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REPORT OF WORKING GROUP ON DIVESTMENT*

INTRODUCTION

Planning for the payment of long-term care is an important aspect of practice for an attorney who serves older clients. The divestment working group addressed the role or duty of the lawyer under professional responsibility rules given public policy concerns about asset divestment to advance Medicaid eligibility. Although the specific public policy concerns are external to professional responsibility, the working group focused on the extent to which external public policy concerns create an impact upon the lawyer's professional responsibility.

I. HYPOTHETICALS AND QUESTIONS RAISED

A. *Hypotheticals*

This working group did not generate any hypotheticals for inclusion in its report.

B. *Questions Raised*

In the working group's first session, participants generated a list of questions triggered by the topic of divestment in the context of representing older clients. The group articulated these issues, in some instances, as direct questions which the members then categorized by their relationship to various Model Rules of Professional Conduct ("Model Rules"). At the end of the first morning session, group members were able to group the questions into six areas. These include the following:

1. Are there overall public policy concerns that give attorneys particular responsibility to society?¹
 - a. Does the percentage of Medicaid dollars going to nursing homes as opposed to other medical care for poor persons affect the ethical responsibilities of an attorney?
 - b. Does the attorney's responsibility to the client include informing the client of the public policy implications with regard to a government benefits program?
2. Does competency of the attorney include externalities, such as

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1. The Model Rules of concern are 2.1, 1.2(b), and 1.2(d). The early working group discussions were heated as the group began to coalesce around the central issues. The members expressed great concern about the use by the middle class of a policy originally designed for poor persons. The participants raised broad questions about a lawyer's role in society, including whether the lawyer should serve only his or her client or rather owes a responsibility to society at large in counseling the client. The group also asked whether there are particular issues in counseling about long-term care that require a comprehensive discussion of the consequences of a proposed strategy.

non-legal counsel?²

- a. Should the attorney provide an understanding of the consequences of a particular type of action?
 - b. Should the attorney be aware of his or her limitations and be able to direct the client to appropriate resources?
3. What are the responsibilities of attorneys to disclose alternatives in the context of planning for long-term care?³
4. Who is the client?⁴

2. The attorney should have knowledge of issues, consequences, and resources available to counsel the client. This issue can be addressed in light of Model Rule 1.1 addressing attorney competence. The group also asked the following questions:

- a. What non-legal issues need to be brought to the table regarding competency of the attorney?
- b. What is realistic to recommend?
- c. Should clients try to find a lawyer who is an expert in all areas?
 - i. Does such a person exist?
- d. How should an attorney counsel clients and address the potential effects or consequences of decisions made.
 - i. What alternatives could be offered to mitigate any known or unknown consequences?
- e. What knowledge of the regulation of long-term care insurance policies must a lawyer have?
- f. When counseling a client, must a lawyer explain that future legislation, changes in the tax code, or changes in the status of trusts may affect Medicaid eligibility?
- g. What are deeply held views of a client and how does the attorney discover them?

3. The attorney should explain the basic issues, consequences, and resources to his or her client in a manner that can be understood. This issue falls within the Model Rule provision 1.4(b) pertaining to communication. The working group addressed the following sub-issues:

- a. How should a lawyer communicate the risks of divestment if the client's goal is to maintain independence?
- b. How should the lawyer educate the client on the intent of the law?
- c. If the client has decided to pursue a certain course, should the lawyer present alternatives and consequences?
- d. If spending down one's resources has a potential impact on admission or treatment of Medicaid nursing home residents, should the lawyer so advise his or her client?
- e. Should the lawyer inform the client that a facility might drop out of the Medicaid program?
- f. Is it malpractice or potentially unethical not to discuss Medicaid in the context of divestment in the course of counseling a client seeking help with long-term care planning?

4. These issues arise in Model Rule provisions 1.7, 1.9(a), 1.9(c), and 1.6. In addition, questions arise regarding confidentiality of information and the lawyer as intermediary as described in Model Rule 2.2. This led the group to ask:

- a. Are there safeguards that should be considered if the family is the client?
- b. What are the ethical factors or expectations in divestiture when the client comes in with or without his or her family?
 - i. Does Model Rule 1.7 apply?
- c. How does the attorney represent the family unit?
 - i. How does this representation differ when the family agrees or disagrees as to the outcome of the representation?
- d. If a situation in which members of a family need separate counsel arises,

- a. Can there be multiple representation in requests for assistance with divestment?
- b. Can the family be the client?
5. What is the scope of representation?⁵
 - a. Is it the attorney's responsibility to inform the client of the intent of the Medicaid law in providing medical assistance to those in need and that there are strict financial eligibility tests for Medicaid and that divestment of assets is subject to a period of ineligibility for Medicaid nursing home care?
6. How much attention must an attorney pay to an individual client's circumstances?⁶

The working group, in addition to these six categories, asked several more general questions during the morning session:

1. What is the "ethical" obligation of the attorney in making referrals

may an attorney refer them to a specific attorney? The group noted that this might be covered by Model Rule 1.7.

- e. How does representation of the Attorney-In-Fact or the Principal differ?
 - i. How is this representation similar in the context of divestment?

5. This issue may be covered by Model Rules 1.2 and 1.2(d). Model Rules 8.4 and 1.2 address fraudulent transfers and an attorney's responsibility in the divestment context, if divestment, permissible within the scope of federal statutes, can be construed to be a fraudulent conveyance. Local and state laws regarding financial responsibility of families for older relatives exist in a minority of states. Attorneys must be aware of these laws and should counsel the older person and his or her family about them. Model Rules 1.2 and 1.4 also should be considered when doing such counseling.

The group also asked:

- a. What are the obligations to creditors when asset transfers are made?
- b. Is the nursing home or the government, either state or federal, considered to be a creditor in the context of divestment?
6. An attorney needs to be aware of individual client circumstances. In this regard, Model Rules 1.1, 2.1, and 1.2 (a), (b), and (d) attempt to give guidance about counseling to accommodate client circumstances. The working group discussed whether the attorney should advise a client with regard to eligibility for public benefits, in particular, Medicaid, if the client has the financial means to pay for his or her own care. The group asked:
 - a. Are ethical considerations dependent upon the level of a client's wealth?
 - b. Should the financial status of a client alter the factors considered by an attorney in advising a client about the options that are available?

This is of particular importance in the context of advice about divestment, since some might argue that a lawyer should not counsel a person who has \$1 million in assets about the divestment option but should so counsel a person with only \$30,000. One important difference is that "counseled about the divestment option" is quite different from "counseled to divest." The latter suggests advocacy for the divestment option for that client.

- c. Is it proper for a lawyer to base his or her advice on the client's circumstances or financial situation?
- d. Should those clients with assets above the limits of the Medicaid program be permitted to transfer their assets for the express purpose of qualifying for Medicaid and, concomitantly, providing a legacy for the next generation?
 - i. Can an attorney fulfilling the professional obligations of competence participate in the activity?
 - ii. Do the Model Rules regarding the scope of representation shed any light?

- when multiple persons who may have conflicting interests seek the attorney's advice?
2. What is the role of a nursing home or other service provider in advising older persons about Medicaid eligibility?
 3. What is the responsibility of a lawyer to society?
 4. How much must an attorney know about the value of long-term care insurance policies in order to adequately counsel older clients?
 5. What is realistic to recommend to the client?
 6. Is the lawyer an agent of social change or a mouthpiece for the client's wishes?

II. DISCUSSION

The working group decided that several of the issues raised warranted a great deal of discussion. First, the group addressed the public policy implications that the group considered as a part of the role of the attorney as an advisor in light of Model Rule 2.1. Second, the group considered the role that an attorney plays in fulfilling the expressed wishes of the client in accord with the law. The working group adopted the theme of questioning how the Model Rules should treat divestment, if at all. After much discussion, the group looked toward practice guidelines and educational efforts.

Model Rule 2.1 states the role of an attorney as advisor: "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." Some members of the working group argued that the Model Rules should address the issue of divestment as a public policy in this provision. The Comment to Model Rule 2.1 goes further and suggests that a lawyer always has an obligation to put forward "not simply technical advice" but also "the relevant moral and ethical considerations" and to consider "cost or effects on other people." Thus the lawyer's responsibility is to inform the client of matters that go beyond strictly legal issues.

In the context of the divestment discussion, the working group asked whether they should suggest changes to the Model Rule, additional commentary, or develop practice guidelines. Divestment raises a number of concerns for those who practice elder law. With respect to the lawyer's obligation to provide full advice to the client, some members argued that the scope of the Model Rules needs to be as comprehensive as the full faith and lending provisions. The consumer needs to be made aware of all of the alternatives and consequences including the economic, social, moral, and ethical concerns.

A majority of the working group felt comfortable giving the attorney discretion to incorporate within his or her legal advice other issues such as moral, economic, social, and political factors. A minority of the working group argued that the Model Rules should be changed from "may"

to "shall" to mandate these considerations in discussions of long-term care, particularly with respect to divestment options. The group heavily debated this issue. Advocates of mandating this requirement referred to Model Rules 1.4(a) and (b) and felt that the lawyer has a duty to keep the client reasonably informed and to explain matters in a way to enable the client to make an informed decision. Opponents expressed concern about the breadth of the proposed rule and argued that such a change might create an obligation that an attorney would be unable to fulfill. The working group was unsuccessful in its attempt to fashion alternative language that would be acceptable to the group as a whole.

The entire working group agreed, however, to support the discretionary language and turned to a discussion of adding to the Commentary. The proposals for adding to the commentary included the following:

- (1) That the scope of advice should include an honest assessment of the client's situation including the moral, ethical, economic, and social issues. In giving advice the lawyer should also include all of the possible alternatives, options, and resources. For each alternative, the consequences and ramifications of each choice should be given to the client.
- (2) When counseling older clients, it may be appropriate to involve other professionals. The client's permission should be obtained prior to any confidential information being shared among the "experts" in order not to violate Model Rule 1.6.

A small portion of the group also sought to add language to the Model Rules or its commentary prohibiting the non-poor from using Medicaid as a way of paying for long-term care. These members argued that it is unfair to have middle-class and upper-middle-class people use a system meant to provide for those in financial need. This position, however, did not prevail in the working group. The majority of participants felt that such a position would be inappropriate and that an attorney should advise his or her clients on the law and not what they may believe the law should be. Another proposal would have required an attorney who counsels a client to transfer property solely to become eligible for Medicaid also to counsel his or her client regarding the potential effect on limited Medicaid resources. That proposal failed on a close vote.

The discussion continued as to whether practice guidelines would be more practical than either changes to Model Rule 2.1 or its Commentary. Elder law practitioners have focused on the needs of older clients and have emphasized that attorneys serving older clients must have a knowledge of the health and social service systems that serve their clients. With this additional knowledge, an attorney is better equipped to serve as both a counselor and a legal technician. The increasing availability of attorneys with this background should prove advantageous for older clients.

The working group started the second morning discussion by addressing the role of an attorney in serving his or her client. The group posed

several questions as to the appropriate positioning of the lawyer with regard to executing the client's wishes. These questions included:

1. How can the attorney fulfill the responsibility of meeting the client's objectives in accord with the law?
2. Is the role of the lawyer to advise clients within the bounds of the law, without regard to his or her own idea of ethics?
3. Shouldn't the expectation of the client determine the role of the attorney?
 - a. How can a lawyer be aware of a client's expectations?
4. How does the consumer perspective affect the job of the lawyer?

These questions led the working group to look at the core value statements for clients and those for attorneys developed by the National Academy of Elder Law Attorneys. There are three core value statements for clients: "(1) The elderly have a unique set of needs that require special attention; (2) The elderly are caught in the uncertainty and unfairness of public policy on long-term care; and (3) The elderly deserve high-quality legal services." There are three core value statements for attorneys: "(1) Elder law attorneys are alert to the concerns of elderly clients and develop responses to client's needs; (2) Elder law encompasses diverse areas of practice; and (3) Elder law attorneys provide balanced and appropriate legal services within the financial, medical, emotional and family issues affecting the elderly client."

As a starting point, the working group incorporated these notions into its recommendations to be discussed in the plenary session. The group made an assumption, one that later became a core value of the working group, that the role of the attorney was to "preserve the dignity and self-determination of the elderly in the face of competing interests and grim alternatives." The members then decided that the scope of representation for those attorneys who serve older clients, as described in Model Rule 1.2, should be "to counsel clients about the full range of options and their potential consequences in obtaining coverage and cost of long-term care." The group also determined that this counseling role is a part of the attorney's duty of competency in rendering such advice, as described in Model Rule 1.1.

The working group began drafting language for its recommendations late in the morning session and finished in the afternoon session of the second day. After a few unsuccessful attempts to achieve consensus regarding changes to the Model Rules or changes to its commentary, the participants decided to concentrate on practice guidelines and education for attorneys. The members discussed how to define the target audience for either practice guidelines or educational efforts and asked whether to create a separate set of guidelines for those lawyers who define themselves as "elder law attorneys" or to target a more general audience of lawyers. The group noted that the American College of Trust and Estate Counsel and the American Bar Association Real Property, Probate and Trust Section segregate their practices. The group decided that the

guidelines should be general to include lawyers who might not define their practice narrowly.

The last issue that the working group struggled to decide was whether the practice guidelines should be mandatory or suggestive as an approach to practice. A majority of the working group members believed that the practice guidelines should not be mandatory and noted that mandatory guidelines are, in fact, rules. These members also expressed concern that the plenary group would not accept mandatory guidelines. Those who advocated mandatory guidelines did not raise their view as a minority position at the plenary session. The group thus determined that “[t]he practice guidelines that follow seek to identify approaches for addressing important issues *without expressly mandating or prohibiting particular conduct* by attorneys.”

The remaining recommendations were essentially an attempt to get at the root elements that would make for good planning without dealing directly with the issue of divestment for the purposes of Medicaid planning as an issue in professional responsibility. The group did not have enough time to discuss ethical guidelines for attorneys counseling fiduciaries in divestment planning when the principal’s intent is not clear, and therefore suggested that this issue be included in any further study.⁷

7. For the full text of the Recommendations of this working group, see Conference on Ethical Issues in Representing Older Clients, *Recommendations, in* Ethical Issues in Representing Older Clients, 62 Fordham L. Rev. 989 (1994).

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