

# The Elder Law Extra

Morris Klein , *Chair*

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## *Message from the Chair...*

Dear Colleagues-

Welcome to the latest Elder Law Section newsletter!

I want to “take stock” as to where I think the practice of elder law is today:

1. The practice is diverse. “Elder law” is popularly thought of as legal issues affecting the senior population. Practitioners can include lawyers in private practice as well as in the not-for-profit sector and government. The practice can include estate planning, asset protection, fiduciary services, taxation, social security, veteran’s benefits, long-term care, Medicaid and Medicare, guardianship, health care planning, end-of-life planning, housing, protection from elder abuse from family or others.

2. The number of potential clients is expanding. The “elder” age cohort is the fastest growing segment of the population. In 2000, about 12% of the population in the United States was over 65. This percentage is expected to increase to 20% by the year 2025. Seniors are also living longer. The Congressional Research Service reports that in 2003 the life expectancy at birth for the total population has reached an all-time American high level, 77.5 years, up from 49.2 years at the turn of the 20<sup>th</sup> century. Unfortunately, living longer does not always mean living well, and people can encounter many challenges to maintaining a good quality of life as they age. The goal of aging in place in financial security remains elusive.

3. The recent economic downturn has increased the need for legal services. It has financially weakened some people, increasing the demand for public benefits. These same economic forces have also

made it more costly to receive long term care and more difficult for the government to meet the increase in demand for services. Good legal counsel is often needed to help individuals navigate these challenges.

4. The practice is expanding beyond “seniors.” Persons with disabilities encounter many of the same legal issues facing those over 65. Indeed, virtually all of the legal needs of seniors described above are also faced by persons with disabilities. Of particular note is the use of “special needs” planning to protect the legal rights of disabled persons.

5. The more complex the laws, the more clients need attorneys for advice and counsel. This is particularly noteworthy in the Medicaid area. Our legislators have made the Medicaid rules more complicated each time they have changed the law in this area. As a result, clients seek legal counsel in this complicated and often counterintuitive area of the law.

The Elder Law Section, through the Section Council, is trying to adapt to this robust area of the law. We continue to offer a variety of MICPEL courses and section programs. This is the second year MICPEL has offered a course on veterans’ benefits. We are also considering expanding our reach to include issues of interest to attorneys who represent persons with special needs.

As always, feel free to contact me with your questions and concerns.

*Morris Klein*  
*Chair*

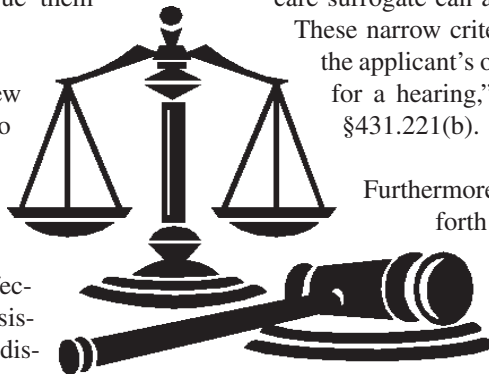
# Proposed Changes to Medicaid Fair Hearing Regulations

By Jennifer Goldberg

On November 6, 2009, the Department of Health and Mental Hygiene published new regulations to govern fair hearings procedures in Medical Assistance cases. See [www.dsd.state.md.us/mdregister/3623/main\\_register.htm](http://www.dsd.state.md.us/mdregister/3623/main_register.htm). The Elder Law Section Council has significant concerns about these regulations, which are shared with a number of organizations, including the Maryland Disability Law Center and the Legal Aid Bureau.<sup>1</sup> After expressing these concerns in comments to the Department of Health and Mental Hygiene in early December, the Department has decided to withdraw the regulations and reissue them with some changes.

Our overall concerns are that the new regulations effectively limit access to Medical Assistance at a time when policy-makers are striving to increase the pool of those covered by health insurance. Administrative fair hearings are the keystone to effective quality control in Medical Assistance--ensuring that aged, blind, and disabled persons, poor families, and those institutionalized receive that to which they are entitled. The new proposal unnecessarily complicates an appeal system that currently serves persons of low-income who frequently are disabled, non-ambulatory, and experience challenges reading, writing, and navigating bureaucracies. Simultaneously, the plan releases the State from its current obligations to assist appellants. This is not only at odds with the ameliorative purpose of Medicaid, but is incongruous with the interim recommendations of Maryland's Access to Justice Commission, created in 2008 by Chief Judge Robert M. Bell to develop, coordinate, and institute policy objectives to *expand access* to the State's civil justice system.<sup>2</sup> As administrative appeals are a prerequisite for judicial review under Medical Assistance, a plan to complicate what is currently a relatively simple and accessible system is a plan that limits access to justice.

The following details just some of the proposed changes about which we have concerns:



## COMAR 10.01.04.01B(3)

### Definition of Authorized Representative

This subsection significantly narrows the current definition of an authorized representative for the purposes of filing and pursuing a Medical Assistance appeal, to the detriment of Medical Assistance applicants and recipients. The proposed regulation defining authorized representative, COMAR 10.01.04.01B(3) is highly specific about the conditions under which a person other than a spouse, domestic partner, parent, legal guardian, power of attorney or health care surrogate can assist an individual in filing an appeal.

These narrow criteria effectively “limit or interfere with the applicant’s or recipient’s freedom to make a request for a hearing,” in direct contravention of 42 C.F.R. §431.221(b).

Furthermore, the Maryland regulations must set forth a process to protect the legal rights of Medical Assistance applicants or recipients to receive notice and appeal eligibility or service denials when they lack capacity but have no legal guardian or other legal representative to act on their behalf. Such individuals are protected under federal law by 42 C.F.R. § 435.907 and 42 C.F.R. § 431.206(b)(2). The original proposed regulations were clearly illegal because they failed to conform with these federal regulations permitting a person acting responsibly on behalf of an incapacitated individual to apply for Medicaid services and permitting an individual to be represented by “legal counsel, a relative, a friend, or other spokesman” in a fair hearing appeal.

In response to our comments, DHMH did make some changes in who can represent a person who is incapacitated. However, the regulations have the effect of prohibiting providers from filing appeals. Frequently, a provider is the only person that is available to file the appeal in a timely fashion.

*continued on page 3*

Visit [www.msba.org/sec\\_comm/sections/elder/](http://www.msba.org/sec_comm/sections/elder/) for all the latest updates!

## Proposed Changes..

continued from page 2

Furthermore, these regulations would harm the appeal rights of not only applicants and recipients who lack capacity, but also those who may have capacity, but due to their health conditions or life circumstances, require assistance to maintain their appeal.

### COMAR 10.01.04.02

#### Opportunity for a Fair Hearing

Subsection .02B requires that a Medicaid recipient exhaust all of the internal MCO complaint and appeal procedures specified in COMAR 10.09.71 before filing a fair hearing appeal *unless they are waiver-eligible*. Recipients have the right to have the entire fair hearing process to be completed within 90 days of when they file their initial complaint or appeal. Given the current scheduling by the Office of Administrative Hearings, if exhaustion is required before sending a hearing request to OAH, it will be impossible for the Department to meet this 90 day deadline.

### COMAR 10.01.04.03

#### Notification of Right to Request a Fair Hearing

The proposed regulations eliminate the requirement that the Department inform appellants of their right to be represented by a lawyer or other person of their choice during the entire fair hearing process. Instead, the proposed regulations include a general statement requiring the Department to “include an explanation of the individual’s right to request a fair hearing” and “include a summary of the regulations related to fair hearing procedures.” COMAR 10.01.04.03B(4) and (5).

### COMAR 10.01.04.04

#### Request for Fair Hearing

The proposed changes to COMAR 10.01.04.04 significantly restrict an individual’s ability to request a fair hearing. First, the changes eliminate the possibility of requesting a fair hearing orally. While federal law does not require states to permit *oral* as opposed to written hearing requests, Maryland’s fair hearing regulations have long permitted such oral requests. The requirement that a fair hearing request be made in writing puts a greater onus on applicants and recipients, especially those who are illiterate or who have limited English proficiency. This is of particular concern when coupled with proposed 10.01.04.04A(2) that eliminates the Department’s current obligation to assist an individual or representative in submitting a fair hearing request.

### COMAR 10.01.04.06

#### Hearing Procedures

COMAR 10.01.04.06A(5) states that all parties have the

right to “*Question or refute any testimony or evidence, including an opportunity to confront and cross-examine all [adverse] witnesses the administrative law judge judges to be adverse.*” This provision must be amended to acknowledge that it is subject to existing law in the OAH regulations on the admission of evidence, the Administrative Procedure Act in Maryland Annotated Code, State Government Article § 10-213, and Maryland case law on the admissibility of evidence in administrative proceedings. As the proposed regulation is written now, it could permit DHMH to object to the introduction of affidavits and telephone testimony that are admissible under existing law.

COMAR 10.01.04.06B changes the current fair hearing regulations to require an appellant to subpoena an employee of the Department. This new requirement adds additional burdens to make it more difficult for pro se recipients to appeal and put on their case.

### COMAR 10.01.04.08

#### Findings, Timing of Decision and Effect of Decision

The provisions regarding the timing of the decision in proposed COMAR 10.01.04.08B are highly confusing. The proposed regulations, as well as with COMAR 10.09.72.05, do not satisfy the federal regulatory timelines *and* standards for expedited appeals for MCO enrollees appealing a MCO decision.

The appeal rights section of COMAR 10.01.04.08C sets forth a two stage process of appealing first to the Board of Review, then to the Circuit Court through a petition for judicial review. Because this Board of Review process can take months (including getting a transcript, providing briefing, oral argument, and then a decision), it violates the federal requirement that the agency must take final administrative action within 90 days of the appeal. 42 C.F.R. §431.244(f).

Subsection C(2) sets forth that any administrative law judge decision adverse to the appellant (and only those decisions adverse to the appellant) shall be implemented immediately and may not be stayed pending appeal. This provision is illegal and must be amended. First, the administrative law judge decision cannot be considered final administrative action by the Department if it can be appealed to the Board of Review. Any action adverse to the appellant cannot be implemented until the Department’s administrative action is final. Further, a Circuit Court judge has the discretion to

*continued on page 4*

## Proposed Changes..

continued from page 2

decide whether to stay an administrative decision during an appeal to the Circuit Court.

Without such a stay, an applicant's appeal rights may simply become moot. Medical Assistance recipients who are receiving benefits pending their appeal cannot wait months, or even years, for the appeals process to take place before receiving necessary medical services. By definition, these recipients are indigent persons with extremely limited income and resources, who will not otherwise be able to access medical care. Without continuing benefits, their health may suffer so much that they cannot pursue their appeal, and their lives may be in danger.

Finally, COMAR 10.01.04.08D(2) states that if the decision is favorable to the appellant, the Department may "authorize corrected payments or relief retroactive to the date the

incorrect action was taken **if appropriated funds are available . . .**" The Medicaid Program is an entitlement program under federal law and thus appropriate relief cannot depend on the availability of state funds.

These regulations are fraught with many serious legal problems. The Elder Law Section Council will continue to urge the Department to address these issues prior to reissuing any proposed regulations.

### Footnotes:

<sup>1</sup> The discussion below is adapted from the comments submitted by the Maryland Disability Law Center and the Legal Aid Bureau, which were supported by the MSBA Elder Law Section Council.

<sup>2</sup> Maryland Access to Justice Commission, *Interim Report & Recommendations*, Fall 2009 , <http://www.courts.state.md.us/mdatjc/pdfs/interimreport111009.pdf>

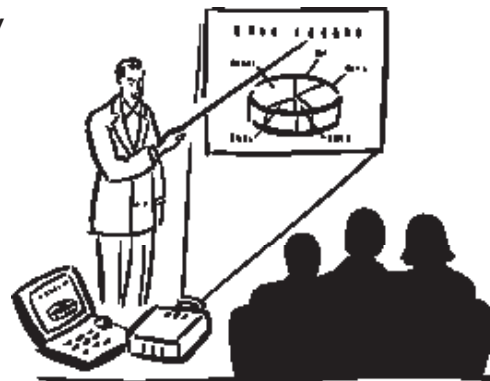
Please contact the editor, Elena S. Boisvert, [meboisvert@comcast.net](mailto:meboisvert@comcast.net) for article suggestions and member news for the next newsletter.



## Upcoming MICPEL Programs

April 23, 2010 - Full day program addressing capacity and involuntary commitment.

June, date tba - Hot Topics in Elder Law.



# Elder Law Section Law Day Volunteer Event

Law Day 2010

The Elder Law Section Council of the Maryland State Bar Association will once again sponsor a statewide free preparation of Health Care Powers of Attorney and Living Wills / Advance Directives in Senior Centers throughout Maryland in early May 2010.

In 2009 Law Day efforts took place in nearly every county in the state, reaching several hundred seniors. This year our goal is to place at least one attorney in each of Maryland's 122 Senior Centers to provide this service.

We hope that attorneys involved last year, those who served either as county coordinators or volunteer attorneys in senior centers, will once again offer their time for this valuable pro bono opportunity.

All attorneys, regardless of areas of practice, are invited to volunteer. For those attorneys less familiar with the forms being used, coordinators work to pair them with others who have more experience.

Coordinators match their volunteers with centers. Senior Centers handle time slot bookings for the volunteer attorney, generally one-half hour per client.

Law Day information will be distributed through the Elder Law Section newsletter, State and Local Bar Association publications and through the Maryland Association of Senior Centers. The Senior Center Association's e-mail list includes the Area Agency on Aging Directors in each county and Baltimore City, along with 200 staff working in Senior Centers across the state.

A firm date along with the list of county coordinators will appear in an upcoming Elder Law Section newsletter so that potential volunteers can contact the coordinators directly.

For general information about Law Day, contact Joyce Demmitt, Assistant to Lawrence Adashek, PA, 410-415-5880 or e-mail [joyce@adasheklaw.com](mailto:joyce@adasheklaw.com).

## Announcement – First Maryland Disability Trust

**T**he First Maryland Disability Trust, Maryland's new pooled asset special needs trust is now accepting beneficiaries.

Operated by First Maryland Disability, Inc., a Maryland non-profit organization with 501(c)(3) status, The First Maryland Disability Trust ("FMDT") serves the state's disabled population by offering a way to preserve an individual's assets while permitting him or her to qualify for public benefits such as Supplemental Security Income (SSI) and Medicaid (also known as Medical Assistance.) These programs have strict limits on income and assets and provide for only the most basic needs, hence a special needs trust allows funds to be preserved for an individual's supplemental needs over time. FMDT is authorized under the Social Security Act (42 U.S.C. §1396p(d)(4)( C)) and Maryland regulation (COMAR 10.09.24.08-2B(6)(b)).

FMDT is open to any individual, regardless of age or type of disability, who has assets which would make him or her ineligible for benefits, such as SSI and Medicaid, and who wishes to place these assets in trust for his or her lifetime. The funds in the beneficiary's account are used for his or her needs not met by SSI or Medicaid, or other programs. In addition, if the beneficiary does not already have a care manager, FMDT will arrange for one to meet

with that beneficiary to assess his or her current and future needs.

FMDT does not provide legal advice and requires that all potential beneficiaries meet with an attorney prior to signing the joinder agreement. We recommend meeting with an attorney experienced in special needs planning.

FMDT was the brain child of Ron M. Landsman and Jason A. Frank, who long recognized the need for more planning options for Maryland's disabled population. In 2005, Frank and Landsman drew together a group of elder law and disability law attorneys from across the state to form FMDT's board of directors. In the future, it is anticipated that the board will expand to include representatives of disabilities organizations and family members of individuals with disabilities. Current board members and officers include Michael W. Davis, Laurie S. Frank, Louise Gonzales, Mindy Morrell, Morris Klein, Ellen Callegary and James Carter. Mary E. O'Byrne serves as the Executive Director. The firm of Frank, Frank & Scherr, LLC, located in Lutherville, Maryland, is providing staff and operational support on a pro bono basis to FMDT for the present.

For more information about FMDT, please contact Denise W. Fike, at 410-296-4408 or 410-337-8900 or go to [www.FIRSTMDTRUST.org](http://www.FIRSTMDTRUST.org).

### ***Elder Law Section Meeting***

The Elder Law Section will hold its Annual Legislative Meeting in Annapolis on **Tuesday, February 16, 2010** from 12 noon until 1:30 p.m. at the Amoss Room, 4th Floor, Miller Senate Office Building. A light lunch will be provided.

Please RSVP to Theresa Michael at [tmichael@msba.org](mailto:tmichael@msba.org) or by calling 410-685-7878, extension 3017 regarding your attendance as soon as possible so that the proper arrangements can be made.



## For Attorneys in Anne Arundel, Calvert & Prince George's Counties:

### **Maryland Crime Victims' Resource Center, Inc. Announces New Elder Justice Community Coalition**

The Maryland Crime Victims' Resource Center, Inc. (MCVRC) has received a grant to create a new, local Elder Justice Community Coalition in Anne Arundel, Prince George's, and Calvert Counties. The multidisciplinary coalition will seek to improve elder abuse awareness and intervention efforts in the tri-county area.

In furtherance of that goal the MCVRC will host a one-day technical training session on how to build and sustain a local elder abuse crime victim coalition. The training will be held on **February 24, 2009 from 9:00 a.m. to 3:00 p.m.** at the Prince George's County Courthouse. Interested individuals and organizations are welcome.

Taking an interactive, hands-on approach, this comprehensive training will focus on a six-step process designed to successfully establish and sustain an effective community coalition to address the issues of elder abuse, neglect and exploitation. The six steps are:

- **Step 1** – Determine Vision, Mission and Values
- **Step 2** – Create a Results-Oriented Approach
- **Step 3** – Build an Inclusionary Coalition Membership
- **Step 4** – Establish Effective Leadership
- **Step 5** – Promote a Strong Commitment to Purpose
- **Step 6** – Monitor Performance

Workshop participants will come away with a **Strategic Plan** in place for developing a new, regional elder abuse crime victim coalition. The Plan will identify such things as potential coalition and steering committee members, a mission statement and goals of the coalition

**For more information**, please contact Director of Special Grants, Merry O'Brien at 301-952-0063 or at [merry@mdcrimevictims.org](mailto:merry@mdcrimevictims.org) with the name, organization, address, phone number, and e-mail address of those who would like to attend.

# MSBA ANNUAL MEETING

## OCEAN CITY, MARYLAND



The MSBA annual meeting in Ocean City will be held from **Wednesday, June 9 through Saturday, June 12, 2010.**

For more information, visit [www.msbaannualmeeting.org](http://www.msbaannualmeeting.org) or call Wanda Claiborne of the MSBA at 410-685-7878.



MSBA's Annual Meeting offers an opportunity to exchange ideas with colleagues and sharpen your skills through instructional sessions and presentations by prominent members of your profession.



As well as relaxing in the sun and the surf.



# SEA. YOU. THERE.