

Quarterly

The Journal of the National Academy of Elder Law Attorneys

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SUMMER 2004

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Planning Lessons Learned

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amicably resolve any disagreements. Determine if the disagreement can be resolved through:

1. discussion of patient wishes;
2. education through social worker, chaplain, patient advocate, outside clergy;
3. use of facility based ethics committees, but note that not all ethics committees function effectively or to decide in a manner consistent with the wishes of the patient;
4. waivers signed by family members;
5. moving the patient to an alternate care location may satisfy an unhappy provider potential for referral of case to Adult Protective Services or to Prosecutors.

Appendix Note: For ease in downloading, an appendix containing sample language has been placed on the home page of the NAELA website at www.naela.org.

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Revisiting the Ethics of Medicaid Planning

By Timothy L. Takacs, CELA
and David L. McGuffey, CELA¹

[Report from a telephone conversation]: "When the agent learned we had [no company that would provide long term care insurance for a gentleman in his 90s], he thought they could do some Medicaid Planning instead. I gasped and said, 'Why in the world do that?' ... 'Here we have an individual who is coming into the final phase of life, who has accumulated over his 90+ years a tidy sum of a half a million dollars. Why wouldn't we want these last years to be the very best for him and his family? *I don't believe Medicaid planning will do that for him, but his own money will!*'"²

Ethical codes regulate the practice of law, and the practice of Elder Law is fraught with ethical pitfalls. This article explores some of those pitfalls in the Medicaid Planning context. In our 2002 law review article, we began a discussion concerning the tension that arises where Medicaid asset protection planning clashes with an individual's responsibility to pay for his own nursing home care. Under the broad view, which could be called macro-ethics,

we concluded that Medicaid Planning as practiced by Elder Law Attorneys is ethically justified in the present economic environment. In a free market system in which "health" is not a right but is bought and sold just like any other commodity, no participant in that market has an obligation to pay more than the legal market price for that commodity.³

The inquiry does not end there. Tools such as Medicaid Planning are not always used for *just* ends. We now return to another conclusion we reached in our first article, that our primary goal as Elder Law Attorneys should be to improve the lives of our clients. In this narrower context, what could be called micro-ethics, we now address how Medicaid Planning should be done and under what circumstances it is dedicated to justice.

In this article, we turn our attention to whether Medicaid Planning is ethically justified in the context of family wealth preservation. More to the point, does Medicaid asset protection planning, if its principal purpose is to pass those assets to the

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1 Copyright 2004 Timothy L. Takacs and David L. McGuffey.

2 Jack Stayer, Thinking About The End of Life, And Where LTC Insurance Fits In <http://www.nationalunderwriter.com/LTC/articles/2003_08_stayer.asp> (August 2003) (emphasis added).

3 T. Takacs and D. McGuffey, Medicaid Planning: Can It Be Justified?: Legal and Ethical Implications of Medicaid Planning, 29 William Mitchell Law Review 111 (2002); http://www.wmitchell.edu/lawreview/Volume29/Issue1/04_Takacs_McGuffey.pdf. We are borrowing from economics when we use the terms "macro-ethics" and "micro-ethics." Both the broad view we discussed in our prior article and the more narrow view discussed in this article would be considered "practical ethics" because they address professional conduct. A similar distinction is made at L. Zeman, Estate Planning: Ethical Considerations of Using Medicaid to Plan for Long-Term Medical Care for the Elderly, 13 Quinnipiac Prob. L.J. 187, 215-216 (1998), between policy ethics and professional ethics.

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next generation, serve the interests of our Client-Elders?

We don't think so – not if the goal of protecting the Elder's assets takes priority over the goal of bettering the Elder's life. Asset protection, alone, abandons the well-being of the *living* Elder and, thus, is contrary to the purpose of Elder Law.⁴ Asset protection, alone, pits the Elder's well-being against the interests of her heirs, creating a conflict.⁵ Our conclusion is that Elder Law Attorneys should resolve this conflict in favor of the Elder and that a failure to do so is unethical.⁶ A secondary implicit conclusion is that ethics requires foresight and planning, and that it should begin not later than when the client walks in the Elder Law Attorney's door.

Framing the Issue

The attorney-client relationship is a creature of contract and, once formed, the attorney owes her client a duty of loyalty and diligence. Ordinarily, the attorney-client relationship cannot be formed unless both parties are competent to contract.⁷ If competent, the Elder may retain the attorney; if not, she cannot retain the

attorney's services and the lawyer's duty will be to the person engaging her services.⁸ Nonetheless, because the person approaching the attorney is typically concerned with protection of the Elder's assets, the Elder's interests must be considered and the Elder may be deemed the intended beneficiary of the plan. Taken a step further, unless the person approaching the Elder Law Attorney brings with her the power to transfer the Elder's assets, the Elder Law Attorney cannot transfer those assets without the Elder's consent.⁹ Moreover, where consent pre-exists the attorney-client relationship, the attorney must not assist a client in taking action that the lawyer knows is criminal or fraudulent.¹⁰ Diverging interests could create a "conflict" or a Catch-22, precluding all Medicaid Planning transfers.

Common sense tells us, however, that ethical rules which bind lawyers were designed to prevent abuse; they were not designed to prevent attorneys from assisting persons who face the financially devastating consequences of paying privately for long-term care. If the Elder Law Attorney focuses on the Elder's well-being, these conflicts resolve themselves, and the Elder Law Attorney may pro-

ceed by undertaking planning in which asset transfers are directed primarily to caring for the Elder, not asset protection. In this elder—focused, as opposed to asset—focused, approach, the plan centers on what benefits the Elder and is not limited to a review of the Elder's Medicaid eligibility and potential transfer strategies.¹¹

The Typical Medicaid Plan

To shift the cost of the nursing home to the State Medicaid program,¹² the Elder must "spend down" until her "countable assets" reach a certain threshold (in most states, \$2000).¹³ The Elder's first contact with the Elder Law Attorney is often at this stage of her health care crisis, when her family members meet the Elder Law Attorney for help in developing a Medicaid Plan to "save the money from the nursing home." For the Elder Law Attorney, the ethical dilemma is whether the Plan is to be structured to benefit the Elder or to benefit someone else.

Let's take a look at what we may call a typical Medicaid Plan. Children visit the Elder Law Attorney because Mom, who is in the mid-to-late stages of Alzheimer's disease, is in the nurs-
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- 4 "Elder law attorneys focus on the legal needs of the elderly, and work with a variety of legal tools and techniques to meet the goals and objectives of the older client." NAELA, What is Elder Law? <<http://www.naela.org>> (accessed August 4, 2004) (emphasis added). See also Model Rules of Professional Conduct Rule 1.7 (2002) (hereafter "MRPC"). To some extent, this argument invites a discussion concerning the nature of law and its ends. Professor Pound identified twelve views concerning "what law is" in his lectures on the philosophy of law. R. Pound, *An Introduction to the Philosophy of Law* 25-30 (Yale University Press, 1922, 1982). Here, we hold to Pound's fourth idea concerning the nature of law. That view is that law is a discovered system of principles expressing the nature of things, to which man ought to conform his conduct. This is consistent with American legal tradition expressed in such documents as the Declaration of Independence (e.g., "We hold these truths to be self evident..."). There are, of course, other views.
- 5 "There is a heightened potential for conflict in representing different generations with respect to asset distribution and/or decisions regarding health care. In these cases, a lawyer should be careful to identify the person or persons to whom the lawyer's duty of loyalty is owed." Proceedings of the Conference on Ethical Issues in Representing Older Clients, 62 *Fordham L. Rev.* 989, 997 (1994).
- 6 See MRPC Rule 1.14 (2003), Note 4. This presumes that the informed Elder has not personally voiced asset protection as his or her priority. "In general, it is the client (and not the lawyer) who has the authority to make major decisions – those affecting the merits of the case, or substantially prejudicing the client's rights." R. Rotunda, *Legal Ethics: The Lawyer's Deskbook on Professional Responsibility* § 3-2.1 (West Group 2002). In many cases, however, it is the potential heir who is telling the Elder Law Attorney that asset protection is Mom's (or Dad's) priority.
- 7 But see Restatement (Third) of Law Governing Law § 24, Comment C: "A lawyer for a client with diminished capacity may be retained by a parent, spouse, or other relative of the client."
- 8 See Recommendations, *supra*, at 998; see also *Estate of Leonard v. Swift*, 656 N.W.2d 132, 144-145 (Iowa 2003) (although ward may be an intended third party beneficiary, attorney for fiduciary does not represent ward).
- 9 MRPC Rule 1.2(d) (2003). In considering whether a transfer of assets might be prohibited by Rule 1.2(d), we present the following example: "A person commits theft of property if, with intent to deprive the owner of property, the person knowingly obtains or exercises control over the property without the owner's effective consent." T.C.A. § 39-14-103.
- 10 MRPC Rule 1.7 (2003). Regardless of client identity, because property rights cannot be transferred without the consent of the owner or his authorized representative, the Elder Law Attorney cannot engage in Medicaid Planning without taking the Elder's interests into account. Even if the Elder is not the client, we believe that creates the type of responsibility to the Elder described in Rule 1.7(b). Furthermore, if the client represents the Elder's personal representative, the lawyer may have a duty to prevent or rectify misconduct. See MRPC Rule 1.4, Note 4. In sum, we do not believe the Elder Law Attorney may ethically abandon the Elder's well-being in favor of other persons who are interested in acquiring the Elder's assets.
- 11 See MRPC Rule 1.1 (2003). "Perhaps the most fundamental legal skill consists of determining what kinds of legal problems a situation may involve...." *Id.* Note 2. In our view, competent representation of the elderly, at a minimum, requires an assessment of the Elder's needs and must not be limited to Medicaid eligibility. We are not arguing that a lawyer must undertake general representation of the client. Ethical rules allow lawyers to limit the scope of representation. See, e.g., Tennessee Rules of Professional Conduct, Rule 1.2 (2003), Note 7. We simply note what is taught in every first year law program: law should be applied to the client's facts and not vice versa. If we as Elder Law Attorneys fail to assess our client's needs, then we might just as well send them to an office supply store for a pre-printed form. Stated in positive terms, if a lawyer recognizes the need for help, and fails at least to summon help, then he is immoral. T. Beauchamp & J. Chambliss, *Principles of Biomedical Ethics*, 5th Edition, 175 (Oxford Press 2001).
- 12 Medicaid covers a broad range of medical needs for eligible participants. However, because Medicaid Planning generally anticipates long-term care for the elderly, our discussion is limited to long-term care. Here, we refer to all long term care facilities as "nursing homes." Specific facility definitions are found at 42 C.F.R. § 442.2. and § 483.5.
- 13 For purposes of discussion, we discuss spend down and divestment strategies together.

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ing home and spending \$5000 a month on the cost of care.¹⁴ She has been there for six months; she has \$100,000 in her savings account; and there seems to be no end in sight to the money draining away.¹⁵

What is the objective of the representation? As typically formulated by the Children and the Elder Law Attorney, the justification for the Medicaid Plan is usually: "Mom and Dad would never have wanted all of their money to go to the nursing home!"

The Elder Law Attorney's Medicaid Plan for accelerating Medicaid eligibility may therefore look something like this:

\$100,000 in the bank; less

\$5,000 paid to Elder Law Attorney; less

\$10,000 paid for an irrevocable funeral contract; less

\$15,000 paid to Children for a "personal care contract" (in states that allow this strategy, Mom is paying Children to visit her in the nursing home for the rest of her actuarial life expectancy); less

\$35,000 gifted to Children; leaving

\$35,000 paid to the nursing home during the Medicaid penalty period due to the gift.

If we assume that Medicaid's penalty divisor is \$5000, Mom will be eligible for Medicaid after seven months. Instead of her paying the nursing home until her money runs out, Medicaid pays. She still receives the same care, but Mom has "saved" \$50,000 and has a burial plan.

This plan consumes \$85,000 of Mom's money while providing her with little tangible consideration in return.¹⁶ Because her children would visit her regardless of payment, the \$15,000 personal care contract is simply an asset protection device. Similarly, the \$35,000 gift of Mom's money to her children does nothing to improve the quality of care Mom receives. The \$35,000 payment to the nursing home is simply "lost" as the price paid for gifting.

The Elder Law Attorney purports to represent the Elder. The Elder Law Attorney's work consists of saving \$50,000 for the Children and assisting the Children with the Medicaid application. After Medicaid starts paying, he closes his file. But whose interests does he serve here? How has Mom benefited from the Medicaid Plan that her Elder Law Attorney developed for her?¹⁷ If the Plan is not structured to address the Elder's long-term care needs, in our view the attorney has ignored the spirit, if not the letter, of Rule 1.14.¹⁸

Principlism as an Ethical Framework

For attorneys, "ethics" means

the Rules of Professional Conduct, or their state specific counterpart, where the attorney practices.¹⁹ In this article we focus on the American Bar Association's Model Rules of Professional Conduct (MRPC). Attorneys engaged in Medicaid Planning typically act as advisors and, therefore, MRPC Rule 2.1, together with MRPC Rule 1.2(a), define the lawyer's duties to her client.²⁰ Comment 2 to Rule 1.2 indicates that Rule 1.14 is also applicable where the client suffers from diminished capacity.²¹ Rule 1.14 indicates that, as far as reasonably possible, the attorney should maintain a "normal" attorney-client relationship with clients who suffer from diminished capacity.²² Confronting this tangled web, the Elder Law Attorney asks, quite appropriately, "who is the client, who has decision-making authority, and who do I owe a duty to?" As discussed below, where the client lacks capacity, a departure from the normal attorney-client relationship is justified.²³

We believe "principlism" provides a framework within which Elder Law Attorneys can resolve conflicts between the interests of the Elder and those who claim to speak for the Elder. The principlism approach to analyzing conflicts in clinical medicine has become the dominant theory of bioethics during the last quarter of the twentieth century. As articulated by Beauchamp and Childress, principlism is a weighted approach to health care decision making that takes

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14 Restatement (Third) of Law Governing Law §24, Comment C.

15 This could be construed as the type of emergency discussed in MRPC Rule 1.14 (2003).

16 See *Thompson v. Department of Children and Family Services*, 835 S.2d 357 (Fla. App. 2003).

17 See MRPC Rule 1.7 (2003). If loyalty is an essential element in the attorney-client relationship, we question how the lawyer can participate in an asset protection plan which fails to address the Elder's needs. Who holds the lawyers' loyalty in this context?

18 See also MRPC Rule 1.7(b) (2003); Restatement (Third) of Law Governing Law §51(4).

19 "Each state has a code of behavior for lawyers. Although these codes are sometimes called "codes of ethics," they are in reality legal rules enforced by the courts." P. Baude, *Private Lawyers and the Public Interest*, <<http://www.law.indiana.edu/publications/particulars/2001winter/lawyerethics.shtml>> (accessed August 3, 2004).

20 MRPC Rule 2.1 provides: "In representing a client, a lawyer shall exercise independent professional 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." MRPC Rule 1.2(a) (2003) provides: "A lawyer shall abide by a client's decisions concerning the objectives of representation...." (Emphasis added). See, e.g., *Zack v. NCR Corporation*, 738 F. Supp. 933 (E.D. Penn 1990) (stating that a fee contract cannot prohibit client from settling claim without lawyer's approval).

21 MRPC Rule 1.2, Comment 2 (2003).

22 "The 'normal' attorney-client relationship includes at the very least a duty of competence (Rule 1.1), a duty to consult and abide by the client's decisions concerning the objectives of representation (Rule 1.2), a duty of diligence (Rule 1.3), a duty to explain and advise (Rule 1.4), a duty of confidentiality (Rule 1.6), and a duty to avoid conflicts of interest (Rule 1.7)." Alaska Bar Association Ethics Committee, *Representation of Client under Disability*, Ethics Opinion No. 94-3, 1994 WL 924305 (October 27, 1994).

23 The traditional role of the attorney is that of advocate. In certain cases, however, the attorney is justified in either serving as de facto guardian of the client, or in seeking the appointment of a guardian. This typically occurs in situations where there is evidence that the client lacks capacity to direct the scope of the representation and is frequently discussed in cases where attorneys represent children. See e.g., *In re Care and Protection of Georgette*, 785 N.E.2d 356, 363 (Mass 2003); *Clark v. Alexander*, 953 P.2d 145 (Wyo. 1998); *In re Paternity of Anthony T.G.*, 506 N.W.2d 426 (Wis. App. 1993); *In re Marriage of Rolfe*, 699 P.2d 79 (Mont. 1985). Many of the same concerns arise in representing persons with diminished capacity. See *In re M.R.*, 638 A.2d 1274, 1284 (N.J. 1994).

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into account four central principles: (1) **autonomy**, (2) **nonmaleficence**, (3) **beneficence**, and (4) **justice**. These four principles serve as general guides for the analysis of specific cases.²⁴

Autonomy refers to the individual's freedom from controlling interference by others and from personal limitations that prevent meaningful choices, such as diminished mental capacity that affects understanding. Two conditions are essential for autonomy: liberty, which is the independence from controlling influences; and the individual's capacity for intentional action. The health care professional owes his patient the duty to respect the patient's autonomy.²⁵ The concepts of the "capacity" of the client to contract with the attorney for legal services and "informed consent" invoke the principle of autonomy.²⁶

Nonmaleficence asserts an obligation not to inflict harm on the person to whom a duty of care is owed within a special relationship such as attorney-client or physician-patient. This principle sets the minimum standard for the duties owed by the health care professional to his patient. The direct precursor to this principle is set forth in the physician's Hippocratic Oath to "first, do no harm."

The third principle, **beneficence**, refers to actions performed that contribute to the welfare of the patient.

Justice refers to fair, equitable and appropriate treatment in light of what is due or owed to a person.

When considering the principle of justice, it is important to distinguish between three different types of justice: (1) commutative justice, which refers to that which is owed between individuals, for example, the relationship between principal and agent; (2) contributive justice, which refers to what individuals owe to society for the common good, including the rights and responsibilities of citizens to obey and respect the rights of all and the laws devised to protect peace and social order; and (3) distributive justice, which refers to what society owes to its individual members.²⁷

We believe principlism is particularly helpful where the Elder's capacity to consent is questionable. Before embarking on an analysis of principlism, we look briefly at *Fickett v. Superior Court*, 558 P.2d 988 (1976). There, the Arizona Court of Appeals employed a balancing test in determining whether there was sufficient privity between a guardian's attorney and a ward to create a duty to the ward. It "involves the balancing of various factors, among which are the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injuries suffered, the moral blame attached to the defendant's conduct, and the policy of preventing future harm." *Id.* at 990. This, in our humble opinion, sounds like principlism.²⁸

Beneficence: Do Good

Happily, Elder Law is a practice where attorneys can make a difference in the quality of their lives. It is often said that "elder law attorneys can do well by doing good."²⁹ How does an elder law attorney "do good"?

For the Elder Law Attorney, the attorney-client relationship often begins, as we wrote earlier, amidst a health care crisis. Initially then, the Elder, or more likely, the Elder's surrogate, seeks the advice of the Elder Law Attorney. The Elder has been hospitalized and may already have been moved to a skilled nursing facility. Mom cannot return home, and the family does not know what to do. They need the counsel of an Elder Law Attorney to help them sort out their options and advise them what to do.³⁰ The attorney should be proactive and should provide sound advice.³¹

Autonomy: Respect for Client Choices

Respect for individuality is a core value in our society. Implicit within any discussion of autonomy is the concept of equality, at least as it relates to human dignity. Autonomy is the natural by-product of that value and is therefore an ideal foundation on which we build an ethical framework. Frequently, the attorney is called on to maximize the client's autonomy.³²

"Personal autonomy is, at a minimum, self-rule that is free from both
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24 T. Beauchamp & J. Childress, *Principles of Biomedical Ethics*, 5th Edition (Oxford Press 2001).

25 Often, the Elderly lack (or appear to lack) capacity to make decisions. Recently, the American Bar Association Commission on Law and Aging addressed health care decision-making in its study on unbefriended Elders. See, generally, N. Karp & E. Wood, *Incapacitated and Alone: Health Care Decision-Making for the Unbefriended Elderly* (ABA July 2003). The initial conclusion the Commission reached is that capacity assessment is a threshold question. *Id.* at 41. "Sensitive evaluation and enhanced communication techniques may reveal that a patient is able to make the decision at hand." *Id.* Elder Law Attorneys engaged in Medicaid Planning should use the same care in the Medicaid Planning process.

26 The Model Rules likewise recognize autonomy, even where there is diminished capacity. See MRPC Rule 1.14 (2003). As otherwise stated in this article, informed consent happens when a competent attorney provides sound advice and the client, using that advice, determines the scope of the representation. See MRPC Rule 1.1, 1.4 and 1.2 (2003).

27 Commutative and distributive justice can be traced back to Aristotle. These two principles and a third, that of contributive justice, form the basis of the Catholic social tradition of justice, which arose from Aquinas. See Thomas Aquinas, *Summa Theologica*, Second Part of the Second Part, Question 61; and E. H. Morreim, *Moral justice and legal justice in managed care: the ascent of contributive justice*, *J. Law Med. Ethics*, 1995 Fall; 23(3): 247-65.

28 See also *Capitol Indemnity Corporation v. Fleming*, 58 P.3d 965 (Ariz. Ct. App. 2003). In *Wetherill v. Basham*, 3 P.3d 1118 (Ariz. Ct. App. 2000), the same analysis was used in examining an attorney's alleged duty to the beneficiary of a ward. Holding there was no privity, the Court found that the plaintiff "was not the intended beneficiary of the services for which [the attorney] was retained." In contrast, the Elder is an intended beneficiary of Medicaid Planning services. For a different view, see *Great American Insurance Company v. Perry*, 1994 WL 101991 (Minn. Ct. App. 1994), where the ward was an indirect beneficiary of the attorney's services.

29 See NAELA, *National Elder Law Month*, <<http://www.naela.com/media/elderlawmonth.htm>> (accessed August 4, 2004).

30 MRPC Rule 1.2 (2003).

31 T. Begley & J. Jeffreys, *Representing the Elderly Client: Law & Practice* § 8.01 (Aspen 2003); MRPC R. 1.1 and 1.4 (2003).

32 M. Freedman, *Legal Ethics and the Suffering Client*, 36 *Cath. U.L. Rev.* 331 (1987). The attorney assists in maximizing autonomy "by counseling clients candidly and fully regarding the clients' legal rights and moral responsibilities as the lawyer perceives them." *Id.* at 332. In Freedman's opinion, after the lawyer accepts a case, "principle function is to serve the client's autonomy."

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controlling interference by others and from limitations, such as inadequate understanding, that prevent meaningful choice."³³ Exercising autonomy depends upon relevant information and implies a capacity to use that information. We refer to the legal corollary of medicine's concept of "informed consent." The principlism approach to dealing with ethical conflicts, whether in medicine or law, begins by educating the client concerning available options and the probable consequences of each option. Unless autonomy is counterbalanced against another principle, the client exercises autonomy by choosing among his options.

The problem inherent with beneficence (discussed below) is that it may lead to paternalism. By their superior training, knowledge and experience, Elder Law Attorneys, like physicians, are better positioned to determine and advocate for the client's best interests.³⁴ Those qualifications, however, are not a mandate which overrule the Elder's wishes. Failure to respect the Client-Elder's right to make choices can result in paternalism.

We emphasize that it is not the attorney's place to make decisions for the client. The attorney must respect the client's right to make choices. Once these choices are made, autonomy trumps beneficence, and the lawyer must allow the client to direct the scope of representation, *but only after the lawyer has discharged his duty to obtain informed consent*.³⁵ In other words, to enable the Client-Elder to make informed

decisions about the Medicaid Plan, the Elder must be given adequate information on the risks and the benefits of shifting nursing home costs to the Medicaid program. This is called the "informed consent process." The Elder Law Attorney must educate the Elder about the alternatives to Medicaid-financed nursing home care available to the Elder, the deficiencies in that care, and the risks and benefits of relying on public financing for the Elder's nursing home care. The Elder Law Attorney must obtain the Client-Elder's (now informed) consent before implementing the Plan and keep the Elder informed on the consequences of the Client-Elder's decision. Obtaining informed consent is as essential to elder law practice as it is to the medical profession. The principlism approach is satisfied through the informed consent process, provided the Elder has capacity to exercise her right to autonomy *or* the Elder's surrogate who exercises autonomy on her behalf does not have a conflict of interest.³⁶

As Elder Law Attorneys, we frequently encounter situations where we have reason to question the Elder's mental capacity to understand his options. If we believe that the Elder's mental capacity is insufficient for adequate understanding of his options, true autonomy cannot exist.³⁷ Instead, autonomy is exercised through a surrogate. Otherwise stated, a recurring problem we face is the identification of our client or, in this case, the moral agent.³⁸ An ethical dilemma—or conflict of interest—arises when the Elder lacks capacity, the Elder's surrogate has a conflict of interest (that is, the surrogate's inter-

est in protecting the Elder's assets for his own benefit) may diverge from the Elder's interests, *and* there is no clear guidance from the Elder to enable us to resolve the issue with reasonable certainty. In these circumstances, MRPC Rules 1.14 and 1.7(b) suggest that the principle of autonomy should be weighed against the principles of nonmaleficence, beneficence, and justice.³⁹

We believe the principle of autonomy and the conflict of interest rules are interwoven. While surrogate decision-making can render the issue problematic, careful application of the conflict rules (guided by the principles of nonmaleficence, beneficence and justice) will unravel the Gordian knot.

In practice, how does this work? First, the Elder Law Attorney should consider who engaged the attorney's services. If it is the Elder, Rule 1.2 provides that the Elder guides the scope of the representation. If it is a surrogate, Rules 1.2(d) and 1.14 require that the lawyer prevent misconduct. Even where the Elder is clearly not the client, Rule 1.7(b) requires that Elder Law Attorneys weigh the interests in favor of the Elder.⁴⁰ It is, after all, the Elder's money that is the focus of the typical Medicaid Plan.

Nonmaleficence: Do No Harm

The above Medicaid Plan had the effect of impoverishing Mom so she could qualify for Medicaid-financed nursing home care. Until she attains Medicaid eligibility, she has retained only enough money to purchase and receive the basic package

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33 Beauchamp & Chambless, at 58. For Beauchamp & Chambless, autonomous choice and capacity to choose are not coequal. Persons with capacity sometimes fail to make such choices. In the legal context, the lawyer has a duty to assist clients who have capacity in a manner that will ensure that choices are made autonomously.

34 Beauchamp & Chambless, at 178. Beauchamp and Chambless define paternalism as "the intentional overriding of one person's known preferences or actions by another person, where the person who overrides justifies the action by the goals of benefiting or avoiding harm to the person whose preferences or actions are overridden." *Id.* Under this definition, paternalism is never justified in the context of legal representation if the Elder has capacity to make her own decisions. Paternalism in some form may be justified under MRPC Rule 1.14 (2003), however, where the Elder cannot make her own decisions. Note 2 to Rule 1.14 contemplates that, in certain instances, the lawyer may act as de facto guardian, and Rule 1.14(b) contemplates instances where the lawyer may seek the appointment of a guardian. These actions are ethical paternalism.

35 MRPC Rule 1.2 and 1.4 (2003).

36 MRPC Rules 1.4 and 2.1 (2003).

37 The lawyer nonetheless has a duty to treat the Elder with attention and respect. MRPC Rule 1.14 (2003), note 2.

38 With the passage of the Patient Self Determination Act, it is clear that health care providers no longer serve as the Elder's moral agent. Omnibus Budget Reconciliation Act of 1990, P. L. 101-508, sec. 4206 and 4751, 104 Stat. 1388, 1388-115, and 1388-204 (classified respectively at 42 U.S.C. 1395cc(f) (Medicare) and 1396a(w) (Medicaid) (1994)).

39 The attorney weighing the elements of principlism should be mindful of the agent's fiduciary duty to his principle. See, e.g., *In re Estate of Myers*, 2003 WL 22037527 (Tenn. Ct. App. Jan. 8, 2003).

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of nursing home services. Once Medicaid begins to pay, Mom continues to receive that basic package. Only the source of payment for the basic package has changed (from private pay to Medicaid). This Medicaid Plan is unethical because it violates the principle of nonmaleficence.⁴¹ Although she qualifies for Medicaid, Mom is nonetheless harmed because the Medicaid Plan deprives her of resources that she could use to purchase supplemental long-term care services that are not included in the basic services paid for by Medicaid. Worse, if there is a possibility that the Elder's needs can be met by not relying

on Medicaid to pay for long-term care (for example, the Elder leaves the nursing home), the Medicaid Plan violates the principle of nonmaleficence by making that an economic impossibility.

Medicaid provides a limited bundle of benefits. It finances care that must include certain required elements⁴² including, among other things, nursing home care for residents in a manner and in an environment that promotes maintenance or

enhancement of each resident's quality of life.⁴³ Each resident must receive, and the facility must provide, the necessary care and services to attain or maintain the resident's highest practicable physical, mental and psychosocial well-being, in accordance with the resident's comprehensive assessment and plan of care.⁴⁴

There is, unfortunately, no compelling reason to assume the elder's needs will be met in a nursing home. The shortcomings in nursing home care are well known. Recent studies indicate that the quality of care in nursing homes remains deficient. Deficiencies in good nursing home care have been laid directly at the doorstep of inadequate staffing. According to a major federal study, more than 90

percent of nursing homes do not have enough workers to take proper care of residents.⁴⁶

Respect for client autonomy does not abrogate or excuse the lawyer's duty to prevent harm to the client. The Elder Law Attorney is ethically justified in advising the Elder or directing the Elder's surrogate to focus the Plan on bettering the Elder's life, with asset protection concerns becoming secondary. Elder Law Attorneys are not only advisors but advo-

cates for their Client-Elders as well. As client choices are made, the attorney's duty shifts to ensuring that someone is (or will be) available to speak for the Client-Elder and that misconduct or harm is addressed, mitigated, or avoided. "The lawyer is then free, except in circumstances where the [personal representative] might be abusing the position, to follow the [personal representative's] instructions. The burden of determining what is in the best interests of the disabled person is then lifted from the lawyer's shoulders, allowing the lawyer to perform more traditional functions in an objective environment."⁴⁷

Justice

The fourth principle is justice. In our 2002 law review article, we implicitly applied the principles of contributive justice and distributive justice in reaching our conclusion that Medicaid planning is justified in a macroethics setting. In a free market health care system, distributive justice protects only access to health care—and, even then, largely only for those with the ability to pay. As a consequence, the duty owed by each individual within this health care market is to pay only for one's own health care. In such a system, justice does not require the health care purchaser to pay a higher price if she can obtain a lower price without violating the system's legal or ethical norms (without, for example, concealing assets which is Medicaid fraud).

In the micro-ethics setting, however, we focus instead on the principle of commutative justice. What

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40 See Restatement, *supra*, § 51(3) (2003).

41 Our conclusion that the Plan is unethical presupposes that Mom was unable to and did not understand or request the Plan. "Lawyers are not free to act contrary to their client's desire merely because the lawyer believes such actions to be the better course." AK Eth. Op 94-3, *supra*, at *3. Instead, consistent with MRPC Rule 1.14 (2003), in certain cases it may be necessary to seek the appointment of someone who can act for the client to participate on the client's behalf in the normal attorney-client relationship. See State Bar of Michigan Standing Committee on Professional and Judicial Ethics, Opinion No. RI-213, 1994 WL 423008 (June 8, 1994).

42 42 C.F.R. § 442.100 (2003), *et seq.*

43 42 C.F.R. § 483.15 (2003).

44 42 C.F.R. § 483.25 (2003).

45 Recently, the General Accounting Office discussed continuing quality of care problems in Nursing Home Quality: Prevalence of Serious Problems, While Declining, Reinforces Importance of Enhanced Oversight (GAO-03-561 July, 2003).

46 Ordered by Congress in 1990, Phase I of "Report to Congress: Appropriateness of Minimum Nurse Staffing Ratios In Nursing Homes," was issued by the Clinton administration in July 2000. Phase II was issued in March 2002. For the Phase I report, see <http://cms.hhs.gov/medicaid/reports/rp700hmp.asp>; for the Phase II report, see <http://www.cms.hhs.gov/medicaid/reports/rp1201home.asp>.

47 MI Eth. Op. RI-213, *supra*, at note 4. The reasoning here is that the client has a system of checks and balances, as contemplated under the "joint" decision-making scheme described in MRPC Rule 1.2 (2003) where there is someone other than the lawyer involved in the decision-making process. Where the lawyer serves as guardian, *de facto*

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duty does the Elder's agent or surrogate owe him? One duty we have already alluded to: to avoid doing harm to the Elder. The duty to avoid harm is especially poignant within the principal-agent relationship. The presumption is that the Elder has selected his agent specifically to shield him from harm in the event the Elder loses his autonomy and capacity. Moreover, the principle of justice invokes another related duty: to respect the Elder's human dignity.⁴⁸ Within the micro-ethics setting, this duty requires that the Elder's agent not regard his principal, the Elder, solely as a source of economic gain to the agent.

Applying Principlism: An Elder-Centered Approach

The elements of Principlism are meaningless unless we apply them. If we begin with an assessment of the Elder's needs, we believe the Elder Care Plan will take a different view from the one described above.

Every plan should begin by assessing the Elder's needs with a view toward providing quality care in the least restrictive environment possible.

That may involve preserving assets, not for the purpose of passing them to heirs, but for the purpose of spending them on home health care or assisted living. As Beauchamp and Chambless argue, we should contribute to our client's welfare.

In problem-solving for clients,

Elder Law Attorneys should be mindful of general demographic trends and should make themselves aware of the Elder's client's specific wishes. Generally, when needs must be addressed, most Elders want them satisfied at home. Of those persons over age 70 living in the community and seriously ill, research shows that 29 percent say they would rather die than go to a nursing home.⁴⁹ Of

equal significance, home care tends to improve overall health.⁵⁰ Regarding the specific client, there is no substitute for taking the time to speak with the Elder or, if that is not possible, exploring other means of determining the Elder's wishes.

Absent an understanding of Medicare and Medicaid home health programs, as well as other caregiver resources available in the community, the Elder Law Attorney's planning will focus primarily, if not solely, on asset protection. Elder Law At-

torneys who do not familiarize themselves with those programs and resources will be more likely to leap directly to nursing home care. Nursing home care, however, will separate the Elder from a familiar environment, will impose a more rigid schedule on the Elder and, even if family visits are not physically impeded, will make them more clinical. Where the Elder Law Attorney lacks expertise necessary to recommend home health options, utilization of a geriatric care manager may be appropriate.⁵¹

When the Elder's need for long-term care can no longer be met either inside the home, or without the intervention of paid providers, the Elder enters, as we say, "the long-term care system." The Elder (and the Elder's family) are now embarking on an arduous journey through murky waters. Let them begin their journey with the observation that "the current system in our country for addressing long-term care is hardly systematic, it is a hodgepodge of services that fail to meet the needs of the elderly and disabled in the variety of long term care settings. The long-term care system is economically inefficient and it fails to assure the quality of services which are provided."⁵² The "system" does not fund assisted living and provides home health care in an inconsistent fashion. As a consequence, the long-term care financing system is biased in favor of providing long-term care in an institutional setting, which usually means a nursing home, even though it costs less to support individuals in their own homes and communities.⁵³

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guardian, under a power of attorney or otherwise, "the ward is essentially at the mercy of his single representative." *Id.* at note 5.

48 A surrogate's respect for the Elder's human dignity loops back into our discussion of autonomy. In the health care context, potential surrogate decision makers are encouraged to gather information about "the lives of residents, their values and preferences" which will help shape good decisions following incapacity. See *Incapacitated and Alone*, supra at 46. Surrogates in non-health care situations should act similarly.

49 R. Kane & R. Kane, What Older People Want From Long-Term Care, And How They Can Get It, 20 HEALTH AFFAIRS 114, 115 (2001).

50 "Familiar surroundings can have a positive effect on a person's sense of well-being, which can lead to a quicker, more complete recovery or, in cases where recovery is not expected, to a better quality of life." A. Perry, *American Medical Association Guide to Home Caregiving 1* (John Wiley & Sons 2001).

51 Geriatric Care Managers (GCM) can be located in most communities. For assistance locating a GCM, contact the National Association of Professional Geriatric Care Managers at <http://www.caremanager.org/>.

52 National Academy of Elder Law Attorneys, White Paper on Reforming the Delivery, Accessibility and Financing of Long-Term Care in the United States § 3.1 (2000).

53 National Council on Disability, National Disability Policy: A Progress Report, December 2001-December 2002, July 26, 2003. See < <http://www.ncd.gov/newsroom/publications/>

The Elder Care Plan

Let's now consider an alternative Elder Care Plan under the same facts as before, but apply an approach of "weighing and balancing" the four principles. First, the Elder Law Attorney will have fully investigated the Elder's circumstances.⁵⁴ Specifically, the Elder Law Attorney will know Mom's health care needs, both what she needs now and what she can reasonably expect to require in the future. The attorney then provides a full explanation to the Children of possible options on how those needs can be met for the Client-Elder.⁵⁵ That explanation includes a discussion of moral, economic, social and political factors.⁵⁶ Specifically, the Elder Law Attorney will engage in an extensive explanation of the long-term care system, how long-term care is financed, who furnishes it and how, and the shortcomings in the provision and financing of long-term care. The Elder Law Attorney should be able to discuss understaffing and related problems that occur in nursing homes and other long-term care facilities and how the Elder's funds can be used to ameliorate those problems.⁵⁷ That is, the Elder Law Attorney must be familiar with the resources available in her community and how much those resources cost.

Mom's Children are the remainder beneficiaries of her estate. Money she does not spend for her own care can be expected (and it is expected, by the Children) to accrue to the benefit

of the Children. The Children, one of whom is Mom's attorney-in-fact, acknowledge that they have a conflict of interest. If Mom could speak clearly and loudly in her own voice, what would she want? All of her money to be paid to the nursing home? None of it? Some set aside for supplemental care? Self-serving declarations that "Mom and Dad would never want all of their money to go to the nursing home" do not rise to the level of certainty of choice required to implement a Medicaid Plan that sets aside nothing for Mom's supplemental needs during the remainder of her actual life expectancy.⁵⁸

Under the guidance of the Elder Law Attorney, the Children define the goals of the Plan for Mom. The first priority of the Plan is that Mom gets good care, whether in a nursing home or other residential facility. Second, the Plan presupposes that the Elder Law Attorney will monitor the performance of the Plan during the remainder of Mom's life and help the Children make decisions about her care.⁵⁹ Third, Mom does not want to burden her Children with the costs of her burial. Fourth, Mom wants to leave her Children a financial legacy. Preservation of family wealth is an important goal for her, but under the Elder Care Plan, this goal stands fourth in priority, not first.

The Elder Law Attorney and the Children develop the following Elder Care Plan for Mom:

\$100,000 in the bank; less

\$7,500 paid to Elder Law Attorney;⁶⁰

\$10,000 paid for an irrevocable funeral contract;

\$12,500 paid to Children for a personal care contract;

\$25,000 paid to Caregivers Incorporated, for sitting and monitoring services, four hours a day for three days a week for 30 months;

\$15,000 paid to a professional geriatric care manager to train Children in nursing home resident advocacy, coordinate care and resources for Mom, monitor Children's compliance with the personal care contract, and monitor and coordinate care provided by Caregivers Incorporated for 12 months.

\$15,000 gifted to the Children; and

\$15,000 paid to the nursing home during the period of Medicaid ineligibility.

Three months later, Mom applies, and is eligible for, Medicaid. The Plan is based upon a careful, informed estimate of Mom's actual life expectancy and a calculation of how much money is needed to purchase supplemental care and "extras" for her comfort for the remainder of Mom's life. (This illustration assumes 30 months, which is about the average length of stay in a nursing home's intermediate care facility.⁶¹) Only after the funds necessary to meet the first three goals

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progressreport_final.html > (accessed September 15, 2003) and "Feds and the States Have Failed to Implement Olmstead, Says Federal Report" The NAELA E-Bulletin, August 26, 2003.

54 This is often called "due diligence."

55 MRPC Rule 1.4(b) (2003).

56 MRPC Rule 2.1(2003).

57 At this point in the discussion, one can either fulminate that providing good care is what Medicaid pays nursing homes to do or accept reality and address the need. Or, as the saying goes, "light a candle or curse the darkness."

58 Myers, supra note 15, was a case where an alleged attorney-in-fact transferred a CD from an Elder to herself. The Tennessee Court of Appeals held that the attorney-in-fact was in a confidential relationship with the Elder, which created a presumption of undue influence absent evidence that the transaction was fair. "A transaction that impoverishes the purported donor cannot be considered fair." In other words, transfers that produce no benefit to the donor should raise the attorney's eyebrows.

59 Although many Elder Law Attorneys may balk at assuming such an open-ended obligation, the typical Medicaid Plan results in impoverishing Mom for the remainder of her life. If Mom unexpectedly recovers from her illness and looks to the Elder Law Attorney for redress because her money is gone, "I'm no longer her attorney" is a lame defense to a lawsuit for attorney malpractice. A more realistic scenario, perhaps, is that the Elder Law Attorney is added as a defendant with the nursing home in an injury case because the Medicaid Plan withdrew supplemental care in favor of preserving assets for the Elder's children. With that in mind, the Elder Law Attorney should accept the reality that she has signed on for the long haul and affirmatively commit to helping the Elder.

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of her Plan are expended may the rest of Mom's money be used to satisfy the fourth goal. Under Medicaid's transfer-of-assets rules, the price Mom pays to preserve wealth for her children is three months of nursing home care. Although gifts are made to the Children, this Plan does not violate the principle of nonmaleficence because assets are used to obtain supplemental care for remedying shortcomings in nursing home care.

Under this Elder Care Plan, Mom's money is devoted first to improving Mom's quality of life. Who can make a plausible argument that our alternative Elder Care Plan will not provide a greater contribution to the improvement of Mom's life than the Medicaid Plan? In our view, the only plausible criticism of this plan comes from third parties who are more interested in acquiring Mom's assets than in caring for Mom.

While asset protection may be the goal of potential heirs, it may not be the Elder's goal. If another, less restrictive care plan can be developed, our goal as elder law attorneys should be to provide a vehicle for meeting the Elder's needs in a way that achieves the Elder's goals.

Making the Transition to an Elder-Centered Practice

Medicaid Planning is a tool in the Elder Law Attorney's toolbox. But like any tool, it can be misused. Misuse occurs when "the transaction" (that is, asset transfers) takes priority over the Elder's well-being. Our goal in addressing this subject is not to define the model plan. Instead, our goal is to ensure that we, as Elder Law Attorneys, keep our eye on the ball (so to speak) by focusing on the Elderly. Fundamentally, the practice of law requires dedication to justice and the common good.⁶²

Elder Law Attorneys who choose to make the transition from an asset-focused to elder-centered practice will enjoy an increasing demand for their services. In our experience, families, almost without exception, are concerned foremost about the care and well-being of their loved one. They may present themselves to our office with questions about "saving Mom's money from the government and the nursing home," but they do want our help navigating the long-term care maze and do want Mom to get the best care. They don't know what it is, where to go for good care, or how to get it. Elder-centered Elder Law Attorneys do.

As former NAELA president Cynthia Barrett recently observed:

Some elder law attorneys developed a transactional practice focused primarily on Medicaid eligibility, and concentrated on the mechanics of practice management to move the many files through the process. Some elder law attorneys used their expertise in responding to health care crises to build a broader practice, assiduously developing the guardianship, probate, trust administration, and estate-planning tools that they were accustomed to using for health-care crises.

The current recession brought on diminished government revenues, which has caused a tightening of eligibility for Medicaid. *The elder law attorney with a solely transactional practice, focused on Medicaid, will see a drop in case numbers as the eligibility gateway closes. The elder law attorney who can handle health-care crises will see an increase in the number of such cases, and an increase in demand for good fiduciary management to make the private pay dollars last longer.*

Knowing the ever-changing Medicaid eligibility rules does distinguish the elder law practitioner

from the traditional estate planner...⁶³

The ethics rules are not handcuffs. Instead, they provide a framework within which we can resolve ethical dilemmas. If the legal profession hopes to maintain credibility in the community, they should be interpreted in a manner consistent with accepted notions of justice or morality. Elder Law Attorneys should not be guided by rules of ethics that elevate the principle of autonomy above all others, particularly where capacity is questionable. This can be accomplished by planning, before the representation begins, to create a holistic care and financial plan which ensures the well-being of the Elder. Anything less will contribute to negative impressions of the legal professional already prevalent in society and will impede our ability as professionals to contribute to the overall well-being of our clients.

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60 Because the Elder Law Attorney assumes an obligation to monitor the Plan during the remainder of Mom's life, charging a higher fee is justified.

61 According to a June 2003 survey by the MetLife Mature Market Institute, cited in *The NAELA E-Bulletin*, August 19, 2003.

62 Tennessee Rules of Professional Conduct, Preamble (2003).

63 C. Barrett, *ALI-ABA Course of Study Materials: Advanced Estate Planning Techniques, The Elder Law Approach to Estate Planning* (February 2003) (emphasis added). The authors reluctantly note their inability to find a single NAELA publication criticizing the transactional approach to Medicaid Planning.