

THE WOMEN'S ADVOCATE A CATALYST FOR 2011



Women and the Law Section Newsletter
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EMERITUS VOTING MEMBER DIES

Louise Raggio, our Section's emeritus voting member, died on January 23, 2011. She was a true trailblazer and always an advocate for the Women and the Law Section. She worked tirelessly to draft and enact the Marital Property Act in 1967 and the Texas Family Code in 1979. She had an outstanding career of firsts: she was the only woman in her law school class at SMU Law School; she was the first woman criminal assistant district attorney in Dallas County; she was the first woman to be elected as a director of the State Bar of Texas; and she was the first woman trustee and chair of the board of the Texas Bar Foundation. She received numerous awards and honors including our section's Sarah T. Hughes Outstanding Attorney Award; the State Bar of Texas Presidents' Award; and the Texas Bar Foundation Ethics & Professionalism Award.

Her funeral was Sunday, January 30, 2011 at the First Unitarian Church of Dallas.

In lieu of flowers, her family has asked that donation be made to the First Unitarian Church "endowment and Memorial Gift Fund" or to the "SMU Raggio Lecture Series".

The Officers and Council members of the Women and the Law Section submitted made a contribution in Louise's honor from the Women and the Law Section to the SMU Raggio Lecture Series.

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Should you want to make donations, addresses are:

The Louise B. Raggio Endowed Lecture in Women's Studies
SMU Program Services Office
P.O. Box 750460
Dallas, TX 75275
214-768-8283
Email – esutton@smu.edu

Endowment and Memorial Gift Fund
First Unitarian Church of Dallas
4015 Normand
Dallas, TX 75205
214-528-3990
Email – office@dallasuu.org

Carol Jendrzey, chair of Women and the Law Section, said that “Louise Raggio was and will continue to be an inspiration to all attorneys. She showed that you can make changes without compromising professionalism and civility.” Ms. Jendrez asked that all of us take time to look at an awesome video on YouTube about Louise at **http://www.youtube.com/watch?v=mTW_tXQEvuE**.

Ralph H. Brock, former chair of Women and the Law Section, wrote that “Louise epitomized the WAL Section and what it should be.”

Carolyn F. Moore, newsletter editor of Women and the Law Section, wrote that “I believed Louise when she commented that she always over-prepared for her cases. Louise was the kind of lawyer any of us would want on our side.”

LOUISE BALLERSTEDT RAGGIO
JUNE 15, 1919 — JANUARY 23, 2011

A TRIBUTE

by Ralph H. Brock

When my wife, Carolyn, and I registered for the 1986 State Bar Convention (this was before the more politically-correct “Annual Meeting”), the President’s Party was included in the registration fee, so we decided to attend. The event was held in the huge Houston Hyatt Regency ballroom, and when we walked in, we realized we didn’t know a soul in the place. As we stood there looking for a friendly face, an older couple at one of the tables in the back of the room, nearest the door and furthest from the stage, invited us to join them. We had a pleasant dinner – Louise asked about the Lubbock Bar and seemed to take a real interest in us – but I don’t remember much about the conversation. Ray Charles and the Raettes were the entertainment and I was more interested in listening to them and dancing to their music.

The 1987 Convention was in Corpus Christi. It was a long, hot walk from the convention center to the Hershey Hotel where we were staying. Carolyn spoke to a woman we met along the way; when she was out of earshot, I asked Carolyn who she was. Carolyn said I should remember her – she was Louise Raggio, who had invited us to sit at her table during the President’s Party the year before. She added that Louise had just received the State Bar’s Presidents’ Award. I didn’t know that the Presidents’ Award was the most prestigious award the State Bar gives to a Texas lawyer, and anyway, I was more concerned about the newly-created Appellate Section, which I was going to chair, so I didn’t give the encounter any further thought.

A couple of years or so later, Carolyn was invited to join the Council of the Women and the Law Section. Since I was already doing the newsletter for the Appellate Section, she volunteered me to do the newsletter for the Women and the Law Section as well. That was when we finally got to know Louise, who was already on the Council, and we learned how important she was within the State Bar.

Louise was something of an accidental law student. After growing up on a farm near Austin, she graduated *magna cum laude* from the University of Texas in 1939 and took a teaching certificate. Instead of entering the classroom, though, she won a Rockefeller fellowship in public administration at American University in Washington. There she met all the notables of the day, including Eleanor Roosevelt who, in later years was a guest in the Raggio home whenever she was in Dallas, she dined in the family quarters of the White House, and she generally led a busy social life totally alien to her

country Texas upbringing. Returning to Austin in 1941 she went to work for the National Youth Administration and met her future husband, Grier, who proposed to her on their first date. They were married three months later.

The war soon intervened. Although Grier had an undergraduate degree, a law degree and two master of law degrees, he was denied admission to officer candidate school because of secret, unfounded allegations of disloyalty that would haunt him for the rest of his life. The Army sent him instead to the South Pacific. He returned home three years later suffering from what today is called post-traumatic stress syndrome. He and Louise had been together as a married couple such a short time before he was drafted that they essentially had to start over. Louise describes the difficulties they had with remarkable candor in her book, *Texas Tornado*, but she persevered to make the marriage work.

One day Grier came home from work and announced that Louise was going to law school, to take night classes at SMU. Louise resisted at first, then decided that a law degree, or even a few law school courses, might augment her teaching certificate and allow her to teach some business law courses. Of course she met the usual resistance from the law faculty and administration, including the argument that she would be taking the place of a man who would do something with his law degree. With Grier’s support, she persevered again and made it through law school and the Texas bar exam.

Licensed but without a job, Louise became a protégé of the late Judge Sarah T. Hughes. Judge Hughes had been after the legendary Dallas County district attorney Henry Wade to hire a female prosecutor. He finally hired Louise, and told her later that he expected her to fall on her face, but at least he would have Judge Hughes off his neck. Instead of falling on her face, Louise excelled in handling the cases that nobody else wanted.

Louise writes that if Judge Hughes “had asked me to stick my head in the oven with the gas turned on, I’d have done it.” Years later, Judge Hughes, then on the federal bench, did tell her to buy some shares of Republic National Bank because it had no female vice-presidents, and they were going to go to the next shareholders meeting and demand a change. As Louise told the story, she replied, “Yes, Ma’am” and bought the shares, but word had leaked out and the directors put a token woman in a vice-president’s position in advance of the shareholders meeting.

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While she was in the district attorney's office, Louise began racking up the first in a long series of firsts in her career. Women had just received the right to serve on juries and after striking all the men on the panel, Louise tried (and won) an aggravated assault case to the first all-woman jury in Texas history. As she made a name for herself, she took on speaking engagements for Wade and became even more well known.

In 1955 Grier opened his own law office and the next year he persuaded Louise to quit her job in the district attorney's office and join him in private practice. They developed a reputation in family law and Louise became the first female chair of the relatively new State Bar family law section. The issue of removing the disabilities of married women had begun to simmer and Louise took the lead in drafting a bill, the Marital Property Act, and getting it passed to allow married women to control their own property. Then she undertook a driving campaign around the state – this was long before Southwest Airlines – to explain the Act to the lawyers of Texas. Next, she took the lead in the effort to write a complete Texas Family Code. This took another decade; she describes the effort in detail in her book.

In 1979 Louise became the first woman elected to the State Bar Board of Directors. The Bar presented her with the traditional gift for new directors – a set of gold cufflinks bearing the State Bar seal. She wore them to the Board dinner on a thin gold chain. Her point made, the State Bar soon sent her a gold pendant with the State Bar seal. Louise's directorship was followed by her election as the first female member of the Texas Bar Foundation Board of Trustees. In 1984 she was elected chair of the Bar Foundation. In 1985 she was named to the Texas Women's Hall of Fame. This brings us to 1987 when, as earlier noted, she received the Presidents' Award for distinguished service to the lawyers of Texas for her service on the State Bar Board, her chairmanship of the Bar Foundation Trustees, and her chairmanship of the Bar Foundation Fellows, which raises the money for the Foundation, and where she was currently serving.

While she was Chair of the Fellows, Louise called Carolyn and said she wanted to nominate us to become Fellows, but not without a price. Each State Bar district is supposed to have a nominating chair who makes recommendations for new Fellows. Louise said that the nominating chair for our district had not been functioning for several years, and she was going to make us earn our nomination as the new nominating co-chairs for our district. Our response was the same that she had always made to Judge Hughes: "Yes, Ma'am," and we considered it a matter of trust and honor to try to meet our quota each year we served.

In 1992 this Section established an award, based on the American Bar Association's Margaret Brent Award, to honor women attorneys who have achieved excellence in their respective fields. Louise insisted that the award be named for Judge Hughes. It honors the accomplishments of women

who have achieved outstanding recognition in their professional area and who, by doing so, have paved the way for success for other women attorneys, and who have:

Influenced other women to pursue legal careers, or opened doors for women lawyers in a variety of job settings that historically were closed to women, or advanced opportunities for women within a practice area or segment of the profession, or have otherwise served their profession or community in a manner that has benefitted the legal profession.

Louise was the Council's choice to be the first award recipient, but Louise insisted that Harriet Miers, the first female president of the State Bar of Texas, be a co-recipient. Two years later, in 1995, the American Bar Association gave Louise the Margaret Brent Award. Named for America's first woman lawyer, and recognized as the first woman in America to make a stand for the rights of her sex, it is the ABA's accolade for outstanding women lawyers. Louise's wisdom and experience were invaluable to this Section's Council, and she was named a voting emeritus member of the Council for life. She remained actively involved in the Section as long as she was physically able.

A list of the awards Louise won during her career include the following:

- * 1967, State Bar of Texas President's Citation of Merit Award for work on the Marital Property Act
- * 1967, Y.W.C.A. of Dallas Award
- * 1970, Zonta of Dallas Award for Community service
- * 1972, Southern Methodist University Outstanding Alumni Award
- * 1974, Business and Professional Women Extra Mile Award, for leadership in law reform
- * 1979, Women's Center of Dallas Award for Service to Women
- * 1980, American Bar Association Award for Family Law Service
- * 1985, Business and Professional Women of Texas, Woman of the Year Award
- * 1985, Texas Women's Hall of Fame inductee (legal category)
- * 1985, Chairman of Board of Trustees Award, Texas Bar Foundation

- * 1987, President's Award for Outstanding Lawyer of the Year
- * 1988, Trustee Emeritus Award, Texas Bar Foundation
- * 1990, Unitarian of the Year Award, Dallas
- * 1990, International Women's Forum Award, "Woman That has Made a Difference"
- * 1992, Southern Methodist University Outstanding Law Alumni Award.
- * 1993, Sarah T. Hughes Outstanding Attorney Award
- * 1993, Dallas Bar First Outstanding Trial Lawyer Award
- * 1994, National Business Women Owners Association Award
- * 1994, American Civil Liberties Union Thomas Jefferson Award
- * 1995, Girls, Inc. "She Knows Where She's Going" Award
- * 1995, North Texas Association of Women Journalists, Courage Award
- * 1995, Margaret Brent Outstanding Woman Lawyer Award
- * 1996, LL.D honoris causa, from Southern Methodist University, Dallas
- * 1996, Texas Trailblazer Award
- * 1997, Women in Executive Leadership Award
- * 1997, Dallas Bar Foundation Award for Distinguished Career and Civic Contribution
- * 1997, Texas Bar Foundation Ethics and Professionalism Award
- * 1997, North Texas Legal Services Equal Justice Award
- * 1999, Texas Women of the Century Award
- * 1999, Veteran Feminist of America Award
- * 2000, Gillian Rudd Award from National Business Women Owners Association
- * 2000, Fortune Magazine: one of fifteen Heroes in Hall of Fame

- * 2001, Individual Rights and Responsibilities Award, State Bar of Texas
- * 2002, Lifetime Achievement Award, Family Law Section, American Bar Association
- * 2004, Texas Center for Professionalism and Legal Ethics Sandra Day O'Connor Award.

This Tribute, and even this list of awards, does not begin to reflect all the time and effort that Louise devoted to the Dallas Bar, to the City of Dallas, to her beloved League of Women Voters, to the State Bar's Family Law and Women and the Law Sections, to the State Bar itself and to the Texas Bar Foundation, to the American Bar Association and its Family Law Section, to the Dallas Unitarian Church, nor to Grier and their three sons, Grier, Jr., Tommy, and Ken, nor to all the protégés, women and men alike, whom she mentored over the years. On a personal note, Louise encouraged Carolyn and me to become more involved in service to the State Bar. Louise was truly one of a kind. She set the standard high and few, if any, of us will come close to rendering the selfless service and devotion that she exhibited during her time among us.



LOOKING FOR THE NEXT SARAH T. HUGHES AND MA'AT JUSTICE AWARD WINNERS

by Carol E. Jendrzey

The Texas State Bar Annual Meeting is only months away. Your section's council is busy preparing the program for its Annual Section Meeting, which is held in conjunction with the State Bar Annual Meeting. One of the highlights of our meeting is the presentation of the Sarah T. Hughes Women Lawyers of Achievement Award and the Ma'at Justice Award. This is one part of the program preparation where your input is vital to the Council. We need you or your organizations to provide us with nominations for these two awards. There are some incredible women out there who should be recognized for the great things that they are doing for our profession and for women in our community. The deadline to submit nominations is **March 15, 2011**, and should be directed to **Patricia Blackshear** at **phb@fol.com**.

The Sarah T. Hughes Women Lawyers of Achievement Award honors the accomplishments of women who have achieved outstanding recognition in their professional area and who, by doing so, have paved the way for success for others. In deciding who to nominate for this award, I thought that it would be helpful, if not interesting, to set out some of the highlights from the career of Sarah T. Hughes.¹

Sarah T. Hughes has many "firsts" in her professional career. In 1935, she was the first woman to serve as a state district judge in Texas. In 1961, President John F. Kennedy appointed her to the federal district bench. She was the first woman to serve as a federal district judge in Texas. However, she may be best known as the federal district judge who swore in Lyndon B. Johnson as president following the assassination of President Kennedy. Although these "firsts" insured Judge Hughes a place in history, her accomplishments along the way and thereafter created her legacy and the reason for our Section's decision to name this particular award after her.

As it is in life, not all her efforts met with immediate success. Indeed, it is interesting to note that while serving in the state legislature in the 1930's, Judge Hughes co-authored legislation that attempted to give women the right to serve on juries. Here she was, a lawyer and a member of the state legislature, however, women were not permitted to sit on juries. It was not until 1953 that women in Texas were permitted to sit on juries. So she spent a number of years presiding over trials where there were no women allowed on the jury.

It is also interesting to note that although she presided over notable cases such as *Roe v. Wade*, she stated that *Taylor v. Sterrett*, which involved upgrading the treatment of prisoners in the Dallas County jails, was the most important case she tried. Clearly, Sarah T. Hughes' actions and accomplishments paved the way for the success of other women. However, a brief glance over the past years' recipients shows that there are numerous women who continue to pave the way for the success of other women.

The Ma'at Justice Award celebrates individual attorneys or associations of attorneys who are actively addressing the needs and issues affecting women both in the legal profession and in the community. The Egyptian goddess Ma'at was known for bringing order out of the chaos. She symbolizes truth, order, and righteousness. Unlike Sarah T. Hughes, Ma'at was a mythical character, so there are not real life examples of her work. However, the past recipients of this award are awash with examples of the characteristics of Ma'at. Like the award named in honor of Sarah T. Hughes, I believe that these awards remind us of the importance of recognizing the contributions that women and men continue to make in addressing the needs and issues affecting women.

Over the years, there has been much progress in dealing with issues that affect women in the profession and in the community. However, such accomplishments should not lull us into a false sense of security. Such accomplishments should not be taken for granted or assumed that they are enjoyed by all. For instance, women in certain areas continue to fight for equal pay. This issue is even seen in our own profession. Notwithstanding that incoming law school classes generally have as many women as men in their first year classes, women in practice continue to lag behind men in both pay and advancement in the firms. According to the American Bar Association in "Enrollment and Degrees Awarded in 2008," 47 percent of law students enrolled in the first year class were women. Yet, the 2010 survey conducted by NAWL found that only 15 percent of the equity partners in the surveyed firms were women.² Even more troubling is that the survey further showed that women equity partners earn only 85 percent of the compensation earned by their male colleagues. *Id.* The survey was conducted on a limited sample of law firms and the findings clearly are not the case for all firms. Nonetheless, I raise these statistics not to cause consternation, but to emphasize that even in our own profession, there continues to be issues

affecting women in the workplace. Working towards a resolution of issues that affect women in the profession and in the community is not only hard work, but many times frustrating work. Thus, it is important that we acknowledge the women and men who are actively working to address these issues and to encourage them through recognition of their endeavors. However, we need you to tell us about these individuals through the nomination process.

The most difficult task our Council is faced with each year is choosing from the many worthy candidates, the recipients of the Sarah T. Hughes Women Lawyers of Achievement Award and the Ma'at Justice Award. So, now it is time for you to step up and nominate the individuals you believe should be recognized by these awards. Remember the deadline for nominations is March 15, 2011.

ENDNOTES

- 1 The following information was taken from The Handbook of Texas Online, which gathered its information from the Judge Sarah T. Hughes Collection at the University of North Texas Libraries as the source of my information.
- 2 The National Association of Women Lawyers & The NAWL Foundation, "Report of the Fifth Annual National Survey on Retention and Promotion of Women in Law Firms." October 2010.

**SARAH T. HUGHES WOMEN LAWYERS OF
ACHIEVEMENT AWARD
AND
MA'AT JUSTICE AWARD**

The Women and the Law Section are seeking nominations for the *Sarah T. Hughes Women Lawyers of Achievement Award* and the *Ma'at Justice Award*. These awards will be given out at the State Bar's Annual Meeting in San Antonio (June 23rd) during Women & the Law's annual meeting.

The **Sarah T. Hughes Women Lawyers of Achievement Award** recognizes women who have achieved excellence in their fields while influencing other women to pursue legal careers or facilitating their advancement in their legal careers. The impressive list of past recipients includes Louise Raggio, Harriet Miers, Gaynelle Griffin, Justice Alma Lopez, and last year's honoree, Justice Linda Reyna Yanez.

The **Ma'at Justice Award** looks at contributions that women have made in their communities, with an equally impressive list of names, including Carolyn F. Moore, Jonita Borchardt, Judge Migdalia Lopez, Ileta Sumner and last year's honoree, Alicia Key.

More information regarding these awards can be found on our website on the **Women and the Law – Awards page**.

If you know of someone deserving of either of these awards, please email Patricia Blackshear at **phb@fol.com** the (1) name of the nominee; (2) the nominee's contact information; (3) a brief description of why the nominee should receive the award; and (4) any other information that you believe would be helpful to the council in making its decision. **Nominations close on March 15, 2011.**

WE CARE FOR OTHERS AS THEY CARE FOR US

by Carolyn F. Moore



As a child, I watched my mother tend to many people while she and my father operated a small business. At home, she provided tender loving care to my father, younger brother, me, and two of my male cousins whose own mother was terminally ill. She was always ready to help her mother and father and many siblings with meals, transportation, or other errands. She offered the same services to Dad's siblings. When neighbors experienced times of stress, she would clean their houses or take care of their children. She taught several people how to quilt and to sew. For years she would visit elderly friends and help them address and mail bills as well as Christmas cards. By the time she became a grandmother, she willingly spent hours with her grandchildren, doing whatever they wanted to do. She was full of energy and had a zest for life.

She knew that she had to be healthy to maintain her quality of life. She watched what she ate and kept the same weight for most of her life. She did not miss having a check-up with her doctor and dentist, and saw her optometrist on a yearly basis. When she was diagnosed with breast cancer, she listened to her doctors and followed their advice to undergo a lumpectomy. She survived the cancer and was able to care for my father during the years he was ill and eventually died in early 2004.

By the time Mother reached the age of 85, she needed, and accepted, a caregiver of her own because she began to have problems with her memory. She retained her sense of humor and remained in good physical shape until she died just a few weeks before she would have turned 91.

Mother was a good role model because she taught me the importance of doing what I could to keep healthy. To this day, I remember what she would say about eating regular meals, particularly breakfast, to prevent the craving for a snack or second helping of food. I maintain a calendar with notations of when it is time for me to have visits with a doctor or dentist. I also keep a list of web sites that help me keep updated on current issues concerning health. Some of those sites are www.ahrq.gov by the Agency for Healthcare Research & Quality; www.smallstep.gov which has information on health for adults and teens; www.womenshealth.gov from the National Women's Health Information Center; and <http://familydoctor.org>, sponsored by the American Academy of Family Physicians, which has health information for the whole family.

While I will never have the energy that Mother had, I hope to maintain my health and to be as gracious as she was in providing care to others and in accepting care, when needed, from others.

Carolyn F. Moore
Newsletter Editor

FIVE THINGS A WOMAN, HER PHYSICIAN AND HER ATTORNEY SHOULD KNOW ABOUT HEALTH CARE AND PPACA

by Carol E. Jendrzey

In January, the Women and the Law Section in conjunction with the University of Texas Health Science Center's Council For Excellence in Women's Health, and the Bexar County Women's Bar Association sponsored a panel presentation on "5 Things a Woman, Her Physician and Her Attorney Need to Know About Health Care and PPACA." I was honored to moderate the distinguished panel comprised of Eileen Breslin, Ph.D., R.N. FAAN, Graciela Cigarroa, J.D., Catherine Greaves, J.D., Susan Jarvis, J.D., and Luci Leykum, M.D., M.B.A. The mixed audience of attorneys, physicians, nurses, nutritionists, administrators and the public made for insightful questions about the issues from various perspectives.

The Patient Protection and Affordable Care Act ("PPACA") was passed last March. However, as Susan Jarvis explained to the audience, the passage of PPACA was only the first step. There is still work to be done creating the rules and regulations needed to enforce the various provisions. The panel addressed questions regarding the effect of PPACA in different areas, such as medical costs, availability and accessibility of health care, the effect of the change in focus from procedure oriented to outcome oriented care, as well as Accountable Care Organizations. Catherine Greaves talked about how prescription medications, not previously covered as a result of a gap in Medicare Part D

coverage known as the "Medicare Donut Hole" created an issue for many of the elderly, and how this had been partially relieved by PPACA. Ms. Greaves also talked about how co-pays for certain preventative services such as mammograms were no longer required. However, she pointed out, there is still some confusion as to exactly what services are considered part of the preventative care for which no co-payments may be assessed.

Graciela Cigarroa discussed issues related to electronic records under the Health Information Technology for Economic and Clinical Health Act, known as HITECH. The audience raised questions about a health care provider's liabilities with respect to the business associates that it uses for billing and other related services in light of the changes brought about by HITECH. Ms. Cigarroa also was joined by Dr. Leykum in the discussion as they responded to questions from the audience about the effect of HITECH on research studies involving patients.

Susan Jarvis continued the presentation with a discussion about the fact that the 19 to 54 year old age group is the largest uninsured part of the population and how PPACA intends to address that issue. Ms. Jarvis explained the various levels of coverage provided under the Health Care Exchanges and the effect on the employer and



employee. Ms. Jarvis also talked about the protections in place to prevent an individual from being denied coverage due to a pre-existing condition or because the individual developed a serious illness.

Dr. Leykum presented a very informative discussion about the incentives being offered to health care providers to practice more outcome oriented care. As she put it, we are likely to see physicians and other health care providers “more on the patient’s case” about coming in for follow-ups and complying with medication and treatment regimes. Dr. Leykum also talked about how some of these measures may be extended into the workplace, whereby employers may be incentivized to provide healthy alternatives in the workplace.

The Accountable Care Organization (“ACO”) is another new concept to come out of PPACA. Dr. Breslin talked about what an ACO is and what might be expected from ACOs. Her discussion about various types of health care providers, such as physicians, home health care agencies and hospitals all coming together as a group resulted in a number of questions about allocation of payment among the various ACO constituents, as well as, whether a provider could belong to more than one ACO.

The presentation would not have been complete without a discussion about future health care providers. Dr. Breslin, who is the Dean of the UTHSC School of Nursing and Dr. Leykum, who is the Associate Dean for Clinical Affairs at the Health Science Center Medical School shared their thoughts on how PPACA and other issues affect medical and

nursing education. This also led to a discussion on the potential problem of insufficient numbers of physicians and nurses to meet our health care needs. This, in turn, led to a discussion on some of the challenges nursing schools are facing in finding faculty to teach the graduate students necessary to provide such care.

The Council sees this as an opportunity to reach out to its membership and the community. So, if your local bar would like to co-sponsor such an event, please contact me at cejendrez@coxsmith.com.



SETTLING YOUR PERSONAL INJURY CASE WITH A PARTY COVERED BY MEDICARE: NEW RULES YOU NEED TO KNOW

by Melissa Dorman

Recent changes to Medicare make settling a personal injury case with a party covered by Medicare more onerous and potentially more costly.

As of October 1, 2010, new regulations allow Medicare to increase the enforcement of the Medicare Secondary Payer Statute in liability settlements.

Settling parties are being forced to reimburse Medicare for any “conditional medical payments” related to a claimed incident which were included – or should have been included – in a settlement payment to a plaintiff or claimant in relation to the incident.

The practical effect of this requirement is that settling defendants must ensure Medicaid is reimbursed during the settlement process. If the settling defendant fails to reimburse Medicare, the defendant will be responsible for making further payment to reimburse Medicare. This applies to medical care already paid for by Medicare, or for incident-related medical care which might be paid in the future by Medicare.

This brief article is not intended to cover every scenario, describe each step for compliance, or identify the penalties involved in non-compliance. This article is intended to help you help your clients perform due diligence so that they are in a better position to comply with Medicare requirements.

1. What is it?
The Medicare Secondary Payer Statute (MSP) refers to situations where another entity or responsible party is required to pay for covered services before Medicare pays. See 42 U.S.C. § 1395y and 42 CFR § 411:1 *et al.*
2. When is Medicare the Secondary Payer?
Generally, Medicare is a secondary payer to liability insurance, including self-insurance, no-fault insurance, and workers’ compensation.
3. What must be reported to Medicare?
Responsible Reporting Entities (RREs) must electronically identify and report specific information regarding settlements and judgments with Medicare beneficiaries. RREs must register with the Center for Medicare & Medicaid Services (CMS).
4. Who are Medicare Beneficiaries?
 - a. Age 65 and older;
 - b. Someone with a current Medicare Health Insurance Claim Number (HICN);

- c. Someone with a history of permanent end stage renal disease; and
- d. A potential beneficiary is someone with a reasonable expectation of Medicare entitlement within the next 30 months. “Reasonable expectation” includes someone 62.5 years of age or older; one currently receiving Social Security Disability Benefits (SSD); one who has applied for SSD benefits; one who has been denied SSD benefits but who expects to appeal that decision; or one with end stage renal disease.

To protect your client from the possibility of double exposure when settling with claimants covered by Medicare, you should first send the claimant discovery targeted at determining the claimant’s status and details of any Medicare payments made. Further, there is settlement language that can be incorporated into a release or settlement agreement.

Discovery

The following discovery can be used to determine the claimant’s Medicare status and the status of any payments made or anticipated to be made on his behalf.

Definitions:

1. “Medicare” includes Medicare, CMS, COBC, MSPRC or any other entity that has provided information regarding conditional payments made by Medicare on your behalf pursuant to 42 U.S.C.S. 1395y.
2. “Medicare beneficiary” is defined as a person eligible to receive Medicare Coverage pursuant to the requirement of the Social Security Act of 1965.
3. “Medical coverage” is defined as benefits under Part A for Hospital Insurance, Part B for Medical Insurance, Part C for Medicare Advantage Plan Coverage, or Part D for Prescription Drug Coverage of the Social Security Act of 1965.
4. “Incident” is defined as the accident [define more fully] which is the subject of your lawsuit.

Interrogatories:

Interrogatory No. 1: State your full name, social security number, gender, date of birth, and current address.

Interrogatory No. 2: State your Medicare Health Insurance claim number.

Interrogatory No. 3: Are you a Medicare beneficiary?

Interrogatory No. 4: If you are a Medicare beneficiary, state the type of medical coverage you are eligible to receive.

Interrogatory No. 5: If you are a Medicare beneficiary, state the basis for your qualification to receive Medicare coverage.

Interrogatory No. 6: If you are a Medicare beneficiary, have you received medical treatment that was paid for by Medicare related to the injuries allegedly suffered as a result of this incident?

Interrogatory No. 7: If your response to Interrogatory No. 6 is yes, identify each and every injury allegedly suffered that relate to the incident requiring medical treatment that was paid for by Medicare.

Interrogatory No. 8: If your response to Interrogatory No. 6 is yes, identify the cost of the treatment for each and every injury allegedly suffered that relate to the incident that was paid for by Medicare.

Interrogatory No. 9: Are you seeking to recover for future medical expenses as a result of the injuries allegedly suffered that relate to the incident?

Interrogatory No. 10: If your response to Interrogatory No. 9 is yes, identify each and every injury allegedly suffered that relate to the incident you believe will require future medical expenses.

Interrogatory No. 11: If your response to Interrogatory No. 9 is yes, state each and every basis for your belief that future medical expenses will be required for the injuries allegedly suffered that relate to the incident.

Interrogatory No. 12: If your response to Interrogatory No. 9 is yes, provide an estimate of the cost of the future medical expenses for the injuries allegedly suffered that relate to the incident.

Interrogatory No. 13: If your response to Interrogatory No. 9 is yes, provide the method used to calculate the cost of the future medical expenses for the injuries allegedly suffered that relate to the incident.

Requests for Production:

Request for Production No. 1: Produce a copy of your birth certificate.

Request for Production No. 2: Produce a copy of your Social Security card.

Request for Production No. 3: Produce a copy of your Medicare Health Insurance Claim Number card.

Request for Production No. 4: Produce a copy of any and all correspondence with:

- a) Social Security Administration
- b) Department of Health and Human Services
- c) Centers for Medicare and Medicaid Services (CMS)
- d) CMS Coordination of Benefits Contractor (COBC)
- e) Any State or Federal agency regarding Medicare benefits or Social Security Disability Income payments

Request for Production No. 5: Produce a copy of any analysis, including but not limited to, a Medicare Set Aside Allocation of the future medical expenses which might be incurred by Plaintiff which would be covered by medical benefits provided by Medicare.

Request for Production No. 6: Produce a copy of any and all documents associated with any workers' compensation you have that is related to the subject incident, including but not limited to, any settlement statements and future medical expense allocations.

Request for Production No. 7: Produce all documents you or your attorneys have received from Medicare regarding conditional payments made by Medicare on your behalf as a result of the injuries allegedly suffered that relate to this Incident.

Sample Settlement Agreement Terms

Settlement terms will depend on the Medicare status of the claimant. Modification will be necessary to address your appropriate factual situation. Three options are likely to occur: 1) no apparent conditional incident-related medical payments have been made or are anticipated; 2) incident-related conditional payments have been made but no future medical payments are anticipated; and 3) incident-related conditional payments have been made, and future incident-related medical care is anticipated.

The third scenario presents the most risk for the settling defendant. Typical release language, where a claimant gives up his right to recovery against a defendant for unknown future medical payments, will likely require Medicare's review. The parties cannot "contract away" future medical payment possibilities; there must be a good faith attempt to determine such payment amount, and that basis will need to be identified in the agreement submitted to Medicare for review. Address this possibility early with opposing counsel, so it is not a surprise when a settlement is finalized.

Continued on page 14.

Option A: Settlement Language When No Apparent Conditional Payments Made

Plaintiff represents that none of his medical treatment for injuries claimed to have been sustained as a result of the incident was paid for either directly or indirectly by Medicare. Plaintiff's counsel has conducted a reasonable inquiry into possible Medicare payments to Plaintiff or on behalf of Plaintiff relating to the incident which is the subject of this suit, and believes Plaintiff's representations are accurate and complete. Defendant and its counsel have conducted discovery in relation to this issue and are not aware of any information inconsistent with Plaintiff's representations.

Option B: Settlement Language When Conditional Payments Previously Made

Plaintiff has received Medicare conditional payments in the amount of \$_____ [amount identified in conditional payment letter] as identified by Medicare in a Conditional Payment Letter dated ____ [date of most recent Conditional Payment Letter] for treatment for incident-related injuries. Plaintiff understands that Medicare must be reimbursed pursuant to 42 U.S.C.S. 1395y (b)(2) out of the settlement funds which are the subject of this Settlement Release Agreement. Plaintiff further understands that Defendant is legally obligated to report this settlement to Medicare and that Medicare may determine that a different and higher amount than indicated in the Conditional Payment Letter is due based upon their records of conditional payments made on Plaintiff's behalf. A Final Demand Letter for reimbursement by Medicare will be distributed to the parties after Medicare has reviewed this Settlement Release Agreement. Payment of funds to Plaintiff pursuant to this Settlement Release Agreement shall be made after Medicare is reimbursed for conditional payments made on Plaintiff's behalf. Reimbursement shall be made out of the settlement funds in the amount designated in the Final Demand Letter. Under no circumstances shall Defendant's payment obligation exceed the payment obligation identified as the settlement amount in this Settlement Release Agreement.

Plaintiff is not likely to need future medical care for the injuries alleged to have resulted from the incident based upon the evaluation of medical doctors. Thus the parties have not designated any portion of the funds covered by this Settlement Release Agreement to cover Medicare's secondary payer status for future payments.

Option C: Future Medical Payments are anticipated (add to Option B, but omit the last paragraph of Option B):

Plaintiff understands that as part of this settlement, a portion of the settlement funds must be designated to pay for the future medical expenses which are likely to result from Plaintiff's injuries. Plaintiff further understands that all parties to this Agreement have an obligation to protect Medicare's secondary payer status pursuant to 42 U.S.C.S. 1395y (b)(2)(B)(ii). Plaintiff further understands that this settlement and the designation of funds to cover future medical payments may impact, limit or preclude his ability to receive future Medicare benefits arising out of the injuries allegedly suffered as a result of the Incident in this lawsuit, and nevertheless wishes to proceed with this settlement.

Plaintiff's counsel has taken reasonable steps to determine the cost of the future medical expenses Plaintiff is likely to incur from Plaintiff's medical care provider, and has provided such information. All parties to this Settlement Release Agreement have relied upon the representations made by such medical care provider regarding future medical expenses, and have agreed that \$_____ [Amount designated for future medical expenses] of the total amount of the settlement funds shall be designated as funds reasonably anticipated to be used to pay for the future medical expenses.

This Settlement Release Agreement shall be submitted to the Regional branch of the Center for Medicare & Medicaid Services ("CMS") for approval of the future payment amount. If CMS declines to review this Settlement Agreement or if it disapproves the future payment amount and/or substitutes a different future payment amount, such action shall have no effect on the validity of this Settlement Agreement nor shall it increase the Defendant's obligation to Plaintiff or to CMS.

Medicare rules and regulations are constantly changing. To stay current, I recommend consulting Medicare's website, **www.medicare.gov**, and consulting the Medicare provisions found in the U.S. Code and Code of Federal Regulations, 42 U.S.C. § 1395y and 42 CFR § 411.

Melissa Dorman is a Partner with Hartline, Dacus, Barger, Dreyer & Kern, L.L.P. in Dallas, Texas. Her practice involves product liability defense, commercial litigation, and insurance defense.

NEWS FROM HIDALGO COUNTY

By Marissa Carranza Hernandez

The Women's Bar Section of the Hidalgo County Bar Association in conjunction with The Hidalgo County Bar Foundation held the 2nd Annual Heart Gallery of Hidalgo County on November 11, 2010 at The Art Village on Main in McAllen, Texas. Letty Garza of KRGV-News Channel 5 served as the Mistress of Ceremonies. The program's speakers featured Michelle Mendoza from Child Protective Services; Dr. Mary Curtis and her beautiful adoptive daughter Caitlyn; and, Mr. Gerardo Oliva, foster adoptive parent of two beautiful children that were formerly in his and his wife's care.

It is our sincere hope that through the Heart Gallery exhibit, we can help promote awareness, understanding, and encourage the adoption of the many children that find themselves in the foster care program. This year's Heart Gallery exhibit contained 24 photographs and highlighted 38 children currently in the foster care program and available for adoption in Region 11, which comprises of the

following counties: Hidalgo, Starr, Willacy, Cameron, Jim Wells, Aransas, Bee, Nueces, Kleberg, Webb, San Patricio. However, these 38 children are just a fraction of over 300 children in need of a forever family in Region 11 alone. Together, we can make a difference in these children's lives.

Last year, the Heart Gallery came to Hidalgo County for the very first time and out of the sixty-two children featured in the exhibit, sixteen of them found their forever family!

Following the Grand Opening, the exhibit was on display at the International Museum of Art & Science in McAllen until November 30, 2010 and at First National Bank in McAllen from December 1-9, 2010.

For more information on foster adoption contact:

TX Dept. of Family & Protective Services, Region 11 at (361) 878-3545 or log on to: adoptchildren.org

Congratulations to Members:

Chantel Crews received on the first El Paso Women of Impact awards. Chantel practices law in El Paso, Texas and is a former council member and secretary of Women and the Law Section.

Marissa and **Kyle Helm** are the proud parents of **Kaitlyn**, born on November 24, 2010. Marissa practices law in San Antonio, Texas and is a current council member of Women and the Law Section.

New App Offered

The Computer and Technology Section is offering an application for use with Apple products that contains rules, codes, and annotations. It is a free app if you are a member of the Computer and Technology Section. If you are not a current member of the Computer and Technology Section, if you join prior to April of 2011, you will receive a \$10.00 rebate from the Section.

COUNCIL MEMBER DEBORAH CORDOVA FINALIST FOR MINORITY DIRECTOR POSITION

By Andrea Johnson, Immediate Past President

The Women and Law Section is proud to announce that Council member **Deborah Cordova**, a partner with Kittleman, Thomas & Gonzales, L.L.P., in McAllen, Texas, was recently nominated for a Minority Director position on the State Bar Board of Directors. Deborah was one of 16 nominated and one of only two finalists selected for one-on-one interviews with the State Bar President, Terry Tottenham. In addition to being a hard-working transactional lawyer in the Valley, Deborah has also been named a “Texas Rising Star” by Texas Monthly from 2007 through 2010 and is a very active member of the Bar in Hidalgo County. She has acted in several leadership roles within the Hidalgo County Bar, including being the county bar president and president of the county’s young lawyers group, as well. Deborah’s educational achievements were likely strong

indicators of the excellent lawyer she has become. She was a top student at St. Mary’s Law School, graduating in 2002, and she also has an MBA (with a 4.0 GPA) from University of Texas Pan American, received after she graduated *cum laude* from St. Mary’s with a BBA. Deborah is a strong supporter of women’s issues generally and is on the board of the nonprofit networking group Texas Women Lawyers, in addition to her participation in other charitable activities in her area. In sum, she is an accomplished, well-connected, and much respected lawyer, and we with WAL are proud to include her in our council. It is a terrific honor to be a finalist in this highly-selective and extremely competitive process for State Bar Minority Director.

Congratulations to Deborah!