

THE HUMAN TOUCH: CLINICAL TEACHING OF ELDER LAW

Kate Mewhinney*

TABLE OF CONTENTS

<i>INTRODUCTION</i>	153
<i>I. LUXURIES, BIG QUESTIONS, AND CHALLENGES</i>	156
A. The Luxuries.....	156
B. The Big Questions	157
C. The Challenges of an Elder Law Clinic	158
<i>II. WAKE FOREST ELDER LAW CLINIC:</i>	
<i>THE HEALTHCARE SETTING</i>	163
A. History and Overview.....	163
B. What the Medical-Legal Partnership Is Not	170
C. Participation in Bioethics Policies and Consultations	172
<i>III. THE CASES</i>	172
A. Overview of Case-Selection Criteria	173
B. Guardianships	176
C. Estate Planning and Probate	178
D. Medicaid Counseling	182

* © 2010, Kate Mewhinney. All rights reserved. Clinical Professor, The Elder Law Clinic, Wake Forest University. In writing this Article, I would like to thank one person in particular. Janice (Jan) Scales was the program's Client Coordinator from 1992 until her retirement in 2011. She played a key role in building Wake Forest's Elder Law Clinic. Much of what we have accomplished is due to Jan's dedicated, thoughtful work. I would like to thank my research assistant, Davis R. Powell, who was invaluable in the preparation of this Article. Mr. Powell was a clinic student in Wake Forest's Elder Law Clinic in the spring semester and worked in the Clinic during the summer of 2010. I also thank Laura P. Graham, Associate Professor of Legal Writing at Wake Forest Law School, and Professor Kim Dayton of William Mitchell Law School for reading a draft and providing input. I am responsible for any errors.

1. <i>Why Do It?</i>	182
2. <i>Learning That Laws Are Not Always Legal or Fair</i>	184
3. <i>Learning Who the Client Is and What the Goals Are</i>	185
E. Home Visits and Clients in Healthcare Facilities	187
F. Administrative Advocacy.....	192
G. Litigation and Alternative Dispute Resolution	192
H. Elder Abuse and Exploitation.....	197
I. Consumer Issues and Bankruptcy	199
J. Advocacy and Community Outreach	201
K. Professional Ethics Issues.....	204
L. Interviews	211
M. Other Ethical Issues	213
IV. <i>TEACHING STRUCTURE</i>	215
A. Student Selection.....	215
B. Credit Hours	216
C. Curricula and Course Requirements	216
D. Course Materials	217
E. Guest Lecturers	218
F. Orientation, Special Projects, and Field Trips.....	219
G. Student Reflections	220
V. <i>ADMINISTRATIVE ISSUES</i>	221
A. Office Management	221
B. Funding.....	222
C. Staffing and Schedules	225
D. Publicity.....	226
E. Client Eligibility	227
F. Intake Procedures.....	229
G. Case Management.....	232
H. Client Feedback	233
I. Office Accessibility Issues	234
<i>CONCLUSION</i>	235

INTRODUCTION

Many of the fundamental skills needed to represent older clients are best learned when law students work with actual clients. To describe a client's options, the students first learn the options and then explain them in their own words. The legal concepts tend to sink in better. While doing this, the student addresses the client's intellectual and emotional responses. Being focused on the client's needs and engaged on many levels allows students to experience one of the most rewarding parts of being a lawyer. Clinical teachers get to help students find this moment, when they, too, can enjoy the satisfaction of solving problems for real people.

An Elder Law clinic also gives law students several other challenges. They get to negotiate the pervasive ethical issues that arise when working with older clients, especially those who are frail. The students practice calibrating their interview styles based on a client's education, mental capacity, and physical limitations. They have to figure out a complex universe of healthcare programs and providers, with its own jargon and dogmas.

The teaching of Elder Law is becoming a common element of many law schools' curricula.¹ Most courses are still doctrinal or lecture based, but there has been a steep increase in the number of clinical courses focusing on Elder Law.² The growth in Elder Law teaching coincides with a long-overdue trend toward provid-

1. Nina A. Kohn & Edward D. Spurgeon, *Elder Law Teaching and Scholarship: An Empirical Analysis of an Evolving Field*, 59 J. Leg. Educ. 414, 414 (2010).

2. In 1976, it was reported that, while over ninety percent of approved American law schools had clinical programs for academic credit, only eight, or about two percent of those schools, were devoted to aging issues. The reported law schools included Dickinson, Duke, George Washington, St. Louis, Tulane, and Washington Universities, as well as the University of San Diego and the University of Baltimore. Joseph D. Harbaugh, *Clinical Training and Legal Services for Older People: The Role of Law Schools*, 16 Gerontologist 447, 448 (1976). Syracuse University Law School had a multidisciplinary clinic from 1972 to 1975, and Temple University started a clinic in 1977. *Id.* at 449, 451. Alabama's program started around 1980 and Catholic's in 1986. Email from Hugh Lee, Dir. Civil & Elder L. Clinics, Univ. Ala. Sch. L., to Kate Mewhinney, Clinical Prof. & Managing Atty., Elder L. Clinic, Wake Forest Univ. Sch. L. [hereinafter *Author*], *Your Wisdom about the Clinical Teaching of Elder Law* (June 19, 2010, 1:34 p.m. EDT) (copy on file with *Stetson Law Review*); Email from Michael T. McGonnigal, Clinical Asst. Prof. & Supervising Atty., Advocacy for The Elderly Clinic, Catholic Univ. Am. Columbus Sch. L., to Author, *Your Wisdom about the Clinical Teaching of Elder Law—20 Questions* (June 8, 2010, 5:59 p.m. EDT) (copy on file with *Stetson Law Review*).

ing students with more experiential learning opportunities.³ Law schools have been criticized for emphasizing doctrine and teaching it in a fashion that fails to develop skills in solving problems, professional ethics, and good client relationships.⁴ As a result, Elder Law clinics tap into a “hot area” of law⁵ while helping schools meet the accreditation requirements for hands-on learning.⁶

This Article centers on one program, Wake Forest University Law School’s Elder Law Clinic, which is entering its twentieth year of operation. Our clinic lays no claim to being the oldest or the best Elder Law clinic. It has some unique elements, though, as do the twenty or so other Elder Law clinics in this country.⁷

3. See ABA Sec. of Leg. Educ. & Admis. to B., *Standards and Rules of Procedure for Approval of Law Schools 2010–2011* § 302, 19–20 (ABA 2010) (stating that law schools shall require students to receive professional skills necessary to participate in the legal profession) [hereinafter *Standards*]; ABA Sec. of Leg. Educ. & Admis. to B., *Legal Education and Professional Development—An Educational Continuum, Report of the Task Force on Law Schools and the Profession: Narrowing the Gap* 236–241 (ABA 1992) (discussing the trend in recent decades to provide more skills courses for law students) [hereinafter *MacCrate Report of 1992*]; Roy Stuckey et al., *Best Practices for Legal Education* 165–167 (University Publications 2007) (describing the experiential education method in law school courses); William M. Sullivan et al., *Educating Lawyers: Preparation for the Profession of Law* 93–95 (Jossey-Bass 2007) (commenting on the wide pattern of use of experiential education courses) [hereinafter *Carnegie Report*].

4. Stuckey et al., *supra* n. 3, at 18–29.

5. Robert W. Denney, *What’s Hot and What’s Not in the Legal Profession*, 35 L. Prac. Mag. 12 (Jan./Feb. 2009) (available at <http://www.abanet.org/lpm/magazine/articles/v35/is1/pg12.shtml>).

6. American Bar Association (ABA) standards require that each student receive substantial instruction in professional skills. The school must provide substantial opportunities for live-client or other real-life practice experiences. *Standards, supra* n. 3, at 19–20.

7. This Article does not purport to be an empirical study or a comprehensive survey of law school Elder Law clinics. I did, however, solicit limited information from some of the Elder Law clinics identified, and included limited information about those programs, particularly in Part III. I wish to thank the following clinicians who provided information for this Article: Marguerite Angelari (formerly of Loyola-Chicago), Gary P. Bauer (Thomas M. Cooley), Emily Benfer (Loyola-Chicago), Kurt Eggert (Chapman), Donna S. Harkness (Memphis), Roger Manus (Campbell), Mary Helen McNeal (Syracuse), Debra H. Kröll (Temple), Michael T. McGonnigal (Catholic), and Jim Pietsch (Hawaii). For a partial list of Elder Law clinics in the United States, visit the Web site of the National Legal Resource Center at NLRC, *Elder Law Clinic*, http://nlrc.aoa.gov/nlrc/Services_Providers/service_type_list.aspx?ST=1 (accessed Jan. 7, 2011).

This Article also does not address the clinical teaching of Elder Law in Canada. See Charmaine Spencer & Ann Soden, *A Softly Greying Nation: Law, Ageing and Policy in Canada*, 2 J. Intl. Aging L. & Policy 1 (2007) (discussing Canada’s need to recognize and react to the social and legal needs of its aging population).

I hope that this Article will spark more conversation among Elder Law clinicians about how to improve our teaching and our community service. Clinicians are busy with the demands of being lawyers, teachers, and administrators, with one foot in the legal academy and one foot in the practitioner's life. The field of law and aging is particularly in flux. The approach that this Article takes to the clinical teaching of Elder Law ranges from a discussion of our broadest teaching goals to an elaboration of highly focused office policies related to the Elder Law field. Some parts of the Article may be overly specific for some readers, but given the increase in clinical teaching and in Elder Law, these "how to" elements may be useful for other law schools.

Part I offers a perspective on the rich learning opportunities these clinics provide, as well as the challenges of running an Elder Law clinic. Part II introduces the reader to Wake Forest University's Elder Law Clinic, with an emphasis on its partnership with the medical school. Part III discusses the types of cases typically handled by Elder Law clinics. Part IV addresses some of the teaching issues, aside from cases, including credits, student selection, reflection opportunities, and course materials. Part V covers some administrative aspects of running such a clinic, including funding, case management, student and client feedback, curricula, and similar topics.⁸

8. This Article focuses on "in-house" or faculty-supervised Elder Law clinics and only touches on the externship approach to clinics, although many of the teaching issues are the same. An example of the externship approach can be found at the University of Virginia's program: U. of Virginia Sch. of L., *Advocacy for the Elderly Clinic*, <http://www.law.virginia.edu/html/academics/practical/elderlaw.htm> (accessed Jan. 7, 2011). Also, pro bono programs offer valuable Elder Law experience. At John Marshall Law School in Chicago, for example, students can assist at the Center for Disability and Elder Law. More information about the Center's work can be found at the center's Web site, Center for Disability & Elder Law, *Homepage*, <http://probonocdel.org/> (accessed Jan. 7, 2011). Students can also get some Elder Law training in the practicum portion of a traditional doctrinal Elder Law course. See John Marshall Law School, *Externship Directory*, http://www.jmls.edu/academics/advocacy_dispute/externship/DIR_centerforelderlaw.shtml (accessed Jan. 7, 2011) (providing information on various Elder Law externship programs).

I. LUXURIES, CHALLENGES, AND BIG QUESTIONS

A. The Luxuries

There are certain luxuries involved in teaching Elder Law by working with actual clients. All students can relate to the clients, because most students have older relatives. Aging crosses race, class, ethnicity, nationality, and gender. Law students often still have living grandparents. The students' parents are usually facing care-giving issues with their own parents or with each other. Some students have experienced the illness or loss of a parent, sibling, or grandparent. Even as young adults, they sometimes have experienced their own vulnerability, due to illness or accidents. With this broad exposure to the issues of older people, the students are primed both to learn the law and to glean lessons about successful aging for their families and themselves.

Elder Law clinics tend to have lovable clients. The clients are often eager to hug the helpful students, to compliment them on their skills, and to assure them that, with clients' years of life experience, they know a brilliant future lawyer when they see one! Older clients might take more time with side stories, but they will usually acknowledge this tendency and encourage the anxious students to let them know when there is work to be done. Sweet note cards of thanks often show up in the student's mail, and plates of baked goods are dropped off at the clinic.

Moreover, older clients seem "safe," allowing students to get past some of the barriers that often make effective lawyering difficult.⁹ Later in the course, students are more comfortable when

9. See Jane Harris Aiken, *Striving to Teach "Justice, Fairness, and Morality,"* 4 Clin. L. Rev. 1, 25 (1997) (discussing the opportunity for law students' "disorienting experiences" when they interact with clients with differing socioeconomic statuses); Barbara L. Bezdek, "Legal Theory and Practice" Development at the University of Maryland: One Teacher's Experience in Programmatic Context, 42 Wash. U. J. Urb. & Contemp. L. 127, 135 (1992) (indicating that law students' experiences with clients in poverty-stricken situations are usually shocking to the students and do not help the students express what they have learned); Robert Dinerstein et al., *Connection, Capacity and Morality in Lawyer-Client Relationships: Dialogues and Commentary*, 10 Clin. L. Rev. 755, 766-769 (2004) (discussing the importance of a lawyer's connection with his or her client, and the barriers to forming such a connection); Fran Quigley, *Seizing the Disorienting Moment: Adult Learning Theory and the Teaching of Social Justice in Law School Clinics*, 2 Clin. L. Rev. 37, 53-54 (1995) (discussing the impact of disorienting experiences on law students' social views); but see Helen Y. Kim, *Do I Really Understand? Cultural Concerns in Determining Diminished Competency*, 15 Elder L.J. 265 (2007) (discussing the importance of understanding

they face the challenges of clients who have mild dementia, family interference, or health problems that necessitate home visits.

B. The Big Questions

Another luxury in the clinical teaching of Elder Law is that it is rich in big questions for students to consider, beyond the mechanics of lawyering skills.¹⁰ Some of these questions are intimate and even spiritual. What is a meaningful life, looking back from the vantage point of old age?¹¹ What did the client's children or grandchildren do that made the client so fond of them—or not so fond? How does the client see the coming years of life? What kind of death does the client hope to have? When is an older client being generous, and when is the client being manipulated to be generous?¹²

Other big questions faced by clinic students relate to the law itself. How far should the law go in its role as protector of the vulnerable? At what point is this protector role countered by respect for the older person's autonomy? Where should we draw

differences in cultural beliefs in making client competency determinations).

10. See generally Grant P. Wiggins & Jay McTighe, *Understanding by Design* (2d ed., Assn. for Supervision and Curriculum Dev. 2005) (lamenting that most educational curricula lack a "big ideas" approach to the overall learning process). I do not mean to diminish the value of teaching lawyering skills. One of our students, now a Superior Court Judge in North Carolina, when asked what he got out of his experience in the Elder Law Clinic, put it this way: "I want to be like Atticus Finch, who was described as a lawyer who '[c]an make somebody's will so airtight can't anybody meddle with it.'" Ed Wilson, Remarks, (1993) (quoting Harper Lee, *To Kill a Mockingbird* 120 (Grand Central Publishing 1960)).

11. After teaching in the University of Hawaii's Elder Law Clinic for four years, Calvin G.C. Pang writes: "Our elderly clients have done things that gave us cause to think beyond the obvious, moving us to reflect on the humanness of our clients, our adversaries, and ourselves, and on the things we seek to become whole. In those reflections, we stumble on opportunities to at least consider the spiritual dimension of what we do." Calvin G.C. Pang, *Eyeing the Circle: Finding a Place for Spirituality in a Law School Clinic*, 35 *Williamette L. Rev.* 241, 262 (1999).

12. An excellent case for discussion is the recent dispute in France between eighty-seven-year-old Liliane Bettencourt and her daughter, Françoise Bettencourt-Meyers, over Liliane's gifts of approximately \$1.86 billion of her over \$13 billion in assets to a younger male friend of many years. See Doreen Carvajal, *A Fight over the Legacy and Image of the L'Oreal Heiress*, *N.Y. Times* (June 29, 2010) (discussing Liliane Bettencourt's dilemma); Doreen Carvajal, *Generous to a Fault?* *N.Y. Times* (Aug. 23, 2009) (chronicling the same). In a short exercise in our clinic's weekly class, students are assigned in pairs to make a mock appellate argument. One side represents the daughter in arguing that the mother is a victim of elder exploitation. Another side represents the mother in arguing that she should be free to give her money to this friend. Other students play the role of the judges, questioning the implications and probing the weaknesses of each side's position.

the line between an individual's responsibility to plan for old age and society's duty toward its older members? And where does family responsibility fit in? Is there a place in the law for "filial responsibility," or does the responsibility run only from parents to their minor children?¹³ When has an older person been unduly influenced by someone? Did the older person use financial assets to buy attention, or was he or she manipulated?

In some cases, the big question is whether the client is competent to direct the legal advisor, which might be a threshold issue, or to competent to sign a document. In this situation, students must carefully assess the facts using thorough investigation and "due diligence" for the client's protection. Occasionally, a medical evaluation is arranged or the student seeks an opinion from the client's physician. With the client's permission, the student may consult relatives or friends before moving forward. The cases might involve small amounts of property, but the overall process of assessing capacity and evaluating a client's situation is a fundamental skill in the practice of Elder Law.

For law students, one of the significant questions is whether they will find a job after law school, so having a professor who is active in the practicing Elder Law bar can be helpful. Lawyers who are looking to add an Elder Law component to their firms sometimes prefer to hire a new or recent graduate to develop the practice, particularly one with clinical experience, rather than learning the field themselves.

C. The Challenges of an Elder Law Clinic

Often, the same things that make the clinical teaching of Elder Law a rich experience also make it challenging. Face it: practicing law is messy. On top of that, older clients sometimes

13. See generally Seymour Moskowitz, *Filial Responsibility Statutes: Legal and Policy Considerations*, 9 J.L. & Policy 709 (2001) (discussing filial responsibility statutes and the policies that underlie such statutes); Allison E. Ross, *Taking Care of Our Caretakers: Using Filial Responsibility Laws to Support the Elderly beyond the Government's Assistance*, 16 Elder L.J. 167 (2008) (examining filial responsibility laws and analyzing why they are not actively enforced); Katie Wise, Student Author, *Caring for Our Parents in an Aging World: Sharing Public and Private Responsibility for the Elderly*, 5 N.Y.U. J. Legis. & Pub. Policy 563 (2002) (examining whether the responsibility to care for the elderly should fall on the state or on the families of elderly individuals and which state institutions are best suited to take on the responsibility of caring for the United States' elderly population).

have transportation issues, communication issues, and pressure from family, perhaps while coping with emotional, mental, and physical weakness. Their family members are often having difficulty adjusting to the caregiver roles in which they find themselves. Just juggling the appointments with the Elder Law clinic is difficult for the older clients' children, who often have their own children and full-time jobs.

For clinical professors and students, it is a challenge to keep up with the laws, particularly regarding Medicaid and other federal benefits. Tough decisions must be made on how broad a range of cases to undertake, and how to triage the inevitable excess of cases.

All clinics face the challenge of balancing the students' needs with the desire to serve more clients. Students require more time to figure things out and need time to reflect on their experiences. Reflection skills will allow them to become lifetime learners.¹⁴

Diplomacy and boundary-setting skills are useful for all lawyers; they are essential in the Elder Law practice. Because older clients often have actively involved adult children, students have to learn how to manage that involvement. This is precisely the type of skill that cannot be effectively taught in just the classroom setting. If students do not make clear who the client is, there is a risk that the older person's "voice" will not be heard.¹⁵ Including family members in the interview can also breach the attorney-client privilege, unless certain limited exceptions apply.¹⁶ Another

14. See generally Donald A. Schön, *The Reflective Practitioner: How Professionals Think in Action* (Basic Books 1983) (examining the professions of engineering, architecture, psychotherapy, management, and town planning, and concluding that practitioners will learn and do more through regular, active reflection on their methods and goals); Stuckey et al., *supra* n. 3, at 173. In many clinics, one way this is done is to require the students to complete weekly journals. Some of the ways that students in Wake Forest's program are encouraged to reflect on their experience are discussed later, *infra* Part IV.

15. See Gregory S. French et al., *Aspirational Standards for the Practice of Elder Law with Commentaries*, 2 NAELA 5, 19–20 (2005) (stating that the National Academy of Elder Law Attorneys' (NAELA) aspirational standards require attorneys representing elderly clients to speak directly with an elderly client about the representation even though the client might be represented by a third party); Ann Juergens, *Teach Your Students Well: Valuing Clients in the Law School Clinic*, 2 Cornell J.L. & Pub. Policy 339, 368–369 (1993) (stating that legal educators should teach students to listen to the client's voice in order to provide the most effective legal strategy).

16. See Roberta K. Flowers, *To Speak or Not to Speak: Effect of Third Party Presence on Attorney Client Privilege*, 2 NAELA J. 153, 161 (2006) (stating that if a client chooses to have a third party present during communication with his or her attorney, even if the third party is a spouse, family member, or friend, then the communication will not be

downside to including relatives is that it can complicate decision-making and lead to hard feelings when the adult children find that they are not the final decisionmakers. While it is certainly up to the client to decide to whom disclosures can be made, students must learn to do more than give lip service to who the client is. Saying, "Your mother is my client and she will make decisions," and then failing to protect the client's right to the student's undivided attention, is confusing to families and disempowering for older clients. There is no perfect protocol in these matters.¹⁷

It is a challenge to teach practical judgment.¹⁸ Students are not always aware that judgment is a part of good lawyering. Building their "judgment muscle" is a challenge in the Elder Law clinic.¹⁹ In assisting older clients and their families, an attorney is often using experience and instinct to assess the situation. It is the difference between "Can the client do this?" and "Should the client do this?"²⁰ For example, consider the client who wants to know if she has the right to return home from a long-term care facility. The client may have the legal right to leave, perhaps, but

protected by attorney-client privilege).

17. Further discussion of ethics issues in the teaching of Elder Law appears later in this Article, *infra* Part III. See also French et al., *supra* n. 15, at 7–9 (discussing the duties and ethical obligations Elder Law attorneys owe to their clients). Some experienced Elder Law attorneys favor a more "communitarian" or inclusive approach in the representation of older clients. A. Frank Johns, *Multiple and Intergenerational Relationships*, 2001 Prof. Law. Symposium Issues 7, 21 (2001); Russell G. Pearce, *Family Values and Legal Ethics: Competing Approaches to Conflicts in Representing Spouses*, 62 Fordham L. Rev. 1253, 1294–1301 (1994).

18. Both clinical professors and clinic students can lose sight of the potential the students are capable of, even before the students start in the clinic. The professor should reassure students that they have a lot to offer, even before they become proficient in the law. Students come into our programs with strengths such as personal warmth, calm demeanor, enthusiasm, listening skills, and commitment to community service. They may have empathy, great recall for details, facility with numbers and complex data, skills as a succinct and engaging writer, or natural ability in oral advocacy. In the Elder Law clinic, as in all clinics, it is important to recognize the students' strengths, without coddling them or becoming overly solicitous.

19. See generally Steven Keith Berenson, *Can We Talk? Impediments to Intergenerational Communication and Practice in Law School Elder Law Clinics*, 6 Elder L.J. 185 (1998) (proposing that Elder Law clinics create a space for older and younger generations to have productive "dialogic encounters" about policy issues).

20. The pressure to do something just because it can be done is well known as a tension in medical practice. One geriatrician told the Author he was taught that sometimes the best advice is, "Don't just do something, stand there!" Apparently, this phrase is used by other geriatricians. See e.g. Jennifer Kearney-Strouse, *Don't Just Do Something, Stand There*, <http://www.acphospitalist.org/archives/2008/07/elderly.htm> (2008) (noting the use of the phrase in clinical practice).

from a practical perspective, returning home might be unrealistic. The student needs to be able to present legal advice while providing a reality check and a sympathetic ear.²¹ A more-common situation is when the client wants to appoint a “new friend” and revoke a longstanding power of attorney to a relative. Usually, the relative is honest but not communicating what is being done or simply not visiting the client enough!

Now and again, a student comes along who expects to be told every sentence he should say to a client, as if the clinical professor keeps the “script” in the office. Of course, clients have all kinds of stories and decisionmaking approaches, as do students. It can be helpful to role-play, encouraging the student to play out some of the ways the discussion could go. After doing this several times, and resisting the urge to ask the clinician to spell out how the counseling might be handled, students become more self-reliant and confident.

Some challenges of being an Elder Law clinician do not relate to the students or to the clients.²² One concern is the unequal

21. As one practitioner states:

In order to treat the patient, the clinician must be able to move back and forth between detached analysis of the medical condition and emphatic engagement with the distressed patient. Medical education clearly demonstrates that this clinical habit of mind can, like analytic thinking, also be developed within a formal education program.

Stuckey et al., *supra* n. 3, at 68; see also Mark Neal Aaronson, *We Ask You to Consider: Learning about Practical Judgment in Lawyering*, 4 Clin. L. Rev. 247, 249 (1998) (emphasizing the importance of clinical education in teaching students to be “responsible and thoughtful practitioners”). For other important articles related to teaching professional judgment, see generally Gary L. Blasi, *Teaching/Lawyering as an Intellectual Project*, 14 J. Prof. Leg. Educ. 65 (1996) (examining the nature of lawyering and the role of skills training in legal education); Gary L. Blasi, *What Lawyers Know: Lawyering Expertise, Cognitive Science, and the Functions of Theory*, 45 J. Leg. Educ. 313 (1995) (suggesting lawyers now have heightened abilities to relate judgment, wisdom, and expertise to the theory of lawyering practice); Paul Brest & Linda Krieger, *On Teaching Professional Judgment*, 69 Wash. L. Rev. 527 (1994) (discussing the reintegration of the profession’s ideals with gaining public trust through education).

22. Also, as lawyers based in a university setting, Elder Law clinicians are perceived as having expertise and time on their hands. Everyone has an elderly relative, friend, neighbor, or church member. Calls come from professors, from students with ailing grandparents in other states, from members of the extended university “family,” and from the professor’s own neighbors, friends, and church members. Elder Law clinicians must decide where to set the limits to best serve their actual students and clients. It is useful to have support staff refer callers to the clinic’s Web site, to alumni who practice Elder Law, and to organizations such as the National Elder Law Foundation, which certifies Elder Law attorneys. See National Elder Law Foundation, *Homepage*, <http://www.nelf.org/> (accessed Jan. 7, 2011) (providing online information on becoming a certified Elder Law attorney).

treatment of clinical teachers compared to doctrinal faculty, in much of the legal academy.²³ Some clinical professors excel in their field of practice, but still are not accorded the status and benefits of the doctrinal faculty, such as the right to vote on hiring or promotion decisions, or the right to take a sabbatical.²⁴ Fortunately, the vibrancy of the Elder Law field and the increasing demand for Elder Law expertise help make this less frustrating. Also, the new focus on experiential learning in law schools will help to improve the position of Elder Law clinicians. The clinical teaching and the Elder Law communities are both strong, so Elder Law clinicians have these sources of support.²⁵

The marginalization of Elder Law clinicians and adjuncts may be slowing the development of the field of Elder Law in the legal academy.²⁶ Many Elder Law professors are not in the traditional tenure system, according to the study by Kohn and Spurgeon. This, they suggest, has resulted in a lack of Elder Law scholarship in top general law reviews and in the journals of

23. ABA accreditation rules require only that law schools provide their clinical faculty with the functional equivalent of tenure, usually through long-term, presumptively renewable contracts. Section 405(c) of the ABA Standards and Rules of Procedure for Approval of Law Schools states: "A law school shall afford to fulltime clinical faculty members a form of security of position reasonably similar to tenure, and non-compensatory perquisites reasonably similar to those provided other fulltime faculty members." *Standards and Rules of Procedure for Approval of Law Schools 2010–2011*, *supra* n. 3, at § 405(c), 32. Many law schools also provide tenure for clinical faculty.

24. Nina W. Tarr, *In Support of a Unitary Tenure System for Law Faculty: An Essay*, 30 Wm. Mitchell L. Rev. 57, 58 (2003); Bryan L. Adamson et al., *Report and Recommendations on the Status of Clinical Faculty in the Legal Academy* (Wash. U. Sch. L. Working Paper No. 10-06-07, 2010).

25. See generally e.g. ABA Commn. on L. and Aging, <http://new.abanet.org/aging/Pages/default.aspx> (accessed Jan. 7, 2011) (listing upcoming events and information); Clinical Legal Education Association (CLEA), *Welcome Page*, <http://www.cleaweb.org/index2.php> (accessed Jan. 7, 2011) (offering networking and support to legal clinicians); Natl. Acad. of Elder L. Attorneys (NAELA), *Homepage*, www.naela.org (accessed Jan. 7, 2011) (listing upcoming events and information); Sec. on Clinical Leg. Educ. of the Assn. of Am. L. Schools (AALS), *Homepage*, <https://connect.aals.org/p/co/ly/god=85> (accessed Jan. 7, 2011) (providing legal education services and resources to members). Most state bar associations also have an Elder Law section. NAELA sponsors a writing competition for students and provides for free or low-cost attendance for students at some of its continuing legal education events. For more information, contact Meredith Hansen at NAELA, mhansen@naela.com. NAELA, *Elder Law Writing Competition*, http://www.naela.org/App_Themes/Public/PDF/Membership%20forms%20and%20PDFs/NAELA2010StudentWritingCompetition.pdf (accessed Jan. 7, 2011).

26. See Lawrence A. Frolik, *The Developing Field of Elder Law Redux: Ten Years After*, 10 Elder L.J. 1, 12–13 (2002) (noting that the hiring of private practitioners to teach Elder Law as adjuncts puts the field on "fringe" of legal academia).

related disciplines.²⁷ It has also limited the integration of Elder Law issues into the non-Elder Law curriculum.²⁸

Two other challenges for Elder Law clinics involve the risk of political interference with the program. Occasionally a clinic represents clients regarding problems in long-term care facilities, landlords, or other businesses. One slumlord insisted to me, once, that he would have our program shut down, because he was a “big donor to the university.” The flip side of this influence peddling can also be a problem: businesses with different positions from the low-income elderly client population want to ally themselves with the Elder Law clinic. The clinician needs to assess whether the Elder Law program will be used primarily as “do gooder” window dressing for corporate interests. Setting up the appropriate relationship can lead to a win-win situation for donors and the clinic.

II. WAKE FOREST ELDER LAW CLINIC: THE HEALTHCARE SETTING

Few places are more confusing and alien to the public than the world of hospitals, nursing homes, and other health-related services that older people need. Exposing clinic students to this complex world offers them a skills set that is invaluable when they begin to serve older clients. As federal healthcare expands, there are likely to be even more opportunities in the coming years to help people navigate the new system. The program in place at Wake Forest University is preparing law graduates to fill this role.

A. History and Overview

In the late 1980s, Wake Forest University in Winston-Salem, North Carolina, developed a proposal for a multidisciplinary center on aging. Under the leadership of Robert K. Walsh, then the dean of the law school, and Dr. Richard Janeway, then the dean of the medical school, the center was to include a law school clinic to teach law students and serve older clients. The guiding concept was that the problems of older people would be best addressed by

27. Kohn & Spurgeon, *supra* n. 1, at 430–431.

28. *Id.* at 431.

a team approach, rather than having discrete silos of expertise that do not communicate with each other.²⁹ Named after a former CEO of R.J. Reynolds Company J. Paul Sticht,³⁰ the Center includes physicians, pharmacy experts, social workers, and pastoral-care providers. Research, teaching, inpatient care, and outpatient clinics are provided, along with rehabilitation services and inpatient adult psychiatry. The goal of the new legal clinic was to teach and to provide legal help to the underrepresented, an aim that fit well with the Wake Forest motto “Pro Humanitate,” or “For Humanity.”

Located just five miles away from Wake Forest University’s main campus and law school, the J. Paul Sticht Center on Aging and Rehabilitation gives law students a unique opportunity to learn from medical school faculty as well as the other professionals who serve older clients.³¹ For example, many Elder Law

29. See generally *Handbook of Geriatric Assessment* (Joseph J. Gallo et al. eds., 4th ed., Jones & Bartlett Publishers 2006) (emphasizing the importance of a multidisciplinary approach in the assessment and treatment of the elderly patient); Alan M. Lerner & Erin Talati, *Teaching Law and Educating Lawyers: Closing the Gap through Multidisciplinary Experimental Learning*, 96 Intl. J. Clinical Leg. Educ. (2006) (extolling the benefits of an interdisciplinary legal education); Kate Mewhinney, *Is There a Lawyer in the House? Wake Forest’s Medical/Legal Collaboration*, 3 Claude D. Pepper Older Am. Indep. Ctr. Rep. 1 (Winter 2002) (copy on file with Author) (describing the benefits of having a legal clinic attached to the medical center).

30. Mr. Sticht (pronounced “sticked”) provided the funding to establish the Sticht Center. Wake Forest U. Baptist Med. Ctr., *History and Mission*, <http://www.wfubmc.edu/Research/Gerontology-and-Geriatrics/Sticht-Center/History-and-Mission.htm> (updated Oct. 18, 2010).

31. At the University of Hawaii’s Elder Law Program, students from the medical, nursing, and social work schools are allowed to take the Elder Law course. The program plans on expanding its partnerships with the healthcare community to better integrate services. Email from James Pietsch, Prof. of L. and Adj. Prof. of Geriatric Med., Univ. Hawai’i Manoa, to Author, *Your Wisdom about the Clinical Teaching of Elder Law* (June 19, 2010, 12:49 a.m. HST) (copy on file with *Stetson Law Review*).

The University of Alabama is also known for its strong medical-legal collaboration. It partners with the University’s Psychology Department’s Geropsychology Research Service. Its medical partners provide evaluations for the clinic on capacity issues and occasionally testify in the clinic’s cases. The clinic also participates in some elder research with the Geropsychology Research Service. Email from Hugh Lee, *supra* n. 2.

At Syracuse University, the Elder Law clinic is developing a partnership with the State University of New York (SUNY) Upstate Medical University, taking referrals from the Syracuse Medical-Legal Partnership (SMLP). The clinical professor has done some joint training for law and medical students, and is working on a partnership with the Visiting Nurses. The program also gets referrals from upstate social workers, independent from the SMLP, and from the Veteran’s Affairs hospital social workers.

With the leadership of the National Center on Medical-Legal Partnerships, it is likely that more law schools will develop collaborative relationships with the medical field. For example, Loyola/Chicago University’s Elder Law program will enroll students starting in

courses teach students the laws on living wills and healthcare powers of attorney.³² In Wake Forest's program, the students actually assist clients in completing these, resulting in a richer understanding of end-of-life issues through an immersion in the medical world. They may tour an intensive care unit with a physician who has years of experience advising patients and families on end-of-life decisions. A pastoral-care chaplain helps the law students understand the common religious and spiritual responses to the dying process. A palliative-care physician or the medical director of a large hospice program teaches our law students about both healthcare coverage issues and the wide range of services offered by palliative-care and hospice programs. Finally, some students get to observe the ethics consult team analyzing

January of 2011, and will be collaborating with social-work students at the Community Health Center, with University of Chicago medical students, and with the Public Health program at both the University of Chicago and Northwestern University. It will also collaborate with Project Health. Email from Mary Helen McNeal, Prof. and Clinical Dir. Syracuse Univ. College L., to Author, *Your Wisdom about the Clinical Teaching of Elder Law—20 Questions* (May 25, 2010, 1:41 p.m. EDT) (copy on file with *Stetson Law Review*).

Elder Law often requires social-work expertise, and some private firms now have geriatric care managers on staff. The Pittsburgh program has limited use of a master's level social worker (MSW), due to:

[F]unding from an ongoing donor who endowed a joint lecture for the School of Social Work and the Law School . . . The MSW [] does not have an academic appointment [and] is not associated with the University, but maintains her own private practice. She participates in [the clinic's] case rounds sessions and is available for consultation otherwise.

Email from Martha M. Mannix, Clinical Assoc. Prof. of L. & Co-Dir. of Clinical Programs, Dir. John P. Gismondi Civ. Litig. Certification Program, Univ. Pitt. Sch. L., to Author, *Your Wisdom about the Clinical Teaching of Elder Law—20 Questions* (June 21, 2010, 1:45 p.m. EDT) (copy on file with *Stetson Law Review*).

While multidisciplinary collaboration can benefit clients and teach valuable skills to law students, clinics need to be aware that different ethical standards might apply to the different professions. See Alexis Anderson et al., *Professional Ethics in Interdisciplinary Collaboratives: Zeal, Paternalism and Mandated Reporting*, 13 Clin. L. Rev. 659 (2007) (proposing solutions to the ethical differences between the legal profession and social workers); A. Frank Johns, *Multidisciplinary Practice and Ethics, Part II—Lawyers, Doctors, and Confidentiality*, 6 NAELA J. 55 (2010) (discussing how the differences in ethics codes in the legal and medical profession may serve as impediments to serving the same patient/client); A. Frank Johns, *Multidisciplinary Practice and Ethics, Part I—Lawyers, Doctors, and Confidentiality*, 5 NAELA J. 123 (2009) (discussing the differences between the legal and medical codes of ethics and the confidentiality boundaries established by each code).

32. Our program started in 1991, the same year the federal law went into effect that mandates that hospitals and other providers that receive federal funds provide information to their adult patients about the advance medical directives in their state. Patient Self-Determination Act, Pub. L. No. 101-508, § 4206, 104 Stat. 1388 (Nov. 5, 1990) (codified as amended in scattered sections of Title 42 of the United States Code).

and making recommendations on end-of-life disputes in the medical center.

The law school's program was initially named "The Clinic for the Elderly" and was renamed "The Elder Law Clinic" after about ten years.³³ The various branches of the Sticht Center were originally in a variety of university locations.³⁴ After a forty million dollar building was completed in 1997, on the medical school's campus,³⁵ Wake Forest's Elder Law Clinic moved into a suite on the ground floor. Its neighbors in the building include two outpatient clinics: a memory-assessment program³⁶ and a geriatric assessment clinic.³⁷ The Sticht Center is physically connected to the large tertiary care hospital Wake Forest University Baptist Medical Center.³⁸ The Sticht Center is a vibrant and well-regarded center for teaching, research, and clinical care.

Wake Forest seems to have anticipated the recent trend in law school clinical education to partner with the medical community but is not alone in doing this type of collaboration.³⁹ The

33. The name change was aimed at aligning the program name with the common name of the field as it appears, for example, in the name of the National Academy of Elder Law Attorneys.

34. The heart of the Sticht Center's research effort is the Claude D. Pepper Older Americans Independence Center, one of the first three named by the National Institute on Aging. A major area of growth is research from the Kulynych Center for Memory and Cognition Research that focuses on the relationship between chronic disease and memory impairment. In 2007, Wake Forest Baptist was named a Center of Excellence in geriatric medicine and training by the John A. Hartford Foundation. Wake Forest U. Baptist Med. Ctr., *Hartford Center of Excellence*, <http://www.wfubmc.edu/School/Gerontology/Hartford-Center-of-Excellence.htm> (updated Dec. 9, 2010).

35. *Id.*

36. Wake Forest U. Baptist Med. Ctr., *Roena B. Kulynych Center for Memory and Cognition Research*, <http://www.wfubmc.edu/Research/Roena-B--Kulynych-Center-for-Memory-and-Cognition-Research.htm> (updated Sept. 23, 2010).

37. Wake Forest U. Baptist Med. Ctr., *Geriatric Outpatient Clinic*, <http://www.wfubmc.edu/Gerontology-and-Geriatrics/Geriatric-Outpatient-Clinic.htm> (updated Oct. 1, 2010).

38. The largest employer in the county, with over ten thousand employees, Wake Forest University Baptist Medical Center has over nine hundred hospital beds. Wake Forest U. Baptist Med. Ctr., *Fact Book 2009* (Wake Forest U. Off. of Pub. Rel. and Mktg. 2009). The hospital has a fulltime medical staff of 713, all of whom are faculty members of Wake Forest University School of Medicine, plus 612 residents, and more than two thousand nurses. *Id.*

39. See Katherine C. Pearson & Lucy Johnston-Walsh, *Partners in Outreach and Advocacy: Interdisciplinary Opportunities in University-Based Legal Clinics*, 11 J. Higher Educ. Outreach & Engagement 163 (2006) (examining the Dickinson School of Law's, at Pennsylvania State University, application of an interdisciplinary approach to clinical education); Jane R. Wettach, *The Law School Clinic as a Partner in a Medical-Legal Part-*

original medical-legal partnerships, or “MLPs,” addressed the needs of children and families, wherein loss of federal benefits or the existence of unsafe rental housing was hurting the children’s health. Their goal was to address “social determinants of health.”⁴⁰

For older clients, there are certainly many areas in which medical and legal needs are concurrent. These involve three primary arenas: questions of mental capacity in guardianship and testamentary capacity cases; healthcare coverage issues under Medicaid, Medicare, and private insurance; and end-of-life care that implicates advance directives and medical standards of care.⁴¹

At Wake Forest’s program, the collaboration between my medical school colleagues and me has been educational for all of us, and helpful for the clients and patients we serve. Most impor-

nership, 75 *Tenn. L. Rev.* 305 (2008) (proposing that law students need to learn cross-disciplinary understanding as part of clinical legal education). See *infra* Part II(B) for more about other programs in medical-legal partnerships.

40. Ellen Cohen et al., *Medical-Legal Partnership: Collaborating with Lawyers to Identify and Address Health Disparities*, 25 *J. Gen. Internal Med.* S136, S136 (2010) (discussing the purpose and application of medical-legal partnerships); Kathleen Conroy, Megan Sandel & Barry Zuckerman, *Poverty Grown Up: How Childhood Socioeconomic Status Impacts Adult Health*, 31 *J. Dev. & Behavioral Pediatrics* 154 (2010) (discussing the impact of clinical innovations on improving childhood healthcare and health as an adult); Wettach, *supra* n. 39.

41. The ABA has recognized the value of medical-legal partnerships and recently established a department to promote them. The mission of the Medical-Legal Partnerships Pro Bono Support Project is stated as follows:

Medical-legal partnerships integrate lawyers in a healthcare setting to help patients navigate the complex legal system that often holds solutions to many social determinants of health—income supports for food[-]insecure families, utility shut-off protection during cold winter months, and mold removal from the home of asthmatic children. Doctors and lawyers are now partnered at over 120 hospitals and health centers nationwide, serving children, the elderly, patients with cancer, pregnant women, the formerly incarcerated reentry community[,], and other vulnerable populations. Medical-legal partnerships receive *pro bono* assistance from dozens of law firms and lawyers across the [United States]. The Project will develop a national support center to further extend the reach of this exciting legal services delivery model both in terms of targeted patient populations and the variety of medical and legal partners involved. In particular, the need for *significant engagement by the private bar in supporting the medical-legal partnership model is seen as critical to the growth of these projects across the country.*

ABA Standing Comm. on Pro Bono and Pub. Serv., *Center for Pro Bono Projects*, http://www.abanet.org/legalservices/probono/nav_projects.shtml (updated Nov. 6, 2008) (italic emphasis in original, bold emphasis omitted). There are now over 225 medical-legal partnerships in the national network. Natl. Ctr. for Med. Leg. Partn., *About Us*, <http://www.medical-legalpartnership.org/about-us> (accessed Jan. 8, 2011).

tant, the law students learn about the medical world their clients are encountering.⁴² The class session on mental-capacity issues of older people is taught by medical school faculty members from the departments of geriatrics, neurology, or psychiatry. Our class session on end-of-life issues has included hospital chaplains and ICU physicians. Each student spends half a day in a multidisciplinary-assessment program focused on memory problems and functional abilities.⁴³ Other interactions include the student going to see at least one client who is a patient in the hospital and going with me

42. We also invite the geriatricians or the geriatric fellows to observe guardianship hearings, having obtained court permission to do so.

43. Students are required to complete the following questionnaire after their participation in the medical-assessment clinic:

- (1) What brought the patient in to the hospital?
- (2) What was the mental-competency issue of the patient you saw?
- (3) What was the result of the mental screening test? _____ (Give #)
Were you surprised?
- (4) Aside from the formal "mini-mental status exam," did you notice any subtle ways that the team member used to check the patient's mental capacity? What phrases or responses did the team member use to get the patient to elaborate or talk more?
- (5) Did the patient cover-up and compensate for loss of mental capacity? How?
- (6) What possible causes of the loss of mental capacity did the physician discuss?
- (7) What concerns were expressed by family members? What feelings?
- (8) What were the family dynamics when faced with the older person's health and mental frailty? How did they feel? How did the doctors respond?
- (9) How did the doctor's method of dealing with the patient's family compare with an attorney's way of dealing with the elderly client's family?
- (10) What medical or social support issues did you learn about?
- (11) What are your observations about the "bedside manner" (interviewing skills, empathy, trust-building...) of the doctor and other professionals?
- (12) Were there issues involving the medication the patient was taking?
- (13) How is the assessment service "reimbursed" or paid for through the Medicare system? (You may need to ask the physician about this if it doesn't come up.)
- (14) Do you feel this experience will enhance your ability to serve elderly clients, particularly elderly frail clients, and if so, how?
- (15) Even if you did not discuss legal issues with the patient, what legal ramifications or questions were raised and what legal issues would be likely results of the patient's condition?
- (16) Do you have any suggestions on how we can improve the experience that law students have at the medical clinic?

to participate in collaborations in which I am involved, including research projects⁴⁴ and the medical center's institutional review board (IRB).

Learning opportunities also are arranged as the need arises. For example, I am regularly court appointed to represent patients in guardianship actions. A few years ago, we had several cases in which electroconvulsive therapy (ECT) was the emergency treatment modality that was urgently recommended, but the patients were unable to make decisions and had no surrogates. To learn more about the ECT option, I arranged with the attending physician from the psychiatry department to allow me and several clinic students to observe ECT being administered. With the permission of mentally competent patients, the students and I got to see how minimally invasive and routine ECT had become.⁴⁵ To follow up on this experience, I invited a colleague at the medical center, geriatric psychiatrist Deirdre Johnston, M.D., to write an article for Elder Law attorneys about the benefits of ECT for some older patients.⁴⁶

A recent initiative for our clinic has been collaboration with the Psychiatry Department's Geriatric Outreach (GO) Program. The GO Program is an outreach service that brings mental healthcare to seniors who need it at home.⁴⁷ For those who meet Medicare criteria for home healthcare,⁴⁸ the GO Program service is covered by Medicare. GO Team members are physicians, nurse practitioners, social workers, and other healthcare professionals specializing in geriatric mental health. In addition to clinical service, the GO Program assists patients and their families in

44. See generally e.g. Christopher Colenda et al., *Variables Predicting the Completion of an Advance Directive by Older Adults*, 6 *Annals of Long-Term Care* 83 (1998) (reporting results of a study worked on by the Author).

45. As observers, we had to wear gowns, gloves, booties, and facemasks as the ECT environment must be kept sterile. The ECT Service is directed by Associate Professor Peter B. Rosenquist, M.D. Wake Forest U. Baptist Med. Ctr., *Electroconvulsive Therapy (ECT) Service*, <http://www.wfubmc.edu/Psychiatry-and-Behavioral-Medicine/Electroconvulsive-Therapy-Service.htm> (updated June 14, 2010).

46. D. Johnston, D. Eitel & W.V. McCall, *Electroconvulsive Therapy (ECT): An Introduction for Elderlaw Professionals*, 2002 *Elder's Advisor: J. Elder L. & Retirement Plan.* 4, 18–27. Dr. Johnston is now at the Johns Hopkins Medicine in Baltimore.

47. Wake Forest U. Baptist Med. Ctr., *Geriatric Psychiatry Outreach (GO) Program*, [http://www.wfubmc.edu/Psychiatry-and-Behavioural-Medicine/Geriatric-Psychiatry-Outreach-\(GO\)-Program.htm](http://www.wfubmc.edu/Psychiatry-and-Behavioural-Medicine/Geriatric-Psychiatry-Outreach-(GO)-Program.htm) (accessed Jan. 4, 2011).

48. U.S. Dept. of Health & Human Serv., *Medicare and Home Health Care* 6–7 (May 2010) (available at <http://www.medicare.gov/Publications/Pubs/pdf/10969.pdf>).

accessing community resources. The law students learn about these services and, in appropriate cases, can assist caregiver spouses by advising about surrogate decisionmaking options, such as becoming a representative payee for Social Security income or seeking guardianship.⁴⁹

For me, there is a palpable comfort level when working in a teaching hospital. The medical school faculty members are teachers, like law faculty, but they also practice. Many do this while conducting research and writing. Medical school faculty members care for patients but also have many interactions with patients' families, so we also have that in common.

B. What the Medical-Legal Partnership Is Not

Initially, there was some misunderstanding about why a lawyer was being introduced into the Center on Aging. I was often asked about two legal concerns by the medical school faculty members.

First, physicians asked "*Am I liable if...*" and then described some common dilemma, such as whether to tell an older patient not to drive anymore or whether to allow the frail patient to return home after a hospitalization.⁵⁰ Second, the researchers wanted to know what could be done about the delays in getting research approved by the IRB.⁵¹ While these questions are rele-

49. At Wake Forest's program, law students are reminded of the duty of confidentiality before they observe in the medical setting. The medical learners, some of whom are students and some of whom are physicians in the fellowship program, are asked to sign a confidentiality agreement when they come to observe the law students meeting with clients. Other than that, no formal agreements have been entered into regarding ethical requirements of the different professions.

50. For example, while writing this Article, I was contacted by a hospice physician whom I had never met, asking whether it would be a HIPAA violation for the physician to report her concerns about a patient's driving to the Department of Motor Vehicles. I referred her to the state medical society and to a recent publication by the American Medical Association, the *AMA Physician's Guide to Assessing and Counseling Older Drivers*. See Am. Med. Assn., *Older Driver Safety*, <http://www.ama-assn.org/ama/pub/physician-resources/public-health/promoting-healthy-lifestyles/geriatric-health/older-driver-safety/assessing-counseling-older-drivers.shtml> (accessed Jan. 8, 2011) (explaining, among other topics, ethical and legal responsibilities of a physician in this situation).

51. Some of the medical staff members are clinicians who mainly see patients, and others are primarily involved in research. Human subject research must comply with federal rules aimed at protecting the people being studied. 42 U.S.C. § 289a-1 (2006); 45 C.F.R. § 46 (2009). Each institution must have an institutional review board, or IRB, that must decide whether to approve studies, and the process can take months, possibly costing

vant to law students who might one day represent healthcare providers, they are not the best way to teach students about the legal needs of underrepresented populations.

To prevent questions about liability from a medical partner, role clarification must be regularly addressed in medical-legal partnership clinics. Now, when I give presentations to physicians, I explain that they should consult with their own lawyers or with the Risk Management Department, which might (and often does) have somewhat different advice. When a young physician stops by Wake Forest's Elder Law Clinic for a "curbside consult," that is always the first piece of advice I give. The course of action that is most protective of the healthcare provider is not always the course of action that is best for the patient, who might be or want to be the clinic's client. For example, while a client/patient may want to return home from the hospital "against medical advice" or "AMA," the physician and hospital might have concerns about having made an inappropriate discharge plan.⁵²

To learn more about the IRB, I offered to become a member of the medical center's board. In the hospital where Wake Forest's clinic is based, the IRB has four panels of seventeen to twenty-one members each. By law, each panel must have at least two "non-scientists,"⁵³ so I filled one of those spots. Serving on the IRB for several years clarified the rights of research participants and shed light on research being the largest source of income for the medical school.⁵⁴ Several years later, to serve as the co-investigator on a project with a physician, I first had to take and pass an online training course on research ethics, which was quite rigorous.

the institution grant opportunities in the millions of dollars.

52. See Robert N. Swidler et al., *Difficult Hospital Inpatient Discharge Decisions: Ethical, Legal and Clinical Practice Issues*, 7 *Am. J. Bioethics* 23, 25–26 (2007) (noting that, with a patient who leaves AMA, the "central tension" presented to the healthcare team is a struggle between "autonomy and beneficence"). For a discussion of the applicable law from the patient advocate's perspective, see Alfred J. Chiplin, Jr., *Breathing Life into Discharge Planning*, 13 *Elder L.J.* 1, 13–30 (2005).

53. 21 C.F.R. 56.107(c) (2010).

54. Email from Mark Wright, Dir. of Commun., Wake Forest U. Baptist Med. Ctr., to Davis R. Powell, research asst., Wake Forest U. Sch. L., *Finances Question* (June 9, 2010, 2:40 p.m. EDT) (copy on file with *Stetson Law Review*).

C. Participation in Bioethics Policies and Consultations

At Wake Forest, I have been a member of the medical center's Ethics Committee for about fifteen years. By having input on the "do not resuscitate" policy and the policy on futile or non-beneficial care, I have been able to promote more patient-oriented policies. Law students have been allowed to observe the meetings, including the smaller "clinical consultation" meetings that generally involve specific patients.

In a hospital, some policymaking functions and dispute resolution functions are handled by ethics committees. This is particularly true regarding end-of-life care. Also, specific case consultations help reach conflict resolution for the healthcare team and the patient or his or her family.

III. THE CASES

Elder Law clinics come in all shapes and sizes. They vary in significant ways, including the number of semesters, hours per week, and types of cases handled.⁵⁵ The substantive focus may depend on what other clinics the school offers, on the interest and expertise of the supervising attorneys, and on the requirements of the clinic's funding sources.⁵⁶ Some programs, such as Wake Forest's and Thomas M. Cooley's Sixty Plus Elderlaw Clinic, are best described as general civil practice clinics.

The most common Elder Law matters handled in law school clinics are wills and advance directives,⁵⁷ consumer debt prob-

55. Teaching issues, such as credits, semesters, course materials, student selection, and related topics are addressed *infra* Part IV. Case selection and intake procedures are covered *infra* Part III(A).

56. This Article does not cover pro bono programs or the practicum elements of doctrinal Elder Law courses, or health law or disability law clinics that serve older people. Also, law students may help older people through the Volunteer Income Tax Assistance program, which offers free tax assistance to people whose income is below Earned Income Tax Credit (EITC) eligibility amounts for families and cannot prepare their own tax returns. See VITA, *Volunteer Income Tax Assistance 2009-2010*, <http://www.vita-volunteers.org/> (last modified Mar. 28, 2010).

57. There may not be as great a need for help preparing advance directives as there is for the other matters. This is because people can get help signing these (typically the healthcare power of attorney and a living will) if they enter a hospital or use a hospital's outpatient clinics. The federal Patient Self-Determination Act mandates that hospitals, nursing homes, and other healthcare providers that accept federal funds provide information to patients about their state's laws on advance directives. 42 U.S.C. §

lems, and government benefits questions (such as Medicaid, Medicare and Social Security).⁵⁸

A. Overview of Case-Selection Criteria

In Wake Forest's program, before the students arrive in the clinic, we send them a survey that asks about relevant work, volunteer, and course experience, career interests, and what types of legal work they would prefer not to handle. We also inquire about their work with lawyers or judges, to avoid conflicts of interest. Although the clinic generally does not handle real estate matters, except with regard to Medicaid or guardianships, if a student has an interest in real estate we would, for example, accept a case in which the client has a dispute with his or her homeowner's association. At Thomas M. Cooley's Sixty Plus Elderlaw Clinic, by contrast, students are assigned cases based on a random rotation.⁵⁹

Some clinics handle conservator or guardianship cases, but at least one—Syracuse—will not assist families in seeking guardianship over an older person.⁶⁰ Consumer debt cases seem to be on

1396a(w)(1)(A)(i) (2006). Also, most state forms are widely available and written to be user-friendly. See ABA Commn. on L. and Aging, *Health Decisions*, <http://new.abanet.org/aging/Pages/HealthDecisions.aspx> (accessed Jan. 8, 2011) (providing resources for state advance directive registries and other tools for advance planning).

58. Veterans' cases and immigration law matters are handled by a few Elder Law clinics. The Aid and Attendance ("A & A") benefit from the Veterans Administration (VA), for example, can bring in much-needed income for an older client, and many private Elder Law attorneys have begun to handle these claims. In order to handle VA "Aid and Attendance" cases, the clinical supervisor must attend training. 38 U.S.C. § 5904 (2006); 38 C.F.R. § 14.629 (2009). Students at Temple University handle Veterans benefits cases and, because of its location in Washington, District of Columbia, Catholic's program represents veterans from around the country before the United States Court of Veterans Appeals. At the University of Miami, the Health and Elder Law Clinic handles immigration status adjustment cases.

Valuable work is also done by clinics that are not limited to Elder Law. An important example is the work of Yale Law School's Lowenstein International Human Rights Law Project, where students helped to draft an international convention on the rights of older persons in collaboration with Global Action on Aging, a United Nations project, and the International Longevity Center. *Strengthening Older People's Rights: Towards a U.N. Convention*, <http://www.globalaging.org/agingwatch/convention/humanrights/Strengthening%20Rights%20%20-%5Bupdate%5D%20Low%20Res.pdf> (accessed Jan. 8, 2011).

59. Gary Bauer, *Sixty Plus Elderlaw Clinic: An Elder Law Teaching Model*, 81 Mich. B.J. 52, 52 (2002).

60. Email from Mary Helen McNeal, *supra* n. 31.

the rise, increasing the acceptance of these cases by clinics.⁶¹ Other types of cases include landlord-tenant, disability discrimination, pension issues, small estate administration, bankruptcy, real property disputes and title problems, and subsidized housing.⁶² At the Memphis clinic, students have also handled uncontested divorce, child support, and grandparent adoption and visitation.⁶³ At the Syracuse program, students handled quite a few power of attorney cases in 2009–2010 because of a new state statute. They also handled a property tax foreclosure case.⁶⁴

The Syracuse program does not handle probate matters,⁶⁵ nor does the Campbell University program, which started in 2010.⁶⁶ Due to its small size, Hawaii's program does not handle litigation, except petitions for guardianship or conservatorship, or adoption.⁶⁷ The program also limits its Medicaid counseling to basic information about qualification.⁶⁸ The Loyola program in Chicago, resuming in January 2011 after about a year of inactivity, will focus more on medical-legal partnership issues than on Elder Law, and will handle neither litigation nor probate.⁶⁹

At Catholic University's Advocacy for the Elderly program, a common type of consumer law case is the home improvement rip-off.⁷⁰ That program excludes foreclosures.⁷¹ According to the managing attorney, they also exclude "[a]ny case where I am likely to find myself pitted against a 500-member firm [because t]he better

61. Consumer and bankruptcy cases are discussed *infra* in Part III(I). See also Email from Donna S. Harkness, Prof. of Clinical L., Dir. Elder L. Clinic, U. Memphis Cecil C. Humphreys Sch. L., to Author, *Your Wisdom about the Clinical Teaching of Elder Law—20 Questions* (June 1, 2010, 2:39 p.m. DST) (copy on file with *Stetson Law Review*) (noting such an increase).

62. At Wake Forest, we have also filed Chapter 7 and Chapter 13 bankruptcies, state court suits alleging unfair debt collection practices, administrative complaints with state regulators of nursing homes and assisted living facilities, domestic violence protection cases (on behalf of a father against his abusive daughter), and even an adverse possession case.

63. Email from Donna S. Harkness, *supra* n. 61.

64. Email from Mary Helen McNeal, *supra* n. 31.

65. *Id.*

66. Fax from Roger Manus, Dir. Senior L. Clinic, Campbell U. Norman Adrian Wiggins Sch. L., to Author (June 24, 2010).

67. Email from James Pietsch, *supra* n. 31.

68. *Id.*

69. Telephone Interview by Davis Powell, Research Asst. at The Elder L. Clinic, with Emily Benfer, Dir. Health Just. Project (June 2010).

70. Professor Michael T. McGonnigal writes, "At one time, I was going to rename this the Bad Roof Clinic." Email from Michael T. McGonnigal, *supra* n. 2.

71. *Id.*

part of valor is discretion.”⁷² The program does handle Medicaid cases, but not the more-complex ones because “any complex planning usually requires a bond of trust with the rising generation. Trust usually is not in the equation in our cases.”⁷³ While the program originally aimed at serving “the frail elderly,” this no longer is its focus due to the limited amount of time available to evening students and the time-consuming nature of this client population.⁷⁴

In Pittsburgh’s Elder Law program, the primary cases handled are “[g]uardianships (generally representing petitioners)[,] simple estate planning[,], Medicaid advising[,], discharge of guardian[,], and] settlement of small estates (under \$25,000 with no real estate).”⁷⁵ According to Clinical Associate Professor Martha M. Mannix, “[N]ot only do the students need to develop the substantive knowledge in these areas, but [it is] often the ethical issues that arise that provide them with the most challenge[s].”⁷⁶ The students also handle some “defense of credit card claims or nursing[-]home bills ([such as third-party-guarantee] cases).”⁷⁷

At Southern Illinois University, the clinic “provides a full range of civil legal services to those [sixty] and over.”⁷⁸ The services included are “the drafting of simple wills and powers of attorney, [and] assistance with securing public benefits and entitlements including Social Security, Medicare, Medicaid[,], and Veteran’s benefits.”⁷⁹ The clinic also “handles family law (divorce, etc.) matters, consumer problems, and public utilities problems.”⁸⁰ The clinic also assists families with guardianships.⁸¹

72. *Id.*

73. *Id.*

74. *Id.*

75. Email from Martha M. Mannix, *supra* n. 31.

76. *Id.*

77. *Id.*

78. S. Ill. U. Sch. of L., *Clinics, Legal Services to Older Persons*, http://www.law.siu.edu/clinic_services/elderpublic2.asp (accessed Jan. 8, 2011).

79. *Id.*

80. *Id.*

81. *Id.*

B. Guardianships

Most Elder Law clinics handle guardianship adjudications.⁸² These are excellent teaching tools for several reasons. In many states, they proceed more quickly than traditional litigation, so a student can often handle a guardianship case from start to finish in one semester. The cases require good fact investigation, especially gathering of medical records, translating medical terms into plain English, and interviewing family members who may have strong views about the case and each other. Some cases are particularly challenging because it is unclear whether the marginally impaired person even needs a guardian or how extensive a guardianship is needed.⁸³ The court hearings are generally less formal than traditional litigation, so discovery and evidentiary rules are less important. On the other hand, the students can use formal discovery, evidentiary rules, and other civil procedural motions if the case calls for it.

In Wake Forest's program, students generally handle cases as court-appointed guardians ad litem.⁸⁴ Because guardianships

82. Pittsburgh's program sometimes handles the final steps of guardianship cases when the ward has died. This takes the form of either an account and audit or a petition to waive a final accounting. The cases are typically those in which the guardian was initially represented—years ago—by another attorney and in which the ward had limited funds. When the ward dies, the guardian has to close out the guardianship but may lack funds (his or hers, or the ward's) to pay an attorney. Email from Martha M. Mannix, *supra* n. 31. Our program occasionally handles other types of issues subsequent to the initial adjudication. For example, in a few cases, students have sought court permission to have a ward's home gifted to the guardian or other family members. See N.C. Gen. Stat. §§ 35A-1340, 35A-1341.1 (Lexis 2010) (outlining the legal process and prerequisites of gifting by an incompetent person with court approval). I believe our program handled the first case in the county using the statute allowing guardians to petition the court for permission to gift assets. Our first case was quite compelling because the guardian was the sole beneficiary under the ward's will, had moved from out-of-state and provided years of care for the ward, and had improved the home.

83. See Gary P. Bauer, *The Sixty Plus Estate Planning Clinic—Change is the Constant*, 10 Thomas M. Cooley J. Prac. & Clin. L. 107, 131–132 (2007) (noting how instances such as dealing with the guardianship of comatose patients pose complex questions for Elder Law students and “provide the greatest opportunity to explore and educate”).

84. In North Carolina, the State contracts with private attorneys to serve as court-appointed guardians ad litem for respondents (referred to in some states as the “alleged” or “allegedly incapacitated person”) in the event they do not hire an attorney. In Forsyth County, which is the primary county served by Wake Forest's Elder Law Clinic, a three-way Memorandum of Understanding (MOU) has been entered into each year between the local private attorney, the State's Office of Indigent Defense Services, and the clinical professor (copy on file with Author). Under this MOU, the private attorney who contracted with the State refers cases involving older adults to the clinical professor during the aca-

focus on health-related issues, they are perfect cases for us. As soon as the court papers are served on me, two dates are entered into the office's calendars: the hearing date and the deadline to request a multidisciplinary evaluation of the respondent/client.⁸⁵ This evaluation can be useful when there are only skimpy medical records about the respondent/client, often the situation for a respondent who lives in the community and not in a medical facility.

While it is not common to request a multidisciplinary evaluation, there are two primary benefits to keeping track of the deadline. First, the students see in their client's file that the clinic has a system in place to determine when the deadline is and that someone has the responsibility to enter this date on the office calendars. Second, when it appears advisable to file the motion, the students often encounter hostility from the court personnel. While the statutes provide the option of an evaluation, courthouse personnel—even those appointed to judge the case—may express frank hostility to using that option. When the student takes the motion to court for filing, he or she may find him or herself being grilled about it, with questions about using taxpayer money to pay for the evaluation!

When issues of capacity are contested, the student must cast a wide net to understand the situation. The students develop skills in fact investigation and then learn to record these in the file in a useable format. I might encourage the student to "be a sponge" and come back with every possible detail about the client, the people involved, the medical issues, family relationships, and so on. It is a challenge to seek a creative solution to the conflict, rather than merely following the litigation path, when the student is still mastering the jargon and procedures.⁸⁶ On occasion,

demio year. The court order appointing the private attorney is followed in these cases by an order that substitutes the clinical professor for the private attorney.

85. A clinic support staffer calls the sheriff's department to find out the date that the respondent was served a copy of the court papers, and enters this information into the file. By statute, any Motion for a Multidisciplinary Evaluation must be filed within ten days of that date. N.C. Gen. Stat. § 35A-1111(a) (Lexis 2010).

86. We try to teach students to see beyond the mechanics of litigation and to get a sense of the goals and concerns of each side. "Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser—in fees, expenses, and waste of time. As a peacemaker the lawyer has a superior opportunity of being a good man. There will still be business enough." Abraham Lincoln, *Notes for a Law Lecture*, in *Collected Works of Abraham Lincoln* vol. 2, 81 (Roy P.

the take-home lesson is that the guardianship was not filed because the person's mental status changed. Rather, it was filed because the family or community services reached the point in which they could or would do no more for that person at home. In other words, some cases are filed because the county or family wants to place the person in a "safe environment" and cannot afford to provide any more service at home. Is this "safety"—often illusory in facilities that house poor older people—more important than allowing a person to remain in his or her familiar surroundings? That is another question that students ponder as they work on these cases.

In our program, we sometimes get involved in a guardianship after the adjudication stage, or stay involved as the guardian's counsel after assisting the guardian in being appointed. Typically, when the client is guardian of the estate, this means arranging for the person to be bonded, as required by law,⁸⁷ and then preparing the initial property inventory and subsequent annual accountings.⁸⁸ These accountings continue until the ward is restored to capacity, uses up his or her assets, or dies.

C. Estate Planning and Probate

In our program, every student prepares several powers of attorney and two or three wills. The student is assigned a single person and, later in the semester, a married couple. If the student has a strong interest in estate planning, more cases will be assigned.

There are many more requests for wills than the clinic can accommodate. The Wake Forest program generally will draft a will only for a client who owns real estate, in order to focus on the clients who can benefit most from the clinic's services. Other clients are given written and verbal advice about how to prepare a handwritten will for personal property and how to designate a beneficiary on a bank account. Fortunately, the state laws provide for a simple and inexpensive estate administration for small estates of under \$20,000.⁸⁹ For these reasons, and because a per-

Basler ed., Rutgers U. Press 1953).

87. N.C. Gen. Stat. § 35A-1230 (Lexis 2010).

88. N.C. Gen. Stat. §§ 35A-1261, 35A-1264 (Lexis 2010).

89. See *infra* n. 100 (discussing statutory requirements of administration of estates

son can obtain a will for as little as \$100 in the area, students generally prepare only two or three wills during their semester. Clients who do not own real estate are assisted, however, with powers of attorney and advance medical directives.

In some cases, the client brings in a will that was either prepared in another state or that is simply very old. The clinic student might still recommend a new will, even when the will conforms to North Carolina law and reflects the client's current wishes (or, more likely, has alternative beneficiaries listed who reflect the client's wishes). The rationale for a new will is to take advantage of simpler probate options.⁹⁰

The other reason the student might recommend a new will is to suggest a testamentary supplemental needs trust. This allows a disabled beneficiary to inherit property without putting it directly into his or her name, thereby preserving eligibility for Medicaid and other needs-based benefits.⁹¹ Most clients choose to include such a provision.

The student starts the will interview by informally eliciting what is on the client's mind and how the client wants to leave property. We provide the student with a lengthy questionnaire to go through after that, to get more details, but encourage the student to allow him or herself to get "off track" as needed.

The student also reviews deeds to confirm the client's ownership interest. Occasionally, it turns out that the client only has a life estate and does not realize that it is no longer possible to select a beneficiary of the home. The student also goes over life-insurance-beneficiary designations and financial accounts that might be set up as "joint with right of survivorship" or as "pay on death" accounts. The student will caution the client about a possible future sale of the client's home. Specifically, if the client was to put the proceeds into an account that is payable on death to only one child (the one who helps with bill paying, typically), this may undo the plan that is set out in the client's will.

under \$20,000).

90. The state law was amended in 1977 to allow for "self-proving wills" which make the probate process simpler than it used to be. The self-proving procedure provides for notarization of the witnesses' signatures, and not just the testator's signature. This avoids having to locate the witnesses to have them confirm their signatures, or locate someone else to confirm the witnesses' signatures, if they have died and cannot be located.

91. 42 U.S.C. § 1396p(c)(2)(B)(iv) (2006).

In explaining powers of attorney, the student typically answers many questions or gently probes the client's concerns to get to those questions. Often the student needs to clarify such issues as whether the agent under the power of attorney will be "taking over" and what the agent will and will not be allowed to do. The student explains that the client has the option of including a power to make gifts of the client's assets, and discusses to whom gifts may be made.⁹² This is a difficult concept to explain to some clients. The student has to explain that one reason to consider the gifting option is to protect the client's assets from the costs of long-term care, especially nursing-home costs. Most clients do decide to include the gifting provision in order to take advantage of Medicaid rules on legally permitted transfers of property and to avoid Medicaid estate recovery.⁹³ Another option for the power of attorney that the student offers is specifically to bar any gifts. A third option is not to address the issue at all, which would allow the agent to file a court action asking to add a gifting power.⁹⁴

After the power of attorney is signed, the student provides a verbal and written explanation on how the document (and any other signed) can be revoked in the future. Clinic staff take care of the registration of the power of attorney with the appropriate

92. Typically, this provision would read: "To make gifts of my real or personal property or my interest in such property in ____ shares to my [spouse, children, grandchildren, stepchildren, etc], even if one of said individuals is acting as my agent. These gifts may be made for purposes of facilitating my eligibility for governmental benefits or assistance, to reduce overall estate or income taxes, or to reduce the effect of Medicaid estate recovery. Any such gifts shall be made upon the written advice of an attorney with knowledge and experience regarding these matters. These gifts may be made in such manner as my agent deems appropriate, including outright gifts, gifts in trust, and gifts to custodians for the minor under the North Carolina Uniform Transfers to Minors Act." N.C. Gen. Stat. §§ 33A-1 to 33A-24 (Lexis 2010).

93. Space does not permit a detailed discussion of Medicaid law. Suffice it to say that federal law allows gifts to a spouse, to a client's child who is blind or permanently disabled, and to a trust for the sole benefit of anyone under age sixty-five and permanently disabled. 42 U.S.C. § 1396p(c)(2)(B)(iv). It allows transfer of the client's home to the client's minor child. *Id.* at § 1396p(c)(2)(A)(ii). It also allows transfer of the client's home to the client's child who has lived in the client's home for at least two years prior to the client moving to a nursing home and who provided the client with care that allowed the client to stay at home during that time; and to a sibling who already has an equity interest in the house and who lived there for at least a year before the client moved to a nursing home. *Id.* at § 1396p(c)(2)(A)(iii)-(iv).

94. See N.C. Gen. Stat. § 32A-14.1 (Lexis 2010) (outlining statutory requirements for a power of attorney to authorize an attorney-in-fact to make gifts of any amount on behalf of the principal).

government office.⁹⁵ The student sends a copy of the executed power of attorney to each agent, with a detailed cover letter explaining the scope of the agent's powers and the limitations on those powers. Copies of these letters go to the client, with a closing or disengagement letter.

In addition to helping clients execute a healthcare power of attorney and a living will, each student explains the option of signing a medical privacy or HIPAA release.⁹⁶ Older clients often bring adult children with them to physician appointments or have them handle medical or insurance paperwork. Having the HIPAA release ensures that this goes smoothly, even while the client is still competent. The healthcare power of attorney, by contrast, is only effective to allow the adult child to get private medical information when the client cannot communicate.⁹⁷

Some Elder Law clinics give students the experience of handling probate matters.⁹⁸ These cases fit well into the training of those students who want to practice in the traditional estate planning sectors or in the small firm settings where probate is a part of the bread-and-butter caseload.

In our program, probate is only a small part of the caseload. The students occasionally handle the "spousal year allowance," which allows the surviving spouse to get \$20,000 free of the claims of creditors.⁹⁹ This might involve changing the deceased spouse's car title to the survivor or getting court authority to re-title the decedent's bank account to the survivor. Students also assist in the statutory procedure available for small estates that

95. Using a small grant from the North Carolina Bar Foundation, we are able to cover the registration costs for clients. The grant is also used to pay for deposition costs and copies of records, such as bank or medical records.

96. Health Insurance Portability and Accountability Act of 1996, or HIPAA, requires a signed consent form for the release of healthcare information. 45 C.F.R. 164.508 (2010).

97. See e.g. N.C. Gen. Stat. § 32A-20(a) (Lexis 2010) (delineating when a healthcare power of attorney will become effective by the determination of a physician or a psychologist). Many healthcare providers do not seem to understand the difference between a HIPAA release and a healthcare power of attorney, and will release information to healthcare agents even when the client is competent.

98. Our students assembled resources on estate planning for same-sex and unmarried couples. Wake Forest U. Sch. of L., *Resources and Links, Same-Sex and Unmarried Couples*, <http://elder-clinic.law.wfu.edu/resources/same-sex-and-unmarried-couples/> (accessed Jan. 8, 2011).

99. N.C. Gen. Stat. § 30-15 (Lexis 2010).

allows heirs to collect estate assets, regardless of whether there was a will.¹⁰⁰

D. Medicaid Counseling

Medicaid counseling and advocacy is a difficult area of law to handle, especially in a clinic. One Elder Law clinician reported that he handles Medicaid cases “with some trepidation.”¹⁰¹

1. *Why Do It?*

Some Elder Law clinics, including the clinic at Wake Forest, counsel clients about eligibility issues for Medicaid coverage of long-term care.¹⁰² The cost of this care, particularly at the nursing-home level, comes as a shock to many older people and their families.¹⁰³ They go scurrying for legal advice as they see a lifetime of savings being used up quickly. Other clients want to be proactive, having read or heard about the costs of nursing-home care, to prevent losing their property. It is common for us to get requests for help “to give my home to my children before I ever need nursing-home care.”

In the Civil Practice Clinic at Pittsburgh University, as well, many older clients want to sign over their homes to their children.¹⁰⁴ The students advise them of the Medicaid implications. Occasionally the client decides to proceed, and the students draft

100. This is available if the decedent's personal property value is not more than \$20,000 and there is no surviving spouse, and it increases to \$30,000 if there is a surviving spouse. N.C. Gen. Stat. §§ 28A-25-1, 28A-25-1.1 (Lexis 2010).

101. Email from Hugh Lee, *supra* n. 2.

102. This Subsection is focused on Medicaid for nursing home coverage, not for the program that provides benefits to people living at home. In Wake Forest's clinic, we start the students with some simple exercises to orient them to concepts of countable versus non-countable (or exempt) assets, spousal income and resource allowances, transfer-of-assets rules, and rules providing for exceptions to the asset-transfer penalties. These exercises can be seen on the Web site of the Aging and Law Section of the Association of American Law Schools (AALS). Kate Mewhinney, *Introductory Exercises in Elder Law and Medicaid Basics*, <http://law.wfu.edu/aals/documents/AALS-KMTeachingMaterialsIntroductoryExercises-Feb2010.pdf> (accessed July 13, 2010).

103. For the statistics, see MetLife, *2010 Market Survey of Long-Term Care Costs*, <http://www.metlife.com/mmi/research/2010-market-survey-ltcc.html#findings> (accessed Jan. 8, 2011) (noting “[t]he national average daily rate for a private room in a nursing home is \$229” and other average costs).

104. Students can select between doing Elder Law or health law in this clinic. Email from Martha M. Mannix, *supra* n. 31.

the deed. They also provide advice regarding spend down and spousal protections, and assist with appeals from the denial of Medicaid for long-term care.

Teaching this area of the law to a one-semester group of students, such that they are capable of advising clients, is extremely challenging. Medicaid is complicated, and the federal and state laws change drastically. Sometimes the rules change with only a few days of advance notice, such as when the Federal Deficit Reduction Act was instituted in North Carolina.¹⁰⁵ The interpretation of various rules can vary from lawyer to lawyer and from county to county. Significant differences exist from state to state.¹⁰⁶ There are rarely appellate decisions clarifying the finer points, surprising students who have been taught to rely on such decisions for guidance. Also, the states are prone to their own idiosyncratic and sometimes dubious additions to Federal Medicaid law.

Nevertheless, Medicaid is a valuable area to which a student should be introduced. First of all, it is a frequent concern of potential clinic clients. At least in North Carolina, most law firms still lack any Medicaid expertise and are eager to employ someone who has some exposure to those laws. Law students who want to work in general practice firms, or in firms that already handle some Elder Law work, are more marketable with this knowledge.

Students can offer significant help to two groups of clients in particular. One group consists of those clients who are close enough to being Medicaid-eligible that they simply need to know what steps to take in the future, should they or their spouse require nursing-home care. They might be counseled about spend-down options (to reduce assets to below Medicaid's limit), such as paying bills, making repairs or improving their home, buying a better car, or prepaying for irrevocable burial contracts. Another

105. N.C. Dept. of Health & Hum. Servs., *Change Notice for Manual No. 25-07, DRA Transfer of Assets*, http://info.dhhs.state.nc.us/olm/manuals/dma/abd/chg/MA_CN25-07.htm (accessed Jan. 8, 2011) (highlighting the State's announcement of changes made pursuant to federal law, which was issued three days before their effective date).

106. For example, there are significant differences in the amount of savings the "at home" or "community spouse" can keep when the other spouse enters a nursing home. North Carolina uses the less-generous approach, allowing the community spouse to keep a minimum of \$21,912 (2010 figures) and a maximum of \$109,560. N.C. Dept. of Health & Hum. Servs., *Adult Medicaid Manual MA-2231 Community Spouse Resource Protection*, <http://info.dhhs.state.nc.us/olm/manuals/dma/abd/man/MA2231.htm> (accessed Jan. 8, 2011). In some other states, the *minimum* is \$109,560. 42 U.S.C. § 1396r-5(f)(2).

group is made up of those married individuals whose incomes are reduced when one spouse enters a nursing facility on Medicaid. Federal law allows either an administrative adjustment or a court-ordered change to the amount of income that the spouse at home gets to keep, out of the income of the “institutionalized spouse.”¹⁰⁷ In our clinic, we have had success in the court proceedings but not through the administrative route. In one case, we managed to get the court to shift all of the husband’s monthly income to our client, so that the Medicaid program covered all of the husband’s costs in the facility. Our client’s lifestyle was far from lavish after this victory. She was, however, able to take care of home-maintenance issues and pay for modest items that improved her quality of life.

2. *Learning That Laws Are Not Always Legal or Fair*

One dubious Medicaid rule reflects the almost irrational and mean-spirited creativity of North Carolina’s agency. This rule sets out the agency’s requirements for a person to be able to pay for family care giving, without being disqualified for having given away assets.¹⁰⁸ The agency seems bent on thwarting the family involvement that would help keep our elders in their own homes. In North Carolina, family members often live in close proximity and help each other. Our clinic students sometimes have clients whose grown children are actively helping their parents.

The basic concept underlying Medicaid’s rule against asset transfers is that an applicant should be punished for having given away property for less than it is worth, rather than using it for their care costs.¹⁰⁹ “Caregiver contracts” are written agreements whereby an older person pays someone fair market value for caregiving services. These are a simple example of how the person can pay fair compensation to relatives or friends and not make a prohibited gift.¹¹⁰ In North Carolina, caregiver contracts are,

107. 42 U.S.C. §§ 1396r-5(d)(3), 1396r-5(e), 1396r-5(f)(3) (2006); N.C. Dept. of Health & Hum. Servs., *Adult Medicaid Manual MA2270 Long Term Care Need and Budgeting*, http://info.dhhs.state.nc.us/olm/manuals/dma/abd/man/MA2270-05.htm#P483_25713 (accessed Jan. 8, 2011).

108. N.C. Gen. Stat. § 108A-58.1.

109. See 42 U.S.C. § 1396p(c)(1)(A) (making individuals who sell assets “for less than fair market value . . . ineligible for medical assistance” for a specified time).

110. Mary Beth Franklin, *The Crackdown on Medicaid Planning*, Kiplinger’s Personal

nevertheless, considered asset transfers unless the applicant's physician certifies that the services were necessary to prevent entry into a nursing home.¹¹¹ As of December 2010, it appears that this rule has not been challenged in North Carolina's courts. Instead, some members of the North Carolina Bar Association's Elder Law Section have appealed transfer sanctions and received favorable decisions under the "undue hardship" exception.¹¹²

It is not difficult for students to see that North Carolina's rule is overly strict when a client wants to pay relatives for care giving even before he or she needs nursing-home care. Fortunately, several students have been able to get written certification from clients' physicians to satisfy our State's rules. Other clients, for whom we were not able to get such certification, have entered into caregiver contracts and have been advised to return to the clinic if they face a Medicaid disqualification later on.¹¹³

3. *Learning Who the Client Is and What the Goals Are*

Medicaid cases are also valuable teaching tools because they often raise questions about who is the client and whose agenda is being addressed. In some cases, the moving force behind getting legal advice is the client's adult children.¹¹⁴ The older client, when counseled independently, may or may not want to put protection

Fin. Mag. 77, 80 (Nov. 2007); Rachel Emma Silverman, *Who Will Mind Mom? Check Her Contract*, Wall St. J. D1 (Sept. 7, 2006); Anne Tergesen, *Should You Pay a Relative to Take Care of Mom?* <http://online.wsj.com/article/SB10001424052748703963704576005892803914056.html> (Dec. 11, 2010).

111. N.C. Adult Medicaid Manual, Section DMA 2240 IX.H.1.d. requires a doctor certification for a care agreement, such as one with adult children or non-relatives, to be "valid"—i.e., to avoid the transfer penalty. N.C. Dept. of Health & Hum. Servs., *Adult Medicaid Manual MA-2240: Transfer of Assets* <http://info.dhhs.state.nc.us/olm/manuals/dma/abd/man/MA2240-08.htm#TopOfPage> (accessed Jan. 8, 2011). At least one other state has this requirement. Mich. Dept. Hum. Servs., *BEM 405, MA Divestment*, <http://www.mfia.state.mi.us/olmweb/ex/bem/405.pdf> (accessed Jan. 8, 2011).

112. See 42 U.S.C. § 1396p(c)(2)(D) (providing an exception if denial of eligibility results in an undue hardship on the individual); N.C. Dept. of Health & Hum. Servs., *Adult Medicaid Manual MA-2245 Undue Hardship Waiver for Transfer of Assets*, <http://info.dhhs.state.nc.us/olm/manuals/dma/abd/man/MA2245.htm#TopOfPage> (accessed Sept. 15, 2010) (describing the undue hardship exception process).

113. In all cases, the client is advised that the payee, usually the client's adult child, should seek his or her own tax advice about the income tax implications of these payments.

114. See David M. Rosenfeld, *Whose Decision Is It Anyway? Identifying the Medicaid Planning Client*, 6 Elder L.J. 383, 391 (1998) (noting that sometimes "the engine that drives the divestment of assets to qualify for Medicaid is the children" (internal citations omitted)).

of his or her children's inheritance above his or her own needs. It is difficult to predict, when counseling the client, what future care options he or she is foregoing, when he or she makes protection of an inheritance his or her primary goal. A classic example is this: a single woman contacts the clinic. She owns only a \$100,000 home and a car, and would be eligible for Medicaid.¹¹⁵ She starts by simply asking for help re-titling her home to her children. These are excellent teaching cases because the client is telling the student what to do, instead of expressing her goals and concerns. The student is taught to probe for this information, rather than simply saying that the clinic is capable of preparing a gift deed.¹¹⁶ Typically, the student is told by the client that she wants to "avoid probate" and "not have to turn over her house to a nursing home" one day.

The clinic student explains, in most cases, that the client's home would not have to be sold should she need nursing-home care,¹¹⁷ but intends to return home.¹¹⁸ The student also explains that her children would inherit the home, less any Medicaid estate recovery claim. The student also discusses the possibility that the client might want to use her home equity to buy a smaller home or pay for in-home care or assisted living. Given these considerations, and the inherent risks of giving away assets, the single client generally opts not to re-title the home. Also, these asset transfers will generally trigger a period of ineligibility for

115. This assumes she has made no gifts that would cause a Medicaid disqualification period, has an income low enough to qualify for Medicaid, and will meet the medical requirements for nursing-home care.

116. Although Wake Forest's Elder Law Clinic has prepared some deeds, generally we provide the Medicaid advice verbally and in a lengthy advice letter, and recommend that the client hire a private attorney to handle any real estate transaction. The attorney often will consult with the clinic prior to drawing up a deed.

117. Typically, for the unmarried, low-income client, her monthly income is applied to the nursing-facility bill and Medicaid pays the balance. She can own a home and a car while in the facility, as Medicaid considers them "exempt" or "non-countable." But at her death, there is often a Medicaid estate claim, which can take all or most of the modest estate to repay the Medicaid program for any amount it paid toward the client's nursing-home costs. Most single clients are able to protect their home if they express, or someone expresses for them, their intent to return home. The Supplemental Security Income (SSI) regulations exempt a home that one intends to return to. 20 C.F.R. § 416.1212(l) (available at http://www.socialsecurity.gov/OP_Home/cfr20/416/416-1212.htm) (accessed Jan. 8, 2011). Detailed administrative guidance is found in the SSA Program Operations Manual. Social Security Online, *POMS Section: SI 01130.100*, <https://secure.ssa.gov/poms.nsf/lnx/0501130100> (accessed Jan. 8, 2011).

118. We discuss "avoiding probate" and the realities of the probate process separately.

the client when she needs nursing-home care within a few years. Without a crystal ball to predict the client's health, the student recommends caution.

It is sometimes possible to use the federal exceptions to the transfer rules. Our students have used two exceptions in particular. First, the law allows the home to be deeded to the client's disabled adult child.¹¹⁹ Second, the "caregiver child exception" allows the home to be transferred without penalty to an adult child who has provided nursing-home care to the parent for at least two years, while living in the parent's home.¹²⁰

Every state seems to have its own quirks and strategies for avoiding the extreme financial effects that long term care costs have on those of modest means. In North Carolina, for example, one strategy sometimes used by Elder Law attorneys (and Wake Forest's Elder Law Clinic) is for the client to sell a small interest, such as one percent, to the heirs and create a joint tenancy with right of survivorship.¹²¹ Selling the small interest avoids the asset transfer penalties under Medicaid and, at least under current rules and procedures, avoids the estate recovery claim that Medicaid could make against the home.

E. Home Visits and Clients in Healthcare Facilities

In our program, each student is assigned at least two clients who are unable to travel to the clinic office. Because they are time consuming, the number of these home visits is limited. Typically, these are clients who are homebound, who reside in assisted living or nursing homes, or who are in the hospital.¹²²

119. 42 U.S.C. § 1396p(c)(2)(A)(ii).

120. See 42 U.S.C. § 1396p(b)(2)(B)(ii) (pertaining to the two-year, in-house residency requirement); N.C. Dept. of Health & Hum. Servs., *N.C. Adult Medicaid Manual 2240-VII.B.3.e.*, http://info.dhhs.state.nc.us/olm/manuals/dma/abd/man/MA2240-06.htm#P429_28541 (accessed on Jan 8, 2011) (pertaining to allowable transfers).

121. N.C. Gen. Stat. § 41-2 (allowing for unequal joint tenancy interests).

122. In one case, the student learned exactly what we do not want to teach. We went to the home of a client who had been referred by Adult Protective Services. Her adult son lived with her and his behavior had caused the social services department to monitor her situation. At the house, the son loomed over the law student and insisted that he be a part of his mother's discussions about a will. A knife in a sheath hanging from his side added to our nervousness. Because the client had regular doctor visits at our hospital, we decided to continue our interview when she next came to the hospital. Her health required that she be transported by ambulance. Unfortunately, the day the client came to see her doctor we just missed finding her at her medical appointment. We hurried down to the hospital's

By seeing clients in the settings in which they live, students learn about the challenges facing both the clients and their caregivers. Frail or cognitively impaired clients are better oriented than if they had to travel to our office. We bring a HIPAA release¹²³ for the prospective client to sign, in case we need records or to talk with medical personnel. Nursing home social workers are helpful in understanding the client's situation. Students also learn to interact with administrators, billing-office personnel, nursing staff, and, sometimes, the legal departments for the facilities.¹²⁴

In the hospital setting, where Wake Forest's clinic is housed, I wear my hospital identification badge. If we see patients there, the student identifies us as "from the legal clinic over in the Sticht Center," putting hospital staff at ease.

The interactions with facility personnel provide an excellent learning experience for the law students. Sometimes these cases highlight the "big question" of safety versus autonomy for older people, and the power of family members versus older relatives in making decisions. Students must demonstrate diplomacy, assertiveness, and sensitivity to family dynamics. When the client has an impairment, it is a real test to balance the role of advocate with the role of counselor when the client's choices might expose him or her to some risk.

Nursing homes are often nervous about having legal representatives come in, so it helps the Clinic to represent clients most effectively if we have a relationship with the nursing-home staff. Meeting the staff face to face usually lessens their fear. But on one occasion, when the student asked to talk with the administra-

medical transport floor to catch up with her before she was taken home. It was quite a shock when we realized we had become "ambulance chasers"—not exactly the lesson an Elder Law clinic should teach!

123. For information on HIPAA generally, see U.S. Dept. of Health & Human Serv., *Health Information Privacy*, <http://www.hhs.gov/ocr/privacy/hipaa/administrative> (accessed Jan 8, 2011).

124. Almost twenty years ago, we represented the husband of a nursing-home resident who, along with the couple's adult son, wanted the facility to take his wife off of the extended artificial hydration and nutrition that was keeping her alive. She suffered from advanced dementia, had ballooned to fifty percent above her normal weight, and had been curled up in a fetal position for several years. The clinic student researched the law and persuaded the facility's legal department—without filing legal action—that the husband had the legal authority under state law to authorize the withdrawal of life support from her.

tor about a client who resided in a facility, about eight staff gathered in the administrator's office to serve as witnesses to the conversation.

In several cases, the prison-guard mentality of long-term care administrators was shocking to the law students. We sometimes see de facto involuntary commitments of older people, i.e., with no court adjudication of incompetency. For example, we were contacted by the regional long-term-care ombudsman about a man who was not being allowed to leave the assisted living facility where his wife had put him. When the clinic student and I went to meet the man, who was fully competent, we got his permission to review his file. The first page in the facility's very thick file (as he had been a resident there for over a year) said "Do Not Provide the Code to Mr. ___ to leave the building." (Building doors had a coded alarm system that alerted the facility to unauthorized entries and departures.)

After investigating the matter, the student informed the facility that it could not keep the client against his wishes. The student worked for several weeks with the client's wife to arrange for his return home. The family negotiations were particularly challenging because the client's wife wanted him to be "completely safe," which she felt he would be in the facility. Most of the residents had significant cognitive impairments, so the long stay there had been unpleasant for the client. It turned out that the client had, in fact, learned the door code. But his wife had moved all his funds out of their joint account and pushed him to stay where he was. Compounding the problem, the man's psychiatrist refused to release his records to Wake Forest's Elder Law Clinic without his wife's permission. This, again, involved some negotiation and education of that provider about the patient's right to control his own records. The client's passivity clearly played a big role in his inability to leave the facility. These vagaries and complications make the role of advocate and counselor quite challenging.¹²⁵

125. A year or so later, another man, whose son had put him in another facility owned by the same assisted living chain, contacted The Elder Law Clinic. The administrator told the law student and me that the resident could not leave without his son's permission. Ultimately, the administrator acknowledged that this was incorrect. Negotiations ensued with the family about visiting more and arranging for more outings for the client. Changes in the family's behavior and an agreement by the facility to move him into a single room

In another case, a woman who was under guardianship asked the ombudsman to contact the clinic about getting free of guardianship by being restored to competency.¹²⁶ The student and I arranged to go see her at the assisted living facility in a rural county where she resided. That morning, the Clinic staff called the facility to confirm directions. When we arrived, the resident was not there. She had been picked up by her guardian, who was her sister. We got the guardian's address and drove twenty miles to her home. She came outside and announced that she had a Rottweiler—and the ward (the Clinic's prospective client)—in the house. Only after some conversation did she allow the ward to come outside to talk to the student and me.

We returned to our client's nursing facility about a week later, this time without calling ahead. After speaking with our client in her room for a few minutes, the two facility staff members came and directed us to leave, on orders of the guardian. Rather than risk an arrest of the student, in her third year of law school, the student and I left the building. Parked outside the front door was a police car.

Ultimately, the student negotiated successfully with the facility about the resident's rights under federal and state law to see a legal advocate.¹²⁷ The student was unsuccessful in persuading the guardian to get the client's medical records, so that we could evaluate her chances of being restored to capacity. So, the student filed a motion with the court to force the guardian to authorize the release of the records and to allow the ward to attend the church of her choice with long-time church friends. Ultimately, we decided that we did not have sufficient evidence to ask for the client to be restored to capacity. But the case was resolved by the court modifying the guardianship order to allow our client to go to the church of her choice and to have outings with specific individuals. The order also reaffirmed the resident's right to consult with counsel when she wanted to.

(which the family agreed to pay extra for) led to him agreeing that he would stay there.

126. See N.C. Gen. Stat. § 35A-1130 (providing that an interested person may petition for a ward to be restored to competency).

127. See 42 C.F.R. § 483.10(j)(2) (2009) (requiring a facility to allow access for an individual that provides legal services to a resident); N.C. Gen. Stat. 131E-115 (stating that a facility shall not infringe a patient's civil liberties).

Recently, a woman contacted Wake Forest's Elder Law Clinic to find out if she had the legal right to leave her nice assisted living facility to return to the house she owned. The student went to see her. Upon arrival, the facility administrator told the student she first had to meet with the resident's family to get their permission for her to see their mother. For about forty minutes, the adult children talked with the student and finally agreed to let her see their mother. They had taken their mother's car and car keys and felt that she could not safely return home. Though the client was ambivalent about upsetting her children by returning home, she was fully competent. Sharing a room for a year and being away from home was simply not acceptable. Because North Carolina law provides that residents of assisted living facilities are free to see legal representatives without interference,¹²⁸ the clinic filed a complaint with the state regulatory agency.

The students are encouraged to review nursing-home-admission contracts for clients. Many of these, they find, misstate the residents' rights with regard to discharge, payment, and other important matters.¹²⁹ The clinic has represented a client in fighting against discharge from a facility (by filing a Chapter 13 bankruptcy and taking advantage of the federal bankruptcy stay). In another case, students helped a nursing-home resident stop the facility from unlawfully keeping the client's thirty dollar monthly spending money permitted under Medicaid out of her Social Security income.¹³⁰ The case resulted in television-news coverage and a successful stop to the facility's seizure of our client's limited spending money each month.

128. N.C. Gen. Stat. §§ 131D-21(8), (11).

129. See Eric Carlson, *Essay: Illegal Provisions in Nursing Home Admission Agreements*, <http://www.yourestatematters.com/files/Illegal-Provisions-in-Nursing-Home-Admission-Agreements.pdf> (accessed Jan. 8, 2011) (describing various ways nursing-home residents' rights are infringed by nursing-home agreements).

130. The case was filed in federal bankruptcy court to discharge the underlying debt and to stop the debt collection of the resident's thirty dollar personal-needs allowance. See 42 U.S.C. § 407(a) (2006) (titled "Assignment of benefits," and noting that "[t]he right of any person to any future payment ... shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable[,] or rights ... shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law").

F. Administrative Advocacy

Other than Medicaid cases, Medicare and Social Security cases often require administrative advocacy for older clients.

Temple University's Elderly Law Project handles mainly public entitlement cases, representing people at administrative law hearings.¹³¹ The cases include Social Security overpayments, disability denials, Medicare disputes, Medicaid denials, veterans' benefits, pension problems, railroad retirement benefits, public assistance, food stamps, and issues involving prescription drug plans. The clinic does quite a bit of work involving Medicaid eligibility for people entering nursing homes and also handles estate-recovery cases. Some of the benefits cases handled by the clinic are on behalf of grandparents caring for minor grandchildren.

At Wake Forest, the Medicare appeals that students have handled include denials of coverage for skilled nursing-home care or ambulance service. Medicaid cases have included appeals regarding asset transfers and challenges to the amount of the community spouse income allowance.¹³² Social Security matters have included requests for waivers of overpayment.¹³³

G. Litigation and Alternative Dispute Resolution

Many Elder Law clinics, like many Elder Law attorneys, do not handle litigation, with the possible exception of some guardianship matters.¹³⁴ The length of most lawsuits can result in a case being handled by multiple students over several years.

131. Email from Debra H. Kroll, Assoc. Clinical Prof., Temple U. Sch. L., to Author, *Your Wisdom about the Clinical Teaching of Elder Law —20 Questions* (May 27, 2010, 5:11 p.m. EDT) (copy on file with *Stetson Law Review*).

132. See 42 U.S.C. § 1396r-5(c) (pertaining to treatment of resources for institutionalized spouses and the computation of spousal share at time of institutionalization).

133. See 42 U.S.C. § 404(b) (2006) (providing for no recovery from persons to whom the United States has made overpayments when such payees are "without fault" in the overpayment).

134. Some of our former students are involved in Elder Law litigation, however. For example, Aimee L. Smith and Susan Ryan handle a wide range of Elder Law litigation with the Winston-Salem firm of Craige, Brawly, Liipfert, & Walker. Katie McClanahan practices with the Chicago Elder Law litigation firm of Peck Bloom, LLC. In eastern North Carolina, Mark E. Edwards has handled a range of litigation and administrative advocacy. Edwards is also a Board Certified Specialist in Elder Law by the North Carolina State Bar Board of Legal Specialization.

In Elder Law clinics that do handle litigation, typical cases involve suits over breach of fiduciary duty, consumer law disputes, landlord-tenant cases, and age or handicap discrimination. In our program, we are very selective about accepting litigation. The case generally needs to involve some issue of mental capacity, a known “bad actor,” or abuse of trust by a family member. Handling litigation that challenges an older client’s prior transactions gives a student valuable insights on how to avoid such challenges when assisting other older clients. This is especially true when representing an impaired client or a transaction involving a gift or an unusual will provision.

In our program, students have drafted and filed numerous complaints, conducted discovery, argued motions, and handled bench and jury trials. The students have also won injunctive relief, taken and defended depositions, and negotiated settlements. One student even defended a deposition in the nursing home, when his client (the plaintiff) was too ill to leave. On occasion, the students have been awarded attorneys’ fees (which get deposited into the program’s budget) as a result of motions to compel discovery, or pursuant to statutory attorneys’ fee provisions, usually involving consumer law claims.¹³⁵

In 2008, one of our students handled a four-day jury trial involving breach of fiduciary duty by the client’s brother in the sale of a home to our client. After a moderately favorable verdict, we filed a notice of appeal. The case was settled while the record on appeal was being assembled.¹³⁶

Because of the academic schedule, I sometimes file a motion for peremptory setting, so that the case is definitely set to be tried during a specific week.¹³⁷ In some cases, opposing counsel consents to the clinic’s motion.¹³⁸

135. See *Jordan v. United States Dept. Just.*, 691 F.2d 514, 524 (D.C. Cir. 1982) (“Fees for student legal work . . . should represent the market value of their services . . .”); *Payday Today, Inc. v. Hamilton*, 911 N.E.2d 26, 35–36 (Ind. App. 2009) (“a legal aid organization merits an attorney fee fully as much as does the private attorney”).

136. Fortunately, Wake Forest has an Appellate Advocacy Clinic that is ably directed by Associate Professor of Legal Writing John J. Korzen, who was invaluable in assuring our compliance with the complex appellate rules.

137. See Forsyth Co. Ct. R. 1-5.1 (2001) (allowing a party to file for a peremptory session for “good and compelling reasons”).

138. Opposing counsel does not always accommodate the clinic’s schedule, however. Also, they are sometimes wary of any advantage that might inure to our clients. In one case, the opposing attorney successfully moved, pretrial, to prohibit the clinic student,

Some of the litigated cases have gone to mediation, either by court order or by agreement of the parties.¹³⁹ While not all the cases were resolved in mediation, preparing for and participating in the mediation has given students excellent experience in the process. Because more and more litigation matters now go through alternative dispute resolution procedures, these skills will be useful in all types of practices.¹⁴⁰ Both Wake Forest and William Mitchell's programs anticipate expanding into the area of mediation. As with other family-related disputes, mediation is particularly important when the parties have had long-term relationships, in contrast to commercial disputes, for example.¹⁴¹ Mediation is more likely to allow parties to vent about their feelings and to reach a resolution that they are comfortable with, as opposed to the "winner-and-loser" scenario that court-ordered resolutions create.

Students can benefit from a discussion of which cases not to accept for litigation.¹⁴² In Elder Law, these cases often involve situations in which the client made a gift of property some time ago to an adult child. Another child has been angry about the gift and brings the parent to see us. Often, the parent (who is our client) is not as keen on suing the transferee child, but wants to make everyone happy so has agreed to come see us. Other cases that we reject include those in which the prospective client has

professor, and witnesses from making any mention that the plaintiffs were represented by a law school clinical program. He argued that this might create unfair sympathy for the plaintiffs.

139. I am a Certified Superior Court Mediator, and am also certified to mediate guardianship and estate disputes under the rules of the North Carolina Dispute Resolution Commission. See generally N.C. Ct. Sys., *North Carolina Dispute Resolution Commission*, <http://www.nccourts.org/courts/crs/councils/drc/> (accessed Jan. 8, 2011) (describing the mediation process and the programs the Commission supports).

140. Although it does not appear to be in widespread use at the time of this writing, North Carolina allows for mediation of guardianship and estate disputes. See N.C. Gen. Stat. § 35A-1108(b) (Lexis 2010) (indicating that North Carolina courts may order mediation "after notice of hearing has been issued"). For information about North Carolina's program, see N.C. Ct. Sys., *Clerk Mediation Program*, <http://www.nccourts.org/courts/CRS/councils/DRC/clerks/default.asp> (accessed Jan. 8, 2011). The best national resource on guardianship mediation is The Center for Social Gerontology. Ctr. for Soc. Gerontology, *Homepage*, <http://www.tcsg.org> (accessed Jan. 8, 2011).

141. Sandra G. Boodman, *Elder-Care Mediators Help Resolve Feuds*, Special to The Washington Post E5 (Dec. 14, 2010) (available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/12/10/AR2010121005722.html>).

142. For further discussion of case selection criteria, see *infra* Part V(F) on "Intake Procedures" in the Administrative Procedures discussion.

fired several attorneys or has accused attorneys and judges of being bribed by the opposing party. Also, interstate litigation can be a nightmare.¹⁴³

We have also had some challenging housing-discrimination cases in which students were afforded the opportunity to analyze the fair-housing laws. Such cases will probably become more prevalent as our population ages.¹⁴⁴ One example follows.

A lovely elderly lady came to us with a summary ejectment (eviction) action from the nice federally subsidized garden apartments where she rented. She was making complaints too often, it was alleged, about such things as people spying from trees, ground glass being put into her food, and so on.¹⁴⁵ The resident manager testified that he was unaware *that such a thing as a mental* disability existed. Two of the defendant's arguments were creative, but—we assured them—would end up in the appellate courts if they were used successfully at trial. First, the company argued that because our client had a daughter living in town (where the client could go live), the company should not have to accommodate the tenant's mild mental-health problems. It also tried to argue that the tenant should have given a formal notice of her disability and the accommodation she wanted.¹⁴⁶ We argued, however, that her complaints made it obvious that she was having mental-health issues. Our students managed to obtain a

143. Our program did handle a case with all of these "red flags" several years ago. Suffice it to say that we ended up winning, but only after learning (1) how to use the "full faith and credit" law, and (2) what little impact that law had on certain courts in the distant state of Alabama. A couple of years later, after trying different tactics to resolve the problem, we managed to get what the client wanted. The lesson here is that sometimes it makes sense to acknowledge those red flags but then decide to forge ahead anyway because the client's case is compelling.

144. As Baby Boomers age and assert their rights, likely there will be an increase in claims of handicap discrimination. A particularly excellent resource in advocacy is the Bazelon Center on Mental Health Law. J. David L. Bazelon Ctr. for Mental Health L. <http://www.bazelon.org/where-we-stand/community-integration/housing/housing-resources.aspx> (accessed Jan. 8, 2011). See also Jon Pynoos et al., *Aging in Place, Housing, and the Law*, 16 *Elder L.J.* 77, 78, 80 (2008) (describing how more adults are "aging in place," staying put in homes that are not handicap accessible).

145. She also complained that marijuana smoke was being pumped into her apartment through the phone jacks.

146. See Gretchen M. Widmer, Student Author, *We Can Work It Out: Reasonable Accommodation and the Interactive Process under the Fair Housing Amendments Act*, 2007 *U. Ill. L. Rev.* 761, 770–771 (describing cases that required a discussion between landlord and tenant regarding an accommodation once "the tenant informs the landlord of her disability").

consent judgment in which the defendant, a multistate real-estate company, agreed to train its resident managers about mental disabilities and the company's duty to reasonably accommodate those disabilities.

Litigation has a way of spiraling out of control. For example, a case that seemed like a straightforward rent-abatement claim took a strange twist. We sued a landlord who had a history of housing code violations. The landlord pled "release and accord"¹⁴⁷ in a long list of affirmative defenses. When the student took the landlord's deposition, the landlord produced a "release" that our illiterate client apparently had signed. Additionally, the landlord obtained our client's signature on this release to sign it the week after we sent a demand letter, before we had filed suit! It purported to release the defendant-landlord of all claims for a mere fifty dollars. (The client's claims were worth, we felt, about ten thousand dollars). Of course, this "release" became yet another issue in the case.

Toward the end of the academic year, we necessarily become more selective about litigation, often only taking cases for which discovery that can wait until the fall. We also make referrals to pro bono counsel. During the school year, litigation means that some clients and students receive less attention. The process in court is slow, stressful, and often unpredictable. Also, even having taught trial practice for several years, it is difficult for me to respond quickly to evidentiary disputes and the tactics of some attorneys who spend every day in court.

The clinic at Wake Forest also acts as a resource for judges and law enforcement. For instance, we were consulted by the district attorney's office regarding a criminal case involving negligent homicide due to neglect, and another involving the attempted use of habeas corpus to remove a ward from guardianship.¹⁴⁸

147. See N.C. Gen. Stat. § 1A-1 R. 8(c) (listing "accord and satisfaction" as an affirmative defense).

148. After giving my opinion that this was not an appropriate path for the Clinic, I referred the court to Greensboro, North Carolina attorney A. Frank Johns, a national expert on guardianship law, who had been involved in a case in which opposing counsel tried to use a writ of habeas corpus.

H. Elder Abuse and Exploitation

As mentioned earlier, financial exploitation cases are among the few cases we litigate at Wake Forest's program. We have also used the state's domestic violence law¹⁴⁹ when an adult daughter who lived with our client was threatening him. This procedure went smoothly, as the court recognized the personnel from the women's shelter who accompanied us and the client to court. The civil action that the student handled for the client was separate.

After handling several financial exploitation cases, one clinic student organized a program on how to avoid exploitation. An agent from the State Bureau of Investigation was among the invited speakers, as well as a counselor who addressed the emotional issues that make some people easy prey for exploiters. The students gave an overview of typical frauds committed against the elderly. The audience of about seventy-five people included some victims of fraud and their families.

In the fall of 2010, a student organized a similar program on avoiding exploitation and fraud. She invited as presenters a geriatrician, a representative of the North Carolina Secretary of State's office (to speak about investment fraud), a police detective, an assistant district attorney, and the director of a consumer credit counseling agency. Two of this student's cases involved theft by employees of a home-health agency from elderly clients, so this fit in well with her community education program.¹⁵⁰

Several years ago, Wake Forest's Elder Law Clinic had several clients who gave significant amounts of money to a man they met when he tried to sell them vacuum cleaners. The man developed friendships with the clients, all of whom were women, and even invited some to celebrate holidays at his home with his wife and children. These matters were reported to the police, and the

149. N.C. Gen. Stat. Ch. 50B. Professor Kurt Eggert from the Chapman University School of Law Elder Law Clinic reports that his clinic has dramatically increased its elder abuse and conservatorship practice. Email from Kurt Eggert, Prof. & Dir. Elder L. Clinic, Chapman U. Sch. L., to Author, *Your Wisdom about the Clinical Teaching of Elder Law* (June 19, 2010, 2:13 a.m. PDT). He expects this to continue and hopes that the program will strengthen its connections with Adult Protective Services. *Id.* The clinic partners with Family Violence centers on Elder Abuse Cases. *Id.*

150. Annette Fuller, *Elderly Are Often Targets for Fraud, Several Factors Can Put them At Risk of Trickery*, Deception, Winston-Salem Journal, A16 (Nov. 12, 2010) (available at <http://www2.journalnow.com/news/2010/nov/12/elderly-are-often-targets-for-fraud-ar-530986/>).

clinic also filed suit against the man on at least one occasion, recovering about thirty-nine thousand dollars for the client and five hundred dollars in attorneys' fees for the clinic. The Secret Service began an investigation of the man. When the state and local law enforcement agencies closed in on him, he killed himself. The papers reported that he was suspected of bilking older people of about two million dollars.¹⁵¹

Often, there is little chance that the funds taken from an older client by relatives can be recovered. This is another factor to discuss with students when deciding whether to move forward with a case. But when the prospective defendant is working and owns real estate and vehicles, we will consider filing suit. In one case, the Superior Court granted our motion to enjoin the defendant-daughter from spending money from a certain account that was in dispute. After we prevailed at the trial against the daughter, she filed for bankruptcy. The clinic students filed a motion in the federal bankruptcy court objecting to the discharge of the debt owed to our client, and succeeded.¹⁵²

As we handle more cases of breach of fiduciary duty, we learn more. For example, the defendant son or daughter's primary asset is often his or her home, owned with a spouse. Before suing, we now meet informally with them and gently inquire about the role of the daughter- or son-in-law. Of course, they typically want to emphasize how involved and helpful they were in the "care" of their spouse's parent. With this conversation documented, we sometimes have a sufficient basis to include the son- or daughter-in-law as a defendant, thereby possibly reaching the marital home if we win a judgment against that person for our client.¹⁵³

One evidentiary issue in these cases is common. Typically, the attorney-in-fact attempts to testify that our client (usually the defendant's parent) gave oral permission for the adult child-

151. Jason Hardin, News-record.com, *Man Suspected of Scamming Elderly in Triad*, http://www.news-record.com/content/2007/11/30/article/man_suspected_of_scamming_elderly_in_triad (last updated July 20, 2008, 10:22 p.m. EDT).

152. See 11 U.S.C. § 523(a)(4) (providing that a debt is not discharged in bankruptcy if it is incurred through "fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny").

153. Real estate owned by the entireties (husband and wife) is exempt from the claims of a judgment creditor against just one spouse. James A. Webster et al., *Webster's Real Estate Law in North Carolina: Possessory Estates and Interests in Real Property* vol. 1, § 7-16 (5th ed., LEXIS L. Publ. 1999).

defendant to take money or property. Students have successfully argued motions in limine to bar this testimony, citing caselaw to the effect that gifting powers must be in writing to be included in the powers under a power of attorney.

Oddly enough, sometimes the person who exploited the older person is the one who comes to our office. For example, a man came to see us about his mentally impaired, elderly mother. He mentioned that his mother had inherited money and that, to avoid her being taken advantage of by his siblings, he took the money out of her name. Because of the North Carolina law that requires the reporting of elder abuse, we inquired of the State Bar ethics counsel how to reconcile that duty with the ethical obligation of confidentiality. The North Carolina State Bar issued a formal ethics opinion that clarifies the attorney's duty of confidentiality when elder abuse is discovered. The attorney has discretion on whether to report the suspected abuse to authorities.¹⁵⁴

Clinic students get to see the problem of elder abuse from many angles. They learn about mental impairments that increase vulnerability to abuse, collectability issues in cases, criminal prosecution of abuse, evidence issues, and the need for community education as a prevention tool. It is, sadly, an area of Elder Law that is rich in teaching opportunities.

I. Consumer Issues and Bankruptcy

The economic recession has hit older adults particularly hard.¹⁵⁵ Many clinic clients are unsophisticated with regard to using credit, but need to use credit to cover uninsured medical and living expenses.¹⁵⁶

154. Ltr. from Alice Neece Mine, Asst. Exec. Dir., N.C. St. B., to Angela Kreinbrink, Wake Forest U. Sch. L. Elder L. Clinic, *EA 2394: Disclosure of Confidential Information* (April 1, 2005) (copy on file with *Stetson Law Review*).

155. Nadwa Mossad, Population Ref. Bureau, *The Impact of the Recession on Older Americans*, <http://www.prb.org/Articles/2010/recessionolderamericans.aspx> (Mar. 2010).

156. See generally Donna S. Harkness, *When Over-the-Limit Is Over the Top: Addressing the Adverse Impact of Unconscionable Consumer-Credit Practices on the Elderly*, 16 *Elder L.J.* 1 (2008) (delineating that the elderly are particularly prone to credit scams and advocating for the revision of the federal Truth in Lending Act to protect the elderly); Nathalie Martin, *Consumer Scams and the Elderly: Preserving Independence through Shifting Default Rules*, 17 *Elder L.J.* 1 (2009) (discussing how the elderly are increasingly at risk for exploitation by credit scammers).

Many of the clients who come to Wake Forest's clinic with consumer debt problems have assets that are fully protected under the state's exemption laws.¹⁵⁷ The students can reassure them that, if they are sued and follow the exemption procedures, their property will be protected. These situations offer good opportunities for students to explain the process of being sued and what steps will follow. They also counsel the clients that, with very limited exceptions, North Carolina does not permit wage garnishment.¹⁵⁸ Because the clinic space is provided by the Wake Forest University Baptist Medical Center, the clinic does not assist or advise clients regarding debts to the medical center, as that would create a conflict of interest.

Social Security income is also federally protected from consumer creditors and, for many clients, is their sole or primary source of income.¹⁵⁹ Unfortunately, when a client owes money to a bank, sometimes merely as the co-signor for a younger relative, the client finds that the bank has directly paid itself out of an account into which Social Security was directly deposited. For this reason, we typically ask clients who have debt problems if they have a charge card or other account at their financial institution. If they do, we advise them of the option of moving their accounts elsewhere, to an institution to which they do not owe money.¹⁶⁰

Most Elder Law clinics appear to be handling consumer cases. Penn State Dickinson's Elder Law and Consumer Protection Clinic, in particular, has done impressive work in this arena.¹⁶¹ Although not limited to older clients, clinics at North-

157. N.C. Gen. Stat. Ann. §§ 1C-1601–1604 (Lexis 2007) (providing exemptions such as real property, motor vehicles, life insurance, and individual retirement plans).

158. Lars Lefgren & Frank McIntyre, *Explaining the Puzzle of Cross-State Differences in Bankruptcy Rates*, 52 J.L. & Econ. 367, 374 n. 14 (2009) (describing North Carolina as a "high-restriction" state with respect to wage garnishment for non-priority, private debts); N.C. Dept. of Lab., *Garnishments in North Carolina*, <http://www.nclabor.com/wh/fact%20sheets/garnishments.htm> (accessed Jan. 8, 2011).

159. See 42 U.S.C. § 407 (protecting Social Security income from legal processes such as levy, garnishment, and bankruptcy law); Heidi Hartmann & Sunhwa Lee, *Social Security: The Largest Source of Income for Both Women and Men in Retirement*, <http://www.iwpr.org/pdf/D455.pdf> (Apr. 2003) (categorizing the income of the elderly based on living status and marital arrangement).

160. David Godfrey, *Comments Sought on Proposal Requiring Banks to Protect from Garnishment Social Security and Other Federal Retirement Income*, 31 ABA Bifocal 71, 72 (2010) (explaining that banks can release funds to creditors as long as the account holder fails to object).

161. Penn State L., *Elder Law and Consumer Protection Clinic*, <http://law.psu.edu/>

western, Cornell, and San Francisco Universities are representing small investors in actions involving alleged securities fraud.¹⁶²

J. Advocacy and Community Outreach

Most Elder Law clinics do some community education but focus on individual client representation.¹⁶³ Penn State Dickinson, for example, held a “Senior Law Day” in an apartment complex for older or disabled adults.¹⁶⁴

Wake Forest’s Web site is geared both to the public and to lawyers and aging services professionals. It provides links to statutes and regulations on state and federal programs. It is also the primary resource link found on the Web site of the North Carolina Bar Association’s Elder Law Section, which has over 500 members.¹⁶⁵ As discussed later, the Wake Forest program developed a brochure for lawyers to use that explains our professional ethical duties, for the family members of older clients.¹⁶⁶ It also developed brochures on nursing-home discharges,¹⁶⁷ the difference between

academics/clinics_and_externships/elder_law_clinic (accessed Jan. 8, 2011).

162. J. Samuel Tenenbaum & Thomas H. Morsch, *Guidelines for Establishing a Law School Investor Advocacy Clinic*, <http://www.finrafoundation.org/web/groups/foundation/@foundation/documents/foundation/p118734.pdf> (accessed Jan. 8, 2011); U. of S.F. Sch. of L., *Investor Justice Clinic*, <http://www.usfca.edu/law/investorjustice/> (accessed Jan. 8, 2011); see Ed Finkel, ABA J., *Stock Advice*, http://www.abajournal.com/magazine/article/stock_advice/ (posted March 1, 2010, 5:10 a.m. CDT) (noting how Northwestern University School of Law has helped protect investors by publishing this manual).

163. At least one program is limited by a funding source to doing only individual representation. The Pittsburgh program is funded by the Pennsylvania IOLTA (Interest on Lawyers Trust Accounts) program, which focuses on individual client representation. Email from Martha M. Mannix, *supra* n. 31.

164. Trisha Cowart, *Students Expand Outreach through “Senior Law Day,”* http://law.psu.edu/academics/clinics_and_externships/elder_law_clinic/news (accessed Jan. 8, 2011).

165. N.C. B. Assc., *North Carolina Bar Association, Welcome to the Elder Law Section*, <http://elderlaw.ncbar.org> (accessed July 13, 2010).

166. Wake Forest U. Sch. L., “*Why Am I In the Lobby?*”, E-Clinic News (newsltr. of the Elder L. Clinic) 5 (Fall 2003) (available at <http://elder-clinic.law.wfu.edu/files/2010/11/fall-2003.pdf>) (commenting on the brochure and its adaption by the ABA Commission on Law and Aging); ABA Commn. on L. and Aging, *Understanding the Four C’s of Elder Law Ethics* (Nov. 2003) (available at <http://www.abanet.org/aging/publications/pdfs/elderlawethics.pdf>) (revising the content of Wake Forest’s “*Why Am I in the Lobby?*”).

167. Wake Forest U. Sch. L., Elder L. Clinic, *Consumer Tips on Nursing Home Discharges and Transfers*, http://elder-clinic.law.wfu.edu/files/2010/11/nursing.home_discharge.pdf (accessed Jan. 8, 2011) (explaining the rights and options of a person discharged from a nursing home).

guardianship and power of attorney,¹⁶⁸ and Medicare home health benefits.¹⁶⁹

It is important that Elder Law clinics do more than educate about existing law. They need to help the public become aware of proposed laws and to consider how our laws affecting older people could be improved. Our program has served as a catalyst when legislation was proposed that threatened good end-of-life care.¹⁷⁰ Having close working relationships with the medical community has allowed us to respond quickly to legislative issues. In another effort to be productive, we developed short materials about the Federal Elder Justice Act for community programs, and have included information about the Elder Justice Coalition in our newsletter.¹⁷¹

Community education programs put on by Wake Forest's clinic students have focused on fraud, advance medical directives, nursing-home residents' rights, and innovative local programs for aging adults. In addition, students have been invited to speak at churches, public and subsidized housing complexes, congregate eating facilities, county health departments, AARP functions, assisted living facilities, and nursing homes.

Our partnership with the geriatrics department gives us access to medical expertise that is highly regarded in the community. One program, on nursing-home residents' rights, included clinic students who explained the basics of the Nursing Home Reform Act (OBRA '87) and state laws on residents' rights. Other

168. Wake Forest U. Sch. L., Elder L. Clinic, *Guardianship or Power of Attorney: Which One Do You Need?* (accessed Jan. 8, 2010) (available at <http://elder-clinic.law.wfu.edu/files/2010/11/gpoa.pdf>) (providing advice on choosing a guardianship or power of attorney).

169. Wake Forest Elder L. Clinic, Brochure, *Your Right to Medicare Benefits for Home Health Care* (copy on file with *Stetson Law Review*).

170. A coalition of physicians, hospice workers, and lawyers in North Carolina joined to oppose a bill in the state legislature that would have made it a felony to assist in suicide. N.C. Sen. 145, 2003 Sess. 1–2 (Feb. 24, 2003); see Kate Mewhinney, *Ideals and High Heels: A Look at Wake Forest's Elder Law Clinic*, 11 N.C. St. B. J. 20, 21 (Fall 2006) (available at http://www.ncbar.com/journal/archive/journal_11,3.pdf); reprinted in 28 ABA Bifocal 1, 7 (Oct. 2006) (available at http://www.abanet.org/aging/publications/bifocal/bifocal_october_2006.pdf) (accessed Jan. 8, 2011).

171. Wake Forest U. Sch. L., *Building Habits for Humanity*, E-Clinic News (newsltr. of the Elder L. Clinic) 6 (Fall 2007) (available at <http://elder-clinic.law.wfu.edu/files/2010/11/fall-2007.pdf>) (providing the Web site and telephone number for the Elder Justice Coalition); see generally Lori A. Stiegel, *Elder Justice Act Becomes Law, but Victory Is Only Partial*, 31 ABA Bifocal 71, 73 (Mar.–Apr. 2010) (available at <http://new.abanet.org/aging/PublicDocuments/Mar%20April%2010%20ABA%20Bifocal%20J.pdf>) (stating that the Elder Justice Act was finally enacted in 2010, many years after being proposed).

invited speakers included the regional long-term-care ombudsman, and a geriatrician who was the medical director for a nursing home.

Some clinics participate in National Healthcare Decisions Day,¹⁷² and at Wake Forest we have held several events for staff and students to learn about and execute advance directives. At the Syracuse program, there is a demand from other service providers for more community education about the need for powers of attorney.¹⁷³ That program is also collaborating with an advocacy group on how better to address financial exploitation issues.¹⁷⁴ One innovative approach they have used is to partner with a drama professor to do community education.¹⁷⁵

In Hawaii's program, students have been involved in the drafting or shaping of numerous statutes, including Hawaii's Adult Protective Services, Health Care Decisions, and Guardianship/Conservatorship laws, and others.¹⁷⁶

Wake Forest's students have learned about the law through writing and research. For example, in an independent study project, one student collaborated with the ABA Commission on Law and Aging to update its survey of laws on living wills and healthcare powers of attorney.¹⁷⁷ Other students have written articles on Elder Law topics, or co-written them with the Author, for the state bar association¹⁷⁸ and have assisted by researching articles addressing law reform issues.¹⁷⁹

172. See Natl. Healthcare Dec. Day, *Homepage*, <http://www.nationalhealthcaredecisionsday.org> (accessed Sept. 19, 2010) (explaining that National Healthcare Decisions Day is a collaborative effort to ensure competent adults have the ability to make their healthcare decisions).

173. Email from Mary McNeal, *supra* n. 31.

174. *Id.*

175. *Id.*

176. Email from James Pietsch, *supra* n. 31.

177. ABA Commn. on L. and Aging, *Health Care Power of Attorney and Combined Advance Directive Legislation: Selected Features Compared—December 2009*, <http://new.abanet.org/aging/PublicDocuments/HCPA-CHT%2009%20corrected.pdf> (2009) (accessed Dec. 23, 2010).

178. Articles in "Elder Law" (now called "Gray Matters"), the newsletter of the North Carolina Bar Association (NCBA) Elder Law Section include the following: John T. Griffin, Student Author & Kate Mewhinney, *Three Simple Steps Lawyers Can Take to Protect a Home: Medicaid and the "Intent to Return Home" Rule*, 7 Elder L. (newsltr. of the N.C. B. Assn. Elder L. Sec.) 1 (Mar. 2003) (reprinted in 24 Real Prop. (newsltr. of the N.C. B. Assn. Real Prop. Sec.) 5 (June 2003); Alex MacClenahan, Student Author & Kate Mewhinney, *Prosecuting and Preventing Financial Abuse under Powers of Attorney*, 6 Elder L. (newsltr. of the N.C. B. Assn. Elder L. Sec.) 5 (Jan. 2002); Robert E. Rude, M.D., Student Author,

A unique approach among Elder Law clinics can be found in William Mitchell College of Law's Elder Justice and Policy Keystone. The program was started in 2008 by Professor A. Kimberley Dayton.¹⁸⁰ The foundation for the students' experience lies in a partnership between the law school and a coalition of elder advocacy organizations identified as the Vulnerable Adults Justice Project.

In the William Mitchell program, students are placed for the semester with a wide variety of nonprofit and government entities that engage in policy development and advocacy for older persons and persons with disabilities.¹⁸¹ Rather than handling direct client representation, the students provide legal information to the public and strengthen the advocacy work of community groups. Some of the groups they have been placed with are the National Center for Lesbian Rights, the Elder Care Rights Alliance, the Alzheimer's Association of Minnesota-North Dakota, and the Minnesota Kinship Caregivers Association. These placements have generated scholarly research and materials for consumers on a wide variety of issues affecting seniors and their families and caregivers. The program does not receive funding either from the Legal Services Corporation or from the Administration on Aging's Title III program.

K. Professional Ethics Issues

In an Elder Law clinic, it is critical that students learn about and practice the proper handling of professional ethical challenges.¹⁸² In particular, students need to be familiar with the

Physician Orders for Scope of Treatment (POST): Will the "Yellow Sheet" Turn Pink in North Carolina? 9 *Elder L.* (newsltr. of the N.C. B. Assn. Elder L. Sec.) 3 (Dec. 2004).

179. *E.g.* Kate Mewhinney, *Gifts with Powers of Attorney—Are We Giving the Public What It Wants?* 35 *Wake Forest Jurist Mag.* 14 (Summer 2005) (reprinted in 10 *N.C. St. B. J.* 24 (Winter 2005) (available at <http://www.ncbar.com/journal/archive/Journal%2010,4.pdf>) and 16 *Voice of Experience* (newsltr. of the ABA Senior Law. Div.) (Spring 2006)).

180. William Mitchell's program is described in more detail in Professor Dayton's article in this law review. Kim Dayton, *The Accidental Elder Law Professor*, 40 *Stetson L. Rev.* 97 (2010).

181. For more about this approach to clinical "combined advocacy" teaching, see generally Jayashri Srikantiah & Jennifer Lee Koh, *Teaching Individual Representation alongside Institutional Advocacy: Pedagogical Implications of a Combined Advocacy Clinic*, 16 *Clin. L. Rev.* 2, 451 (2010).

182. See M. Ann Miller, *Learning from Our Elders: Teaching Professional Responsibility in an Elder Law Setting*, 2 *Thomas M. Cooley J. Prac. & Clin. L.* 59, 64–66 (1998–1999)

rules on representing the impaired client,¹⁸³ receiving payment from a third party,¹⁸⁴ conflicts of interest,¹⁸⁵ duties to a non-client,¹⁸⁶ and confidentiality.¹⁸⁷ They also must learn to clarify with the older person's fiduciary that they will represent that person in his or her role as fiduciary and not as an individual.¹⁸⁸ Finally, when the client's "de facto" agent comes in without the client, and may have a conflict of interest, we ask the agent to confirm that he or she understands that the information provided to us might be used against him or her.¹⁸⁹

Reading ethics rules does not make an ethical lawyer, of course. By practicing certain steps, some of which are discussed in this section, the student leaves the clinical experience with an operating framework that should hold the student in good stead. Once in practice, the student can reflect upon this framework and determine when varying an approach is appropriate.¹⁹⁰

(describing the ethical issues that arise when meeting with elderly clients); Marla Lyn Mitchell-Cichon, *What Mom Would Have Wanted: Lessons Learned from an Elder Law Clinic about Achieving Clients' Estate-Planning Goals*, 10 *Elder L.J.* 289, 305 (2002) (showing some of the difficulties in applying traditional ethical rules to the Elder Law setting); Rebecca C. Morgan, *Who Is the Client? Ethical Issues in Elder Law Practice*, 16 *J. Am. Acad. Matrimonial Law.* 463, 465–467, 471 (2000) (discussing the ethical problems that arise with the joint representation of two spouses on an estate planning issue); Joseph A. Rosenberg, *Adapting Unitary Principles of Professional Responsibility to Unique Practice Contexts: A Reflective Model for Resolving Ethical Dilemmas in Elder Law*, 31 *Loy. U. Chi. L.J.* 403, 412–414 (2000) (outlining a four-step model to deal with ethical dilemmas).

183. Model R. Prof. Conduct 1.14 (ABA 2010). The lawyer is able to take "reasonably necessary protective action" if he or she believes the client cannot act on his or her own accord and is at "risk of substantial physical, financial, or other harm." *Id.* at R. 1.14(b).

184. Clinics do not typically accept payment, but payment by third parties comes up often for private Elder Law attorneys. The Model Rules state that a lawyer shall not be compensated by a third party unless the client gives informed consent or the payment does not interfere with the attorney's judgment. *Id.* at R. 1.8(f); French, *supra* n. 15 at 12 (restating Model Rule 1.8(f) and stressing the importance of obtaining the client's written consent to the third-party payment).

185. Model R. Prof. Conduct 1.7.

186. *Id.* at R. 1.18.

187. *Id.* at R. 1.6.

188. French, *supra* n. 15, at 14 (warning that attorneys should inquire into whether the fiduciary is actually acting in the principal's best interest).

189. See N.C. St. B., *2003 Formal Ethics Opinion 7, Preparation of Power of Attorney for Principal upon Request of Prospective Attorney-in-Fact*, <http://www.ncbar.com/ethics/printopinion.asp?id=675> (Jan. 16, 2004) [hereinafter *Power of Attorney*] (stating that an attorney must inform an agent that any information provided by the agent will be used to further the representation of the client).

190. For example, our protocol of seeing the older client first and alone is adjusted when we see the client in a hospital room or at home. In those situations, when confirming the appointment, the staff person will let the family know that for most of the time, the student will meet alone with the client. Then, when we arrive to see the client, after a few

The paradigm couple in Elder Law is the mother and daughter combination. Typically, the daughter locates the attorney, sets up the appointment, gathers the necessary paperwork, and drives her mother to the lawyer's office. Having seen this play out countless times, I have dubbed these daughters "DD" for "dutiful daughter." Students find that they describe cases, sometimes, by explaining that "DD said this" or "DD asked that." Being respectful of DD but somewhat wary of her excessive control is something students must learn to do in an Elder Law clinic.¹⁹¹

Ethics rules and opinions from the state bar where a clinical program is located should, of course, be consulted.¹⁹² In North Carolina, a State Bar ethics opinion directs that the attorney who drafts a power of attorney must represent the principal.¹⁹³ A later opinion directs that, outside of the business context, a lawyer may not, at the request of a third party, prepare documents, such as a will or trust instrument, that purport to speak solely for principal without consulting with, exercising independent professional judgment on behalf of, and obtaining consent from the principal.¹⁹⁴

Besides the paradigm of the parent coming in with "DD, the dutiful daughter," Elder Law clinics also see traditional married couples. In our program, every student prepares wills and related documents for a married couple, so that they learn to address the unique ethical issues in joint representation.¹⁹⁵

minutes together with the family present, we can shoo them out and meet with just the client. Those are situations when it bears repeating to both the client and the family that the clinic student is only representing the older person.

191. I refer to this step of diplomatically separating the client from her "dutiful daughter," at least until the bulk of the interview has been completed, as "the sheepdog maneuver."

192. The Author was a member of the North Carolina State Bar Ethics Committee and, before that experience, was invited to give input into the key opinions related to Elder Law practice. See e.g. N.C. St. B., *Representation of Client Resisting an Incompetency Petition*, 98 Formal Ethics Opinion 16, <http://www.ncbar.gov/ethics/printopinion.asp?id=277> (Jan. 15, 1999) (revealing a sample of the Author's input into one such key opinion).

193. *Power of Attorney*, *supra* n. 189.

194. N.C. St. B., *Preparation of Legal Documents at the Request of Another*, 2006 Formal Ethics Opinion 11, <http://www.ncbar.gov/ethics/printopinion.asp?id=752> (July 21, 2006) (clarifying a previous opinion in the 2003 Formal Ethics Opinion 7).

195. For a somewhat skeptical view of joint representation, see generally Jeffrey N. Pennell, *An Estate Planner's Perspective of the NAELA Aspirational Standards*, 2 NAELA J. 95 (2006).

Most Elder Law clinics and courses emphasize ethics.¹⁹⁶ There are four main reasons I have found to stress the ethical issues. First, my experience in litigation makes me particularly sensitive to the risk of challenges to documents. By paying attention to who the client is, and avoiding undue influence, the Elder Law attorney's work is less likely to be challenged by other family members or to be set aside by a court.¹⁹⁷ Conversely, the students know what to look for when determining whether to challenge an older client's transaction from the past. For example, in one case a client had deeded valuable real estate to his daughter. Upon investigation, the students learned that the lawyer who drew up the gift deed had previously been the lawyer for the transferee/daughter, was paid by the daughter, and never met privately with the client or advised him of the risks of the property transfer.¹⁹⁸

Second, it seems to me that my students are surprisingly deferential to the adult children of older clients. This might be because these "children" are the age of the students' parents. It is also easier, often, to quickly gather information from adult children, rather than wait for the older client to remember it or to find the right piece of paper.

Third, because Wake Forest's clinic is located in a medical facility focused on older people, we have experience working with those who have physical or mental impairments. The students and I might see clients with aphasia, mild cognitive impairment, or stroke-related cognitive diminishment and speech impairments. Because we conduct home visits and advise hospitalized clients, we are more likely to deal with capacity and conflict of interest issues.

196. Ethics is a core component of almost all Elder Law courses. See Kohn & Spurgeon, *supra* n. 1, at 422.

197. One of the recent, more compelling stories of "undue influence" was the case of Brooke Astor, whose will was challenged based on lack of testamentary capacity. The case got even stranger when her son and his lawyer were criminally convicted—the son was convicted of grand larceny and the attorney of forgery. Serge F. Kovalski, *Astor's Guardians Challenge Her Later Wills, Citing Incompetency*, N.Y. Times B5 (Aug. 16, 2007).

198. Cf. Lawrence A. Frolik & Melissa C. Brown, *Advising the Elderly or Disabled Client* (2d ed., Warren, Gorham & Lamont 2009) (stating that "[t]he third element of undue influence is a requirement of proof of active procurement of the challenged will. Active procurement can be proven where the influencer has taken actions such as being present at the execution of the will, being present at the time when the testator expressed a desire to make a will, recommending an attorney to draw up the will, instructing the attorney as to the contents of the will, paying the attorney for preparing the will, securing the witnesses to the will, or safekeeping the will after its execution." (footnotes omitted)).

Starting conservatively by being protective of the client's privacy is the best approach for learners. Most families are respectful of older relatives and willing to wait to express their opinions. These families will encourage the parent to go ahead without them. It is the other group that can be of concern.¹⁹⁹ It helps to explain to the active relatives at the initial contact that the student will be meeting with the older client and they are not required to attend. Years ago, I developed a brochure that explains the ethical issues in simple terms, called "Why Am I in the Lobby?" The brochure was later adapted by the American Bar Association's Commission on Law and Aging, and re-titled "Understanding The Four C's of Elder Law Ethics."²⁰⁰ The client's relatives are now sent the ABA brochure if they make the appointment for the client.

On occasion, a client actually thanks the student for asking the relative to wait in the lobby. Clients have various explanations, when the door closes behind them: they tell us that there is something they want to say without their relative hearing, or they express concern about being pressured by the relative. One client even whispered that she was afraid of her son's anger.²⁰¹

199. Once, a client's wife opened the door during the interview, grabbed papers off the desk, and insisted that her husband was not going to sign anything unless she first approved of it. We had to call building security to resolve the problem. Another case involved a client in her nineties, who lived in a nursing home. She was brought into the clinic by her daughter and son-in-law. The client told the student that she wanted to appoint her daughter under a power of attorney but did not want to allow the daughter to come in during the interview or hear what her plans were. (Of course, if the daughter was to be appointed, she would probably need to know, but this was a first interview and we decided not to push the issue.) When we exited the interview room, the daughter and son-in-law insisted on knowing what had been discussed. When we said we could not share that, at least at that point, they "fired" the clinic. The student and professor offered to meet the client again at her nursing home, but the client's relatives insisted that we not do so.

200. ABA Commn. on L. and Aging, *supra* n. 166. The professional organization of Elder Law attorneys in England, Solicitors for the Elderly, also uses the brochure. See Solicitors for the Elderly, *Homepage*, <http://www.solicitorsfortheelderly.com/> (accessed Jan. 8, 2011).

Your leaflet is in print and all members are given the leaflet when they join[,] and [are] able to buy them at cost price. I am pleased to say that we reprint them often so they are widely used by our members. We call it 'Why am I left in the waiting room' and made some changes to some words that people would not understand here. It is a valuable leaflet and removes potential conflict.

Email from Caroline Bielanska, Sol., Chairwoman of Solicitors for the Elderly, to Author, *Hello and a Question from the U.S.* (May 27, 2010, 7:24 a.m. GMT).

201. She had good reason to be worried. He later made threatening phone calls to Wake

Some clients reveal that the person in the lobby is bossy, a spend-thrift, or beginning to have memory problems.

I do not recommend using a “joint representation” approach in the Elder Law clinic, except for married couples. Reams of law review articles, ethics commentaries, and treatises have been written about the option of joint representation and the attendant waivers of conflicts of interest, about family entity representation, and so on. These concepts are tricky for lawyers, challenging for law professors, overwhelming for law students, and completely incomprehensible for clients. Making the older client the sole client, with permission to disclose information to relatives, is the approach used in Wake Forest’s Elder Law Clinic. There may be an element of coercion or “take it or leave it,” one might argue, because, as a provider of free services, the clinic can dictate the terms on which it handles cases. A different perspective is that, because a clinic does not charge fees or need to cover its overhead, it is less likely to succumb to market pressures on lawyers—specifically, the clinic can simply refuse to accede to the older person’s relatives’ demand to be considered as clients.²⁰²

Another step that we take to adhere to ethical rules is to anticipate the possibility that the client will become disabled during our representation. In our engagement letters, we address this and enclose a short statement explaining what our policy is. If the client objects to the policy, he or she is asked to contact us in writing.²⁰³

Forest’s Elder Law Clinic, and when our client died a few years later, he was so threatening to the court personnel handling the estate that he was ordered by the court security division to leave the courthouse.

202. See Model R. Prof. Conduct 1.6 (requiring an attorney not disclose confidential information to a non-client); *ACTEC Commentaries on the Model Rules of Professional Conduct* 91–92 (2006) (discussing the conflict of interest issues that arise when representing multiple clients); Patricia M. Batt, *The Family Unit as Client: A Means to Address the Ethical Dilemmas Confronting Elder Law Attorneys*, 6 *Geo. J. Leg. Ethics* 319 (1992) (arguing that the Model Rules are not sufficient to deal with Elder Law conflict of interest issues); Teresa Stanton Collett, *The Ethics of Intergenerational Representation*, 62 *Fordham L. Rev.* 1453 (1994) (concluding that familial representation reduces attorney’s accountability); Steven H. Hobbs, *Family Matter: Nonwaivable Conflicts of Interest in Family Law*, 22 *Seattle U. L. Rev.* 57 (1998) (suggesting that determination of waivable conflicts of interest should be done subjectively, on a case-by-case basis).

203. The engagement letter sent to competent clients, but not to fiduciaries, includes this statement: “On occasion, our clients become ill while we are representing them. I am enclosing a page that explains how we would handle such a situation, if that was to happen to you. Please let me know if you have questions about it.” The enclosed policy reads:

For students, it is sometimes challenging to advocate for what impaired clients want. The student's initial reaction is to be protective and consider mainly "best interests." Someone new to lawyering has a harder time than an experienced attorney putting aside established views of what the client "should do." On the other hand, it is exactly this frank discussion of what the client "should do" that is part of the lawyer's role as counselor. In Wake Forest's Elder Law Clinic, when an older client wants to pursue a course of action that seems unwise, the student must learn to balance these sometimes-conflicting roles—to be an advocate for the client's views, but also to counsel the client about the legal risks and other pitfalls associated with that plan.²⁰⁴

On all of the ethical issues discussed, the clinic's support staff needs to be just as vigilant as the students are. Staff plays a big role in introducing the client's family to the notion that the student will meet with the older client while the relative waits. The staff also must understand that "DD, the dutiful daughter" does not automatically have the right to information from the file, nor can she direct what changes will be made to draft documents.

Students confirm in their engagement letters to clients to whom information can be released. We are trying a new system of having the client provide a list of names, at the first interview, in addition to including this information in the engagement letter. In situations when the client's children are unusually pushy, we

This page explains our policy if we have serious concerns about your mental capacity. If we are still representing you, we will continue to do so. We will take steps to protect your interests. We will follow legal standards of practice and ethics rules. N.C. ethics rules provide that, when a client cannot act in his [or her] own interest, the lawyer may take appropriate action in assessing the client's capacity and considering protective action. This could include seeking appointment of a guardian. I would only take actions that I reasonably believe to be in your best interests and consistent with your previously expressed wishes. Unless you direct me otherwise in writing, you authorize me to represent one or more members of your family or other advisors acting in a fiduciary relationship (which means a "trusted" relationship) for you or your property. However, I would not represent them in any proceeding involving determination of your capacity. Please tell me if you have questions or concerns about this. Thank you.

Ltr. from Kate Mewhinney, to Client, *Engagement Letter* (copy on file with *Stetson Law Review*).

204. See Peter Margulies, *Access, Connection, and Voice: A Contextual Approach to Representing Senior Citizens of Questionable Capacity*, 62 *Fordham L. Rev.* 1073, 1085 (1994) (stating that an action against a client's interest can be justified in an emergency situation).

have sent them a letter gently confirming what we have told them in person—that the parent is the client.

The ethical obligation to provide competent legal services is, of course, fundamental. We try to accomplish this by keeping an eye on the range of cases we handle and, where necessary, referring matters out or associating attorneys with relevant experience.²⁰⁵

The core value in the procedures is to place a high value on loyalty to and open communication with the client.

L. Interviews

Students often need to break the habit of passive note taking, with their noses to paper or laptop, and learn to interact face-to-face with clients. They are discouraged from taking any notes or even holding a pen until they have covered the usual pleasantries and required topics, and chatted for a few minutes about what the client has in mind to do.²⁰⁶

Some attorneys use mental capacity screens in their Elder Law practices.²⁰⁷ We have not done so in our program. But we do have a class specifically covering the different legal standards of capacity, such as contractual capacity (to sign a power of attorney), testamentary capacity, and capacity for purposes of incompetency proceedings. We also have unusually good access to

205. Fortunately, in our community we have been helped in several cases by B. Bailey Liipfert, III, a partner with the firm of Craige, Brawley, Liipfert, & Walker. His law partner Brent W. Stephens has also provided pro bono assistance. Both are Certified Elder Law Attorneys by the National Elder Law Foundation. Another valuable consultant has been Gordon W. Jenkins, with the firm of Wells Jenkins, who is board certified by the North Carolina State Bar in estate planning and probate law.

206. The typical open-ended beginning is encouraged to facilitate the client conveying information. G. Nicholas Herman & Jean M. Cary, *A Practical Approach to Client Interviewing, Counseling, and Decision-Making: For Clinical Programs and Practical Skills Courses* 34 (LexisNexis 2009). Students are not to ask, “Do you know why you are here?” because it is insulting and creates even more anxiety for the memory-impaired client. It can be difficult for the student to know how far to go in showing emotional responses when the older client describes difficult experiences. If the student consistently displays only an impassive response, even when the client is distressed and empathy is in order, the clinical professor will encourage him or her to simply say “I am so sorry,” or “That must be difficult,” and to give the client time to collect herself. *Id.* at 32.

207. An excellent resource on this topic is ABA Commn. L. & Aging & Am. Psychol. Assn., *Assessment of Older Adults with Diminished Capacity* (2005) (available at <http://www.apa.org/pi/aging/resources/guides/diminished-capacity.pdf>) (accessed Jan 8, 2011).

medical expertise, with expert geriatricians all around us in our building. Students do have to include information about the client's mental status in their notes following the initial interview, which helps with continuity if the case is transferred to another semester.

When the student learns to listen and communicate, he or she builds rapport and also begins to pick up on common misunderstandings. Clients often say things like, "I have a power of attorney. My daughter's name is already on my checks." Of course, having a joint account or an agency account is not the same thing as a power of attorney. Another statement that can go right past the student is the client who says, about a power of attorney, "I can handle everything myself. If I ever need a power of attorney, I'll sign one then." Students in an Elder Law clinic learn to gently clarify and correct these misunderstandings, while being explicit that the choice is the client's.

If the prospective client has memory problems, we usually have been given this information beforehand. Sometimes the deficit has been greatly exaggerated, sometimes not. A slow and easy pace is often the key to working with clients who have only mild cognitive impairment.²⁰⁸ Students learn to ask simpler questions and not to ask question after question, but rather intersperse the interview with relaxed chatting.

During interviews, I find that facts are often assumed and not clarified or confirmed. If a client says she "has a living will," the student needs to be sure to lay eyes on it. Also, a married client often says she wants her oldest child to serve as agent under a power of attorney. Students can easily miss what many older clients take for granted—their spouses! Many married clients assume that one spouse is automatically the agent for the other. So, students need to be reminded sometimes to ask—without the other spouse in the room—whether the client wants the spouse to be listed as the primary agent. Most of the time, she does but has not explicitly said so.

208. See e.g. Alzheimer's Assn., *Steps to Enhancing Communication: Interacting with Persons with Alzheimer's Disease*, http://www.alz.org/national/documents/C_EDU-StepstoEnhancing.pdf (accessed Jan. 8, 2011) (providing tips on how to improve communication with someone that has Alzheimer's Disease).

In our program, I sit in on interviews for most of the first half of the semester.²⁰⁹ After that point, I sit in only for unusually complex cases. On those cases, I typically will enter the interview room after twenty or thirty minutes and, with the client's consent, ask the student to summarize what he or she has learned thus far.²¹⁰ Videotaping and then reviewing tapes is very time consuming, and I rarely use videos, although most students are more comfortable without me present during their interviews.

Interviews are adjusted to accommodate the clients' limitations. For example, students are taught to be attuned to client fatigue. They check periodically with the client about continuing, if they see the client's energy level dropping or ability to recall waning. Because of possible incontinence issues, students mention early in the interview that the client can ask to take a break at any time, and they explain that the restrooms are down the hall.

M. Other Ethical Issues

Some of our cases raise ethical dilemmas other than professional ethical issues. Three of these stand out: planning for Medicaid eligibility; advising clients regarding debts; and helping clients in guardianship cases. These are, again, some of the "big questions" that make Wake Forest's Elder Law clinic an interesting place to teach. The questions are not merely theoretical; each one has the name and the face of a client.

Sometimes students question the propriety of Medicaid planning. Generally, they come to realize that helping clients protect their modest savings and homes is hardly a welfare scam. The use of long-standing exceptions to the asset-transfer rules, such as the federal authority for transfer of the home to a disabled child, are rational and not loopholes. We discuss the bias in our healthcare policy in favor of hospital care versus chronic care, which some consider to be a poor fit with the reality of today's healthcare needs. Students see that the Medicaid rules are complicated and

209. See Juergens, *supra* n. 15, at 367–368 (discussing the reasons for the supervisor to remain in the room during the interview).

210. The Author has observed this teaching approach being used by attending physicians and is consistently impressed at the succinct and detailed responses provided by medical interns, residents, and fellows.

that clients urgently want to understand them. Our clients—like those who do “wealth-transfer planning”—want to leave an inheritance to their families, which they might not be able to do with current laws on Medicaid estate recovery.

Another ethical challenge for some students is posed when they counsel clients who owe consumer debt. Often, there is no reason to contest or litigate the debt because the client is “judgment proof,” meaning his or her assets are completely protected under state law. A few students have questioned whether it is “right” to tell clients that they do not have to pay their bills.²¹¹ Older clients, of course, deserve to know their legal options, so the student explains these to them. The students and clients might feel that it is morally important to pay one’s bills. These views can be discussed as long as the client understands the legal steps and options available. I encourage the students to consider the moral value (expressed in laws) of protecting people with limited income and assets from hardship and deprivation caused by insurmountable debt.

Other ethical dilemmas swirl beneath the surface of a busy Elder Law clinic. They involve the policy challenges we face in a country that is aging during the declining economic conditions. One challenge is simply the shortage of affordable legal services for moderate-income people of any age.²¹² Another issue is the barren and inadequate care that is frequently provided in nursing homes, especially those where older poor people live out their lives. Yet another moral concern is the gender inequity that puts

211. One student excused himself during a client interview to tell me that his religious views prevented him from telling someone they did not have to pay their debts. This made for a good discussion, then and later, about the duty of loyalty to clients not to “hide the ball” but to give them their legal options. If he personally disagreed, he was told, he could tell them what his personal views were, but he had to tell them their legal rights or I would do that. He later said that the discussion was one of the more enlightening he had had during law school and that he better appreciated what it meant to be someone’s lawyer.

212. See Leg. Servs. Corp., *Documenting the Justice Gap in America: The Current Unmet Civil Legal Needs of Low-Income Americans* 9 (Sept. 2009) (documenting that almost one million cases per year are rejected by programs funded by the Legal Services Corporation because of inadequate resources). There are many opportunities that students should be told about for pro bono work in the future. For example, the attorney who serves as a consultant to a law school clinic is serving those in need. The attorney who helps a church set up subsidized housing for the elderly or disabled is sharing expertise to help the community. See Model R. of Prof. Conduct 6.1 (stating that attorneys should aspire to perform fifty hours of pro bono service per year to persons of limited means).

so much responsibility on women as caregivers and also causes them to constitute the vast majority of the elderly who are both poor and alone.²¹³

These dilemmas are important to touch on, in the hope that they will spark a moral commitment in students. Learning the basic skills of a lawyer is daunting enough for the students. It is a challenge for them and their professor to step back periodically from the case files, phone slips, draft documents, and research tasks to talk about the big picture questions. But it is also an essential part of the experience.

IV. TEACHING STRUCTURE

A. Student Selection

Various criteria come into play when Elder Law clinics select students. At Syracuse, for example, preference is given to students who have taken the doctrinal Elder Law course. At Gonzaga, preference is given to students who have taken wills and trusts or Elder Law. At Wake Forest, the course registration is “first come, first served.” For the spring semester, two slots are held open for second-year students.²¹⁴ This way, the program can offer a paid position to one student to work during the summer.

213. See generally A. Kimberley Dayton, *A Feminist Approach to Elder Law*, in *Theories on Law and Ageing: The Jurisprudence of Elder Law* (Israel Doron ed., Springer 2009) (noting women live longer than men in most countries and are therefore more likely to live in poverty, and alone, in their old age); Lisa C. McGuire et al., *Supportive Care Needs of Americans: A Major Issue for Women as Both Recipients and Providers*, 16 J. Women's Health 784 (2007) (noting that care giving is a uniquely important issue for women, in that sixty-one percent of caregivers are women, while women comprise sixty-five percent of those receiving care); Chizuko Wakabayashi & Katherine M. Donato, *Does Caregiving Increase Poverty among Women in Later Life? Evidence from the Health and Retirement Survey*, 47 J. Health & Soc. Behavior 258 (2006) (exploring the issue of how caring for the elderly affects women's risks of living in poverty and concluding that women's caring for parents earlier in life increases women's chances of living in poverty later on); Natl. Fam. Caregivers Assn., *Caregiving Statistics*, http://www.thefamilycaregiver.org/who_are_family_caregivers/care_giving_statistics.cfm (accessed on Jan. 8, 2011) (revealing that the “typical family caregiver” is a forty-nine year old woman caring for her widowed mother, and that approximately sixty-six percent of caregivers are women).

214. Students have to be past the midpoint of law school, in North Carolina, to work with clients in a clinical course. State Bar rules require that students have completed at least three semesters of law school before taking a clinic. 27 N.C. Admin. Code 01C.0203(2) (2010). Thus, during the fall, all eight slots are taken by third-year students. In the spring semester, I hold open two spots for second-year students. Typically, one of them is hired to work in the clinic during the summer that follows, in a paid position.

We may move toward a policy of selecting students because some of the waitlisted students have a strong interest in Elder Law, or a background (such as nursing or social work) that makes them particularly suited to Elder Law.

B. Credit Hours

Credits for Elder Law clinic courses seem to vary widely. At Gonzaga, for example, students get six credits for an average of twenty-four hours per week, but if the class is not full, other students are accepted who get three credits for twelve hours per week in the clinic.

Our program is a one-semester, four-credit course, and students spend eight hours in the clinic and two hours in a weekly class.²¹⁵ At Syracuse, students spend twenty to twenty-five hours per week, including the weekly seminar, but get six credits.²¹⁶ At Chapman, students can take either one or two semesters and spend about ten hours per week in the clinic.²¹⁷

At Catholic University, students have the option of taking the clinic for four, five, or six credits. The commitment varies from thirteen to twenty hours per week. It is a one-semester clinic, but roughly one-third of students will re-enroll.²¹⁸ Hawaii has both a basic Elder Law clinic and an advanced one, each lasting only one semester. Students spend about ten hours per week on cases, projects, and research.²¹⁹

C. Curricula and Course Requirements

Compliance with state bar rules is the first prerequisite for students to enroll in Elder Law clinics. Typically, the rules provide that the students must be in good standing at the law school²²⁰ and have completed one third or one half of law school.²²¹

215. Sometimes a student will return after being in the clinic to do a one-credit independent study. For example, a student with an interest in international and comparative law compiled information about law and aging issues in other countries. I used her research in a summer course on comparative law and aging that I taught in Wake Forest's summer program in Venice, Italy.

216. Email from Mary McNeal, *supra* n. 31.

217. Email from Kurt Eggert, *supra* n. 149.

218. Email from Michael T. McGonnigal, *supra* n. 2.

219. Email from James Pietsch, *supra* n. 31.

220. 27 N.C. Admin. Code 1C.0203(3).

2010] *The Human Touch: Clinical Teaching of Elder Law* 217

These state bar rules might provide for various levels of client representation, such as are allowed under Illinois' rules.²²²

In terms of course prerequisites, these vary. Evidence is required at Chapman and Gonzaga, for example. At Gonzaga, students must have taken a course on Professional Responsibility. Under North Carolina's State Bar Rules, clinic students do have to certify that they have read the Rules of Professional Conduct.²²³ Lawyering Skills is a prerequisite at Northern Illinois University Elder Law Clinic²²⁴ and an Elder Law survey course is required at William Mitchell and at Temple. At Wake Forest, we also provide a list of recommended, related courses.²²⁵ The core courses for a well-rounded Elder Law curriculum have been listed by the National Academy of Elder Law Attorneys, along with recommended, related courses.²²⁶

D. Course Materials

At Wake Forest's program, the primary course materials are statutes, checklists, sample letters, links to Web sites, articles and manuscripts, and questions to be answered for class. Since 2009, these materials are only on TWEN,²²⁷ rather than in hard copy. They are divided into chapters that track the syllabus.²²⁸

221. See Haw. S. Ct. R. 7.3(a) (available at <http://hawaii.gov/jud/ctrules/rsch.htm>) (mandating completion of one-third of law school); 27 N.C. Admin. Code 1C.0203(2) (mandating completion of one-half of law school).

222. S. Ill. U. Sch. L., *Clinics, Civil Practice/Elderly Clinic*, http://www.law.siu.edu/clinic_services/elderstudents2.asp (accessed Jan. 8, 2011).

223. 27 N.C. Admin Code 1C.0203(6).

224. N. Ill. U. College L., *Elder Law Clinic*, http://www.niu.edu/law/academic/courses/elder_law.shtml (accessed Jan 8, 2011).

225. Wake Forest U. Sch. L., *Student FAQs*, <http://elder-clinic.law.wfu.edu/sfaq/> (accessed Jan. 8, 2011).

226. NAELA, *Law School Students*, http://www.naela.org/Public/MemberServices/Law_School_Students/Public/Membership/Join_NAELA/Law_School_Students.aspx?hkey=131182a4-5639-4dc7-b773-cac3c7a5d34a (accessed Jan 8, 2011) (listing such courses as Trusts and Estates, Estate Planning, Administrative Law, and Public Benefits and Poverty Law, among others).

227. TWEN stands for "The West Education Network." Westlaw, *The West Education Network*, <https://lawschool.westlaw.com/shared/signon10.asp?path=%2ftwen%2fdefault.aspx> (accessed Jan. 8, 2011).

228. Syllabus topics have included: Financial Powers of Attorney; Advance Medical Directives; Ethics and Mental Capacity from a Lawyer's Perspective; Interviewing and Counseling; Guardianship; Will Drafting for the Small Estate; Basics of Medicare and Medicaid; Mental Capacity Issues: The Medical Perspective; Housing Issues; Nursing Home Law; Long Term Care Insurance; Women and Aging; Remedies for Abuse and

Other Elder Law clinics use TWEN as well, and supplement that with a text,²²⁹ ABA and CLE materials, skills texts, and statewide training materials.²³⁰

The clinics at Memphis and Campbell use *Elder Law in a Nutshell*,²³¹ and Wake Forest and Campbell (and probably other schools) assign the *Aspirational Standards for the Practice of Elder Law*, from NAELA.²³²

E. Guest Lecturers

Because Elder Law involves many other disciplines, inviting guest lecturers can enrich the substantive-law teaching. It also helps Wake Forest's Elder Law Clinic to build relationships with partner professionals and programs.

At Wake Forest, one or two guest lecturers are invited each semester. Over the past nineteen years, I have invited a wide variety of guest lecturers. Besides helping to train the students, the lecturers are teaching me and also conveying a commitment to older people that is inspiring. Visiting speakers have included representatives of the county Adult Protective Services program, a certified professional accountant who assists older clients, the hospice medical director, the hospice chaplain, a plaintiffs' attorney who handles nursing-home-negligence litigation, a representative of a reverse mortgage company, a demographer, bioethicists (generally a physician or an ethicist/professor), private Elder Law attorneys, hospital chaplains, hospital physicians who specialize in end-of-life care in the intensive care units, geriatricians, neurologists, psychologists, psychiatrists, and the state's legal services developer under the Federal Older Americans Act. The students have also had visits from several presidents of the National Academy of Elder Law Attorneys,

Neglect; Medical Ethics and End-of-Life Care; Special Needs Trusts; Ethics and Life Support; Consumer Issues; Medical Ethics and Hospice Care; Mediation; Nursing Home Litigation; Nursing Home Negligence; and Tax Issues of Older Clients. Kate Mewhinney, Remarks, *Teaching Structure, Course Materials* (Wake Forest U. Sch. L.).

229. Memphis uses Lawrence A. Frolik & Richard L. Kaplan, *Elder Law in a Nutshell* (4th ed., Thomson/West 2006). Email from Donna Harkness, *supra* n. 61.

230. Email from Mary McNeal, *supra* n. 31.

231. Lawrence A. Frolik & Richard L. Kaplan, *Elder Law in a Nutshell* (5th ed., West 2010).

232. French et al., *supra* n. 15.

including A. Frank Johns, Charles Sabatino, Bernard Krooks, Allan Bogutz, and Rebecca Morgan.

F. Orientation, Special Projects, and Field Trips

In the first few weeks in Wake Forest's program, students have projects that orient them to Elder Law terminology, advance directives and end-of-life issues, and Medicaid basics. They go in small groups to visit two or three organizations that serve older adults, such as the Area Agency on Aging, the Long Term Care Ombudsman, Consumer Credit Counseling's senior health-insurance-information program,²³³ hospice, and other locations. They view one or two short documentaries on end-of-life issues,²³⁴ and read an article about the pros and cons of artificial hydration and nutrition at the end of life.²³⁵

Some semesters, students also work in pairs on short projects that they choose, and give a presentation to the class. Some of the topics that past students have selected are marketing the Elder Law practice, selecting a long-term care insurance policy, and evolving laws on genetic discrimination.

At Catholic University, the clinic has a special relationship with the Armed Forces Retirement Home (AFRH).²³⁶ It is also starting a consumer law program just over the border in Maryland, using a cy pres grant arranged by an alumnus.²³⁷

233. Senior Financial Care is the local office of the federally mandated program to provide health-insurance information to seniors. 42 U.S.C. § 1395b-4 (2006). See Senior Fin. Care, <http://www.seniorfinancialcare.org/> (accessed Jan. 8, 2011) (providing debt counseling and information regarding reverse-mortgage options to seniors). During the semester, every clinic student will make several referrals to this agency.

234. *Before I Die: Medical Care and Personal Choices*, TV Broad. (PBS Apr. 22, 1997) (available at <http://www.thirteen.org/bid/p-description.html>); *Whose Death Is It Anyway?* <http://www.whosedeathisitanyway.com/> (accessed Jan. 8, 2011).

235. Stephen G. Post, *Tube Feeding and Advanced Progressive Dementia*, 31 *Hastings Ctr. Rpt.* 36 (2001).

236. For more information about the AFRH in Washington, District of Columbia, see AFRH, *AFRH Washington, DC*, <https://www.afrh.gov/afrh/wash/washcampus.htm> (accessed Jan. 8, 2011).

237. Email from Michael T. McGonnigal, *supra* n. 2. For more about cy pres grants, see <http://www.cypresfunds.net/> (accessed Jan. 8, 2011).

G. Student Reflections

In our program, two class sessions are specifically focused on the learning experience. These are called “case reviews,” and each student picks two cases to present.²³⁸ They discuss legal and ethical issues they encountered, as well as what they felt they did well and not as well, and their colleagues offer suggestions. Students also meet with me following most client interviews.²³⁹ Reflection on the clinic experience is also encouraged at the end of the semester and following participation in the medical clinics.²⁴⁰ Students are asked to speak up if they feel that their caseload is too difficult, and they do.

238. See Susan Bryant & Elliott S. Milstein, *Rounds: A “Signature Pedagogy” for Clinical Education?* 14 Clin. L. Rev. 195, 199 (2007) (discussing the benefits of holding “rounds” to discuss students’ cases in a classroom setting).

239. These discussions cover both the student’s experience and any questions about the legal issues raised by the case. The student and professor might focus on changes to make for future interviews. Common concerns include poor eye contact or a lack of empathetic and active listening skills; skipping over the “small talk” and rapport-building part of the interview; and the excessive use of informal language, such as “like” and “you guys,” which is not the best way to talk to a couple in their eighties!

240. End-of-Semester Feedback Questions include the following:

- (1) In looking back over the syllabus, which speakers do you think were especially good and which were not so good?
- (2) Are there topics that you would add, delete, or amplify on? Please explain why.
- (3) Was your caseload generally manageable and varied? Is there any type of case you would add (if possible), delete, or handle differently?
- (4) Are there any office procedures that you would suggest we reformulate? If so, how and why? (This would include everything from appointment scheduling, typing procedures, opening or closing memos, and any other procedure we used.)
- (5) Do you have suggestions about how to improve our service to our clients?
- (6) Was the level and amount of supervision and feedback sufficient for your needs? What did you find helpful and what was not helpful?
- (7) Do you feel that the trips to the Geriatric Assessment Clinic, to talk to community groups, and to Hospice were of enough value to retain them as part of the course? Would you add any similar activities?
- (8) What skills or work habits do you feel you have strengthened during this course?
- (9) In a broader way, what has this experience meant to you, other than four credits and eight hours per week? For example (and without limitation), has it affected your views on aging or the elderly? Do you think you are more competent in interviewing and representing individuals? Has it caused you to consider issues of life, death, and family in a different way?
- (10) Other Comments?

V. ADMINISTRATIVE ISSUES

A. Office Management

Clinic students need to gain some understanding of how a law office is run. In fact, former students who joined small firms or opened solo practices report that the office-management lessons were as valuable as the laws they learned about. Of course, one semester does not permit students to see every aspect of the office's administration, but they learn how an office is set up and that a lawyer's work is very much the product of a detail-oriented, dedicated office staff.

In our program, we send a letter to those applicants for services who are accepted to be on the waiting list.²⁴¹ The letter then explains that being on the waiting list does not guarantee getting an appointment. If an appointment is set up, the staff sends an appointment card and calls the day before to confirm the appointment. If the appointment is to take place at the client's home, directions are printed out and placed in the file, and a copy given to me.

For certain types of cases, the clinic staff also send the prospective client a list of items to bring. For estate planning cases, for example, the list includes a copy of existing wills, as well as deeds, marriage and divorce certificates, life-insurance policies, retirement accounts, and other financial records.

At the first interview, the student introduces me, if I am sitting in, and points out the secretary and client coordinator. The student also provides the client with a copy of the student's schedule. The client may have spoken by phone with one or two support staff, so these introductions help to orient the client and give them a face to go with each name. These courtesies, particularly helpful for the older client, also orient the student to his or her responsibility to assure a client's comfort and feeling of security.

Files are not opened until conflicts of interest are checked. We use the ABACUS software for this.²⁴² A conflicts-checking

241. For more about intake procedures in our program, see *infra* Part V(F).

242. See AbacusLaw, *Complete Law Office Software, Feature List, Conflict of Interest Checks*, <http://www.abacuslaw.com/products/conflictchecking.html> (accessed Jan. 8, 2011) (providing attorneys with the ability to check potential clients' names against those of all previous clients in the database).

notebook goes to the students before any case is opened, listing the names of prospective clients and of opposing parties, so that the students can sign off that they have no conflict of interest with a prospective client. Within a day of the initial interview with a client, the student is required to list opposing parties and to provide the secretary with the names of opposing parties who were not listed on the initial intake paperwork. These additional names are crosschecked for conflicts of interest and added to the clinic's database. Students are also informed that if they learn of other opposing parties during the course of representation, they are to follow the same procedure.

Every clinic has different support staffing, but to the extent possible, students should be taught to delegate certain types of tasks. It is generally best to have the support staff handle copying, faxing, scanning, transcribing handwritten items, confirming appointments, and the like. When the client's file has extensive documents, students should ask support staff to create an index or take advantage of other appropriate organizational tools.

B. Funding

A natural ally in representing low-income older clients is the federal legal services program, which has offices in most cities in our country.²⁴³ With its extensive expertise and network of offices, the legal services programs provide partnering clinics a large number of clients and a committed, experienced staff of attorneys and paralegals. These programs typically have expertise in health law, consumer law, and landlord-tenant law. Although they are stretched thin, the legal services programs allow a law school clinic to leverage resources and broaden a clinic student's understanding of poverty law.

One school that has partnered with legal services is the Chapman University School of Law, located in southern California. The school's Alona Cortese Elder Law Center was founded in 2000 and partners with the Legal Aid Society of Orange

243. Leg. Servs. Corp., *What is LSC?*, <http://www.lsc.gov/about/lsc.php> (accessed Jan. 8, 2011). The Kansas University Elder Law Clinic started in 1995 by partnering with Kansas Legal Services, Inc., for example. Molly M. Wood, *Changing with the Times: The KU Elder Law Clinic and the Kansas Elder Law Network*, 44 U. Kan. L. Rev. 707, 707 (1995).

County.²⁴⁴ Some clinics, like ours, are funded as part of the law school's normal budget, without the need for external funding. Supporting an Elder Law clinic with "hard money" allows the faculty and staff to focus on teaching students and serving clients. Other sources of funds, or "soft money," can sometimes be obtained for clinic start-ups or expansion, or for ongoing budgetary needs. Local foundations and alumni are obvious places to start looking.

There are two common sources of federal funding for Elder Law clinics. First is through an affiliation with the federally funded legal services program. The University of Virginia's Advocacy for the Elderly Clinic, for example, places students with the Legal Aid Justice Center's Elder Law Initiative.²⁴⁵ A second source of funding is through the Federal Administration on Aging's Title III program.²⁴⁶ Thomas M. Cooley's Sixty Plus Elder Law Clinic is one program that gets partial funding from this source.

244. Chapman U. Sch. L., *The Alona Cortese Elder Law Center*, <http://www.chapman.edu/law/programs/clinics/elder.asp> (accessed Jan. 8, 2011).

245. U. Va. Sch. L., *Advocacy for the Elderly Clinic*, <http://www.law.virginia.edu/html/academics/practical/elderlaw.htm> (accessed Jan. 8, 2011).

246. Each state is divided into "Area Agencies on Aging" (AAA), whose service areas are determined more or less by population. Each AAA contracts with a firm or attorney who provides a range of free legal services to many seniors in that area. The "Older Americans Act" provides funds to be used for seniors in each state. 42 U.S.C. § 3001 (2006). The Administration on Aging sends funds to the fifty state senior services offices and state offices make grants to the AAAs, all of which offer legal assistance. AoA, *Legal Assistance*, http://www.aoa.gov/AoARoot/AoA_Programs/Elder_Rights/Legal/index.aspx (accessed Jan. 8, 2011).

According to the Web site of the Administration on Aging, the primary goal of legal providers under the Title III program is to protect the safety, health, and dignity of the most vulnerable seniors, especially those who are isolated by location or circumstances. Although there is no charge for services and there is no income or asset test, the Older Americans Act requires that first priority be given to those in the greatest financial, social, or health need. For instance, this could mean representing a poor, elderly person who is being evicted or sued, or perhaps a senior who could afford an attorney but cannot locate one reasonably nearby who can handle the matter at issue. Sometimes, the AAA lawyer cannot offer representation, but can help define the need and refer the senior to appropriate resources. 42 U.S.C. § 3030d(a)-(d) (2006).

The United States Department of Health and Human Services' Web site states:

By Congressional mandate, . . . the funds for these two programs are divided among individual states and U.S. territories using a population-based formula. In addition, grantees are required to match a percentage of the Federal funds received with State-appropriated funds and to administer the total of state and Federal program funds in accordance with an AoA-approved State Plan for the state.

AoA, *AoA Grant Programs*, <http://www.aoa.gov/AoARoot/Grants/Funding/overview.aspx> (accessed Jan. 8, 2011).

For many years, some law school clinics—including Wake Forest's and the University of Memphis²⁴⁷—received partial funding from the Federal Department of Education Title IX, but this is no longer available.²⁴⁸ It is possible that federal funds will be allocated for medical-legal partnerships under federal demonstration projects.²⁴⁹

Clinics that represent small investors in securities cases can seek funding from the FINRA Investor Education Foundation,²⁵⁰ the Investor Protection Trust (IPT)²⁵¹ and state regulators.²⁵² There are also funds currently available through the Borchard Foundation.²⁵³

A state-specific-funding source is sometimes found in the IOLTA (Interest on Lawyers Trust Accounts) program.²⁵⁴ The

247. Email from Donna Harkness, *supra* n. 61.

248. The United States Department of Education, through the Title IX Law School Clinical Experience Program, provided grants of over eighty-seven million dollars to law schools from 1978 through 1997. Margaret Martin Barry, Jon C. Dubin & Peter A. Joy, *Clinical Education for This Millennium: The Third Wave*, 7 *Clin. L. Rev.* 1, 19–20 (2000); see also Natl. Archive Clinical Leg. Educ., *Clinical Legal Education in the United States of America Time Line*, <http://lib.law.cua.edu/nacle/timeline.html> (accessed Jan. 8, 2011) (tracing congressional funding for clinical programs).

249. The bipartisan Medical-Legal Partnership for Health Act (MLP) was introduced in the United States House of Representatives and Senate on July 29, 2010. Two identical bills were filed, authorizing federal funds for a nationwide demonstration project for MLP. Sen. 3668, 111th Cong., 2d Sess. (July 29, 2010) (available at <http://www.medical-legalpartnership.org/sites/default/files/page/S.%203668%20MLP%20for%20Health%20Act.pdf>).

250. FINRA Investor Educ. Found., *Grant Guidelines*, <http://www.finrafoundation.org/grants/general/guidelines/index.htm> (accessed Jan. 8, 2011).

251. Investor Protec. Trust, *The ITP Grant Process*, <http://www.investorprotection.org/grant/> (accessed Jan. 8, 2011).

252. Northwestern U. Sch. L. & FINRA Investor Educ. Found., *Guidelines for Establishing a Law School Investor Advocacy Clinic* 29, <http://www.finrafoundation.org/web/groups/foundation/@foundation/documents/foundation/p118734.pdf> (accessed Jan. 8, 2011).

253. Borchard Found. Ctr. L. Aging, *Homepage*, <http://www.borchardcenter.org/> (accessed Jan. 8, 2011). Wake Forest's 2006 graduate Devon Green was the recipient of the Borchard Foundation Fellowship in 2008–2009, to be used to develop a seniors-based consumer law practice with the Senior Citizens Law Project at Vermont Legal Aid. She represent[ed] seniors in consumer collection, consumer fraud, and financial exploitation cases. At the same time, she [] work[ed] with the Consumer Assistance Program at the Vermont Attorney General's office to train seniors on consumer protection issues ... [and] also track[ed] legislation involving long-term care insurance partnerships, reverse mortgages, and stranger-originated life insurance.

Borchard Found. Ctr. L. Aging, *Devon Green*, <http://www.borchardcenter.org/fellowship-program/current-a-past-fellows/46-devon-green> (accessed Jan. 8, 2011).

254. IOLTA.org, *What Is IOLTA?*, <http://www.iolta.org/grants/?print=1> (accessed Jan. 8, 2011).

2010] *The Human Touch: Clinical Teaching of Elder Law* 225

University of Pittsburgh's clinic, for example, gets funding from this source.²⁵⁵

As mentioned earlier, grants are sometimes obtained from alumni or foundations. For example, Loyola University in Chicago had a clinic from 2000 to 2009 that was funded from several sources. The most significant was a gift by law school alumnus Jack Goedert, who had cared for his wife at home for many years as her Alzheimer's disease progressed.²⁵⁶ The Loyola program also received a \$300,000 grant from the Retirement Research Foundation, smaller grants from the Dr. Scholl Foundation, and funds from Illinois FIRST, a state program.²⁵⁷

C. Staffing and Schedules

In addition to clinical supervisors, support staff, and students, some clinics have other staff. For example, the University of Miami clinic offers a "two-year[,] post-graduate teaching[and] practice fellowship for individuals interested in an opportunity to learn to teach and practice law in a clinical setting."²⁵⁸ The Borchard Foundation offers a one-year fellowship that can provide additional supervision and community service.²⁵⁹

Catholic University's program, Advocacy for the Elderly, is set up to handle cases and classes only in the evening. Its students, who usually work full time, see clients on weekends as well.²⁶⁰ Thomas M. Cooley Law School, which started its Sixty Plus Elderlaw Clinic in 1979, added an Estate Planning Clinic in 1999.²⁶¹ Clients are seen only during weekend and evening hours.

255. Email from Martha Mannix, *supra* n. 31.

256. Email from Marguerite Angelari, Former Clinic Dir., Loyola U. Sch. L. Elder L. Initiative, to Author, *Loyola Funding Sources* (June 17, 2010, 9:27 a.m. EDT).

257. *Id.* Illinois FIRST, which stood for "Fund for Infrastructure, Roads, Schools & Transit," was a five-year public works program that began in 1999. Neighborhood Capital Budget Group, *Public Works: Illinois FIRST*, http://www.ncbg.org/public_works/illfirst.htm (accessed Jan. 8, 2011).

258. See Elder Law Prof Blog, *University of Miami Health & Elder Law Clinic Fellowship*, http://lawprofessors.typepad.com/elder_law/2010/06/university-of-miami-health-elder-law-clinic-fellowship.html (June 30, 2010) (posting a job listing for individuals interested in the fellowship).

259. Borchard Found. Ctr. L. Aging, *Fellowship Application Process*, <http://www.borchardcenter.org/fellowship-program/fellowship-application-process> (accessed Jan. 8, 2011).

260. Email from Michael T. McGonnigal, *supra* n. 2.

261. Bauer, *supra* n. 83, at 109.

This unusual schedule allows the school to include students who work full time during the day but need to complete a three-credit-hour practicum to graduate.²⁶²

Wake Forest's Elder Law Clinic twice offered a condensed summer clinic of about six weeks. Students worked in the clinic about twenty hours per week, in addition to having two class sessions of two hours each. The short schedule made it difficult to get students oriented to the legal issues and keep them busy with a caseload. Overall, the short summer session option has not worked well to give students a valuable clinical experience.

The typical summer schedule in our program has been to have one or two paid summer clerks to help close out cases, work on research and writing projects, and assist in updating and improving course materials, office forms, and procedures. New clients are not accepted over the summer, but a long waiting list of cases is built up for the fall semester students to tackle. Litigation matters are either postponed, when possible, or simply handled by me with a summer clerk.

D. Publicity

Every clinic has its own network for case referrals. Typically, this network includes news articles or announcements, brochures and posters, community education programs, senior hotlines and related agencies, former clients, and partner organizations. Typical referring agencies are likely to include the Area Agency on Aging,²⁶³ long-term-care ombudsmen,²⁶⁴ legal services corporation offices, the Social Security Administration, and local Medicaid and Adult Protective Services offices. Also, other attorneys refer clients as do physicians, financial institutions, senior housing complexes, nursing homes, and assisted living facilities.

Because of its location in a large teaching hospital, Wake Forest's program is able to take advantage of the extensive public-relations services of the medical center. Hospital room televisions

262. *Id.* at 107, 143; see *id.* at 142–144 (offering specific suggestions on running an evening or weekend Elder Law clinic).

263. Natl. Assn. Area Agencies Aging (n4a), *Policy News*, <http://www.n4a.org/> (accessed Jan. 8, 2011).

264. Natl. Long-Term Care Ombudsman Resource Ctr. (NORC), *News/Press*, <http://www.ltombudsman.org/> (accessed Jan. 8, 2011).

have an information channel that includes basic information about The Elder Law Clinic; the monthly newsletter to all employees occasionally features the clinic; elevators have signage; “table tents” (foldable signs) are located on the cafeteria tables, in family waiting rooms, and at the medical center’s information desks; and the medical center’s internal internet advertises our services.

The Wake Forest program also hosts information sessions for the medical center’s case managers. These are social workers who assist families and patients with a variety of matters, including discharge. Referrals from inside the hospital are given priority, so it is common to be at a patient’s bedside within a few hours of a social worker referring the family or patient. Also, the application form to get the clinic’s services is online and can be filled out on the Clinic’s Web site and faxed or emailed to the program’s client coordinator for immediate attention.²⁶⁵

The clinic’s newsletter is also a source of referrals. It is posted on the clinic’s Web site and is sent by regular mail or electronically to agencies, grant funders, judges, healthcare providers, attorneys, alumni, and those who have asked to receive it.²⁶⁶ The law students and law school faculty and staff all receive a copy, and the clinic’s newsletter is used by the admissions office at recruitment events.

E. Client Eligibility

The clients represented in Elder Law clinics are often more economically diverse than in most clinics that serve low-income populations. This prepares the students to handle the types of cases seen in law firms that serve middle-class clients, rather than limiting students to learning typical poverty law issues.²⁶⁷

265. Wake Forest U. Sch. L., *Our Services, Apply to Be a Client*, <http://elder-clinic.law.wfu.edu/services/> (accessed Jan. 8, 2011).

266. To subscribe to the twice-a-year newsletter “E-Clinic News,” write to ecclinic@wfu.edu. For a hard copy, please also provide your mailing address.

267. State bar rules generally limit law students to representing indigent clients. Student practice rules are an exception to the rules barring the unauthorized practice of law. See e.g. Pa. Code tit. 204, § 322(a)(1) (2010); R. Regulating Fla. B. 11-1.2(b) (revised April 21, 1994) (available at <http://www.floridabar.org/divexe/rrtfb.nsf/FV/6F71578A060642BD85256BBB004BD180>); N.C. St. B. R. C.0202(1) (amended Mar. 6, 2008) (available at <http://www.ncbar.com/rules/printreg.asp?id=529>); N.C. St. B. R.

Law school clinics teach students but also increase the availability of legal help to those who cannot afford private attorneys.²⁶⁸ About ten percent of older Americans have incomes under the federal poverty guidelines.²⁶⁹ Under ABA accreditation rules, law students cannot be paid for clinical work in which they receive course credit.²⁷⁰

Often, older people's incomes have dropped following retirement, so the clinic students find themselves representing middle-class clients. The clients are likely to own a home,²⁷¹ and many clients have some savings and investments, and possibly a pension in addition to Social Security income. Some clinics assist clients with higher incomes, such as Northwestern University Law School's Investment Protection Center, which accepts clients with up to \$100,000 per year of income.²⁷²

The age requirement for most Elder Law clinics appears to be sixty, but in some programs, the students represent someone younger, who is the de facto or court-appointed fiduciary.²⁷³ For example, the agent under a power of attorney might contact the clinic, or a court-appointed guardian for an older ward might seek assistance. Also, when the older person is not able to communicate, the clinic might represent a family member in seeking to become the elder's court-appointed guardian. When an incompetent elder has only Social Security income, the clinic student might simply explain how to apply to become "representative payee."²⁷⁴

C.0206(c) (amended Mar. 6, 2008) (available at <http://www.ncbar.com/rules/printreg.asp?id=533>).

268. Colleen Leyrer, *An Address for Advocacy*, 21 *Student Law* 30, 31 (1993).

269. Ellen O'Brien, Ke Bin Wu & David Baer, *AARP Public Policy Institute, Older Americans in Poverty: A Snapshot 7-8*, <http://assets.aarp.org/rgcenter/ppi/econ-sec/2010-03-poverty.pdf> (Apr. 2010).

270. *Standards*, *supra* n. 3, at 305-1, 25.

271. See generally U.S. Census Bureau, *Homeownership Rates for the United States, by Age of Householder and by Family Status*, <http://www.census.gov/hhes/www/housing/hvs/annual09/ann09t17.xls> (accessed Jan. 8, 2011) (showing homeownership rates by age and family status of homeowner).

272. Northwestern U. Sch. L. & FINRA Investor Educ. Found., *supra* n. 252, at 16.

273. At least one program, Thomas M. Cooley Law School, represents minors in guardianship reviews. Bauer, *supra* n. 83, at 130-131.

274. Soc. Sec. Administration, *Representative Payee Program, FAQs for Representative Payees*, <http://www.socialsecurity.gov/payee/faqrep.htm> (accessed Jan. 8, 2011).

F. Intake Procedures

In the Wake Forest program, the students and I do not handle phone inquiries about our services. The client coordinator and the secretary handle all of these initial contacts and walk-ins. They also refer calls from current clients directly to the students handling the cases. Phone duty often requires great patience. The callers are told that the staff will not answer legal questions but will see if the person is eligible to apply for the program's services. They are told that the services are free.

In its first few years, the Wake Forest program took "intake" calls over the phone, but this was very time consuming. Now, when time permits, phone screening is limited to asking about the caller's age, income, and general legal problem.²⁷⁵ Eligibility questionnaires are sent only to (or on behalf of) prospective clients who are aged sixty or older, who meet the program's income guidelines, and whose legal issues are within the program's scope.²⁷⁶ Other callers are referred to the federally funded legal services program or to the state bar association's lawyer referral program, or are sent a list of local attorneys. This list refers them to attorneys certified as Elder Law specialists by the North Carolina State Bar's Board of Legal Specialization²⁷⁷ (Board) and to graduates of Wake Forest Law School's Elder Law Clinic who practice with board certified estate planning or Elder Law specialists.²⁷⁸

275. Wake Forest's eligibility questionnaires include a prominent statement that the Clinic has not agreed to take the applicant's case, and the Web site states that not all who apply become clients. Wake Forest U. Sch. L., *supra* n. 265.

276. The program does not handle traffic, tax, business, medical malpractice, probate, criminal, or personal injury cases. Real estate matters are also not accepted unless they are connected to some type of benefits law question, which is typically a Medicaid eligibility question. Wake Forest U. Sch. L., *The Elder Law Clinic Eligibility Questionnaire*, <http://elder-clinic.law.wfu.edu/files/2010/11/EligibilityQuestionnaire.pdf> (accessed Dec. 28, 2010).

277. N.C. St. B. Bd. Certified Attys., *North Carolina Legal Specialization*, <http://www.nclawspecialists.gov/> (accessed Jan. 8, 2011).

278. The Board recognizes national certification programs that are recognized by the ABA, such as the National Elder Law Foundation (NELF). But in 2009, it added a parallel certification under the state's certification program. Presently, there are twelve attorneys certified as Elder Law specialists by the North Carolina State Bar, two of whom are my former students: Caroline T. Knox of Hendersonville, North Carolina and Mark E. Edwards of Nashville, North Carolina. N.C. St. B. Bd. Certified Attys., *Legal Specialists Directory*, <http://www.nclawspecialists.gov/results.asp?SpecialtyID=1113> (accessed Jan. 8, 2011). I chair the Board's Elder Law certification committee, a reward for having com-

When there is no problem with age, income, or type of case, the eligibility applications are then checked for conflicts of interest. If there is no conflict, the eligibility questionnaire is given to me to review. Most cases are approved for acceptance, and then the secretary adds the information to a word-processing directory that is divided into several categories. These categories are generally wills and powers of attorney, medical directives, consumer law, Medicaid, guardianship questions, family (including breach of fiduciary duty), and a miscellaneous category.

Some cases are given priority.²⁷⁹ The first consideration is to give each student a variety of cases but also to assign cases according to the students' interests. Case priorities, besides referrals from our host hospital, include cases involving pending litigation, situations in which a person is about to enter a nursing home or other long-term care facility and has questions about how to pay, or cases in which a person will shortly lose Medicare coverage in a nursing home and has questions about Medicaid eligibility. When the clinic has a student with a strong interest in a field, cases that appear to involve that field are also given priority. For example, some students are particularly interested in health law or real estate law, so those cases will get priority. If necessary, I associate, or at least consult, with an attorney with expertise in that area of law.²⁸⁰

I assign cases to students starting a week or so after the semester starts. The initial cases are generally selected because they appear to be relatively straightforward, such as a single, mentally competent person who is able to come into the office and who needs a will or power of attorney, or who has a consumer debt problem. Only later in the semester will the student be assigned a case in which mental capacity is impaired. Also later in the semester, students will be assigned a married couple who both want wills or a person who needs advice about Medicaid eli-

plained that the State Bar was not publicizing the specialists certified by NELF. The committee is made up of seven NELF certified attorneys.

279. Consult *infra* Part III(G) for a discussion of what types of cases to reject for litigation.

280. Recently, we have been fortunate to be able to consult with Rene H. Reixach, a New York litigator and Elder Law expert, and Avram Sacks, a Social Security analyst with Wolters Kluwer Law and Business Publishing.

gibility. Students who have taken a course on decedents' estates are usually the first to see clients who need wills.

The client coordinator handles appointment scheduling. Because many older clients cannot drive themselves, this often involves coordinating with the client's relative or friend who will be doing the driving. An appointment card, with a map to the office, is sent to the client, including information on where free parking can be obtained.²⁸¹ The appointment card also provides the clinic student's name.

The cases do not neatly fit the academic schedule, of course. So students have had to dive into cases their first week or two, such as handling administrative hearings involving Medicaid eligibility or going up onto the hospital floors to see prospective clients about wills or powers of attorney.²⁸²

Most cases are accepted at the initial interview. But some are rejected for a variety of reasons. For example, if the request is for the person to sign a will, but they lack testamentary capacity, the student will decline to take the case. Like many lawyers, the clinic is reluctant to take cases that have been handled or rejected by several other attorneys.²⁸³ This history is often a sign that the client is quickly dissatisfied and might be difficult to work with. Other prospective clients are more interested in revenge or in making someone's life miserable than in any tangible results. These cases are also avoided. When the family members have significant resources and stand to gain from a transaction, the potential matter is sometimes turned down. For example, if well-heeled adult children want to protect their inheritance and are the moving force to get Medicaid counseling for an incompetent or almost incompetent parent, the clinic might simply refer them to a private Elder Law attorney.

Some semesters, the clinic has held client interviews at the county's largest provider of services, Senior Services of Winston-Salem, Inc.²⁸⁴ But due to the travel time involved, and my being

281. Otherwise, there is a fee in the hospital parking deck.

282. A student volunteered to stay on after exam week when it was not possible to calendar a jury trial during the semester, which turned out to be a four day trial. Her third-year classmates, on the other hand, were enjoying some down time before starting bar exam preparation!

283. Consult *supra* Part III for a discussion of what cases are accepted for litigation.

284. Senior Servs. of Winston-Salem, NC, *Homepage*, <http://www.seniorservicesinc.org/> (accessed Jan. 8, 2011).

away from the other clinic students, this is currently not being done.

When a case is accepted, we confirm this in an engagement letter. Only in litigated cases do we have a written retainer agreement with the client. Litigation costs, such as deposition fees, are paid out of a grant from the North Carolina Bar Foundation. If the client's claim might result in attorney's fees for the clinic, as some consumer protection statutes provide, we keep contemporaneous records of my time and the student's time.

G. Case Management

In our program, as mentioned, the only case-management software we are currently using is ABACUS. We use it to check for conflicts and to locate files that have been closed. When pleadings, correspondence, or file notes need to be reviewed, either the hard copy file is opened or the items are retrieved through Microsoft Word. Old files are destroyed after seven years.²⁸⁵

For each client, students are required to prepare a detailed opening memorandum within a day or two of the initial interview. They also are required to send the client an engagement letter that sets out the issues on which the Clinic is engaged to do work and the issues that it has declined to handle.²⁸⁶ Referrals to other agencies are sometimes mentioned. The letter also confirms to whom the client has authorized disclosures to be made. This step forces the student to be deliberate in identifying whether the client has authorized confidentiality to be breached.

While the case is being worked on, typed or legible file notes must be maintained to keep a record of information obtained in phone calls or other fact investigation. Students must keep some record of research, even when it turns up nothing useful. If students write letters on behalf of their clients, they are to send a copy of the letters to the clients.

285. The Rules of Professional Conduct of the North Carolina State Bar require that attorneys keep files for at least six years, unless the client consents to a shorter time. N.C. St. B., *RPC 209*, <http://www.nbar.com/ethics/ethics.asp?page=216&keywords=6> (Jan. 12, 1996).

286. *Supra* n. 203 (discussing that an engagement letter includes an explanation of what the clinic's policy will be if the client becomes disabled and unable to communicate with the student during the representation). The explanation is enclosed with the letter. *Id.*

When a case is closed, the student must send a closing letter that confirms the disengagement of Wake Forest's Elder Law Clinic from further representation. It invites the client to contact the program in the future but does not commit the program to agree to future representation.

At the end of the semester, some cases need to be transferred. This is handled by sending the client a letter explaining when another student will take over. A transfer memo must be completed by the student and approved by me. The memo sets out the next steps, an overview of the case, and any insights about the client's needs, as well as any deadlines.

H. Client Feedback

Getting feedback from clients is encouraging and informative for the students as well as for the staff and me. In our program, we enclose a "Client Feedback" form and a stamped, self-addressed envelope with each closing letter. The forms that are returned typically express thanks for the services. The most common complaints are that it took too long to obtain our services and that paying for parking was a hardship. The clients often make a point to thank the client coordinator and secretary for being so welcoming and patient.

In addition to this feedback form, some clients who are particularly happy with our services receive a slip of paper with the name and address of the law school dean, Blake D. Morant. He graciously acknowledges the clients' thank you notes and copies his responses to me and the clinic student who handled the case.

Copies of the feedback forms that are sent in are posted in the clinic where all the students can read them. Client names are redacted. This allows the students' good work to be recognized and helps the students see what was most appreciated by the clients. Our students have many positive attributes! Their clients commend them for being approachable, professional, kind, informative, patient, smart, respectful, detail oriented, thorough, considerate, courteous, poised, confident, friendly, business-like, compassionate, easy to understand, well-mannered, good listeners, and clear speakers.

I. Office Accessibility Issues

Teaching students how to serve older clients should include a discussion of office design.²⁸⁷

The Elder Law Clinic at Wake Forest is fortunate to be in a building that was specifically designed to serve older patients. The entrance has a covered portico over a circular driveway, for easy drop-off of those with mobility impairments. Automatic doors open as one approaches or exits. Wheelchairs are available from the lobby receptionist. The covered parking deck has a covered pedestrian link to the building. The Elder Law Clinic is on the ground floor just off the main lobby, so it is easily seen when one enters the building.

The door to the clinic suite has a feature that allows it to stay open for about ten seconds. Unfortunately, there is not an automated door opener or a feature to press outside to open the door. The chairs selected for the clinic lobby and offices are firm and have armrests. Rather than sitting across a large desk, the students meet with their clients across a small round table. The computer is behind them at a separate desk, so it is not used for note taking during interviews and does not loom as a barrier between the student and the client. If something is needed from the Internet or the clinic's forms directory, however, the computer is handy.

Clients with hearing impairments may be offered the use of an assistive device, which involves lightweight headphones connected to a pager-sized amplification box that sits on the desk.²⁸⁸ An advantage to being in the medical center is that we have access to translators for most languages through a service used by the medical staff.²⁸⁹ The client and student speak on separate handsets that are attached to a special phone, allowing each of them to hear and speak with the translator.

287. See Rebecca C. Morgan, *The Practical Aspects of Practicing Elder Law: Creating an Elder-Friendly Office*, 38 Fam. L.Q. 269 (2004) (discussing the ways in which an office can be designed to be "elder-friendly" by examining office design in a practical manner).

288. See e.g. Williams Sound, *Product Detail*, http://www.williamssound.com/productdetail.aspx?product_id=200 (accessed Jan. 8, 2011).

289. See CYRACOM, *Translation and Localization for Healthcare*, <http://www.cyracom.com/Translation/> (accessed Jan. 8, 2011) (providing translation services for healthcare professionals).

2010] *The Human Touch: Clinical Teaching of Elder Law* 235

Lighting is ample in all rooms. A magnifying glass and a signature guide made of rigid plastic are available for clients with extremely limited vision.²⁹⁰ Also, the lobby has some large-print magazines. To protect client confidentiality, doors and ceilings have extra soundproofing.

CONCLUSION

Clinical experience gives students a strong start in learning the legal rules, ethical principles, and interpersonal skills that older clients need in an attorney. A short experience will, by necessity, only begin to teach the students what they need to know. But it can inculcate in them important lessons about being a good lawyer and the needs of our older generation. As Elder Law clinics grow in number, we should continue to share our approaches to teaching and service. Our teaching has that most powerful element—the human touch.

290. See e.g. Independent Living Aids, LLC, *Low Vision Products*, <http://www.independentliving.com/> (accessed Jan. 8, 2011) (offering products online for the visually impaired).