

Is Medi-Cal Planning Ethical?

Client and Family Issues

Medi-Cal planning is not simply an exercise in which the elder law attorney and the family engage in transferring assets. In formulating a plan, several considerations come into play. These include:

- Marital status
- Disability – is it actual or imminent?
- Housing options – independent vs. dependent living
- What care is available in the community, and how will it be paid for?
- Are there decision-making documents in place?
- Is a conservatorship necessary?
- Medi-Cal planning – moral or ethical concerns

Ethics in Counseling Clients on Medi-Cal

Medi-Cal Planning

For many of my clients, the issue that primarily concerns them is financing the cost of nursing home care. That is the issue that the client, or the client's family, brings to me as their elder law attorney to help solve. Now that Mom has been placed in the nursing home, how do we save her money? Can we shift the cost of her nursing home care to the government?

Medi-Cal eligibility planning for a person in a nursing home may be likened to picking at the flesh of a person who is not yet dead. The money goes either to the nursing home or to the family. For the latter, there is seldom any issue about where the money should go. But let's not be Polly Anna-ish about our counseling in this area. No one wants to spend the rest of his or her life in a nursing home. Residents of nursing homes require daily nursing care. By definition, therefore, they are severely disabled, and their quality of life is not very good. It should be the goal of the elder law attorney to make their lives in the nursing home the best they can be, but I have done enough counseling of the elderly to know that most of them are realistic about what they can expect. They do want our help in preserving assets for the benefit of future generations.

Much of my elder law practice consists of counseling clients on the rules of Medi-Cal eligibility. Using these rules, institutionalized persons, or persons who believe that they may someday be institutionalized in a nursing home, may shift the cost of nursing home care from themselves to the State Medi-Cal program. Because the cost of such care in the San Francisco Bay Area runs from \$4000 to \$6000 a month, the savings that can result from planning and implementing such steps are not inconsiderable.

For most of my clients, therefore, Medi-Cal planning makes good financial sense. Why should the client and his or her family continue to pay the nursing home when the cost or the risk can be transferred, legally, to the State Medi-Cal program? In California, like most other states, there is very little difference between the quality of care the client is likely to receive in a nursing home that accepts Medi-Cal and one that is strictly private pay. And in my experience, a primary determinant on whether my client gets good care in a nursing home is the family's continuing interest and involvement in his or her care. So whether the client pays or the State Medi-Cal program pays is not a significant factor in making the decision on whether to engage in Medi-Cal planning.

Who Should Pay the Nursing Home, and Why Should It Matter?

Medi-Cal planning—the practice of shifting or transferring assets in order to make them unavailable for the person's nursing home care, presumably for the benefit of the person's

family—has been widely criticized. Critics contend that paying one's own way in the nursing home is a civic duty, at least until the money runs out. Critics charge that in some instances, the elderly person is exploited by relatives, who would rather see the family fortune in their pockets than utilized for the elder's nursing home care. The elder is often unaware of the planning and transferring of assets or not informed fully of the impact of being on public benefits. Medi-Cal is, after all, welfare, and some persons adamantly do not want to be on welfare.

Critics also point to anticipated funding crises long-term care programs for the elderly and ask: why should the taxpayers pay for Mom's nursing home care when she has or had the assets to pay for her own care? If this practice is allowed to continue, Medi-Cal will go broke and join Medicare and Social Security on the sick list, they say. Low Medicare and Medi-Cal reimbursement rates to nursing homes contribute to the understaffing and other problems nursing homes face in delivering quality of care to their residents. If more persons paid their own way, some say, the financial problems of nursing homes would be ameliorated.

Critics of Medi-Cal planning sometimes have their own interests to advance. The insurance industry has developed long-term care insurance products to enable an individual, for a premium, to transfer the risk of the high cost of nursing home care to an insurance company. If the risk can be transferred to the taxpayers—that is, Medi-Cal—instead, at less cost, what incentive is there for an individual to purchase long-term care insurance?

In fact, one of the policy issues now under debate is whether Medi-Cal and long-term care insurance can coexist. Encouraging people to purchase private long-term care insurance while working to strengthen the public safety net for those who cannot afford it probably are incompatible strategies, according to a recent study. Encouraging those who can purchase long-term care insurance to do so would erode support for efforts to assure access to care for the poor through Medi-Cal or another system, according to the study, which was sponsored by The Commonwealth Fund..

Proponents of Medi-Cal planning seldom apologize for their views. Instead, they observe, Congress sets the rules of Medi-Cal eligibility. As long as the rules are followed, they say, where is the issue? It is not as if Congress is unaware that Medi-Cal eligibility planning takes place. If Congress wants to change the rules or even do away with the entire Medi-Cal program, it is free to do so.

Moreover, proponents draw analogies to tax and estate planning. Congress has enacted laws pertaining to the income, estate and gift taxes. Should taxpayers not take advantage of planning opportunities, deductions, and exemptions out of concern for the fiscal health of the U. S. Treasury? If this is acceptable and indeed accepted practice, why should taxpayers not take advantage of opportunities to shift the cost of nursing home care to the Treasury as well?

Whether transferring assets adversely affects Medi-Cal financial stability and integrity has been questioned. Joshua Wiener, for one, who is widely acknowledged as an expert in the area of long-term care financing, has found that while almost all states regard transferring assets as a problem, only a few states have elevated it as a major policy concern affecting Medi-Cal's fiscal health.

Most Medi-Cal planners are sensitive to charges that engaging in the practice is potentially exploitative of the elderly family member. They respond to such charges by asserting that mentally-incapacitated persons should not be deprived of the right to engage in prudent financial planning merely because of their disability. That is why elders make durable powers of attorney and create joint tenancies with children, so that others can manage their assets on their behalf.

More problematic is the family member who regards Mom's property as his own even though Mom is still very much alive and residing in a nursing home (or even at home, for that matter). What does the attorney do who has knowledge that the family member has transferred assets

without authority? Such conduct qualifies as "elder financial abuse," which I regard as a fancy term for stealing. The only difference is the age of the victim.

Finally, what would the elder want to do with his or her money? How much does the elder law attorney and the family member really know about the elder's wishes? Are decisions being made that are in the best interests of the elder or of the elder's family? Is there a fundamental and irreconcilable conflict between assuring quality of care and asset protection?

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