

CONTRA COSTA LAWYER

Volume 24, Number 2 | March 2011

ELDER LAW ESSENTIAL RESOURCES

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ELDER LAW ISSUES IN AGING



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CONTRA COSTA LAWYER

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This month, I get the honor of guest-editing the Elder Law issue of the Contra Costa Lawyer, a point of great pride for me. Elder law attorneys are an amazing bunch and I get to talk a bit about what they do for this community.

I realize not everyone wants to practice in the Elder Law arena. It can be a very overwhelming and unnerving area of law. Nonetheless, all attorneys need to know something about this vital area of law – even if it is just a phone list of resources. Everyone – every single person I know – knows someone with an elder law issue. As soon as I tell someone that I do elder law, the next thing I hear is: “My mom/neighbor/friend has a problem, and I have no idea what to do to help them...” The worries of an elder living alone, dementia, conservatorships, long term care planning, VA benefits and financial elder abuse touch almost everyone in some way.

If it hasn't happened already, one of these days you are going to get a call from a family member, a friend or a client that needs elder law assistance. The goal of this issue is humble: to give attorneys who have no intention of ever practicing elder law a baseline ability to field that call – even if it is just to point the caller to someone else.

To that end, we have chosen to highlight the resources a local lawyer has at his or her disposal. This county has numerous essential legal resources available to elders, many at low or no cost. We are highlighting some of the core programs for you here, along with additional resources you should know about with articles from the following people:

- **Samantha Sepehr**, director of the Law Center's fledgling Elder Law Center;
- **Virginia M. George**, who has spent the past year as Judge Pro Tem in the Probate Department and is the prior director of the JFK Elder Law Clinic;
- **Judge Joyce Cram** of the Contra Costa Elder Court (interview by Nick Casper);
- **Verna Haas**, Director of Contra Costa's Senior Legal Services and Senior Self Help Clinic;
- **Barbara Proctor**, Director of the Elder Mediation program at the Center for Human Development;
- **Tina Olton** of the Contra Costa Senior Peer Counseling Program;
- **Arlene Segal**, Chair of the CCCBA Elder Law Section (spotlight by Craig Nevin);
- **Ron Mullin**, past President of the CCCBA and Elder Law practitioner; and
- **Jay Chafetz**, CCCBA Board member and Elder Law practitioner.

These are just a few of the people who are committed to serving this county's elders – I wish I could give a nod to all of the amazing attorneys and community members who do this important work. There are so many and only so much space. Our local attorneys are committed to trying to get elders the help they need; and most are happy to answer questions from other attorneys. Including me.

If you are confronted with an emergency elder issue – criminal or physical, you should always call the authorities – Adult Protective Services (925) 646-2854 or the local police. The County also has a great phone number to call that helps get you to local elder services when you don't know what you need or what exactly to ask: (800) 510-2020. That number isn't good just for Contra Costa, either; it will work for Alameda, Solano, or whichever county you call from.

Whether you practice elder law or not, YOU are a vital link in the chain connecting elders to much-needed services. Hopefully this issue will help you navigate a little more easily through the elder law issues you are confronted with in your practices. ♦



Kathryn Schofield
Guest Editor &
CCCBA Board President

- Kathryn Schofield, owner of the Schofield Law Group, focuses her practice on Elder Law, Conservatorships, Estate Planning and Probate/Trust Administration - www.schofieldlawgroup.com



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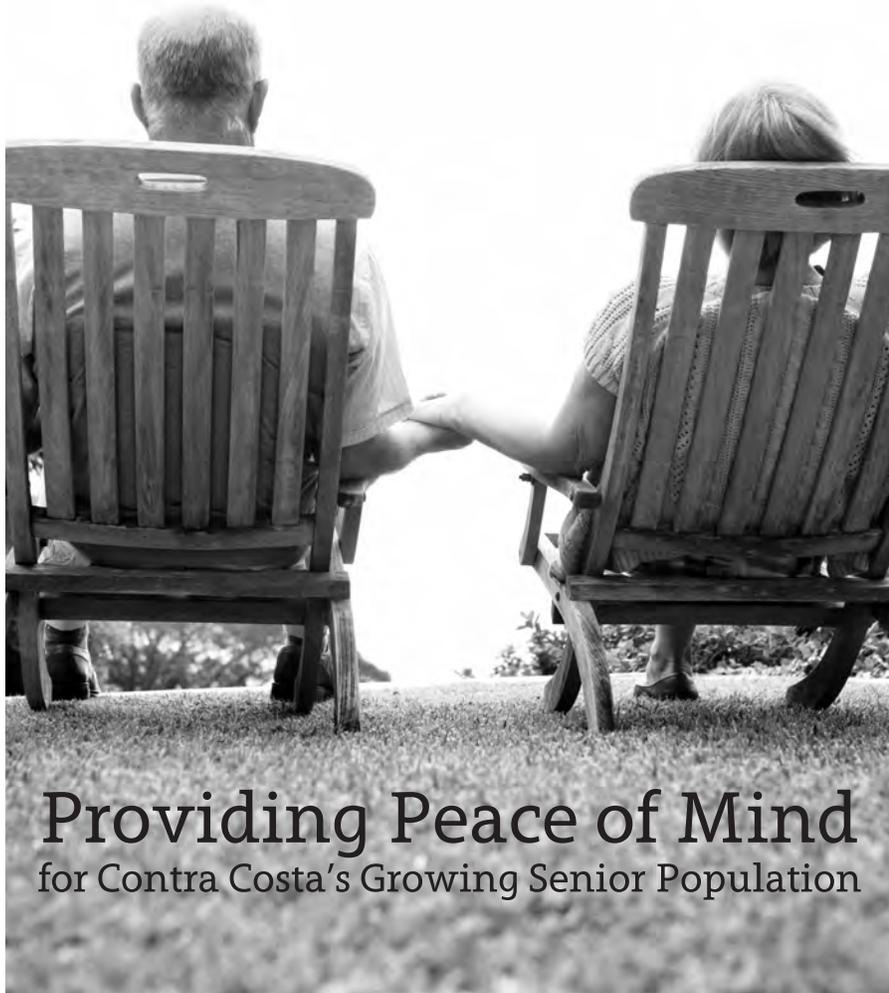


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THE ELDER LAW CENTER

by Samantha Sepehr



Providing Peace of Mind for Contra Costa's Growing Senior Population

Can you remember your very first day of work? We suspect that not many years, or even days, went by before you began dreaming of your retirement. As we all know, for that dream to become a reality you must plan, work and wait for the day when you can afford to enjoy the wonders of the world without relying on a salary. But what happens when all of your hard work and your plans become a nightmare?

Imagine receiving a telephone call from a 75-year-old man who nervously tries to explain to you that in the midst of trusting his

adult son with "great investment opportunities" that apparently never existed, the retirement funds that he and his wife worked 50 years to establish and rely on have been depleted - leaving them destitute. As a result, the elderly couple's home, which has been the one and only family home for decades, is facing foreclosure. What's even more heart-wrenching is learning that the husband and wife admit that they are both looking to go back to work, at least part-time, to increase their monthly income in order to support themselves. After hearing this and learning that the son is also facing foreclosure, we know you

would find it virtually impossible to quote your hourly rate, let alone the potential total amount of attorney's fees that might be incurred in trying to assist this couple. Fortunately for residents of Contra Costa County, there are resources in place to assist the elderly with these kinds of situations.

In 2005, former School of Law Dean, Terri Cannon, with the support of an extremely broad-based advisory board, brought an innovative idea to life when she established The Elder Law Clinic at John F. Kennedy University. The clinic appeared to be the only full-time clinic west of the Mississippi devoted solely to combating elder financial abuse.

It was clear that there was a critical need for this type of clinic and, under the direction and supervision of Virginia M. George, the Elder Law Clinic exceeded all annual projections in only its fourth month of operation. It operated successfully for several years and the clinic became an important provider of critically needed legal services. However, in June of 2010 John F. Kennedy University determined that it could no longer financially maintain the Elder Law Clinic and closed the program as it was originally designed.

At the same time, the California Department of Aging estimated that there were approximately 203,146 citizens in Contra Costa County 60 years or older. The 85+ age group is the fastest growing portion of the elderly population in Contra Costa County. Over the next 10 years, the 85+ age group is predicted to increase by 55% and the 65+ age group is projected to increase by 37%. During the fiscal year of 2006-2007, Contra Costa County Adult Protective Services alone received 486 reports of elder financial abuse. During 2007-2008 the number of reports increased to 528 reports. As evidenced by these statistics, there is an obvious and growing need for senior legal services.

To allow the Elder Law Clinic's program to cease operating could have been disastrous to the increasing senior population of Contra Costa County. The Law Center, a non-profit agency that assists low income residents of Contra Costa County, and the Contra Costa County Bar Association were committed to continuing the work of the Elder Law Clinic. The reconstituted program, the Elder Law Center (ELC), is now under the auspices of The Law Center (TLC) and continues to be a vital resource for those Contra Costa County residents who are 65 years of age or older who are often victims of financial abuse and who need pro bono representation.

In addition to having a part-time staff attorney handling pro bono cases and referring overflow cases while providing legal support to a pro bono panel of well over a hundred county attorneys, the ELC will work in collaboration with the CCCBA Lawyer Referral & Information Service (LRIS) and CCCBA Moder-

ate Means Program (MMP) which provide services to those elders who are in need of services and are able to afford legal services at standard, market rates (LRIS) or at a reduced rate (MMP).

The ELC is also working proactively to combat elder financial abuse by

The 85+ age group is the fastest growing portion of the elderly population in Contra Costa County. Over the next 10 years, this group is predicted to increase by 55% while the 65+ age group is projected to increase by 37%.

educating the public through various programs, including organizing six annual durable power of attorney and advance health care directive workshops. Each workshop occurs over two evenings. During the first evening, volunteers provide information regarding how durable financial powers of attorney and advanced health care directives operate, the powers that each bestow on the nominated agents, and why these documents are important. At

the return appointment each client is requested to have discussed their decision of nomination with each agent and then obtain the contact information of each agent. Volunteer attorneys review all documents with each client and notaries are available onsite to execute both

documents. All services are provided free of charge and carry no obligation. The goal of this workshop is to try to place trusted individuals in control of each client's health care and financial decisions in an effort to alleviate the potential for abuse.

Though the ELC has only recently been reconstituted, there continues to be a powerful Advisory Board in place to help support clients' needs. Because elder law so often requires a multi-disciplinary approach, the

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ELDER LAW CENTER,

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advisory board is made up of representatives from various senior service provider agencies. One of the goals of the ELC is to promote collaboration between like-minded organizations in order to more wholly and efficiently serve each client's needs.

For example, over two-thirds of elder abuse perpetrators are committed by someone the victim knows, loves and trusts. Overcoming the emotions and the stress of finally seeking help can regularly require a team of support for the victim. Therefore, the support of available counseling programs, such as Senior Peer Counseling, is often necessary to allow the victim to move through the emotional turmoil while an attorney navigates and pursues the legal issues.

The need for elder legal services will continue to grow and the Elder Law Center is looking forward to meeting the need by developing further collaborations with the other existing senior legal services, including Contra Costa County Senior Legal Services, the Senior Self-Help Clinic and John F. Kennedy University's new Legal Clinic for Elders. In addition to the need for collaborations between the existing organizations, there is a great need for additional panel attorneys who are willing to donate their time, their money, or both, to continue these important programs so all residents receive access to justice. Please become a part of the solution. ♦

- Samantha Sepehr is the staff attorney of The Law Center and Elder Law Center Director.

Online Only:

Visit cclawyer.cccba.org to download a summary of all Elder Law resources mentioned in this magazine.

Elder Law is



Alzheimer's Planning

The average survival rate is eight years after being diagnosed with Alzheimer's — some live as few as three years after diagnosis, while others live as long as 20. Most people with Alzheimer's don't die from the disease itself, but from pneumonia, a urinary tract infection or complications from a fall.

Until there's a cure, people with the disease will need caregiving and legal advice. According to the Alzheimer's Association, approximately one in ten families has a relative with this disease. Of the four million people living in the U.S. with Alzheimer's disease, the majority live at home — often receiving care from family members.

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ELDER LAW

LOCAL RULES OF COURT & OTHER RESOURCES

by Virginia M. George

With the onslaught of the population explosion in the 65 and older segment in our society and the fact that baby boomers have now successfully entered senior citizenship, elder law and the issues that accompany it are firmly on the forefront of the practice of law.

Issues such as conservatorships, housing, Medicare, capacity, and elder abuse all tie into this growing field of law. The newer practitioner can avail him- or herself of an abundant variety of resources both on and off line in order to become better educated and equipped at representing elderly clients and/or their families in the host of issues that they may be facing.

This article will generally address several key areas, issues and resources for the attorney who wishes to learn to navigate the field of elder law.

FIND A MENTOR

Given the potential complexities of a given case, it is advisable to find a mentor. Mentoring is the process where an experienced professional takes a protégé under his or her wing to assist that person in developing business acumen and judgment, as well as in career development in a particular field of law. If developed outside a law firm, mentoring can be an informal, but highly important process where the apprentice learns not only the subject matter, but appropriate business and professional skills. Mentoring offers advantages to the newly-licensed attorney as well as the seasoned attorney switching fields of specialty. Both types of practitioners will find mentoring equally beneficial in the field of elder law.

JOIN A SECTION

Secondly, it is advisable to join one of the applicable sections of the local bar association in the

county[ies] in which one practices. Appropriate alternatives would include the Elder Law Section; Conservatorship, Guardianship, Probate and Trust Section and the Pro Bono section of the local bar association. Joining a section offers key networking opportunities as well as the ability to keep current on legal issues and updates. Referrals and/or the opportunity to work as co-counsel on elder law cases are also advantages of joining an appropriate section.

KNOW YOUR LOCAL COURT RULES

Additionally, it is critical to become familiar with the local rules of court in general and the rules of court as they pertain to the probate court in particular. In addition to the standard rules of probate, there have been new additions and amendments as of January 1, 2011. Two examples of such amendments in the Contra Costa County Superior

ELDER LAW RESOURCES,
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Court Local Rules include:

Local Rule 106 which defines deadlines for documents to be considered in response to the probate department's tentative rulings. Currently, tentative rulings are posted online three court days in advance of the hearing. This new Local Rule, effective January 1, 2011, requires that in order to be considered, **responses to tentative rulings must be filed no later than the close of business two court days before the hearing and endorsed filed copies must be delivered to the probate file examiners.**

Attachment 2 - Probate Department Fees and Costs Guidelines. Effective January 1, 2011, attorney fees for conservatorship and extraordinary probate services provided on or after that date has risen to \$325.00 per hour. Professional fiduciary rates have increased to

\$125.00 per hour and non-professional fiduciary rates have increased to \$40.00 per hour.

KNOW YOUR LOCAL COURT DEPARTMENTS

It is also important for newer practitioners to familiarize themselves with the types of cases over which particular court departments preside. In Contra Costa County, the Probate Department hears pre-trial matters dealing with conservatorships, guardianships, and probate matters such as petitions surrounding issues with respect to wills and trusts. Probate matters are generally heard on Monday, Tuesday and Thursday. Conservatorships and Guardianships are heard on Wednesday and Friday. Given the significant rise in the reporting of all types of elder abuse, a separate department (currently Department 22, Hon. Joyce Cram) handles all elder abuse matters, including civil and criminal matters and restraining

orders, each Tuesday. New practitioners are encouraged to sit in on a variety of these calendars to become familiar with the court process as well as the types of cases heard.

KNOW APPLICABLE CIVIL STATUTES

It is critical to be familiar with the applicable civil statutes for elder abuse. In 1991, California lawmakers enacted a unique form of legislation specifically aimed at deterring acts of abuse and neglect of elders and dependent adults. This set of laws, commonly referred to as California's Elder Abuse Act, is more formally known as California's Elder Abuse and Dependent Adult Civil Protection Act ["EADACPA"] and is found at Welfare and Institutions Code Sections 15600 et. seq.

In order to deter acts of elder abuse and neglect, these civil statutes provide additional recovery against defendants who are found liable for such abuse or neglect upon the

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elderly or dependent adults. Specifically, EADACPA includes provisions for recovery by victims of abuse and/or neglect, even in circumstances where the victim has died. Additionally, EADACPA provides recovery for all attorneys' fees and costs expended in a case where a claim of abuse and/or neglect is successfully proven.

KNOW APPLICABLE CRIMINAL STATUTES

It is also advantageous for attorneys to be generally familiar with the companion criminal statute which governs elder abuse and neglect: Penal Code Section 368. Criminal defendants can be potentially charged with either misdemeanor or felony elder abuse should the district attorney's office decide such charges are warranted.

UNDERSTAND CONSERVATORSHIPS

Attorneys interested in learning

more about conservatorship matters should become aware of the different types of "general" conservatorships (both of the person and the estate) as well as the types of cases which are classified as "limited" conservatorships. Included in such an understanding would be the common types of persons who may require a conservatorship. These individuals possibly include a person who is elderly, developmentally disabled, drug and/or alcohol impaired or injured. Given the magnitude of this subject alone, sufficient time and space is not available to adequately give a complete overview. However, practitioners should be well-versed in issues regarding capacity (including possible dementia); bond amounts and requirements; duties of the proposed conservator; housing; and, accounting of assets. Appropriate starting sections to review are Probate Codes Sections 810, 811 and 813 for Conservatorships, including

general capacity definitions; and Probate Code Sections 2252, 2354, 2355 and 2357 for medical powers and related issues. Limited conservatorships are generally governed by Probate Code Section 2351.1.

OTHER RESOURCES

Finally, there are a host of resources available to newer as well as seasoned attorneys in the area of elder law. A few suggested resources are:

1. The National Academy of Elder Law Attorneys ["NAELA"]

A professional association of over 4000 attorneys in the private and public sectors, as well as judges professors of law, and students. On line resources, publications, events and continuing education are abundantly available. <http://www.naela.org>.

2. California Advocates for Nursing Home Reform ["CANHR"]

A statewide non-profit advocacy organization for California's long-term care consumers. A great deal of CANHR's clients and issues surround the elderly. On line resources, publications, events, current litigation and pending legislation are all available for review. <http://canhr.org>.

3. Conservatorship Workshops

in Contra Costa County Sponsored by The Professional Fiduciary Association of California ["PFAC"] Over the course of the next several months, PFAC will be sponsoring one-day workshops covering Conservatorships of the Estate and of the Person at the Contra Costa Public Law Library in Martinez. The workshop runs from 9:00 a.m. to 4:30 p.m. Further information can be gained by either calling the Law Library at (925) 646-2783 or visiting their website at www.ccpllib.org. ♦

- For the past year, Ms. George has been sitting as judge pro tem in the Probate Department for Contra Costa Superior Court. She has a law practice in Walnut Creek and specializes in probate, estate planning, conservatorships and elder law.

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THE ELDER COURT



JUDGE JOYCE CRAM INTERVIEW BY NICK CASPER

WHAT WAS THE IMPETUS BEHIND THE CREATION OF CONTRA COSTA'S ELDER COURT?

We knew that it was important to have a court that would deal with the needs of the elder population. We had incoming Presiding Judge Mary Ann O'Malley contact people involved in the senior community. We started having task force meetings to ask them if they were interested in helping and, if so, what they would want it to look like. There was a lot of enthusiasm in the community, and we knew it was something that the court and public needed.

We used Alameda's model as a starting point, which only has criminal cases and restraining orders involving elder abuse. From there we made it into a calendar that has every possible elder-related case. Criminal cases, conservatorships, financial abuse, physical abuse, civil cases, restraining orders, small claims... everything that relates to the senior comes into my court at some point.

HOW DOES A CASE GET TO THE ELDER COURT?

It comes in different ways. The criminal cases come automatically because the district attorney has what's called vertical filing, with one DA handling elder abuse cases. Some come directly from other judges. For instance, there are domestic violence cases in family law that may have an elder component and the judge who reviews the temporary order puts it on my calendar. The civil cases usually come after the first case management conference. Finally, lawyers can request to come directly to Elder Court.

WHAT ARE SOME UNIQUE ELEMENTS OF THE ELDER COURT?

We have Senior Peer Counselors that come from County Health Services. They will meet with the seniors before the hearing and tell them where they're going to sit before they are called, what papers to show the judge and when to speak. After the hearing, they will make reassurance calls to make sure the elder understood what happened. A lot of times if you are self-represented, senior or not, you have no idea what just happened when you got the order. So there are reassurance components before and afterward.

We also have the Senior Help Center. That's where seniors find help to fill out paperwork, such as an application for a restraining order. It's aimed at self-represented seniors. So if somebody comes into my court and they need help with paperwork, they don't have to do anything except walk right down the hall.

HOW DID IT COME ABOUT THAT YOU RAN ELDER COURT? HAVE YOU BEEN INVOLVED SINCE DAY ONE?

Yes, Judge O'Malley asked me to do it. She knew she needed someone who would be interested in it and who would be willing to take on all the multiple tasks of civil, criminal, probate, restraining orders and small claims. As soon as I heard about it, I was excited.

WAS THERE TRAINING WITH PEOPLE INVOLVED IN GERIATRICS?

Yes, one of our faculty members was a geriatrician from UC Irvine. She had a course on the aging brain and the aging body. For example, there are certain things to look for to determine if there is physical abuse. Is it bruising from physical abuse, or is it bruising because the skin gets thinner as we get older, etc...? She also covered issues concerning mental capacity.

WHEN IS ELDER COURT IN SESSION?

Every Tuesday morning. We have a diverse calendar. At 8:30 the criminal calendar is called. We also call the civil cases at that time. At 8:45 are conservatorship cases and other probate cases. At 10:00 is the restraining order calendar. We calendared those at 10:00 on purpose. It is difficult for someone who may be old and frail to get up, get dressed, eat breakfast, take their medications and be alert by 8:30. There is evidence that 10:00 is an optimal time for alertness for seniors. We have evidentiary hearings at 10:30, and those might be the preliminary examinations with the elderly victim, or even to preserve testimony if there is a risk that the victim will die before trial.

ARE THERE OTHER ELEMENTS THAT SET ELDER COURT APART FROM A TYPICAL COURTROOM ON A DAY-TO-DAY BASIS?

There is a very collaborative approach to the cases. Oftentimes a criminal case will have a companion civil case. Usually, the civil case is told to wait until the criminal case resolves because of the Fifth Amendment privilege. In Elder Court, we bring everybody together at the same time and try to negotiate a resolution that the DA, the defendant, the attorneys and the victim can live with...we try to get a global settlement. We have been very successful at doing this far faster than the other way, which can take years. Sometimes people don't have years. ▶

ELDER LAW COURT STATISTICS

176 Number of Temporary and Permanent Elder Abuse Restraining Orders granted by the Elder Law Court in 2010.

2009 The year the Senior Self Help Clinic began operating.

150 Number of seniors who have received legal services from the Senior Self Help Clinic since its inception.

1/3 Ratio of Senior Self Help Clinic clients seeking restraining orders.

129 Number of in-court contacts made by Senior Peer Counseling volunteers in 2010, the program's first full year of operation.

109 Number of Senior Peer Counseling contacts made in 2010 that were related to an Elder Abuse Restraining Order.

52 Number of reassurance calls* made by Senior Peer Counseling volunteers (*if the senior is interested, the volunteer calls him or her at home at the end of the day to see if there are questions or concerns about what happened in court).

8 Number of Spanish translation volunteers recruited to provide interpretation and translation services and assistance filling out forms at the Family Law Facilitator's Help Desk and at the Senior Self Help Clinic.

SINCE ITS INCEPTION, HAVE OTHER COUNTIES APPROACHED CONTRA COSTA ABOUT ITS ELDER COURT?

Absolutely, and we are thrilled. We have gone to roundtables in Northern and Southern California. We were asked to fly to Buffalo and Erie County will be setting up an elder court. A judge from Chicago is meeting with me - Chicago is planning on a whole Elder Division. We are considered a mentor court, so part of our mandate is to let other court systems know about Elder Court and what it can do.

FINANCIALLY, HOW DOES ELDER COURT WORK DURING THE TOUGH ECONOMIC TIMES OF THE JUDICIAL SYSTEM?

Some courts say they wish they could have an elder court, but they don't because they think it will cost them money. One of the messages I bring is that you can do it without additional resources. It would be nice, and we could certainly use case managers, if we had money to do it. But we don't, so all it is is just a reallocation of resources.

WHAT MAKES YOUR ASSIGNMENT SPECIAL TO YOU?

I really enjoy being able to take a case and resolve it to the benefit of everybody who is in the courtroom. It is nice to see the restoration of dignity to the seniors and to their bank account. A lot of seniors are very independent and worked hard all other lives. They need their nest egg and when I can get some or all of it back, the senior can return to living independently once again. ♦

— Nick Casper is an associate at the Walnut Creek law firm Casper, Meadows, Schwartz and Cook and he also serves on the CCCBA Board of Directors.

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CONTRA COSTA SENIOR LEGAL SERVICES

A Small Organization with a Powerful Mission

by Verna Haas

An 87-year-old Walnut Creek resident lives in a lovely apartment close to the Senior Center. She plays bridge twice a week and bingo once a week. She still drives herself and is proud of her small garden, which she maintains. She is able to afford this apartment because she receives money from renting a house she built and lived in for many years. Her daughter used to handle the rental but in late 2009 she refused to turn over the proceeds to her mother. Without these proceeds, she had no means of paying the rent, and was concerned that she would have to give up her apartment and move in with family members. This senior - we'll call her Mrs. C - continues to live independently thanks to the assistance of Contra Costa Senior Legal Services ("CCSLS"). CCSLS filed suit on Mrs. C's behalf and, after nearly a year and the commitment of countless attorney hours, won a judgment against the daughter requiring that she turn over \$1,000 per month of the rental proceeds to Mrs. C.

CCSLS is a non-profit organization that has been providing free legal representation to seniors such as Mrs. C throughout the county for over twenty five years - and in spite of these challenging economic times, it hopes to be able to continue to be a viable and important resource for years to come. CCSLS is located in Richmond, where attorneys and staff assist area seniors 60 and over with help in civil legal matters such as housing, income

maintenance and finance, elder abuse and credit and consumer issues. Our mission is to provide "free legal advice, representation and education to elderly residents of Contra Costa County, with an emphasis on seniors who are in the greatest social and economic need."



Many of the problems facing seniors are similar to those faced by the general population, but often the consequences are far more severe. One such client, Brenda Z, a 62 year-old woman, lives in a mobile home park. She suffers from chronic depression and anxiety attacks. One source of comfort is her Australian sheepdog, Shadow. While the park allows animals, it has a weight limit of 20 pounds. Shadow, acquired as a puppy, eventually grew to about 40 pounds. In spite of the fact that Shadow created no problems for other residents or for the park itself,

the park filed suit to evict Brenda from her home. CCSLS agreed to represent Brenda and when the park refused to consider a reasonable settlement, took the case to trial. The judge ruled in Brenda's favor, safeguarding her right to stay in her home. Without the services of CCSLS, she faced the unhappy prospect of giving up her companion or being forced to move. At CCSLS, the staff recognizes the vital importance of senior housing, whether government subsidized or otherwise, and vigorously defends those, like Brenda, who do not have the resources to simply move. Sometimes, without senior housing, these seniors would be homeless.

CCSLS also assists seniors with issues involving consumer debt. This area of law is particularly important because many seniors live on limited incomes and are at a time in their lives when they are not as



able to resist unscrupulous or high pressured sales tactics as they once were. One outrageous case involved Harry C., an 82 year-old retired firefighter. He saw a television commercial for the new Harley-Davidsons and since he had once loved riding them, determined to check them out. Harry had recently suffered a stroke and had not driven a vehicle of any kind for years. He also had recently been diagnosed with early stage Alzheimers. His granddaughter agreed to indulge him and drove him to a dealership to see the bike. She waited in the truck while granddad looked at the Harleys. Two hours later, Harry had agreed to pay \$25,000 for a 750 lb., 1500 cc hog, and another \$2,000 for a six year extended service plan. Harry couldn't ride the motorcycle home, obviously, so the dealer delivered it to his house the next day. Harry's daughter, who was at his home when the bike arrived, immediately called the dealership to try to cancel the contract and return the bike, but they refused. Eventually, the dealership's finance company sued. Attorneys at CCSLS were able to convince the finance company to dismiss the suit on the basis that Harry's age and physical and mental condition entitled him to the protections of the elder abuse statute that now includes undue influence. Had Harry been the vigorous, vital young man he once was,



he never would have fallen prey to such high-pressured tactics and would not have needed the services of an organization like CCSLS.

Unfortunately, cases such as Harry's are common. We had one senior who was convinced to purchase a \$3,000 vacuum cleaner from a door-to-door salesperson—this despite the fact that she made less than \$800 a month and did not even have carpeting. After sending a letter informing the vacuum company about the statutes pertaining to financial elder abuse and undue influence, we received notice from our client that the company agreed to void the contract and accept return of the vacuum cleaner.

There are also situations where seniors, as with consumers in general, simply cannot convince retailers to comply with their legal obligations. Several years ago we had a very elderly woman approach us for help. She lived on less than \$800 per month but needed new hearing aids. She purchased them from a large retail establishment. She said she was careful in entering into the contract and only did so after being assured that she had 30 days to return the hearing aids if they did not work for her. The retailer had our client apply for a credit card (with a very high annual percentage rate) and immediately charged nearly \$4,000 to her account. She received the hearing aids weeks later, and immediately had trouble. She could not hear as well with the new hearing aids as she could with her old ones. She went back for adjustment time and again, and then finally, asked for a refund. The retailer refused, arguing that the 30-day return period had passed. By the time the client called us, she had paid three month's on the credit card at a whopping \$200 per month—one quarter of her meager income. She was having trouble paying her utilities and finding money for food. We agreed to represent her and when we were unable to resolve the matter informally, we prepared a complaint. Only after we called



the retailer to learn the name of the agent for service of process did they agree to refund our client her money and void the contract. The client was immensely relieved and very grateful for the assistance we were able to provide.

CCSLs was incorporated in 1986 under the name of Contra Costa County Legal Assistance for the Elderly and was a successor organization to Senior Paralegal Project founded in 1976. Legal services are provided by in-house paid and volunteer attorneys and paralegals. In addition, CCSLS trains and utilizes community volunteers to assist in providing services. Projects include a Consult-an-Attorney program and a Wills Clinic which are conducted in association with various county senior centers. We assisted nearly 900 seniors last year. While the majority of the cases concerned housing and consumer or financial matters, we also assisted seniors with elder abuse cases, helping prepare restraining orders for the victims of abuse, for example. We have also helped seniors with numerous other civil legal issues relating to education, employment and long-term planning for nursing home placement.

We are in the third year of partnering with the Contra Costa Superior Court to provide services to pro per clients at the Senior Self-Help

Clinic. This drop-in clinic is available to seniors 60 and over who are not represented by an attorney. Approximately a third of our cases involve assistance with elder abuse restraining orders. We provide information about how to apply for a restraining order, help clients to prepare the application and assist clients with follow-up issues, such as service of process and preparation for the court hearing. The clinic is one of a number of support services offered to seniors using the innovative Elder Court, presided over by Judge Joyce Cram. At the clinic, staff also provides general information about simple civil cases and court procedures, including landlord tenant and credit card cases, as well as help in preparing simple demand or settlement letters. The clinic also provides referrals to other self-help resources, to public agencies and non-profits and to the Bar Association's Lawyer Referral Service. Later this year, we hope to expand our services to clients seeking assistance with pro per conservatorships of the person.

CCSLS is funded by grants from the Area Office on Aging, the California State Bar Equal Access Fund, the Contra Costa County Bar Association, the Contra Costa County Community Development Departments and by block grants from the cities of Antioch, Concord, Pittsburg, Richmond and Walnut Creek. We are also funded by private donations from those who share our commitment to providing this essential service to our local seniors. We invite you to learn more about our program by visiting our website, ccsls.org, and to consider volunteering. Those who have done so will tell you that it is immensely rewarding. ♦

— Verna Haas is the staff attorney at Contra Costa Senior Legal Services.

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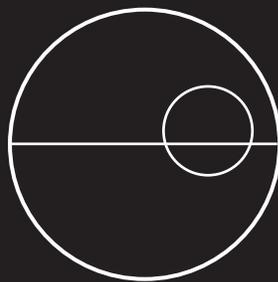
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ELDER MEDIATION AT CONFLICT RESOLUTION PROGRAMS

by Barbara Proctor

Director, Elder Mediation Program
at the Center for Human Development

Consider this scenario - At Senior Court in Superior Court, our mediator meets the parties, a mother in her 90's and her son, late 60's, in the corridor, explains the mediation process and once they agreed to mediate, sits down at a secluded table. They had gone before the court to request restraining orders against the other. The presenting cause of the dispute was over ownership of personal property. With skilled questioning from the mediator, the parties understood that the conflict over the personal property also included long-held resentments in their personal interactions. These parties left with their personal property issues resolved, talking with one another and most likely will not return to court. In this case the savings to the court was substantial, but more importantly saving their relationship

was invaluable. Restoring relationships improves the likelihood the parties can avoid another court visit and support one another in the later stages of life. Gracefully negotiating through this life stage requires assistance from those people near us.

The Elder Mediation Program at Conflict Resolution Programs (CRP) began over two years ago, offering mediation and training specifically geared to address the concerns and needs of seniors. CRP has been serving Contra Costa since 1984, and this new focus is a response to the growing needs for resources for older residents as numbers in this population swell.

Our program realized early on that mediating with elderly participants required advanced training for experienced mediators. There are practical considerations (working

with physical disabilities of elderly individuals) and social and generational considerations. Generational differences play a surprisingly important role in working with families. For instance, older generations sometimes consider bankruptcy shameful, receiving governmental benefits as a sign of a lack of self-reliance and asking for help a character weakness. We address these and many other related issues in our training by inviting experts in the field of aging as speakers.

We created our program to be a comprehensive service. Our program has categorized resources in Northern California and ensures that each caller to our office receives several referral resources, even if mediation is not appropriate. As services dwindle in these tight economic times, we contact the referral

resource to make sure they are still in business. The landscape is changing and we know we have to stay current. Our staffers are frequently out at senior centers, community meetings and senior service agencies explaining the benefits of elder mediation to families.

Not all mediations are family-centered. Many involve non-family-member caretakers. Take, for example, the case of a 106-year-old woman who was living in her home with a 24-hour caregiver. We sent our team of two mediators to her home and facilitated a discussion that resulted in an agreement, agreeable to both parties, brought out the unspoken feelings of each party and helped mend broken communication in this very important relationship. Their solutions allowed the elder to remain independent and living at home, the wish of many older adults and a savings to the community.

Our panel mediators are encouraged to honor the capacity that is present in each participant. A determination of decreased capacity is not the same as a determination of no capacity. At times it can be situational; For instance, mediations scheduled in the mornings and for shorter time periods, which can allow some people to attend at the time of day they are sharpest. Accommodations are always of the upmost importance in our mediation planning.

Elder mediation can be an alternative to the court system—as well as provide added value to the practice of law. Elders need “customized” services to meet their physical, social and emotional needs. Mediation is helpful before a legal consultation to narrow the division between the parties. How much of that division is due to relational issues that have existed for years? After a legal consultation, mediation is helpful for families to figure out

how to work side-by-side in the care of their elders. Repaired and healed relationships may be the most valued legacy for a family to receive. ♦

- For more information about our program and training, please contact Barbara Proctor, J.D. at the Center for Human Development, Conflict Resolution Programs, Elder Mediation, (925) 687-8844 ext. 250 or at barbara@chd-prevention.org. We are a non-profit organization and our fees are on a sliding scale. However, no one is ever turned away for lack of funds. We are also available for on-site presentations to groups.

Online Only:
Visit cclawyer.cccbba.org to download a summary of all Elder Law resources mentioned in this magazine.



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Arlene Segal: Living Life to the Fullest



This month, we are delighted to spotlight Arlene Segal. Our readers know Arlene as one of the County's eminent elder law attorneys, whose volunteer efforts include many years on the Contra Costa Lawyer editorial board and as the active Chair of the Elder Law Section. She is also a member of several other sections, as well as a regular panelist in presentations focusing on legal issues faced by elders.

Arlene was born in Brooklyn and grew up in Brooklyn, Long Island and New Jersey. She completed her undergraduate degree at Douglass College at Rutgers University (graduating Phi Beta Kappa with honors in Political Science and University Honors). She then attended Stanford University and obtained a Masters in Political Science (in 1966) and a Masters in Education (in 1967). Arlene then taught high school in several northern, and, southern California districts (due to her husband being stationed at Long Beach Naval Hospital). However, she "retired" from teaching after having her first child, a daughter. After her

son was born and started Kindergarten, Arlene entered Law School at the University of Santa Clara. She finished law school in 1984, ranking first in her part-time class.

Arlene's legal career started as an Associate at the firm of Trembath, McCabe, Schwartz, Evans & Levy. She became a Partner there when Judge Trembath was elevated to the bench of Contra Costa County. In 1996, Arlene moved her practice when she associated with the firm Lipton, Warnlof & Segal. Thereafter, she went out on her own, handling real estate litigation, trusts and estate disputes, financial abuse of elders and mediation.

But with Arlene, there is more: For the past several years, she has contributed her time and talents by serving on the Board of Directors of The Law Center (whose mission it is to increase access to justice by connecting those who cannot afford legal services with agencies or Pro Bono representation by one or more of its Panel Attorneys). Within her work for The Law Center, she is one of the individuals who has helped ensure the continued existence of the Elder Law Clinic (now, the Elder Law Center, "ELC"); and, she was instrumental in obtaining ELC funding from, among other sources, The Rossmoor Fund.

With Arlene, there is much, much more. She credits her husband and children and finds her most cherished time spent with family, having 2 grandchildren in the area. She and her husband, Dr. Josef ("Jerry") Segal, have been married for over 43 years. Together enjoy travelling.

Arlene and Jerry's children have combined their parents' professions: their daughter is a paralegal in the

area of medical malpractice and their son is an attorney who works primarily with pharmaceutical and medical device clients.

What struck us most is that Arlene is not only an attorney who sets "best practices" in her practice: she is also one of those (perhaps regrettably few) attorneys who has much more in her life than her law practice. By way of example, over the past years, Arlene has cultivated a keen interest in cooking and baking. She enjoys sewing and knitting - when she finds the time - and her current interests include learning golf and Spanish. She also reports that she is currently "relearning math" alongside her 7th grade granddaughter. Lastly, let us not forget, she recently began cultivating Irises - and anything else the deer won't eat. Amidst all this activity, she is still making plans for her future and perhaps even her next career: Arlene wants to find a way to use her background in the field of education in new and exciting ways.

Arlene: you inspire us. You are another great example of how lawyers can make widespread contributions to their profession, assist in the lives and legal struggles of their clients and even help those we have never met--while still living a life with many interests, hobbies and other endeavors. ♦

- For those who have not yet made their own pro-bono commitment for 2011, there are many ways in which attorneys can assist indigent parties, assist the court in processing its cases and increase access to justice. For further information on how you can become involved, please contact Craig Nevin at cnevin@LawNRS.com.

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Date of Seminar: Saturday, October 8, 2011 through Saturday, October 15, 2011

Cost: Prices start as low as \$1,182 per person, double occupancy. Don't wait, the sooner you book your trip the cheaper your rate! (There is an additional \$200 seminar fee for MCLE attendees, payable to CCCBA to cover the teaching portion of the seminar.)

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What is on your personal bucket list?

I want to travel to the west coast of Africa to see where my ancestors left on the slave boats traveling to the Caribbean and the USA.

Algera M. Tucker
Tucker Family Law Practice, P.C.



1. Travel to China extensively
2. Write my memoirs humorously
3. See more movies, so I know the meaning of terms

like "bucket list" when the Question Man comes around

Bonnie Maly
CEB - Real Property Practice Group



To see capital punishment abolished everywhere in the USA.

Len Cook
Attorney & Mediator

Spending a month, ideally in the spring or autumn, touring the battlefields and other historical sites of the American Civil War. Unfortunately, none of them are local.

John Barnard
Law Offices of John Barnard



A fly fishing and mountain bike tour of British Columbia.

Kyle M. Johnston
Law Offices of Kyle M. Johnston

I would love to sail south, cross through the Panama Canal and travel up the Amazon River to photograph the flora and fauna of the region. First though, I'd have to inherit a lot of money and learn to sail. I already have the camera equipment.

Patrick M. Callahan
Burnham Brown



I would like to return to Tz'fat (Safed) to learn for six months.

Merrit Weisinger
Walnut Creek Family Law Center



Make amends.
Thomas W. Cain
Law Office of Thomas W. Cain



Black Porsche 356 "outlaw"

Michael Patrick Durkee
Allen Matkins Leck Gamble Mallory & Natsis LLP

Every man dies - Not every man really lives." ~ William Ross.

I adopted two boys (full brothers) in 2000. They are now 14 and 15, and I am having some fantastic "golden years" with them, after many hard struggles and challenges. Raising my sons has made practicing law seem like a day at the country club! In this still relatively bad economy, instead of worrying, I am trying to keep my heart wide open to love, loving my boys and my significant other. I do not live a reckless life, but I try to love and be compassionate for others and enjoy, even the simplest things, on a daily basis. If my "financial ship comes in" once again, I would love to do some more traveling with my loved ones! If I was hit by a car today, I would have no regrets about the life I have lived on this planet.

Peter Sproul
Mullen & Sproul LLP





Your seventy-five year old client is a victim of elder abuse - financial, physical, verbal or emotional. Someone she trusted has done her harm, has wiped out her savings account, or stolen her credit card. Perhaps his unemployed adult child, with a substance abuse problem, has moved back in with him and is stealing from him. Your client is

embarrassed, ashamed, helpless, humiliated, depressed and angry. You are a counselor of the law, not of the mental health variety. Where can you turn for help?

In November 2008, Contra Costa Superior Courts established an Elder Court to hear cases of elder abuse. Early in 2009, Senior Peer Counseling, a program of Contra

Costa County Health Services Department, petitioned the court to append our counseling services and the **Elder Court Support Program** was inaugurated. Our mission is to meet elders with legal burdens, and support them through a resolution of their legal matters. We are not attorneys or legal experts; we are older adults, with a perspective on later life, dedicated to this mission.

The Elder Court Program has three support avenues:

1. Meeting with elder victims as early in their legal processes as possible, hopefully before the court proceeding. A counseling relationship is established to offer support around the emotional issues of their legal matters.

To help relieve any anxiety before a court appearance, our counselors talk with clients about what is likely to happen. We accompany clients to court, to be another pair of ears and talk with the clients after the court hearing. We try to help keep clients on track. If they are testifying, we help with "rehearsals" - opportunities to practice answering questions about the legal problem - so they can become more comfortable with what might happen in court. Most importantly, we address the emotional issues of their legal burdens.

2. Providing in-court assistance on Elder Court Tuesdays. Peer counselors are available to meet plaintiffs and petitioners at Department 22 to answer questions about court procedure, paperwork and what's next. In an effort to make the experience less confusing, anxiety-ridden, or intimidating, we show them into the court room, where to sit and what to expect.

The counselors' presence at Elder Court is a unique service. Senior Peer Counselors are on hand outside the courtroom every Tuesday morning to greet petitioners without counsel who are coming for restraining order hearings. It is not difficult to identify them coming down the corridor towards us: some tread slowly, some have walkers or wheelchairs. Nearly all appear worried, confused, even frightened. When we greet these petitioners, their relief is often palpable. "I'm so nervous," they say. "I don't know what I'm supposed to do." "I've never been to court before."

Although information and assistance before a hearing may be use-

ful, our presence at Elder Court is to help with the emotional content of their legal burden. We often spend up to half an hour with petitioners following their hearing to help them work through what has just happened. All too often the respondent is a family member. Taking legal action against a loved one can weigh heavily on the elder.

3. Follow-up reassurance calls and/or longer term counseling. Reassurance calls are made at the end of their court day or the next week, to be sure the victim is comfortable with what happened, to see if there are any questions about what happened, or about the court ruling, to lend an ear to the emotional aftermath and offer support. Particularly in the cases of petitioners without counsel, questions often arise later in the day. SPC's phone calls offer an opportunity to air their questions, concerns, disappointments, and relief that the court proceeding is over. If the client wishes, we refer them to our regular counseling program. In 2010, SPC counselors met over 120 elders who came to Elder Court. About half accepted our offer of follow-up calls or visits. In addition, counselors worked with nearly forty individuals, both in and out of court proceedings, with longer-term counseling.

As a resource for the District Attorney's Office Victims Assistance Program, we have been providing assistance to older victims, especially those who are coming to court to testify. In criminal cases, with the many weeks and months of waiting for court hearings, it is often difficult for an elder to cope. Our support through these time periods offers the victim someone to talk to, someone who will listen and help them manage the long process emotionally. ♦

- Tina Olton, Volunteer Counselor & Coordinator; Elder Court Support Program of Senior Peer Counseling; Contra Costa County Health Services, Older Adult Mental Health Program

If you have a client who might benefit from Senior Peer Counseling or the Elder Court Support Program, please consider the following:

- Ask clients if they think talking to someone - not involved, neutral, non-judgmental - might help.
- Refer clients as early in the legal process as possible.
- We are careful not to give any advice, legal or otherwise.
- Our counseling relationship is strictly confidential, unless the client gives us permission to talk to other parties.
- We go to our clients' homes; although, if this is not a comfortable environment for them, we will meet them elsewhere.
- Although Elder Court is for seniors sixty-five and older, SPC's minimum age is fifty-five.
- Our counselors are trained volunteers; **our services are free!**

Contact:

Senior Peer Counseling Program
Office: 925-521-5640

SPC Program Director:
Ken Salonen, LCSW: 925-521-5636

Chinese Senior Peer Counseling:
Anna Chang, MSW: 925-521-5638

Latino Senior Peer Counseling:
Liz Villafuerte-Jones,
MFT: 925-521-5653

THE NEW DISQUALIFIED PERSON RULES



by **Ron Mullin**

This last year, a great deal of attention has been paid to California Probate Code §21350, the so-called “disqualified person rules.” Both the California courts and the State Legislature have weighed in on the interpretation and application of the rules, and the State Legislature has passed a replacement statute, Probate Code §21381, et seq. which modifies the rules as well.

The disqualified person statutes (Probate Code §21350, et. seq.) void provisions found in deeds, wills, trusts and other donative instruments that purport to make a transfer of property from a transferor to a caregiver, family member or drafter unless one of the exceptions set forth in Probate Code §21351 applies. The California Supreme Court in *Bernard v. Foley* (2005, Cal App 2d Dist) 130 Cal. App. 4th 1109, 30 Cal. Rptr. 3d 716, broadened the application of the disqualified persons and settled the conflict among the lower courts by holding that a care custodian under Prob. Code § 21350 includes any person providing health services or social services to an elderly person or dependent adult.

Essentially, the Court adopted the definition of care custodian found in California Welfare and Institutions Code §15610.17, which lists categories and specific language in subsection (y) upon which the court relied: “any other person providing health services or social services to elders or dependent adults.” Widening of the definition of care custodian creates implications for friends who may be assisting an elderly or dependent adult. Suddenly, transfers that seemingly have been made to express gratitude and appreciation to a caregiver are now presumptively barred even if there was an ongoing and long term friendship.

The *Bernard* court further held that there is no preexisting personal friendship exception or professional occupation limitation to this definition, thereby broadening the class of people that could be defined as “care custodians” under the statute and subject to a rebuttable presumption of fraud, undue influence, menace and duress should they be the beneficiary of a testamentary bequest. Admittedly, the *Bernard* case and the statute create a presumption of fraud, menace, duress or undue influence and the presumption can be overcome by clear and convincing evidence but not based solely on the testimony of the disqualified person. This creates a trap for the unwary estate planner and drafter who is not aware of the significant issues created by the disqualified person rules.

Fast forward to 2011, and the Legislature passes and enacts Probate Code §21380, et seq. as of January 1, 2011. According to LexisNexis the following differences between the two statutory schemes are noted. For the most part, Probate Code §21380 restates the substance of former §21350(a) with some notable exceptions:

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THE NEW DISQUALIFIED PERSON RULE,

cont. from page 26

(1) Subdivision (a)(3) limits the care custodian presumption to gifts made during the period in which the care custodian provided services to the transferor, or within 90 days before or after that period.

(2) Subdivision (a)(6) generalizes the reference to a "law partnership or law corporation" in former Section 21350(a)(3), to include any law firm, regardless of how it is organized.

(3) Subdivision (a)(6) generalizes the rule creating a presumption of fraud or undue influence when a gift is made to the law firm of the drafter of a donative instrument, so that it also applies to a fiduciary of the transferor who transcribes an instrument or causes it to be transcribed.

Subdivision (b) restates the substance of the first sentence of former Section 21351(d), with two exceptions:

(1) The former limitation on proof by the testimony of the beneficiary is not continued.

(2) The presumption of menace and duress is not continued.

Subdivision (c) continues the substance of former Section 21351(e) (1), and expands the rule to apply to gifts to specified relatives and associates of the drafter of a donative instrument.

Subdivision (d) restates the sub-

stance of the second sentence of former Section 21351(d).

§21380(d) provides that if a beneficiary is unsuccessful in rebutting the presumption, the beneficiary shall bear all costs of the proceeding, including reasonable attorney fees. Representing beneficiaries of proposed transfers that fall within the gambit of 21380 can be dicey, and the careful advocate will warn his/her client in writing of the possible consequences of a failed attempt to validate the gift by means of clear and convincing evidence.

However, as LexisNexis points out, "The burden of establishing the facts that give rise to the presumption under subdivision (a) is borne by the person who contests the validity of a donative transfer under this section. See Evid. Code § 500 (general rule on burden of proof)." This is undoubtedly because gifts are presumed to be valid, unless and until there is sufficient evidence to give rise for the application of the 21380 presumption of fraud or undue influence.

Now for the good news, there is another difference found in §21380. In section 21384(c), an attorney who drafts an instrument can review and certify the same instrument but only as to a gift to a care custodian. In §21350, a certificate of independent review was required for all transfers to disqualified persons.

The Certificate of Independent Review (CIR) is the way to get around the presumptions of invalidity found in §21380, and section 21384(a) sets forth the wording of

the certificate. Careful practitioners will want to create a declaration in support of the CIR. The declaration of the drafting attorney helps to make sure that all of the requirements of a valid CIR are met. I have a declaration that was provided by Gregory Wilcox, Esq., a frequent contributor to the Consumer Advocates for Nursing Home Reform's Legal Network News. If you would like a copy, email me at Ronald@mullin-law.com and ask for the declaration and I will send it out to you.

Now that the Certificates of Independent Review are so important, and it looks like we are going to be using them even more, it is important to read the case of *Estate of Winans* (2010), 183 Cal.App.4th 102. The case discusses the duties of an attorney who provides a CIR under the old §21351(b). The issues surrounding the statutory scheme of disqualification of specified people under §21380 are not affected by the application of the common law governing menace, duress, fraud and undue influence. See *Bernard v. Foley*, 39 Cal. 4th 794, 800, 139 P.3d 1196, 47 Cal. Rptr. 3d 248 (2006); *Rice v. Clark*, 28 Cal. 4th 89, 97, 47 P.3d 300, 120 Cal. Rptr. 2d 522 (2002).

It's going to be an interesting year! ♦

- Ron Mullin, a lawyer in this county for over 30 years, dedicates his practice to estate planning, wills and trusts, conservatorships/guardianships, business and commercial law, real property, and business formation. He also acts as mediator and arbitrator for disputed cases.

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MCLE SELF-STUDY

THE NEW DISQUALIFIED PERSON RULES

- 1 The new disqualified person rules can be found in California Probate Code §21380 et seq.
 True False
- 2 Under the new disqualified person rules, a caregiver is not an included person and therefore is capable of receiving a gift from a testator.
 True False
- 3 Bernard v. Foley held that care custodians under Probate Code §21350 do not include persons providing health services or social services to an elderly person or dependent adult.
 True False
- 4 In Bernard v. Foley, the Court adopted the definition of care custodian found in California Welfare and Institutions Code §15610.17
 True False
- 5 Widening the definition of care custodians has no implication for friends who may be assisting an elderly or dependent adult.
 True False
- 6 Care custodians who have a pre-existing personal friendship with their charge are exempt from the presumption of fraud, undue influence, menace and duress should they be the beneficiary of testamentary bequest.
 True False
- 7 California Probate Code §21380, et seq was effective as of January 1, 2011.
 True False
- 8 For the most part, California Probate Code §21380 restates the substance of former §21350(a), but with some notable exceptions.
 True False
- 9 California Probate Code §21380 Subdivision (a)(6) generalizes the reference to a "law partnership or corporation" in former Section 21380(a)(3) to exclude law firms organized as LLP's.
 True False
- 10 The presumption of menace and duress is not continued under §21380 Subdivision (b).
 True False
- 11 A careful advocate will warn his/her client in writing of the possible consequences of a failed attempt to validate a gift by means of clear and convincing evidence.
 True False
- 12 In Section 21384(c), an attorney who drafts an instrument is not authorized to review and certify the same instrument as to a gift to a care custodian.
 True False

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Last-Minute Holographic Wills

in the age of revokable living trusts

Estate planning attorneys today often encourage clients to use revocable living trusts over wills as the primary estate planning device. Will last-minute holographic documents be as effective to change an estate plan now as when the primary estate planning device was a will?



by Jay Chafetz

Suppose a testator has an attorney draft a revocable living trust. He comes back to the attorney once for an amendment, but then, shortly before death, leaves a letter cutting out an heir. Whether this letter will be effective depends on a number of factors.

A revocable trust may be amended by the same means as it may be revoked. Prob. C. §15402. A revocable trust may be revoked:

“(1) By compliance with any method of revocation provided in the trust instrument.

(2) By a writing (other than a will) signed by the settlor and delivered to the trustee during the lifetime of the settlor. If the trust instrument explicitly makes the method of revocation provided in the trust instrument the exclusive method of revocation, the trust may not be revoked pursuant to this paragraph.” Prob. C. § 15401 (a).

Probate Code Section 15401 (a) (2) might seem to imply that a holographic will cannot amend or revoke a trust. The case of *Gardenhire v. Superior Court* (2005) 127 Cal. App. 4th 882, 891-892, 26 Cal.Rptr.3d 143, 149-151 ruled to the contrary, however. *Gardenhire* held that sec-

tion 15401 (a)(1) is an alternative to section 15401 (a)(2) and that if a trust says it can be amended by any writing, this includes a holographic will. The trust need not specifically say that the writing can include a holographic will.

Gardenhire does not provide the whole answer to the question of whether the last-minute document will be effective, however. The rest depends upon the specific facts regarding preparation of the document and whether the testator intended it to serve as a will, or only as a set of instructions for a new will to be prepared.

When clients relied mainly on wills to achieve their estate planning objectives, they could override a prior will by leaving a subsequent letter or other document if it met the requirements for a holographic will.¹ This could be the result even though the client did not know that holographic wills were valid or how to draft one.²

A line of authority provides, however that a document which is not itself intended to have testamentary effect but rather is only a set of instructions for preparation of a subsequent will is not a holographic will. For instance, in *Estate of Kisling* (1945) 68 Cal.App.2d 163, 156 P.2d

57, the court held that a letter to an attorney could not serve as a holographic will. The letter stated that the testator was seriously ill, felt he had not been fair to his nephew in a prior will, and wanted the nephew to have all of his personal property. He asked the attorney to come as soon as possible. The court affirmed the ruling of the trial court denying admission of the letter to probate on the grounds that for the letter to be a valid holographic will the decedent must have “intended by the very paper itself to make a disposition of his property . . .” The court said that the letter warranted the conclusion that it was not itself intended to make a disposition of the property but instead “was simply a request . . . to [the decedent’s] attorney that he come see her for the purpose of making a will.”³

Also in *Estate of Beebee* (1953) 118 Cal.App.2d 851, 258 P.2d 1101 a client wanted to change a prior, attorney-drafted will. There was evidence that the client would be afraid to change her will without consulting an attorney. She wrote a letter to her attorney asking about changing the will and then wrote a subsequent letter to her bank, saying that conditions had changed and she wanted to leave her entire estate to her son. She concluded the

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Re: David Hermelin

"Mr. Hermelin was very helpful. [...] We have his name and number on file and will call if ever the need comes up."

Re: Virginia Ekelund

"Excellent and patient attorney!"

letter by saying, "Please help me either to add a new codicil or to make a new will." The court held that the letter was not a valid holographic will. The court said that the bulk of the letter showed "at most it is a letter to the bank telling them how she wished to change her will but intending that the preparation of a codicil or new will was necessary before such intent could be effected."⁴

Do such cases mean that a last-minute holographic document will never be effective to change the terms of a prior, attorney-drafted trust? Most clients probably view a trust as so complicated a document that it can be changed only by an attorney. Like the decedent in *Beebee*, they probably would not try to change it without an attorney's help. A court could therefore always conclude that the decedent did not intend a subsequent letter itself to make a disposition of property because the client did not know he could change the trust on his own.

Nevertheless, there are competing lines of cases as well as public policy arguments that may support a finding under the facts of a particular case that a subsequent holographic document will be effective to amend or revoke a prior, attorney-drafted trust.

Public policy would seem to favor permitting testators greater, rather than less, flexibility in having their wishes carried out. Holographic wills have historically allowed such flexibility. Not all clients feel they have the money to return repeatedly to attorneys for amendments or restatements of their trusts, and others die too suddenly to have the opportunity. The primary purpose of the court is to carry out the wishes of the testator⁵. Giving effect to the holographic writing does this.

Further, there are various lines of cases that show the law has allowed flexibility where a testator's intent was sufficiently clear.

A trust may generally be estab-

lished as well as revoked without excessive formality. A trust may be created by a simple declaration of the owner that he holds the property in trust.⁶ There is no requirement of any particular kind of writing, that the writing be witnessed, or that the testator's signature be acknowledged.⁷ Also, Probate Code section 15401 permits amendment or revocation of a trust by any writing, not necessarily only by a witnessed, formal, or attorney-drafted writing. See *Fleishman v. Blechman* (1957) 148 Cal.App.2d 88, 95, 206 P.2d 548, 552 (trust regarding real property could be revoked by any writing which clearly manifested intention to revoke and therefore was revoked by a lawsuit in which testator alleged that he held the property free and clear of any other interest; the complaint apparently did not even specifically refer to the trust); *Gardenhire v. Superior Court*, supra, 127 Cal.App. 4th at 888, 26 Cal.Rptr.3d at 147 (will executed after trust which stated it revoked all prior wills was also held effective to revoke a prior trust even though the will did not explicitly refer to the trust.)

Further, an instrument will be construed more liberally when it is written by an inexperienced or illiterate person than when it is written by a more sophisticated one.⁸

Courts have upheld holographic wills even when the testator contemplated signing a subsequently drafted formal will incorporating the provisions of the holographic will. See *Estate of Brenner* (1995) 76 Cal.App.4th 1298, 91 Cal.Rptr.2d 149 (testator apparently intended to execute formal will based on holograph, but failed to execute it properly; holographic document held to be valid will anyway); *Estate of Sar-gavak* (1950) 35 Cal.2d 93, 216 P.2d 850 (testator met with executor/attorney, gave him a letter, and said, "I want you folks to prepare and take care of my estate, my affairs, in the way that you know I want it. And whenever Lillian Shooshan ever gives any trouble, I want you

to have this"; while this stated a request to "prepare . . . my estate" (evidently in the future) document still held to be valid holographic will.)

Various cases stand for the proposition that the law does not require anyone who has once hired a lawyer to draft estate planning documents to return to a lawyer to make any changes to the estate plan.⁹

In the presence of such competing arguments and lines of authority, the decision in any given case about whether to give effect to a last-minute holographic document becomes very fact specific. Did the testator leave the document among his own possessions or send it to an attorney or other third party? If he sent it, did he do so with instructions that it was his new will or with instructions that an attorney should use it as the basis for drafting a new will or trust? Most testators who hire attorneys to draft trusts probably do not realize that they

can amend the trust on their own by means of a holographic will, but knowledge of the ability to draft an effective will without the help of an attorney was never a prerequisite for the validity of a holographic will in the past, so it can be argued it should not be one now either. In the age of extensive use of revocable living trusts difficult issues concerning the effectiveness of subsequent holographic documents can be expected to recur and to present a continuing challenge for litigants and the courts.♦

- Jay Chafetz practices in Walnut Creek, specializing in personal injury, medical malpractice, elder abuse, and trust and will contests. He is on the Board of Directors of Contra Costa County Bar Association and the Litigation Section.

Footnotes:

¹ See *Estate of Brenner* (1995) 76 Cal. App.4th 1298, 91 Cal.Rptr.2d 149.

² See *Estate of Wolfe* (1968) 260 Cal. App.2d 587, 593, 67 Cal.Rptr.297, 301.

³ 68 Cal.App.2d at 168, 156 P.2d at 59.

⁴ *Estate of Beebee, supra*, at 859, 258 P.2d at 1106.

⁵ See *Estate of Russell* (1968) 69 Cal.2d 200, 205, 70 Cal.Rptr. 561, 564; Prob. C. § 15200 (a).

⁶ Prob. C. § 15200 (a).

⁷ See generally Prob. C. §§ 15200-15210; cf. Prob. C. § 4673.

⁸ *Estate of Wolfe* (1968) 260 Cal.App.2d 587, 593, 67 Cal.Rptr.297, 301.

⁹ *Estate of Sargavak, supra*, 35 Cal.2d 93, 216 P.2d 850 (court permitted subsequent 6 holographic letter to amend formal, witnessed will); *Estate of Brenner, supra*, 76 Cal.App.4th 1298, 91 Cal.Rptr.2d 149 (same); *Estate of Smilie* (1950) 99 Cal.App.2d 794, 22 P.2d 692 (same); *Estate of Fuller* (1933) 135 Cal.App. 781, 22 P.2d 399 (same).

MORE CLIENT COMMENTS FROM RECENT LRIS SURVEYS:



Re: Kenneth Bergquist:

"Mr. Bergquist [...] helped me cope with this situation. [I] would contact him again if I needed further help. The people from the LRIS were very courteous and made me feel comfortable being so far away. They were quick to get back to me and set me up an appointment the next day. I was very happy with everyone I talked to. Thank you."

Re: Virginia Ekelund:

"Ms. Ekelund was very professional and very helpful. I had faxed background materials to her prior to our telephone conference. When we spoke by phone, it was evident that she had carefully reviewed the materials. Thus, my questions were answered quickly and she gave me excellent advice as we prepared for our small claims court hearing. The hearing was held last Friday (Oct. 1) and we prevailed! I greatly appreciated Ms. Ekelund's advice and help."

To learn more about LRIS and how to join, please contact LRIS Coordinator, Barbara Tillson at (925) 370-2544 or btillson@cccba.org - or go to "Join our Lawyer Referral Network" at www.cccba.org.

civil jury verdicts



by **Matt Guichard**

Some years ago, I moderated a roundtable discussion entitled "The Vanishing Jury Trial". Remember we ran the transcript of that discussion in the *Contra Costa Lawyer*? Peter Hinton, K.C. Ward, Harvey Sohnen and I participated in that roundtable discussion. Lots of reasons we thought contributed to the diminishing numbers of civil jury trials. One that stands out in my brain was the tremendous costs of experts. But I digress.

I thought it might be of interest to go back and look at the jury verdict statistics for a number of years and test that theory to see if the numbers are really down or not. Interestingly, recall the numbers in the early years up through the mid 2000's did not include civil jury verdicts for the branch courts. We have done that for the past four or five years. So if anything the new numbers should be greater.

- **In 1999 there were 52 civil jury verdicts in Martinez Superior Court.** Couldn't find my breakdown on Plaintiffs v Defendants. Sorry.
- **In 2000 we had 36 civil jury verdicts.** 20 for Plaintiffs and 16 for defendants.
- **In 2001 we saw 38 civil jury verdicts.** 15 for Plaintiffs and 23 for Defendants.
- **2002 saw 55 civil jury verdicts.**

Plaintiffs took 31 and Defendants took 24.

- **2003 had 52 verdicts** with Plaintiffs taking 31 and Defendants 21.
- **2004 dropped all the way down to 28 verdicts.** Plaintiff took 16 verdicts, Defendants 11, and one no decision (One hang).
- **2005 dropped further to 21 total civil jury verdicts.** Plaintiffs took 11 and Defendants took 10 verdicts.
- **2006 jumped up to 35 verdicts.** Plaintiffs took 18 and Defendants 15 and two no decisions.
- **2007 dropped back to 25 verdicts.** Plaintiffs took 14 and Defendants took 8, with 3 no decisions.
- **And finally 2008 was a miniscule 18 civil jury verdicts number.** Plaintiffs took only 3 verdicts and Defendants 15.

What does it all mean? I am not sure. But clearly the trend is downward.

Very happy to hear from our own Nick Casper and his first chair jury verdict. ***Cervantes v Sono***, Alameda County Superior Court Case No. RG09484889 was tried before the Honorable Ronni MacLaren. Fulvio Picerno and Steven Toschi for the defense.

The case involved a motor vehicle collision at the Richmond San Rafael Bridge. Liability was disputed. Prior to trial, Plaintiff made a policy limits demand of \$50,000. Defendant's carrier made no offer. Prior to the trial the parties stipulated that if Defendant was found negligent, the carrier would pay the policy limits. With that, no evidence of damages was introduced at trial. Sounds like an underinsured motorist issue.

The jury indeed found Defendant 90% at fault. I think we will be hearing more about this case.

Field Properties et al v The Gomes Partnership et al was

tried before the Honorable Barry Baskin. Clifford Horner and Matt Urdan of Walnut Creek represented Plaintiffs. Ladd Bedford and Arman Javid of Larkspur represented Defendants. The case involved claims for breach of contract, fraud and concealment in the sale of a commercial building in Livermore.

The jury returned a verdict of \$2.7 million for Plaintiffs. Punitive damages were awarded.

Tanner et al v Horizon West, Inc., et al, Case No. 06ASo4261, was tried before the Honorable Roland L. Candee in Sacramento County Superior Court.

Jay P. Renneisen represented of Walnut Creek represented Plaintiffs. Michael LeVangie, Eric Emanuels, and Kim Wells of Sacramento represented Defendants. The case involved allegations of wrongful death and elder abuse. Prior to trial Plaintiffs demanded \$650,000. Defendants offered \$30,000.

The jury returned a verdict of \$1,100,000 in compensatory damages, and \$28,000,000 (Yes 28 million) in punitive damages.

Thelma Russ et al v Fremont Unified School District, Alameda County Superior Court Case No. HG 05239834, was tried before the Honorable John M. True. Matthew Oliveri of Walnut Creek represented Plaintiffs. James Marzan of Pleasant Hill represented Defendant.

In 1977 the Fremont Unified School District established a Vandal Watch Program allowing the District to lease property to persons to place mobile homes for residential use on District property for the purpose of keeping a watchful eye on campus property and to perform periodic inspections. In 2005 Plaintiffs sued the District alleging they were employees of the District and entitled to back pay and overtime pay.

After some interesting legal rulings and a Court of Appeal bit of involvement, a jury found for the District in a unanimous verdict.

Ho v Truong, Santa Clara County Superior Court Case No. 109CV135753 was tried before the Honorable Peter Kirwan. Plaintiff was represented by Susana Hamilton and Lisa Trepel of San Jose. Defendant was represented by James Slone of Walnut Creek.

The case involved claims of personal injury arising out of a motor vehicle accident. Prior to trial the case went to arbitration. The arbitrator awarded \$7,888 to Plaintiff. Defendant rejected that award. Defendant then made a CCP 998 offer of \$3001. Plaintiff demanded the arbitration award. The jury returned a verdict for defendant, finding Plaintiff failed to fulfill her burden to show Defendant was negligent.

People of the State of California v E. Greg Kent was not a criminal case. It was a civil case in San Joaquin County Superior Court. Case No. 39-2009-00215440 was tried before the Honorable Barbara Kronlund. Scott Jenny of Martinez represented E. Greg Kent. Pete McCloskey represented Beverly Kent, Greg's wife. The Kents were the property owners in an eminent domain case in which Caltrans took a 32,000 square foot industrial building in Stockton for freeway project.

The Caltrans appraiser valued the property at \$2,290,000. The Kent's appraiser valued the property at \$3,500,000. After a three week jury trial the jury returned a verdict of \$3,300,000. Our tax dollars hard at work. ♦

— Matthew P. Guichard is a principal in Guichard, Teng & Portello, APC. Please send case information to: 1800 Sutter Street, Suite 730, Concord, CA 94520 or contact him at 925.459.8440 or mguichard@gtplawyers.com



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LONG TERM CARE INSURANCE

by **Colleen Callahan**, , CLU, CASL, LUTCF

*Are you considering purchasing Long Term Care Insurance?
Do you know what it is and why it might be a key component
in planning successfully for retirement?*

Long Term Care is the type of care a person might need due to an injury, illness, increased frailty or perhaps cognitive impairment. Care might be provided at home or in a facility setting. Some believe that Medicare will cover the cost; that is a myth. Payment sources can be personal income, personal savings, government programs (maybe) or Long Term Care Insurance (LTCI). People make the decision to buy for varied reasons: to maintain independence, to avoid being a burden to family or to protect assets.

Long-term care insurance is valuable for many reasons, but it all comes down to getting help. Have you ever had a relative need care? How was it handled? Did you play a role?

Recently, I stood outside a patient's room in the hospital with a discharge planning team firing information at me, telling me what was available and what needed to be done - It was as if I was hearing them in slow motion but everything was happening at warp speed. While the team believed they were offering assistance and surely thought it was helpful, I was struggling to absorb brief snippets, hoping I would remember later.

How do you select a facility, how do you prepare for your loved one to return home, where do you get a hospital bed? How do you hire help? How fast can it be done? Am I equipped to lift him/her? What happens if I get hurt? Am I making

the right choices for him/her? Is this what he/she wants? How much will this cost?

Did you know that the average cost of care today in Contra Costa County is \$250 per day, if a nursing home stay is approximately 2.5 years, not even accounting for the cost of care received at home prior to entering a facility that translates to \$228,125 in today's dollars. Is that potential expense funded and set aside? How will that impact retirement planning?

One good argument in favor of purchasing LTCI is that it makes good business and financial sense. The premiums are much less expensive than the current annual or even monthly cost of care. Premiums are waived if you are collecting a benefit and the benefit can be received tax free. There are also tax incentives for the self-employed, corporations and individuals (you have to ask your tax professional - I cannot give tax advice). LTCI can be a benefit for selected employees, partners and executives. Some insurance companies offer discounts or simplified qualification requirements if several people, including spouses, from one business apply for coverage. Each participant can personally select benefits that best suit his or her needs. The cost of the policy is determined based on individual health, age, tobacco use, the length of the benefit (2, 3, 5, 6 years) the waiting (deductible) period (90, 120 days) and the daily benefit in terms of dollars per day. There are

options for simple or compound inflation protection and there are a number of riders available depending on the carrier.

The care coordination benefits policies provide are invaluable and often underappreciated. There are professionals available to help with all of those daunting challenges. The three times I have been involved with care giving there was no policy in place and the learning curve was fierce. I have first hand experience: It is physically demanding to provide care and also taxing to schedule care and to coordinate treatment. Not to mention the emotional involvement concerning the complex needs of the individual needing the care.

These are real life challenges. Purchasing a policy that can provide piece of mind, pay for care AND help design a treatment plan, make sure it is implemented and updated, makes sense on many levels. LTCI is not a lucky charm, it will not magically eliminate all stress and most likely will not pay for all of the costs associated with the care, but it will help. ♦

— *Colleen has over 20 years of experience in the insurance industry. Her practice, based in Lafayette, focuses on individuals and small to mid-sized businesses, providing insurance and employee benefits. She is a current member of the board for the local health underwriters (GGAHU) and a former board member of the local insurance and financial advisors association (NAIFA – Mt. Diablo).*

JFKU COLLEGE OF LAW CONTINUES TO PROVIDE LEGAL SERVICES FOR ELDERS

by **Audrey A. Smith**

Through its Legal Clinic for Elders, John F. Kennedy University, College of Law continues to provide free legal advice and representation to low-income elders in Contra Costa, Solano, and Alameda Counties. "Elder Law is one of the fastest growing areas of legal specialization in the country. It requires a command of complicated substantive areas of state and federal law, as well as adherence to the highest ethical standards. JFKU's Legal Clinic for Elders is designed to provide our law students with academic training and hands-on clinical experience to prepare them to practice in the area of elder law," said Pamela Zimba, Adjunct Professor and Director of the JFKU Legal Clinic for Elders.

The Elder Law Clinic at JFKU was founded in 2005 under the leadership Teri Cannon, former dean of the law school. It was the first on-campus clinical program offered by the law school. Under the direction of

Virginia M. George, it provided hundreds of hours of legal assistance to Contra Costa County residents, primarily in the area of financial elder abuse, which is now the focus of the Elder Law Center and Contra Costa County Bar Association. In the fall of 2010, JFKU College of Law modified the program in order to emphasize its academic component and to provide legal services outside the field of financial elder abuse.

"In the Legal Clinic for Elders students spend an average of 6 to 9 hours per week in seminars and on casework. In weekly seminars students learn the substantive and procedural laws and practical skills related to representation of elder clients. Ethical issues related to representation of seniors are discussed at length, as well as issues relating to aging, capacity, elder abuse, public entitlements, and health care. Students meet once a week for case evaluations where we discuss what steps to take next," said Zimba.

Law students, certified by the California State Bar, and working under the supervision of the clinic director, represent elder clients in court on a variety of issues including physical and emotional abuse. They also provide free legal advice to elders (and their family members) who are need help with issues related to changes in their financial resources, housing needs, access to medical care, physical and mental incapacity, and death.

Participation in the clinic has become popular among the students. Alicia Halperin, a third year JFKU law student, expressed that participation in the Legal Clinic for Elders "was the most rewarding and educational experience of my law school studies." Halperin intends to practice elder law upon graduation.

Dean Barbieri, recently appointed dean at JFKU College of Law expressed admiration for the work of the clinic law students. "Our goal is to have many of our students gain hands-on experience in our on campus Legal Clinic for Elders, our Housing Advocacy Clinic, or one of many off-campus internship placements, including the new programs being established by the CCCBA." ♦

— *Audrey A. Smith is an Associate Professor and Director of the Legal Research and Writing Progra at John F. Kennedy University, College of Law.*

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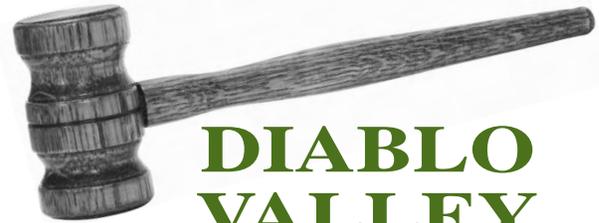
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Perry Novak, a graduate of UC Berkeley and the USF School of Law, has provided financial advice and investment management to Bay Area families and companies for almost 30 years. He has served on a panel advising the Joint Economic Committee of the U.S. House of Representatives, and has worked with financial and retirement planning programs sponsored by the California Medical Association and the California Society of CPAs.

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