

CUTTING EDGE VS. OVER THE EDGE: ETHICS AND MALPRACTICE ISSUES FOR MEDICAID PLANNING

*by Patricia F. Sitchler, CELA**

| | | |
|------|---|-----|
| I. | GENERAL ETHICAL CONSIDERATIONS..... | 176 |
| A. | <i>Ethics in the Practice of Elder Law.....</i> | 176 |
| 1. | <i>Highest Ethical Standards.....</i> | 176 |
| 2. | <i>Communication.....</i> | 177 |
| 3. | <i>Conflicts of Interest.....</i> | 178 |
| 4. | <i>Fee Agreements.....</i> | 179 |
| 5. | <i>Reporting Ethical Violations.....</i> | 179 |
| II. | THE CLIENT..... | 179 |
| A. | <i>Identifying the Client.....</i> | 179 |
| 1. | <i>Individual.....</i> | 179 |
| 2. | <i>Who is the Client if the Attorney Meets with a Surrogate?.....</i> | 180 |
| a. | <i>Is the Agent the Client or is the Principal the Client?.....</i> | 180 |
| b. | <i>Is the Guardian of the Ward the Client or is the Ward the Client or are Both?.....</i> | 181 |
| 3. | <i>Administrators/Executors.....</i> | 182 |
| B. | <i>Capacity to Make Decisions About Legal Representation.....</i> | 182 |
| III. | ETHICAL CONSIDERATIONS OF MEDICAID PLANNING..... | 183 |
| A. | <i>Ethics of Medicaid Planning.....</i> | 183 |
| B. | <i>Client Expectations.....</i> | 188 |
| C. | <i>Gifting.....</i> | 189 |
| D. | <i>Avoiding Fraud.....</i> | 190 |
| 1. | <i>The State.....</i> | 190 |
| 2. | <i>The Nursing Home.....</i> | 192 |
| E. | <i>Medicaid Planning by Non-attorneys.....</i> | 193 |
| F. | <i>Some Current Issues in Medicaid Planning.....</i> | 193 |
| 1. | <i>Medicaid Estate Recovery Program ("MERP").....</i> | 193 |
| 2. | <i>The Nursing Home Agreement.....</i> | 195 |
| IV. | CONCLUDING THOUGHTS..... | 197 |

* Certified as an elder law attorney by the National Elder Law Foundation, as recognized by the Texas Board of Legal Specialization.

I. GENERAL ETHICAL CONSIDERATIONS¹

The ethical duties of an elder law attorney have many of the same requirements as any other practice of law. The attorney must identify the client, determine the scope of the representation, communicate with the client, maintain client confidentiality, and provide diligent representation.² However, there may be additional considerations. For example, the attorney must consider the ramifications of communicating solely with an agent when a client's capacity is in question, and identify any conflicts of interest that may arise when spouses and agents are involved in the legal consultations.³ This chapter will examine some of the ethical duties specific to an elder law attorney.

A. Ethics in the Practice of Elder Law

The role of an elder law attorney may extend to discussions of estate planning that include the following: planning for disability; the use of government benefits to help fund housing and health care; explaining, drafting, and implementing advanced directives; guardianship in the event advanced directives are non-existent or ineffective; and probate of the estate of a decedent.⁴ An attorney should look to the Rules of Professional Responsibility for guidelines in any practice.⁵

1. Highest Ethical Standards

An attorney must always act in an ethical manner, inform the client of the breadth of the law, and never withhold portions of the law that the attorney may not like simply because of the attorney's own personal belief system.⁶ "A consequent obligation of lawyers is to maintain the highest standards of ethical conduct."⁷ "As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their

1. This material is based in part on Chapter 2 of *Texas Elder Law (Vol. 51, Texas Practice Series)*, and is used with permission of Thomson Reuters.

2. See TEX. DISCIPLINARY R. PROF'L CONDUCT preamble, reprinted in TEX. GOV'T. CODE ANN., tit. 2, subtit. G app. A (Vernon 2005) (Tex. State Bar R. art. X, § 9).

3. See TEX. DISCIPLINARY R. PROF'L CONDUCT 1.06, reprinted in TEX. GOV'T. CODE ANN., tit. 2, subtit. G app. A (Vernon 2005) (Tex. State Bar R. art. X, § 9).

4. See National Academy of Elder Law Attorneys, Inc., http://www.naela.org/public_whatiselderlaw.aspx?internal=true (Last visited Dec. 21, 2009).

5. See generally TEX. DISCIPLINARY R. PROF'L CONDUCT, reprinted in TEX. GOV'T. CODE ANN., tit. 2, subtit. G app. A (Vernon 2005) (stating minimum standards of conduct that attorneys should adhere to).

6. See *id.*

7. See TEX. DISCIPLINARY R. PROF'L CONDUCT preamble ¶ 1.

practical implications.”⁸ “In advising or otherwise representing a client, a lawyer shall exercise independent professional judgment and render candid advice.”⁹ Even when the advice may not be what the client wants to hear, the attorney must be candid.¹⁰

For example, an estate planning attorney may meet with clients who ask about the possibility of using the Medicaid program to preserve assets for a healthy spouse in the event the other spouse must enter a nursing home. It would be a breach of ethics to simply point out that only indigent individuals obtain Medicaid, advising the couple to simply invest wisely and “pay their way” until the funds are depleted.¹¹ Medicaid rules allow a healthy spouse to preserve at least some of the family assets while accessing Medicaid funds for the ill spouse.

2. Communication

The attorney must reasonably inform the client of the legal issues and status of the case.¹² “A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”¹³ The Comments to the Rule are very instructive:

[Comment No. 2:] The guiding principle is that the lawyer should reasonably fulfill client expectations for information consistent with the duty to act in the client’s best interests, and the client’s overall requirements as to the character of representation.

[Comment No. 4:] A lawyer may not, however, withhold information to serve the lawyer’s own interest or convenience.

[Comment No. 5:] In addition to communicating with any legal representative, a lawyer should seek to maintain reasonable communication with a client under a disability, insofar as possible. When a lawyer reasonably believes a client suffers a mental disability or is not legally competent, it may not be possible to maintain the usual attorney-client relationship. Nevertheless, the client may have the ability to understand, deliberate upon, and reach conclusions about some matters affecting the client’s own well-being. Furthermore, to an increasing extent the law recognizes intermediate degrees of competence.¹⁴

8. *See id.* at ¶ 2.

9. TEX. DISCIPLINARY R. PROF’L CONDUCT 2.01, *reprinted in* TEX. GOV’T. CODE ANN., tit. 2, subtit. G app. A (Vernon 2005) (Tex. State Bar R. art. X, § 9).

10. TEX. DISCIPLINARY R. PROF’L CONDUCT 2.01 cmt. 1.

11. *See* TEX. DISCIPLINARY R. PROF’L CONDUCT 2.01 cmt. 2.

12. *See* TEX. DISCIPLINARY R. PROF’L CONDUCT 1.03(a).

13. *See* TEX. DISCIPLINARY R. PROF’L CONDUCT 1.03(b).

14. TEX. DISCIPLINARY R. PROF’L CONDUCT 1.03 cmts. 2,4,5.

3. *Conflicts of Interest*

In an elder law practice, it is not unusual to be contacted by the spouse, a child, an agent, or a legal guardian of the prospective client. It is imperative that the attorney be vigilant for any possible conflicts of interest.¹⁵ An attorney cannot represent an individual if the attorney represents another individual, when representing both individuals creates a conflict of interest.¹⁶ An attorney can represent a client even if the attorney represents another family member or related person only if the attorney (1) believes that the other representation will not materially affect the representation of the client, and (2) informs all parties of the attorney's concerns and obtains informed consent for representation from the parties.¹⁷ "If a lawyer has accepted representation in violation of this Rule, or if multiple representation properly accepted becomes improper under this Rule, the lawyer shall promptly withdraw from one or more representations to the extent necessary for any remaining representation not to be in violation of these Rules."¹⁸

Again, the comments are very instructive:

1: Loyalty is an essential element in the lawyer's relationship to a client. An impermissible conflict of interest may exist before representation is undertaken, in which event the representation should be declined. If such a conflict arises after representation has been undertaken, the lawyer must take effective action to eliminate the conflict, including withdrawal if necessary to rectify the situation.

....

4: Loyalty to a client is impaired not only by the representation of opposing parties in situations within paragraphs (a) and (b)(1) [of Rule 1.06] but also in any situation when a lawyer may not be able to consider, recommend or carry out an appropriate course of action for one client because of the lawyer's own interests or responsibilities to others. The conflict in effect forecloses alternatives that would otherwise be available to the client. Paragraph (b)(2) [of Rule 1.06] addresses such situations. A potential possible conflict does not itself necessarily preclude the representation. The critical questions are the likelihood that a conflict exists or will eventuate and, if it does, whether it will materially and adversely affect the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client. It is for the client to decide whether the client wishes to accommodate the other interest involved.

15. See TEX. DISCIPLINARY R. PROF'L CONDUCT 1.06(b).

16. See *id.*

17. See TEX. DISCIPLINARY R. PROF'L CONDUCT 1.06(c)(d).

18. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.06(e).

However, the client's consent to the representation by the lawyer of another whose interests are directly adverse is insufficient unless the lawyer also believes that there will be no materially adverse effect upon the interests of either client.

5: The lawyer's own interests should not be permitted to have adverse effect on representation of a client, even where paragraph (b)(2) is not violated.¹⁹

4. *Fee Agreements*

More so than in many other practices of law, an elder law attorney may receive payment for services from someone other than the client, such as an adult child, "if the clients consent after consultation and the arrangement ensures the lawyer's professional independence."²⁰

5. *Reporting Ethical Violations*

If violations of the Texas Disciplinary Rules of Professional Conduct have occurred, an attorney has the obligation to report the infraction to the State Bar of Texas Grievance Committee.²¹ Texas Disciplinary Rules of Professional Conduct state that, "a lawyer having knowledge that another lawyer has committed a violation of applicable rules of professional conduct that raises a substantial question as to that lawyers honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate disciplinary authority."²² There is an exception to this rule if the violation arises from an illness.²³ Attorneys can also forward reports to the State Board of Legal Specialization.²⁴

II. THE CLIENT

A. *Identifying the Client*

1. *Individual*

While age may bring infirmities, age alone does not mean that the client is incapable to hire an attorney for representation.²⁵ There should be no

19. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.06 cmts.1,4, 5.

20. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.06 cmt. 12.

21. See TEX. DISCIPLINARY R. PROF'L CONDUCT 8.03.

22. TEX. DISCIPLINARY R. PROF'L CONDUCT 8.03(a).

23. See TEX. DISCIPLINARY R. PROF'L CONDUCT 8.03(c).

24. See *id.*

25. See TEX. PROP. CODE ANN. § 602 (Vernon 1993).

presumption of incapacity just because an individual is older.²⁶ The San Antonio Fourth Court of Appeals eloquently discussed the relationship between age and capacity:

Mrs. Morris' advanced age, without more, proves neither incapacity nor

the fact of undue influence. . . . At eighty, Verdi wrote Falstaff, Goethe wrote Faust, and Cato began the study of Greek. At eighty-one, Franklin counseled the Constitutional Convention, and still later urged its adoption by the colonies. At eighty-six, Shaw was producing plays, Churchill was writing his History of the English Speaking People, Russell finished Human Knowledge, and Sweitzer continues to pour out literature and philosophy, while practicing missionary medicine. Hobbes translated the Odyssey at eighty-seven, and the following year the Illiad. Roscoe Pound, at eighty-nine, published his five-volume work on Jurisprudence. Michelangelo died at the threshold of ninety and, to the last, was active in his artistic decoration of St. Peter's Basilica. At ninety, Titian painted "The Battle of Lepante." Mr. Justice Holmes was writing opinions at ninety, and yearned to be a young man of seventy. At ninety-two, he read Plato in the Greek, as he said, "to improve my mind." Grandma Moses painted more than a thousand pictures after she began painting at the age of seventy-seven. She left unfinished her "Beautiful World" which she began at the age of one hundred and one. Her pictures hang in the galleries of Europe and America. The law does not render persons incompetent upon proof merely of advanced age.²⁷

However, age can bring with it debilitating infirmities. Therefore, an attorney should assess each client to assure that the client has the capacity to understand the scope of the consultation. To assess capacity, a standardized form is advisable. A standardized form sets out a disciplined method of recording observations that assist with the analysis of the client. For example, engage the client in a conversation about the extent of the family and the client's assets. Discuss the client's goals and concerns, all the while, evaluating the client's ability to be articulate and oriented.

2. *Who is the Client if the Attorney Meets with a Surrogate?*

a. *Is the Agent the Client or is the Principal the Client?*

In *In re Mary Linda McCall*, an unreported case, the court granted a principal's petition requesting an attorney to turn over client files.²⁸ The

26. See *id.* Simply because a person is old does not mean the individual has lost capacity. Isolated instances of negligence or bad judgment will not be grounds for a determination of incapacity in a guardianship. *Id.*

27. Price v. Johnston, 352 S.W.2d 864, 865 (Tex. Civ. App.—San Antonio 1962, writ dismissed) (citations omitted).

28. See *In re Mary Linda McCall*, No. 08-02-00071 CV, 2002 WL 1341104, at *3 (Tex. App.—El Paso June 20, 2002, pet. granted) (not designated for publication).

attorney had met only with the agent for the principal.²⁹ The court of appeals held that the attorney represented the principal even though the attorney had never met with her.³⁰ The attorney was required to turn over the client files to the principal.³¹

b. Is the Guardian of the Ward the Client or is the Ward the Client or are Both?

In a well publicized case, *Fickett v. Superior Court*, an Arizona court held that an attorney represents both the guardian and the ward.³² In 1996, Florida's Attorney General issued an advisory opinion finding that the attorney owed a duty of care to both the ward and the guardian.³³ Then in 2003, a Washington court held that if an attorney discovers that a guardian is not acting in the ward's best interest, the attorney may need to take action to protect the ward.³⁴

A Texas case actually addressed the *Fickett* case.³⁵ In *First Mun. Leasing Corp. v. Blankenship, Potts, Aikman, Hagin & Stewart, P.C.* the court refused to follow *Fickett*, which required privity of contract.³⁶ Sixteen years later, the *Blankenship* ruling was abrogated by *McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests*, a misrepresentation case.³⁷ However, the *McCamish* ruling specifically addressed an attorney misrepresentation, stating:

As the court of appeals noted [in this case], a negligent misrepresentation claim is not equivalent to a legal malpractice claim. Under the tort of negligent misrepresentation, liability is not based on the breach of duty a professional owes his or her clients or others in privity, but on an independent duty to the nonclient based on the professional's manifest awareness of the nonclient's reliance on the misrepresentation and the professional's intention that the nonclient so rely. Therefore, an attorney can be subject to a negligent misrepresentation claim in a case in which she is not subject to a legal malpractice claim.³⁸

Notwithstanding the limitations of *McCamish*, the Texas Supreme Court narrowed the privity requirement as recently as in *Belt v. Oppenheimer, Blend,*

29. See *id.* at *2.

30. See *id.* at *3.

31. See *id.*

32. See *Fickett v. Superior Court*, 558 P.2d 988, 990 (Ariz. Ct. App. 1976).

33. See 96 Op. Att'y Gen. 94 (1996).

34. See *Estate of Treadwell v. Wright*, 61 P.3d 1214, 1217-18 (Wash. Ct. App. 2003).

35. See *First Mun. Leasing Corp. v. Blankenship, Potts, Aikman, Hagin & Stewart, P.C.*, 648 S.W.2d 410, 413 (Tex. App.—Dallas 1983, writ ref'd n.r.e.).

36. See *id.*

37. See *McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests*, 991 S.W.2d 787, 792 (Tex. 1999).

38. *Id.* (citations omitted).

*Harrison & Tate, Inc.*³⁹ In the *Belt* case, the Texas Supreme Court found that an executor of a decedent's estate, who had no privity of contract with the decedent's attorney, could file suit against the decedent's attorney for an alleged malpractice that occurred twenty years prior to the decedent's death.⁴⁰ So, while we have no case law that extends the attorney's duty of care to both the guardian and the ward, the attorney for the guardian should closely follow the Disciplinary Rules for fraud (see paragraphs below) in the event the guardian breaches the duty to the ward.⁴¹

3. Administrators/Executors

Fortunately, it is clear that an attorney represents the executor or administrator of the estate and not the beneficiaries of the estate.⁴² However, an attorney must be careful not to state that she represents the "estate."⁴³ By claiming to represent the estate, an attorney may be leading beneficiaries to believe that she represents them as well as the administrator.⁴⁴

B. Capacity to Make Decisions About Legal Representation

The attorney should abide by the client's informed decisions resulting from the attorney's explanation of the law unless (1) the attorney believes that it is not a well reasoned decision, or (2) the attorney believes, after consultation, the client is not competent to make the decision.⁴⁵

If the attorney believes that the client has lost capacity after the initial engagement, the attorney has an obligation to protect the client.⁴⁶

A lawyer shall take reasonable action to secure the appointment of a guardian or other legal representative for, or seek other protective orders with respect to, a client whenever the lawyer reasonably believes that the client lacks legal competence and that such action should be taken to protect the client.⁴⁷

Comment 13 to Rule 1.02(g) further clarifies the attorney's role:

If a legal representative has not been appointed, paragraph (g) requires a lawyer in some situations to take protective steps, such as initiating the appointment of a guardian. The lawyer should see to such appointment or

39. See *Belt v. Oppenheimer, Blend, Harrison & Tate, Inc.*, 192 S.W.3d 780, 786 (Tex. 2006).

40. See *id.*

41. See TEX. DISCIPLINARY R. PROF'L CONDUCT preamble ¶ 3, reprinted in TEX. GOV'T. CODE ANN., tit. 2, subtit. G app. A (Vernon 2005) (Tex. State Bar R. art. X, § 9).

42. See *Vincent & Elkins v. Moran*, 946 S.W.2d 381, 402 (Tex. App.—Houston [14th Dist.] 1997, no writ).

43. See *id.*

44. See *Querner v. Rindfuss*, 966 S.W.2d 661, 667 (Tex. App.—San Antonio 1998, pet. denied).

45. TEX. GOV'T. CODE ANN., Title 2, Subt. G App. A. Art. 10, §9, Rule 1.02 (Vernon 2005).

46. See TEX. DISCIPLINARY R. PROF'L CONDUCT 1.02(g).

47. *Id.*

take other protective steps when it reasonably appears advisable to do so in order to serve the client's best interests.⁴⁸

Rule 1.05 allows an attorney to reveal otherwise confidential information to the court to obtain a guardianship or other protective order for the client if the attorney perceives that the client is no longer competent.⁴⁹ However, the attorney must continue to communicate with the client even if there is a question of capacity.⁵⁰

III. ETHICAL CONSIDERATIONS OF MEDICAID PLANNING

A. Ethics of Medicaid Planning

A frequently used euphemism for the practice of elder law is "Medicaid planning" because of the need of many clients to utilize the Medicaid program to pay for health care and housing costs.⁵¹ The Medicaid program will help pay housing costs and the costs of medical care in a nursing home if an individual meets certain medical and financial requirements.⁵² The reason one would even need to address the ethics of an elder law practice is that there appears to be some controversy as to the ethics of planning to use the Medicaid program to help pay for disability.⁵³

In the 1980s, as Medicaid planning developed as a method of paying for long-term care, the insurance industry developed the long-term care insurance policy.⁵⁴ In theory, insuring against the costs of disability is laudable.⁵⁵ However, in the beginning, the cost of coverage made the product very expensive for the average American.⁵⁶ "Two well-known critics [of Medicaid planning] were Stephen A. Moses and Brian Burwell each of whom was known to have support from the long-term care insurance industry."⁵⁷

48. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.02 cmt. 13.

49. See TEX. DISCIPLINARY R. PROF'L CONDUCT 1.05(c)(4), (d)(1); see also TEX. DISCIPLINARY R. PROF'L 1.05 cmt. 17.

50. See TEX. DISCIPLINARY R. PROF'L CONDUCT 1.03 cmt. 5.

51. See, e.g., Alison Barnes, *An Assessment of Medicaid Planning*, 3 HOUS. J. HEALTH L. & POL'Y 265 (2003) (discussing the progress of Medicaid planning).

52. See TEX. HUM. RES. CODE ANN. §§ 2.001-32.257 (Vernon 2009); see also Medicaid Eligibility for the Elderly and Persons with Disabilities Handbook, TEXAS HEALTH AND HUMAN SERVICES (2009), <http://www.dads.state.tx.us/handbooks/mepd>.

53. See Timothy L. Takacs & David L. McGuffey, *Medicaid Planning: Can It be Justified?*, *Legal and Ethical Implications of Medicaid Planning*, 29 WM. MITCHELL L. REV. 111 (2002); Eleanor M. Crosby & Ira M. Leff, *Ethical Considerations in Medicaid Estate Planning: An Analysis of the ABA Model Rules of Professional Conduct*, 62 FORDHAM L. REV. 1503 (1994).

54. See Barnes, *supra* note 51, at 278-79.

55. See generally *id.* at 275-76 (discussing how Medicaid planning is a way to steal from the government).

56. *Id.* at 278-79.

57. *Id.* at 278. The Burwell articles that were influential in molding the opinions of Medicaid planning: *Beating the System: How Medicaid Estate Planning Works Around Transfer of Asset Rules; the Elderly are Not the Problem (Their Adult Children Are); Divesting Assets: Other Tricks of the Trade; Manipulating the Medicaid Spousal Impoverishment Rules.* *Id.*

“Medicaid planning is depicted as shameful, associated with being a deadbeat.”⁵⁸ Moses held court with the Texas legislature and the Texas Health and Human Services Commission during the 2007 legislative session.⁵⁹ Moses, the founder of The Center for Long-Term Care Reform, continues to publish articles questioning the ethics of Medicaid planning.⁶⁰ The insurance industry has a stake in blocking Medicaid planning because there is little incentive to buy long-term care insurance if an individual has access to reliable state disability assistance.⁶¹

While the insurance industry was not the sole source of opposition to Medicaid planning, the controversy arising from its vocal opposition was influential. There are vast differences in the perception of Medicaid planning.⁶² One court described Medicaid planning as “the transferring of assets to permit an individual to become Medicaid-eligible for the cost of nursing home care while enabling him or her to preserve some of his or her assets for the next generation.”⁶³

Another court stated that when an individual “will require continued nursing home care, the cost of which will exhaust his assets, it cannot be reasonably contended that a competent, reasonable individual in his position would not engage in . . . Medicaid planning.”⁶⁴ The Medicaid planning referred to by the court includes asset transfers.⁶⁵

Another description of Medicaid planning is that it is an attempt by a disabled individual “to preserve and pass on a larger estate while achieving Medicaid eligibility. The practice of planning for Medicaid eligibility has been criticized by state and federal lawmakers and the public as a shirking of responsibility.”⁶⁶

Much of the criticism arises from the evolution of Medicaid from a poverty program to one that may provide valuable benefits to people who achieved some security, however modest, by working, saving and planning throughout their lifetimes. In that context, it is not only rational to plan to conserve assets that might be consumed by the needs of advanced old age and

58. Barnes, *supra* note 51, at 278.

59. See generally STEPHEN A. MOSES, TEXAS PUBLIC POLICY FOUNDATION, DON’T MESS WITH TEXANS’ LONG-TERM CARE—FIX IT! (2007), <http://centerltc.com/pubs/Texas/pdf> (stating he has testified before Congress and state legislatures).

60. See The Center for Long-Term Care Reform, www.centerltc.com/pubs/articles/index.htm (last visited Sept. 21, 2009). These articles include *Is Medicaid Planning Ethical?*, with commentary that suggests it is unethical, and *Legal Abuse of Medicaid Long Term Care Rife Post-DRA*, discussing how the Deficit Reduction Act (DRA) of 2005 significantly limited asset transfers in conjunction with Medicaid application. *Id.*

61. See Barnes, *supra* note 51, at 278.

62. See *In re Daniels*, 162 Misc. 2d 840, 842 (N.Y. 1994); see also *In re Keri*, 853 A.2d 929, 916 (N.J. 2004).

63. *In re Daniels*, 162 Misc. 2d at 842.

64. *In re John XX*, 652 N.Y.S. 2d 329, 331 (App. Div. 1996).

65. See *id.*

66. LAWRENCE A. FROLIK & ALLISON MCHRYSTAL BARNES, ELDER LAW: CASES AND MATERIALS 321 (Lexis-Nexis 4th ed. 2007).

infirmity; it may be shirking a responsibility *not* to know the rules and engage in planning to do so.⁶⁷

Another perception was published in Newsweek in 2003 by a woman who was caring for her parents:

Once my parents reached their 80s, I started getting an unwanted education in just how expensive end-of-life care can be. I began to discover, too, that there are clever ways for people with money to avoid paying their fair share of nursing-home costs. Lawyers who specialize in elder law, and who are well versed in Medicaid rules, can show the upper middle class how to become poor on paper, so that the government will pick up their nursing bills. These arrangements are all perfectly legal, but are they ethical? . . . When I called a Medi-Cal office on my father's behalf, I found out that to qualify [my step-mother for medicaid] . . . "he'll need to spend down". . .⁶⁸

The Medi-Cal office worker suggested that her father should see an attorney to help explain the program. Her response was, "You mean about how to hide his assets?"

Medicaid is designed to help the truly indigent. If we steal from the federal government, or the state of California, we steal from our fellow citizens, whose taxes go up to pay for our care. Medi-Cal currently pays about \$1,000 less a month than the average private patient. That means nursing homes must raise the rates for private patients to compensate. "When ethics and self-interest seem to be in conflict, we face an ultimate choice," writes ethics professor Peter Singer in "How Are We to Live?" My father expressed his choice this way: "I've never cheated one penny on my taxes, and I'm not going to start hiding money now. If we outlive our savings, I won't feel a bit guilty about accepting Medicaid. But I sure as heck am not going to pretend to be eligible before then." Every well-to-do senior who hides savings for the gain of his own family and seeks benefits meant for the needy weakens communal bonds. Have we become a nation of Scrooges, counting our own coins with little concern for others?⁶⁹

In stark contrast to Conway's letter to the Newsweek editor above, Timothy Takas, a Certified Elder Law Attorney in Tennessee, describes Medicaid planning in the following manner:

Medicaid planning can be justified ethically only by placing it within the context of the economic system in which the planning takes place, we assert. Within the United States free market system, no one has a right to basic health care and long-term care. Instead, better care goes to the individual

67. *See id.*

68. Diana Conway, *Cheating Uncle Sam for Mom and Dad*, NEWSWEEK, Jan. 27, 2003, at 14.

69. *Id.*

who can afford to pay for better care. The individual whose dire health care needs force him to “spend down” to Medicaid benefits loses his ability to pay for his other basic needs (such as food, shelter, and clothing, as well as other health care and long-term care goods and services). Within this system, Medicaid planning is not only ethically justified, it is imperative to the individual’s survival.

As we wrote, “Where the market permits planning which results in a reduced net price, a purchaser cannot be faulted for availing himself of the lower price even if he could pay more. In a health care system in which the commodity known as *health* is bought and sold, there is no reason why any market participant should value another person’s property (that is, health) more than his own. Until the United States elevates health care to a moral right, instead of a property right, Medicaid planning is morally and ethically justified.”⁷⁰

However, all of the above comments have not clearly identified why an elder individual would want to pass on assets to children while using the Medicaid program to fund disability. A closer look at the realities of disability may help an attorney to decide if Medicaid planning should be included in his or her personal practice of law.

The children of the disabled elder population are referred to as the “sandwich” generation—sandwiched between the obligation of caring for children who are in high school and college and also caring for parents who have lived longer than earlier generations but with more disabilities.⁷¹ Alzheimer’s Disease, a disease of the brain that diminishes a person’s ability to reason and perform even the basic activities of daily living, is a major cause of elder disability.⁷² The Alzheimer’s Association has found that the caregivers for our disabled elders provide uncompensated care that is valued at \$1 billion in thirty-one of the United States.⁷³ The unpaid caregivers in Texas, New York, Florida, and California provide care at more than \$4 billion.⁷⁴ Based on statistical estimates, about one-half of the unpaid caretakers spend an average of \$219 per month out of their own pockets to help finance their loved one’s care.⁷⁵ However, costs may be much higher than the \$219 monthly estimate.

Evercare, in conjunction with the National Alliance for Caregiving, published a study in 2007 describing the sacrifices made by caregivers for their elder loved ones.⁷⁶ According to the report, the actual out-of-pocket cost

70. Timothy L. Takas, Is Medicaid Planning Ethical? The Elder Law Attorney’s Ethical Dilemma, LIFE CARE PLANNING FIRM (2006), <http://www.tn-elderlaw.com/medicaidplanning.aspx>.

71. See The Sandwich Generation, <http://www.thesandwichgeneration.com> (last visited Oct. 15, 2009).

72. ALZHEIMER’S ASSOCIATION, 2008 ALZHEIMER’S DISEASE FACTS AND FIGURES (2008), www.nadsa.org/publications/.../2008_Alzheimers_Facts_web.pdf.

73. *Id.* at 15.

74. *Id.*

75. *Id.* at 18.

76. See generally National Alliance for Caregiving, www.caregiving.org (last visited Dec. 21,

of the caregiver participants was \$12,348 annually or \$1,029 per month, rather than the \$219 per month estimated by the Alzheimer's Association.⁷⁷

Additionally, "the level of out-of-pocket spending remains high for those with extremely limited incomes. Those with the lowest income (less than \$25,000 per year) report an average annual expense of more than \$5,000—greater than 20% of their annual income."⁷⁸

Not only were caregivers reaching into their own pocketbook to pay for their loved ones' care, but the added financial burden also adversely impacted the working caregivers' employment.⁷⁹

Survey respondents were asked about the overall effects of care responsibilities on their work and work related issues. Not surprisingly, half (48%) of employed caregivers or those who had been working at some time while they were a caregiver reported that they had used their own vacation time or sick days to provide care. More than one-third (37%) cut back on work hours or quit work entirely.

A total of 15% of employed caregivers in the survey reported that they had taken an unpaid leave of absence and 14% reported they had left a job and taken another as a result of caregiving. One in six (17%) of the employed caregivers reported that they had taken an additional job or worked extra hours as a result of their care responsibilities.⁸⁰

Ask an elder client about disability, and the first thing one will tell you is that he or she does not want to be a burden to their family.⁸¹ However, they are a burden to their family, and they desperately need help to get to the doctor, pay bills, feed pets while they are in the hospital, and so on.⁸² Their way of repaying their children for the huge sacrifices they make is to ensure that some of their meager assets pass to their children while they desperately

2009) (explaining that the National Alliance for Caregiving is a coalition of such organizations as AARP, Alzheimer's Association, Easter Seals, Lighthouse International, Parkinson's Foundation, and other organizations with a goal of creating a resource for family caregivers to improve the quality of life for families and their disabled loved ones).

77. See EVERCARE, STUDY OF FAMILY CAREGIVERS—WHAT THEY SPEND, WHAT THEY SACRIFICE: THE PERSONAL FINANCIAL TOLL OF CARING FOR A LOVED ONE 16 (Nov. 2007), http://www.caregiving.org/data/Evercare_NAC_CaregiverCostCtudyFINAL20111907.pdf.

78. *Id.* at 19.

79. *See id.* at 20.

80. *See id.* at 21.

81. See IRA BYOCK, HOUSE HUMAN SERVICES COMMITTEE TESTIMONY ON HOUSE BILL 44 (2007), <http://www.dyingwell.com/downloads/byockH44testimony/03-01-07.pdf>.

82. See, e.g., Alzheimer's Association, *Caregiver Stress*, http://www.alz.org/living_with_alzheimers_caregiver_stress_lwa.asp (last visited Dec. 21, 2009). See also Kim Culver, *If You Are Counting on Receiving An Inheritance, You Better Think Again: How to Help Your Client Avoid Receiving a Negative Inheritance*, available at http://www.thecodicil.org/home/index.php?option=com_content&view=section&layout=blog&id=8&Itemid=62 (last visited Dec. 21, 2009) (While the Comment does not accurately reflect Texas Medicaid rules, it contains an interesting discussion of "negative inheritance" or the cost of care borne by children of aging baby boomers.).

try to obtain health care through the Medicaid program that they otherwise could not afford.⁸³

All said, the United States Congress that created the Medicaid program designed it not only to allow the indigent person to access Medicaid assistance, but also to allow a spouse to use Medicaid funds so that the community spouse is not financially decimated.⁸⁴ Under the rules of the Spousal Impoverishment Act, Congress took the Medicaid program out of the realm of welfare to allow a spouse to protect up to \$109,560 (for 2009), and potentially more assets if their combined monthly income is low.⁸⁵ The United States Supreme Court also recognized that the Medicaid program, as designed by Congress, is not limited to persons who are poor.⁸⁶

B. Client Expectations

The necessity of diligent representation of a client is clear, as noted in the discussion of the Texas Disciplinary Rules in the first section of this paper.⁸⁷ However, the elder law attorney must have additional consideration in the representation of an elderly client.⁸⁸ “There is no question that the use of . . . Medicaid planning by competent persons is legally permissible and that proper planning benefits their estates.”⁸⁹ Therefore, the counselor, when questioned about the medicaid program, should investigate all legal planning opportunities before responding “there’s nothing you can do.”⁹⁰ Tax lawyers do not encourage clients to pay the maximum tax liability because the lawyer believes that it will generate needed tax revenues.⁹¹ All attorneys venturing into the realm of public benefits must adhere to the Disciplinary Rules by zealously representing the client within the law.⁹² Advising a client to take actions contrary to the law would be inconsistent with the Disciplinary Rules

83. See Jan Ellen Rein, *Misinformation and Self-Deception in Recent Long-Term Care Policy Trends*, 12 J.L. & POL. 195, 268 (Spring 1996).

84. See 42 U.S.C. § 1396r-5(c),(d) (Supp. 2009) (referred to as the Spousal Impoverishment provisions of the Medicare Catastrophic Coverage Act of 1988).

85. See 1 TEX. ADMIN. CODE § 358.415 (2009) (Tex. Health and Human Serv. Comm.’s); see also Medicaid Eligibility for the Elderly and Persons with Disabilities Handbook J-6000, TEXAS HEALTH AND HUMAN SERVICES (2009), <http://www.dads.state.tx.us/handbooks/mepd>.

86. See generally, *Wis. Dep’t of Health & Family Servs. v. Blumer*, 534 U.S. 473, 473 (2002) (noting that the 1988 amendment to the Social Security Act was for the purpose of preventing pauperization of the community spouse when Medicaid is needed to assist with payment of the ill spouse’s nursing care).

87. See *supra* Part I.A.

88. See *supra* Part I.A.1.

89. *In re Klapper*, NYLJ, Aug. 9, 1994, at col.1 [Sup. Ct., Kings County].

90. TEX. GOV’T. CODE ANN, Title 2, Subt. G App. A. Art. 10, § 9, Rule 1.06 (Vernon 2005). See also Ell en Rein, *Misinformation and Self-Deception in Recent Long-Term Care Policy Trends*, 12 J.L. & Pol. 195, 340 n. 177 (Spring 1996) (citing Brian O. Burwell, Middle-Class Welfare: Medicaid Estate Planning for Long-Term Care Coverage, *SysteMetrics Rep.*, Sept. 1991, at 3) (“[b]ecause the rules are complex, Medicaid estate planning often requires the counsel of an attorney or financial planner who is knowledgeable about Medicaid.”).

91. See MODEL RULES OF PROF’L CONDUCT pmbl. ¶ 2 (2009) (describing a lawyer’s role as an advocate as one who zealously vies for the client while adhering to the rules of the legal system).

92. See *supra* note 9 and accompanying text.

and invites litigation for negligence, breach of fiduciary duty, or malpractice.⁹³ For example, a guardian was held personally liable for assets that he spent on private pay when he could have protected assets by using Medicaid to pay for the ward's care.⁹⁴

C. Gifting

For a number of years, clients considered transferring assets to a loved one in anticipation of a possible application for Medicaid benefits for many reasons, two of which are: (1) because the assets were insufficient to pay for the client's care, and (2) as a means of reimbursing family members for their uncompensated assistance.⁹⁵ Gifting as a means to obtain Medicaid assistance has significantly changed since Congress passed the Deficit Reduction Act of 2005.⁹⁶ Nonetheless, an attorney should take special care when advising about past gifts or assisting a client with gift assets in anticipation of applying for, or maintaining eligibility for, Medicaid benefits. The lawyer must keep in mind the role of the advisor: "In representing a client, a lawyer shall exercise independent judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation."⁹⁷

Likewise, the Ethical Considerations (EC) within the ABA Model Code of Professional Responsibility, speak to the breadth of advice required and permitted:

EC 7-8: A lawyer should exert his best efforts to insure that decisions of his client are made only after the client has been informed of relevant considerations. A lawyer ought to initiate this decision-making process if the client does not do so. Advice of a lawyer to his client need not be confined to purely legal considerations. . . . In assisting his client to reach a proper decision, it is often desirable for a lawyer to point out those factors which

93. See MODEL RULES OF PROF'L CONDUCT R.1.2 (d); MODEL CODE OF PROF'L RESPONSIBILITY DR 7-102(A)(7) (1981).

94. *In re Guardianship of Connor*, 525 N.E. 2d 214, 216-17 (Ill. App. Ct. 1988); see also *Gamez v. State Bar of Texas*, 765 S.W.2d 827, 834-35 (Tex. App.—San Antonio 1988, writ denied) (upholding the State Bar of Texas' disciplinary action against paying debts out of debtor's estate without consent, or even advising the client of an available income tax exemption that would have protected some of the client's assets).

95. See Lisa Schreiber Joire, *After New York State Bar Ass'n v. Reno: Ethical Problems in Limiting Medicaid Estate Planning*, 12 GEO. J. LEGAL ETHICS 789, 799-800 (Summer 1999) (discussing cultural reasons for Medicaid planning, including avoiding depletion of assets due to health care costs and compensating family members).

96. See Julia M. Hargraves, *Financing Long-Term Care in Missouri: Limits and Changes in the Wake of the Deficit Reduction Act of 2005*, 73 MO. L. REV. 839, 846 (Summer 2008) (discussing how the Deficit Reduction Act of 2005 ("DRA") makes Medicaid planning more difficult by delaying eligibility after asset transfers, among other changes). Not all states have adopted DRA. Texas as well as Missouri are two states that implement DRA.

97. MODEL RULES OF PROF'L CONDUCT R.2.1 (2009).

may lead to a decision that is morally just as well as legally permissible. . . . In the final analysis, however, . . . the decision whether to forego legally available objectives or methods because of non-legal factors is ultimately for the client and not for himself.⁹⁸

The attorney should take note of one judge's consideration of gifting for medicaid eligibility:

The complexities [of the law]. . . should never be allowed to blind us to the essential proposition that a man or a woman should normally have the absolute right to do anything that he or she wants to do with his or her assets, . . . which includes the right to give those assets away to someone else for any reason or for no reason. . . . We would only amplify this by saying that no agency of the government has any right to complain about the fact that middle class people confronted with desperate circumstances choose voluntarily to inflict poverty upon themselves when it is the government itself which has established the rule that poverty is a prerequisite to the receipt of government assistance in the defraying of the costs of ruinously expensive, but absolutely essential, medical treatment.⁹⁹

D. Avoiding Fraud

It is unethical to assist a client in committing fraud.¹⁰⁰ While this statement sounds obvious, transfers must still be scrutinized.

1. The State

It is not uncommon for a client to ask, "What if I just transfer the asset and then fail to list the asset in a Medicaid application?" It is clearly unethical to assist a client in failing to disclose a material fact.¹⁰¹ The fact that a transfer was in cash or consisted of tangible, untitled property and cannot be traced does not mean the transfer does not have to be disclosed. Contrary to some clients' beliefs and values, these disclosures are required in the Medicaid application and in the oral interview with the Texas Health and Human Resources Commission caseworker. However, every asset transfer is not penalized.¹⁰² For example, an uncompensated transfer is not penalized if it is "solely for some purpose other than to obtain Medicaid services."¹⁰³

98. MODEL RULES OF PROF'L CONDUCT EC 7-8 (2009).

99. *In re Shah*, 733 N.E. 2d 1093, 1101 (N.Y. 2000).

100. See TEX. DISCIPLINARY R. PROF'L CONDUCT 1.02(c), *reprinted in* TEX. GOV'T. CODE ANN., tit. 2, subtit. G app. A (Vernon 2005) (Tex. State Bar R. art. X, § 9).

101. See TEX. DISCIPLINARY R. PROF'L CONDUCT 3.04(a), 3.10, 4.01(b), *reprinted in* TEX. GOV'T. CODE ANN., tit. 2, subtit. G app. A (Vernon 2005) (Tex. State Bar R. art. X, § 9).

102. See 1 TEX. ADMIN. CODE § 358.401(d)(2) (2009) (Tex. Health & Human Servs. Comm'n, Transfer of Assets).

103. *Id.* § 358.430(I)(1).

Could a gift result in the state bringing an action against the applicant for fraud? Assume that a elderly individual gifts assets to a family member and then applies for Medicaid assistance. The agency will impose a transfer penalty for Medicaid assistance by dividing the average cost of nursing care into the amount of the gift.¹⁰⁴ Following enactment of the Omnibus Budget Reconciliation Act of 1993 (OBRA '93), the question arose whether the asset transfer was also a fraudulent transfer.¹⁰⁵ After some scrutiny, elder law attorneys generally concluded that the federal law imposing a transfer penalty was the sole penalty a state could impose because the federal transfer penalty pre-empted state fraudulent transfer laws.¹⁰⁶ In fact, there is no fraud on the state because the transfer is revealed during the application process and absent any exemptions, a transfer penalty is assessed.¹⁰⁷ In the sixteen years following enactment of OBRA '93, the author finds no successful cases of the agency claiming a fraudulent transfer in an eligibility application in addition to the transfer penalties imposed by the federal law.

Additionally, OBRA '93 amended the federal law to require states to attempt to recover from the estates of certain deceased Medicaid recipients.¹⁰⁸ However, Texas resisted implementing a Medicaid Estate Recovery Program (MERP) until the 2003 legislative session.¹⁰⁹ In that session, one sentence was inserted in the Health and Safety Code, designating the State of Texas as a creditor of a deceased medicaid recipient's estate.¹¹⁰ The designation created the Texas Medicaid Estate Recovery Program¹¹¹ The legislature could have passed a much more restrictive statute, but chose the more lenient form of MERP allowed by federal law.¹¹²

Upon enactment of MERP, the Texas legislature instructed the rule-makers in the state Health and Human Services Commission to promulgate laws that would be the least restrictive and the rulemakers acknowledged the mandate.¹¹³ The promulgated rules allow enforcement of MERP only against

104. See 1 TEX. ADMIN. CODE § 358.430(f) (2009) (Tex. Health & Human Servs. Comm'n); see also Medicaid Eligibility for the Elderly and Persons with Disabilities Handbook I-5000, TEXAS HEALTH AND HUMAN SERVICES (2009), <http://www.dads.state.tx.us/handbooks/mepd>.

105. See Robert M. Freedman & Frances M. Pantaleo, *In Defense of Medicaid Planning: Federal Law Prohibits States from Applying Debtor-Creditor Laws to Transfer Assets*, 7 NAT. ACAD. OF ELDER L. ATTY'S Q.J. 15 (Fall, 1994).

106. See, e.g., *id.*

107. See 1 TEX. ADMIN. CODE § 358.430(e) (2009) (Tex. Health & Human Servs. Comm'n).

108. 42 U.S.C. §§ 1396p(a)-(b) (2009).

109. *Recovery of Medical Assistance*, 78th Leg., R.S., Ch. 198, § 219, 2003 Tex. Gen. Laws 650 (current version at TEX. GOV'T CODE § 531.007 (Vernon 2007)).

110. See TEX. PROB. CODE ANN. § 322 (designating the State of Texas a Class 7 creditor of a decedent's estate).

111. See TEX. GOV'T CODE ANN. § 531.077 (Vernon 2007) (a creditor statute making the state a Class 7 creditor under Probate Code § 322); 1 TEX. ADMIN. CODE § 373 (2009) (Health and Human Serv. Comm'n).

112. TEX. GOV'T CODE ANN. § 531.077(a) (Vernon 2007) ("The commissioner shall ensure that the state Medicaid program implements 42 U.S.C. § 1396p(b)(1)."). The legislature could have required the commissioner to implement the more onerous subsection (a) of the federal law, requiring liens on a recipient's property but chose the lesser restrictive measure of unsecured creditor status. *Id.*

113. See Peggy Fikac, *State Could Grab Medicaid Recipient's House at Death; Seizure Would*

the estate of a deceased Medicaid beneficiary.¹¹⁴ Thus, Texas Medicaid, by legislative direction, has MERP regulations that allow Texas citizens to take steps to protect assets. Hence, just as an individual may take the appropriate steps to claim an income tax credit, the individual may also take the appropriate steps to avoid MERP, such as passing assets outside of an estate.¹¹⁵ As with the gifting penalty, avoiding estate recovery by passing assets outside of the Medicaid recipient's estate is well within the law and should not be subject to a State claim as a fraudulent transfer.¹¹⁶ In 2003 when MERP was enacted, the state could have extended estate recovery to include assets owned just prior to death in the form of a life estate, for example. However, the state legislature chose to limit MERP as much as possible under the federal statute.¹¹⁷ The state cannot impose a standard that is more restrictive than the federal plan, and thus there should be no fraud in taking legal steps to protect an estate from Medicaid Estate Recovery.¹¹⁸

2. The Nursing Home

The Texas Disciplinary Rules prohibit an attorney from engaging in conduct that is dishonest, fraudulent, or deceitful.¹¹⁹ If an attorney assists a client in transferring assets to the ultimate detriment of a nursing home, the nursing home may attempt to include the attorney in an action for conspiracy to transfer assets in fraud of known creditors.¹²⁰

Reimburse Nursing Home Costs, SAN ANTONIO EXPRESS-NEWS, June 18, 2003, at A1. ("Our intent is to implement the law in a way that protects the interests of the heirs and the taxpayers," [HHSC spokesperson Kristie] Zamrazil said.)).

114. See 1 TEX. ADMIN. CODE § 373.103 (2009) (Tex. Health & Human Servs. Comm'n, Medicaid Estate Recovery Program).

115. See *id.* For example, assets might pass outside of a decedent's estate by beneficiary designation, joint tenancy with rights of survivors, or life estate with designated remainder, to name some of the legal methods. *Id.*

116. The author finds no reported cases of a state claiming a fraudulent transfer of assets resulting from legal steps to protect an estate from Medicaid Estate Recovery.

117. See Fikac, *supra* note 113, at A1.

118. See 42 U.S.C. § 1396p(c)(4) (2009).

A state . . . may not provide for any period of ineligibility for an individual due to transfer of resources for less than fair market value except in accordance with this subsection. In the case of a transfer by the spouse of an individual which results in a period of ineligibility for medical assistance under a State plan for such individual, a State shall, using a reasonable methodology . . . apportion such period of ineligibility . . . among the individual and the individual's spouse if the spouse otherwise becomes eligible for medical assistance under the State plan." *Id.*; see also 42 U.S.C. § 1396a(a)(18) (2009) (stating that a state must "comply with the provisions of section 1396p of this title with respect to liens, adjustments and recoveries of medical assistance correctly paid, transfers of assets. . .").

119. See TEX. DISCIPLINARY R. PROF'L CONDUCT 8.04(a)(3), reprinted in TEX. GOV'T. CODE ANN., tit. 2, subtit. G app. A (Vernon 2005) (Tex. State Bar R. art. X, § 9).

120. Compare TEX. DISCIPLINARY R. PROF'L CONDUCT 8.04(a)(3) (barring lawyer from engaging in fraud or misrepresentation) with TEX. BUS. & COM. CODE ANN. § 24.005 (Vernons 2009) (barring transfer of assets with an intent to defraud a creditor).

A debtor makes a fraudulent transfer when transferring assets intending to defraud, delay, or hinder creditors from reaching the debtor's property.¹²¹ The purpose of the Uniform Fraudulent Transfer Act is to prevent transfers of debtor's property with an intent to defraud creditors.¹²² Imposing liability on a third party who participates in the fraud is a possible deterrent.¹²³ An attorney can face liability if the attorney knowingly participated in a conspiracy to defraud someone.¹²⁴ "Over 100 years ago, the Supreme Court of Texas held that where a lawyer acting for his client participates in fraudulent activities, his action in so doing is 'foreign to the duties of an attorney.'"¹²⁵ Thus, if the attorney, in the zeal to assist a client in gifting assets assists a disabled client or client's agent in creating an insolvent estate that has no means of paying the known nursing home costs, the attorney could potentially face a claim of conspiracy to defraud the nursing home.¹²⁶

E. Medicaid Planning by Non-attorneys

Attorneys should be aware of the illegality of Medicaid planning by non-attorneys. Section 12.001, Prohibited Activities, of the Texas Human Resources Code states:

- (a) A person who is not licensed to practice law in Texas commits an offense if the person charges a fee for representing or aiding an applicant or recipient in procuring assistance from the department.
- (b) A person commits an offense if the person advertises, holds himself or herself out for, or solicits the procurement of assistance from the department.
- (c) An offense under this section is a Class A misdemeanor.¹²⁷

F. Some Current Issues in Medicaid Planning

1. Medicaid Estate Recovery Program ("MERP")

a. Scrutinize the forest as well as the trees when avoiding Medicaid Estate Recovery by passing real property outside of probate. The primary

121. See, e.g., *Nobles v. Marcus*, 533 S.W.2d 923, 925 (Tex. 1976).

122. See, e.g., *Flores v. Robinson Roofing & Const. Co., Inc.*, 161 S.W.3d 750, 754 (Tex. App.—Fort Worth 2005, review denied).

123. See, e.g., *Connell v. Connell*, 889 S.W.2d 534, 541 (Tex. App.—San Antonio 1994, writ denied).

124. See *Likover v. Sunflower Terrace II, Ltd.*, 696 S.W.2d 468, 472 (Tex. App.—Houston [1st Dist.] 1985, no pet.).

125. *Id.* (citing to *Pool v. Houston & T.C. Ry*, 58 Tex. 134, 137 (1882)).

126. See *Shelley v. Walnut Place Nursing Home*, No. 05-94-01047-CV, 1995 WL 73094 (Tex. App.—Dallas Feb. 23, 1995, no pet.) (not designated for publication).

127. TEX. HUM. RES. CODE ANN. § 12.001 (Vernon 1996); see also TEX. PENAL CODE ANN. § 12.21 (stating a Class A misdemeanor is punishable by either jail time or a fine, or both).

asset owned by a Medicaid recipient is most often the homestead.¹²⁸ Upon the recipient's death, if title to the property is owned by the decedent's estate, the Medicaid recovery unit, HMS, Inc., will attempt to recover for Medicaid expenditures made during the life of decedent (but no earlier than the MERP effective date of March 1, 2005).¹²⁹ If, however, the homestead passes outside of the estate through joint tenancy with rights of survivorship or as a life estate with remainder vesting at death, then there is no recovery because there is no estate to recover from.

In the zeal to protect assets from MERP, the counselor should be careful to maintain the decedent's estate plan as set out in the decedent's will. For example, assume Mama has been in the nursing home receiving Medicaid assistance since January 1, 2006. Mama still owns her homestead as a Medicaid exempt asset. Mama's will passes all of her estate to her two daughters or if a daughter predeceases, that deceased daughter's share shall pass to the deceased daughter's descendants per stirpes, which is typical of many estate plans. Now assume both daughters are alive and married. Daughter #2 has divorced her husband of thirty years and married a man who is the same age as the youngest of her three sons. At Daughter #2's wedding, Mama made it clear that she did not like her new son-in-law, believing him to be a gold-digger. Mama is now incapacitated but named Daughter #1 as her agent under a statutory durable power of attorney prior to incapacity.

Enter the elder law attorney. The attorney is asked by Daughter #1 to assist in avoiding MERP. The attorney finds a form for a joint tenancy deed transferring a minuscule interest in the real property to Daughter #1 and #2. Daughter #2 predeceases Mama leaving the entire homestead to Daughter #1—disinheriting the three sons of Daughter #2.

In the alternative, the attorney finds a form for a deed reserving a life estate with a power of appointment (referred to as a "ladybird deed") and names Daughters #1 and #2 as grantees. Daughter #2 predeceases Mama leaving her remainder interest to Gold Digger, which again distorts Mama's intent to pass assets down to her grandchildren.

b. Affidavits of heirship do not pass assets outside of an estate. MERP can recover from the estate of a deceased Medicaid recipient. Avoiding estate administration does not mean that the decedent's estate did not own an asset.

c. The state, acting through its contracted agent, HMS, Inc., is an unsecured creditor that must comply with statutes protecting debtors.¹³⁰ Upon the death of a Medicaid recipient, the State has the right to recover for State payments made on behalf of the recipient from the deceased recipient's estate,

128. See, e.g., 1 TEX. ADMIN. CODE, Ch. 358, Division 2 (2009) (Tex. Health & Human Servs. Comm'n, Medicaid Eligibility for the Elderly and People with Disabilities).

129. See 1 TEX. ADMIN. CODE § 373.103(a)(2) (2009) (Tex. Health & Human Servs. Comm'n, Medicaid Estate Recovery Program); see also Medicaid Estate Recovery (DADS), http://www.dads.state.tx.us/services/estate_recovery (last visited Sep. 21, 2009).

130. See FAIR DEBT COLLECTION PRACTICES ACT, 15 U.S.C. §§ 1692-1692p (2006). There is no immunity from complying with the Fair Debt Collection Practices Act for a privately contracted collection agency. *Brannan v. United Student Aid Funds, Inc.*, 94 F.3d 1260, 1263 (9th Cir. Or. 1996), *cert. denied*, 521 U.S. 1106, 521 U.S. 111.

under certain guidelines set out in Chapter 373 of the Texas Administrative Code.¹³¹ However, as an unsecured creditor, the state must comply with federal and state statutes that protect a debtor from unfair debt collection practices.¹³² Continuing to contact the client once an attorney for the client gives the creditor notice of appearance is in clear violation of the Federal Debt Collections Practices Act.¹³³ Also, the federal, state, and common law protections provide that if a debt is disputed, the “debt collector has 30 days after receiving [our] written request to determine whether or not the disputed item is correct.”¹³⁴

2. *The Nursing Home Agreement*

An initial consultation with an elder law attorney may often occur after a medical emergency makes clear that the frail individual must enter a nursing facility in order to receive the necessary level of care. The Federal Nursing Home Reform Act (NHRA) prohibits skilled nursing facilities from conditioning admission on a third party guarantee of payment.¹³⁵ However, in an effort to assure payment, some nursing homes have tried to enforce payment, at best, through allegedly voluntary guarantees, and at worst, in clear violation of NHRA. Consider the following cases:

a. A son was liable for breach of contract when he placed his mother in a nursing home and failed to reduce his mother’s assets to \$1,600 in order for her to qualify for Medicaid benefits. The nursing home sued after no payment was received for the mother’s care. The son signed the nursing home contract only as power of attorney for his mother, but the explanations of his duties as the responsible party were enough to constitute an oral contract.¹³⁶

b. An agent signed a nursing home agreement in the capacity as agent but failed to pay the monthly income to the facility. Subsequently, the agent signed a promissory note on behalf of the principal. The court held that the agent was personally liable for failing to pay the principal’s income to the facility.¹³⁷

c. An Arkansas court found the son of a nursing home resident liable for payment of nursing home costs.¹³⁸ The nursing home contract, in clear violation of the NHRA, placed liability for payment on the resident and the

131. See 1 TEX. ADMIN. CODE § 373 (2009) (Tex. Health & Human Servs. Comm’n).

132. See 15 U.S.C. § 1692.

133. *Id.*

134. See Texas Attorney General, www.oag.state.tx.us/consumer/debt_collection.shtml (last visited Sept. 21, 2009).

135. See 42 U.S.C. § 1395i-3 and § 1396r (West 2004). NHRA regulates facilities that accept Medicaid and Medicare payments. *Id.*

136. See *Glastonbury Healthcare Ctr., Inc. v. Esposito*, No. CV 01-0811032, 2008 WL 2797003 (Conn. Super. Ct. June 23, 2008).

137. See *Concord Health Care, Inc. v. Schroeder*, 894 N.E.2d 351 (Ohio Ct. App.—11th Dist. 2008).

138. See *Holloway v. Riley’s Oak Hill Manor, Inc.*, No. CA 02-74, 2002 WL 31259803 at *4 (Ark. Ct. App. Oct. 9, 2002).

responsible party who signed the agreement on behalf of the resident.¹³⁹ A Missouri court also held in favor of a nursing home contract that required the agent to guarantee payment as a condition of admission.¹⁴⁰ In these two cases, the attorney representing the agent apparently did not plead violation of NHRA.

d. In *Sunrise Healthcare Corp. v. Azarigian*, the court held an agent or responsible party liable for the nursing home debt because the agent transferred assets for estate planning purposes and paid for a private duty nurse rather than paying the funds for nursing care.¹⁴¹ The resident was denied medicaid eligibility as a result of the agent's failure to provide documentation requested by the State.¹⁴² In the contract signed by the agent on behalf of her mother, Gloria Wood, the agent stated "that if she had control of or access to the income and/or assets of Gloria Wood, she would use such funds for her welfare, including making prompt payment for care and services rendered to Gloria Wood pursuant to the contract."¹⁴³ The court discussed the NHRA but found that the contract did not require the agent to personally guarantee payment; thus, the contract did not violate the act.¹⁴⁴

e. In *Pioneer Ridge Nursing Facility Operations, L.L.C. v. Ermey*, a son was his mother's agent under a general durable power of attorney.¹⁴⁵ His mother was admitted to the nursing home in 2006 as a Medicaid-pending applicant.¹⁴⁶ His mother was ultimately eligible for Medicaid, but a period of ineligibility was assessed incurring a nursing home debt in excess of \$13,000.00.¹⁴⁷ The son signed a promissory note in his capacity as agent for his mother.¹⁴⁸ After his mother's death, the nursing home sent a demand letter, but the son failed to pay; the nursing home sued the son.¹⁴⁹ The lower court dismissed the suit finding that the nursing home could not enforce personal liability in violation of NHRA.¹⁵⁰ The court further held that the promissory note was without consideration and thus invalid.¹⁵¹ The Kansas appellate court, however, reversed and remanded on the issue of whether the son voluntarily signed the promissory note, stating that while NHRA prevented a nursing home from requiring a third party guarantee, a guarantee

139. See *id.* at *3.

140. See *Care Ctr. of Kan. City v. Horton*, 173 S.W.3d 353 (Mo. Ct. App.—W.D. 2005) *reh'g denied*, (Nov. 1, 2005).

141. See *Sunrise Healthcare Corp. v. Azarigian*, 821 A.2d 835, 836 (Conn. App. Ct. 2003).

142. See *id.* at 842.

143. See *Sunrise Healthcare Corp. v. Azarigian*, No. CV990405206, 1999 WL 33980715, ¶ 7 (Conn. Super. April 13, 1999).

144. See *Sunrise*, 821 A.2d at 840.

145. See *Pioneer Ridge Nursing Facility Operations, L.L.C. v. Ermey*, 203 P.3d 4, 5 (Kan. Ct. App. 2009).

146. See *id.*

147. See *id.* at 5-6.

148. See *id.* at 6.

149. See *id.*

150. See *id.*

151. See *id.*

could be given voluntarily.¹⁵² One particular point in the opinion is especially interesting:

Second, the trial court correctly asserts that Pioneer was prohibited from discharging Neva [mother]. Under the NHRA, a skilled nursing facility must also permit its residents to remain in its facility and may only discharge its residents under very limited circumstances, such as when a resident fails to pay for his or her stay at its facility. 42 U.S.C. § 1396r(c)(2)(A)(v). Furthermore, “[f]or purposes of [42 U.S.C. § 1396r(c)(2)(A)(v)], in the case of a resident who becomes eligible for [Medicaid] assistance . . . after admission to the facility, only charges which may be imposed under [42 U.S.C. § 1396r are] allowable.” 42 U.S.C. § 1396r(c)(2)(A). In other words, when an individual originally admitted as a “private pay” resident later qualifies for medicaid assistance, the individual cannot be discharged for failing to pay the debt he or she has incurred as a “private pay” resident. Under the NHRA, the individual can only be discharged for “failing to pay” certain permitted Medicaid charges.”¹⁵³

f. In an unreported case, an individual filed an action against the debt collector, who was also an attorney, for violation of the Fair Debt Collections Practices Act (FDCPA).¹⁵⁴ The agent for a nursing home resident appealed garnishment of his wages and countersued the debt collector for violations of the NHRA.¹⁵⁵ The nursing home contract, which was the basis for the debt, required the agent of the nursing home resident to guarantee payment of the nursing home cost as a condition of admission.¹⁵⁶ The debt collector argued that the suit should be dismissed for failing to state a valid cause of action, arguing that the FDCPA does not require the debt collector to institute a legal analysis of the creditor’s contract.¹⁵⁷ However, the agent pointed out that the debt collector had lost a number of cases because the creditor’s contract violated NHRA and thus should have known that there was no basis for a claim against the agent.¹⁵⁸ Accordingly, the debt collector’s plea to dismiss the case was denied.¹⁵⁹

IV. CONCLUDING THOUGHTS

There are numerous areas of legal practice. The attorney may choose not to engage in the practice of criminal law, bankruptcy law, litigation, or elder law for various reasons, all of which are absolutely acceptable. However, if the attorney accepts representation of an elder client who has concerns about

152. *See id.* at 8.

153. *See id.* at 8-9.

154. *See Carroll v. Butterfield*, No. 02-C-4903, 2003 WL 22462604 (N.D. Ill).

155. *See id.* at *1.

156. *See id.*

157. *See id.* at *2.

158. *See id.*

159. *See id.* at *4.

funding disability, the attorney is bound by the Texas Rules of Disciplinary Conduct guiding principle: “[T]hat the lawyer should reasonably fulfill client expectations for information consistent with the duty to act in the client’s best interests, and the client’s overall requirements as to the character of representation.”¹⁶⁰ And “[a] lawyer may not, however, withhold information to serve the lawyer’s own interest or convenience.”¹⁶¹

As attorneys, we strive to please our clients, but we all must deal with the facts. We may certainly engage in “cutting edge” legal planning, but we should take great care not to go over the edge.

160. TEX. DISCIPLINARY R. PROF’L CONDUCT 1.03 cmt. 2, *reprinted in* TEX. GOV’T. CODE ANN., tit. 2, subtit. G app. A (Vernon 2005) (Tex. State Bar R. art. X, § 9).

161. TEX. DISCIPLINARY R. PROF’L CONDUCT 1.03 cmt. 4.