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The Lawyer's Ethical Considerations In Medicaid Planning For The Elderly: Representing Smith And Jones

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INTRODUCTION

Lawyers who give legal advice on Medicaid planning encounter significant ethical questions, often with answers that are highly fact specific.¹ The Pennsylvania Supreme Court

recently approved major revisions of Pennsylvania's Rules of Professional Conduct, effective on January 1, 2005. The changes, which flow from the American Bar Association's Ethics 2000 Project, provide an appropriate opportunity for lawyers to reconsider their ethical obligations. To assist in recognizing

whether the public should be "forced" to shoulder the financial burdens of the individual. For example, in 1997 Congress attempted to criminalize certain Medicaid planning advice about disposition of assets, but the provision has not been enforced. Compare 42 U.S.C. §1320a-7b(a)(6) (2003) with *New York State Bar Association v. Reno*, 999 F.Supp. 710 (N.D.N.Y. 1998) (granting injunctive relief in favor of Bar Association on likelihood of irreparable harm to First Amendment rights through impairment of right to counsel clients, despite Attorney General's pledge of non-enforcement) and *Magee v. U.S.*, 93 F.Supp 2d 161 (D.R.I. 2000) (finding no case or controversy in light of Attorney General's position that statute was unconstitutional). In considering whether to undertake any role as a legal advisor on Medicaid planning, the lawyer with fundamental doubts should review the Pennsylvania Rules of Professional Conduct, Rule 1.2 on "Scope of Representation and Allocation of Authority Between Client and Lawyer" and Rule 2.1 on "Advisor." See also John A. Miller, *Voluntary Impoverishment to Obtain Government Benefits*, 13 CORNELL J. L. & PUB. POL'Y 81 (Fall 2003) (discussing policy concerns and recommending legislative changes to adopt a "middle way" between welfare that permits or encourages voluntary impoverishment, and the high public cost of nationalized, uniform health care); A. Frank Johns, *Legal Ethics Applied to Initial Client-Lawyer Engagements in Which Lawyers Develop Special Needs Pooled Trusts*, 29 WM. MITCHELL L. REV. 47 (2002); Timothy Takacs & David L. McGuffey, *Medicaid Planning: Can It Be Justified?* 29 WM. MITCHELL L. REV. 111 (2002).

* © Copyright 2004 Katherine C. Pearson. Special thanks are due Professor Laurel S. Terry and Visiting Clinical Professor Keith Noll for their very helpful comments on an earlier draft. Thanks also to the students and clients at the Elder Law Clinic at Penn State Dickinson who helped to inspire this article.

¹ An important ethical dimension to Medicaid planning, not directly addressed in this article, involves what are arguably political questions, such as

potentially relevant ethical considerations in Medicaid planning, this article begins with two basic scenarios.

Scenario A. *Mr. and Mrs. Smith make an appointment with Lawyer. Mr. Smith, age 70, has recently been diagnosed with early stages of Alzheimer's disease, and Mrs. Smith, age 68, while mentally healthy, has severe arthritis, thus compromising her ability to care for her husband. They have two adult children, who do not live in the area. The couple has modest assets, including \$800,000 in savings and investments, a home (\$250,000 equity), and Mr. Smith has income in the form of a pension that pays \$4,500 monthly as long as he is alive. At the meeting, they express concern about maximizing their assets for their own care, while still leaving money for their children if possible. They express concern that nursing home care will be inevitable for Mr. Smith, potentially wiping out their savings. They already have reciprocal wills making each other the primary heirs and their two children equal secondary heirs. They are inquiring about preparation of "powers of attorney," naming son or daughter as agent, and making provision for appropriate transfers or gifts for purposes of Medicaid planning.*

Scenario B. *Judy Jones makes an appointment with Lawyer for advice about her mother, Mrs. Jones. Judy explains that her mother is a widow, age 78, who is in the mid-stages of Alzheimer's disease. Several years ago, prior to the death of her husband, Mrs. Jones properly executed a "power of attorney" naming her daughter as agent. The power of attorney is general and durable, with specific provision for the agent to make "unlimited gifts," but no specific mention of Medicaid planning.² Judy recognizes that as her mother's condition is progressing, she must consider placement in a nursing home. Judy's adult brother does not live in the area. Judy currently lives in an apartment in the same city as her mother; she is divorced, has a full time job and a minor*

child. Her mother has a will, making Judy and her brother equal heirs. In addition to Mrs. Jones' home (\$250,000 equity), her mother has savings totaling \$500,000 and Social Security in the amount of \$3,000 per month. Judy says that her parents always planned to leave "something" for Judy, as they recognized that as a working, single mother, she hasn't yet been able to buy her own home. Judy wishes to discuss Medicaid planning to maximize her mother's assets for long term care and inheritance.

In each scenario, the likelihood of nursing home care is high, raising valid questions about Medicaid planning. In each situation, realistic concern is expressed by family members to the lawyer about exhaustion of personal savings through private payment for long term care. Careful planning can maximize the elders' resources so as to better protect the financial stability for the community spouse or to better assure an elder's peace of mind on matters such as estate planning. Medicaid planning frequently involves some reallocation of the elders' resources or income, thereby accelerating the date of eligibility for Medicaid. Permissible Medicaid planning may include gifting of some of parent's assets to children while taking into account the need to wait for the expiration of any corresponding period of ineligibility to make an application for Medicaid benefits for the parent in need of care.³

In the first scenario, involving the Smiths, any plan for gifting to the children would likely be tempered by the couple's concern about protecting the community spouse from "impoverishment."⁴ In the second scenario, involving the Jones', the concern about spousal protection does not exist, as the only apparent heirs are the adult children. In either scenario, planning requires the informed consent of "the client" or "clients."

² Pennsylvania amended its statutory authority for powers of attorneys, effective December 12, 1999. In the absence of the grantor's express provision of "unlimited" gifting powers, a grant of gifting authority is now presumed to be "limited" in scope, closely linked to the Internal Revenue Codes's annual exclusions for gifting. See 20 Pa.C.S.A. §§5601.2 and 5603. This is a significant departure from Pennsylvania common law. Compare *Estate of Reifsneider*, 610 A.2d 912 (Pa. 1992).

³ See e.g., 42 U.S.C. §1396p(c)(1) (requirement that each state adopt a Medicaid plan for the treatment of transfers for less than fair market) and 55 PA.CODE §178.104 (discussing ineligibility for Medical Assistance in Pennsylvania, created by disposition of certain assets for less than fair market value). Medical Assistance is the term used in Pennsylvania for Medicaid.

⁴ See e.g., ROBERT C. GERHARD, PENNSYLVANIA MEDICAID (Bisel 2004) [hereinafter Pa Medicaid] at Chapter 3, a thoughtful summary of the history of "spousal impoverishment" protections at the federal level.

While lawful gifting to children may be possible in both scenarios, each scenario poses unique ethical concerns for the lawyer in deciding whether to recommend or undertake gifting or other transfers as Medicaid planning steps. In providing analysis of these scenarios, this article attempts to identify ethical factors relevant to the lawyer in providing Medicaid planning advice. Specific answers are not, however, offered here, as specific answers depend on facts and subtleties not available in hypothetical scenarios.

THE CLASSIC ELDER LAW QUESTION: "WHO IS THE CLIENT?"

In elder law, identification of the "client" (or "clients") is often both difficult and critical, especially as it is the first step in recognizing potential conflicts of interest for the attorney who consults with both the elder and the elder person's family members.⁵ In the context of Medicaid planning, ignoring the question of "who is the client?" may lead the attorney or the family to make unwarranted assumptions about appropriate disposition of the elder's assets. The need to identify the client (or clients) is not represented by any single rule, but, rather flows from obligations arising under several rules, as described below.

Duty and Scope of Competent Representation

Under the Pennsylvania Rules of Professional Conduct, **Rule 1.1**, governing "**Competence**," does not require abstract or theoretical competence of a lawyer, but rather, frames the lawyer's duty in terms of providing "competent representation to a client." Similarly, **Rule 1.2**, providing for "**Scope of Representation and Allocation of Authority Between Client and Lawyer**," discusses the lawyer's obligation, within limits, to "abide by a client's decisions concerning the objectives of representation." (Emphasis added to each provision.) These two rules are a starting place for recognition of an obligation to identify "the client."

Documenting the Lawyer-Client Relationship

Under the Pennsylvania Rules of Professional Conduct, for new or non-regular attorney-client relationships, the lawyer is obligated to provide written communication of the fee agreement to the client. Again, this emphasizes a need for identification of the "client" or "clients." **Rule 1.5 (b)** on "**Fees**," specifies that "when the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, in writing, before or within a reasonable time after commencing the representation." (Emphasis added.)

Unlike the Pennsylvania Rule, the ABA Model rule makes the written communication on fees "preferred" rather than mandatory. However, the ABA Model Rule also provides a more extensive obligation to document the lawyer-client relationship than does the Pennsylvania rule. "The scope of representation and the basis or rate of the fee and expense . . . shall be communicated to the client, preferably in writing. . . ." See ABA Model Rules of Professional Conduct 1.5. (Emphasis added.) Even though written documentation of the "scope of representation" is not required in Pennsylvania, it seems a wise practice to follow in order to reduce or avoid disputes about the job undertaken, particularly where potential conflicts of interest exist.

Engagement letters are typically appropriate for documenting the commencement of the lawyer-client relationship, and provide a means of satisfying the requirement of Rule 1.5 regarding fee communication.⁶ Further, using the engagement letter to identify the "client" or "clients" seems a logical extension of Pennsylvania's written fee communication requirement and the ABA's recommendation to document the "scope of representation." As the engagement letter (or retention agreement) is most appropriately prepared at the outset of the relationship or the undertaking of a new matter, the preparation of this document also serves as an important early reminder to the attorney to "think through" the issues connected to client identification.

⁵ See e.g., Jeffrey N. Pennell, *Representations Involving Fiduciary Entities: Who is the Client?*, 62 FORDHAM L. REV. 1319 (March 1994) (discussing the lawyer's ethical dilemmas arising out of trusts and estates administration). This special issue of Fordham Law Review offers several interesting articles on ethical issues in representing older clients.

⁶ See PENNSYLVANIA ETHICS HANDBOOK (Laurel S. Terry, Aims C. Coney & Thomas G. Wilkinson, eds., Pa. Bar Inst., rev. vol. 2000) [hereinafter PBI ETHICS HANDBOOK], including a Sample Engagement Letter at §1.6.

Identifying Conflicts of Interest

Identification of the "client" or "clients" is also necessary in order to recognize and respond to potential conflicts of interest among family members who frequently participate in discussion of Medicaid planning.

The rules regarding "Conflict of Interest" among clients have been substantially reorganized by the Rules of Professional Conduct as adopted by the Pennsylvania Supreme Court, effective in January 2005. Under the old Rule 1.7, there were two classes of conflicts, based on a determination that the lawyer's representation of one client "will" or "may" be adverse to another client. New Rule 1.7, eliminates the "will" or "may" adversity distinction and instead sets forth a preliminary bar on representation of clients with "concurrent conflicts of interest," *unless* certain additional protective steps of analysis and action are satisfied.

New **Rule 1.7** on "**Conflict of Interest: Current Clients**," provides:

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client *will* be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients *will* be materially limited by the lawyer's responsibilities to another client . . . or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer *may* represent a client *if*:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; *and*

(4) each affected client gives *informed consent*.

(Emphasis added.)

On the one hand, the new Rule 1.7 appears to eliminate the "may" standard for dealing with significant risks of conflict of interest, that appeared in the old Rule 1.7. On the other hand, the new Rule 1.7 continues to put the

burden *on the lawyer* to analyze the potential for a conflict to arise, to analyze candidly the lawyer's own potential for conflicting loyalties or susceptibility to competing interests, and to seek "informed consent" of all affected clients. As noted in Comment 14 to new Rule 1.7, "[w]hen the lawyer is representing more than one client, the question of consentability must be resolved as to each client." In any simultaneous representation of multiple clients, the lawyer must be highly self-aware in order to resist subtle pressures or temptations to favor one client's position, especially to the detriment of a less visible or less communicative client. Where there are persons with acknowledged impairments to their capacity, the opportunity to gain truly "informed" consent regarding conflicts is, at best, limited.

The commentary to new Rule 1.7 emphasizes the need to identify clearly "the client" or "clients," in order to also identify and resolve any conflict, noting the potential for both a pre-representation agreement conflict or one that arises later.⁷

A conflict of interest may also arise from the terms for payment of the lawyer. As noted in Comment 13 to new Rule 1.7, "A lawyer may be paid from a source other than the client, including a co-client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty or independent judgment to the client."

Rule 1.8, newly titled as "**Conflict of Interest: Current Clients: Specific Rules**," continues to prohibit the lawyer from accepting third person compensation unless "*the client* gives informed consent."⁸

⁷ Comment 2 to new Rule 1.7 provides: "Resolution of a conflict of interest problem under this Rule requires the lawyer to: 1) clearly identify the client or clients; 2) determine whether a conflict of interest exists; 3) decide whether the representation may be undertaken despite the existence of a conflict, i.e., whether the conflict is consentable; and 4) if so, consult with the clients affected under paragraph (a) and obtain their informed consent. . . ." Further, if the conflict arises after the representation has already begun, "the lawyer ordinarily must withdraw from the representation, *unless* the lawyer has obtained the informed consent of the client . . ." Comment 4 to new Rule 1.7 (emphasis added).

⁸ In addition to the obligation to seek the informed consent of a client whose fees are paid by another, the lawyer must establish the ground rules for the payer's noninterference with the lawyer-client relationship and the lawyer's role as independent advice giver, and the lawyer must establish the means by

Duties When Dealing with Unrepresented Persons

Even if the lawyer takes the position that he or she is representing only one of the persons who is affected by the legal advice about Medicaid planning, the lawyer should not ignore the other, "unrepresented" person's possible reliance on the lawyer's advice. Pennsylvania Rules of Professional Conduct, **Rule 4.3(b)** on "**Dealing with Unrepresented Persons**," in pertinent part, provides:

[D]uring the course of a lawyer's representation of a client, a lawyer shall not give advice to a person who is not represented by a lawyer, *other than the advice to secure counsel*, if the lawyer knows or reasonably should know the interests of such person are or have a reasonable possibility of being in conflict with the interests of the lawyer's client.

(Emphasis added.) The commentary recognizes that the lawyer may prepare documents that require the unrepresented third person's signature, but the lawyer should clearly state that he or she is *not* disinterested when seeking the unrepresented third party's signature.⁹ This rule, often overlooked by practicing lawyers, establishes a potentially fine line between the lawyer's frequent role in giving "instructions" to a third party, versus giving legal advice to a third person who is acting as an agent for the client. In Medicaid planning, frequently the lawyer may view his or her representation as running only to the elder, but the instructions given to the elder's agent, if the agent is unrepresented, creates a situation that

triggers the concerns of Rule 4.3 (b).¹⁰ Again, the engagement letter may be the appropriate place to document the lawyer's role in making statements to the unrepresented agent, perhaps offering a paragraph to specify the "non-engagement" of the lawyer as the agent's "personal lawyer."

Anticipating the Potential for Client's Improper Use of Advice

Several rules highlight the unique role of the lawyer as an advisor on both uses and abuses of the law, including the potential need for caution in giving advice that a client may misuse in ways that constitute a crime or fraud. For example, Rule 1.2 (d), in its revised form, continues to recognize the sometimes fine line between advice that assists a client in engaging in conduct the lawyer "knows is criminal or fraudulent," and advice or counsel that makes "a good faith effort to determine the validity, scope, meaning or application of the law."¹¹ This distinction becomes particularly important for the lawyer dealing with a family member or other agent of the elder, when counseling about the alternatives for asset use or preservation.¹² The commentary to **Rule 4.1** on "**Truthfulness in Statements to Others**," observes that "[o]rdinarily, a lawyer can avoid assisting a client's crime or fraud by withdrawing from the representation." Sometimes,

which the client's confidential concerns are protected. See new Rule 1.8(f), including the cross reference to Rule 1.6 on Confidentiality of Information. See also Rule 5.4 on "Professional Independence of a Lawyer," and especially subsection (c) providing that the "lawyer shall not permit a person who . . . employs or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment. . . ."

⁹ "Whether a lawyer is giving impermissible advice may depend on the experience and sophistication of the unrepresented person, as well as the setting in which the behavior and comments occur. . . . So long as the lawyer has explained that the lawyer represents an adverse party and is not representing the person, the lawyer may . . . prepare documents that require the person's signature and explain the lawyer's own view of the meaning of the document or the lawyer's view of the underlying legal obligations." Comment 2 to Rule 4.3 (as amended effective January 1, 2005) (emphasis added).

¹⁰ "For example, a lawyer representing the lender at a real estate closing should inform all parties that the lawyer represents only the lender and cannot offer anyone else advice regarding the transaction. Other than to advise an unrepresented party to consult counsel, the lawyer should not give advice if there is a reasonable possibility that the interests of the unrepresented party conflict with those of the lawyer's client." (PBI ETHICS HANDBOOK, *supra* note 6 at §8.5.)

¹¹ See also Rule 8.4 on "Misconduct," including (c) describing the professional misconduct of a lawyer who "engage[s] in conduct involving dishonesty, fraud, deceit or misrepresentation."

¹² Although not involving allegations of a lawyer's role or misconduct, the recent "Bertha Trout" case in central Pennsylvania, vividly demonstrates the potential for trusted family members to misuse powers of attorney. A great-niece and her husband were convicted of theft and conversion of more than \$600,000 of the elder's assets using a power of attorney; fortunately, the 100 year old aunt was able to testify at trial about the misuse of authority. See Matt Miller, *Couple Found Guilty of Theft from Relative*, PATRIOT-NEWS, Sept. 20, 2003, at B1, available at 2003 WL 3218137.

a so-called “noisy” withdrawal is necessary, in the “extreme” case where a lawyer may have a duty “to disclose information relating to the representation to avoid being deemed to have assisted the client’s crime or fraud.” (Comment 3 to Rule 4.1.) The level of noise appropriate for prevention of serious misconduct affecting the person with diminished capacity is also a matter for consideration under Rule 1.14, addressed below.

Addressing Client Identification Concerns for Smith and Jones

Keeping in mind the above discussion of key Rules of Professional Conduct, and returning to our two hypothetical scenarios, a cautious attorney will identify clearly the designated “client” or “clients,” using the engagement letter for documenting the relationship. Despite the lack of an affirmative Pennsylvania rule-based obligation to specify the “scope of representation” in addition to basis or rate of the fee, the cautious lawyer will include at least some details about the scope of the matters undertaken at the outset of the representation, with written updates of the scope of representation as appropriate during the course of the representation.

Under Scenario A, it appears that both Mr. and Mrs. Smith are approaching the lawyer as joint clients. From the brief hypothetical, it initially appears there is no “direct” adversity, addressed in Rule 1.7(a)(1). However, the cautious lawyer will recognize that Mr. and Mrs. Smith’s interests in the outcome of any Medicaid planning may not be identical, thus triggering the risk that the lawyer’s responsibilities to one client may be impacted by the desires of the other client, thus implicating Rule 1.7(a)(2) and the lawyer’s responsive steps under Rule 1.7(b)(1) through (4).

The cautious lawyer will consult individually with both Mr. and Mrs. Smith to determine each spouse’s separate understanding of the possible risks of dual representation should a dispute arise. Further, the cautious lawyer will communicate at the outset of representation the lawyer’s obligation to withdraw from representation of *both* Mr. and Mrs. Smith should a conflict of interest arise and if either spouse declines (or is unable) to waive the conflict of interest. While the gifting of their joint assets will reduce the assets available to pay for care for either Mr. Smith or Mrs. Smith as “private pay” patients, the key question is whether each recognizes the consequences. Are they in agreement about the plan

to allocate the money first to the “community spouse,” and to the extent not used by the community spouse, to the children in the form of inheritance? As long as both spouses understand the goals, the risks of this plan, and are in agreement about the gifting plan or plans, there appears to be no “concurrent conflict of interest.” Nonetheless, the cautious lawyer will document each client’s informed consent to the joint representation, consistent with the final step of Rule 1.7 (b)(4).

Under Scenario B, there are three possible answers for the question of “who is the client?” The client may be Daughter Judy Jones. Or, the client may be Mrs. Jones, with daughter Judy Jones acting as her authorized agent in securing representation. Or, both Judy and Mrs. Jones may be the clients. It appears that without the lawyer’s careful articulation of the identity of a joint representation or of the individual representation of either Judy Jones or Mrs. Jones as the sole client, Judy may assume that she is the client and would thereby assume she is entitled to rely on a confidential relationship with the lawyer in seeking advice.

In the Jones’ scenario, the cautious lawyer will recognize that representation of either Judy Jones, Mrs. Jones, or both is fraught with a potential for “concurrent conflict of interest” or future “conflict of interest,” whether it arises from “direct adversity,” subtle pressures from daughter, or later complaints from the son, either on his own behalf or on behalf of his mother. While the daughter is offering a “power of attorney” that appears to be duly executed and appropriately broad in granting her the authority to make gifts, the daughter’s plan for gifting appears at least in part to be self-motivated. Again, “informed consent” as to this conflict can be used as a basis for waiver of the conflict of interest, but seeking the consent of appropriate persons is potentially more challenging here than with the Smith couple.

If the lawyer determines he or she is representing both Mrs. Jones and the daughter, the lawyer must decide how to handle the “informed consent” required for waiver of any conflict of interest, as required by Rule 1.7. If the lawyer determines he or she is representing “only” Mrs. Jones, while viewing daughter as “only” the agent, the obligations of Rules 1.7 and 4.3 appear to require careful explanation to Judy of this limited representational role. Further, there is a question of the mother’s capacity to make decisions for herself, thus triggering additional considerations under new Rule 1.14, regarding “Clients with Diminished

Capacity,” discussed below. Even if the lawyer determines that he or she is representing “only” the daughter, the lawyer may still have significant obligations to Mrs. Jones as a vulnerable ward or principal, also as recognized in Rule 1.14 and emphasized by the comments to Rule 1.14. Thus, any answer to the question about “who is the client?” may be strongly impacted by the diminished, or diminishing capacity of Mrs. Jones.

MEDICAID PLANNING FOR PERSONS WITH DIMINISHED CAPACITY

In the first scenario, Mr. Smith is in the early stages of a dementing illness, but appears to demonstrate adequate understanding of the future of the illness, his need for formal care, and the impact of any Medicaid planning on his future care. In the second scenario, Mrs. Jones did not participate in the original request for Medicaid planning, and as explained by her daughter, is already experiencing difficulty in taking care of herself. The Rules of Professional Conduct require the lawyer to make distinctions based on assessment of the individual client’s capacity. The individual’s ability to provide “informed consent” to the plan (or to release any conflict of interest created by the plan) is fact specific.

Under the Pennsylvania Rules of Professional Conduct, as amended, “**informed consent**” is defined as “the consent by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.” (*See the new provisions of Rule 1.0 on “Terminology.”*) Obviously, the ability of the person to provide consent will be affected by the individual’s level of capacity.

Rule 1.14, which used to be titled “Client under a Disability,” and is now titled “**Client with Diminished Capacity**,” provides:

(a) When a client’s capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client’s own interest, the lawyer may take reasonably necessary protective action, including consulting with indi-

viduals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) Information related to the representation of a client with diminished capacity is protected by Rule 1.6 [related to “Confidentiality of Information”]. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client’s interests.

The first paragraph of Rule 1.14 can be characterized as imposing the obligation to “maintain a near-normal lawyer-client relationship,” while the second paragraph authorizes the lawyer to initiate appropriate protective action for the incapacitated client at risk, and the third paragraph permits limited waivers of confidentiality to effectuate appropriate protective action.

The commentary to new Rule 1.14 is extensive. The comments emphasize that the elderly may “be quite capable of handling routine financial matters while needing special legal protection concerning major transactions.” (Comment 1 to Rule 1.14.) Even where an agent, guardian, or other “legal representative” exists, the lawyer “should as far as possible accord the represented person the status of client, particularly in maintaining communication.” (Comment 2.)

While the comments recognize the potential for frequent involvement of family members in discussions with the lawyer, the comment cautions the lawyer to look to keep the “[impaired] client’s interests foremost,” and to look to the client and not the family members for major decisions about the client. (Comment 3.)

Where there is an agent, guardian or “legal representative,” the lawyer “should ordinarily look to the representative for decisions on behalf of the client.” (Comment 4 to Rule 1.14.) However, even where “the lawyer represents the guardian as distinct from the ward” if the lawyer becomes “aware that the guardian is acting adversely to the ward’s interest, the lawyer may have an obligation to prevent or rectify the guardian’s misconduct.” Comment 4 to Rule 1.14 also cross references Rule 1.2(d), which provides that the “lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent. . . .” Comment 11 to Rule 1.2 further states that “[w]here the client is a fiduciary, the lawyer may be charged with special obligations in dealing with a beneficiary.”

Thus, even though a lawyer may initially take the position that he or she is representing “only” the agent, thus believing that Rule 1.14 for an incapacitated “client” is not triggered, the cautious lawyer will give careful consideration of the context of Rule 1.14, its commentary, and related rules, and thereby recognize a separate obligation may still exist requiring the lawyer to consider the impact of the client-agent’s actions on the “ward” or “principal” or “beneficiary.”

In determining capacity to consult, Comment 6 to Rule 1.14 provides guidance, noting the lawyer is expected to take into account a number of facts including “the client’s ability to articulate reasoning leading to a decision[;] variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client.” While medical personnel may have rendered opinions on capacity as a medical matter, the commentary appears to emphasize the lawyer’s role in considering legal capacity, by phrasing the attorney’s use of the medical community in “may” rather than “shall” language. “In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.” (Comment 6.)

The commentary to Rule 1.14 further recognizes both the possible benefits *and* the potential costs of a formal guardianship as opposed to the use of a power of attorney or an informal arrangement. “In many circumstances . . . appointment of a legal representative may be more expensive or traumatic for the client than circumstances in fact require. Evaluation of such circumstances is a matter entrusted to the professional judgment of the lawyer.” (Comment 7.)

Addressing Capacity Concerns for Smith and Jones

New Rule 1.14 has important implications for a lawyer engaged in Medicaid planning for someone who is already experiencing diminished capacity. Returning to the first of the two scenarios, it appears that Mr. Smith’s capacity is sufficient for him to consult and make an adequately informed decision on transfer of assets for purposes of Medicaid planning. If Medicaid planning is to include future transfers, it may be appropriate for Mr. Smith to execute a power of attorney expressly authorizing gifts or transfers for the purposes of Medicaid planning, and to do so well in

advance of any eventual deterioration of capacity.¹³

As the level of capacity diminishes, that person’s ability to give “informed consent” to the plan as a “client” also diminishes. In Scenario B above, Mrs. Jones’ power of attorney permits gifts, but does not specifically authorize Medicaid planning. Mrs. Jones’ will is additional evidence of her wishes, but it is a post-death plan, and the plan was to leave any estate jointly to her two children. It is possible that in making transfers or gifts of Mrs. Jones’ assets, the daughter’s actions may benefit herself or her brother, but, depending on the availability of so-called “Medicaid beds” in the area, her mother’s care options may thereby become more limited. Thus, a number of questions are raised by any reliance on Mrs. Jones’ broad, yet relatively imprecise power of attorney for authority to make gifts or transfers as a major step in Medicaid planning, such as:

- Despite the description by the daughter of her mother as in the “mid” stages of Alzheimer’s, does the mother have sufficient capacity to participate in any portion of the proposed Medicaid planning?¹⁴
- Will proposed gifting significantly affect Mrs. Jones’ ability to find an appropriate nursing home, particularly as the ability to “private pay” may expand the range for choices of facilities and thereby help to secure the more desirable facility for any eventual Medicaid-financed stay?
- Will the brother, who is not participating in the meeting, agree with the plan as falling “within” the scope of his mother’s wishes and/or best interest?
- Is gifting the most appropriate way to maximize Mrs. Jones’ long term care options as compared to other options, such as exempting a mutual home from estate recovery where there is a direct caregiver

¹³ See Jeffrey A. Marshall, *Power of Attorney: Key Issues For Elder Care Planning*, 74 P.A.B. ASS’N Q. 160 (October 2003) (discussing fiduciary obligations of agent to principal).

¹⁴ See *In the Matter of Disciplinary Proceedings Against John W. Strasburg*, 452 N.W. 2d 152 (Wisc. 1990) (suspending attorney who, among other improper actions, failed to meet with elderly “client” for three weeks after retention by daughter, and who advised children to transfer money into trust, actions inconsistent with “the client’s” wishes and/or best interest).

child?¹⁵ In other words, simplistic gifting to children may not be the experienced lawyer's primary recommendation for appropriate Medicaid planning.

The cautious lawyer will make a personal visit, without the presence of Judy Jones, to assess Mrs. Jones' capacity either to authorize Medicaid planning or to waive any conflict of interest. The lawyer may seek permission to consult with Mrs. Jones' son as an additional family member with knowledge of his mother's wishes. Even if the lawyer determines that the daughter is the only "client," the cautious lawyer recognizes that under Rule 1.14 there may be significant obligations to Mrs. Jones as the incapacitated person, even if she is viewed only as the "ward" of the client-daughter. Once additional facts are available, the lawyer may conclude that "gifting" is not an appropriate Medicaid step for Mrs. Jones.

AVAILABILITY OF GUIDANCE ON PENNSYLVANIA ETHICS QUESTIONS

The Pennsylvania Bar Association Committee on Legal Ethics and Professional Responsibility provides advisory opinions in response to requests by members of the Pennsylvania Bar for guidance on ethical concerns.¹⁶ Of particular relevance is a recent informal opinion, addressing the attorney's role in handling a daughter's plan for gifting, connected to Medicaid planning for her mother, using a power of attorney.¹⁷

In response to a lawyer's request for advice in representing a daughter who was attempting to use a durable power of attorney to make gifts from her 71 year old mother's estate, the PBA Committee's informal opinion notes that "[e]ven though Daughter comes to you as a new client, there are ethical concerns for you

if Daughter is not acting in the best interest of her Mother."¹⁸

Treating the daughter as the primary client and the mother, who was in a nursing home, as a "derivative client" under the power of attorney, the opinion warns that "[d]aughter may have [a] conflict of interest, and hence, you, as Counsel for Daughter, are also in a conflict situation as what may be financially advantageous for your client, the attorney-in-fact, may be to the detriment of the Mother, the principal."¹⁹ The opinion notes the ability of the lawyer to represent both mother and daughter may depend on full disclosure and consultation with both clients. Further, the Daughter's plan to make transfers of her mother's assets in the form of gifts to herself and grandchildren "may result in a poorer standard of care for Mother or expose Mother to claims by Medicaid authorities" and thus may create a conflict of interest under 1.7 and a violation of the Daughter's fiduciary duties.²⁰ If the mother is incapacitated, the opinion concludes that the conflict of interest cannot be waived.

CONCLUSION

A lawyer asked to provide Medicaid planning for a person already experiencing significant capacity issues has a delicate road to travel. The revision to Rule 1.14 heightens the lawyer's obligation to the "Mrs. Joneses" throughout Pennsylvania, whether cast as an obligation running to Mrs. Jones as "the client" or to her as the principal, ward or beneficiary of the "client-agent's" actions. As concerns about the political correctness of Medicaid planning increase, so, likely, will the pressures for lawyers to consider and document their decisions about "who is the client?," whether a conflict of interest exists between the family members involved in Medicaid planning, and whether the elder has the capacity to make informed consent for planning or waivers of conflict of interest.

As seasoned Elder Law attorneys report regularly, the vast majority of family members seeking Medicaid planning advice do so out of concern for their frail loved ones, because of their need for help in the increasingly complicated universe of Medicaid, Medicare and private insurance, and not because of personal

¹⁵ See e.g., PA MEDICAID, *supra* note 4 at Section 6.11.

¹⁶ The Pennsylvania Bar Association's Committee on Legal Ethics and Professional Responsibility can be contacted by the Ethics Hotline at (800) 932-0311 or by writing to the Committee at Post Office Box 186, Harrisburg, PA 17108, or by fax to (717) 238-7182 or by E-mail to <http://www.pabar.org>. Both a formal and informal opinion process is available (with the distinction based on number of committee members involved in the review) and copies of both types of opinion are available on Westlaw.

¹⁷ Informal Opinion Number 2003-31, dated June 8, 2003, available on Westlaw at 2003 WL 23358331.

¹⁸ *Id.* at *3.

¹⁹ *Id.*

²⁰ *Id.* at *4.

greed. When given information about the available options for Medicaid planning, families frequently select alternatives that cost the family a higher sum of money, but that also provide greater peace of mind. Using the revisions to the Rules of Professional Conduct as additional guidance, lawyers can assist those most affected in making the most informed choice possible about long term care.²¹

In concluding this article, the author invites comments from the practicing bar and welcomes samples of “engagement” letters or retention agreements, particularly those that address the sensitive issues of client identification for families who seek advice in Medicaid planning for their elders. The author hopes to provide further analysis of this topic in other publications or forums. The ethical considerations offered here are ever a “work in progress.”

²¹ See also Timothy L. Takacs & David L. McGuffey, *Revisiting the Ethics of Medicaid Planning*, 17 NAT'L ACAD. ELDER L. ATT'YS Q. 29 (Summer 2004) (noting that frequently clients want

the help of experienced Elder Law Attorneys to navigate “the long-term care maze and [they] do want Mom to get the best care”).