

LAW & HEALTH CARE

N E W S L E T T E R

Volume VII

Number 2

SPRING CONFERENCE Guns As A Consumer Product

In this issue:

Spring Conference: Guns As a Consumer Product	1
Karen Rothenberg Named Dean	2
Faculty News:	
UN Symposium on International Disability Rights	4
Hellman Explores Moral Choices in the Design of Clinical Trials	6
Hoffmann Elected Chair of Maryland Health Care Ethics Committee Network	7
Faculty Notes	7
Is There a Pink Slip in My Genes?	8
JHCL&P Elects 2000-2001 Board	9
Focus On:	
The Student Health Law Organization	10
L&HCP Places in Top Five in <i>U.S. News and World Report</i> Survey	12
In the Health Law Clinic	13
Concentration in Health Law Awards	14
Spotlight on Practicums	15

Maryland Governor Parris N. Glendening and Attorney General J. Joseph Curran, Jr. were keynote speakers at the L&HCP's Spring conference, "Guns As A Consumer Product: New Public Health and Legal Strategies to Reduce Gun Violence," held on March 9, 2000.

The conference was a response to the mounting evidence that firearm injury and related death has become an epidemic. In fact, there is a growing list of literature that connects not only homicides but also suicides and unintentional deaths to gun ownership and an equally fast-growing list of proposals to reduce gun violence. These proposals, in part, reflect a move to regulate guns in the same manner that cars, toys, and other consumer products are regulated. At the same time, there have been a number of products liability lawsuits against gun manufacturers for failure to childproof or design safe guns. One of the first suits to allege failure of a manufacturer to design and market a childproof gun is pending in Maryland. These initiatives challenge the limits of consumer products safety and liability laws and could have far-reaching effects on the sale of guns in this country.

The conference, held while the Maryland legislature debated the merits of "smart gun" legislation, explored the public health, policy, and legal ramifications of gun violence and the proposed

changes to the law in Maryland and around the country.

As the first presenter, Governor Glendening spoke passionately about the bill, sponsored by this administration, that would require all guns sold in

Cont. on page 3

From the Director

This has been a year of transitions for the Law & Health Care Program. Karen Rothenberg, the founder and Director of the Program, served as Interim Dean of the Law School this past year and was recently appointed Dean (see story, p. 2). In addition, the Law School moved to temporary quarters while our new building is under construction.

In spite of these significant changes, the L&HCP has continued to thrive. Our faculty continues to be extremely productive (see Faculty News and Faculty Notes), our *Journal of Health Care Law & Policy* continues to put forth issues on significant and timely societal questions, most recently on "Defining a Disability Under the Americans with Disabilities Act," (see story p. 8) and our students continue to be more energetic than ever (see our story on the Student Health Law Organization, p. 10).

We look forward to even more new developments in the Program over the next year and look forward to sharing them with you!

Diane Hoffmann
Interim Director

Learn more online!
Visit our website:
[www.law.umaryland.edu/
maryhealth/index.htm](http://www.law.umaryland.edu/maryhealth/index.htm)

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Interim Director, L&HCP and Associate Dean,
University of Maryland School of Law

Joan O'Sullivan, JD

Acting Associate Director, L&HCP

There are a number of law school
faculty who contribute to the diversity of the
Law & Health Care Program through their
teaching and scholarship. We share some of
these faculty's selected publications, presenta-
tions, and appointments in *Faculty Notes*:

Taunya Lovell Banks, JD

Richard Boldt, JD

Karen Czapanskiy, JD

Deborah S. Hellman, JD, MA

Susan J. Hankin, JD, MPH

Stanley S. Herr, JD, DPhil

David A. Hyman, MD, JD

Susan Leviton, JD

Karen Rothenberg, JD, MPA

Rena I. Steinzor, JD

Deborah J. Weimer, JD, LL.M.

Roger C. Wolf, JD

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James Doherty, Jr., JD, Pecore & Doherty, LLC

W. Lawrence Fitch, JD, Community

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Kevin McAnaney, JD, Office of Health and

Human Services

Lewis Noonberg, JD, Piper and Marbury

Frank Palumbo, PhD, JD, University of

Maryland School of Pharmacy

Robert T. M. Phillips, MD, PhD

Forensic Consultation Association, Inc.

Sanford V. Teplitzky, JD, Ober, Kaler,

Grimes & Shriver

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*Comments and letters should be
forwarded to the above address.*

Karen Rothenberg Named Dean

On April 6, 2000, University of
Maryland President David J.
Ramsay named L&HCP

Director Karen Rothenberg Dean of
the University of Maryland School of
Law. She has served as Interim Dean
since August, 1999 after former Dean
Donald Gifford resigned. An exten-
sive candidate search was conducted
prior to Rothenberg's appointment.

The appointment makes Rothenberg
the first woman to lead the law school
in its 184-year history and one of
about 20 women law school deans
across the country.

Rothenberg started her legal career
at the firm of Covington and Burling
in Washington, D.C. handling health
law issues. As the industry was being
revolutionized by changes such as the
advent of managed care, the health
law field grew increasingly more
complex.

She made the change from private
practice to academia seventeen years
ago, and when she joined the law
school faculty, Rothenberg made
several commitments. One of the first
to be realized was the formation of
the Law & Health Care Program,
which has flourished under her
direction and is consistently ranked in
the top five such programs nationwide
by *U.S. News & World Report*.

A second commitment was to foster
interdisciplinary programs on the
University of Maryland Baltimore
campus. In addition to the law
school, the Schools of Dentistry,
Medicine, Nursing, Pharmacy and
Social Work are located on the
campus, as well as the University of
Maryland Medical System. Today, a
pervasive spirit of interdisciplinary
cooperation is evident in the curricu-
lum, clinical education, faculty
research, conferences, symposia—
nearly every aspect of campus life has
been positively affected by the trend.



Dean Karen Rothenberg

Rothenberg has also been nationally
recognized for her scholarship in health
law. Her research has impacted many
cutting-edge issues in the field, including
regulation of the use of genetic informa-
tion by insurers and employers, regula-
tion of clinical research and reproductive
technologies, and women's health and
HIV-AIDS issues.

In appointing Rothenberg, Ramsay
said, "In her seventeen year career as a
faculty member at Maryland, Professor
Rothenberg has earned a reputation for
excellence not only on campus but in the
national and international legal and
health care communities. I am sure that
under her leadership the School of Law
will continue to grow in stature."

Professor Diane Hoffmann, former
Associate Director of the L&HCP, is
currently Interim Director and Professor
Joan O'Sullivan has been appointed
Acting Associate Director.

Guns As a Consumer Product

Cont. from page 1

Maryland to have built-in trigger locks as of 2002 as well as the possible application of "personalized handgun" technology (e.g., guns that could recognize owners and other authorized users) by as early as 2003. (See box, this page.)

The Governor's keynote was followed by a session on the epidemiologic evidence of gun violence and the public health response. Speakers included James A. Mercy, Ph.D. and Stephen Teret, J.D., M.P.H. Mercy, a Visiting Professor in the Department of Emergency Medicine at the Medical College of Wisconsin (MCW), was formerly the Associate Director for Science of the Division of Violence Prevention at the Centers for Disease Control in Atlanta. He is currently working with the Firearm Injury Center at MCW and professionals across the country to build a National Firearm Fatality Reporting System.

Teret is Director of the Johns Hopkins Center for Gun Policy and Research and is a national expert on firearm injury prevention. Under Teret's leadership, in 1996, the Center developed a model law that would require all new handguns to be personalized, that is, only fired by their intended owner. The model law,

revised in 1998, has been used by Pennsylvania, New Jersey, New York and other states in their efforts to write effective legislation.

Vincent DeMarco, representing Marylanders Against Handgun Abuse, spoke on the politics of gun control and voter education. He distributed excerpts from the Maryland Handgun Poll, which showed that 76 percent of Maryland voters favor legislation requiring all new handguns sold in Maryland to be personalized and child-proof.

Attorney General Curran, the conference luncheon speaker, discussed his recently published 63-page report, "A Farewell To Arms: The Solution to Gun Violence in America," which calls for banning firearms, as well as his personal reasons for becoming involved in this highly controversial issue.

Other speakers at the conference included: Stuart Simms, Secretary of the Maryland Department of Public Safety and Correction who spoke on gun safety issues in Maryland, Jon Vernick from the Johns Hopkins Center for Gun Policy and Research who provided information on legislative proposals regulating gun safety, Dr. Thomas Scalea, physician-in-chief of the R Adams Cowley Shock Trauma Center who provided information on

both the increase over time of the severity of handgun injuries and the increase in number of such injuries, and Senator Timothy R. Ferguson, Maryland State Senate who spoke on redesigning guns, questioning whether the technology was far enough advanced.

The conference ended with a provocative discussion by four panelists, who in light of recent litigation against gun manufacturers, debated whether the tort system is the best way to force change in the design of guns. The four panelists were Andrew D. Freeman, Brown Goldstein and Levy, representing the plaintiff in the current suit in Maryland against Sturm Ruger for failure to childproof their guns; Lawrence S. Greenwald, Gordon, Feinblatt, Rothman, Hoffberger & Hollander, LLC, who represents Beretta U.S.A. Corp. in products liability litigation; Jonathan E. Lowy, from the Center to Prevent Handgun Violence, and Deborah L. Robinson, Robinson Woolson O'Connell who teaches products liability law as an adjunct professor at the University of Maryland School of Law.

Papers based on the conference presentations will be included in a symposium issue of the *Journal of Health Care Law & Policy* to be published later this year. A *Journal* order form is included on page 9.

President Clinton Attends Signing of Gun Control Bill

On April 12, 2000, President Bill Clinton attended the ceremony during which Governor Parris Glendening's gun control bill was signed into law. Dean Karen Rothenberg was also present at the signing.

The main provisions of the law require that all handguns sold in Maryland as of October 1, 2000 must come with external trigger locks, and as of January 1, 2003, all new handguns must have built-in locks. Police guns will be exempt. "Smart gun" technology was deleted by

amendment, but the law requires a state board to report on the technology.

Other provisions require:

- Some felons, if found with a firearm after release from jail, to serve mandatory minimum sentences of five years without parole;
- Handgun purchasers to complete a two-hour gun-safety course;
- Gun manufacturers to send dealers a bullet casing from any handgun sold in Maryland. The dealer must send the casing to state police for use in tracking guns used in crimes; and

- Juveniles convicted of a violent crime to be barred from owning handguns until age 30.

At the bill signing, President Clinton praised Maryland for taking the lead on this controversial issue, "Everything [my administration] has tried to accomplish . . . Maryland has been out there on the forefront of the change, and is again leading the way. Congress should follow Maryland's lead."

UN Symposium on International Disability Rights

by Stanley S. Herr

Professor Herr is a professor of law at the University of Maryland School of Law and immediate past president of the American Association on Mental Retardation. He is on sabbatical leave as Visiting Richard Crossman Professor, Haifa University and Mary Switzer Distinguished Research Fellow, National Institute on Disability Research and Rehabilitation, U.S. Department of Education. In this article Professor Herr describes his experiences as a delegate to the UN Symposium on International Norms and Standards Relating to Disability.

How do you advance the rights of the world's 500,000,000 people with disabilities? How do you help governments and society to see and understand the human rights and needs of this huge, but largely invisible minority? How do you assure that the less assertive and less vocal sectors of this minority, such as people with intellectual disabilities, receive their due concern and dignity? These in essence, were the challenges posed by the United Nations cosponsored Interregional Seminar and Symposium on International Norms and Standards Relating to Disability, held in Hong Kong from December 13-17, 1999.

Along with its co-organizers, the Equal Opportunities Commission of Hong Kong and the Faculty of Law of the University of Hong Kong, the UN sought to bring together international experts to consider three main topics. The first was to critically examine the adequacy of the existing human rights framework for persons

with disabilities and to explore current and possible strategies for ensuring the equalization of opportunities for people with disabilities. The second was to map issues and strategies for building national capacity to promote and monitor the implementation of those human rights. The third was to analyze emerging approaches to the definition of disability. These were tough and complex issues to confront, but in several respects, this meeting at the end of the millennium may prove a turning point for international disability rights.

I was privileged to be invited to the conference as a delegate—experts on law and on disability rights representing some 20 countries around the world. At Maryland Law School, my students and I had often worked on law reform projects of national and even international dimensions so I welcomed this chance to extend my work on international law relating to people

with mental, physical, and sensory disabilities.

These were truly roll-up-your-sleeves, working sessions with meetings and drafting sessions from morning through night. Add a considerable touch of jet lag and the participants required the stamina of marathon runners. To facilitate open discussion, the tasks of moderating sessions were rotated among the experts. I moderated two sessions and worked with a drafting group responsible for developing findings and recommendations on international norms and standards. This collaborative work with Theresia Degener, a visiting professor from Boalt Law School and a German disability rights specialist and activist [who happened to be born without arms], and Janet Lord, a legal analyst with the World Bank, was intense and very satisfying. By the end of the week, we had a substantial draft report with

recommendations targeted to the UN, governments, non-governmental organizations [NGOs] and even the corporate sector.

By far, our most dramatic recommendation was for a United Nations treaty on disability rights. In a session that I led with Prof. Degener, after thoughtful contributions from all the delegates, we concluded that the UN, member States and disability rights organizations "should initiate the process for the adoption of an international treaty dealing specifically with the human rights of people with disabilities." Recognizing that such a process will take time and resources, the forum called for a drafting process for such a treaty that would be open and inclusive, taking into account the interests of all persons with disabilities, and involving such persons as principal participants in that process. Since a regional convention is now open for ratification—the Inter-American Convention on the Elimination of All Forms of Discrimination—governments in the Americas were urged to ratify this document. We concluded that other regional efforts could also help to pave the way for an international convention. Unlike "soft law" declarations, regional and UN treaties are enforceable and "have teeth."

In the Seminar's final plenary session, we adopted dozens of recommendations that can spell concrete progress for international disability rights. These included 15 recommendations directed to the UN and its constituent bodies and more than a dozen recommendations to governments.

We also produced an impressive agenda for future research and activism. Among other items, the forum called for research to identify the uses of international standards on disability in domestic law contexts such as litigation, legislation, and other public policy formulations. We agreed to develop a compilation of national

Faculty News . . .

laws on disability discrimination, special education, vocational rehabilitation, personal support, accessibility to health care services, transport, and other supports and benefits that can offer models in the development of national and international laws and disability policies. This material, periodically updated, should be part of a web site maintained at the UN.

The experts also grappled with the problematic search for an international definition of disability. Since UN resolution 1998/31 already calls for a human rights treaty monitoring bodies and governments to "cover fully the question of human rights of persons with disabilities in complying" with their reporting obligations under relevant human rights treaties, such as conventions dealing with children, women, and other protected groups, the issue of an international definition is not just a theoretical matter.

One of the innovative features of the seminar was an advocacy and human rights workshop that featured experimental approaches to national capacity building that included disability-accessible Internet technologies for distance collaboration.

I also led a session that revealed heartening examples of the increased participation and inclusion of people with disabilities. Promising developments are occurring in all parts of the globe, in countries as diverse as Cambodia, China, Colombia, Costa Rica, India, Japan, Pakistan, Philippines, Poland, Tanzania, Uganda, and the United States. Many delegates at this meeting had been lonely crusaders for changes in their respective countries. A Cambodian man in a wheel chair spoke with understated emotion about the threat posed in his land for its 11 million citizens who live amidst 10 million unexploded land mines. An Indian woman who used a wheel chair referred to the double jeopardy on her sub-continent that comes from being

female and disabled. For all the delegates, the chance to work together and to plan the next steps for progress in the face of formidable obstacles was exhilarating. Sometimes the word "empowerment" is just a slogan. Sometimes, as in this Hong Kong meeting at the dawn of a new millennium, empowerment has a real palpable meaning.

As we return to our daily routines, we have much left to do. We take to

"for personal dedication to this important initiative" and urged us to promote "awareness and building of national capacities to implement international norms and practices, focusing on empowerment of people with disabilities," we carry the burdens and joys of new commitments forged in Hong Kong. For example, another delegate and I are exploring putting together a manual on international disability rights to help activists around



Professor Stanley Herr at the Seminar and Symposium on International Norms and Standards Relating to Disability.

heart the message we received from the President of the UN General Assembly who described our meeting as "a welcome, innovative and unique undertaking to translate the commitment of the international community into concrete policies, strategies and programs aimed at furthering equalization of opportunities by, for and with persons with disabilities." As his Excellency Dr. Theo-Ben Gurirab congratulated us

the world. And the work on UN and/or regional treaties on disability rights will surely take many years. But as the ancient Chinese proverb says, a journey of a 1000 miles begins with a single step. We have now taken those first firm steps.

This article was excerpted from a version previously published in *News and Notes*, a publication of the American Association on Mental Retardation.

Hellman Explores Moral Choices in the Design of Clinical Trials

“Consider the case of a patient dying of a disease for which the standard therapy offers very little hope. Her doctor tells her that a study testing a new therapy has been carried out. But the results of that study are not considered meaningful because the requisite “p” value was not reached (significance level for study data). He invites the patient to join a new study where she stands a 50 percent chance of being assigned to the standard, not very effective therapy.”

What should she do? Should she try the new treatment when there is a great deal of uncertainty as to whether it is more beneficial than the standard treatment? Or should she pick the standard—not very effective—therapy about which doctors know more?

Law & Health Care Program Professor Deborah Hellman raised this question in a lecture she gave as part of the Medical Humanities Hour at the University of Maryland Medical System on March 16, 2000.

She discussed the Randomized Clinical Trial (RCT) and the use of .05 as the significance level for study results—a remedy for chance—and the randomized assignment of study subjects to treatments—a remedy for bias—in her talk, “The Quest for Certainty: Moral Choices in the Design of Clinical Trials.”

Hellman argues that each of these design elements represents a *choice*. She says, “Proper scientific method does not require randomization or a .05 significance level, a point that is often forgotten as the model RCT lauded by scientific researchers includes both of these elements. Rather, these elements constitute preferences for a high degree of certitude in study results over other values and interests.

Although .05 and randomization generate a high degree of confidence in study data, this confidence benefits future patients. Hellman says that, as in the example above, current patients need less certainty.

“Other things being equal, we want scientists to employ the method most likely to produce reliable data about treatment efficacy. But since other things are rarely equal, there are other important values and interests at stake



Professor Hellman during one of her classes.

when we conduct medical research on human subjects. Particularly, when the study subjects are very sick people.”

Hellman’s research examines the RCT from the perspective of the patient who often needs to make a decision immediately and who must act on the basis of uncertain information. The patient may want to “play the odds” since her goal is to get the treatment with the best chance of success in treating her illness.

The perspective of the researcher is different. The researcher wants, first of all, to discover the truth and is less constrained by time. The ultimate goal of the researcher is the advancement of medical knowledge and the development of the best treatment for disease.

These two perspectives result in the need for different degrees of certainty.

Different degrees of certainty, Hellman adds, result in costs and benefits for both current and future patients and society as a whole.

Randomization is the second design element of the RCT that also represents a *choice*. Randomization helps to reduce bias by neutralizing the effects of unknown differences between the treatment groups that may, inadvertently, affect the study result. By “bias” the statistician means skewed distortions in the study data. Again, Hellman argues, there are degrees of certainty. How much less likely is there to be an error in the study data when randomization is used. And equally importantly, what are the costs to the patient of reducing the occurrence of error?

“Even if the scientific community is in ‘equipoise,’ (neither therapy is ‘known’ to be superior) there still may be good reasons to believe that one treatment is better.” Hellman asks, “In that case, do the patients get equal care?”

Hellman cites other costs to the patient—loss of control over the choice of which treatment they receive, and, in a double blind study, the lack of knowledge about the type of treatment they are receiving. There is also a sense of powerlessness inherent in the situation that is caused first by contracting the disease, and second by the treatment and subsequent reliance on medical professionals.

In summary, Hellman says that the choice of .05 and randomization are not dictated by science, but are moral and political choices that reflect particular values. If certainty is chosen over other values, then this choice favors the interests of future patients over those who are sick now.

Hoffmann Elected Chair of Maryland Health Care Ethics Committee Network

In January, the newly elected Executive Board of the Maryland Health Care Ethics Committee Network (MHECN) elected Diane Hoffmann as chair. In 1992, Hoffmann co-founded, with Dr. Henry Silverman, chair of the ethics committee at the University of Maryland Medical System, the Baltimore Area Ethics Committee Network. Her goal was to provide a forum for ethics committee members to share experiences and cases and learn from one another as well as to provide them with resources and support for their tasks. These tasks included consulting on cases most often involving termination of life support, developing policies on various issues related to patient care and educating their relevant communities about ethical decision making in patient care. However, it soon became clear that there was a need in other areas of the state for these types of resources and additional educational support for committee members to adequately perform their tasks. In 1998, Hoffmann spearheaded an effort to establish the MHECN. The mission

of MHECN is "to facilitate and enhance ethical reflection in all aspects of decision making in health care settings by supporting and providing informational and educational resources to ethics committees serving health care institutions in the state of Maryland."

Functions of the Network include:

- ◆ serving as a resource to ethics committees as they investigate ethical dilemmas within their institution and as they strive to assist their institution operate consistently with its mission statement;
- ◆ fostering communication and information-sharing among Network members;
- ◆ providing educational programs for ethics committee members, other health care providers, and members of the general public on ethical issues in health care;
- ◆ conducting research to improve the functioning of ethics committees and ultimately the care of patients in Maryland.

Hoffmann's plans for the Network include offering a basic course in ethics and relevant health law for new ethics committee members and an advanced course for those who regularly perform ethics consults. Results of a study recently performed by Hoffmann and colleagues Anne O'Neil, PhD, RN, newly appointed Director of the Network, and Anita Tarzian, PhD, RN, found that formal bioethics education was lacking for many ethics committee chairs, most ethics committee members, and approximately two-thirds of those individuals designated to perform ethics consultations. (The study will be published in an upcoming issue of the *Journal of Law, Medicine & Ethics*). Based on these findings, Hoffmann believes there is still much work to be done in educating members of ethics committees and helping them to have the skills and knowledge base necessary to adequately carry out consults. She hopes the MHECN will help to fill that need.

L&HCP Faculty Notes . . .

PROFESSOR DIANE HOFFMANN

Publications:

"Are Ethics Committee Members Competent to Consult," (with A. Tarzian & J.A. O'Neil), *J. of Law, Medicine & Ethics* (2000)

Selected Presentations:

"Institutional Barriers to Pain Management," Mayday Scholars Meeting, Univ. of St. Louis School of Law St. Louis, MO (2000)

Appointments:

Institutional Review Board, Maryland Health Care Commission (2000)

Chair, Executive Board, Maryland Health Care Ethics Committee Network (2000)

ASSOCIATE PROFESSOR

DEBORAH S. HELLMAN

Selected Presentations:

"Genetic Discrimination and an Expressive Theory of Equal Protection," University of Toronto Law School, Toronto, Canada (2000)

"The Quest for Certainty: Moral Choices in the Design of Clinical

Trials," Medical Humanities Hours, University of Maryland School of Medicine, Baltimore, MD and the Center for Bioethics at the University of Toronto, Toronto, Canada (2000)

PROFESSOR STANLEY S. HERR

Selected Presentations:

"On the Need for a UN Convention on Disability Rights," UN Interregional Seminar and Symposium on International Norms and Standards Relating to Disability, Hong Kong (1999)

Cont. on page 14

Is There a Pink Slip In My Genes?

Commissioner of EEOC Presents Rome Lecture

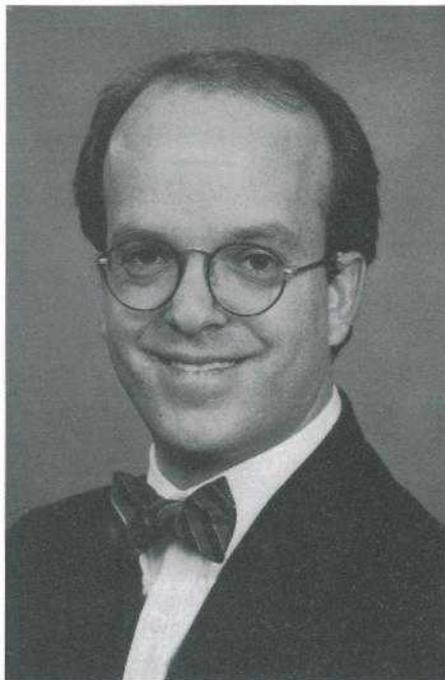
Paul Steven Miller, Commissioner of the U.S. Equal Opportunity Commission, spoke on genetic discrimination in the workplace at the Law School's Rome Lecture held on April 27, 2000. Miller's forthcoming article in the Spring 2000 issue of the *Journal of Health Care Law & Policy* (JHCL&P) was the basis for the lecture.

Miller says that the surge in genetic research and technology, fueled in part by the Human Genome Project, has resulted in the continuing expansion of the range of genetic tests and other genetic information available to physicians, insurance companies, employers, and the general public. Genetic tests can provide information about an individual's increased risk of future disease, disability, or early death, as well as an individual's carrier status and information about the health of family members.

As a result of the increase in genetic testing and the availability of genetic information, legal issues regarding employment discrimination on the basis of genetic information are emerging. These issues are important to all working Americans.

Miller's presentation addressed workers' fears and the reality of genetic discrimination in employment, as well as the application of existing federal statutes, particularly the Americans with Disability Act, state statutes, and the limited amount of caselaw in this area.

Paul Steven Miller is a cum laude graduate of the University of Pennsylvania and he received his JD from Harvard Law School. As a Commissioner of the EEOC, he participates with the four other commissioners on enforcement policy, authorization of



Paul Steven Miller, Commissioner of the U.S. Equal Opportunity Commission

litigation, and issuance of Commissioners' charges of discrimination. Currently he is serving on the Presidential Task Force on Employment of Adults with Disabilities, a government-wide task force created to develop a coordinated national policy to raise the employment rate of adults with disabilities.

The Stuart Rome Lecture was established to celebrate Rome's life and work as an attorney, community activist, art patron and humanitarian. Rome, who died in 1983, devoted many hours to pro bono legal work and supported numerous organizations, including the NAACP, Echo House, and the Maryland State Arts Council. The annual lecture is designed to reflect his extraordinarily widespread interest and commitments.

The Journal of Health Care Law & Policy

Volume 3, Issue 2

Defining a "Disability" Under the Americans with Disabilities Act

Is there a Pink Slip in My Genes? Genetic Discrimination in the Workplace
by Paul Steven Miller, JD

Commentary: *Bragdon v. Abbott*, Asymptomatic Genetic Conditions, and Antidiscrimination Law: A Conservative Perspective
by Roger Clegg, JD

Discrimination Based on HIV/AIDS and Other Health Conditions: Disability As Defined Under Federal and State Law
by David W. Webber, JD and Lawrence O. Gostin, JD, LLD

The Definition of Disability: Perspective of the Disability Community
by Deborah Kaplan, JD

Bragdon v. Abbott: Extending the Americans with Disabilities Act to Asymptomatic Individuals
by Eugenia Liu, JD

Genetic Discrimination: Why *Bragdon* Does Not Insure Protection
by Laura F. Rothstein, JD

Adverse Impact of Predisposition Testing on Major Life Activities: Lessons from *BRCA1/2* Testing
by Katherine A. Schneider, MPH

Olmstead v. Zimring: Unnecessary Institutionalization Constitutes Discrimination Under the Americans with Disabilities Act
by Shoshana Fishman

Cleveland v. Policy Management Systems Corporation: Triumph for the Working Disabled or Hollow Procedural Device?
by Sarah Otwell

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No. _____ "Substance Abuse, Families and the Courts: Legal and Public Health Challenges," Winter 1999-2000
No. _____ "Defining a 'Disability' Under the Americans with Disabilities Act," Spring 2000

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JHCL&P Elects 2000-2001 Board

This spring the Journal of Health Care Law & Policy elected the following as members of the 2000-2001 editorial board:

Julia Callahan, Editor-In Chief
Shoshana Fishman, Articles Editor
Sara Otwell, Executive Editor
John Eriksen, Managing Editor
Jessica Porter and Jayson Slotnik,
Assistant Managing Editors
**Melinda DeAtley and
Jennifer Schwartzott**
Notes and Comments Editors
**John Greenleaf, Mitzi Rivers and
Kevin LaTulip**
Articles Editors

*From left to right:
Melinda DeAtley,
2000-2001 Notes
and Comments
Editor, Cynthia
Tippett, 1999-2000
Executive Editor,
Scott D. Nelson,
1999-2000 Editor-
In-Chief, and
Joseph Pestaner,
Journal staff at the
"Guns As A
Consumer Product,"
conference.*



Focus on . . .

THE STUDENT HEALTH LAW ORGANIZATION

In this issue of our newsletter, we are proud to highlight a vital component of the L&HCP—our Student Health Law Organization (SHLO). The effectiveness of student groups are measured first by the people who belong to them and secondly, by their leaders. Successful leaders are organized, motivated, and perhaps most importantly, they are adept at delegating responsibility. For these very reasons, the 1999-2000 SHLO has done a remarkable job and we thought our readers would like to know more about the group's accomplishments. The article that follows presents an overview of the group's activities, as well as some insight into how they made the year the success that it was.

When the 1999-2000 Student Health Law Organization board met for the first time at the beginning of the fall 1999 semester, they had already defined a long list of ideas that they wanted to implement for the organization. By early October, after discussing their ideas at a general membership meeting, the list had coalesced into eighteen ambitious goals that the organization hoped to accomplish over the course of two semesters.

Outgoing president Jayson Slotnik (2D) said, "One of the members or an officer were given the details and then were given sole responsibility for the task." SHLO's events schedule alone was ambitious, but the "sole responsibility" method worked well.

The group worked hard, bringing a number of health law speakers to the school and fully realizing about half of the goals they defined at the beginning of the fall semester.

Matt Parra, the outgoing vice-president, says that the group deliberately incorporated a broad spectrum of health law issues in their goals.



1999-2000 SHLO Officers, from left to right: Matt Parra (May 2000), Lucy Shum (2D), Sai Deepa Saggare (3D), Mindy Caplan (3D), Denise McNairn (3D), and Jayson Slotnik (3D).

In November 1999, the group co-sponsored (with the L&HCP) a lecture, "The Crisis in Health Care: Why We Need Health Care Reform in Maryland." Single-payer plan advocate, Dr. Peter C. Beilenson, and a representative of the Maryland Health Care Commission, John M. Colmers, spoke.

In January, Senator Paula C. Hollinger, a member of the Maryland legislature since 1987 and Senate Chair

of the Joint Committee on Health Care Delivery and Financing, spoke on state health care issues.

In February, in conjunction with the L&HCP and the law school's Career Development Office, SHLO held a highly successful health law career fair. Approximately twenty attorneys and 100 students traded job requirements and resumes in an informal setting. The career fair, which is evolving into an

SHLO Elects 2000-2001 Officers

Congratulations and welcome to the newly elected Student Health Law Organization Board:

Lucy Shum, President
Vanessa Taneyhill, Vice-President
Joanna Fong, Secretary
Gemma Vestal, Treasurer
Luciene Parsley, Events Committee Chairperson

Focus on . . .

THE STUDENT HEALTH LAW ORGANIZATION

annual event, is praised by alumni both for helping them in their own job search and for providing access to a pool of candidates for the positions they are now trying to fill.

The career fair is part of SHLO's efforts to actively target employers in the region to increase opportunities both for graduates and students seeking summer employment.

In April, at the invitation of SHLO, Congressman Ben Cardin spoke to a crowd of Maryland faculty, staff and students on Congressional efforts to deal with a variety of health care issues, including the challenge posed by managed care. Cardin is a Maryland law alumnus who has represented the state's Third Congressional District since 1987.

In addition to reaching out to the faculty, students and local community by hosting the above events, SHLO also accomplished a number of other tasks—all designed to make their organization more effective. The group rewrote their constitution both to strengthen the election provisions and bring it more in line with other student groups. The updated constitution was approved by the general membership in April.

SHLO also established an informal mentor program, a listserv, and collaborated with the L&HCP on a web page. The mentor program was directed to first-year students and offered specific advice and counseling on course selection, as well as more general advice from students who had just "been there" themselves. The listserv provided a simple and effective way for both SHLO and the L&HCP to communicate and share time-sensitive information quickly and easily.

SHLO also instigated a more structured method for selecting participants in the National Moot Court Competi-

Senator Paula Hollinger accepts a University of Maryland Law School shirt from outgoing SHLO President, Jayson Slotnik.



The Health Law Career Fair was well-attended by both students and prospective employers.



tion held annually in Carbondale, Illinois (see separate article), and set plans in motion to publicize the competition.

Finally, the group sent two students to the American Health Lawyers Association's Institute on Medicare and Medicaid Payment Issues and hosted a seminar on the perils of substance abuse.

Jayson Slotnik commented that the year was successful, in part, because of

the members' hard work and dedication to the organization. Slotnik added, "Because of each officer's commitment to SHLO, my job was made much easier such that I really enjoyed my tenure as president."

The group elected officers for the 2000-2001 school year on April 12. (See box, p. 10.) The Law & Health Care Program wishes the 2000-2001 SHLO officers and members another great year!

Focus on . . .

THE STUDENT HEALTH LAW ORGANIZATION

SHLO Holds Moot Court Competition

by Matthew Parra

Over twenty students recently competed in a health law moot court competition to become next year's national team members. Each year the University of Maryland School of Law sends at least one three-member team to a national competition hosted by Southern Illinois University School of Law, in Carbondale, Illinois. This year, the Student Health Law Organization (SHLO) and last year's team members organized and coordinated an internal competition to select the members of next year's team.

The internal competition involved a single issue that is based on a case which is currently before the U.S. Supreme Court. (The problem used for the school's competition was a modification of the 1999 National Health Law Moot Court competition held at Southern Illinois University in Carbondale, IL.) The issue presented the question of whether a *qui tam* case under the Federal False Claims Act (FCA) should be allowed to proceed after the federal government has declined to intervene. The moot court problem mixed several concerns that courts have faced on this issue, including who is the real party in interest in a *qui tam* suit and whether the State can properly be a defendant in a *qui tam* action. Competitors arguing for the private citizen that filed the suit had the daunting task of convincing the court that a federal court has subject matter jurisdiction to hear the *qui tam* action, despite the government's decision not

to intervene. On the other hand, competitors arguing for the State hospital being sued had the equally daunting challenge of convincing the court that the case was barred by the 11th Amendment and should not be allowed to proceed. The U.S. Supreme Court has granted certiorari to hear a case involving these issues to resolve a split among the Circuit Courts.

Of the original twenty-plus students, five ultimately prevailed in the competition to become members of next year's national team. These students submitted written briefs and presented oral arguments before a three-judge panel comprised of practicing health law attorneys from the Health Care

Financing Administration. The five new team members were selected by the three attorneys who graded the written briefs and oral arguments. Two of the three attorneys, Kay Scanlan and Paul Soeffing, graduated from the University of Maryland School of Law, and a third, Jon Brumer, graduated from Duke University School of Law. The five new team members are Stephanie Genser, Deepa Saggare, Eric Oberer, Tim Adleman, and Karen Saks.

Under the National Competition rules, each team may have up to three members and each school may send two teams. The SHLO plans to continue this internal competition in the coming years.

L&HCP Places in Top Five in U.S. News & World Report Survey

The Law & Health Care Program has been named one of the nation's top five health law specialty programs in *U.S. News & World Report's* annual survey for 2000. Since 1995, the L&HCP has been consistently named among the top five health law programs, placing fifth this year.

In addition to its health law ranking, The University of Maryland School of Law has two other specialty programs in the top ten nationwide—the Environmental Law Program ranked fourth and the Clinical Law Program ranked sixth.

IN THE HEALTH LAW CLINIC

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.

by Joan O'Sullivan, JD

By the time we entered the case, her bill was over \$30,000.

Lisa Hesse, a second year student, did an excellent job preparing for a hearing during the early months of clinic. Medicaid regulations are complicated; to a second year law student used to the majority rule and the minority rule learned in first year contracts and property classes, the regulations at first appear incomprehensible. We argued at the hearing that it was impossible to cash in the insurance policy any sooner, but the judge found against our client. She is now on Medicaid, but she still owes the nursing home \$30,000. She refuses to give her daughter a power of attorney so she can file for bankruptcy. And when we went to see her, all she could talk about was returning to her own home.

Perhaps the saddest cases are those in which our client has been abandoned by his or her family. Jayson Slotnik, another second year student, handled a case this year in which he represented a woman who was so angry about being in a nursing home that she allegedly struck out at others. We entered the case after she had struck her roommate, a patient with Alzheimer's Disease who yelled constantly. Our client had taken to sleeping in a chair in the hall, in order to evade the noise, but after several nights of this, she allegedly struck the roommate in frustration. The nursing home sought to involuntarily discharge our client and send her to her son's home. The son had called us to represent his mother. He lived in a distant city, and would not have taken care of his mother, who had abandoned him when he was very young. He had

received a phone call years later saying his mother was dying. He placed her in a nursing home close to where she grew up, but rarely saw her. Her home had been sold to pay for the nursing home, so if she were discharged, she had nowhere to go.

Mr. Slotnik researched the federal regulations governing nursing homes, and presented his arguments in a letter to the nursing home. We argued that the nursing home had a duty to our client to provide her with better care, and that it should have moved her when the noise from her roommate became unbearable. The nursing home eventually withdrew its involuntary discharge letter, and our client is still in the nursing home, although she is not happy about it.

In another case, a son called us to ask us to write a power of attorney for his mother. He was being forced to sell her home so that she could stay in a nursing home. When we went to see his mother, we explained to her that her son was going to sell her home. She was outraged, because she had worked so hard to buy the home. She refused to sign a power of attorney, said that she would be returning home soon, and that if she needed a lawyer, she would give us a call. She believed she could return to her home and resume her life as a seamstress, even offering to "taper" the student attorney's trousers for him.

When we explained this to the nursing home administrator, she said it was the resident's ticket out of the nursing home, since she had no funds to pay the private rate. The story did not end there, for soon the mother was hospitalized, and two doctors at the hospital found she was incompetent. Her son sued for guardianship of her, and the last we heard, her court-

Some of the most difficult cases student attorneys encounter in the Health Law Clinic involve clients who are in nursing homes. They are legally complex cases, and often, a nursing home is the last place our clients want to be—they would rather be at home with loved ones.

The legal problems we encounter often involve paying for the nursing home because poor people cannot plan for this contingency as middle class people do. Those who have funds might engage an elder law attorney to advise them about how to place their assets, so if they need nursing home care, they can begin receiving benefits from the Medicaid program as soon as possible. Or they might have purchased a long term care insurance policy years ago which will pick up much of the tab.

Poor people, however, with the little that they have, often have the most trouble qualifying for Medicaid. In one case this year, our client had a small insurance policy which had a cash value. It was not much, but it was enough so that it put her over the asset limit for Medicaid. Her daughter, who handled our client's affairs for her, had difficulty cashing in the policy, to the extent that it took her six months to obtain the cash value. During those six months, the mother was charged the private pay rate at the nursing home.

Cont. on page 14

In The Clinic

Cont. from page 13

appointed attorney was fighting the guardianship, arguing that she is competent.

Nursing homes today are under the gun. Several national nursing home chains have filed for Chapter 11 bankruptcy protection. The Health Care Financing Administration is enforcing nursing home quality of care regulations as never before, decertifying nursing homes from receiving Medicare and Medicaid payments. The Justice Department is bringing False Claims Act cases against nursing homes for not providing the care for which they bill the government. Medicaid and Medicare reimburse nursing homes at a very low rate, making it difficult for them to hire competent help. The salaries of nurses aides, who do the heavy lifting in nursing homes, rival those at fast food emporiums.

The industry lost its case before the Supreme Court, *Shalala v. Illinois Council on Long Term Care, Inc.*, 120 S. Ct. 1084 (2000). The court ruled that the federal courts have no jurisdiction to hear an action filed by the association of nursing homes seeking to raise federal questions about the validity of Medicare regulations. The regulations provide for sanctions for failure to comply with regulatory standards. The

association must seek remedies through special review channels created by Medicare statutes.

What is the answer to the nursing home dilemma? One answer might be that none of us wants to live out our lives in a nursing home, but would rather age in place, and end our days in our own homes, as our clients wanted to do. At least two states, Arizona and Oregon, have used Medicaid waivers to apply Medicaid funds to home health care for those who would otherwise qualify for nursing home care. Those programs are widespread and successful, due in part to well designed programs which provide for checks and balances between the government and service providers. Perhaps this is only part of the answer to the problem. Other answers might be more incentives for long term care insurance policies, better reimbursement rates from the government, and better quality assurance from the industry.

Nursing home cases are excellent teaching tools for our students. They learn the complexities of the laws governing nursing homes, the intricate rules governing payment, and the desperation many clients feel about ending their lives in a nursing home. They also learn that there are alternatives. When they begin practicing law, perhaps they will be in positions to address these perplexing questions.

Faculty Notes

Cont. from page 7

"The Role of Consumer Movements in Disability Rights," Israel Organization of Handicapped Children (ILAN), Jerusalem (2000)

"Human Rights and Social Policy: The Case for Disability Rights," National Conference of Social Workers, Tel Aviv (2000)

PROFESSOR DAVID A. HYMAN

Publications:

"Managed Care at the Millennium: Scenes from a Maul," *Journal Health, Politics, Policy & Law* 1061-1070 (1999)

"Drive-Through Deliveries: Is Consumer Protection Just What the Doctor Ordered?," *78 North Carolina Law Review* 5-99 (1999)

"Medical Malpractice and System Reform: Of Babies and Bathwater," (Review of The Practice of Uncertainty: Voices of Physicians and Patients in Medical Malpractice Cases), *19 Health Affairs* 258-259 (2000)

"Regulating Managed Care: What's Wrong with A Patient Bill of Rights," *73 Southern California Law Review* 221-275 (2000)

PROFESSOR SUSAN P. LEVITON

Selected Presentations:

"Diversion and Alternatives to Incarceration for the Mentally Ill," Judicial Institute, Judiciary Training Center (2000)

"Mental Health Services for Children and Adolescents," Sheppard-Pratt Conference Center (2000)

ASSISTANT PROFESSOR

JOAN O'SULLIVAN

Publications:

"The Increasing Medical Malpractice Risk Related to Pressure Ulcers in the United States," (with Richard D. Bennett, MD, Eric M. DeVito, JD, and

The Year 2000 Concentration in Health Law Awards

Twenty seven students were awarded the Concentration in Health Law at the May, 2000 graduation ceremonies. We are very proud of these students and congratulate them on their outstanding achievement!

Deondra Sue Arko	Cara J. Heflin	Christine Salerno
Jana L. Artnak	Andrea E. Jaskulsky	Cara Schoem
Mojdeh Bahar	Oluyemisi O. Koya	Tracy Silverman
Laura Callahan	Dawn Lanzalotti	Brian Frederick Sklar
Ruben Chavez	Erica Ward Magliocca	H. Arrah Tabe
Kay E. Cheney	Hilary L. Martinson	Cynthia L. Tippet
Bruce L. Currie	Louis Patalano IV	Robyn C. Tyler
Marisa Ferraro	Jennifer C. Peters	Margaret Webster
Kevin B. Gerold	Anthonia St. John	Christina Wilson

Robin Remsburg, PhD, RN), 48
Journal of the American Geriatric
Society 73 (2000)

Selected Presentations:

"Health Care Decision Making in
Maryland," Frederick Memorial
Hospital Medical Staff, Frederick, MD
(2000)

"Nursing Homes and the Law: How to
Enforce Quality of Care?" moderator,
Association of American Law Schools
Annual Meeting, Washington, DC
(2000)

"The Increasing Medical Malpractice
Risk Related to Pressure Ulcers in the
United States," Scientific Meeting, The
Gerontological Society of America,
San Francisco, CA. (1999)

"Understanding the Elements of
Informed Consent," American Associa-
tion on Mental Retardation Region IX
Conference, Annapolis, MD (1999)

"Advance Directives and Medical
Decision Making," Maryland Coalition
for Aging and Developmental Disabili-
ties Conference, Anne Arundel Com-
munity College, Arnold, MD (1999)

DEAN KAREN ROTHENBERG

Selected Presentations:

The Cyril H. Wecht Distinguished
Lecture on Legal Medicine, 40th
Annual Conference of the American
College of Legal Medicine, San Diego,
CA (2000)

"Genetic Information in the Work-
place," CNN Interview, Washington,
DC (2000)

"The Regulation of Gene Therapy,"
The Mark Steiner Show, WJHU-FM,
Baltimore, MD (2000)

Spotlight on . . .

HEALTH LAW PRACTICUMS AND
EXTERNSHIPS: **University
Physicians, Inc./Compliance Unit**



Oluyemisi Koya

by Oluyemisi Koya, MD (3D)

The Law & Health Care Program's Health Law Practicum Program 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 The Health Law Practice Workshop. Placements have included the American Nurses Association; Johns Hopkins Health System Corporation; Legal Services to the Elderly; Med-Chi of Maryland; Maryland Board of Physician Quality Assurance; National Health Law Program; NIH; U.S. Senate Subcommittee 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 Unit.

The Program has also offered seven 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), The Federal Trade Commission, The Maryland Health Care Commission; the NIH General Counsel's Office; and the National Partnership for Women & Families (formerly the Women's Legal Defense Fund) in Washington, D.C.

As I grew tired of the drudgery of the classrooms, I longed for the chance for first hand experience in the real world—practicing health law. The Law & Health Care Program provided me with that opportunity last semester, through my practicum at the Board of Physician Quality Assurance (Board) in Baltimore. I had a productive time learning, observing and participating in the regulation of the practice of medicine in Maryland.

After my experience at the Board I became a glutton for "real life work." Luckily, during the Spring 2000 semester, through the law school's Asper Fellowship Program, I was able to participate in a placement at the Compliance Office, University Physicians, Inc., (UPI) in Baltimore where my supervisor was Jerry Carr, J.D., Chief Compliance and Legal Affairs Officer. (UPI is also a Law & Health Care Program placement.)

The Compliance Office primarily deals with ensuring the compliance of the University Practice Associations with federal, state and local laws and regulations. Two presumptions that

went with me to the placement were quickly rebutted, namely that the Compliance Office deals only with compliance issues, and the Compliance Office deals only with health law issues.

Cont. on page 16

Spotlight On . . .

Cont. from page 15

Soon the diversified legal issues I contended with during my placement reminded me of previous health law seminars—where it was stressed that health law or the representation of health care providers or patients encompasses many other areas of law including contracts, property, criminal law, antitrust, labor law and more.

As I worked my way through volumes of service agreements and collaboration agreements, sorting through legal issues such as the adequacy and sufficiency of consideration as well the violation of the Anti-Kick Back Statutes, I concluded without any doubt that health law is by no means a “legal island.” When I had to revisit the issue of abandoned property in the context of Practice Associations, I chastised myself for letting my mind wonder during Property lectures.

At the Compliance Office, I was given the opportunity to work on

several projects and observe first hand the implementation of compliance strategies designed to prevent, detect and rectify compliance mishaps. My assignments ranged from the usual endless research, to other productive things like drafting policies on record retention, policies on the Maryland escheat laws, reviewing contracts and writing collaboration agreements.

In terms of compliance issues in particular, my assignments revealed that compliance focuses on prevention, early detection and immediate rectification. During my placement I began to appreciate the importance of the paper trail in the context of compliance issues, wherein it is crucial to show the government (in case they drop by) that the organization is complying with the law. In this regard, some of my tasks such as keeping track of corporate documents and making sure that they were up to date were mundane and lacked the

excitement of courtroom drama. Nonetheless, working at the Compliance Office gave me the chance to appreciate that the evidence of a credible paper trail might eventually save an organization from the severity of liability, just as a brilliant closing argument may sway a jury.

One of the highlights of my placement at the Compliance Office was my participation in meetings discussing the implementation of the first internal audit program for Practice Associations. This new program is to further ensure the appropriateness of coding and billing sent to the government and proper evaluation/management documentation.

The time spent during this placement has been rewarding and certainly gave me an insight into developing and improving compliance strategies. And the best thing of all was that there was *no exam!!!*

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