Heckerling Inst. on Estate Planning, chapter 17 (2007).

Professor Kaplan was a Panelist at a Symposium on "Protecting Seniors" sponsored by the Securities Exchange Commission in May 2007 and spoke on "The Other Crisis in Long-Term Care: Who Will Do It?" at the Annual Meeting of the Council of Advanced Practitioners, National Academy of Elder Law Attorneys.

Kate Mewhinney (Wake Forest University) was a speaker at the National Aging and Law Conference in Washington, D.C. on "The Durable Power of Attorney: Tool for Empowerment or Exploitation?" In September, she was a plenary speaker at the North Carolina Conference on Aging, on "Street Smarts for Seniors - Financial and Consumer Issues." This past summer, Professor Mewhinney began a three year term on the Council of the NC Bar Association's Dispute Resolution Section. In November, she spoke at the Canadian Conference on Elder Law (Vancouver), on establishing elder law clinics.

Nina Kohn (Syracuse) recently published an article exploring new ways of conceptualizing and combating durable power of attorney abuse. See: Nina A. Kohn, Elder Empowerment as a Strategy for Curbing the Hidden Abuses of Durable Powers of Attorney, 59 Rutgers Law Review 1 (2006).

This fall, she is publishing an article on the voting rights of long-term care residents. The article was presented this spring at "Voting as People Age: Implications of Cognitive Impairment," a symposium of invited experts sponsored by the American Bar Association, the Borchard Foundation Center on Law and Aging, and McGeorge Law School. The citation for the article is: Nina A. Kohn, Preserving Voting Rights in Long-Term Care Institutions: Facilitating Resident Voting While Maintaining Election Integrity, 38 McGeorge Law Review 825 (2007).

Seymour (Sy) Moskowitz (Valparaiso) recently published "Discovering Discovery: Non-Party Access to Pretrial Information in the Federal Courts 1938-2006," 78 U. Colo. L. Rev. 817, a topic of concern to attorneys litigating elder law cases. He was on sabbatical in fall 07, and taught at the Catholic University of the North (Chile) and at the University of Melbourne (Australia) Law Schools.

Linda Whitton (Valparaiso) recently published "Navigating the Uniform Power of Attorney Act," 3 NAELA J. 1 (2007). Additionally, she has authored "The New Uniform Power of Attorney Act: Balancing Protection of the Principal, the Agent, and Third Persons," in Proceedings of the 41st Annual Heckerling Institute on Estate Planning 9-1 (Matthew Bender 2007). Professor Whitton has also written a forthcoming law review article titled "Durable Powers as an Alternative to Guardianship: Lessons We Have Learned," 37 Stetson L. Rev. 1 (forthcoming 2007). Professor Whitton was recently awarded the ABA Presidential appointment as a Commissioner on the ABA Commission on Law and Aging.

Announcements

Call for Papers

Volume Three, *Journal of International Aging, Law & Policy*

Published by the AARP and Stetson University College of Law

AARP and Stetson University College of Law are seeking submissions for Volume 3, *Journal of International Aging, Law & Policy*.

The Journal, which is co-sponsored by AARP and Stetson University College of Law, provides a place for many people concerned with elder law issues to exchange ideas: scholars in different countries are able to share information about law reform and significant cases; lawyers and other advocates representing aging citizens are able to exchange information about laws across the globe that facilitate their work and inspire changes from within their countries to improve the lives of their elderly clients; and others around the world who are working to make the lives of elderly citizens better are able to learn more that can help them continue their important work.

Volume 3's focus will be on "ageism" and age discrimination in different regions or countries throughout the world. The Journal will accept four or five articles for publication in Volume 3.

Paper Details: Paper length should be approximately 25 to 50 pages, with endnotes or footnotes in Bluebook or ALWD format. Past volumes of the Journal can be viewed online at www.law.stetson.edu/centers/AARPJournal/

Paper submission procedure: Please submit an electronic version of the paper no later than November 30, 2007.

Paper selection will be finalized by December 15, 2007.

Position Announcement

Director of Elder Law Clinic The University of Alabama School of Law

The University of Alabama School of Law is seeking applicants for the full-time faculty position of Director of the Elder Law Clinic. The appointment is under the Law School's long-term contract-track and will commence in the summer of 2008. The Director will oversee and/or conduct all phases of legal advocacy for elder clinic clients, teach and supervise law clinic students, manage other clinic staff, and teach other courses in the law school's curriculum, as needed.

Minimum qualifications include a J.D. degree from an ABA accredited law school, a distinguished academic record, and experience as a clinical teacher or practicing lawyer. Candidates must either be licensed to practice law in Alabama or become licensed no later than one year after accepting the position. Preference will be given to applicants with significant experience in elder or civil legal matters.

Applications should include a letter of interest, resume, and contact information for three references directed to Professor Robert Kuehn, Associate Dean for Skills Programs, The University of Alabama School of Law, Box 870382, Tuscaloosa, AL 35487-0382. For further information regarding the position, contact (205) 348-0316 or rkuehn@law.ua.edu. For fullest consideration, apply by November 1, 2007. The position will remain open until filled.

The University of Alabama is an Equal Opportunity/Affirmative Action employer. Women, minorities, veterans, and persons with disabilities are encouraged to apply. Requests for reasonable accommodation during the application or interview process should be made to Associate Dean for Administration Noah Funderburg, Box 870382, Tuscaloosa, AL 35487-0382, (205) 348-4508.