Legal Assistance Issues for Retirees: A Counseling Primer on Old Age, Disability, and Death Issues

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You are a newly assigned legal assistance attorney, fresh from the basic course. Your parents are still of working age, and your grandparents are just beginning to draw Social Security benefits. Old age, disability, and death have so far eluded your immediate concerns. Lieutenant Colonel (Retired) X *comes to see you at the legal assistance office for help. His questions center around what he has to do to have legal authority over his wife to put her in a nursing home. She has grown so forgetful that she almost burned down their house last week after leaving food cooking on the stove. Lieutenant Colonel* X *also wants to know about paying for a nursing home. He has heard that he must either pay for it himself or go on Medicaid to have Medicaid pay the bill. This is all new to you, although* Army Regulation (AR) 27-3 *states that the Army will provide legal assistance for many of these issues. What will you tell Lieutenant Colonel* X*?*

I. Introduction

Legal assistance attorneys are often the least experienced attorneys in a staff judge advocate's (SJA) office. They routinely face complex issues, however, in advising clients on topics including consumer law, income and estate taxes, family law, real estate law, bankruptcy, and estate planning.[3] As the life expectancy of Americans increases along with the myriad legal issues facing older Americans, it is essential that legal assistance attorneys become familiar with common concerns for these clients.[4] This area of law is generally referred to as elder law, in recognition of some of the particularized issues clients face as they age.[5] This article provides an overview of elder law as it applies to the practice in legal assistance. Section II describes preparing for and meeting with clients, to include ethical considerations. Section III describes planning for disability, such as powers of attorney, advance medical directives, guardianships, and Medicaid. Section IV describes planning for death, including wills, trusts, and probate. Section V summarizes the major learning points from this article and suggests elder law resources for legal assistance attorneys.

II. Meeting with the Client

A. Office Arrangements

Usually, someone other than the SJA or the chief of legal assistance determines the location of the legal assistance office.[6] As a practical matter, however, these individuals must ensure that the legal assistance office is accessible to their clients. Not all legal assistance clients are active duty Soldiers who have few, if any, physical limitations.[7] Practitioners must be sensitive to the limitations of older clients and ensure that the physical accommodations of the office provide for them. For example, how hard is it to get to the legal assistance office? How far away must clients park? Is the office on the upper floor of a multi-story building? If so, are there elevators that are easily accessible to clients? In any building, are there ramps or other methods of access for those using walkers, wheelchairs or scooters?[8] Are the offices and hallways well-lit and marked with signs?

Young attorneys may wonder why the answers to these questions matter. Accessibility to the legal assistance office is important because older clients must be reasonably able to get to the office or they cannot seek assistance. With the security practices in place at many military installations,[9] clients often

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3. *See generally* U.S. Dep't of Army, Reg. 27-3, The Army Legal Assistance Program ch. 3, sec. III (21 Feb. 1996) [hereinafter AR 27-3].

4. *See* U.S. Census Bureau, Population Division, Populations Projection Project, *National Population Projections* (last modified Aug. 2, 2002), *at* http://www.census.gov/population/www/projections/natsum-T3.html. Demographic studies indicate that in the United States, senior citizens (those over age sixty-five) are increasing to the point to which that segment of the population will reach some fifty million individuals, or twenty percent of the total population in the next few years. *Id.*

5. *See generally* Virginia Morris, How to Care for Aging Parents (1996).

6. AR 27-3, *supra* note 3, para. 1-4f.

7. *See id.* para. 2-5 (identifying individuals eligible to receive legal assistance).

8. *But see* Americans with Disabilities Act (ADA) of 1990, 42 U.S.C. § 12101 (2000) (noting that the ADA does not apply to the federal government).

must park some distance away from legal assistance offices. Not all impaired clients qualify for handicapped parking permits, so it may be reasonable to request that offices reserve certain parking places for legal assistance clients. For example, one SJA directed office personnel to leave the parking spaces closest to the office open for clients.[10] In buildings that house multiple offices, the SJA may request that certain parking spaces be reserved for legal assistance clients. During the initial screening of clients, the legal assistance office staff should ask whether the client has a special need, such as limited mobility, and arrange for special request parking on an as-needed basis.

The interior of the office is also critical.[11] Is there enough room in the waiting area for someone in a wheelchair to sit comfortably without being jostled or bumped as others walk by? Is the play area for children off to one side in the waiting room so that older clients can sit away from the noise? Is the seating area user-friendly for someone who has difficulty moving? Are reading materials and handouts available in larger print for ease of reading? Are there easily accessible restroom facilities nearby? Is a water fountain readily available?

The chief of legal assistance should examine the layout of the waiting area. Does the seating consist of individual chairs or couches without firm cushions and secure armrests, making it difficult or even painful for elder clients to sit and rise? Does the furniture consist of used furniture from other sections? Is there a place for a wheel chair? Loose carpet and uneven surfaces can be hazardous to those who are frail. Further, older clients often need quick access to restrooms. Because they may take medications, they also need easy access to water fountains or water coolers. Once the client is inside the waiting area, how difficult is it for someone using a walker or a wheelchair to move from there to the attorney's office? Do bookcases or rugs obstruct any passages?

Even individual attorneys who cannot influence the quality of the furniture or the layout of the office can do much to improve the effectiveness of the meeting itself. First, attorneys should minimize auditory distractions, such as frantic screensavers, that can make concentration difficult for older clients. The furniture in the attorney's office should be arranged so that less-than-agile clients can easily enter the office and still be able to close the door for privacy.[12] They can instruct the staff not to disturb them during meetings since such disruptions can interrupt the older client's train of thought. While it may not be necessary to speak loudly, attorneys should speak clearly and pay close attention to their diction. They should avoid blocking their mouths with their hands; seniors may be embarrassed to admit that they do not hear well, but may pay close attention to the attorney's mouth movements to assist their comprehension. Attorneys should not be surprised if clients repeatedly ask them to repeat themselves. Ultimately, attorneys should be certain that clients hear every part of the attorneys' advice, not just the last part.[13]

Some may react that these concerns are overly specialized for such a small group of clients. These concerns, however, reflect an attitude of caring for clients and making them welcome in the military community rather than raising so many barriers that the clients give up and go away. It may be helpful to remember that this class of clients has served their country for many, many years and that they likely feel a very special closeness to those continuing to serve today.

B. Handouts and Materials for Review

Legal assistance attorneys should consider providing clients with written materials, either before or after counseling sessions.[14] The importance of written materials becomes apparent when one considers that visiting a legal assistance office may be an unfamiliar, stressful experience for many older clients. Many clients, particularly elderly clients, are already under stress arising from the circumstances that brought them to a legal assistance office. They may never have met with an attorney or dealt with legal issues before visiting the office. "Legalese" may seem foreign to them. Some clients are not even certain whether legal assistance attorneys are licensed attorneys. This may be a particular concern for older clients; many of them remember the days when line officers prosecuted

9. *See* U.S. Army, The 2003 Posture Statement: Force Protection & Anti-terrorism, *available at* http://www.army.mil/aps/2003/realizing/readiness/force.html (last visited Aug. 26, 2004) ("In the war on terrorism, the area of operations extends from Afghanistan to the East Coast and across the United States. Naturally, Force Protection and Antiterrorism measures have increased across Army installations in the Continental United States (CONUS) and overseas.").

10. Oral Office Policy, Office of the Staff Judge Advocate, III Corps and Fort Hood, Fort Hood, Texas (1981-1985).

11. *See generally* U.S. Dep't of Army, Office of The Judge Advocate General, Legal Assistance Policy Division, *Instructions for the Application Form for the FY03 Army Chief of Staff Annual Award for Excellence in Legal Assistance, Legal Assistance Office Facilities*, at 2 (1 Oct. 2003), *available at* https://www.jagcnet.army.mil/JAGCNET/JAGCNet.nsf/JAGCNet2?OpenFrameSet&Login [hereinafter FY03 Chief of Staff Award Application] (assessing legal assistance office facilities in its application).

12. *See* AR 27-3, *supra* note 3, para. 4-8 ("Those providing legal assistance will carefully guard

> the attorney-client relationship and protect the confidentiality of all privileged communications with their clients."); *see also* U.S. Dep't of Army, Reg. 27-26, Rules of Professional Conduct for Lawyers para. 1.6 (1 May 1992) [hereinafter AR 27-26] ("A fundamental principle in the client-lawyer relationship is that the lawyer maintain confidentiality of information relating to the representation.").

13. AR 27-3, *supra* note 3, para. 4-7 (explaining ethical standards).

and defended criminal cases.[15] They may also be concerned about losing their independence, experiencing prolonged sickness, losing their mental faculties, or facing their own mortality. As a result, they may suffer lapses in memory or concentration and the ability to process complex information independently of any organic or physiological impairment.[16]

Pamphlets or fact sheets with commonly asked questions and answers are an easy way to provide clients with valuable information on individual topics. When provided to clients before counseling sessions, such documents may help clients prepare and organize for sessions more effectively. Checklists of items for clients to bring to interviews, sorted by topic, are also useful. After a client counseling session, a pamphlet or fact sheet may be an important reminder, as well as a summary of information discussed during the meeting. For example, clients may hear the terms "testate" and "intestate" for the first time when they talk to their lawyers. A pamphlet covering the basic concepts of probate procedure will insure that a client understands the substance of a thirty-minute counseling session and has something to review to refresh his memory. Materials should use examples to illustrate how procedures work. They should include a disclaimer that the pamphlet alone is not a substitute for personal legal advice nor is it intended to create an attorney-client relationship. If there is enough space in the waiting area, use two racks for handouts, one for documents in regular-sized print and the other with documents in larger print.

There are many additional benefits for legal assistance offices with a good collection of preventive law materials. Legal assistance officers may use handouts at preventive law classes they teach to Soldiers, commanders, staff sections, family members, and family support groups. Many SJA offices have web pages on their installation internet sites, typically with separate legal assistance sections.[17] Clients can download, read, or print these materials before or after they visit legal assistance attorneys.

C. Before the Client Walks in the Door

Before the client comes to the legal assistance office for an appointment, support staff personnel should do a preliminary screening to make sure the appointment is necessary, the client understands the time and place of the appointment, and the client brings the appropriate documents to the appointment.[18] Again, checklists may be particularly useful. As a routine matter, the person making appointments should inquire whether the client has any special needs or requirements, such as limited mobility, special parking requirements, or visual or auditory impairments. Those who schedule the appointments should note any such factors in the appointment book so that office personnel are prepared on the client's appointment day.

The person who makes the appointment should confirm the time and date, and ensure the client knows how to find the office. With an elder law client, this may mean repeating the information to the client and asking for an affirmative reply. If the client makes the appointment in person, the staff should give the client an appointment card or note showing the time and date of the appointment and the name of the attorney.

Once the staff member determines the legal issue for the appointment, he should discuss what documents, if any, the client should bring. The staff should have checklists for various topics, listing the documents clients should bring for the attorney's review. For example, if the client requests advice about probating his wife's estate, the checklist should include the wife's will, if there is one; the wife's death certificate; a copy of the marriage certificate; a preliminary list of the wife's assets and debts; a copy of the deed for any real estate the wife owned in whole or in part; and copies of the titles to any vehicles the wife owned in whole or in part. Although it is very unlikely that the legal assistance attorney will appear in court to represent the client in the probate proceeding,[19] he must still review the documents to advise the client on the types of probate issues applicable to the deceased's estate.[20]

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14. FY03 Chief of Staff Award Application, *supra* note 11, at 15. Commenting on the need for written material, the Legal Assistance Policy Division states that

> [p]reventive law is an integral part of a successful Legal Assistance operation. An educated client may have the information to avoid a legal problem altogether, or when obtaining legal assistance will be better prepared and have the information necessary to more readily obtain effective advice. At a minimum, a successful legal assistance office should insure that each legal assistance attorney publish one preventive law article/item per quarter.

Id.

15. *U.S. Army Trial Defense Service Begins One Year Test*, Army Law., June 1978, at 10 (explaining the Army established a separate defense structure on 15 May 1978; before the 1969 UCMJ, defense counsel were generally not attorneys).

16. *See* Karl E. Miller, *Depression & Cognitive Functioning in the Elderly*, Am. Acad. of Fam. Physicians (2001), *available at* http://www.aafp.org/afp/20010615/tips/11.html.

17. U.S. Dep't of Army, The Judge Advocate General's Corps, JAGCNET, *Links, SJA Offices, at* https://www.jagcnet.army.mil/JAGCNetIntranet (last visited Nov. 3, 2003) [hereinafter SJA Links] (containing hyper-links to the Web sites of SJA Offices).

18. *See* Administrative & Civil Law Dep't, The Judge Advocate's Legal Center & School, U.S. Army, 51st Legal Assistance Course Desk Book, Main Volume, Legal Assistance Office Management, ch. B, *available at* http://www.jagcnet.army.mil/TJAGLCS (last visited Nov. 3, 2003) [hereinafter Legal Assistance Deskbook].

D. Using Worksheets

Most legal assistance offices have worksheets available for clients. Some worksheets seem simple to attorneys but may confuse clients who are not familiar with the worksheets' terms. Often the attorney relies on the information in the worksheet to draft legal documents for the client. This raises concerns about the accuracy of the information. The client must understand what he is completing and put the right information in the right place. Attorneys who have concerns of this nature should carefully consider whether they should give their clients worksheets before their appointments.[21]

The answer to many legal questions is, "It depends." For legal assistance clients, it usually depends on what document the attorney generates with the worksheet as well as the client's level of knowledge. For example, many legal assistance offices offer walk-in preparation of powers of attorney. Usually, clients complete worksheets in the waiting room. When they finish, they give the worksheet to a staff member who may also be busy answering the telephone, checking-in clients with appointments, and performing other administrative duties. The staff member then prepares the document, asks the client to review it, and shows the client where to sign it. The process seldom includes an explanation. Handouts may be most useful for powers of attorney; the office could include one extra step by asking the client to read a handout before completing the worksheet. This handout should describe the advantages and disadvantages of a power of attorney, along with any attendant responsibilities for the attorney in fact. For example, in Texas, the legislature, in 2001, added a section to the Durable Power of Attorney Act that provides that the attorney in fact is a fiduciary and has a duty to inform and account for actions taken pursuant to a power of attorney.[22] The principal—the client—should understand his right to demand an accounting under this section. A well-written handout and a reasonably conversant legal assistance staff member usually suffice to make these rights clear to the client.[23]

The results are different for other commonly prepared documents. For example, *Army Regulation 27-3* states that legal assistance "*will be provided* on wills, testamentary trusts for the benefit of minors, guardianships, and the designation of beneficiaries under life insurance policies (including the Servicemen's Group Life Insurance (SGLI)). Legal assistance *will* also be provided in preparing advanced medical directives and anatomical gift designations."[24]

The will preparation process demonstrates what often happens when legal assistance offices ask clients to complete worksheets. Asking a client to complete a will worksheet several days before an appointment may not ensure that the client will complete the worksheet properly. A well-written handout can complement a well-written worksheet, enabling the client to provide enough information to complete most of the worksheet and allowing the attorney to elicit the remainder of the necessary information during the interview. Many offices require clients to pick up worksheets before the appointment to prevent multiple visits during the document preparation stage of obtaining a will. Other offices require clients to attend will briefings before their actual appointments.[25] Whatever process the office uses, the worksheet must be clear and have as many

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19. *See* AR 27-3, *supra* note 3, para. 3-7g. The following provision illustrates that such in-court representation is unlikely:

> *d) Civil proceedings.* Except for cases described in paragraphs 3–6*a* (regarding appointment as a guardian ad litem in an adoption case), and 3–6*b*(3) (regarding assistance to certain PNOK) *e*(2), (regarding assistance under USERRA and comparable state statutes), and in AR 608–18, paragraph 1–6*j*(13) (regarding in-court representation of abused children), in-court representation is limited to service members who are eligible for legal assistance pursuant to paragraphs 2–5*a*(1), (2), or (3); and (2) for whom hiring civilian lawyers would entail substantial financial hardship to themselves or their families.

Id. Note that retirees are eligible to receive legal assistance under paragraph 2-5a(4). *Id.* para. 2-5a(4).

20. *See id.*; *see generally* Administrative & Civil Law Dep't, The Judge Advocate's Legal Center & School, U.S. Army, 51st Legal Assistance Course Desk Book, Estate Planning Volume, Probate and Probate Avoidance, ch. C, *available at* http://www.jagcnet.army.mil/TJAGLCS (last visited Nov. 3, 2003).

21. *See* Legal Assistance Deskbook, *supra* note 18, ch. B, at B-10 (Estate & Client Analysis, The Estate Planning Interview). The Judge Advocate General's Legal Center & School recently addressed the issue of whether to fill out the questionnaire before the meeting as follows:

> Whether the client before should fill it in during or after the meeting with the estate planner depends on the estate owner and his relationship with the estate planner. If there's an established relationship, advance preparation of the questionnaire by the client will save time and make the meeting easier and more fruitful. The questionnaire should not touch on sensitive personal relationships and attitudes requiring special handling.

Id.

22. Tex. Prob. Code Ann. § 489B (West 2003).

23. AR 27-3, *supra* note 3, para. 3-7e(2) (providing specific guidance about drafting general powers of attorney, stating that clients requesting general powers of attorney with someone other than a trusted spouse or relative as the agent "should be cautioned as to the serious legal problems that may arise from its misuse"). Legal assistance officers should also include a similar warning in any worksheets or handouts they distribute that relate to powers of attorney. *See id.*

24. *Id.* para. 3-6b (emphasis added).

explanations as possible. Will worksheets vary from office to office; some versions are ten pages or longer.[26] A long and cumbersome worksheet can intimidate clients. It may even be offensive if it asks for too much personal information, such as types of assets and liabilities, and their associated monetary values. Older clients may not be accustomed to divulging this information and may not understand why someone in the legal assistance office needs it. They may also take offense if asked about the names, addresses, and ages of children, and the identities of their natural or adoptive parents. The worksheet should contain a brief explanation of the importance of these details. Like all clients, they are more likely to accept such questions if they understand why the answers are important.

Finally, clients may not understand common terms such as "executor," "guardian," "trustee," "per stirpes," and "per capita." The attorney must be certain that either he or his staff explains these terms clearly and correctly.[27]

E. Information Gathering

When the client arrives at the legal assistance office for an appointment, the legal assistance attorney must be prepared to elicit the necessary information to prepare the required documents and to provide responsible and competent counseling. This can be difficult when the legal assistance attorney was not yet born when the client served on active duty. This age disparity may even cause a client to distrust the attorney's competence to solve his problem.

To help establish rapport, the legal assistance attorney should maintain a professional-looking office.[28] This does not preclude the display of family pictures or personal items; anything tasteful and appropriate for clients of all ages is acceptable. Clients expect to see diplomas, professional certificates, and military memorabilia. The attorney should also have an orderly desk that is free of clutter, loose papers, and confidential matters.

In addition to a professional office appearance, the attorney should minimize interruptions during client meetings. He should listen carefully to the client's responses and ask the client to repeat them if necessary. Older clients who have no previous experience with the legal system may save their questions until the attorney finishes his initial comments; only then will the attorney learn the specifics of why the client is in his office. Similarly, some clients may save important issues for the end of the interview. Attorneys must remember to ask if the client has any other questions before proceeding. At the end of the interview, the attorney must state clearly what he will do for the client and how long he expects it to take. As always, attorneys should resist the temptation to promise results or unrealistic deadlines; this only sharpens a client's displeasure if the attorney cannot meet those expectations.

Older clients often come to lawyers with problems that have short "suspenses," such as the preparation of wills or advance medical directives. This may be because the client or his spouse has medical problems that may require surgery or treatments affecting his mental status. After much procrastination, the client may have finally decided to put his legal affairs in order, perhaps after seeing the problems that resulted when a friend or relative died intestate. The legal assistance staff should understand the perspective of older clients when scheduling their appointments.[29] Although minor surgery a week later may not normally constitute an emergency, it may for an older client for whom surgery is a greater risk.

F. Ethical Considerations in Elder Law

Legal assistance attorneys must be particularly mindful of several ethical rules when dealing with retirees. They must be sensitive to issues of confidentiality, conflicts of interest, undue influence, and mental capacity.[30] These issues may seem obvious in the abstract, but they often are difficult to apply in the real world.

The threshold question is: "Who is the client?" Sometimes the client will be the elder retiree; at other times, it will be his adult child. The client often seeks legal advice on behalf of someone else. To make matters more complex, an elder who is clearly the client may bring his adult child or other family member to the appointment. An inexperienced attorney might insist on seeing the retiree alone to preserve attorney-client confidentiality, but the client may view this as a problem. The client may want the family member to be present as his partner in any

25. *See* SJA Links, *supra* note 17 (reviewing the Web sites for the various SJA offices gives examples of the offices' estate planning practices).

26. *See, e.g.*, Fort Leavenworth Office of the Staff Judge Advocate, *Legal Assistance Will Worksheet*, *available at* http://leav-www.army.mil/osja/LA/wills.doc (last visited Nov. 3, 2003) (containing a twenty-page client questionaire).

27. *See* LEGAL ASSISTANCE DESKBOOK, *supra* note 18, ch. B, apps. A-D (ESTATE & CLIENT ANALYSIS, THE ESTATE PLANNING INTERVIEW) (containing four sample estate planning questionnaires that indicate the importance of explaining all legalese to clients).

28. AR 27-3, *supra* note 3, para. 4-1a(3) ("Attorneys providing legal assistance will exhibit the highest professionalism at all times. This professionalism will be reflected in . . . . [t]he appearance of furniture, equipment, offices and other work areas, and reception and waiting rooms.").

29. *See* LEGAL ASSISTANCE DESKBOOK, *supra* note 18, ch. M (A PRACTICE GUIDE TO ESTATE PLANNING FOR RETIREES).

30. *See* AR 27-3, *supra* note 3, paras. 4-7 through 4-9 (explaining ethical standards, attorney-client privilege, and conflicts of interest); *see generally* LAWRENCE A. FROLIK & RICHARD L. KAPLAN, ELDER LAW IN A NUTSHELL ch. 2 (West Group 2d ed. 1999).

devised plan to serve as his support as well as his memory. The client, of course, can waive the right to confidential communication, but the potential issue of a conflict of interest remains.[31] A client's family member may have a motivation that is quite different from that of the client, and the motivation may be difficult to detect. A family member who asks too many questions about Medicaid and nursing home costs may be revealing a desire to preserve his own lifestyle and potential inheritance. One remedy to the joint-meeting problem is to conclude the meeting with a private session with the retiree-client to confirm his wishes. If the client wishes to mention anything else outside the family member's presence, the attorney should offer to call him later.

Another ethical concern is that of the competence of the client. The legal assistance attorney rarely has any evidence to corroborate the retiree's rendition of his estate holdings or family relationships, or the potential for undue influence or worse. The attorney must be vigilant for hints that the retiree cannot fully remember, comprehend, or adequately assess his situation. In appropriate cases, the legal assistance attorney may want to ask the client's permission to speak with the client's family members or physician. Although this may seem like a difficult question, the attorney can soften it by simply stating the importance of gathering all the details or preventing a will contest later. In fact, it is entirely appropriate for an attorney to ask a client about the chances that someone will contest the will, or about factors that increase the likelihood for a contest, such as blended families, remarriages, and disinherited heirs.[32]

The entire legal assistance team must assess the competence of the client during the entire process—particularly during the execution of any documents. If the attorney is confident in the client's competence but concerned about a potential challenge to the process, the office staff should not satisfy itself with the perfunctory grabbing of bystanders as witnesses who do no more than sign as they are told. Likewise, simply listing a witness's address as "Fort Swampy, North Carolina" will not be of much benefit should a will contest arise that requires more than the self-proving affidavit. If witnesses to the will are legal assistance office personnel, it may be helpful to use the office address, including the street name and building number, on the address line. This provides a logical starting point for attempts to locate these witnesses, if needed in the future. For the same reason, active duty witnesses should use their home of record addresses.

The attorney must also carefully observe the client and ensure that he understands why he is at the office and that he has the mental capacity to provide the information needed for competent counseling. In a will counseling session, for example, the attorney should ensure that the client understands the potential problems with co-executors, or of leaving too much authority to a young child. The legal assistance attorney should also be alert to the reaction of any person accompanying the client who attempts to limit that person's access to the client. If the legal assistance attorney or staff members believe that the relative or friend reacts inappropriately, it could be the sign of undue influence or even elder abuse.

Undue influence is subtler, and therefore more difficult to detect. The first sign for which an attorney should look is another individual helping the client, including the following: a son, daughter, or family friend provided the client with transportation to the appointment; the same relative or friend wants to sit in on the interview; or the client wants the relative or friend to be there to explain things to him. The legal assistance attorney providing the counseling must be aware of attempts by others—well-meaning or not—to influence a client to make a decision or take some action. The attorney must be clear as to whom he is advising and where the client's true interests lie.[33] Attorneys should be wary of comments such as, "My daughter told me I should put her in the will as the executrix," or "My son is the only one who loves me so I do not want the other children to get anything." The attorney should inquire about the family relationships, let the client talk, and listen carefully for clues about the client's mental capacity and the soundness of the reasons for the client's choices. He may discover that the hypothetical daughter is a reasonable choice as the executrix because she is the only relative living in the same state as the client and because state law requires the executrix to be a state resident. The attorney should listen for choices or explanations that do not fit the client's other comments. The attorney must clearly explain the client's options so the client is not confused by what others have told him he must do.

Issues of elder abuse and neglect are closely related to that of the client's competence.[34] It is imperative that the legal assis-

31. *See* AR 27-3, *supra* note 3, para. 4-9c.

32. *See* LEGAL ASSISTANCE DESKBOOK, *supra* note 18, ch. M (A PRACTICE GUIDE TO ESTATE PLANNING FOR RETIREES).

33. AR 27-3, *supra* note 3, para. 4-9d states the following:

> In the following estate planning cases, attorneys providing legal assistance should consider and resolve any conflicts of interest prior to undertaking legal representation:
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> (1) Joint requests by spouses for the preparation of wills or other estate planning documents, particularly if either spouse has a child from a prior relationship.
> (2) Requests (or apparent requests) for legal assistance on behalf of a third party (for example, a younger person accompanying an elderly client who requests a will or power of attorney on behalf of the client).

Id.

tance attorney has the telephone numbers of the local commission on aging and adult protective services. The staff at these offices and others like them can provide free literature, training, and support. Likewise, the National Association of Elder Law attorneys has on-line and printed references, and most importantly, a list of knowledgeable attorneys the legal assistance office may use as referral sources.[35] In some cases, the attorney may have a duty to report suspected neglect or abuse.[36]

Finally, the attorney is responsible for his own competence and the competence of his legal team. Fundamental to being professionally responsible is the ability to know one's limits. An attorney who feels unable to solve the specialized legal problems of retirees competently should feel no shame in admitting it. Young lawyers should not be afraid to ask questions of experienced attorneys and judges that specialize in elder law.[37]

III. Planning for Disability and Incapacity

A. Powers of Attorney

Powers of attorney can cover a wide variety of topics ranging from filing claims, cashing checks, and selling cars, to the broadest authority that a general power of attorney can grant.[38] Most retirees seeking powers of attorney do so as part of long-range planning. Explaining the concepts of springing and durable powers of attorney are very important parts of the process in counseling clients on their use.[39]

A springing power of attorney becomes effective upon the occurrence of a specific event, usually the principal's incompetency, incapacity, or disability.[40] A durable power of attorney remains in effect until the principal's death, its expiration, or its revocation by the principal.[41] For many older clients, selecting at least one of these features of a power of attorney is a necessary part of estate planning to anticipate a decline in mental capabilities with age or illness. The client must also understand the definitions of incompetency, incapacity, or disability so that

34. The National Elder Abuse Incidence Study (NEAIS), conducted in 1996 and published in 1998, with funding from the U.S. Administration on Aging and Administration on Children and Families, documents the extent of elder abuse in our society. Some of the general findings from the NEAIS indicate the following:

> The best national estimate is that a total of 449,924 elderly persons, aged sixty and over, experienced abuse or neglect in domestic settings in 1996.
> Female elders are abused at a higher rate than males, after accounting for their larger proportion in the aging population.
> Our oldest elders (eighty years and over) are abused and neglected at two to three times their proportion of the elderly population.
> In almost ninety percent of the elder abuse and neglect incidents with a known perpetrator, the perpetrator is a family member, and two-thirds of the perpetrators are adult children or spouses.

National Center on Elder Abuse, *The National Elder Abuse Incidence Study Final Report* (1998) *available at* http://www.aoa.gov/abuse/report/default.htm; *see also* Bonnie Brandl & Loree Cook-Daniels, *Domestic Abuse in Later Life* (Aug. 2002), *available at* http://www.elderabusecenter.org/pdf/research/statistics.pdf.

35. *See* National Academy of Elder Law Attorneys (NAELA), *Home, at* www.NAELA.com (last visited July 30, 2004). The NAELA describes itself as follows:

> The National Academy of Elder Law Attorneys, Inc. is a non-profit association that assists lawyers, bar organizations and others who work with older clients and their families. Established in 1987, the Academy provides a resource of information, education, networking and assistance to those who must deal with the many specialized issues involved with legal services to the elderly and disabled. The mission of the National Academy of Elder Law Attorneys is to establish NAELA members as the premier providers of legal advocacy, guidance, and services to enhance the lives of people as they age.

Id.

36. *See, e.g.*, TEX. HUM. RES. CODE ANN. § 48.001 (2002); MO. REV. STAT. § 565.188 (2002); FLA. STAT. ch. 415 (2003); KAN. STAT. ANN. § 39-1402 (2003); *see also* MODEL RULES OF PROFESSIONAL CONDUCT R.1.14 and cmt. (2003); AR 27-26, *supra* note 12.

37. AR 27-3, *supra* note 3, para. 4-2 (explaining that legal assistance attorneys should maintain contacts with the civilian bar). This paragraph states the following:

> Attorneys providing legal assistance should establish and maintain liaison with national, State, and local bar organizations. Membership in professional organizations, especially local branches involved in providing legal services pertinent to the military community, and attendance at professional meetings and seminars is encouraged.

Id.

See U.S. DEP'T OF ARMY, REG. 215-1, MORALE, WELFARE AND RECREATION ACTIVITIES AND NONAPPROPRIATED FUND INSTRUMENTALITIES para. 4-11 (25 Oct. 1998) (governing the use of nonappropriated funds to purchase such memberships). "Upon receipt of necessary approvals, attorneys assigned to Active Army legal offices may attend meetings of private professional organizations at government expense." U.S. DEP'T OF ARMY, REG. 1-211, ATTENDANCE OF MILITARY AND CIVILIAN PERSONNEL AT PRIVATE ORGANIZATION MEETINGS (1 Dec. 1983).

38. *See* U.S. DEP'T OF DEFENSE, DIR. 1350.4, LEGAL ASSISTANCE MATTERS para. 3.4 (28 Apr. 2001) [hereinafter DOD DIR. 1350.4] (defining a military power of attorney as "a written instrument, prepared in accordance with this Directive, whereby one person, as principal, appoints another as his/her agent and confers authority to perform certain specified acts, kinds of acts or full authority to act on behalf of the principal"); The Office of The Judge Advocate General, *From Counsel: Power of Attorney*, Mar. 2002, *available at* https://www.jagcnet.army.mil/JAGCNetIntranet (explaining the types of powers of attorney and its uses).

39. *See* AR 27-3, *supra* note 3, para. 3-7; LEGAL ASSISTANCE DESKBOOK, *supra* note 18, at M-2 (A PRACTICE GUIDE TO ESTATE PLANNING FOR RETIREES).

he will know how these conditions affect his agent's ability to use the power of attorney. Many powers of attorney define these terms in the document itself while others rely on the state's statutory definition. In any event, the client must clearly understand the applicable standard and whether it provides for any aspects of physical limitations or disabilities. For example, if, under state law, the determination of incapacity requires certification by a physician, the client who has given his agent a durable general power of attorney may prefer to use a different definition within the power of attorney—one which does not require his agent to seek a physician's opinion. On the other hand, a client who has selected a springing power of attorney may want his agent to have a physician's certification of incapacity before the agent takes any action using the power of attorney.

Selecting the powers to be given to the agent is another important choice to discuss with the client. Keeping in mind that the older client is often planning for the day when his mental abilities are limited, the general power of attorney is often an appropriate choice. As with any power of attorney, the client must select someone he trusts as the agent. Even with a general power of attorney, however, the attorney must advise the client of any restrictions under state law. For example, some statutes may provide special instructions on general powers of attorney that permit gifting[42] or changing insurance policy beneficiaries. Attorneys must also advise clients about health care powers of attorney, which usually have specific requirements under state statutes.[43]

Once the client has selected the allowable powers, the agent, and whether the power of attorney is to be durable or springing (or both), the legal assistance staff member assisting him then must address the question of the expiration date of the power of attorney. Many legal assistance offices have policies that provide that the document itself must state an expiration date. Often, the time limit is three years or less.[44] Such a policy is often based on concerns that third parties may not accept older powers of attorney, and that an expiration date will prevent an agent from taking actions at remote times in the future when the principal did not envision the agent's further use of the document. Another reason for a limited time period is so that the document expires by its own terms if the agent refuses to acknowledge the principal's revocation of it. With older clients, however, the very reason for considering a power of attorney is often to allow for the agent's future use in the event of incapacity. That incapacity may occur in several months, or it may occur in five years. The better practice with an older client is to draft the power of attorney without including an expiration date, so that the client is prepared for whatever events may occur. Attorneys should advise clients who use this option to name at least the primary agent and one successor agent in the event the primary agent predeceases the client or cannot serve. Attorneys should also advise clients to update their powers of attorney as needed (*e.g.*, when a named agent dies or when family circumstances change). Although the topic may be difficult to address, the attorney should also explain how an agent could abuse the authority given in the power of attorney, and that as the principal, the client must remain alert to questionable actions or decisions by an agent to protect himself from liability.[45]

Assuming that the client does receive a power of attorney with no expiration date, he must be told how to revoke the power of attorney as well. The document itself may include such procedure; state statutes usually provide for them as well. The attorney must advise the client of any particular limitations or provisions in the state statute so he may address those with the staff member assisting him.[46] For example, some state statutes provide that the revocation of a durable power of attorney is not effective as to a third party relying on it until the third party receives actual notice of the revocation.[47] Therefore, the power of attorney may need to contain language stating what constitutes notice of the revocation (for example, filing a revocation in the county clerk's office for the principal's county of residence).

B. Medical Directives

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40. AARP, *Understanding Power of Attorney, available at* http://www.aarp.org/estate_planning/Articles/a2002-08-12-EstatePlanningPowerofAttorney.html (last visited Nov. 3, 2003) (defining durable and springing powers of attorney).

41. *Id.*

42. *See* Nandita Kohli Verma, *Gifts by Proxy: Drafting Powers of Attorney to Avoid Unwanted Tax Results*, PROB. & PROP., Sept./Oct. 2001, at 23-25 (discussing the possible tax results of having a power of attorney with gifting powers included).

43. *See infra* § III.B.

44. *See, e.g.*, U.S. Dep't of Army, Office of The Judge Advocate General, Legal Assistance Policy Division, *Estate Planning, Power of Attorney, available at* http://www.jagcnet.army.mil/Legal (last visited Nov. 3, 2003) ("A POA should be given for only a limited time period (such as six months during a deployment). A third party is more likely to accept a POA with a recent date than one which is many months or years old.").

45. *See* AR 27-3, *supra* note 3, para. 3-7e ("A client who requests a general power of attorney for use by other than a trusted spouse or relative should be cautioned as to the serious legal problems that may arise from its misuse.").

46. *See* LEGAL ASSISTANCE DESKBOOK, *supra* note 18, ch. P, app. B (ESTATE PLANNING FOR THE TERMINALLY ILL CLIENT & ANCILLARY ESTATE PLANNING DOCUMENTS).

47. *See, e.g.*, TEX. PROB. CODE § 488 (West 2003).

Many older clients overlook the medical aspects of their estate planning, or make them a lower priority than the protection of their property assets. The continuing advances in medical technology—and the price tag that goes along with each advance—mean that older clients must understand their options regarding medical directives.[48]

A living will, or directive to physicians, is a direction by the client to terminate life support under certain conditions when the client (now the patient) is unable to express his wishes or rationally participate in medical decision-making.[49] In *Cruzan v. Missouri Department of Health*,[50] the U.S. Supreme Court ruled that a state may apply a clear and convincing evidence standard in proceedings in which a guardian seeks to discontinue nutrition and hydration of a person diagnosed to be in a persistent vegetative state. The Court declined to substitute the judgment of close family members for that of the patient and found that the patient must have declared his desire to be taken off life support in some fashion before he became incapacitated.[51] After *Cruzan*, many state legislatures examined the issue of patient consent and substituted judgment.[52] Currently, all states and the District of Columbia have some type of statute addressing a person's choice regarding health care decisions. Each state provides its own set of conditions under which a living will becomes effective. The applicable statute defines the conditions under which life-sustaining treatment shall be withdrawn, such as "terminal," "irreversible condition," and "persistent vegetative state."[53]

As an alternative to a living will drawn up according to state law, a legal assistance attorney may provide the client with an advance medical directive drafted pursuant to federal law. Section 1044c of Title 10 of the U.S. Code provides that an advance medical directive is any written declaration that "sets forth directions regarding the provision, withdrawal, or withholding of life-prolonging procedures, including hydration and sustenance, for the declarant whenever the declarant has a terminal physical condition or is in a persistent vegetative state."[54]

The selection of the federal or the state living will is primarily affected by the client's domicile and travel habits. Most states have statutes providing for the enforcement of advance directives from other jurisdictions.[55] Nevertheless, a client who travels frequently may want to have a federal living will that he carries with him during his journeys. Federal law, however, does not make an advance medical directive enforceable in a state that does not otherwise recognize and enforce advance medical directives under its own laws.[56] A client should still have a state-specific living will for his state of domicile—one that will be easily recognized by the health care providers most likely to treat him. For the client who is retired, the domicile state is the state where he lives.[57] For the client who is still on active duty, the attorney should discuss the advisability of having a living will for the state where the client is currently stationed, in addition to a federal living will and a state-specific living will for his state of domicile.

Another type of medical directive is a health care power of attorney, also known as a medical power of attorney, health care proxy, or appointment of health care agent.[58] Just as a living will is the client's declaration of when not to use life-sustaining procedures, the health care power of attorney is a document in

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48. *See generally Symposium: Thoughts on Advance Medical Directives*, 37 REAL PROP. PROB. & TRUST J. 537-75 (2002).

49. *See* LEGAL ASSISTANCE DESKBOOK, *supra* note 18, at T-2 through T-4 (ADVANCE HEALTHCARE DIRECTIVES).

50. 497 U.S. 261 (1990).

51. *Id.* at 284.

52. *See generally* Rebecca C. Morgan & Charles P. Sabatino, *Advance Planning and Drafting for Health Care Decisions*, PROB. & PROP., July/Aug. 2001, at 35-39.

53. *See generally id.*

54. 10 U.S.C. § 1044c(b) (2000).

55. *See, e.g.*, TEX. HEALTH & SAFETY CODE ANN. § 166.005 (West 2003); FLA. STAT. ch. 765, § 765.112 (2003).

56. 10 U.S.C. § 1044c(d); *see also* FROLIK & KAPLAN, *supra* note 30; Aimee R. Fagan, *An Analysis of the Convention on the International Protection of Adults*, 10 ELDER L.J. 329 (2002). Regarding the elderly who are incapacitated while traveling outside the country:

> The Draft Hague Convention on the International Protection of Adults was released in 1996, with the intent of protecting the dignity of elderly persons traveling abroad by determining which state—that of their permanent residence, or that in which they were currently located—exercised jurisdiction over them in the case of illness or insufficiency . . . . While praising its goals, [the author] asserts that numerous exceptions within the Convention—allowing for local laws to govern the medical treatment of elderly patients, regardless of the patients' wishes—undermine the purpose of advance directives and render them meaningless.

Id.

57. *See* BLACK'S LAW DICTIONARY 501 (7th ed. 1999).

58. *See generally* ABA Comm. on Legal Problems of the Elderly, *Health Care Powers of Attorney* (1990).

which the client appoints someone he trusts, his agent, to make decisions about his medical care if he cannot make the decisions himself. Usually, the agent can exercise his power at any time the client is unable to act on his own behalf. The power is not limited to when a client is in a terminal condition.

Under federal law, an advance medical directive also includes any written declaration that "authorizes another person to make health care decisions for the declarant, under circumstances stated in the declaration, whenever the declarant is incapable of making informed health care decisions."[59] The same choices as described above for living wills also apply to health care powers of attorney.

Some clients may wonder whether they need both a living will and a health care power of attorney. The answer depends on the client's circumstances. Some clients may have religious, personal, or other beliefs that affect their decisions about obtaining living wills. Other clients prefer to wait until they are in the required condition, that is, in poor health, before executing living wills, because they feel they will be in a better position to evaluate what quality of life means. Also, some clients will not have someone who can serve effectively as the health care agent. This could be because of the proposed agent's personal circumstances, or because the proposed agent does not agree with the choices the client has made about the withdrawal of life-sustaining procedures. It is the experience of the authors that attorneys should discuss living wills and health care powers of attorney with their clients to discover their clients' wishes before attempting to draft such documents.[60] Unfortunately, living wills are

> proferred to and signed by clients routinely, with little discussion and inadequate reflection on the possible consequences. Given the import of the document, clients should expect the same standard of care with regard to advice concerning living wills that they receive with regard to avoidance of death taxes and preservation of assets.[61]

C. Out-of-Hospital Medical Instructions

Legal assistance attorneys must know the laws of the state where they are stationed regarding medical instructions for patients who are not in hospital inpatient settings or in physicians' offices. Many living wills do not apply outside these settings. No client should be in the unfortunate situation in which he thinks he has clearly expressed his wishes regarding the withdrawal of life-sustaining procedures, only to find out during the ambulance ride to the hospital or in the emergency room that his living will is not effective in that setting. A review of a particular statute helps to explain this further. In Texas, the Health and Safety Code specifically provides for "Out-of-Hospital Do-Not-Resuscitate Orders."[62] Section 166.081 includes the following definitions:

> (6) "Out-of-hospital DNR Order:
>
> (A) means a legally binding out-of-hospital do-not-resuscitate order, in the form specified by the board under Section 166.083, prepared and signed by the attending physician of a person, that documents the instructions of a person or the person's legally authorized representative and directs health care professionals acting in an out-of-hospital setting not to initiate or continue the following life-sustaining treatment:
>
> (i) cardiopulmonary resuscitation;
> (ii) advanced airway management;
> (iii) artificial ventilation;
> (iv) defibrillation;
> (v) transcutaneous cardiac pacing; and
> (vi) other life-sustaining treatment specified by the board under Section 166.101(a); and
>
> (B) does not include authorization to withhold medical interventions or therapies considered necessary to provide comfort care or to alleviate pain or to provide water or nutrition.
>
> (7) "Out-of-hospital setting" means a location in which health care professional are called for assistance, including long-term care facilities, inpatient hospice facilities, private homes, hospital outpatient or emergency departments, physicians' offices, and vehicles during transport.[63]

The Texas Department of Health (Department) has made a standard form available for the Out-of-Hospital Do-Not-Resuscitate Order, which can be obtained from the Department via mail or via the State of Texas Web site.[64] The legal assistance attorney must review the statutes of the state where his military installation is located to determine if that state has provisions

59. 10 U.S.C. § 1044c(b)(2).

60. *See supra* notes 1–2.

61. Clifton B. Kruse, Jr., *A Call for New Perspectives for Living Wills*, 37 REAL PROP. PROB. & TRUST J. 551, 545-52 (2002).

62. TEX. HEALTH & SAFETY CODE § 166.081.

63. *Id.*

for out-of-hospital orders to ensure he is providing his client with the complete picture of medical directives.[65]

D. Guardianships

A guardianship or conservatorship may become necessary for long-term care.[66] This is a court-supervised administration of the ward's person or property. This will usually allow the guardian to handle the financial affairs of the ward and make nursing home decisions.[67] Because of the need for local expertise and court appearances, legal assistance attorneys usually will not appear in state courts on behalf of clients in guardianship cases. Legal assistance, however, is often the first stop for a client seeking guardianship information. Because this process is based on state law, it is necessary to review the actual steps the local jurisdiction requires before advising the client. This process is cumbersome and expensive—it is akin to a formal or dependent administration in probate—but it is designed to afford maximum safety to the incapacitated person's (the ward's) estate. Typically, statutes require insurance-type bonds, court approval of investments and expenditures, and annual accountings.[68]

Older adults do not need guardians simply by reason of age or minor mental or physical impairments, provided they can still manage their personal and financial affairs. In the authors' experiences,[69] a typical court will not appoint a guardian merely because the family believes the ward is making foolish or risky decisions; it will do so, however, if a physical or mental condition impairs the proposed ward's decision-making capacity or ability to avoid harm to himself or others. The court determines exactly what kind of incapacitation exists and what benefit the proposed ward would receive from a guardianship. The court may conclude that a person is incapacitated, but only to the extent that he needs help to handle his finances; it may find that he can otherwise take care of himself. In such an instance, the court may decide that this person needs a guardian of the estate only. On the other hand, if the person has no estate or his property can be managed without the requirements for a guardianship, but he is physically unable to do certain things, the court may decide that only a guardianship of the person is necessary.

When assisting an older client, the attorney should look for alternatives to guardianships. If possible, an attorney can prepare and execute revocable management trusts and durable powers of attorney. If the ward is no longer competent, state law (particularly in community property states) may still allow for continuing management powers by the competent spouse, often without the necessity of court appointment, bond, or annual accountings.[70]

Mental health commitments are generally short-term solutions, usually for situations requiring emergency detention to stabilize and evaluate patients' situations. Attorneys should become familiar with the process as well as facilities in their local areas. Often, a military hospital will not be equipped to handle this type of case, and it will be necessary to use a civilian hospital.

E. Long-Term Care Considerations

An increasing area of concern for older clients is who will take care of them when they need assistance in the future as well as how to pay for that assistance. These questions seem to overwhelm not only the older clients, but also younger clients with aging parents.[71] Unfortunately, much of their information might have come from sales representatives who have vested interests in the clients' decisions. If possible, a legal assistance attorney should help his clients assess their long-term financial situations, cash flow, and the odds that they will need nursing home care.

Long-term care is generally defined as health care to help someone who has a disabling or chronic illness and who cannot care for himself.[72] The exact type of care and the length of the care depend on the person's condition. There are several types of long-term care arrangements. Some are based in the patient's home or on an outpatient basis using services available in the community. Other arrangements may be coordinated

64. Texas Dep't of Health, *Standard Out-of-Hospital-Do-Not-Resuscitate Order, available at* www.tdh.state.tx.us/hcqs/ems/dnr.pdf (last visited July 30, 2004). To obtain the form by mail, write to the Texas Medical Association, ATTN: DNR Form, 401 West 15th Street, Austin, Texas 78701-1680. *Id.*

65. *See* U.S. DEP'T OF ARMY, REG. 40-3, MEDICAL, DENTAL, AND VETERINARY CARE ch. 2, § II (12 Nov. 2002). Legal assistance attorneys should be aware of the differences between advance medical directives and "do not resuscitate" orders. *Id.*

66. *See* LEGAL ASSISTANCE DESKBOOK, *supra* note 18, at E-21 (INTRODUCTION TO THE USE OF TRUSTS IN ESTATE PLANNING) (describing use of trust in event of incapacitation of grantor).

67. *See, e.g.*, TEX. PROB. CODE §§ 601-905 (West 2003); S.C. CODE ANN. § 62-5-101 (Law. Co-op 2002).

68. *See, e.g.*, TEX. PROB. CODE §§ 699, 741; S.C. CODE ANN. §§ 62-5-312, 62-5-411.

69. *See supra* notes 1–2.

70. *See, e.g.*, TEX. PROB. CODE § 883.

71. *See generally* Nkiru Asika Oluwasanmi, *Parental Guidance*, SMART MONEY, Dec. 2002, at 112-17.

with a nursing home or other type of living facility. This type of care does not take place in a hospital and is not intended to cure the patient.[73]

A common standard medical and insurance professionals use to determine whether someone requires long-term care is the ability to perform "activities of daily living" (ADLs).[74] If the person can perform most or all of the ADLs without prompting or assistance, long-term care is not usually required. The ADLs are based on the essential functions of dressing, eating, ambulating, bodily functions, and hygiene. Some other recognized ADLs are related to managing one's money and doing housework. The inability to perform an ADL can be based solely on physical or health limitations, solely on mental incapacity to perform the ADL, or a combination of both.[75]

The cost of long-term care varies widely, depending on the geographic location of the patient, the level of care, and the facilities and caretakers involved. According to an article in a military-related publication from two years ago, the national average cost of a year in a nursing home was $50,000.[76] Some people rely on their personal funds or contributions from other family members. This can be financially draining, especially if the need for care goes on for an extended period. Another choice is for the government to pay. Medicare, however, covers very little of the long-term expenses most people incur.[77] The Department of Veterans Affairs (VA) provides extensive long-term care services at larger VA hospitals, but the programs are not fully funded, and the services are not universally available.[78]

The remaining option is to purchase long-term care insurance. Such policies may cover any or all of nursing home stays, home health care, adult day care, assisted living facility care, and respite care. The cost of such insurance depends on the age of insured at the time of the purchase of the policy, the insured's health condition, the amount of the maximum daily benefit, the elimination period, and the maximum benefit period. The maximum daily benefit is the amount the policy will pay each day. If expenses exceed the amount the insured selected, he must pay the difference. The elimination period is the amount of time that must pass after the patient begins receiving long-term care services before the policy begins to pay for them. Periods of up to one hundred days are common. The maximum benefit period is the length of time the insurer will pay benefits; longer periods correspond to higher premiums.[79]

In addition to these factors influencing the cost of the insurance, the prospective insured should consider issues of services or care covered. First, what triggers the payment of the benefits under the policy? Generally, payment is tied to an individual's ability to perform ADLs, but who determines what is sufficient impairment? Must the insurance company's medical staff certify disability, or can the patient's own physician provide the certification? Second, the patient or attorney should carefully review the policy for forfeiture provisions. If the patient cannot afford to pay the premium at some time in the future, he may be able to convert the policy into term life insurance, borrow against the policy, or keep the policy with reduced benefits. Third, the policy should have protection against inflation, such as an automatic increase in the maximum daily benefit each year.

Most policies available for long-term care insurance are offered through private companies. The Office of Personnel Management, however, now offers military and other government employees and retirees such insurance through the Federal Long-term Care Insurance Program. The program became available in 2002 and is intended to cover a variety of health care options, such as custodial nursing home care, assisted-living facilities, and home health care.[80]

F. Medicaid and Nursing Homes

Some older clients may have misconceptions about Medicaid and nursing care. For instance, they may believe that the government will pay for their nursing care if they transfer their

72. *See generally* The Administration on Aging, Center for Communication and Consumer Services, *at* http://www.aoa.gov/about/about.asp (last visited July 30, 2004); Health Insurance Ass'n of America, *A Guide to Long-Term Healthcare*, *at* http://membership.hiaa.org/pdfs.2002LTCGuide.pdf (last visited Nov. 3, 2004) [hereinafter HIAA Guide].

73. HIAA Guide, *supra* note 72.

74. Center for Disease Control (CDC), *National Center for Health Statistics (NCHS)*, *at* http://www.cdc.gov/maso/pdf/nchsfs.pdf (last visited July 30, 2004).

75. *Id.*

76. Gary Turbak, *Securing Your Health: A Primer on Long-term Care Coverage*, VFW, Feb. 2002, at 30-32.

77. *See Centers for Medicare & Medicaid Services*, 2003 GUIDE TO HEALTH INSURANCE FOR PEOPLE WITH MEDICARE, Mar. 2003. Medicare will pay for up to 100 days of care in a skilled nursing facility after the patient has been hospitalized for at least three days. It covers the first twenty days entirely. The patient pays a daily coinsurance after the twentieth day until day 100. After day 100, Medicare covers none of the costs. Medicare does not pay for custodial care. *Id.*

78. Turbak, *supra* note 76, at 32.

79. *See generally* HIAA Guide, *supra* note 72.

80. *See generally* Karen Kopp DuTeil, *Making a Decisions About Long-term Care Insurance*, RETIRED OFFICER MAG., June 2002, at 67-72.

property into their children's names. Clients may seek legal assistance hoping to confirm these beliefs. While some of these strategies previously worked, effective 10 August 1993, Congress amended the Medicaid laws to materially change the eligibility rules and close such loopholes.[81] It is important for legal assistance attorneys to know the basics of Medicaid rules and eligibility.

Medicaid[82] is a combined federal and state program that provides benefits to assist in the payment of long-term care expenses. Federal law sets forth certain criteria for eligibility for those benefits that are binding upon all state medical assistance programs that receive federal reimbursements. State programs, however, may impose additional eligibility requirements to the extent permitted by federal law or administrative waivers the federal government grants to the states. Thus, state-specific facts and figures are essential because of the degree to which they vary, making it difficult to be overly specific.

A patient establishes eligibility for nursing home Medicaid benefits by meeting every part of a series of tests which can be summarized as follows: (1) the applicant must have a medical necessity for nursing home care (not further discussed herein, but see 42 U.S.C.S. § 1382c(a)(3)(A) (2003); 20 C.F.R. § 416.905 (2003)); (2) the applicant must have less than the maximum amount of countable resources, without having made any disqualifying transfers; and (3) the applicant must have no more than the maximum amount of allowable income in his name.[83]

1. Countable Resources

The applicant's state Medicaid agency can provide legal assistance offices with a current list of qualifying assets to determine whether a client exceeds the maximum amount of assets or "resources."[84] In 2004, the maximum amount of resources that federal law allows an institutionalized individual to have is $2000.[85] State law establishes exclusions from countable resources and then sets values for these exclusions. Typical exclusions from countable resources include: the entire value of one's principal residence and its attached land; the current market value of one's household goods and personal effects up to a set limit; the market value of an automobile, up to a set limit (the total value of a car is excluded under some states' laws if it is needed for employment or medical treatment, or if it is specially modified for use of a handicapped person); property of a trade, or business and non-business property essential for the individual's self-support; resources of a blind or disabled person needed to fulfill an approved plan for achieving self-support; life insurance policies up to a set value; payments from another federal benefit program that requires exclusion of such payments (for example, food stamps); cash or in-kind replacement to repair or replace a lost, damaged, or stolen resource, provided that the applicant spends the cash for such purpose within nine months; the entire value of burial spaces for an individual and immediate family, a prepaid irrevocable burial contract regardless of the value, and a burial expense fund, up to a set value; and non-business property essential for self-support, if it produces a net annual income of at least six percent, up to a certain value (but note that the resulting income counts toward the income cap).[86]

2. Disqualifying Transfers

Clients can spend down until they reach the appropriate level of resources for Medicaid qualification. Merely transferring title of an asset, however, into someone else's name, while retaining all benefits from the asset, such as its use or its income, will not be sufficient to take the asset out of its available status. Assets transferred to a revocable trust and which are still considered as owned by the transferor fall into this category.[87] Further, clients who are considering making gifts (or property "sold" at less than fair market value) to children or others in order to make themselves eligible under this resource requirement must be aware that such actions can actually backfire and disqualify an otherwise eligible person from Medicaid benefits by subjecting the transferor to a period of temporary ineligibility for Medicaid benefits.[88] The period of ineligibility is determined by a formula in which the state calculates how long the transferor could have paid for his nursing home care

81. 42 U.S.C.S. § 1396p(d)(4) (2003). The Omnibus Budget Reconciliation Act of 1993 (commonly referred to as OBRA '93) closed many of the loopholes previously used by persons to transfer their assets into trusts and retain many of its benefits yet qualify for Medicaid. *Id.*

82. Social Security Act, tit. XIX, 42 U.S.C. § 1396 (2000). Although referred to as Medicaid by the public, the statutes and regulations used the phrase "Medical Assistance Program." *Id.*

83. *See generally* 42 C.F.R. ch. IV, subch. C (2003); Colonel Richard Kwieciak, *Medicaid Planning*, ARMY LAW., Aug. 1997, app. A (providing an excellent overview of Medicaid qualifying strategies).

84. 20 C.F.R. §§ 416.1201 – 1266 (2003) (Resources and Exclusions).

85. *Id.* § 416.1205 (Limitation on Resources).

86. *Id.* §§ 416.1201 – 1266 (Resources and Exclusions).

87. 42 U.S.C. § 1396p(d) (2000).

88. *See* 20 C.F.R. § 415.1246. These transfers without fair consideration include outright gifts as well as transfers to irrevocable trusts. *Id.*

with the transferred assets if they had not been transferred. For example, if one transfers $300,000 in assets without fair consideration, and the average cost of nursing home care in the state where the transferor resides is $3000 per month, the period of ineligibility would be 100 months because he could have paid for 100 months of nursing home care with the $300,000 if it had not been transferred. While there is no limit on this period of disqualification, the "look-back period" is three years in the case of outright gifts and five years for certain other transfers, including transfers to an irrevocable trust.[89] The legal assistance attorney should also inform the client that assets being transferred by a Medicaid applicant's spouse within the look-back period also results in a disqualification period for the applicant, just as if the applicant had transferred the assets.

There are, however, a few long-term care planning opportunities still available to get the person qualified for resources:

Special needs trusts. If a disabled person has assets of his own that he is mentally or physically able to manage, it is possible to establish a trust to manage his assets. The corpus of the trust is exempt from the regular available assets rules, as long as the trustee is directed to reimburse the state, at the beneficiary's death, for government medical benefits received during the beneficiary's lifetime (to the extent the trust is able to do so). Funds for special needs not covered by Medicaid can be paid out of the trust.[90]

A carefully structured gift program. There is a monthly gifting limit under each state's Medicaid program. By instituting a monthly plan in which an individual gifts assets equivalent to that amount twice the authorized gift limit, he can eventually deplete the estate in a spend down until he reaches the countable resource minimum. Because the penalty period for a transfer of assets runs contemporaneously with the gift period, when the month for one ends, so does the other.[91]

Certain annuities. It is possible to use non-exempt resources to purchase an annuity in the name of the community spouse. Before making the Medicaid application, the community spouse could irrevocably elect an annuity (periodic income) payout; no cash-value lump sum would be available as a resource. Any annuity income payable in the name of the Medicaid applicant could raise his income above the permitted level. It is the understanding of the authors that such annuity arrangements are closely examined by state Medicaid agencies to determine if the annuity purchase was really an improper attempt to transfer resources.[92]

In addition, the institutionalized spouse may establish a *protected resource amount* (PRA) that allows him to transfer assets to the spouse living at home (to the extent her resources are less than his). Public Law No. 100-360 provides for the protection of resources for the community spouse when the other spouse is institutionalized.[93] The PRA is the portion of the total resources reserved for the community spouse and is deducted from the couple's combined resources in determining eligibility. This amount is one-half of all combined resources subject to a minimum and maximum amount as determined by a formula calculated at the time of initial institutionalization, which will not change thereafter. For 2004, the PRA limit is capped at $92,760.00 and subject to a minimum amount of $18,552.00.[94]

Public Law No. 100-360 also provides for the protection of income for the community spouse when the other spouse is institutionalized.[95] A spousal income maintenance allowance is authorized to be deducted from the couple's combined monthly income and is paid to the community spouse if that spouse's income is less than the allowance amount. It is calculated by subtracting the dependent's income from 150% of the monthly federal poverty level for a family of two, and then dividing by three.[96] For 2004, the maximum monthly spousal allowance is $2,319, with a minimum of $1,515.[97] This monthly maintenance allowance protects the institutionalized spouse and his

89. 42 U.S.C. §§ 1396p(c), 1396r-5; 20 C.F.R. § 416.1240. Also, if one makes a disqualifying transfer while the disqualification period for another transfer is still running, the new disqualification period does not begin until the previous one ends. *Id.*

90. 42 U.S.C. § 1396 (d)(4).

91. If an individual donee, however, receives more than $11,000 in a calendar year, he will have to file a gift tax return because the value of the transferred assets exceeds the current annual gift tax exclusion. 26 U.S.C. § 2503(b) (Taxable Gifts).

92. *See supra* notes 1–2.

93. Medicare Catastrophic Coverage Act of 1988, Pub. L. No. 100-360, 102 Stat. 748-64.

94. Announcement by U.S. Centers for Medicare and Medicaid Services, Office of the Actuary, Oct. 30, 2003, as reported in NAELA eBulletin (Nov. 4, 2003). NAELA eBulletin is a weekly newsletter by Tim Takacs, CELA; Robert Fleming, CELA; and Professor Rebecca C. Morgan published by the National Academy of Elder Law Attorneys via email to subscribers and on the Web *at* http://www.naela.org/applications/ebulletins/. It is a highly recommended source for elder law practitioners.

95. 102 Stat. at 748-64.

96. U.S. Center for Medicare & Medicaid Services, Office of the Actuary (Oct. 30, 2003).

97. *Id.*

family from having to use some of his income to pay for his institutional care. This spousal allowance, however, has nothing to do with whether the client exceeds the income cap referenced heretofore and can be payable from the Qualified Income Trust.

Income requirements. Problems may still exist even if a person spends down to reach the minimum resource amount. He may still fail to qualify if he receives too much income from such non-discretionary sources as military retirement, civil service retirement, or Social Security.[98] States vary considerably on the maximum amount of income one may receive in one's name, based on the options the particular state has elected.[99] For those who otherwise would qualify, one method for reducing income to the institutionalized person is for him to transfer that income stream to another person whenever possible. Examples of transferable income include rental income, interest, and dividends. Social Security and military retirement income are not transferable. Another solution is to place excess income in a qualified income trust (QIT), sometimes called a Miller Trust. All income that is routed through this type of trust does not count for income qualification.[100] However a QIT has the requirement to reimburse the state for its Medicaid payments from the residue of the trust after the Medicaid recipient's death. The QITs make sense if the likely government benefits to be received during a lifetime exceed the amount likely to remain in the trust at the time of the client's death had the institutionalized person had to pay for nursing home care out of his private funds.

IV. Planning for Death

A. Wills[101]

As discussed previously, legal assistance attorneys interviewing older clients must be sensitive to the issues of lack of testamentary capacity and the presence of undue influence, particularly when another person asks to sit in on the interview to help explain what the client really means. Attorneys must also be sensitive to statements regarding special bequests or gifts. An attorney should never laugh or make light of an older client's desires, such as the desire to take care of a beloved pet. Many older clients have family pets that they want cared for after they die; this does not mean that the client lacks testamentary capacity. Part of the attorney's discussions with a client about such plans will include the options for future care, such as through gifts or by establishing a trust.[102]

The attorney should learn what assets the client has, either through questions, the use of a worksheet, or both. The client must understand the importance of the accuracy of the information in providing competent advice on estate taxes and general probate procedures. The client must also understand what assets are probate assets and affected by the provisions in the will. Many older clients may have pension plans or other investments that usually do not pass according to a will. If the client has non-probate or nontestamentary[103] assets, the attorney should explain the importance of current beneficiary designations. Some clients are concerned about their debts and what assets will be used to pay those debts. After explaining to the client what the provisions of the will are regarding debt payment, the attorney should discuss the option of converting a non-probate asset into a probate asset for the purpose of paying all or part of the debts. For example, many clients are worried about taking care of funeral expenses but do not want to buy prepaid burial plans. The attorney should consider discussing the option of designating the estate as the beneficiary of a life insurance policy with the estate's interest being roughly equivalent to the cost of a funeral in the local area. In most jurisdictions, however, this would require opening some type of probate so that the life insurance company will issue the check to the estate.[104]

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98. 42 U.S.C. § 1382a(a)(2) (2000); 20 C.F.R. § 416.1120 (2003) (explaining that "income" includes the following: annuities, pensions, alimony, support, dividends, life insurance proceeds, prizes, gifts, and inheritances). Significant exemptions include most federal payments such as food stamps, one-third of child support payments, and certain VA payments (although VA retirements benefits are countable). *See* 42 U.S.C. § 1382a(b); 20 C.F.R. § 416.1124.

99. States can be generally classified into three categories for income determination: (1) "SSI states" that cover everyone who qualifies for the Supplemental Security Income (SSI) program; (2) "Section 209(b) states" that adopt more restrictive requirements than simple SSI determination; and (3) those states that broaden the qualification to cover "medically needy persons." Goldfarb Abrant Stutzman & Kutzkin LLP, *Medicaid Frequently Asked Questions*, *at* www.seniorlaw.com/medicaid-faq.htm (last visited July 30, 2004).

100. 42 U.S.C. § 13969(d)(4).

101. *See* DOD DIR. 1350.4, *supra* note 38 (explaining that it is DOD policy that the "[m]ilitary Departments, within the limits of available resources and expertise, shall inform and educate persons eligible for legal assistance on estate planning generally, and the advisability of preparing a will or military testamentary instrument"); *see also* U.S. Dep't of Army, Office of The Judge Advocate General, Legal Assistance Policy Division, *Estate Planning Tool Kit for Military & Family Members* (May 2002), *at* www.jagcnet.army.mil/legal.

102. *See generally* Gerry W. Beyer, *Estate Planning for Pets*, PROB. & PROP., July/Aug. 2001, at 7-12.

103. "Non-probate" and "nontestamentary" are terms that generally refer to assets that are not required to be distributed through a probate procedure. Examples of common non-probate assets are life insurance policy proceeds, Individual-Retirement Account (IRA) proceeds, and pay-on-death or survivorship accounts. *See, e.g.*, TEX. PROB. CODE ANN. § 436 (West 2003); MO. REV. STAT § 461.001 (2002).

104. *See generally* LEGAL ASSISTANCE DESKBOOK, *supra* note 18, ch. C (PROBATE AND PROBATE AVOIDANCE).

The attorney must explain the procedural requirements for a will along with the substantive requirements. He must explain what a self-proving affidavit is and why it is such an important document.[105] The client and the witnesses must answer any questions aloud. Any handwritten information, for example, dates and signatures, must be legible. Before the attorney gives the signed will to the client and releases the witnesses, the attorney must review the will one last time to ensure all initials, dates, and signatures are where they should be and that the will pages are numbered correctly and in proper order.[106] The attorney should remind the client not to write on the will after signing it and provide the client with instructions on safekeeping of the will.[107]

B. Inter Vivos Trusts

Many clients and their families may have been bombarded with literature and sales pitches for living trusts, family limited partnerships, and other probate-avoiding techniques. These estate-planning tools, while perfectly legitimate, are often marketed to those without the ability to properly evaluate their need or price. Often, the information is predicated on nightmare probate scenarios and percentage probate fees. Attorneys can greatly assist their clients by sorting truth from hyperbole. Inter vivos trusts, often referred to as living trusts (and sometimes more aptly called revocable stand-by management trusts), typically allow the trust maker (settlor) to continue management of his property until he no longer wishes to or is able to do so.[108] These trusts can be very effective at avoiding or minimizing the need for guardianships or probate and have some important advantages over simple ownership as joint tenants with rights of survivorship. Although legal assistance offices usually do not draft these documents, eligible clients often ask legal assistance attorneys to review trusts they have obtained, especially trusts obtained at seminars whose drafters have since left the area. In preparing, reviewing, or discussing such trusts, look for the following critical elements: (1) detailed provisions concerning incapacity, disability, or incompetency, especially with non-judicial determinations; (2) gifts to beneficiaries, especially to take advantage of estate and gift tax exclusions; and (3) proper transfer of all appropriate assets, consistent with an understanding of the potential disadvantages of transferring such items as vehicles (high liability) and homesteads (which may cause the loss of state protection or federal tax benefits).[109]

C. Probate

Because of negative publicity, especially by those selling living trusts, clients often come to the legal assistance office with much hostility toward the word "probate." They often fail to see the need to authenticate in probate what they know to be a valid will, or to update the title on property before the statute of limitations runs on filing any expedited form of probate. Probate is simply the legal process that insures the legitimate and orderly transfer of property at death.[110] This involves the proving of someone's passing; a determination of whether a document is a valid will or, in its absence, who are the lawful heirs; and the updating of transferable title while protecting the rights of legitimate creditors. Even an attorney who practices no probate law needs some basic familiarity with local state laws to discuss these matters with clients.

One of the main reasons probate is necessary is to update the title to property so that it will eventually be saleable. Title, or written documentation of ownership, is often required with real estate, vehicles, investments, and bank accounts. In some instances, this may occur without probate by the mere presentation of a death certificate or affidavit of heirship. In most cases, however, property will require some form of probate administration to verify rightful ownership[111] and to update title to them after legitimate creditors' claims are satisfied.

A legal assistance attorney may assist the client in many ways without actually drafting the probate documents;[112] if the client understands the need for probate and what information he needs to have ready for his probate attorney, his experience with the probate attorney will be less stressful and more effective. Because some simple documents, such as small estate affidavits, may not require court hearings, a legal assistance attorney might consider drafting them in appropriate cases.

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105. States may recognize a military testamentary instrument and a self-proving military testamentary instrument. 10 U.S.C. § 1044d (2000). The format for the military testamentary instrument self-proving affidavit is set by DOD directive. DOD DIR. 1350.4, *supra* note 38, encl. 2. If the legal assistance attorney is using this format instead of the format for the self-proving affidavit for the client's state of domicile, he should explain his reasons for doing so to the client.

106. *See* AR 27-3, *supra* note 3, para. 3-6b(2).

107. *See* LEGAL ASSISTANCE DESKBOOK, *supra* note 18, ch. B (ESTATE & CLIENT ANALYSIS: THE ESTATE PLANNING INTERVIEW).

108. *Id.* ch. E (INTRODUCTION TO THE USE OF TRUSTS IN ESTATE PLANNING).

109. *See id.*

110. *See id.* ch. C (PROBATE & PROBATE AVOIDANCE).

111. This is possible either through presentation of the will or through an heirship determination of the next of kin under the state's intestate succession rules.

112. Because of the length of administration, the need for court appearances, and state-specific rules, it is not usually advisable to encourage clients to do most probates *pro se*, even with the assistance of a legal assistance attorney.

The office should also try to negotiate non-percentage probate fees with local counsel.

V. Conclusion

Elder law represents an emerging field that brings together many areas of law, psychology, and resources in an integrated and holistic manner. While this can be intimidating to the new attorney, it is a chance to help those who have served our country for many years. Legal assistance attorneys must realize that older clients often need additional care and concern. The older client may have health problems that significantly affect his mobility and even his competency. Even a forty-year-old retiree in excellent physical and mental health may have concerns about caring for his aging parents; his own estate plan for his family's future requires a legal assistance attorney to be familiar with various aspects of elder law. Drafting a power of attorney for a nineteen-year-old private first class deploying to the National Training Center and drafting one for a fifty-five-year-old retiree may seem to have little difference. As should be apparent now, however, an attorney must understand each client's individual concerns. Legal assistance attorneys should be aware of the long-term needs of older clients and be prepared to advise them competently on estate planning issues, including durable powers of attorney, wills, and medical directives, as well as counseling on guardianships, long-term care, Medicaid, and probate.

Legal assistance attorneys seeking assistance in elder law have a variety of resources available to them. Some have been listed in this article. They include: members of the local bar; the American Bar Association and its various commissions, committees, and sections; national elder law associations; and state and local agencies specializing in elder law issues. An internet search for the term "elder law" will reveal further sources of information. It is imperative for legal assistance offices to make this emerging subject matter a high priority for training and education.