LAW & HEALTH CARE

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Congressmen Ben Cardin and Robert Ehrlich Speak on Medicare/Medicaid Reform

he GOP proposal to overhaul the Medicare and Medicaid systems, predictably, has been a source of daily fireworks in Congress and a cause for concern among those with the most



Congressman Ben Cardin

at stake—the elderly, health insurers, doctors and hospitals.
These are the interest groups with the most to lose, and they are scrambling to try to gauge the effect of reform.

Congressmen Ben Cardin (D-Maryland) and Robert Ehrlich (R-

Maryland), along with the Maryland Secretary of Health and Mental Hygiene, Dr. Martin Wasserman, and representatives from H C F A, the AARP, the Maryland Hospital Association, the



Congressman Robert Ehrlich

Heritage Foundation, and Families USA will convene at a conference at the

From the Director

he revolutionary proposals to reform Medicare and Medicaid are the current focus of much of our attention this fall. As mentioned in our lead article, two of our Congressmen and Maryland's Secretary of Health and Mental Hygiene will discuss the reform proposals at an upcoming L&HCP Conference in December. We are also planning a larger, two-day conference in the spring on the movement of Medicare and Medicaid into managed care. Our L&HCP students are also very involved in some of the current reform at both the state and the federal level. In this issue, one student talks about her experience in our Spotlight feature. Another student is working on the state's effort to overhaul the delivery of services under the Medicaid Program.

We hope you enjoy the issue and have a happy holiday season.

Diane Hoffmann, JD, MS Acting Director

law school on December 4, 1995 to discuss the Medicare and Medicaid reform proposals.

Rep. Ehrlich will be the keynote speaker at the conference and will discuss the need for reform. Dr. Wasserman will speak about the

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Hoffmann Investigator On Advance Directives Study

&HCP Professor Diane Hoffmann, together with investigators from the University of Maryland Schools of Medicine and Social Work, recently completed a study of Maryland's senior citizens and their attitudes about end of life treatment decisions and advance directives. The respondents were from both urban and suburban areas and they were questioned on their knowledge of and attitudes toward living wills and durable powers of attorney for health care (DPAHC), and their preferences for life-sustaining treatment under scenarios involving terminal cancer, permanent unconsciousness, and advanced Alzheimer's disease. The respondents also read and completed the Maryland Advance Directive Form, part of the Maryland Health Care Decisions Act.

The study found that although a large percentage of those questioned were familiar with the concept of a living will (about half were familiar with the DPAHC), only a quarter actually had a living will or DPAHC. Factors significantly associated with having a living will or DPAHC were the presence of a will for estate distribution purposes, the respondent's race (Caucasian), absence of children in close physical proximity, and education beyond high school. The most common reason for obtaining some sort of an advance directive was the respondent's negative experience with

the illness or death of a relative.

In their responses to questions about life-sustaining treatment, three-quarters of respondents uniformly indicated they would not wish to receive such treatment, regardless of the scenario or treatment involved.

Finally, respondents found the Maryland Advance Directive Form confusing, ambiguous and generally difficult to complete. As a result, when responses on the form were checked for internal consistency as well as consistency with responses given to verbal questions similar to those on the advance directive form, high rates of inconsistency were found. These findings point to the fact that much needs to be done to explain the function of advance directives and increase their relevance and accessibility to the general population.

Law & Health Care Newsletter

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Comments and letters should be forwarded to the above address.

L&HCP Director on Leave at NIH Office for Research on Women's Health

In September, L&HCP Program
Director Karen Rothenberg
began a two-semester leave at the
National Institutes of Health (NIH),
Office of Research on Women's Health
(ORWH). As Special Assistant to
ORWH Director Dr. Vivian Pinn,
Rothenberg is serving as an advisor on
a variety of legal and ethical issues
arising from research on women's
health.

In 1994, NIH promulgated guidelines on the inclusion of women in clinical research. Rothenberg is working on education and outreach addressing unresolved issues arising from implementation of the guidelines—issues such as the inclusion of pregnant women in clinical trials and innovative recruitment and retention strategies.

"It is exciting to be able to assist the research community in making the shift from protectionism to a more equitable inclusion of women in clinical trials,"

says Rothenberg.

Rothenberg's education and outreach

efforts extend to both extramural research—research done outside of NIH—as well as research within the NIH community. She recently spoke at the PRIM&R Annual Meeting in Boston to help Institutional Review Boards (IRBs) understand the Institute of Medicine's Report on Women and Health Research—a Report commissioned by ORWH. Rothenberg addressed the implications of the Report for IRBs and the research community, and also helped to organize two workshops to field questions and comments from IRB members.

Rothenberg is also responsible for increasing ORWH's collaboration on the ethical, legal and social implications of genetic research with the National Center for Human Genome Research (NCHGR), the National Cancer Institute (NCI), and other national research institutes.

While on leave, Rothenberg plans to continue her scholarship in the areas of women's health and genetics.

LAW & HEALTH CARE PROGRAM

ADJUNCTS

Lewis A. Noonberg A.B., 1959, Dartmouth College LL.B., 1962, University of Maryland

hey're getting stronger all the time," Lew Noonberg says without hesitation when asked how health care law students have changed since he first started teaching. Noonberg speaks from a position of authority having been a lecturer at the University of Maryland School of Law for nearly thirty years.

Noonberg is a partner in the Washington office of Piper & Marbury, Baltimore's largest law firm. He received his LL.B. from the law school in 1962 and is a former Assistant Attorney General for the State of

Maryland. He began teaching Federal Jurisdiction in 1967, Antitrust Law in 1980, and added the Antitrust and Health Care Law Seminar in 1986.

Noonberg says his interest in antitrust and health care law was stimulated at the height of the Reagan-Bush administration. Around that time, traditional antitrust law was being slowly eroded while antitrust and health care law was growing steadily. When Karen Rothenberg founded Maryland's Law & Health Care Program in the 1980s, Noonberg recalls that he and Rothenberg would

the Second Annual

Research Program

and expertise in the

field of elder law.

tology Education and

get together "to talk about health care issues "

"Karen's enthusiasm was infectious," says Noonberg, "and considering my own interests at the time, it just seemed a natural fit for me to develop the antitrust and health care law course."

Talking about trends in the antitrust and health care law field, Noonberg's own enthusiasm is apparent. "It's a constantly evolving market," he says, "and the market is more dynamic than any I have seen in thirty years. The groups involved—third-party payors, institutional providers, individual providers (as well as the government and special interest groups) are economically at war. From a legal standpoint, it's a fascinating situation."

The enthusiasm and "real world" experience that instructors like Lew Noonberg bring into the classroom have played a part in garnering the national recognition the L&HCP has enjoyed recently. They are a valued part of the Program.

Program news



Vivian W. Pinn, MD

At the L&HCP's recent conference: "Breast Cancer: Controversies and Challenges," Dr. Vivian Pinn, Associ-Women's Health, spoke on "Meeting the Challenges in Breast National Breast Cancer Coalition, delivered the keynote speech.





From left to right: Barbara Fulller, 3D, Karen Gally, 3D, and Dean Donald Gifford.



Frances M. Visco, JD

. . . and the Best Brief winner is!

ongratulations to our National Health Law Moot Court Team which won Best Brief in the competition held at Southern Illinois University School of Law on November 3-4, 1995.

Students Karen Gally, Andrea Imredy and David Clissold wrote the brief and Karen Gally, David Querido, and David Clissold argued.

Our team was undefeated at the end of the first round and placed 9th of 24, missing advancing to the quarter finals by 1.6 points. Professors David Hyman and Joan O'Sullivan were coaches.

L&HCP Faculty Notes . . .

PROFESSOR KAREN ROTHENBERG

Publications:

"Genetic Discrimination and Health Insurance: An Urgent Need for Reform," with K. Hudson, L. Andrews, M.J. Kahn, and F. Collins, 270 Science 391 (1995)

"The Risk of Domestic Violence and Women with HIV Infection: Implications for Partner Notification, Public Policy, and the Law," with S. Paskey, 85 American Journal of Public Health 1569 (1995)

"Domestic Violence & Partner Notification: Implications for Treatment and Counseling of HIV-Infected Women," with S. Paskey, M. Reuland, S. Zimmerman & R. North, 50 Journal of the American Medical Women's Association 87 (1995)

Selected Presentations:

"The Institute of Medicine's Report on Women and Health Research: Implications for IRB's and the Research Community," PRIM&R Annual Meeting, Boston, Massachusetts (1995)

"Genetic Testing and Managed Care," American Society of Law, Medicine and Ethics Annual Meeting, Boston, Massachusetts (1995)

"Women and Genetics: Ethical, Legal and Social Implications," The Jacobs Institute's Women's Health Series (1995)

"Tissue Banks and Repository Issues: Lessons for the Past: Challenges for the Future," panelist at DOE-NIH Conference, Bethesda, Maryland (1995)

"Genetic Information and Health Insurance: State Legislative Approaches," Workshop on Genetic Discrimination and Health Insurance: A Case Study on Breast Cancer, Bethesda, Maryland (1995)

"Predictive Genetic Testing and Public Policy: Legal, Ethical, and Societal Challenges," General Motors Cancer Research Foundation Conference, Bethesda, Maryland (1995) "Partner Notification, Domestic Violence & Women with HIV," Violence and HIV Conference, National Association of People With AIDS & The New York Gay & Lesbian Anti-Violence Project (1995)

"TB Control in the Age of AIDS," 16th Annual Health Law Teachers Conference of the American Society of Law, Medicine, and Ethics, Chicago, Illinois (1995)

Selected Appointments:

Member, American Law Institute (ALI) (1995-)

Member, The National Advisory Board on Ethics in Reproduction (1995-)

Assistant Professor Diane Hoffmann

Publications:

"Handbook for Nursing Home Ethics Committees," with P. Boyle & S. Levenson, American Association of Homes & Services for the Aging (AAHSA), Washington, D.C. (1995)

Selected Presentations:

"Emergency Care and Managed Care
— A Dangerous Combination for
Patients (or Catch 22 for Emergency
Doctors — The Conflict of AntiDumping and HMO Policy)," Annual
Meeting of the American Society of
Law, Medicine & Ethics, Boston, MA
(1995)

"Research Involving Cognitively Impaired Individuals—A Report from Maryland," at Humanistic Aspects of Research in Long Term Care: A Consensus Conference sponsored by the American Medical Directors Association, Washington, D.C. (1995)

"Legal and Ethical Issues in Providing Medical Care to the Elderly in the Year 2000—The Right to Refuse Treatment to the Right to Receive Treatment,"
University of Maryland at Baltimore
(UMAB) Breakfast Roundtable on "The
Graying of America: Challenges and
Opportunities," Baltimore, MD (1995)

"Ethical and Legal Issues in Gene Diagnosis," Conference for Newly Elected State Legislators, sponsored by the Greater Baltimore Committee, Baltimore, MD (1995)

ASSOCIATE PROFESSOR DAVID A. HYMAN

Selected Appointments:

Named to Privacy/Confidentiality Workgroup for the Maryland Health Care Access and Cost Commission

Visiting Lecturer at the University of Maryland Dental School on "Fundamentals of Health Law"

Other:

Co-Coach (with Joan O'Sullivan) of National Health Care Moot Court Team

VISITING ASSISTANT PROFESSOR JOAN O'SULLIVAN

Selected Presentations:

"Ethical Aspects of Guardianship," Clifton T. Perkins Hospital (1995)

"Long Term Care Issues," House of Delegates Environmental Matters Committee Health Retreat, Woodmont, MD (1995)

Other:

Co-Coach (with David Hyman) of National Health Care Moot Court Team

CLINIC LAW

The law school offers, as part of its regular curriculum, a clinical law program in which faculty members who are practicing attorneys supervise law students in the representation of actual clients. For those students with a general interest in health law, the clinic represents clients in cases involving health care for children, legal issues of the handicapped, mental illness, AIDS and the elderly.

The health law clinic uses a rather loose definition of "health law" when deciding whether a particular case fits within our bailiwick. Generally, we limit the cases we accept to those in which health care or the health care delivery system is a prime focus. For example, we have accepted guardianship cases that teach students about standards for mental competency, community heath care systems and the diseases of the aged and disabled. Debt collection cases involving hospital or doctor's bills teach about how well health insurance programs cover, or do not cover, a person's need for health care.

When the client is elderly, almost any case we accept will teach some aspect of health law, so pervasive are health problems in the lives of older persons. One case in particular, involving an 86 year old client, clearly illustrated this point last semester. If a younger person had been the client, the law that the student attorneys learned would have related to fraud, undue influence, forgery, breach of fiduciary duty and real property. But because the client was older and very ill, the pertinent law also included standards for mental competency, access to medical records, rules of discovery to preserve testimony, rights of nursing home patients, Medical Assistance and Medicare regulations, rules for drafting powers of attorney and advance medical directives, and intestate succession.

by Joan O'Sullivan, JD

At first this case seemed to be a case of financial abuse of an elderly woman by a young man whom she trusted. The story, as related by a social worker at the City's Adult Protective Services Division, was that the young man had added his name to the client's deed, life insurance policy and checking accounts without her knowledge a year before. She had only recently learned of the deception, and wanted to "get her house back." The case came to us at an inopportune time for law students, about three weeks before final exams started. but clinic students Barbara Fuller and Ti'i Etokebe, after talking to the client, decided that we had to take the case to correct a grave injustice.

The first hurdle was to determine whether our client, Mrs. G., was competent to hire us and whether her memory was intact enough for us to rely on her testimony. She had recently been hospitalized due to complications from a hip replacement a year earlier, and we were uncertain about her mental state. Before we went to see her. Fuller briefed herself on the definitions of incompetency and on the rules of professional conduct which govern representing a client who is questionably competent. This preparation was unnecessary, however, for we found our client to be bright and sharp, and feeling very angry at being betrayed by Mr. W., the grandson of her longtime friend. She told us Mr. W. had volunteered to help her with her bill paying after her husband died, and had access to her financial papers and a key to her house.

Mrs. G. could not account for the fact that a deed transferring a half interest in her house to Mr. W. appeared to have her signature on it, but she did remember that she had been in the hospital at the time the deed was signed. Fuller, a former medical records administrator, set out to verify this hospitalization. However, in order to convince the custodian of the hospital records to release them to her, she had to argue from Maryland's statute regarding the confidentiality of medical records.

In the meantime, Etokebe was researching the law regarding fraudulent conveyances of real estate. He soon realized that Mrs. G.'s testimony would be crucial to our case. He is a registered pharmacist, and his experience with elderly patients caused him to recommend that we immediately preserve her testimony in case her condition deteriorated later. He began arranging to take a videotaped deposition in the hospital, even before we filed the petition to set aside the fraudulent deed. However, in another lesson about how health law affects the elderly, Medicare informed Mrs. G. that her condition had improved to the point that she no longer needed acute hospital care. Etokebe started arranging the deposition all over again with the nursing home to which Mrs. G. was moved.

Negotiations were also proceeding with Mr. W., who, at first, would assert vigorously his right to Mrs. G's property, and then later would agree to return it voluntarily to her. Despite his promises, he failed to sign the deed we sent him. We served him with the notice of the deposition, and consulted with Mrs. G.'s doctor about whether his appearance at the deposition would cause Mrs. G. undue stress, on top of that caused by a video camera operator and a court stenographer setting up in her nursing home room. He thought she could handle the confusion, and arrangements proceeded.

The nursing home administration cooperated with our unusual request to video tape their resident up to the point at

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Rothenberg Collaborates on NIH Workshop on Genetic Information and Health Insurance

hile recent scientific advances have helped to identify an ever-growing number of genetic alterations which place individuals at risk for certain diseases, these same advances have raised profound questions. Who will have access to genetic information? How will this information be used by insurers and employers?

On July 11, 1995, the National Action Plan on Breast Cancer (NAPBC) and the National Institutes of Health-Department of Energy (NIH-DOE) Working Group on the Ethical, Legal and Social Implications (ELSI) of Human Genome Research organized a workshop, entitled, "Genetic Discrimination and Health Insurance: A Case Study on Breast Cancer."

As a member of the NAPBC Breast Cancer Susceptibility Gene Working Group, Professor Karen Rothenberg helped to organize the workshop and presented her analysis of state legislative approaches in this area.

The first state laws addressing genetic discrimination and health

insurance were limited in scope and focused primarily on discrimination against people with a single genetic trait. Since the Human Genome Project was launched in 1990, eight states have enacted more extensive legislation. These states (California, Oregon, Colorado, Minnesota, Wisconsin, Ohio, Georgia and New Hampshire) prohibit:

- requiring or requesting an individual or a family member to obtain a genetic test,
- requiring or requesting directly or indirectly the results of a genetic test,
- conditioning the provision of insurance coverage or benefits on genetic testing, and
- considering genetic testing in the determination of rates.

Nearly all of the state laws focus narrowly on genetic tests, rather than more broadly on genetic information generated by family history, physical examination, or the medical record. Currently, there is no federal legislation which protects individuals from being denied health insurance on the basis of genetic information.

Rothenberg ended her analysis with a series of questions which helped to frame the policy discussion at the workshop. As published in the October 20, 1995 issue of *Science*, the ELSI Working Group and the NAPBC developed the following recommendations for state and federal policymakers:

- Insurance providers should be prohibited from using genetic information, or an individual's request for genetic services, to deny or limit any coverage or establish eligibility, continuation, enrollment or contribution requirements.
- Insurance providers should be prohibited from establishing differential rates or premium payments based on genetic information or an individual's request for genetic services.
- Insurance providers should be prohibited from requesting or requiring collection or disclosure of genetic information.
- 4) Insurance providers and other holders of genetic information should be prohibited from releasing genetic information without prior written authorization of the individual. Written authorization should be required for each disclosure and include to whom the disclosure would be made.

Student Health Law Organization (SHLO) News

he Student Health Law
Organization kicked off the fall
semester with an informational
meeting for students to learn about the
SHLO. The sixty-two member SHLO
is headed by an executive committee
staffed by the following students:

Co-chairpersons—Karen Russell Gally and Andrea Imredy Treasurer—Claudia Zuckerman Secretary—Brenda Douglas Networking & Career Chairperson— Robyn Glassman Events Chairperson—John Pucker Curriculum Chairperson—
Suzanne Jenkins
Community Outreach Chairperson—
Batina Wills

Additionally, Erica Cook sits on the executive committee as an at-large member.

Students are excited by a new service offered for the first time this fall: a mentoring program organized by the SHLO and the University's Law & Health Care Program. Students wishing to learn more about a certain aspect of health law, or desiring to network with local practitioners, are matched with

health lawyers in the Baltimore region who have generously volunteered their time. Currently there are twenty-one mentors participating in the program, and the SHLO and Law & Health Care Program hope to continually add more mentors to meet student needs.

In September, the SHLO co-sponsored with the Federalist Society a campus visit by John S. Hoff, a partner with the Washington, D.C. office of Swidler & Berlin. Mr. Hoff discussed Medicare Voucher Reform and other reform proposals circulating Capitol Hill.

The SHLO raised money during the fall semester for the Alzheimer's Association, and participated in that

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Spotlight on . . .

HEALTH LAW PRACTICUMS AND EXTERNSHIPS: U.S. Senate—The Subcommittee on Aging

by C. Diane Wallace-Booker, 3D

The legislative bell rings three times. I flip through my Intern Handbook to find out what three rings mean, ahh - three rings - a call of the absentees to vote. The first week of my Health Care Practicum at the U.S. Senate in Senator Barbara Mikulski's Office was filled with questions and many new experiences. Not only was I excited to work on health care issues, I was also excited to learn about Congress and its inner workings.

Initially, I was given a tour of the Hart and Dirksen Senate office buildings. Along with the hundreds of offices, the Senate building includes several cafeterias, barber shops, gift stores, a laundry, bank, post office, library, stationery store and an underground metro to the Capitol. It is like a mini-city with security and transportation, except unlike most cities, there is no sales tax. The next stop on my tour was the Capitol Building which was very impressive with its exquisitely designed ceilings, House and Senate floor, beautiful paintings and sculptures.

Soon the excitement of being on Capitol Hill was over and the work piled high. I was assigned to work on the Subcommittee on Aging which handles health care issues for the elderly. Senator Mikulski is the ranking minority leader for this subcommittee. My assignment included Medicare reform issues, such as Medicare fraud and abuse, the implica-



C. Diane Wallace-Booker

tions of Medicare beneficiaries moving into managed care, the Patient Access to Specialty Care Act and other similar issues dealing with reform.

The pace of a Senator's office is rapid with Legislative Aids, interns and staff buzzing through the halls to attend mark-up meetings and various conferences. The phone rings constantly with calls from special interest groups and constituents desiring to voice their opinions. And the legislative bells ring all day long to alert Senators to a floor vote, a Quorum call, Roll Call Vote and the like. I like the fast pace because it means I have an opportunity to work on something different every week.

I work on the Hill two days a week, which has only given me a glimpse of the everyday life of Congress. In the month that I have left to complete my Practicum, I hope to work on several more substantive projects involving Medicaid reform. I feel this experience

The Law & Health Care Program's Health Law Practicum Program (dedicated to Louis D. Asper, a Maryland Law School professor who advocated practical training for students) provides an opportunity for students interested in health law to obtain credit by working for organizations and government agencies dealing with health care issues. Students spend 10 to 20 hours at their placement and additional hours throughout the semester in the classroom participating in a health law workshop. Placements have included the American Nurses Association; FDA; Johns Hopkins Hospital, Office of the General Counsel; Med-Chi of Maryland; Medlantic Healthcare Group; National Health Law Program; NIH; U.S. Senate Special Committee on Aging; University of Maryland Medical System, Office of the General Counsel; and the Office of the Attorney General, General Litigation Unit and Medicaid Fraud

The Program has also offered four full semester externships—The National Health Law Program externship in Washington, D.C.; The University of Maryland externship, located in University Hospital's General Counsel's office; Blue Cross/Blue Shield of Maryland (BCBSM), and the Health Care Access and Cost Commission.

has been a very valuable part of my legal education. While working for a Senator's office offers a very different experience than working for a health care organization, I believe I have learned a lot of substantive health care law and especially health care policy.

Cardin and Ehrlich Speak at Conference Cont. from page 1

proposal's effect on Maryland and Rep. Cardin will provide some insight into the "politics" surrounding the proposal's move through Congress.

At present, the proposal increases premiums for some beneficiaries, encourages the use of managed care, caps payments to doctors and hospitals, and allows patients to choose among different types of health care plans, including a high deductible plan in conjunction with a medical savings account. The GOP Medicaid proposal shifts responsibility to State government, guaranteeing a lump sum payment to States restricted by few federal caveats.

In The Health Law Clinic Cont, from page 5

which we asked them to leave the room during the deposition, when we pointed out that Mrs. G. had the right to private visits under Maryland's nursing home patient's bill of rights.

Mrs. G. gave lucid, strong testimony during the deposition, so strong that we were confident that we had a good chance to win back the ownership of her house. Mr. W. did not appear, but just as we were concluding the deposition, in true Hollywood style, there was a knock at the door. It was the nursing home social worker with a letter for Mrs. G. which had just been dropped off at the front desk. Inside was a deed signed by Mr. W., returning to her all his rights in her property. (The social worker had opened the envelope on the way to give it to Mrs. G., though she claimed she didn't read it. Fuller later pointed out to her that the nursing home bill of rights also guaranteed residents the right to unopened mail.)

Mrs. G. was delighted with the return

of her property and Fuller quickly drafted a new will for her, along with a power of attorney and an advance directive for medical care, to ensure that she was not taken advantage of again. Sad to say, she died a few days later, but with the knowledge that her house would go to her beloved niece, and not to the unscrupulous Mr. W.

In a few short weeks these hardworking and dedicated clinic students learned volumes of health law while achieving an excellent result for their client. We all were reminded of how intertwined health law is in the lives of older persons in the United States, and the importance of learning it in law school.

SHLO News

Cont. from page 6

association's annual "Memory Walk" in Memorial Stadium, on October 22.

Professor Diane Hoffmann enlightened students in October about what it was like to spend a one-year sabbatical on Capitol Hill working on health care reform legislation with Senator Barbara Mikulski. After describing the history of the recent health care reform debate and how the legislative process changed, and eventually killed, the health care reform legislation, Hoffmann described what the working environment is like on Capitol Hill, particularly under the tutelage of Senator Mikulski.

In November, the SHLO sponsored a "Meet the Health Law Faculty" reception to promote L&HCP courses and to afford students a chance to meet with professors informally.

Events planned for the spring semester include a panel discussion on health care reform in Maryland, a career symposium entitled "Non-traditional Choices in Health Law Careers", a joint meeting with the Health Law Section of the Maryland State Bar Association and an all-day event entitled "How to Be An Informed Medical Consumer," where members of the law school community will learn about health care advance directives, how to report medical malpractice, and consumers' rights when dealing with insurance companies.

LAW & HEALTH CARE PROGRAM

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