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Contact the Commission at
(202) 662-8690, or at:
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THE GRAYING OF HOMELESSNESS

*Jeff Yungman, LISW-CP, Esq. Director,
One80 Place Legal Services/South
Carolina Homeless Justice Project*

There is no question that with the aging of the “baby boomers,” (those born between 1946 and 1964), the country is getting older. What is much less acknowledged is that the problem of senior homelessness is worsening as well. The Homeless Research Institute estimates that the population of seniors who are homeless could increase from 44,000 in 2010 to 95,000 by the year 2050.¹

Many older people who are homeless have been on the streets for almost a generation—particularly those with disabilities, mental health and/or behavioral health issues. They have settled into patterns that they seem unable or unwilling to break. These seniors are wary of the crowded conditions at shelters, so they are more likely to stay on the street relying on public places or makeshift arrangements for sleeping.

Other seniors who are newer to the streets became homeless after losing their jobs in the latest economic downturn or having lost their housing because they were on a fixed income and could no longer afford the rent due to medical bills or rising housing costs as a consequence of gentrification.

No matter how a senior becomes homeless, the average life span for a person living on the street is estimated to be 64 years. According to the National Coalition for the Homeless, a 50-year-old living on the street possesses

the physical traits of a 70-year-old.² In addition, senior citizens who are homeless are easy prey for criminals.

The Homeless Research Institute estimates that the population of seniors who are homeless could increase from 44,000 in 2010 to 95,000 by the year 2050.

They are more prone to victimization and more likely to be ignored by law enforcement.

In addition to financial difficulties and the scarcity of affordable housing, there are a variety of other reasons why seniors become homeless. They include:

- Loss of a life partner
- Chronic alcohol or drug abuse
- Psychiatric illness (primarily depression)
- Alzheimer’s disease and/or dementia
- Isolation with a lack of family support
- Reduced social welfare protections
- Deinstitutionalization

2. National Coalition for the Homeless, *Homelessness Among Elderly Persons*, (September 2009).

1. William Sermons and Meghan Henry, Homeless Research Institute, *The Demographic of Homelessness Series: The Rising Elderly Population*, (April 2010). The Homelessness Research Institute (HRI), is the research and education arm of the National Alliance to End Homelessness, <https://endhomelessness.org/ending-homelessness/what-we-do/research/>.

- Disability or physical health conditions such as chronic pulmonary disease, hypertension, urinary incontinence, tuberculosis, and other chronic physical ailments

In regard to physical health, senior citizens who are homeless have health issues that are hard to treat while living on the street. They often do not seek treatment for their health conditions for a variety of reasons. They are afraid of what will happen to them if they seek treatment. They do not have the resources to pay for treatment. They do not trust health care or social service professionals. They are not aware that they are eligible for benefits such as Medicaid and Medicare.

For senior citizens who are homeless or at risk of becoming homeless, the key to stable housing and an end to their homelessness is finding the resources to either get housed and off the street or finding the resources to prevent eviction. There has been a good deal written about the supportive services that senior citizens who are homeless can utilize to address their homelessness. These services include:

- Healthcare
- Transportation
- Education & training
- Financial counseling
- Meals
- Outreach
- Rapid rehousing
- Permanent supportive housing
- Mental health and substance abuse treatment

Remarkably, a supportive service that is often overlooked is legal services, when in fact legal services can and do play a significant role in ending homelessness for senior citizens. One example of that assistance is in eviction prevention. It has been reported that tenants with legal representation at a court hearing are less likely to be evicted than unrepresented tenants despite the merits of their respective cases. Here are two examples from the case files of South Carolina's Homeless Justice Project, where — were it not for legal representation — these older adults would have been evicted and would have become homeless.

Ann (60 years old)

Ann had multiple health problems, and, although she did not like living in public housing, she had no other option. She requested legal assistance in her ongoing dispute with the Housing Authority. During a torrential rainstorm her apartment flooded. She had to buy new furniture and as a result fell behind in her rent. A pro bono lawyer represented Ann at an informal hearing with the Housing Authority. There were clearly some discrepancies between what Ann thought she owed and what the Housing Authority claimed that she owed. The matter was not resolved.

Two months later, the Housing Authority filed to evict Ann. Ann's lawyer requested a hearing on the matter. At the hearing, her lawyer was able to show that the Housing Authority used two ledgers that listed varying amounts of what Ann allegedly owed. The Magistrate ruled that Ann only owed \$472 in back rent, not the \$1115 the Housing Authority claimed she owed.

The Housing Authority retained outside counsel to appeal the Magistrate's decision. Ann was again represented and the Magistrate ruled that her first ruling stood. The outside counsel representing the Housing Authority then appealed the matter to the state Court of Common Pleas, requesting that the Magistrate's decision be reversed. At the hearing Ann was again represented. The presiding judge dismissed the Housing Authority's motion and Ann remained housed.

Remarkably, a supportive service that is often overlooked is legal services... legal services can and do play a significant role in ending homelessness for senior citizens.

Oscar (92 years old)

Oscar was a World War II veteran who was, to put it nicely, set in his ways, and at 92 had every right to be. He requested legal services because he had been served with an eviction for nonpayment of rent. He maintained that he had paid his rent and did not understand why he was evicted. At the hearing it was determined that a veterans' assistance agency had agreed to pay the outstanding rent, but the agency failed to pay as promised. Oscar's lawyer contacted the agency and they agreed to pay the back rent.

It was also determined that Oscar had trouble paying his rent because he was not receiving his full pension from a former employer due to unnecessary deductions for medical insurance coverage. Since Oscar was a veteran and received all his medical services at the local VA, he did not need that coverage. His lawyer contacted his former employer and Oscar's monthly pension was increased by \$200.

Three months later Oscar received another eviction notice. This time he was being evicted for allegedly being a public health hazard as a result of having too much "stuff" in his apartment, as well as nonpayment of back rent. At the eviction hearing, Oscar was given 30 days to clean his apartment. With the help of seven law students, Oscar's lawyer was able to satisfactorily clean out the apartment to the extent that, for the first time in months, Oscar was able to sleep in his bed instead of sleeping in a chair.

At the subsequent hearing, the Judge deemed that Oscar's apartment was not a public health hazard and agreed with Oscar's lawyer that all late fees and court costs that Oscar allegedly owed should be thrown out reducing the back rent owed from \$513.29 to \$49.63, which the veterans' assistance agency gladly paid. The agency also agreed to work with the lawyer and Oscar to create a budget for him to prevent further eviction hearings.

These examples demonstrate that legal representation for tenants not only prevents eviction, but holistic legal services provided to senior citizens can serve to address other areas as such as:

- Finding emergency financial assistance to prevent an eviction
- Mediating disputes between tenant and landlord
- Providing assistance to secure other income to prevent future eviction actions
- Providing budget or money management support.

While these services are often provided by public interest law organizations, they do not have to be the only source of representation. They can also be provided by pro bono lawyers who agree to limit their services to just the eviction matter or, as some communities have done, through Housing Courts where legal and supportive services are made available on designated days of the week when eviction hearings are being held.

Eviction prevention is just one of many areas where legal services can work to prevent homelessness among senior citizens. Assisting senior citizens in navigating the complex application process for Social Security benefits and veterans' benefits, helping them obtain identification, representing them in guardian/conservatorship matters, and placing them in safe and appropriate housing are also areas where lawyers can play an important role, as this case, which is also from the Homeless Justice Project, demonstrates:



Diane (74 years old)

Diane was the picture of an aging Southern belle. She always dressed as if she was going to a social event. Unfortunately, in addition to suffering the onset of dementia, she was an alcoholic. Her alcoholism caused her to be evicted from her senior living apartment and to end up in a homeless shelter. Although the staff at the homeless shelter did their best to monitor Diane, she would slip away to the local grocery store where she would open bottles of wine and drink them while sitting in the aisle. Police were called, but Diane was never arrested, just returned to the homeless shelter.

Because there were concerns about her safety it was decided that it would be in Diane's best interest to have a guardian and a conservator. These individuals would make decisions on where she should reside and how her funds were to be spent. Three volunteer lawyers became involved: one to represent the petitioner, one to represent Diane, and one to act as guardian ad litem. At a hearing, the Probate Court found that Diane was unable to act in her own best interest and appointed a guardian and conservator for her.

After the hearing, the lawyers continued to collaborate to locate an appropriate setting for Diane outside the homeless shelter. They were able to find placement for her in a residential care facility that specialized in treating seniors with dementia. Again, but for the legal representation provided to Diane, her living situation may have ended in a much different manner.

While living on the street is risky for anyone, the risks significantly increase for older adults. The provision of legal services for senior citizens who are homeless can play an important role in ending their homelessness and providing them with a safe and secure place to live out their lives. Preventing homelessness among senior citizens should be a priority.

About the Author

Jeff Yungman is a social worker, attorney and former police officer who directs the Homeless

Justice Project at One80 Place in Charleston, South Carolina. You can read more about him in the August 2017 *ABA Journal* article, “[From Cop to Counsel: Former police officer now serves the homeless as a social worker and attorney](http://www.abajournal.com/magazine/article/yungman_homeless_justice_project_charleston),” http://www.abajournal.com/magazine/article/yungman_homeless_justice_project_charleston.

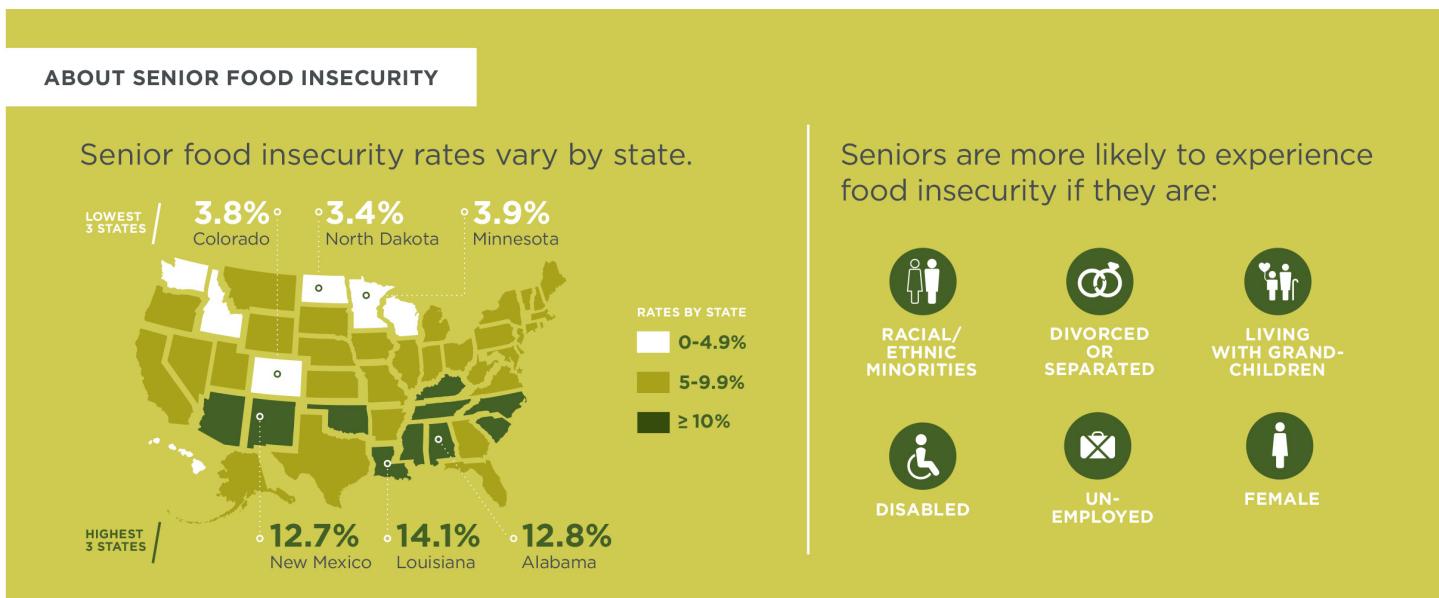
Photographs courtesy of Jeff Yungman.



*Jeff Yungman and co-workers
photo courtesy of Jeff Yungman*

The ABA Commission on Homelessness and Poverty is committed to educating the Bar and the public on the ways in which the legal community and advocates can assist those in need. The Commission is available to provide free technical assistance to lawyers interested in getting involved with representing older adults in these matters. For more information, please visit ambar.org/homeless or contact the Commission Director, Amy Horton-Newell, at Amy.Hortonnewell@americanbar.org.

The Graying of Hunger: Annual Report on Senior Hunger Released



By Liz Milner, Editor

In mid-May of this year, [The National Foundation to End Senior Hunger](#) (NFESh) and [Feeding America](#) released [*The State of Senior Hunger in America 2016: An Annual Report*](#). This statistic-filled report, which has been published since 2012, indicates that food insecurity is increasing among older Americans. Data in the most recent report shows that in 2016, 4.9 million seniors or 7.7 percent of America's population age 60 and older were food insecure. An additional 3.7 million seniors experienced marginal food security. Although food insecurity has declined recently, it remains substantially above the rate reported in 2007 (6.3 percent).

These findings should concern lawyers, policymakers, caregivers and anyone who works with aging issues because food insecure seniors are at much greater risk of suffering from diabetes, depression, congestive heart failure and asthma than their better fed contemporaries.

Recent efforts to limit Supplemental Nutrition (SNAP) benefits for low income seniors in proposed legislation such as the 2018 Farm Bill, which is presently stalled in the House of Representatives, could make this situation much worse. The Farm Bill is scheduled to be rewritten and reintroduced as early as June 22 of this year. In addition,



the nation's healthcare crisis combined with the anticipated steep increase of baby boomer retirees and the decline of the traditional pension will cause further increases in the number of older Americans that suffer food insecurity.

The report is based on original research conducted by Dr.

James P. Ziliak of the University of Kentucky and Dr. Craig G. Gundersen of the University of Illinois. In examining the extent of the threat of hunger nationally among seniors in 2016, the report also provides the rates of senior hunger in each of the 50 states and the District of Columbia.

Among the researchers' findings are:

- Seniors who are racial or ethnic minorities, low-income or age 60-69 were most likely to be affected by some

level of food insecurity.

- “White seniors have food insecurity rates that are substantially less than half the rates for African -American seniors...Hispanics (of any racial category) have food insecurity rates which are generally twice the rates of non-Hispanics.
- Seniors who reported a disability were disproportionately affected, with 24 percent reporting food insecurity.
- Senior food insecurity rates vary by state, ranging from 3.4% in North Dakota to 14.1% in Louisiana. Seniors living in the South are more likely to experience food insecurity than seniors living in other parts of the country.

An [infographic summary](#) of the Report may be viewed at <http://www.feedingamerica.org/research/senior-hunger-research/senior-hunger-infographic.pdf>.

All images in this article courtesy of Feeding America.



Profession-Wide Anti-Stigma Campaign A Fundraising Challenge

Stigma, shame and fear. These obstacles frequently play a major role in an individual's decision not to seek help when suffering from mental health and substance use disorders. Too often, lawyers, judges, and law students find themselves wrestling privately with frustration and despair as an addiction or mental health problem dominates their life and threatens their career.

You can help de-stigmatize mental health and substance use disorders.

The ABA's Commission on Lawyers Assistance Programs (CoLAP) is planning a profession-wide video campaign and seeks to raise \$25,000 by June 30th. Your donation will create high-quality videos that highlight the personal recovery stories of lawyers, judges, and law students who have overcome these issues, serving to raise awareness about the nature of addiction and mental health distress in our profession, and challenging the biases and stigma that surround those problems.

Visit ambar.org/colap to make your gift today.

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Discussion Lists

The Commission provides a forum for legal professionals to communicate and share ideas on 3 active discussion lists:

- **Elderbar**, an open discussion list for professionals in law and aging.
- **Collaborate**, a discussion list on aging, disability, and dispute resolution.
- **COLA-AgingSolo**. Topics related to those who qualify as solo older adults, including solos with capacity and those who lack capacity.

Late Night TV Host John Oliver Raises the Nation’s Awareness of Guardianship Issues

In a sometimes funny, often profane, highly informative 16-minute [television spot](#), John Oliver explained the benefits and dangers of guardianship and the importance of advance planning to a national audience.

Spotlighting the notorious case of a guardian in Nevada who deprived an older couple of their liberty and stole their lifesavings, Oliver presented a trenchant analysis of America’s guardianship system and the pitfalls it holds for the unwary.

The segment concluded with a group of celebrities that included William Shatner, Rita Moreno, Fred Willard, Cloris Leachman, and Lily Tomlin giving advice on how the older adults can avoid losing their goods and their rights to a corrupt guardian. It was the most entertaining public awareness message of all time. Thank you, John Oliver!

National Campaign Launched to Protect LGBT ELDERS



By Liz Milner, Editor

On May 16, a leading advocacy group for LGBT older adults, SAGE, announced a new nationwide advocacy campaign, “*Care Can’t Wait*,” to rally support for LGBT elders whose access to care and services may be threatened by recent initiatives to shield care providers and businesses that claim that their religious beliefs require that they shun LGBT people. The campaign asks care providers, people of faith, and “all who believe in caring for our community members,” to take a [pledge](#) to stand with LGBT elders.

SAGE launched the *Care Can’t Wait* campaign in advance of the Supreme Court’s recent ruling in *Masterpiece Cakeshop v. Colorado Civil Rights Commission* where a baker appealed an adverse decision by the Colorado Civil Rights Commission, arguing that his religious beliefs created a

constitutional right to refuse to sell a wedding cake to a same-sex couple. SAGE’s leaders feared that applying this logic to retirement communities could have a devastating impact on the quality of life for LGBT older adults in long-term care settings since an estimated 85 percent of nonprofit continuing-care retirement communities are affiliated with a religious institution.

Further goads to action were recent national studies that found that roughly half of LGBT elders fear discrimination in healthcare, and, at least 48 percent of same-sex couples have experienced discrimination when applying for senior housing. The recent establishment of the *Conscience and Religious Freedom Division* at the Department of Health and Human Services this year may represent an

attempt to shield medical providers who wish to deny care based on religious or moral beliefs.

This is part of a larger issue. Even mainstream aging services that are committed to treating everyone equally often fail to do proper outreach to the LGBT community or to effectively address acts of discrimination by their staff members or residents. This makes LGBT people reluctant to access mainstream aging services and leads them to become isolated and less resilient.

SAGE’s Chief Operating Officer, Michael Adams, kindly answered questions about the *Care Can’t Wait Campaign* and the *Masterpiece Cakeshop* decision.

“Recognizing that the facts of this case are about a wedding cake, it’s our job as advocates to make sure the Supreme Court understands the potential broader implications.”

Interview with Michael Adams, SAGE CEO

BIFOCAL: What motivated you to create the *Care Can’t Wait* campaign?

MR. ADAMS: SAGE created the *Care Can’t Wait* campaign because religious-based discrimination poses a grave threat to LGBT elders. We want to shine a spotlight on this threat, and to build a movement of concerned individuals who oppose this discrimination and instead commit to support respectful and inclusive care for our elders.

BIFOCAL: How widespread is the discrimination affecting access to care for the LGBT community?

MR. ADAMS: Discrimination against LGBT elders in need of services and care is widespread and needs to be reduced and eliminated, not justified or encouraged based on religion. As just one example, a study by the Equal Rights Center released in 2014 found that 48% of LGBT elders applying for senior housing were subjected to discrimination. A recent *AARP* survey found that roughly half of LGBT older people fear discrimination in health care as they age, while 34 percent of LGBT elders are concerned that they will have to hide their identity in order to access suitable housing. This has huge implications as LGBT elders seek the services and care they need to live their best lives.

BIFOCAL: What do you hope the campaign will accomplish?

MR. ADAMS: We hope *Care Can’t Wait* will accomplish the same things that SAGE’s *We Refuse to Be Invisible* campaign accomplished last year – increase awareness of a dangerous threat of discrimination against LGBT elders, build a critical mass of opposition to this discrimination and support for our elders, and convince the Administration and others who are pushing to authorize religious-based discrimination to reverse course.

BIFOCAL: What can elder lawyers do right now to support the civil rights of LGBT people?

MR. ADAMS: Elder lawyers can support SAGE’s cause by educating themselves on the concerns of LGBT elders so that they can effectively address those concerns for their LGBT clients. To learn more about these concerns, elder lawyers can visit our website at www.sageusa.org or our National Resource Center on [LGBT Aging's legal resources](http://www.lgbtagingcenter.org) section at www.lgbtagingcenter.org.

In the long-term, elder lawyers can work closely with their LGBT clients to make sure they do legal planning appropriate to their needs. Elder lawyers can make sure to refer their LGBT clients to organizations like SAGE for resources, or to legal organizations like Lambda Legal and the National Center for Lesbian Rights if they are facing discrimination. Also, elder lawyers are well-positioned to be persuasive advocates for policy changes that would improve the lives of LGBT elders. For example, research shows that 48% of LGBT elders face discrimination when they apply for senior housing; elder lawyers know how devastating that discrimination can be, and can be powerful voices for the enactment of anti-discrimination protections to prevent it.

BIFOCAL: What is your assessment of the Supreme Court’s ruling in the *Masterpiece Cakeshop* case?

MR. ADAMS: While we are concerned with the Supreme Court’s decision and the dangers posed to LGBT elders, it is clear from the ruling that there is not a license to discriminate, and that civil rights laws still apply to businesses open to the public. Having said that, we already know that LGBT elders already face widespread discrimination in housing, services, and long-term care. So, SAGE will continue to do everything in our power to ensure that LGBT elders, and all Americans, are treated fairly, and encourage all elder law attorneys to do the same. As with so many other issues, the implications of the Court’s decision will likely be contested for years to come.

On the advocacy side, our national SAGECare training and credentialing program will become even more important for both care providers and LGBT elders themselves. The

training will show providers why their mission is better served by culturally competent care than discrimination. The credentialing will help LGBT elders know which care providers to use and which to avoid. And, in a worst-case scenario, if we see a rise in discrimination by faith-based service providers as a result of a pro-discrimination Supreme Court decision, the culturally competent and respectful services provided by organizations like SAGE will become that much more important for LGBT elders.

BIFOCAL: Why was a wedding cake chosen to test this issue? Why not something more high stakes such as refusal to provide care?

MR. ADAMS: Issues that end up at the Supreme Court often aren't the result of well-honed strategies that pick the best possible test case. When it comes to discrimination, what rises up first depends on where the bias starts to manifest and who feels most passionately about refusing to be a victim of discrimination. In this case, as marriage equality became the law of the land we started seeing a backlash against same-sex couples and a decision by some to refuse to serve them. It's not surprising that a couple who is refused service by a business that is serving everybody else would decide not to accept that and to challenge that in the courts. No American should have to face that kind of discrimination. Recognizing that the facts of this case are about a wedding cake, it's our job as advocates to make sure the Supreme Court understands the potential broader implications. That's why SAGE joined the American Society on Aging in filing an amicus brief in *Masterpiece Cakeshop* that educates the Court to the potential threat to vulnerable LGBT elders who need care, given that 85% of long-term care providers in this country are religiously affiliated.

BIFOCAL: What mistakes do lawyers make when dealing with LGBT clients?

MR. ADAMS: The biggest mistake lawyers make when dealing with LGBT clients is to assume that they are not LGBT, or to assume that the fact that they are LGBT is irrelevant to their legal needs and therefore to fail to ascertain how their LGBT clients' lives may be different and require different legal support. Fortunately, we are making significant progress on this front as more and more lawyers avail themselves of the resources at their disposal to learn how to work with LGBT clients in an effective and respectful manner.

BIFOCAL: For senior care professionals, are there certain common questions that well-meaning care providers ask that backfire? Are there routine questions that need to be avoided

or rephrased?

MR. ADAMS: For elder care professionals, the fundamental need is to provide person-centered care to every individual. The only way to provide person-centered care for LGBT people is to recognize and respect that they are LGBT – that their lives can be different in a variety of ways, and that care and services must be adapted to address those differences in a respectful way. The most important things that need to be avoided aren't so much questions, but behaviors rooted in bias and presumptions that all persons in care are or should be heterosexual. What we know from experience is that for many marginalized communities, preferred terms and language changes over time as cultural understandings advance — it's one of many reasons why it's important for providers to make cultural competency training available to their staff on an ongoing basis. The only questions that need to be avoided are questions that reflect bias, questions that reflect a failure to get educated about respectful dialogue, and questions that are irrelevant to an individual's care and needs.

In SAGE's experience, providers sometimes use misplaced concerns about individual privacy or discomfort as a way of avoiding questions that in fact should be asked. For example, all providers should ask care recipients about their sexual orientation and gender identity, in the same way they ask about other demographics and matters that may be relevant to their care. There are great resources available to train providers in how to ask those questions in a respectful and effective manner. In fact, SAGE's [National Resource Center on LGBT Aging](#) has a great guide called *Inclusive Questions for Older Adults: A Practical Guide to Collecting Data on Sexual Orientation and Gender Identity*. This guide helps service providers ask questions about sexual orientation and gender identity in safe and respectful ways by relying on research, real-world knowledge, and experience.

BIFOCAL: Is there a difference in the way Elder Lawyers should deal with issues such as:

- a. End of life decision making
- b. Estate Planning

MR. ADAMS: This depends on the circumstances and desires of the individual LGBT client. Often those circumstances and desires are shaped by distinct social realities. For example, relative to older Americans in general, LGBT elders are twice as likely to be single and four times less likely to be parents. They are more likely

to be disconnected from their families of origin and more likely to rely on caregivers who are not family members in the traditional sense. Because these realities apply to the lives of many (but not all) LGBT elder clients, they have obvious implications for estate planning and end of life decision-making. These factors can potentially impact a client's thinking about end of life issues – who is available as an alternate decision-maker, who needs to be considered in estate planning, etc. The key is for the elder lawyer to fully understand their LGBT clients' lives and needs by learning more about the issues that LGBT elders face.

BIFOCAL: *How can lawyers, policy makers and care providers educate themselves so that they can better serve their LGBT clients?*

MR. ADAMS: I strongly encourage people to read up on issues concerning LGBT elders. As mentioned above, SAGE's [National Resource Center on LGBT Aging](#) is a resource library of all things LGBT aging related, and can be

found at [www.lgbtagingcenter.org](#). Besides visiting SAGE on the web, sister organizations like Lambda Legal and National Center for Lesbian Rights have pages on legal issues and LGBT aging. AARP also recently released a great study on [LGBT aging in America](#). There is a lot of information out there that needs to be digested. Fortunately, more and more care and service providers are recognizing that they have a responsibility to provide respectful care to all elders, including those who are LGBT, and are taking advantage of our SAGECare training and other resources offered by organizations like SAGE that help providers lean into that responsibility.

More information is available at SAGE's web site, [www.sageusa.org](#).



The National Aging and Law Conference can't happen without a lot of help from our friends, so we're very happy to announce that the Borchard Foundation Center on Law and Aging has once again agreed to be our platinum sponsor.

The Borchard Foundation Center on Law and Aging works to improve the quality of life for older people through education, research, and service. Borchard reaches out to those who are poor or otherwise isolated by lack of education, language, culture, disability, or other barriers. We're very proud that they have chosen to sponsor us and we're also thrilled that Borchard will also sponsor the Conference's evening reception on Thursday, October 26.

The NALC is a marketplace for new ideas. We'll be welcoming two exhibitors who'll present innovative ways of dealing with the dilemmas of aging in America.

The [Harry and Jeanette Weinberg Center for Elder Abuse Prevention](#) is pioneering innovative ways to provide safe shelter for elder abuse victims. Its mission is to champion justice and dignity for older adults. Established in 2005, the Weinberg Center is the nation's first elder abuse shelter serving eligible individuals 60 years and older. It provides emergency short-term housing, health-care services, legal advocacy, and support services to victims of elder abuse.

[Estate and Long Term Care Planning, Inc.](#) provides continuing education on estate and long-term care issues for the public and professionals in Pennsylvania and coaching for attorneys throughout the nation.

To learn more about the NALC and its wide-ranging program of presentations and activities, visit the NALC [website](#).

Current Developments in Medicare and Nursing Home Law and Practice: A Summary of a Slide Show/ Discussion by Toby Edelman



Editor's Note: At the April meeting of the Commission on Law and Aging, Toby Edelman, a Senior Policy Attorney at the Center for Medicare Advocacy, presented a slide show/discussion of recent developments in Medicare and Nursing Home Law and Practice. Ms. Edelman ably and succinctly discussed three important developments which I have attempted to summarize:

- Observation status
- *Jimmo/ "The Maintenance Standard"*
- The Bipartisan Budget Act of 2018
 - Repeal of therapy caps
 - Earlier closing of the donut hole (Medicare Part D, prescription drugs)

Observation Status

Ms. Edelman first discussed the problems patients and their families have regarding observation status in the hospital.

“Observation Status” is a Medicare billing issue that is an increasing problem for hospitalized patients. As far as care is concerned, observation status is identical to inpatient care (although observation is considered outpatient care, coverable by Medicare Part B). A patient in observation status usually occupies a hospital bed alongside inpatients and is given whatever treatment is necessary. Patients often don’t even know that they are in observation status rather than inpatient status, although since March 2017, hospitals have

been required both to give patients in observation status a federal notice called the Medicare Outpatient Observation Notice (MOON) and to explain the notice orally. Patients have no right to appeal the hospital’s decision to put them in observation rather than inpatient status. The primary impact of observation status is financial. Patients most affected by observation status are those who need follow-up care at a skilled nursing facility (SNF). Many Medicare beneficiaries have Medigap policies that cover deductibles for inpatient hospital care and copayments for Part B services. However, Medicare covers a SNF stay under Part A only if the patient was a hospital inpatient for at least three consecutive nights. Patients under observation are responsible for paying their entire SNF bill out-of-pocket.

The incentive for hospitals to behave in this manner arose primarily from hospitals’ need to avoid being penalized by Recovery Audit Contractors (RACs) for admitting people who, in the RAC’s view, should have been classified as outpatients. By limiting inpatient admissions and putting more patients into observation status, hospitals avoided the RACs’ sanction – loss of all Medicare reimbursement for the medically necessary care they provided to patients whom they “improperly” classified as inpatients. Initial reviews of hospitals’ inpatient/outpatient decisions are now made by Quality Improvement Organizations, but hospitals remain wary and observation status continues.

The refusal to give the patient the right to appeal their



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observation status will soon be tested in a federal court. For more information, visit:

- <http://www.justiceinaging.org/court-certifies-nationwide-class-observation-status-case/>
- <http://www.medicareadvocacy.org/?s=OBSERVATION&op.x=0&op.y=0>

Jimmo / The Maintenance Standard

A related Medicare problem is the “Myth of Improvement,” a mistaken belief held by many caregivers that Medicare covers care only if the beneficiary is expected to improve. The legal decision in *Jimmo vs Sebelius*, a nationwide class action, affirmed that Medicare benefits cannot be dependent on the beneficiary’s potential improvement. This maintenance standard of care, which also applies to Medicare Advantage Plans, covers care in Skilled Nursing Facilities, home health, and outpatient therapy. However, many health care professionals, providers, Medicare reviewers, and contractors continue to act in accordance with the Myth of Improvement. The Centers for Medicare

& Medicaid Services (CMS) created a webpage, <https://www.cms.gov/Center/Special-Topic/Jimmo-Center.html>, dedicated to explaining the *Jimmo* Settlement and the maintenance standard of care and informing the beneficiaries of their rights under *Jimmo*.

More information about Jimmo vs Sebelius is at:

- <http://www.medicareadvocacy.org/wp-content/uploads/2018/01/Medicare%20SNF%20Coverage%20and%20Jimmo%20v.%20Sebelius%20Toolkit.pdf>
- *Jimmo*, <http://www.medicareadvocacy.org/?s=JIMMO&op.x=0&op.y=0>
- Improvement, <http://www.medicareadvocacy.org/?s=improvement&op.x=0&op.y=0>

The Bipartisan Budget Act of 2018

Two positive Medicare developments were also noted: the repeal of therapy caps and the closing of the “donut hole” for prescription drug coverage in 2019.

The Commission Welcomes our 2018 Summer Interns

Summer has come, and the Commission is celebrating the arrival of two new interns.



Kentucky native **Gabriel Etridge** is a student at George Washington University’s School of Law. Gabriel’s wide-ranging experience includes mentoring high-risk and developmentally disabled students for

AmeriCorps, livestock farming, and serving as a medical records coordinator. Though he has only been working with us for a short time, he is making his mark (see his article on page 87 of this publication). When he is not engaged in original research for the Commission, he likes to read up on the Civil War and to run.

Kelly Crowe hails from York County, Pennsylvania. She’s a student at George Mason University’s Antonin Scalia Law School in Arlington, Virginia. Kelly graduated cum laude with a BA in English from Millersville University in Millersville, Pennsylvania in 2010. Her work experience includes writing analyses of case law as a student intern at the Institute for International Banking Law and Practice, Montgomery Village, Maryland, and coordinating meetings

and seminars for an estate planning law firm. Like Gabriel, Kelly is a former AmeriCorps volunteer who worked on a wide range of projects that included:

- Training AmeriCorps volunteers in the basics of media outreach
- Rebuilding homes in disaster areas
- Weatherizing homes for low-income clients
- Organizing meetings and events
- Developing training materials and curricula
- Researching grant opportunities.



Kelly received a Congressional Achievement award for completing 4000 hours of community service in a 2-year period.

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Are you proud of the work you are doing with older adults and the innovative solutions you engage? Do you have best practices you'd like to share? The American Society on Aging (ASA) invites you to submit a proposal to present at the [2019 Aging in America Conference](#).

The 2019 conference will have a strong focus on critical and emergent topics facing the field of aging, as well as

innovative programmatic, research, policy and advocacy efforts. Potential interest areas include: emergency/disaster readiness, housing and transportation access, caregiving, substance use/opioid crisis, multiple aspects of dementia, technology and aging, intergenerational models, population health, and shifting policy and legislative issues affecting older adults.

Proposals on the theme of aging that offer innovative policies, programs, practices, models, businesses and learning are also welcomed.

Join your peers who are making a difference and submit your proposal before June 30.
<http://www.asaging.org/aia>

Update of State Emeritus Pro Bono Practice Rules for 2018

by Gabriel H. Eridge
Intern and J.D. Candidate

Emeritus pro bono practice rules encourage retired and inactive attorneys to volunteer to provide pro bono assistance to clients unable to pay for essential legal representation. The chart on the Commission on Law & Aging's website contains essential details of the current rules.

The [Senior Emeritus Pro Bono practice rules chart](#) documents each jurisdiction's rules regarding eligibility for waiver of CLE requirements and dues payments for attorneys who wish to practice pro bono work without the burdens of active membership, often referred to as an "emeritus attorney."

Forty-three jurisdictions have adopted emeritus pro bono rules waiving some of the normal licensing requirements for attorneys agreeing to limit their practice. Research focused on the following: whether states have a rule for emeritus pro bono attorneys, whether emeritus pro bono attorneys pay dues for membership or participate in MCLE, whether out-of-state attorneys or in-state attorneys qualify, the minimum age and years of service for this status, what sorts of organizations emeritus pro bono attorneys are allowed to work with, and whether the rules mention malpractice insurance requirements for emeritus attorneys.

Kentucky: A New Rule

With amendments to SCR 3.030 and 3.665, Kentucky has codified bar status for emeritus pro bono attorneys. Attorneys who are 70 years or older and no longer "actively practicing law" may register as Senior Retired Active Members. These attorneys are exempt from MCLE requirements and bar dues, and "may donate legal services through a duly organized legal aid program offering pro bono representation, or a local bar association legal pro bono program or initiative." Unlike other state bars, Kentucky does not enumerate specific qualifying programs.

Maine: Mistakes in Drafting Language to be Ironed Out

Under Maine Bar rules, attorneys who have assumed emeritus status either have reduced or waived MCLE requirements. Which one? It's unclear. Rule 5(a)(1) specifies that emeritus attorneys are "... required to complete only seven credit hours of approved CLE in each calendar year, unless exempted from the requirements of CLE as provided by Rule 5(a)(5)." As it happens, one of 5(a)(5)'s enumerated parties exempted from CLE requirements is emeritus attorneys.

Jacqueline Rogers, the director of the Maine Board of Overseers of the Bar, indicated that the drafting of 5(a)(1) was in error, and that soon an amendment to Rule 5(a)(1) will be released that will waive all CLE requirements for emeritus attorneys.

Links Break, But Rules Stay the Same

Updating references for state statutes is straightforward but helpful, as states reorganize their directories all the time. While state bar and court websites frequently change, and accessibility isn't always guaranteed, the actual rule and the location of the rule within state statutes usually remains consistent; even as hyperlinks change throughout the year, so the chart should remain relevant as a quick reference for practitioners.

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