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Cover Page Footnote

Eleanor M. Crosby, M.A., J.D., is the Economic Security/Consumer Representative with the American Association of Retired Persons, Area 4 Office. Formerly she was the Legal Services Developer for the State of Georgia, and the chair of the State Bar of Georgia YLS Elder Law Committee. The views expressed herein are solely those of the authors and do not reflect this opinion of AARP. Ira M. Leff, J.D., L.L.M., is an elder law attorney practicing in Atlanta. He is a member of the State Bar of Georgia YLS Elder Law Committee, and the National Academy of Elder Law Attorneys

ETHICAL CONSIDERATIONS IN MEDICAID ESTATE PLANNING: AN ANALYSIS OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT

ELEANOR M. CROSBY and IRA M. LEFF*

I. SCOPE

THE purpose of this article is to provide a starting point for discussion of ethical issues related to the practice of Medicaid estate planning. The authors explore the history of attorney involvement in planning and financing long-term care.¹ They also analyze how the ABA Model Rules of Professional Conduct address the ethical dilemmas that arise in practice, using a case study to illustrate some of these issues. The individual authors' perspectives on this practice differ with respect to certain issues. One is a former Legal Services lawyer, and the other has a private practice which focuses on Medicaid estate planning.

II. BACKGROUND

Medicare,² which was enacted in 1965, as part of President Lyndon Johnson's Great Society program, is a social insurance program which covers anyone who meets its age (sixty-five) or disability guidelines.³ While Medicare is the primary insurance for substantially all aged persons who are in need of long-term care, it pays only about six percent of the cost of that care.⁴

Medicare only assists persons in participating nursing homes who need skilled care on a daily basis,⁵ following a hospital stay of at least three

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1. Long-term care is defined as "care needed by people of any age when they have mental or physical impairments or illnesses that will disable them for months." American Association of Retired Persons, Long-term Care Fact Sheet, July, 1993 (on file with *Fordham Law Review*).

2. See Health Insurance for the Aged Act, Pub. L. No. 89-97, 79 Stat. 290 (1965) (codified as amended in scattered sections of 26, 42 & 45 U.S.C.).

3. See 42 U.S.C. § 1395(c) (1988).

4. See U.S. Dep't of Health and Hum. Servs., Health Care Fin. Admin., 1993 HCFA Statistics 27; Health Care Fin. Admin., Health Care Fin. Rev., 22 (Fall 1991).

5. Skilled care is defined as services ordered by a physician, requiring the skills of a registered nurse, licensed practical nurse, physical or occupational therapist, or speech

days.⁶ Even in the limited number of cases where Medicare will help pay the cost charged by a nursing home, it does so, in full, only for the first twenty days. Starting on the twenty-first day, the nursing home resident is responsible for a copayment of up to \$87.00 per day, which continues through day 100. After 100 days,⁷ Medicare nursing home benefits expire. Often the resident is faced with bills of \$3,000 to \$4,000 per month.⁸ While many nursing home residents carry supplemental medical insurance, the coverage for nursing home care varies widely from policy to policy, and in almost all cases, the resident must need skilled care on a daily basis in order to receive benefits. Moreover, fewer than five percent of nursing home residents in the current generation carry long-term care insurance.⁹ As a result, many older persons who have never considered applying for any kind of needs-based, government assistance in the past, seek a solution to their cash flow crises.¹⁰

Medicaid,¹¹ which was also enacted in 1965, provides medical coverage to the financially needy. In order to receive Medicaid assistance, an applicant's income and resources¹² must not exceed certain limits.¹³ "Originally intended to provide medical services to low-income women and children, Medicaid has evolved over time into the largest third-party financier of long-term care in the United States."¹⁴ Medicaid paid 39.6 percent of all nursing home costs in 1992.¹⁵

Financing the cost of long-term care poses particular problems for middle class individuals, who have incomes and resources too high to qualify for Medicaid, yet not high enough to afford the cost of their care. This predicament, together with changing demographics and views on aging, has resulted in the emergence of a new area of legal practice, which is known as *elder law*:

pathologist or audiologist, and furnished directly or under the supervision of such professionals. See 42 C.F.R. § 409.31 (1993).

6. See 42 C.F.R. §§ 409.32-.33 (1992).

7. Assuming that the resident continues to need skilled care on a daily basis throughout the period. See 42 U.S.C. § 1395e (1988).

8. This is the average cost of nursing home care in Georgia. However, in other parts of the country, costs may be considerably higher.

9. Telephone Interview with Susan Coronel, Policy & Research Analyst, Health Insurance Association of America (Feb. 22, 1994).

10. While there are several different proposals pending in Congress to reform the national health care system, most, if enacted, would not solve the long-term care crisis and some would exacerbate it.

11. Pub. L. No. 89-97, title I, § 121(a), 79 Stat. 343 (1965) (codified as amended in scattered sections of 42 U.S.C.).

12. If the applicant is married, his or her spouse's resources are also considered for eligibility purposes.

13. While there are many different programs under the Medicaid umbrella, this article will focus only on those types of Medicaid which assist aging persons in need of long-term care.

14. Health Care Fin. Admin., Health Care Fin. Rev. (1987).

15. See U.S. Dep't of Health and Hum. Servs., Health Care Fin. Admin., 1993 HCFA Statistics 28; Health Care Fin. Admin., Health Care Fin. Rev. 22 (Fall 1991).

[Elder law] is very much a function of fulfilling expectations. Older people expect that the money they have saved all their lives will have value in funding their retirement and in securing the lives of their children and grandchildren. People will not save for a lifetime in order to see those savings go down the drain in a matter of a few months or a few years, just to save the government some Medicaid dollars. It denies the essence of the middle class view of American life and the American dream.¹⁶

Many elder law attorneys are inundated with clients who want to know what they can do to protect some of their assets should they need nursing home care in the future. Notwithstanding this demand for Medicaid advice, some people believe that it is improper for lawyers to counsel clients on how to position assets in order to qualify for Medicaid, since such use of the program diverts scarce resources which could be used to assist low income individuals and persons with disabilities.

With this background then, what are the lawyer's obligations under the ABA Model Rules of Professional Conduct to his or her client who wants to know how to qualify for Medicaid? And what duty, if any, does the lawyer owe to the general public?

This article will address these issues through analysis of a case study, which illustrates some of the ethical dilemmas lawyers face in the practice of elder law. Most lawyers engaged in this area of practice would not make the same decisions made by the lawyer in the case study. The case and its analysis are merely intended to provoke debate and discussion of several difficult issues, which the authors hope will result in new ethical standards for elder law attorneys.

III. CASE STUDY

Henry and Diane Williams are husband and wife.¹⁷ Diane has been taking care of her mother, Mary Johnson, in their home in Georgia, for the last six months. Mary, a widow, is seventy years old and suffers from Alzheimer's Disease. Mary has two other children, Steven and Sean, both of whom reside out of state.

Diane is becoming increasingly burdened by the responsibility of caring for Mary. She is also troubled that her brothers never call or visit their mother and refuse to contribute towards the cost of her care, yet Mary worships them. Diane recently received an offer to return to her profession, teaching, which she would love to do, if she could find someone to care for her mother.

Last week Diane consulted with a care manager, Charlotte Manheim, who referred her to an elder law attorney named Ellen Lea Adams. Di-

16. Joel C. Dobris, *Medicaid Estate Planning by the Elderly: A Policy View of Expectations, Entitlement and Inheritance*, 24 Real Prop., Prob. & Tr. J. 19-20 (1989).

17. The names of the parties in the case are intended to assist the reader in remembering their roles. For example, the Daughter is named Diane, and the Care Manager is named Charlotte Manheim.

ane, Henry, and Charlotte met with Adams yesterday. Diane explained to Adams that she is losing her patience with her mother and needs to go back to teaching. Charlotte told Adams that based upon her assessment, Mary needs assistance with dressing, eating, and bathing, and if Diane can no longer provide that care, Mary will need personal care, either at home or in an assisted living facility. All parties agreed that based upon their understanding of Alzheimer's Disease, Mary was likely to need nursing home care within the next few years.

Adams inquired about Mary's financial condition and was told that she receives \$500 per month from Social Security, and \$800 per month from investments. She has \$200,000 invested in bank accounts and mutual funds, but is very reluctant to touch the principal. Therefore, Diane has not been charging Mary for the care Diane has been providing.

Adams explained that Medicare does not cover the kind of full-time custodial care that Mary needs. She also explained that Medicaid is very difficult to qualify for while Mary is in the home or a personal care home setting,¹⁸ but could be of assistance when Mary goes into a nursing home. Charlotte indicated that in Georgia, home health care costs anywhere from \$8 to \$15 per hour. Personal care homes cost about \$2,000 per month, and nursing homes cost about \$3,500 per month. Adams added, however, that if Mary were to enter a nursing home and qualify for Medicaid, she would only have to pay \$470 per month for her care, because Medicaid would subsidize the cost.

Diane told Adams that she is sure that Mary would never agree to pay more than \$500 per month for her care, and that she and Henry could not afford to subsidize Mary any further. Charlotte asked Adams to explain what steps would be necessary for Mary to qualify for Medicaid.

Adams explained that Mary could keep no more than \$2,000 in resources. She suggested that Mary could transfer \$120,000¹⁹ to Diane, Steven, and Sean, and approximately thirty-four months after the date of the transfer Mary should be eligible for Medicaid.²⁰ The children could use the amount transferred to supplement the care that Mary would receive on Medicaid, and any amount left over on Mary's death would be their inheritance.

Diane and Henry liked Adams' advice very much, except that they did

18. Personal care homes are residences in which patients do not require skilled nursing care, but may need assistance in dressing and bathing, for example. They are also known in various parts of the country as assisted living facilities or as board and care residences.

19. Adams attempted to project the maximum amount that Mary could transfer while retaining sufficient funds to pay for her own care until she would become Medicaid eligible.

20. In Georgia, the period of ineligibility following a transfer for less than fair market value is determined by dividing the amount transferred by the actual monthly cost of the nursing home to a private pay resident. See Georgia Dep't of Human Resources, Georgia ABD Medicaid Manual 1299-7 (Mar. 1, 1994). In this case $120,000/3500=34.28$ months. The fraction of the month is ignored in Georgia. See *id.* at 1299-6.

not think that Steven and Sean should receive any of Mary's assets, since it was likely that they would not agree to use the funds to supplement Mary's care.

Henry asked whether they could wait until Mary was no longer alert, and then have Diane transfer the money to herself under the power of attorney that she held for Mary.²¹ Adams reviewed the document and concluded that Diane had the power to pay Mary's bills, but did not have the power to make gifts of Mary's property. Adams offered to draft a new power of attorney for Mary's signature that would contain specific gifting powers. Adams asked Charlotte if she thought Mary was competent to sign such a document. Charlotte indicated that Mary has lucid intervals, but has trouble with complicated decisions. Charlotte also confirmed that Mary is very concerned about losing her money, and could become very upset if presented with such a document.

Adams offered to explain the power of attorney to Mary in a non-threatening way, and to determine whether Mary was competent to sign it.²² Diane asked Adams who would ever know if Mary wasn't fully competent when she signed the document. Adams indicated that it was likely that nobody would ever know. Instead, Diane suggested that she and Henry could take care of getting the power of attorney signed. Adams agreed to that procedure.

Before the meeting broke up, Adams asked Diane to sign an engagement agreement. Adams explained that Mary was her client, but that Diane had the power to sign on her behalf. Adams explained her fee structure, at which point Diane asked if it was possible for the bills to be sent to Henry's office, because Mary often looks through the mail at the house and would never agree to pay Adams' fees. Diane paid Adams' retainer out of a personal account.

Six months passed before Adams heard from Mary's family again. Diane called Adams and told her that Mary had gotten considerably worse and was ready to be placed in a nursing home. Diane explained that Mary had signed the power of attorney with gifting powers, and Diane wanted to know how she should execute the transfer. Adams explained the process to her, but advised that she should get Mary placed in a Medicaid nursing home before she completes the transfer, since facilities

21. Although all powers of attorney are presumed to be *durable* in Georgia and therefore still valid after the principal becomes incompetent, see O.C.G.A. § 10-6-36 (Michie 1989), the document did not authorize Diane to make gifting decisions for Mary. Powers of attorney are not presumptively durable in all states, however. See e.g., Conn. Gen. Stat. Ann. §§ 1-43, 45a-562 (West 1990 & Supp 1993); N.Y. Gen. Obl. Law §§ 5-1501, 5-1601 (McKinney 1991). Note also that power of attorney provisions giving authority for "all other acts" are construed narrowly by courts to include only routine matters in the best interest of the principle and not authority to make gifts or otherwise transfer assets. See e.g., Vonwedel v. McGrath, 180 F.2d 716 (3d Cir. 1950); Wheelless v. Gelzer, 780 F. Supp. 1373, 1380 (N.D. Ga. 1991); LeCraw v. LeCraw, 401 S.E.2d 697 (Ga. 1991).

22. For a discussion of the difficulties of judging capacity, see Robert P. Roca, *Determining Decisional Capacity: A Medical Perspective*, in *Ethical Issues in Representing Older Clients*, 62 Fordham L. Rev. 1177 (1994).

are much more likely to accept Mary if they think she will be able to pay privately for a longer period of time. Diane understood, and found a bed for her mother at Mountainview Lodge Nursing Center that month.

Mountainview asked Diane to sign her mother in. As part of the admissions process, Diane was asked to sign an agreement that stated that Mary would take no action to qualify for Medicaid as long as she resided at Mountainview.²³ The facility also asked Diane and Henry to sign as *responsible persons*, and thereby to guaranty their mother's monthly payments.²⁴

Diane called Adams to discuss the paperwork. Adams explained that duration of stay agreements and third party guarantees are prohibited by Medicaid, and, therefore, the nursing home was violating Federal law by requiring such agreements.²⁵ Adams advised Diane that it was alright to sign them, since not doing so might jeopardize Mary's chances for admission. Adams explained that the nursing home would never succeed in enforcing the documents, and they were there just to intimidate naive applicants.

Another thirty months passed before Adams heard from Diane again. Mary was doing well at Mountainview, but was just about out of money. Because her expenses were more than Adams projected, Mary was going to run out of money three months before she would be eligible for Medicaid.²⁶ Adams suggested that Diane use some of the transferred assets to pay Mountainview until the Medicaid benefits started coming. Diane was reluctant to do so, and suggested that instead of waiting until the end of the thirty-four-month period, they apply for Medicaid immediately and not tell Medicaid about the transfer. Adams warned Diane that not disclosing the transfer would be fraud and perjury, and that criminal penalties could be applied. Diane asked what were the chances of being caught. When Adams indicated that chances were slight, Diane said that she would take her chances.

Diane then asked Adams to help her complete the Medicaid application and to prepare her for the intake interview. Adams reluctantly agreed to do so.

IV. ANALYSIS OF ISSUES

A. *Who Is the Client?*

Even though Henry, Diane, and Charlotte were the parties who met

23. Agreements of this sort are not unusual in Georgia. They are referred to as *duration of stay agreements*.

24. Whether a *responsible person* is also a guarantor is determined by the particular nursing home contract.

25. See 42 U.S.C. § 1396r(c)(5)(A) (1988).

26. Because of the transfer of assets, Mary would not be eligible for Medicaid for thirty-four months from the first day of the month in which the transfer occurred, even though her assets are below the resource limit of \$2,000. See 42 U.S.C. § 1396p(c)(1) (Supp III 1993).

with Adams, it is apparent that Mary is the object of the discussion. It is Mary who needs long-term care, and it is Mary's finances that are under consideration. Henry and Diane have no present interest in the assets under discussion, and no authority to effect the transfers that have been proposed. Therefore, it is Mary who is the client in this case. As soon as Adams determined this fact, she should have informed Henry and Diane, and advised them that they might want to seek other counsel if they want personal representation.²⁷

Even though Mary clearly is the client in this case, why couldn't Adams represent Mary through Diane as her agent? In this case, the power of attorney that Diane brought to the initial meeting did not allow her to make gifts of Mary's property. Therefore, the document, *per se*, did not authorize Adams to represent Mary through Diane with respect to such decisions.

It is not uncommon for elder law attorneys to work through a *de facto* agent, like Diane, in representing a client, because the person in need of the advice is physically or mentally unable to participate in the discussions. Although the Model Rules do not specifically address this issue, many elder law attorneys agree that if the client has evidenced the intent to trust a surrogate by creating joint bank accounts with that person or otherwise, and if the lawyer concludes that the surrogate is acting in the best interest of the client, then it should be permissible to work through the agent in rendering advice to the client.

Lawyers must be extremely cautious in determining when it is appropriate to represent the client through a *de facto* agent. In the case at hand it is clear that Mary is still cognizant of her affairs, and if consulted, probably would be unwilling to participate in asset transfers. Although she has given Diane a power of attorney, she has not evidenced complete trust in Diane. Moreover, Diane has tried to hide the consultation from Mary. While Mary's decision-making ability may be impaired by her condition, Adams should not assume, without independent verification, that any distrust of Diane is irrational. Notwithstanding Mary's apparent diminished capacity, Adams is required to maintain a normal client-lawyer relationship with Mary, as far as reasonably possible.²⁸

Could Adams, acting as an intermediary, represent Mary's entire family? A lawyer is permitted to act as an intermediary between clients only where the lawyer consults with each of the clients concerning this role and obtains the consent of all involved.²⁹ The intermediary role is only appropriate where it will serve the best interests of all clients.³⁰ In the instant case, Adams could not have served as the family's intermediary because the interests of Diane and Henry conflicted with those of Mary

27. See Model Rules of Professional Conduct Rule 1.7 (1992) [hereinafter Model Rules]; see also Model Rules, *supra*, Rule 1.7 cmt.

28. See Model Rules, *supra* note 27, Rule 1.14(a).

29. See Model Rules, *supra* note 26, Rule 2.2(a)(1).

30. See Model Rules, *supra* note 26, Rule 2.2(a)(2), (a)(3).

and those of Steven and Sean. Therefore, it would not have been in the best interests of all parties for Adams to serve the family.

At the end of the first meeting, Adams discusses her fee structure with Diane, explains that Mary is her client but allows Diane to sign the engagement agreement on Mary's behalf. Adams seems more willing to recognize the legitimacy of Diane's authority at this point where Adams has a personal financial interest in doing so. Even though Diane, under the power of attorney, has the ability to pay bills incurred by Mary, she probably does *not* have the power to contract for the type of services that Adams provides.

Diane pays Adams' fees out of Diane's account and asks that bills be sent to Henry's office so as to conceal the cost of representation from Mary. This creates an impermissible conflict of interest for Adams, since it compromises her loyalty to Mary.

A lawyer shall not accept compensation for representing a client from one other than the client unless: (1) the client consents after consultation; (2) there is no interference with the lawyer's independence or professional judgment or with the client-lawyer relationship; and (3) information relating to representation of a client is protected as required by [the rules relating to confidentiality].³¹

In this fact pattern, it should have been obvious to Adams, that Mary would not consent to payment of the legal fees by Diane and Henry. That is why they asked for the bills to be sent to Henry's office. Adams should not have accepted payment from Diane, in her individual capacity, without first meeting with Mary and obtaining her consent.

B. *What Duties Does Adams Owe to Her Client?*

1. Scope of Representation—Setting Goals

Adams' initial discussion centers around *Diane's goals* for representation. All parties to the conversation appear to have decided that nursing home placement is best for Mary. While placing Mary in a nursing home may achieve Diane's goals of returning to her teaching career and terminating the financial support Diane is providing to Mary, doing so may not achieve Mary's goals or provide the best care for her. At this point, it is impossible to ascertain what Mary's goals are since she did not attend the meeting. However, from the discussion with Henry and Diane, Adams should have suspected that Mary's goals are probably different from Diane's, or else she would have been included in the meeting. If Mary is like most persons her age, she probably would prefer to avoid nursing home placement.³²

31. See Model Rules, *supra* note 26, Rule 1.8(f).

32. Eighty-four percent of persons fifty-five years of age or older wish never to move out of their current homes. See American Association of Retired Persons, Understanding Senior Housing for the 1990's: Survey of Consumer Preferences, Concerns, and Needs 42 (1993).

A lawyer has a duty to discuss the goals of representation with the client, abide by the client's decisions regarding the representation (subject to limitations which include fraud), and consult with the client about the means to pursue the goals of representation.³³ It is the responsibility of both the attorney and the client to define the scope and goals of the representation, as well as the means by which to achieve such goals,³⁴ and, therefore, communication directly with Mary about her goals and all of her options is imperative to the extent that she is able to participate in such discussions.³⁵

2. Communication with Client

In addition to communication with the client concerning her goals, the lawyer also has a duty to keep the client apprised of the status of the case, and to provide the client with all information reasonably necessary to enable the client to make informed decisions regarding the representation.³⁶ Effective and appropriate communication affords the client an opportunity to participate meaningfully in the representation.³⁷ In the case at hand, communication between Adams and Mary is extremely important, not just to allow Adams to ascertain Mary's goals, but also to assess her capacity and to verify her willingness to participate in the representation.

Another troubling issue is raised by the case study when Adams moved rapidly into an examination of Mary's eligibility for Medicaid.³⁸ Adams appears to be promoting nursing home placement and asset divestment for Mary when it is not clear that these are a goal of Mary's and when other alternatives might be preferable.

Because of the permanent impact of asset divestment on the client, that is, the loss of financial autonomy, it is essential that the client be well-informed about all options and their implications. Adams has a duty to explain the matter to the extent reasonably necessary to permit Mary to make informed decisions regarding the representation.³⁹ This includes discussing the difficulties in finding a Medicaid bed in a good nursing home, differences in the quality of care provided to Medicaid residents from that provided to private pay residents, and the risk that a Medicaid nursing home might cease to participate in the Medicaid program, thereby leaving its Medicaid residents in immediate need of an-

33. See Model Rules, *supra* note 26, Rule 1.2.

34. See Model Rules, *supra* note 26, Rule 1.2 cmt.

35. See Model Rules, *supra* note 26, Rule 1.4.

36. See Model Rules, *supra* note 26, Rule 1.4(b).

37. See Model Rules, *supra* note 26, Rule 1.4(b) cmt.

38. As discussed above, Adams should not have discussed any substantive matters with Diane and Henry without Mary's consent. However, in order to address the remaining issues, this article assumes that these discussions continued without Mary's knowledge and applies the Model Rules to Adams' conversations with Diane and Henry.

39. See Model Rules, *supra* note 26, Rule 1.4(b).

other quality Medicaid nursing home with available beds.⁴⁰ Adams also could refer to a variety of external considerations, including the economic, moral, social, and political consequences of asset divestment.⁴¹ Adams also may discuss the effects of asset divestment on a program originally designed to aid those with low incomes and meager assets. Without all of this information, a client would not be able to participate meaningfully in the representation.

Even where nursing home placement and the protection of assets clearly are the client's goals, the lawyer should explore with the client a number of ways that the goals can be accomplished, along with all benefits and drawbacks.⁴² Decisions concerning the objectives of representation rest primarily with the client, and the lawyer must consult with the client about the means by which objectives are met.⁴³

Adams, concerned about Mary's possible fear, offers to explain the power of attorney to Mary "in a non-threatening way" and make an assessment of Mary's capacity to execute the document. Adams' duty to Mary is not to sugar-coat the issues for her, but rather to explain the document to the extent reasonably necessary for Mary to make an informed decision about it.⁴⁴ Even if Mary's impairment is such that she is unable to understand the document fully, Adams still must explain it to the extent reasonably possible.⁴⁵

3. Confidentiality

If Adams represents Mary and is not acting as an intermediary between family members, then it is not proper for Adams to have discussions concerning Mary's affairs with anyone other than Mary except with her consent.⁴⁶ As discussed above, although the rules are clear on this, strict compliance may be impractical when dealing with a client with

40. A Medicaid nursing home decertified in Georgia in 1992, leaving 62 Medicaid residents in need of beds. See Ann Hardie, *N. Atlanta nursing home tells 62 Medicaid patients to leave Facility; says aid for needy residents is too low*, Atlanta J. & Const., Feb. 5, 1992, at A1.

41. See Model Rules, *supra* note 26, Rule 2.1. This is an area where the two authors disagree. Ms. Crosby feels that Adams has a duty to the client to discuss all relevant issues, including the impact on the client and the purpose of the Medicaid program. Mr. Leff does not think it is the elder law attorney's place to discuss moral, social, and political issues with the client.

Note that, although a lawyer might have personal concerns about the appropriateness of divestment, representation of a client does not constitute an endorsement of the client's economic, moral, social, and political views or activities. See Model Rules, *supra* note 26, Rule 1.2(b).

42. For example, Mary might be able to reinvest her assets so as to produce sufficient income to meet her care expenses. Or, if Mary was determined to qualify for Medicaid, she could keep substantially all of her assets in her own name, but convert them to exempt resources such as a principal residence, personal effects, or vehicles.

43. See Model Rules, *supra* note 26, Rule 1.2(a).

44. See Model Rules, *supra* note 26, Rule 1.4(b).

45. See Model Rules, *supra* note 26, Rule 1.14.

46. See Model Rules, *supra* note 26, Rule 1.6.

diminished capacity. However, where there are actual and significant conflicts of interest in the family, such as exist here, it is essential that the lawyer not discuss the case with family members without the client's knowledge and consent.⁴⁷

4. Competency and Diligence

Medicaid divestment is a particularly technical area of practice. The rules governing eligibility for benefits change frequently, and there is no single correct way to qualify for Medicaid if that is the client's goal. "Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."⁴⁸ A lawyer who is not entirely familiar with all aspects of this practice should not agree to represent a client in this type of case unless the lawyer is prepared to associate with another lawyer who is qualified in this area.⁴⁹ Adams' failure to explain all of Mary's various options, and the consequences of each option, could have been a result of a lack of experience and knowledge on her part.

Adams' competence becomes an issue again later in the case when Mary's assets are exhausted three months before she becomes eligible for Medicaid. In an elder law practice, the lawyer should use conservative assumptions about future costs and investment returns so as to assure that a client who has divested himself or herself of funds will not run out of money to pay the costs of care prior to qualifying for Medicaid assistance.⁵⁰ Notwithstanding that there may be a moral obligation for the recipients of transferred assets to supplement the care received by the nursing home resident, there is no enforceable legal obligation for Diane and Henry to use the transferred money to pay Mary's costs, otherwise assets transferred will be considered available to Mary for Medicaid purposes.

Adams allows Diane and Henry to take an unusually broad power of attorney to Mary for her signature—after they questioned who would know if Mary lacked capacity to execute it. Adams should suspect that Henry and Diane intend to commit fraud,⁵¹ yet she does nothing to discourage this course of action or explain the impropriety to Diane and Henry. Assuming that the Model Rules permit Adams to communicate through Diane and Henry, Adams should have discussed the definition of fraud with them and the possible consequences of their act.⁵² If she

47. See Model Rules, *supra* note 26, Rule 1.8(b).

48. Model Rules, *supra* note 26, Rule 1.1.

49. See Model Rules, *supra* note 26, Rule 1.1 cmt.

50. If a nursing home resident is unable to pay privately for his or her care, and is not eligible for Medicaid, the facility is permitted to discharge the resident. See 42 U.S.C. § 1396r(c)(2)(A)(v) (1988).

51. Fraud is "conduct having a purpose to deceive and not merely negligent misrepresentation or failure to apprise another of relevant information." Model Rules, *supra* note 26, Terminology.

52. See Model Rules, *supra* note 26, Rule 1.2(d) cmt.

was not successful in persuading Diane and Henry to abandon this course of action Adams should have warned Mary and ceased communications with Diane and Henry.⁵³

What if Mary was willing to sign the new power of attorney and to permit asset transfers, but her capacity to fully understand the issues was in question. Does Adams' duty to represent Mary zealously⁵⁴ require her to assist in the preparation and execution of the power of attorney document, since doing so will help achieve Mary's goals? Or should Adams refuse to assist in the process without first obtaining a medical or psychological opinion as to Mary's competency? Would Adams be assisting in an act of fraud if she were not absolutely certain of Mary's competency? These issues need further elucidation in the Model Rules.

C. *What Other Duties Does Adams Owe?*

1. Duties Owed to Family Members

In early discussions with Diane and Henry, Adams learns that Mary worships her sons, Steven and Sean. Yet Diane and Henry indicate that they do not trust Steven and Sean with Mary's assets. Given these mixed messages, what, if any, responsibility does Adams have to the absent children? Unless Adams was acting as family intermediary, Adams would have a duty not to disclose confidential information to Steven and Sean without Mary's consent.⁵⁵ Adams should disclose Diane's feelings to Mary and attempt to determine whether Diane is acting in an effort to protect Mary's best interest or has her own personal motives in mind.⁵⁶

Diane and Henry asked Adams about the possibility of effecting an asset transfer without Mary's knowledge. Clearly, Adams is prohibited from assisting them in conduct that is criminal or fraudulent.⁵⁷ Even if Mary's condition precluded her from fully understanding all issues involved in the representation, nothing should be concealed from her, since she is the client. Adams should explain to Diane that secreting the asset transfer from Mary is fraud and Adams cannot assist in that process.⁵⁸

2. Duties Owed to the Nursing Home

Adams advises Diane that Mary should be admitted to the nursing home prior to completing the asset transfer.⁵⁹ While it may be argued that it was less than forthright to conceal from the facility the present

53. See Model Rules of Professional Conduct Rules 1.2(d), 1.16(a)(1), (b)(1), (b)(2) & (b)(3) (1992) (governing declining or terminating representation).

54. See Model Rules, *supra* note 26, Rule 1.3 cmt.

55. See Model Rules, *supra* note 26, Rule 1.6(b)(1).

56. See Model Rules, *supra* note 26, Rule 1.4.

57. See Model Rules, *supra* note 26, Rule 1.2(d); see also *id.* Rule 1.8(b).

58. See Model Rules, *supra* note 26, Rule 1.2(e).

59. The theory is that if Mary has substantial assets to disclose on her financial statement requested by the nursing home, she will be more likely to get a bed in a shorter period of time.

intention to transfer the assets, Adams' duty is to represent her client zealously.⁶⁰ In some parts of the country the only way to reach the top of the waiting list at a desirable Medicaid nursing home is to have a substantial amount of assets when you apply. Although discrimination by nursing homes based on method of payment is prohibited once an applicant is admitted to a facility,⁶¹ it is permitted in many states in the admissions process.

Mountainview's admissions practices raise a number of other issues. Does the fact that Mountainview's questions are prohibited by Medicaid justify Adams' counseling Diane to be less than honest about Mary's future plans to apply for Medicaid? The Model Rules provide only a limited amount of guidance in this area:

A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client⁶²

While generally the lawyer is required to be truthful in statements to others⁶³ and not to advise or assist a client in engaging in fraud,⁶⁴ there is no definitive answer as to whether a lawyer can advise a client to not be truthful in response to a prohibited question. If the lawyer advises the client to be honest with the facility, the client may never be admitted.

3. Duties Owed to the Government

When Mary runs out of money before qualifying for Medicaid, Diane suggests that she not tell Medicaid about the transfer. This raises the issue of Medicaid fraud. Nevertheless, Adams agrees, albeit reluctantly, to continue her representation by preparing Diane for the eligibility interview and assisting with preparing the Medicaid application. Adams has unequivocal information that Diane intends to commit a crime. While Adams may not be able to disclose this fact to the authorities,⁶⁵ Adams must not assist Diane any further and must withdraw from the representation.⁶⁶

V. RECOMMENDATIONS AND CONCLUSIONS

Lawyers who counsel clients with regard to Medicaid eligibility are advised to meet with their clients at an early stage in the process. If the client is accompanied by family members when visiting the lawyer, the

60. See Model Rules, *supra* note 26, Rule 1.3 cmt.

61. See 42 U.S.C. § 1396r(c)(4) (1988); see also 42 U.S.C. § 1396r(c)(5) (1988) (prohibiting requirement that patient waive rights to Medicaid benefits or promise not to apply for Medicaid).

62. Model Rules, *supra* note 26, Rule 2.1.

63. See Model Rules, *supra* note 26, Rule 4.1 cmt.

64. See Model Rules, *supra* note 26, Rule 1.2.

65. See Model Rules, *supra* note 26, Rule 1.6.

66. See Model Rules, *supra* note 26, Rule 1.16(a)(1).

lawyer should speak with the client outside the presence of the family in order to determine whether or not coercion or conflicting interests is an issue.

If the client is physically unable to participate in the representation, the lawyer should be permitted by the Model Rules to represent the client though a *de facto* agent, who has the trust of the client even if the agent does not have the legal authority to transfer the client's property by gift. However, the lawyer should be required to independently verify that the client is competent and that the *de facto* agent is acting in the client's best interest. Because of the conflict of interest between the *de facto* agent, who is often the beneficiary of the proposed transfers, and the client, the lawyer needs to use extreme caution in making judgments regarding the *de facto* agent's motivations.

If such surrogate representation is undertaken, the lawyer should still keep the client informed of all issues being discussed and all actions being taken. If at any point during the representation the lawyer concludes that the client is no longer in agreement with the actions undertaken, the lawyer should cease communications with the agent, and deal directly with the client, if possible.

Other questions, however, remain unclear. What is the lawyer's responsibility to a client who may not be competent? Should the lawyer assist a *de facto* agent if the agent appears to have the client's best interests in mind? If the agent does not have express authority to make decisions with regard to asset divestment, the lawyer should not proceed before contacting the client directly, ascertaining whether he or she is competent to grant such authority, and, if competent, whether he or she is willing to do so, understanding the nature of the authority and the risks and consequences of its delegation. If the client is not competent, the lawyer should not assist a *de facto* agent with divestment.

How does the lawyer balance the duty to represent his or her client zealously with the duty of truthfulness to third parties when the third party is not acting in good faith and asks for a commitment which is prohibited by law? Since it is often the client and not the lawyer who will be communicating directly with the nursing home, the lawyer should be permitted to leave the decision of whether to lie on the application up to the client, once the lawyer has fully explained the risks and ramifications to the client.

While the Model Rules provide clear direction with regard to many ethical dilemmas, this Article has illustrated that there are still some areas where the Model Rules fail to provide the guidance needed by the practitioner. The authors welcome response to, and debate over these difficult questions.