

## **Call for Justice, LLC—United Way 2-1-1 Training Paper**

### **Session 3: Elder Law**

**Speaker on May 10 and 11, 2012: David Rephan of the Chestnut Cambronne Law Firm**

#### **Featured Speaker's Topic**

This month, David Rephan, a private attorney with extensive prior experience as a Legal Aid lawyer, will discuss various elder law topics and legal and non-legal resources for seniors.

A question and answer session will follow the presentation.

#### **What is Elder Law?**

Elder law is a shorthand phrase intended to cover several areas of the law, all of which involve an aging population. Specifically, three major categories make up the practice of elder law:

- Estate planning and administration, including tax questions;
- Medicaid, government benefits, and other long term care programs;
- Guardianship, conservatorship, and commitment matters, including fiduciary (special trust) administration

The Older Americans Act (OAA) was the beginning of elder law as we now know it. The statute was enacted in 1965, the same year that Medicare was created. The law created the Administration on Aging, a division of the Department of Health and Human Services. The OAA also authorized grants to states for community planning and services programs, funding for research, and demonstration and training projects in the field of aging.

In 1972, the OAA was amended to add the national nutrition program for the elderly. The law was amended again in 2000 to include the National Family Caregiver Support Program, which was intended to help family members who are struggling to care for ill or disabled older loved ones. This program provides grant funding for combined services between state and local agencies for such things as counseling, support groups, respite care, and other community-based services. These services are focused on the care of the frail and aging members of society. The program also provides services geared toward the family units of grandparents and other older relatives involved in care-taking for related children eighteen years of age and under.

#### **Particular Challenges of Elder Law**

Practicing elder law has some unique challenges. In particular, it's likely that other family members will be involved with the elderly client in one way or another—such as adult children who act as caretakers, or adult children who believe the parent may have difficulty

understanding the advice or services a lawyer may provide. The challenge for the attorney is that the elderly person presenting for legal help (e.g. the parent or other senior in need of legal services) is the attorney's actual client, and the adult child caretaker is not. (This can vary if the adult child caretaker is also the conservator for the parent or holds a power of attorney.) The complications created by family relationships can really affect an attorney's representation, so attorneys need to be very careful in how they approach various situations.

Another very important factor is what attorneys refer to as the "capacity" or "competency" of the elder/senior. In order for various documents (such as wills or trusts) to be legally binding, the person signing them must be capable of understanding the nature of their actions (they don't necessarily have to understand every word in the document—that's why people hire lawyers in the first place). It's up to the attorney—and not the family member accompanying the elder/senior—to determine if the elder/senior is competent to understand the nature of the legal matter at hand.

**RED FLAG: It's possible that the person calling for a legal referral will be a family member or caretaker rather than the elder or senior who's actually in need of legal assistance. We recommend that when you provide the referral, you remind the caller that attorneys who practice elder law are very specialized. It may also be appropriate to say that in some instances only the attorney and the senior can discuss the legal issues. The goal here is to give the family member a head's up that not just any lawyer is qualified to handle such matters and that the way the matter is handled by the attorney is very specialized.**

### **Distinguishing Between "Estate Planning" and "Government Benefits" Attorneys**

Because elder law is such a broad area of the law, it's important to distinguish between two somewhat related, but also very distinct, practice areas.

"Estate planning," involves the creation of wills, trusts, medical care directives, property transfers, and to a certain extent, business successions or sales. It is very fact-specific and can necessitate a fair amount of document assembly and retention. Further, as stated above, competency of the elder/senior is extremely necessary.

A legal practice that focuses on "government benefits," can be completely different from estate planning. "Government benefits" involves dealing with Medicare, Medicaid, Social Security, and a host of other entitlement plans that help to support seniors. In this area, it's very likely that adult children will be involved since the elder/senior may rely on an adult child to help them understand the government paperwork involved.

A lawyer who practices in estate planning may very well lack the experience or skill set to provide representation on issues involving government benefits. The opposite may be true as well.

RED FLAG: As we discuss the legal resources below, it's important to bear in mind the distinction between "estate planning" and "government benefits," since it would be relatively easy to make a mismatched referral. We're sure you know that the key words and phrases signaling the call involves government benefits will be "monthly check," or "problems with Medicare," which, in turn, will cue that one, rather than the other, type of elder law attorney needs to be referred. Additionally, it may be important for you to alert the caller to the fact that not every attorney holding themselves out as an elderly law attorney can handle every type of legal matter. In short, it's important to instill in the caller the need for the caller to inquire of the attorney's skill set.

## Ombudsman Office and Services

An important intersection between law and social service is the state Ombudsman's office. As you are aware, the Ombudsman's office has trained advocates who intervene in disputes involving various underrepresented populations—the disabled, those with mental disabilities, and persons living in nursing homes or group settings. Many of you make regular referrals to the Ombudsman's office.

The **Ombudsman for Long Term Care** is a program of the Minnesota Board on Aging. The program is centered on persons receiving long term care, which includes home care services. This Ombudsman's office deals with quality of care issues, rights violations, discharge or eviction issues, service terminations and public benefits programs.

The **Ombudsman for Mental Health and Developmental Disabilities** works with clients interfacing with medical providers, government agencies, and group settings to advocate on behalf of the person in need. An example would be if the client didn't like his or her case manager or group home.

**There are no lawyers on the Ombudsman's office staff.** However, if legal needs arise, the Ombudsman's office will make referrals to various nonprofit legal providers (usually to the Volunteer Lawyers Network or to the Disability Law Center).

**Contact Information:** With elderly/senior callers (or those calling on their behalf), it's possible that either of these Ombudsman's office referrals will be needed. **Office of Ombudsman for Long-Term Care** (800) 657-3591; **Office of Ombudsman for Mental Health and Developmental Disabilities** (800) 657-1800 or 657-3506.

## Elder Abuse

We would be remiss if we didn't mention the problem of elder abuse. It's a very real issue. "Elder abuse" refers to intentional or neglectful acts by a caregiver or trusted individual that lead to, or may lead to, harm of a vulnerable elder. Physical abuse; neglect; emotional or

psychological abuse; verbal abuse and threats; financial abuse and exploitation; sexual abuse; and abandonment are all forms of elder abuse.

Statistics indicate that one in ten elder may experience some type of abuse, but only half of those cases are reported. Elder abuse can occur anywhere. Also, dementia and mental health issues are significant risk factors.

Callers should be advised to report suspected abuse by contacting adult protective services agencies. **Elder Care Rights Alliance** is a Minnesota-based organization that can be contacted in the event of suspected abuse (800-893-4055). The **National Center on Elder Abuse** will also assist in reporting. (855-500-3537; 800-677-1116)([ncea-info@aoa.hhs.gov](mailto:ncea-info@aoa.hhs.gov)). If someone is in a life-threatening situation or immediate danger, they should be directed to 9-1-1.

### **Elder Law Legal Resources**

We have a number of resources, but because of the difference between “estate planning” and “government benefits,” it may not be easy to make a quick, targeted referral.

**Primary Referral in Hennepin County: Mid-Minnesota Legal Assistance/Legal Aid Society of Minnesota** (612-334-5970)(<http://www.midmnlegal.org>) does **both estate planning and government benefits work** through its Seniors Law Project which accepts a wide range of cases involving housing, nursing homes, government benefits, debt collection, utility disputes, grandchild custody, general probate, powers of attorney, and health care directives. **The Seniors Law Project works with people 60 years or older who live in Hennepin County without regard to income.** (However, we’re also advised that the project prioritizes the needs of clients who contact them, and as such, it overwhelmingly serves people at 125% of Federal Poverty Guidelines or less.)

**Another Primary Referral State-wide: The Disability Law Center** can be reached through the MMLA/Legal Aid Society of Minnesota number.

**Secondary Referral: Central Minnesota Legal Services** (612-332-8151)(<http://www.centramnlegal.org>) will represent seniors in third party custody cases and no-children divorces where there’s a language barrier or domestic abuse or displaced homemaker issue and the client needs assistance to obtain income for self-support. Again, this will be at 125% or less.

**NE Seniors Clinic** (612-781-5096)([www.neseniors.org](http://www.neseniors.org)) operates a legal clinic for age 60+ seniors/elders on **real estate related issues**. The clinic provides an opportunity to meet with an attorney on an individual basis. **Note: an appointment is required beforehand.**

Frequency: 1<sup>st</sup> Wednesday of every month (except July 2012)

Time: 10:30

Location: 2600 Kenzie Terrace, Saint Anthony MN (go to leasing office building in Autumn Woods).

**Good Alternative Referral: Volunteer Lawyers of America provide Estate and Elder Law Services** (612-676-6300)([estate&elderlaw@voamn.org](mailto:estate&elderlaw@voamn.org)). They advertise that they do both “private pay” and “subsidized services: sliding fee scale.” They limit their services to adults 60+ and persons with disabilities.

Qualifying factors: assets of less than \$10,000 (for individuals) or \$20,000 (for families), excluding automobiles and homes. Incomes can't be above \$1862/mo for individuals and \$2522/mo for couples. Subsidized rates for legal fees are \$10 to \$100 per hour depending on the income of the person or couple.

They have a great subsidized rate for wills ranging from \$75 to \$200 for individuals or \$100 to \$250 for couples depending on income.

The private pay rates are \$195/hr for legal advice and services; \$300 for a basic will; and \$1,200 for a basic trust.

There is no wait list for the Volunteers of America Estate and Elder Law Services.

## This Month's Tips

1. We're disappointed to find that the legal resources for elders/seniors are very limited. We trust this will change over time as lawyers discover the changing needs of aging Baby Boomers. At this point, the best that we can do is work with the system to grow legal resources.
2. It is likely that callers may not be aware of the existence of elder advocacy programs like the Elder Care Rights Alliance. It appears that this organization is a good always-mention resource for any caller involving elder needs.
3. Finally, the question of elder/senior income and assets is tricky. Some elders may have a limited monthly income but tremendous equity in their homes or money saved for their retirement. Because of their limited monthly income, they may be reluctant to see a private attorney who might be more able to serve them. By trying to resource nonprofit attorneys, this type of elder slows down the system, affecting everyone. It's okay, we believe, to mention that spending a few dollars of savings on a qualified lawyer for estate planning is a wise investment for the elder and their larger family.

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