

NAELA PUBLIC POLICY GUIDELINES

I. ELDER JUSTICE

Elder justice means assuring adequate public-private infrastructure and resources to prevent, detect, treat, understand, intervene in and, where appropriate, prosecute elder abuse, neglect and exploitation. From an individual perspective, elder justice is the right of every older person to be free of abuse, neglect and exploitation. Although the number of older Americans is fast growing, the problem of elder abuse, neglect and exploitation has long been invisible to most of society and is among the gravest issues facing millions of American families.

- A. Naela supports Federal law has been enacted that adequately and comprehensively addresses the issues of elder abuse, neglect, and exploitation.
- B. Naela supports efforts to:
 - 1. To provide federal resources to support state and community efforts on the front lines.
 - 2. To bring national attention to the issue.
 - 3. To improve the quality, quantity and accessibility of elder justice information.
 - 4. To support demonstration projects, research, clinical practice, training and dissemination of information.
 - 5. To address the need for victim assistance.
 - 6. To focus on increased prosecution of civil and criminal cases.
 - 7. To provide incentives for greater collaboration and the national level.
- C. NAELA supports further education for the public and for professionals to report and investigate incidents of elder abuse.
- D. NAELA supports the ongoing development of civil and criminal penalties for elder abuse, and calls for increased coordination of criminal law enforcement authorities and civil law attorneys in the prosecution of elder abuse and collection of damages for the victims of elder abuse.
- E. NAELA encourages the use of Durable Powers of Attorney as an important tool for the elderly to manage their property and finances, and as an effective means to avoid the restrictions of guardianship. NAELA recognizes that Durable Powers of Attorney depend upon fiduciaries performing their duties in the best interests of their elderly principals. Therefore, NAELA supports appropriate efforts to prevent and combat improper uses of Durable Powers of Attorney as tools to financially exploit the elderly.

II. HEALTH CARE ACCESS PRINCIPLES

The United States is one of the wealthiest nations in the world and has one of the most technologically advanced health care systems. However, millions of Americans lack health insurance and each year this leads to thousands of unnecessary deaths, illnesses, and lost wages and productivity. NAELA has long supported comprehensive reforms to our health care system to ensure long-term care coverage and services for all Americans. We also support reforms to ensure that Americans of all ages receive the health care services they need.

To that end, NAELA supports the following principles as developed by the Institute of Medicine of the National Academies:

- A. Health care coverage should be universal.
- B. Health Care coverage should be continuous.
- C. Health Care coverage should be affordable to individuals and families.
- D. The health insurance strategy should be affordable and sustainable for society.
- E. Health insurance should enhance health and well-being by promoting access to high-quality care that is effective, efficient, safe, timely, patient-centered, and equitable.

III. HEALTH CARE DECISION-MAKING

The following proposed guiding principles shall be in addition to, and shall complement, the Health Care Decision Resolutions adopted by NAELA on November 17, 1991, a copy of which immediate follows hereto.

- A. NAELA advocates that health care proxies designed to appoint an agent to make health care decisions in the event of incapacity of the principal be readily available and simple to complete for the average layperson.
- B. NAELA supports efforts to enact state and federal statutes and medical board policies that remove the threat of adverse government action for competent pain management.
- C. NAELA supports the education of NAELA members regarding health care decision-making issues.
- D. NAELA encourages the education of the public regarding health care decision-making issues, and the creation of partnerships with allied organizations in order to accomplish this goal.
- E. NAELA supports the right of competent individuals to make their own health care decisions. Health care professionals must observe such right by honoring advance directives with incentives provided for such observance.

- F. NAELA encourages the use of truly effective ethics committees by all health care facilities including hospitals and nursing homes. NAELA encourages partnering to develop model materials that would be made available to hospital and nursing home ethics committees. In this regard, NAELA may network with other organizations.
- G. NAELA supports the enactment of guidelines on when and how to forego life-sustaining medical treatment, and the evidentiary standards required as set forth in the "Guidelines For State Court Decision Making In Life-Sustaining Medical Treatment Cases" by The Coordinating Council On Life-Sustaining Medical Treatment Decision Making By the Courts, a project of the National Center for State Courts. NAELA supports the enactment of legislation that removes burdensome evidentiary requirements to prove that a patient had decided to forego life-sustaining treatment.
- H. The states should enact legislation which mandates that an advance directive be accepted in that state if it is valid in the state in which it was executed.
- I. States should enact legislation which provides that physicians will be free from liability for inadvertently hastening death when giving pain relief medication in sufficient quantity to be effective for individual terminally ill patients.
- J. NAELA strongly encourages each individual to execute a durable power of attorney for health care reflecting his/her wishes.
- K. Persistent Vegetative State Conditions (PVS) shall be considered a terminal condition for the purpose of health care decision-making.
- L. Congress and the states should take action to protect the pensions of persons whose pension plans have purchased insurance annuities which lack the federal guarantees provided by the Pension Benefit Guaranty Corporation.
- M. Any comprehensive health care reform must address the long term care needs of older Americans and persons with disabilities.

IV. LEGAL SERVICES

NAELA recognizes that millions of elderly and disabled individuals cannot afford private legal services. One of NAELA's missions is advocating for quality legal services for the elderly and disabled including those who are unable to pay for such services.

- A. NAELA supports the full funding of the Legal Services Corporation and other state and federal efforts, including, but not limited to, retaining civil legal services as a priority for services funded under Title IIIB of the Older Americans Act, to provide quality legal services to the low income elderly and disabled.
- B. NAELA supports the funding of national and state centers to coordinate and support

the work of local legal services programs.

- C. NAELA opposes: prohibitions on class actions, legislative advocacy and other restrictions which diminish the remedies available to elders and disabled persons who are served by the Legal Services Corporation;
- D. NAELA encourages the participation of its members in providing pro bono and reduced fee services.

V. LONG-TERM CARE

Based on the collective experience of NAELA's members with millions of older and disabled clients, NAELA supports federal and state legislation to create a national long-term care system that provides coordinated and comprehensive services, including home and community-based health, social, and support services, and institutional services, to people with serious physical and cognitive impairments for individuals of all ages. Any system of long-term care should be founded on the principle of individual/consumer choice and individualized care and be consistent with the following characteristics.

- A. NAELA supports effective integration of long-term care policies into our nation's overall health care policy and recommends that the Medicare program be expanded to become the primary provider of long-term care based on level of impairment.
- B. NAELA supports services that are fully accessible to all who need them, regardless of age, illness, or impairment, and are inclusive of persons of all financial means, without causing impoverishment or undue financial hardship to consumers, their spouses and dependents.
- C. NAELA advocates for long-term care services that are as affordable as possible without sacrificing quality of care.
- D. NAELA supports the roles of both the public and private sectors in providing for long-term care and in reducing a person's risk of impoverishment when paying for long-term care.
- E. NAELA supports public education about the possible need for long-term care and the availability of financing options.
- F. NAELA advocates that third-party payers not distort the incentives for a person to choose between home and community-based services and institutional services. An individual's long-term care must reflect his\her actual needs, irrespective of the financial concerns and impediments of third-party payors.
- G. NAELA advocates that the system must support consumer choice and participation with respect to all decisions regarding the nature, timing, and setting for delivery of care.

- H. NAELA supports services that are fully accessible to all who need them, regardless of age, illness, or impairment, and are inclusive of persons of all financial means, and are without undue financial hardship to consumers, their spouses and dependents.
- I. NAELA encourages the system to maximize the independence and dignity of persons in need of care.
- J. NAELA advocates that each person receive the necessary care and services to attain or maintain the highest practicable physical, mental and psychosocial well-being, in accordance with a comprehensive plan of care or self-directed care plan.
- K. NAELA advocates that the system provide consistently high quality under strong national and state standards that are effectively enforced.
- L. NAELA advocates that each person or his\her health care proxy, if applicable, receive meaningful notice of all major decisions affecting his or her care in language that is easily understood, full access to information, and assistance with appeal to an impartial decision maker in a timely manner. NAELA supports impartial decision-making accomplished by a system of both internal and external review.
- M. NAELA supports a system that effectively meets the needs of persons with dementia or other mental disability, including the need for supervision, stand-by help, or cueing.
- N. NAELA urges that, until comprehensive long-term care financing is in place, Medicaid should be retained as a federal-state program, with a guarantee of coverage to all individuals under state plans, income eligibility rules that recognize out-of-pocket medical expenses including long-term care, protections against impoverishment of spouses of nursing home residents, and adequate funding to accommodate the anticipated growth in the need for assistance.

VI. MANAGED CARE

Resolutions Adopted by the NAELA Board of Directors May 6, 1998, Revised November 19, 1998

The rapid growth of managed care is a major concern for the elderly, particularly the need for chronic and long term care services. Their participation in managed care is complicated by the involvement of Medicare, Medicare supplement insurance, and Medicaid. NAELA and its membership should take a leadership role, through federal, state and local public policy advocacy, to ensure that managed care organizations provide strong consumer protection and that the elderly have representation to enforce their rights.

- A. NAELA supports ready access to managed care without discrimination in coverage, enrollment, disenrollment or costs. Individuals should be able to disenroll promptly, with strict limits on involuntary disenrollment.

- B. NAELA advocates that services be provided to ensure that each enrollee achieves and maintains the highest practicable health and functional status and should include a full range of preventative, curative, restorative and palliative care.
- C. NAELA advocates that enrollees be: offered a choice of direct care providers; allowed to change providers; afforded ready access to specialty care, where appropriate; and assured of continuity of care from their chosen providers, particularly with regard to long term care.
- D. NAELA advocates that health care providers be free from constraints, sanctions or incentives that might limit communication with their patients or the provision of appropriate health care services. NAELA encourages managed care organizations to provide patients with complete unbiased information about their medical condition, potential courses of treatment, therapies, referrals, consultations, and tests.
- E. NAELA supports mandated federal and state standards, monitoring and oversight relating to marketing practices, access and quality of care, staffing, and fiscal solvency for all managed care organizations. NAELA supports government enforcement of these requirements and provision for private enforcement actions.
- F. NAELA advocates that prospective and existing enrollees be provided with written notice of costs; covered and non-covered care and services; a listing of all participating health care providers; limitations on the scope, duration or frequency of services; procedures for requesting approval for services and for obtaining payment for non-managed care organizations which provide emergency care; grievance, appeal and disenrollment rights and procedures; and sources of government oversight and organizations providing consumer assistance or legal representation. NAELA suggests that this information be updated at least annually, and be in language that is easily understood by the lay person.
- G. NAELA advocates for enrollees and their health care proxy, if applicable, and their doctors to receive prompt oral and written notice of any decision to deny, limit, reduce or terminate services or to change the provider of services, accompanied with notice of appeal rights and procedures. NAELA believes that services should not be reduced or terminated pending the final outcome of an appeal and that enrollees who obtain denied services should be reimbursed following a successful appeal.
- H. NAELA supports the existence of a prompt, independent appeal system available to enrollees and to health care providers on behalf of enrollees, to challenge managed care organizations that deny, reduce, or terminate services or that fail to provide care in a timely fashion.
- I. NAELA encourages the establishment of an independent and adequately funded advocacy program to assist beneficiaries/enrollees with coverage, appeal, and grievance matters.
- J. NAELA supports the right of an individual to sue, in state or federal court, his or her

health plan for damages, including attorneys' fees, for the failure of the plan to provide necessary items, services, and procedures. To this end, NAELA supports amending the Employee Retirement Income Security Act (ERISA) as necessary.

- K. Naela supports a national standardized core set of managed care quality measures to be used by all managed care plans and publicly reported.

VII. MEDICAID

The following proposed public policy guidelines supplement the NAELA public policy guidelines on "Financing Long-Term Care" and "System for Delivering Long-Term Care" and the NAELA white paper: *Reforming the Delivery, Accessibility and Financing of Long-Term Care in the United States*.

A. General

Based on the experiences of NAELA's members with millions of older and disabled clients, NAELA supports a national long-term care system that provides comprehensive services, including home and community-based and institutional services, to people with serious physical and cognitive impairments. NAELA believes that the federal government has a fundamental role in guaranteeing access, setting quality standards, and financing this system. NAELA recommends that the Medicare program be expanded to become the primary provider of long-term care based on level of impairment.

NAELA believes that until a comprehensive system for long-term care financing and services for all Americans is in place, Medicaid should continue its role in that regard as a federal-state program, with a guarantee of coverage of specific benefits to all individuals eligible under state plans, income eligibility rules that take into account out-of-pocket medical expenses including long-term care, protections against impoverishment of spouses and dependent and disabled children of nursing home residents, and funding to accommodate growth in the need for assistance.

1. NAELA supports:
 - a. A guarantee of health care to the most vulnerable populations: low income older people, people with disabilities and families with children;
 - b. The roles of both the public and private sectors in providing for long-term care and in reducing a person's risk of impoverishment when paying for long-term care; and
2. NAELA believes that the following would help to improve the current system:
 - a. Congress should authorize and encourage states to use the Public-Private Partnership models to assist individuals in meeting the cost of long-term care; and
 - b. The Centers for Medicare and Medicaid Services (CMS) should encourage research and demonstration waivers to expand opportunities for access to long-term care insurance, such as through guaranteed access (e.g., the "Medigap" model) and tax relief.

B. Medicaid Restructuring

1. NAELA supports increased federal contributions to Medicaid in order to assist states.
2. NAELA recognizes the financial burden that states face, but opposes any structural or financial changes in the Medicaid program that would weaken the current obligation that the federal and state governments have to provide a comprehensive set of benefits to all individuals who meet eligibility criteria.
3. NAELA believes that any restructuring of Medicaid must:
 - a. Maintain the government's guarantee that all people who qualify for Medicaid will be covered;
 - b. Ensure that the Nursing Home Reform provisions are retained in Medicaid law, not weakened, and that they are enforced;
 - c. Maintain and improve current federal and state due process protections;
 - d. Ensure that financing policies and payment strategies do not compromise access and quality;
 - e. Include efforts to provide Medicaid coverage to the working poor; and
 - f. Ensure that consumers have a voice in the restructuring process.
4. NAELA opposes any restructuring that would:
 - a. "Block grant" or otherwise cap the amount that states receive from the federal government for Medicaid including both "super-waivers" or waiver agreements between states and the federal government;
 - b. Allow states to reduce the populations they serve under the Medicaid program or drop current program beneficiary protections, including the requirement that the same benefits be offered throughout the state;
 - c. Charge beneficiaries more than minimal co-payments;
 - d. Reduce the requirement that all nursing homes receiving Medicaid funding adhere to federal standards, including residents' rights; or
 - e. Lift the prohibition against placing liens on Medicaid beneficiaries' property except in certain situations, lift the prohibition against placing liens on the property of family members, lift the prohibition against recovering from estates of Medicaid beneficiaries except in explicit circumstances, or lift the prohibition against recovering from the estates of family members.

C. Benefits and Coverage

1. NAELA believes that Medicaid's benefit package should provide access to the most current and effective medical treatments and technologies, a comprehensive range of facility-based and community-based health, social, and support services, and should include health promotion and preventive care for all beneficiaries, including those with chronic illness.
2. NAELA strongly supports the current standard for nursing facility services paid for by Medicaid that each resident receives the long-term care and services to attain or maintain the highest practicable physical, mental and psychosocial well-being, in accordance with a comprehensive plan of care or self-directed care plan. This standard should apply to all long-term care services, regardless of where they are provided.
3. NAELA supports a Medicaid system in which:
 - a. Services must be required to be provided in sufficient scope and

- quantity to achieve their purpose;
- b. The needs of persons with dementia or other mental disabilities are met effectively; and
- c. Expansion of models like the Programs of All-Inclusive Care for the Elderly (PACE) for people age 55 and older is a priority.

D. Eligibility

1. NAELA supports a single, uniform minimum federal standard of eligibility and administration for Medicaid. Uniform laws and regulations are necessary for approval of Medicaid applications, denial of coverage, and the appeals process.
2. NAELA believes that:
 - a. All states should be required to provide full Medicaid coverage for all people living at or below 100 percent of the federal poverty level and to have a “medically needy” program that provides full Medicaid benefits to people of all ages with high medical bills; and
 - b. States should be encouraged to liberalize their income and Medicaid asset rules for eligibility beyond the minimum required by federal law.

E. Affordability

Until such time as the federal government takes full responsibility for all the health care of low-income Medicare beneficiaries, NAELA supports current policy that requires Medicaid to pay premiums and cost-sharing for Medicare beneficiaries with incomes at or below 100% of federal poverty levels. NAELA also supports a change in the law to provide Medicare Part B premium protection to all Medicare beneficiaries with incomes up to 200% of poverty.

1. NAELA believes that:
 - a. Medicaid services must continue to be provided with only nominal cost-sharing and should not place financial hardship on beneficiaries, their spouses and dependents;
 - b. The Federal and state governments should ensure that all people covered by Medicaid have access to health care providers; and
 - c. The Federal and state governments should continue to refine their understanding of who does and does not participate in the Qualified Medicare Beneficiary (QMB) and Specified Low-Income Medicare Beneficiary (SLMB) programs for the purpose of targeting outreach to those eligible but not participating.

F. Consumer Protections and Quality

1. NAELA supports impartial decision-making accomplished by a system of both internal and external review and that each person or his\her health care proxy, if applicable, must receive meaningful notice of all major decisions affecting his or her care in language that is easily understood, full access to information, and assistance with appeal to an impartial decision maker in a timely manner.
2. NAELA believes that:
 - a. Medicaid quality assurance standards must, at a minimum, include

internal and external quality review, grievance and appeals procedures, monitoring and oversight by the state and sanctions for violations of quality standards;

- b. Medicaid beneficiaries must have the right and opportunity to enforce their guarantee of coverage in federal and state courts;
- c. Medicaid must work to find new ways to prevent underuse, overuse, and misuse of health care services;
- d. Medicaid providers must consistently offer high quality care under strong national and state standards that are effectively enforced; and
- e. Medicaid must support consumer choice and participation with respect to all decisions regarding the nature, timing, and setting for delivery of care.

G. Waivers

1. NAELA believes that Section 1115 Medicaid Waivers should be evaluated and approved based on their prospects for expanding services or populations served, improving quality of service or delivering service more effectively and efficiently.
2. NAELA opposes block grants or otherwise capping the amount that states receive from the federal government for Medicaid including both “super-waivers” or waiver agreements between states and the federal government.
3. NAELA believes that all Section 1115 Medicaid Waivers should meet the following criteria:
 - a. Services that would be covered under Medicaid must continue (at a minimum) in the same amount, duration, and scope for all eligible people;
 - b. Beneficiaries eligible for both Medicare and Medicaid must retain full rights under both programs, including consumer protections and grievance procedures;
 - c. Applications should include a beneficiary impact statement and a plan for ongoing monitoring of the impact on each category of beneficiary, including access and quality; and
 - d. States must not be permitted to make federal income and asset rules or spousal impoverishment rules more restrictive under waivers.
 - i. Consumers/the public must be involved in the waiver process at the state and federal levels, and public input must be a part of the state’s application, specifically:
 - ii. States should create a waiver implementation commission or process for ensuring public input throughout the process – review and comment on initial waiver request, review and approve final waiver request, etc.; and
 - iii. The Centers for Medicare and Medicaid Services (CMS) should establish a waiver review panel of consumers, providers, and federal and nongovernmental technical experts to receive testimony and comments and to make recommendations regarding waiver applications to CMS.

- H. Education
 - 1. NAELA supports public education about the possible need for long-term care and the availability of financing options, including long-term care insurance.
 - 2. NAELA believes that states should:
 - a. Conduct outreach activities and promote Medicaid and the State Children’s Health Insurance Program (SCHIP) in order to improve participation; and
 - b. Establish legal assistance programs to help Medicaid beneficiaries who have trouble obtaining services or paying their medical bills or face incorrectly processed claims.

- I. Administration
 - 1. NAELA believes that the Medicaid program must be:
 - a. Administered fairly, adequately, and efficiently, and that appropriate funds must be provided for program administration; and
 - b. Reduce waste, fraud, and abuse to ensure value for the program and for the beneficiaries.

VIII. MEDICARE PROGRAM

The Medicare program is an important source of health care coverage for older and disabled citizens. It must be comprehensive in its scope of coverage and services, affordable for individuals and for the public fiscal arena, flexible in the array of covered options and designed to maximize the good health and quality of life of all its beneficiaries.

- A. NAELA advocates for the Medicare program to continue to offer coverage for a set of comprehensive services that includes, at a minimum, preventive, acute care, rehabilitation, skilled nursing facility, home health care and hospice services. NAELA supports the addition of long-term and chronic care services to the comprehensive service package.

- B. NAELA encourages supporting staffing and funding of the administrative component of the Medicare program to be adequate, diverse, and responsive to program and beneficiary needs, including monitoring and enforcement of program standards and quality of care.

- C. NAELA advocates that the Medicare program continue to offer well-defined options for delivery of covered service options, with easy transition between options, including the flexibility to add new services and options as technology expands and needs arise.

- D. NAELA advocates that proposals for privatization in all its forms be studied in light of avoiding fragmentation and assuring the broad public policy objectives of social insurance as recognized in our current Social Security System.

- E NAELA encourages that financing for the Medicare program be reasonable and adequate and reflective of the cost of providing coverage for a comprehensive scope of services, including the impact of any beneficiary cost-sharing.
- F. NAELA advocates that Medicare beneficiaries and their legal representatives to be provided notice and an opportunity to appeal the denial, reduction, or termination of services and benefits in any health care delivery setting, including prescription drug benefits, pre-termination review, and expedited review of requests for urgently needed services.
- G. NAELA advocates that the Medicare program provide guidance to its program contractors, service providers, and program administrators about establishing a process for beneficiary complaints about such matters as location of services, provider-beneficiary relations, and courtesy of service. NAELA suggests that procedures include the resolution of complaints about quality of care.
- H. NAELA supports the availability of benefit counselors and standardized, clear, and accurate descriptions of the Medicare program, reasonable and fair information about how to make choices among options, including comparative marketing and performance information.
- I. NAELA supports the establishment of a program of advocacy assistance for assuring patients' rights and services, comprised of at least two components: (a) government funded advocates (including lawyers) for low income persons and (b) unrestricted access to private attorneys for those who can afford them.
- J. NAELA opposes the concept of allowing Medicare providers to opt out through private contracting while remaining in the Medicare program.

IX. OLDER AMERICANS ACT

NAELA supports the Older Americans Act and its broad service delivery and advocacy mandates, many of which promote independence for older adults and community-based services and assist individuals living in long term care facilities.

- A. NAELA recognizes that the Older Americans Act and all its titles should serve a critical role in providing legal services, ombudsman services, information and referral, social services, individual and group advocacy, employment, and research for older individuals.
- B. NAELA supports continued an expanded funding in order to keep pace with inflation and ever-increasing demand for the Older Americans Act as the need for legal, social services, and advocacy increases.

- C. NAELA advocates to retain civil legal services as a priority for services funded under Title IIIB of the Older Americans Act.
 - D. NAELA supports the full funding of Title VII for the advocacy needs of every state. This includes funding for the Ombudsman, The Legal Services Developer, the Pension Counseling Program, the Elder Abuse Prevention Program, and any other additional advocacy services to Title VII.
 - E. Other Relevant Federal Laws
NAELA encourages the development and enforcement of the American with Disabilities Act (ADA), the Age Discrimination in Employment Act (ADEA), the Age Discrimination Act (ADA), the Rehabilitation Act, and the Fair Housing Act.
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X. PENSIONS

NAELA believes that it is imperative that given the size of the baby boom generation that all Americans be able to retire with an adequate income based on their individual work history.

- A. NAELA supports the protection of worker and employee defined benefit plans.
 - B. NAELA supports the expansion of coverage to increase the number of workplaces and workers covered.
 - C. NAELA supports funding for the Pension Counseling provisions in Title VII of the Older Americans Act.
 - D. NAELA supports the protection of participants of Defined Contribution Retirement Plans.
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XI. SOCIAL SECURITY

- A. NAELA supports a continuing role for Social Security (OASDI) in meeting the income needs of older and disabled individuals.
- B. NAELA advocates that Social Security (OASDI) benefits and cost of living increases be maintained at least at their present levels.
- C. NAELA supports the maximizing of access, due process rights, and remedies under individual and employer retirement benefit plans.
- D. NAELA opposes efforts to privatize Social Security that would result in a reduction of benefits to either current or future beneficiaries.
- E. NAELA supports the use of direct deposit of Social Security benefits and opposes efforts to streamline the use of such vehicles that do not overburden beneficiaries representatives to provide duplicate accounting. NAELA supports having the Treasury

Rules changed so that Guardians and those who hold Durable Powers would not necessarily have to become Social Security Payees.

- F. NAELA supports repeal or amendment of the current Windfall Elimination Provision (WEP) and Government Pension Offset (GPO) sections of the Social Security Act to more fairly coordinate and equalize Social Security benefits paid to workers and their dependents and survivors who receive governmental pension benefits.

XII. SUPPLEMENTAL SECURITY INCOME and SOCIAL SECURITY DISABILITY INSURANCE

NAELA supports the principle that the SSI/SSDI programs are an integral source of income for low-income elderly and disabled persons, and any changes in the programs should support continuing independence and quality of life when considering financial difficulties commonly suffered by persons of limited income and/or poor health. NAELA should take an active leadership role in coordinating efforts with other interest groups for the elderly and disabled in reviewing and commenting on federal and state legislation affecting the SSI/SSDI programs and in meeting the following principles:

- A. NAELA advocates that SSI benefits and cost of living increases be maintained at least at their present levels;
- B. NAELA recommends a system which provides clear and timely notice of clients rights under the Social Security Act and proposed actions by the Administration in language designed to communicate clearly to the broad range of SSI and SSDI applicants, recipients, and representatives;
- C. NAELA supports the development of a fair and compassionate system governing lump sum payments, gifts, and transfers between family members and significant others which encourages the valuable personal and financial contributions of the family and supports the mutual, voluntary assistance that friends and family members traditionally provide to one another in times of crisis;
- D. NAELA recommends that SSI recipients should have the opportunity to use lump sum receipt of funds for the purchase of excluded resources and the payment of expenses not covered by SSI and Medical Assistance;
- E. NAELA supports the maintenance and development of realistic work incentives for SSI/SSDI recipients;
- F. NAELA recommends that SSA improve claims and appeals management to allow for prompt processing and timely decisions on applications and appeals;
- G. NAELA supports a level of administrative staffing, training, and funding which enables the program to operate efficiently and effectively;

- H. NAELA supports a disability evaluation procedure that allows reasonable weight to be given to any verifiable mental or physical condition, or combination of conditions, including subjective complaints, that significantly reduces an individual's residual mental and/or physical capacity, and prevents the individual from performing substantial gainful activity in the competitive workplace;
 - I. NAELA opposes the creation of any appeal process that removes post administrative appeal jurisdiction of Social Security cases from a United States District Court;
 - J. NAELA supports the right of claimants in the Social Security appeals process to be represented by competent counsel. To this end, NAELA supports efforts to enact statutes and regulations that promote fair and timely processing of fee petitions and fee agreements and the prompt payment of claimant's representatives. NAELA opposes regulations that place undue administrative burden on Social Security claimants or their representatives in the processing and payment of representative's fees;
 - K. NAELA supports a fair and reasonable system of overpayment recovery that does not place the individual in a financial situation threatening health or safety through recovery of overpaid funds;
 - L. NAELA supports a policy of requiring the Department of Justice (DOJ) and the Social Security Administration (SSA) to acquiesce to all court decisions.
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XIII. TORT REFORM

- A. NAELA opposes any linkage between tort reform and Medicare/Medicaid because of its potentially devastating impact on poor and elderly patients.
- B. NAELA opposes tort reform that fails to provide adequate compensation for older victims. NAELA opposes caps on punitive and non-economic damages such as pain and suffering, since such caps have a discriminatory impact on persons with chronic illnesses needing long-term care and on women and children.
- C. NAELA supports the availability of punitive damage awards in limited cases. The basic standard to establish punitive damages should be a conscious or deliberate disregard of a defendant's obligations, and the standard of proof should be "clear and convincing." The principal responsibility to control excessive awards for punitive damages rests on the courts.
- D. NAELA supports greater regulatory oversight of the insurance industry to remedy periodic malpractice insurance cycles that cause unreasonably high jumps in malpractice insurance and reduced access to coverage for health care providers and facilities.
- E. NAELA opposes federal legislation that would change the Federal Rules of Civil Procedure without going through the process set forth in the Rules Enabling Act. NAELA fully supports the Rules Enabling Act process, which contemplates that evidentiary and procedural rules will in the first instance be considered and drafted by

committees of the United States Judicial Conference, next subjected to thorough public comment and reconsideration, and then submitted to the United States Supreme Court for consideration and promulgation, and finally transmitted to Congress which retains the power to veto any rule before it takes effect.

XIV. WINGSPAN GUARDIANSHIP RECOMMENDATIONS

The NAELA Public Policy Committee refers the resolution below for adoption by the full NAELA Board. The comments and clarifications recommended by the Public Policy Committee are provided as part of the resolution below.

RESOLVED, that NAELA endorses the recommendations, appended hereto, of the 2001 Wingspan Conference addressing guardianship issues, with the additional commentary to particular recommendations as described below:

Wingspan Recommendation	Additional NAELA Comment
#2. Functional multi-disciplinary assessment be used in determining diminished capacity; and the terms “incapacity,” “incapacitated,” or “incompetent” be rejected and in place, the term “diminished capacity” be used.	A rationale for the recommended change in terminology should be included with the recommendation.
#5. Dialogue between the legal and medical professions on the determination of incapacity and all aspects of guardianship be encouraged.	The term, “incapacity,” should be defined and used in a manner consistent with recommendation number 2, above.
#6. State and local jurisdictions have an interdisciplinary entity focused on guardianship implementation, evaluation, data collection, pilot projects, and funding.	The term, “interdisciplinary entity” should be defined or described.
#8. Funding be supported for multi-disciplinary assessments that must be linked to the least restrictive criteria throughout the judicial process.	The term, “multi-disciplinary assessments,” should be defined or described.
#12. Multi-disciplinary tools be developed and used in educating all professionals involved in guardianship matters, including family guardians.	The term, “multi-disciplinary tools,” should be defined or described.
#21. Practice precepts or ethics rules should provide that lawyers drafting powers of attorney represent and meet with the principal rather than solely with the prospective agent.	A minority view was expressed that there may be exceptions when an attorney could represent the prospective agent. The majority on the call felt that the attorney should meet with the principal in all circumstances.
#23. Multi-disciplinary diversion programs be developed with collaboration among financial institutions, law enforcement, and adult protective services as an early intervention process to avoid the need for guardianship.	The term, “multi-disciplinary diversion program,” should be defined or described.
#28. Counsel always be appointed for the respondent and act as an advocate rather than as a guardian ad	Because the imposition of a guardianship may result in the curtailment of civil liberties of the alleged

<p>litem.</p> <p>#29. The Wingspread recommendation regarding the role of counsel as zealous advocate be amended and reaffirmed as follows: Zealous advocate B (sic) in order to assume the proper advocacy role, counsel for the respondent and the petitioner shall: (a) advise the client of all the options as well as the practical and legal consequences of those options and the probability of success in pursuing any one of those options; (b) give that advice in the language , mode of communication and terms that the client is most likely to understand; and (c) zealously advocate the course of actions chosen by the client.</p> <p>#30. The -re-hearing process include a separate court investigator/visitor, who must identify the respondents wants, needs, and values.</p>	<p>incapacitated person, the person should be entitled to an attorney who acts as an advocate on his or her behalf and who represents his or her interests in the same manner as the attorney would represent the interests of other clients in other litigation.</p> <p>Recommendation 30 uses the term "investigator/visitor," though other terms are used in different jurisdictions. In some jurisdictions the investigator/visitor is an attorney, while in others the person serving in that role is a social worker, state employee, or volunteer. The investigator/ visitor serves a different purpose than appointed counsel. The investigator/visitor is a fact finder who gathers and presents to the court factual information about the respondent's situation, needs and values. The information gathered by the investigator/visitor may conflict with the respondent's interests and stated goals in the guardianship proceeding. For example, the investigator/visitor may determine that a person cannot care for herself, though she wants to contest the guardianship.</p>
<p>#32. The term “investigator” or “visitor” be used instead of guardian ad litem.</p>	<p>There needs to be in use a term other than guardian ad litem. Whatever term that is used should be defined.</p>
<p>#36. There be special procedures for single transactions.</p>	<p>This is an extension of the concept of limited guardianship. There should be a proceeding that allows a person or an entity to go to court to get the authority to engage in a single transaction on behalf of someone with diminished capacity. For example, a mental health facility needs someone to consent to a dental cleaning and there is no need for a full guardianship and there is no relative to act under a surrogacy statute.</p>
<p>#47. Guardians and guardianship agencies not directly provide services such as housing, medical care, and social services to their own wards, absent court approval and monitoring.</p> <p>Wingspan comment: There needs to be specificity as to the types of services that would come under the purview of this recommendation.</p>	<p>NAELA supports this ban in the context wherein formal services are provided through proprietary, governmental, or non-profit agencies that may also provide guardianship services, or that are owned or controlled by a guardian. It does not proscribe informal services or support provided by a family member or other individual who may also happen to be providing housing, or assisting with medical care, or providing other support in their individual capacity.</p>
<p>#55. Monitoring is appropriate regardless of who is the guardian: family member, professional guardian, or agency guardian.</p>	<p>NAELA supports this recommendation with the recognition that the nature and extent of appropriate monitoring may be somewhat different depending upon whether the guardian is a family member, professional or agency guardian.</p>
<p>#56. Guardianship issues be delegated to judges who have special training and experience in guardianship matters.</p> <p>Winspan Comment: Judicial specialization should be encouraged. There is a need to increase expertise of the judiciary and the support staff in guardianship matters. This recommendation should be communicated to legislatures and chief judges who organize court systems.</p>	<p>NAELA supports the development of judges with special training and expertise to hear guardianship matters, but also cautions that court systems must take steps to avoid the exercise of too much authority and discretion in one or a few judges whose personal biases may disproportionately influence the judicial process and the selection of court appointed attorneys and the selection of court appointed attorneys, investigators and/or fiduciaries".</p>

#60. All persons, including lawyers who serve in any guardianship capacity, be subject to bonding requirements. Further, lawyers who serve as guardians should have professional liability insurance that covers fiduciary activities.	The bonding requirement can be waived by the court.
#62. A lawyer petitioning for guardianship of his or her client not: (a) be appointed as the respondent's counsel; (b) be appointed as the respondent's guardian ad litem for the guardianship proceeding; and (c) seek to be appointed guardian except in exigent or extraordinary circumstances, or in cases where the client made an informed nomination while having decisional capacity.	Exceptions are necessary where there are few persons available to serve as guardians, particularly in rural areas.

WINGSPAN — THE SECOND NATIONAL GUARDIANSHIP CONFERENCE, RECOMMENDATIONS [1]

I. OVERVIEW

CHANGES IN STATUTE OR REGULATION

The Conference recommends that:

1. Standard procedures be adopted to resolve interstate jurisdiction controversies and to facilitate transfers of guardianship cases among jurisdictions.

Comment: State legislatures can look to the model legislation proposed by the National College of Probate Judges.^[2] Guardianship portability, including adoption of a formal validation process for legal recognition of surrogate authority (*e.g.*, healthcare and financial powers) in other countries, should be addressed nationally and internationally.
2. Functional and multi-disciplinary assessment be used in determining diminished capacity. The terms “incapacity,” “incapacitated,” and “incompetent” should be rejected and in place, the term “diminished capacity” should be used.
3. Medicare and Medicaid laws be amended to cover the cost of respondents’ functional assessment.

1. Wingspan — The Second National Guardianship Conference, meeting in plenary session, adopted these Recommendations on December 2, 2001. Primary sponsors were the National Academy of Elder Law Attorneys, Stetson University College of Law, host of the Conference, and the Borchard Center of Law and Aging. Co-sponsors were the ABA Commission on Legal Problems of the Elderly, the National College of Probate Judges, the Supervisory Council of the ABA Section on Real Property, Probate and Trusts, the National Guardianship Association, the Center for Medicare Advocacy, the Arc of the United States, and the Center for Social Gerontology, Inc. The Recommendations, authored by the Wingspan Conferees, do not purport to have the endorsement of the Wingspan Conference’s individual sponsor organizations. To view commentary or dissenting opinions, as well as the Recommendations on-line, visit the National Academy of Elder Law Attorneys’ Web site at <<http://www.naela.com>>.

2. See Natl. College of Prob. JJ., *Standards, National Probate Court Standards* Stand. 2.1.1 <<http://www.ncpi.org/standard.html>> (last revised Feb. 10, 2002) (providing that the final judgments of probate courts in one jurisdiction should be “afforded comity and respect in other jurisdictions”).

CHANGES IN PRACTICE PRECEPTS OR GUIDELINES

The Conference recommends that:

4. A uniform system of data collection within all areas of the guardianship process be developed and funded.

Comment: Although significant legislative revisions have been adopted, little data exists on the effectiveness of guardianship within each state or across the states, and less information is available about how the system actually affects the individuals involved.

5. Dialogue between the legal and medical professions on the determination of diminished capacity and all aspects of guardianship be encouraged.
6. State and local jurisdictions have an interdisciplinary entity focused on guardianship implementation, evaluation, data collection, pilot projects, and funding.

Comment: This entity would be charged with responsibility of monitoring the implementation of guardianship and surrogacy laws.

RECOMMENDATION FOR EDUCATION, RESEARCH AND FUNDING

The Conference recommends that:

7. Innovative and creative ways be developed by which funding sources are categorically directed to guardianship. States and organizations should be informed about these sources.
8. Funding be supported for multi-disciplinary assessments that must be linked to the least restrictive criteria throughout the judicial process.
9. All guardians receive training and technical assistance in carrying out their duties. Organizations, including the National Guardianship Network,^[3] should develop and offer specially designed introductory and continuing guardianship courses for judges, court personnel, families, guardians, proposed fiduciaries, and attorneys practicing in the guardianship area, including training on minimum guardianship standards and ethics.
10. Attention be given to the need for mandatory education for all judges in courts hearing guardianship cases, with special attention to the educational needs of general jurisdiction judges.
11. The Internet and other technology be used to educate and communicate with lawyers, judges, guardians, and other professionals in the guardianship arena.
12. Multi-disciplinary tools be developed and used in educating all professionals involved in guardianship matters, including family guardians.
13. Research be undertaken to measure successful practices and to examine how the guardianship process is enhancing the well-being of persons with diminished capacity.

Comment: The research should examine how the system is working. The Conference co-sponsors should work together to identify increased funding for research, court operations, and training for the bench and bar.

3. The National Guardianship Network is an informal coalition of associations interested in improving guardianship services for individuals as they age and for those with disabilities. The National Guardianship Network was formed in 2000 and its membership includes the ABA Commission on Legal Problems of the Elderly, the American College of Trust and Estate Counsel, the National Academy of Elder Law Attorneys (NAELA), the National Center for State Courts, the National College of Probate Judges, the National Guardianship Association, and the National Guardianship Foundation. For more information about the National Guardianship Network, contact NAELA at its address, 1604 North Country Club Road, Tucson, Arizona 85716, by telephone (520)881-4005, by facsimile (520)325-7925, or through its Web site at <<http://www.naela.com>>.

14. Further study be conducted to determine whether states should adopt statutes and regulations to provide for separate guardianship procedures for persons with developmental disabilities.
15. The National Guardianship Network provide leadership in research and advocacy for guardianship reform.
16. The National Institute on Aging and other federal agencies fund research on guardianship.

Comment: The federal agencies could include, for example, the Agency for Healthcare Research and Quality, the Administration on Aging, the Assistant Secretary for Planning and Evaluation of Health and Human Services, and the Center for Medicare and Medicaid Services. Areas of research might include the appropriate placement of wards by guardians, end of life decision-making by surrogates, and how any universal health-care system would affect guardianships.

II. DIVERSION AND MEDIATION

CHANGES IN STATUTE AND REGULATION

The Conference recommends that:

17. States adopt statutes requiring agents under durable powers of attorney to maintain fiduciary standards.
18. Statutes give preference to the person nominated in the advance directive, power of attorney, or other writing in appointing the guardian.
19. States adopt surrogate medical consent statutes.

Comment: Such statutes will reduce the need for guardian-ship of the person for medical decision-making where the person with diminished capacity does not have an advance health-care directive.

20. Statutes require that guardianship petitions include a review of alternatives and a statement as to why none are appropriate.

Comment: Information should be available at the courthouse on each alternative, including mediation and counseling. The court visitor or other investigator should verify that available alternatives to guardianship have not been overlooked or underutilized.

CHANGES IN PRACTICE PRECEPTS OR GUIDELINES

The Conference recommends that:

21. Practice precepts or ethics rules should provide that lawyers drafting powers of attorney represent and meet with the principal rather than solely with the prospective agent.
22. Standards and training for mediators be developed in conjunction with the Alternative Dispute Resolution community to address mediation in guardianship related matters.

Comment: Standards and training should include identification of issues appropriate for mediation, participants in the mediation, use and role of legal representatives, and procedures to maximize self-determination of individuals with diminished capacity. The development of standards should take into consideration the recommendations of the 2000 Joint Conference on Legal and Ethical Issues in the Progression of Dementia^[4] on dispute resolution, and of The Center for Social Gerontology,^[5] and study

4. *Recommendations of the Joint Conference*, 35 Ga. L. Rev. 423, 423–450 (2001).

5. Susan J. Butterwick, Penelope A. Hommel & Ingo Keilitz, *Evaluation of Mediation as a Means of Resolving Adult Guardianship Cases* (Ctr. for Soc. Gerontology 2001). Copies of the study are available for a fee by contacting The Center for Social Gerontology by telephone at (734) 665-1126 or by email at <tcsg@tcsg.org>. A copy in PDF format is available through its Web site at

whether these recommendations should be extended to all types of disability. Mediators should adhere to such standards even if not statutorily required.

23. Multi-disciplinary diversion programs be developed with collaboration among financial institutions, law enforcement, and adult protective services as an early intervention process to avoid the need for guardianship.

RECOMMENDATIONS FOR EDUCATION AND ADVOCACY

The Conference recommends that:

24. Awareness of risks and benefits of guardianship and planning alternatives to guardianship be raised, and the use of mediation for conflict resolution and as a pre-filing strategy alternative be increased.

Comment: Conference co-sponsors should develop model educational curricula to be implemented by the bench, bar, and medical profession on the state level. Education efforts should be targeted to financial and healthcare institutions, aging and disability advocates, legal and medical professionals, and the public.

RECOMMENDATIONS FOR FURTHER STUDY

The Conference recommends that:

25. Research be undertaken to identify alternative payment sources to expand the availability and affordability of mediation services.

Comment: Such study should include an examination of the following:

- (1) allocation of costs among all parties;
- (2) court fees to cover costs;
- (3) medicaid reimbursement;
- (4) sliding fee arrangements, with courts paying costs for those lacking economic means; and
- (5) mediators on court panels taking pro bono cases along with referred fee-paying cases.

26. Study be undertaken on the extent and nature of the abuse of powers of attorney and trusts, and on statutory options to permit the court to review agents' performance.

III. DUE PROCESS

CHANGES IN STATUTE AND REGULATION

The Conference recommends that:

27. Respondents always have a mandatory right, which can be waived, to appear in court and be heard.
28. Counsel always be appointed for the respondent and act as an advocate rather than as a guardian *ad litem*.
29. The Wingspread Recommendation regarding the role of counsel as zealous advocate⁶ be amended and reaffirmed as follows: *Zealous Advocacy* — In order to assume the proper advocacy role, counsel for the

<<http://www.tcsg.org>>.

6. Recommendation II-C of the 1988 Wingspread Symposium, titled "Role of Counsel Defined." Commn. on Mentally Disabled & Commn. on Leg. Problems of Elderly, *Guardianship: An Agenda for Reform — Recommendations of the National Guardianship Symposium and Policy of the American Bar Association* 12 (ABA 1989). In 1988, the Johnson Foundation's Wingspread Conference Center in Wisconsin

respondent and the petitioner shall: (a) advise the client of all the options as well as the practical and legal consequences of those options and the probability of success in pursuing any one of those options; (b) give that advice in the language, mode of communication and terms that the client is most likely to understand; and (c) zealously advocate the course of actions chosen by the client.

30. The pre-hearing process include a separate court investiga-tor or visitor, who must identify the respondent’s wants, needs, and values.

31. States hold guardianship proceedings in courts with full plenary powers.

Comment: Some states allow guardianship matters to be heard by non-judges. Those states need to provide those hearing personnel with the judicial powers necessary to protect the due process rights of the respondent.

32. The term “investigator” or “visitor” be used instead of guardian *ad litem*.

Comment: The term “guardian *ad litem*” often is confused with the term “guardian,” thus resulting in misunderstand-ing of roles and responsibilities.

33. The respondent have the following rights: the right to request a closed hearing for determining diminished capacity; the right to have medical functional evaluations by someone who is not the respondent’s treating physician; the right to have the treating physician’s privilege recognized and confidentiality maintained; and the right to have medical records automatically sealed at the end of the hearing.

34. Emergency proceedings require the following: actual notice to the respondent before hearing; mandatory appointment of counsel; establishment of the respondent’s emergency; conduct of a hearing on the permanent guardianship as promptly as possible; and placement of limitations on emergency powers.

35. Guardianships be limited to the circumstances giving rise to the petition for emergency or temporary guardianship, and be terminated upon appropriate showing that the emergency no longer exists.

36. There be special procedures for single transactions.

37. The guardian not have the power to consent to civil commitment, electric shock treatment, or dissolution of marriage without obtaining specific judicial authority

38. Statutes be adopted and forms developed to enable courts to fashion the appropriate limited guardianship orders.

Comment: Consistent with the Uniform Guardianship and Protective Proceedings Act, the initial petition should include the reasons why either a limited or plenary finding of diminished capacity is being sought.^[7] This requirement will promote the concept of limited guardianship and preserve individual rights.

39. Orders establishing a plenary guardianship rather than a limited guardianship require proof of why the guardianship should be plenary.

Comment: Responsible advocacy includes advising the court with respect to material aspects of the ward’s financial and health-related circumstances that will promote autonomy (*i.e.*, the right to choose one’s residence, vote, medical consent, participation in research).

CHANGES IN PRACTICE PRECEPTS OR GUIDELINES

The Conference recommends that:

hosted the National Guardianship Symposium, which was sponsored by the ABA Commissions on Legal Problems of the Elderly and on Mental Disability.

7. Unif. Guardianship & Protective Proc. Act § 304(b)(7), (8), 8A U.L.A. 137 (Supp. 2001).

40. Courts have adequate funding for investigation at the inception of the guardianship action and for oversight for the duration of the guardianship.
41. The hearing on a guardianship petition be held promptly after service upon the respondent.
42. The guardian use a substituted judgment standard in making decisions on behalf of the person with diminished capacity.
Comment: Using this standard entails determining what the person with diminished capacity would decide if he or she had capacity.
43. The court consider the best interest of the person with diminished capacity in selecting the guardian.
Comment: Among those persons the court should consider when selecting guardians should include nominees, family, and agencies qualified to serve.

IV. AGENCY GUARDIANSHIP AND GUARDIANSHIP STANDARDS

CHANGES IN STATUTE OR REGULATION

The Conference recommends that:

44. States provide public guardianship services when other qualified fiduciaries are not available.
Comment: This function may be provided through independent state agencies, contracts with private agencies, or by other means.
45. States adopt minimum standards of practice for guardians, using the National Guardianship Association *Standards of Practice*^[8] as a model.
Comment: Lawyers should not be exempt from those standards. Lawyers and courts should be educated and trained in the standards.
46. Professional guardians — those who receive fees for serving two or more unrelated wards — should be licensed, certified, or registered. They should have the skills necessary to serve their wards. Professional guardians should be guided by professional standards and codes of ethics, such as the National Guardianship Association’s *A Model Code of Ethics for Guardians*^[9] and *Standards of Practice*.

CHANGES IN PRACTICE PRECEPTS OR GUIDELINES

The Conference recommends that:

47. Guardians and guardianship agencies not directly provide services such as housing, medical care, and social services to their own wards, absent court approval and monitoring.

8. Reprinted at 31 Stetson L. Rev. __, __–__ (2002).

9. Michael D. Casasanto, Mitchell Simian & Judith Roman, *A Model Code of Ethics for Guardians* (Natl. Guardianship Assn. 1991). A copy of this work in PDF format is available through the National Guardianship Association’s Web site at <<http://www.guardianship.org/ngamembership/index.htm#modelcode>>.

RECOMMENDATIONS FOR EDUCATION AND ADVOCACY

The Conference recommends that:

48. The public guardianship function include broad-based information and training.

Comment: Broad-based education and training about guardianship and alternatives can divert pressure from the public guardianship system.

RECOMMENDATIONS FOR FURTHER STUDY

The Conference recommends that:

49. The National Guardianship Network identify and generate funding for development and improvement of public and private guardianship services from sources including (a) grants, (b) donors, (c) Interest On Lawyers Trust Accounts, (d) Medicaid, (e) increased filing fees, and (f) public-interest litigation.
50. A study be undertaken of successful professional guardianship agencies to identify features that might be used as a model for other programs.

V. MONITORING AND ACCOUNTABILITY¹⁰

CHANGES IN STATUTE OR REGULATIONS

The Conference recommends that:

51. There be mandatory annual reports of the person and annual financial accountings to determine the status of the person with diminished capacity. The report and the accounting should be audited as frequently as possible.
52. To provide effective monitoring, the following are required: (a) a functional assessment of the abilities and limitations of the person with diminished capacity; (b) an order appropriate to meet the needs of the person with diminished capacity (with preference given to as limited a guardianship if possible); (c) an annual plan based on the assessment and an annual report, appropriately updated, based on the plan; and (d) inclusion of any other mandated reports which are the guardian's responsibility, such as reports to the Social Security Administration or the Department of Veterans Affairs.

CHANGES IN PRACTICE PRECEPTS OR GUIDELINES

The Conference recommends that:

53. States maintain adequate data systems to assure that required plans and reports are timely filed, and establish an electronic database to house these data while preserving privacy.
54. Courts have the primary responsibility for monitoring.
55. Monitoring is appropriate regardless of who is the guardian — family member, professional guardian, or agency guardian.
56. Guardianship issues be delegated to judges who have special training and experience in guardianship matters.
Comment: Judicial specialization should be encouraged. There is a need to increase expertise of the judiciary and the support staff in guardianship matters. This recommendation should be communicated to legislatures and chief judges who organize court systems.

10. See Section IV for Recommendations concerning standards to which guardians should be held accountable.

RECOMMENDATIONS FOR EDUCATION AND ADVOCACY

The Conference recommends that:

57. The National Guardianship Network take the lead in a public information campaign to emphasize the importance of monitoring and the need to adequately fund monitoring efforts.

RECOMMENDATIONS FOR FURTHER STUDY

The Conference recommends that:

58. Recognizing the ultimate responsibility of courts to monitor guardianships, a study be conducted as to whether the court should be permitted to delegate or contract out guardianship monitoring to other public or private organizations, and, if monitoring is delegated, on the nature and extent of the oversight responsibility in the court or judicial system for such alternative arrangements.

VI. LAWYERS AS FIDUCIARIES OR COUNSEL TO FIDUCIARIES

CHANGES IN STATUTE OR REGULATION

The Conference recommends that:

59. The American Bar Association (ABA) and the states adopt the ABA Ethics 2000 proposed revisions to the Model Rule of Professional Conduct 1.14.^[11]

Comment: This proposed rule gives the lawyer representing a client with diminished capacity greater flexibility to take protective action.

60. All persons, including lawyers who serve in any guardianship capacity, be subject to bonding requirements. Further, lawyers who serve as guardians should have professional liability insurance that covers fiduciary activities.
61. The lawyer for the fiduciary of a person with diminished capacity who knows of neglect, abuse, or exploitation, as defined by state law, be permitted to disclose otherwise confidential information per Model Rule of Professional Conduct 1.6 to the extent necessary or appropriate to protect the person with diminished capacity.^[12]

CHANGES IN PRACTICE PRECEPTS OR GUIDELINES

The Conference recommends that:

62. A lawyer petitioning for guardianship of his or her client *not* (a) be appointed as the respondent's counsel, (b) be appointed as the respondent's guardian *ad litem* for the guardianship proceeding, and (c) seek to be appointed guardian except in exigent or extraordinary circumstances, or in cases where the client made an informed nomination while having decisional capacity.

11. At its Midyear Meeting in February 2002, the ABA House of Delegates adopted amendments to Model Rule 1.14, which was proposed by the Commission on Evaluation of the Rules of Professional Conduct, known as the ABA Ethics 2000 Commission. ABA Ctr. Prof. Resp., *Report 401 as Passed by the House of Delegates February 5, 2002* <http://www.abanet.org/cpre2k-report_home.html> (Feb. 2000). The revised Model Rule 1.14 is reprinted at 31 Stetson L. Rev. __, __-__ (2002).

12. The ABA House of Delegates adopted amendments to Model Rule 1.6, which were proposed by the ABA Ethics 2000 Commission, at its Annual Meeting in August 2001 and let the amendments stand at its Midyear Meeting in February 2002. ABA Ctr. Prof. Resp., *supra* n. 11. The revised Model Rule 1.6 is reprinted at 31 Stetson L. Rev. __, __-__ (2002).

63. The lawyer for a client with diminished capacity not attempt to represent a third party petitioning for guardianship over the lawyer's client.
64. The lawyer who serves in the dual roles of both lawyer and court-appointed fiduciary ensure that the services and fees be differentiated, be reasonable, and be subject to court approval.
65. Lawyers serving as guardians look to the National Guardian-ship Association *Standards of Practice* and *A Model Code of Ethics for Guardians*, in absence of mandatory minimum standards.
66. When the lawyer represents a fiduciary, the lawyer take reasonable steps to ensure that the fiduciary understands his or her responsibilities and good practice standards, using the National Guardianship Association standards and materials as models.
67. Practitioners be informed of state law provisions regarding estate-planning responsibilities that might impose a duty on the lawyer and/or guardian to engage in such planning.

RECOMMENDATIONS FOR FURTHER STUDY

The Conference recommends that:

68. Further study be conducted on the role and responsibilities of the lawyer for the fiduciary and his or her duty to a ward with regard to any fiduciary actions that could result in the diminution of the estate while the ward is alive.

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