

# **ETHICAL ISSUES SURROUNDING MEDICAID PLANNING**

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## ABOUT THE AUTHOR

Evan Farr is the creator of the **Living Trust Plus® Asset Protection System** used by dozens of Estate Planning and Elder Law Attorneys around the country, and is widely recognized as one of the foremost experts in the Country in the field of Medicaid Asset Protection and related Trusts. Evan is both a Certified Elder Law Attorney through the National Elder Law Foundation and a Member of NAELA's Council of Advanced Practitioners. Evan has been quoted or cited as an expert by numerous sources, including the *Washington Post*, *Newsweek Magazine*, *Northern Virginia Magazine*, *Trusts & Estates Magazine*, *The American Institute of Certified Public Accountants*, and the American Bar Association, and has been featured as a guest speaker on numerous radio shows, including WTOP and Washington Post Radio.

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AV-Rated by Martindale-Hubbell, Evan is a nationally renowned Best-Selling author and frequent educator of attorneys across the U.S. As an expert to the experts, Evan has educated tens of thousands of attorneys across the country through speaking and writing for organizations such as his own Elder Law Institute for Training and Education, the National Academy of Elder Law Attorneys, the American Law Institute and American Bar Association, the National Constitution Center, the National Business Institute, myLaw CLE, the Virginia Academy of Elder Law Attorneys, the Virginia Bar Association, Virginia Continuing Legal Education, and the District of Columbia Bar Association. His publications include 3 Best-Selling books in the field of Elder Law: the *Nursing Home Survival Guide*, which provides valuable information and guidance to families dealing with the possibility of nursing home care and struggling to make the best decisions for themselves or their loved ones; *Protect & Defend*, which Evan authored along with a host of other top attorneys across the country; and *How to Protect Your Assets From Probate PLUS Lawsuits PLUS Nursing Home Expenses with the Living Trust Plus®*. In addition, Evan has authored scores of articles that have appeared in the popular press, and dozens of scholarly publications for the legal profession, including two legal treatises published by American Law Institute in connection with the American Bar Associations: *Planning and Defending Asset Protection Trusts* and *Trusts for Senior Citizens*.

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## SECTION 1. IDENTIFYING THE CLIENT IN ELDER LAW MATTERS

1.1. It is the client to whom the attorney owes the professional duties of competence (**Rule 1.1 of the Virginia Rules of Professional Conduct**), diligence (**Rule 1.3 of the Virginia Rules of Professional Conduct**), communication (**Rule 1.4 of the Virginia Rules of Professional Conduct**), confidentiality (**Rule 1.6 of the Virginia Rules of Professional Conduct**), and loyalty (**Rule 1.7 of the Virginia Rules of Professional Conduct**<sup>1</sup>). Accordingly, the identity of the prospective client should be resolved at the earliest stage (preferably in writing, and the easiest way to do this is via your intake questionnaire by clearly identifying who the prospective client is on said questionnaire) so that the client, the attorney, and other involved persons understand:

1.1.1. Whose interests are to be protected in the legal planning and representation process if the prospective client becomes an actual client;

1.1.2. To whom the attorney owes the professional duties of competence, diligence, communication, and confidentiality if the prospective client becomes an actual client;

1.1.3. The steps that may or may not be taken after the initial consultation if the prospective client is not present at that meeting; and

1.1.4. That the attorney will generally arrange at the earliest practicable time to communicate privately with the person who is expected to be the client.

1.2. Regardless of whom the Elder Law attorney is actually dealing with, the attorney should ensure that all involved persons understand which individual is the prospective client and understands that the others are not prospective clients. The attorney also should determine whether the prospective client authorizes the attorney to communicate with other persons, such as a fiduciaries or family members, and obtain the prospective client's written consent to such authorized involvement. An existing Power of Attorney document naming an agent will often serve as the written consent by the prospective client for the attorney to speak with the agent on behalf of the prospective client.

1.3. **Virginia Rule 1.18(a), entitled "Duties to Prospective Client,"** states that "A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client." **Comment 4 to Rule 1.18** states that:

1.3.1. "In order to avoid acquiring disqualifying information from a prospective client, a lawyer considering whether or not to undertake a new matter should limit the initial interview to only such information as reasonably appears necessary for that purpose. Where the information indicates that a conflict of interest or other reason for non-representation exists, the

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<sup>1</sup> **Comments 1 through 8 of Rule 1.7 (Conflict of Interest: General Rule)** all deal with **Loyalty to a Client**. Comment 1 states: "Loyalty and independent judgment are essential elements in the lawyer's relationship to a client." Essentially, these comments make the point that you can not be loyal to your client if you have a conflict of interest with that client.

lawyer should so inform the prospective client or decline the representation. If the prospective client wishes to retain the lawyer, and if consent is possible under Rule 1.7, then consent from all affected present or former clients must be obtained before accepting the representation."

1.4. Although family involvement may be very important in some elder law matters, above all, elder law attorneys seek to promote the dignity, self-determination, and quality of life of the elders we serve. The client is the person whose interests are most at stake in the legal planning or legal problem. The client is the one—the only one—to whom the lawyer has professional duties of competence, diligence, loyalty, and confidentiality. Who is our client when we are drafting documents or doing Medicaid Planning? Almost always the elder for whom we are doing work and drafting documents. This is especially important to remember in elder law, because family members may be very involved in the legal concerns of the older person, and may even have a stake in the outcome. It is possible, in some circumstances, for more than one family member to be clients of the same lawyer. This is common with married couples. However, in most elder law cases, we will identify the elder or disabled person as our client. We will do this, of course, regardless of who is paying the bill. A major exception to this general rule is with guardianship and/or conservatorship matters, where the attorney is representing a child or other family member against the elder.

## **SECTION 2. CONFLICTS OF INTEREST**

### 2.1. Eliminating Conflicts of Interest when Someone Else Pays Your Client's Fee.

2.1.1. Occasionally a child or children of the parent or parents you are representing pay your fee. Anytime this happens, you need to make it clear in your verbal discussions and in your written Fee Agreement that regardless of who pays your fee, the elders are your clients, and that having someone else pay your fee will not interfere with your independence of professional judgment or with the client-lawyer relationship.

2.1.2. **Virginia Rule of Professional Conduct Rule 1.8(f)** says that "A lawyer shall not accept compensation for representing a client from one other than the client unless:

- (1) the client gives informed consent;
- (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
- (3) information relating to representation of a client is protected as required by **Rule 1.6**.

2.1.3. Suggested language to include in your written Fee Agreement with your client: "You are our Client regardless of whether you, or someone else on your behalf, pays our fee."

## **SECTION 3. REPRESENTING MULTIPLE GENERATIONS**

3.1. Many prospective estate planning and/or elder law clients will come in because you have previously represented their parents or another family member and the prospective clients were

pleased with the results obtained. Or a prospective estate planning client comes in but also wants elder law representation for their parents at the same time. Can you ethically represent multiple generations in these scenarios?

3.1.1. The answer is yes, but you must take reasonable steps under the applicable **Rules of Professional Conduct** to ensure that all clients understand how different types of representation impose different duties on the attorney with different consequences for the client and confirm this understanding in well-drafted engagement agreements and written waivers.

3.1.2. **Rule 1.7 (Conflict of Interest: General Rule)** states that:

"(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 significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former 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 each affected client consents after consultation, and:

- (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) the consent from the client is memorialized in writing.

3.1.3. **Rule 1.9 (Conflict of Interest: Former Client)** states that:

"(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless both the present and former client consent after consultation.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client:

- c (1) whose interests are materially adverse to that person; and
- (2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter;

unless both the present and former client consent after consultation.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to or gained in the course of the representation to the disadvantage of the former client except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client.

#### **SECTION 4. IDENTIFYING AND DEALING WITH DIMINISHED CAPACITY**

4.1. The earliest Baby Boomers (born in 1946) are now nearing 75 years of age. This demographic has already had, and will continue to have, an impact on attorneys, particularly those in the practice of elder law, since the prevalence of dementia increases with age.

4.2. Whether the mental capacity of a client becomes an issue during the initial consultation or after years of representation, the ability of the individual to form, maintain or terminate an attorney-client relationship will determine the ethical obligations imposed upon counsel.

4.3. The core tenets of the **Virginia Rules of Professional Conduct** mandate the protection of client confidences, the promotion of client communications, and the avoidance of conflicts of interest. Compliance with these principles establishes a sacred ground where only the client and lawyer may tread. However, when the client's ability to make decisions is impaired due to dementia or other condition, the **Rules of Professional Conduct** allow the attorney to find ethical solutions in the developing body of legal resources on the subject.

#### **4.4. Observations of Diminished Capacity by Counsel**

4.4.1. Most lawyers are not trained in identifying mental disorders of aging or methods of formal evaluation of capacity, but the focused observation of client behavior by counsel during a consultation will nearly always reveal diminished capacity to the extent that further evaluation is required.

4.4.2. According to the ABA Handbook for Lawyers on the subject, there are "red flags" that may indicate problems with capacity. Attorneys should be alert to cognitive, emotional, or behavioral signs, such as memory loss, communication problems, lack of mental flexibility,

calculation problems and disorientation. ABA Comm. on Law & Aging and Am. Psychological Assn., *Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers* (2005).

4.4.3. **Rule 1.14 of the Rules of Professional Conduct** acknowledge the challenges of the assessment function of the attorney and suggest a duty to make informal capacity judgments in certain cases. The guidance provided is that, when an attorney reasonably believes that a client has diminished capacity and cannot act in his or her own interest, then the attorney shall have:

1. The goal of maintaining a normal client-lawyer relationship;
2. The discretion to take reasonably necessary protective action; and
3. The discretion to reveal information about the client, but only to the extent necessary to protect the client's interests.

4.4.4. What constitutes a "reasonable belief" that diminished capacity exists and the extent of the obligation to maintain a "normal" client-lawyer relationship? This calls for an understanding of the practical, medical and legal considerations which apply to reach the status of "diminished capacity" under varying circumstances.

#### 4.5. **Standards of Diminished Capacity**

4.5.1. The determination of capacity is complicated by the fact that there are multiple levels of threshold capacity in the legal setting. Among them are the levels of capacity required for:

- 4.5.1.1. Specific legal transactions under statutory and case law;
- 4.5.1.2. Appointment of a guardian and conservator; and
- 4.5.1.3. Professional ethics guidelines for assessment of impairment in the context of the attorney-client relationship.

4.5.2. The task of defining client conditions under given circumstances is complicated by the fact that there are multiple terms used for them in the Virginia Code, in the **Rules of Professional Conduct** and in the medical jargon:

- 4.5.2.1. Diminished Capacity
- 4.5.2.2. Incapacity
- 4.5.2.3. Impairment
- 4.5.2.4. Dementia

4.5.3. In the course of observing a new or former client, counsel may be faced with the challenge of determining whether certain behavior is due to personality type or to one of the illnesses and conditions which cause diminished capacity. Thus, it is important for counsel to be aware of the symptoms of the typical causes of dementia in the elder population (although many can occur in much younger persons).

4.5.4. The most common types of dementia include:

4.5.4.1. Alzheimer's disease

4.5.4.2. Vascular dementia

4.5.4.3. Dementia with Lewy bodies

4.5.4.4. Parkinson's disease

4.5.4.5. Frontotemporal dementia

4.5.4.6. Huntington's disease

4.5.4.7. Creutzfeldt-Jakob disease

4.5.4.8. Wernicke-Korsakoff syndrome (alcohol abuse)

4.5.4.9. Normal pressure hydrocephalus

4.5.5. While the role of counsel is not to make a diagnosis of the cause of a client's perceived incapacity, it is incumbent upon us to have some knowledge of these diseases in order to serve our clients who come to us with an existing diagnosis.

#### 4.6. Clients With Diminished Capacity

4.6.1. When dealing with elder law matters, it is very common to be dealing with a client who has diminished capacity. **Rule of Professional Conduct Rule 1.14** addresses dealing with the **Client With Diminished Capacity**. It says:

“(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 individuals 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 relating to the representation of a client with diminished capacity is protected by **Rule 1.6**. 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.”

4.6.2. The relevant **Comments to this rule** state as follows:

“[3] The client may wish to have family members or other persons participate in discussions with the lawyer. When necessary to assist in the representation, the presence of such persons generally does not affect the applicability of the attorney-client evidentiary privilege. Nevertheless, the lawyer must keep the client's interests foremost and, except for protective action authorized under paragraph (b), must look to the client, and not family members, to make decisions on the client's behalf.

4.6.3. Meeting with Client and Family Member.

4.6.3.1. Thus, it is acceptable under **Rule 1.14** to meet with both the client and the client's family members so long the presence of such family members (normally adult children of the client) does not affect the applicability of the attorney-client evidentiary privilege.

4.6.4. Another relevant **Comment to Rule 1.14** states as follows:

“[4] If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client.”

4.6.4.1. This means that if the client already has signed a comprehensive General Power of Attorney, then the elder law attorney may look to the Agent under that Power of Attorney for decisions on behalf of the client.

4.6.4.2. If the client has not yet signed a comprehensive General Power of Attorney, then the elder law attorney should consider whether the client is competent enough to sign, and desires to sign, a comprehensive General Power of Attorney allowing a loved one named by the client to make future legal decisions on behalf of the client.

4.6.5. Taking Protective Action

4.6.5.1. Another relevant **Comment to Rule 1.14** states as follows:

[5] If a lawyer reasonably believes that a client is at risk of substantial physical, financial or other harm unless action is taken, and that a normal client-lawyer relationship cannot be maintained as provided in paragraph (a) because the client lacks sufficient capacity to

communicate or to make adequately considered decisions in connection with the representation, then paragraph (b) permits the lawyer to take protective measures deemed necessary. *Such measures could include: consulting with family members, using a reconsideration period to permit clarification or improvement of circumstances, using voluntary surrogate decisionmaking tools such as durable powers of attorney or consulting with support groups, professional services, adult-protective agencies or other individuals or entities that have the ability to protect the client. In taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client's best interests and the goals of intruding into the client's decision making autonomy to the least extent feasible, maximizing client capacities and respecting the client's family and social connections.*

“[6] In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as: 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. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.

“[7] If a legal representative has not been appointed, the lawyer should consider whether appointment of a guardian ad litem, conservator or guardian is necessary to protect the client's interests. Thus, if a client with diminished capacity has substantial property that should be sold for the client's benefit, effective completion of the transaction may require appointment of a legal representative. . . .*In many circumstances, however, 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. *In considering alternatives, however, the lawyer should be aware of any law that requires the lawyer to advocate the least restrictive action on behalf of the client.*” (emphasis added)

#### 4.6.6. Using the Least Restrictive Action.

4.6.6.1. The Comments above make clear that it is desirable when possible to use voluntary surrogate decision making tools such as durable powers of attorney, which are much less expensive and much less traumatic than forcing the client to go through the financial and personal hardship of a guardianship and conservatorship hearing.

### 4.7. Eliminating Conflicts of Interest

#### 4.7.1. Current Clients

4.7.1.1. **ABA Model Rules of Professional Conduct Rule 1.7 Conflict Of Interest: Current Clients** says:

(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, a former 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, confirmed in writing.

## **SECTION 5. CONFLICTS WHEN REPRESENTING MARRIED COUPLES**

- 5.1.1.1. Elder law attorneys, like all attorneys, have an ethical obligation to avoid conflicts of interest. This means that, in most situations, a lawyer may only represent one individual or a married couple with aligned interests. For example, when legal planning involves multi-generational property such as a family home in which several people have an interest, these interests are almost always actually or potentially conflicting. Sometimes joint representation is possible under **ABA Model Rules of Professional Conduct Rule 1.7**, even with potential conflicts of interest, but it is more likely that we will be representing only the older person or married couple whose interests are at stake. This is especially true when the older person wants to discuss a power of attorney, a will or trust, or planning for long-term care.
- 5.1.1.2. It is common for a husband and wife to employ the same lawyer or law firm to assist them in Medicaid Planning and/or Estate Planning. **Comment 27 to Rule 1.7** states: “For example, conflict questions may arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may be present . . . In order to comply with conflict of interest rules, the lawyer should make clear the lawyer's relationship to the parties involved.” Sometimes this conflict can be avoided by representing just one spouse.

But oftentimes it is essential to represent both spouses because you are preparing documents and performing services for both spouses.

- 5.1.1.3. When we represent a married couple, we include the following language in our Retainer Agreement as a way to comply with **Rule 1.7** and eliminate any potential conflict of interest: “You have asked us to represent both of you in this planning, on a joint basis. It is important that you understand that, because we will be representing both of you, both of you will be considered our clients. Accordingly, matters that one Spouse might discuss with us must be disclosed to the other Spouse. Ethical considerations prohibit us from agreeing that either Spouse may withhold information from the other. In this regard, we will not give legal advice to either Spouse or make any changes to the Plan without mutual knowledge and consent from both Spouses. Of course, anything either Spouse discusses with us is privileged from disclosure to third parties except as otherwise indicated in this Legal Services Agreement. If and when one Spouse enters a nursing home, Medicaid laws and regulations currently offer certain protections to the Spouse remaining at home ("At-Home Spouse"). We understand that it is your desire to take full advantage of whatever techniques are available to protect the At-Home Spouse, if applicable. If either of you has children by a prior marriage, it is understood that some of these techniques may work to the disadvantage of those children. Nevertheless, you have instructed us to fully protect the At-Home Spouse, even at the expense of the children of a prior marriage, though we will always encourage the protection of any children of a prior marriage. By executing this Legal Services Agreement, you indicate your consent to having us represent both of you. Any communications and information will be fully disclosed by us to both of you. We have explained to you the possibility of conflict that is raised by such multiple representation. Specifically, potential conflicts in this case include, but are not limited to, the following: how property should be titled; how property should be disposed of upon death; what persons should serve in fiduciary capacities (e.g., executors, trustees, guardians); and the possibility that an uncontested divorce proceeding between the two of you may be the best strategy to protect assets and secure Medicaid eligibility. Each of you may have different interests, goals, or perspectives regarding these or other matters. Each of you expressly consents to joint representation despite the possibility of conflict; however, we may withdraw from representing one or both of you if there is an actual conflict between your interests. If it is decided that an uncontested divorce proceeding is the best strategy to protect assets and secure Medicaid eligibility, then you both agree that the firm may represent the Medicaid applicant and help secure separate counsel for the non-applicant spouse, in which event the firm's ongoing representation of the non-applicant spouse will be deemed to be automatically terminated at such time.”

## SECTION 6. THE ETHICS OF MEDICAID PLANNING

### 6.1. The Preamble of the Rules of Professional Conduct state that:

6.1.1. As advocate, a lawyer **zealously asserts the client's position** under the rules of the adversary system. As negotiator, a lawyer **seeks a result advantageous to the client** but consistent with requirements of honest dealing with others.

### 6.2. Rule 1.3 of the Rules of Professional Conduct, entitled **Diligence**, states as follows:

(a) A lawyer shall act with reasonable diligence and promptness in representing a client.

(b) A lawyer shall not intentionally fail to carry out a contract of employment entered into with a client for professional services, but may withdraw as permitted under **Rule 1.16**.

(c) A lawyer shall not intentionally prejudice or damage a client during the course of the professional relationship, except as required or permitted under **Rule 1.6 and Rule 3.3**.

6.3. **Both the preamble to the Rules of Professional Conduct and Rule 1.3 of the Rules** require Elder Law attorneys to understand Medicaid and to understand that Medicaid Planning is not only ethical, but is ethically mandated under the **Rules of Professional Conduct**.

#### 6.3.1. Medicaid Planning is Just Like Income Tax Planning

6.3.1.1. Income tax planning involves trying to find all of the proper and legal deductions, credits, and other tax savings that you are entitled to - taking maximum advantage of existing laws. Income tax planning also involves investing in tax-free bonds, retirement plans, or other tax-favored investment vehicles, all in an effort to minimize what you pay in income taxes and maximize the amount of money that remains in your control to be used to benefit you and your family. If an income tax attorney refused to help his client obtain all legal deductions and credits, that income tax attorney would clearly be in violation of **Rule 1.3** because he would be failing to use reasonable diligence or intentionally failing to carry out his contract of employment. The same holds true for an Elder Law attorney when it comes to Medicaid Planning.

#### 6.3.2. Medicaid Planning is Just Like Estate Tax Planning

6.3.2.1. Estate planning involves trying to plan your estate to minimize the amount of estate taxes and probate taxes that your estate will have to pay to the government, again taking maximum advantage of the existing laws. Similar to income-tax planning, estate planning is a way to minimize what your estate pays in taxes and maximize the amount of money that remains in your estate to be used to benefit your family. If an estate planning attorney refused to help his client obtain all legal estate tax

exemptions and credits, that estate planning attorney would clearly be in violation of **Rule 1.3** because he would be failing to use reasonable diligence or intentionally failing to carry out his contract of employment. The same holds true for an Elder Law attorney when it comes to Medicaid Planning.

6.3.2.2. Just like income tax planning and estate planning, Medicaid planning involves trying to find the best methods to transfer, shelter, and protect your client's assets in ways that take maximum advantage of existing laws, all in an effort to minimize what your client pays and maximize the amount of money that remains in your client's control to be used to benefit your client and your client's family. When viewed in this manner, it is clear that Medicaid planning, for an attorney who holds himself out as practicing Elder Law, is required under **Rule 1.3 of the Rules of Professional Conduct**.

6.3.2.3. Like income tax planning and estate planning, Medicaid planning requires a great deal of extremely complex knowledge, so if an Elder Law attorney is not able to conduct Medicaid planning as required under **Rule 1.3 of the Rules of Professional Conduct**, that Elder Law attorney must decline representation and, ideally, make a referral to an attorney who is well-versed in Medicaid Planning.

#### 6.4. Medicaid Planning is Ethical under **Rule 1.3** to Overcome Discriminatory Health Insurance System

##### 6.4.1. How America's Health Insurance System Discriminates.

6.4.1.1. A lawyers representing an elderly client who may need nursing home care or other long-term care cannot be **diligent** and fulfill the requirement of **Rule 1.3** unless the attorney recognizes that one of the inherent tragedies of our American health insurance system is that it discriminates against people suffering from certain types of chronic illnesses, *i.e.*, those that routinely result in the need for long-term care, such as Alzheimer's disease and other types of dementias; Parkinson's disease and other types of degenerative disorders of the central nervous system; Huntington's disease, Amyotrophic Lateral Sclerosis (ALS), and other progressive neurodegenerative disorders; and many genetic disorders such as Multiple Sclerosis and Muscular Dystrophy. Those Americans suffering the tragedy of one of these diseases must also suffer the tragedy of having the "wrong" disease according to our American health insurance system.

6.4.1.2. Why should someone with brain cancer – tumors in the brain that aren't supposed to be there – have all of his treatment (chemotherapy, radiation, and surgery) covered by health insurance, yet someone with Alzheimer's – plaques and tangles in the brain that aren't supposed to be there – must pay for his care out of pocket until he goes broke. In both cases, we are dealing with the care that someone needs because of the disease that person has. How is the differing result fair? It's not, and

for an attorney to diligently represent this client under **Rule 1.3** the attorney must understand this inherent unfairness in America's health insurance system and must be able to help the client overcome this unfair and seemingly arbitrary social policy, or refer the client to an Elder Law attorney who can help the client.