

MY APPROACH TO TEACHING ELDER LAW

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I have the privilege of teaching Elder Law at two different law schools.¹ At the University of Kansas School of Law, I teach a two-hour introductory course that surveys the area of Elder Law. It meets once a week for two hours during the fall semester. I also teach a one-hour class at the University of Missouri-Kansas City School of Law. This course meets once a week for two hours for the second half of the spring semester and focuses on selected Elder Law issues an estate planning attorney will encounter.

My overall objective in teaching these courses is to expose students to the various facets of Elder Law in a way that makes the topics as interesting and realistic as possible. I want the students to understand that the subjects that comprise Elder Law impact people in a very personal way, and every one of us will encounter some of these as we pass through life.²

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1. A recent study determined that 112 out of 192 law schools offer at least one course in Elder Law. Nina A. Kohn & Edward D. Spurgeon, *Elder Law Teaching and Scholarship: An Empirical Analysis of an Evolving Field*, 59 *J. Leg. Educ.* 414, 418 (2010). This number is substantial in comparison to previous statistics. In 1988, a similar study identified only thirty-seven schools that had Elder Law courses, and a 1993 study found that only fifty schools offered a curriculum that included an Elder Law course. *Id.* Now, the University of Kansas, Western New England College, and Stetson University offer LL.M. degrees in Elder Law. ABA, *Post J.D. Programs by Category*, <http://www.abanet.org/legaled/postjdprograms/postjdc.html> (accessed Jan. 6, 2011); *see also* Stetson U. College of L., *Elder Law Course Survey*, <http://justice.law.stetson.edu/excellence/elderlaw/ElderLawCourseSurvey.htm> (accessed Jan. 6, 2011) (offering an overview of the various Elder Law courses and clinics offered at law schools around the nation).

2. “The underlying paradox of elder law as a specialty is that, in its fullest sense, it is a practice defined not by its narrow focus but by its substantive breadth and non-legal extensions. It is cross cutting, cross disciplinary, and oriented toward the goal of achieving a holistic quality of life for the client.” Monte L. Schatz, *The Elder Law Attorney: Is Know-*

I. MY TEACHING TECHNIQUES

Whenever possible, stories are used to illustrate the concept being explained. Many of them are even true, or at least close to the truth.³ A few are totally made up; I find that the funnier or more bizarre the story, the easier it is to remember, and the more effective it is at getting across the ideas.

I also try to relate the legal concept being discussed in a way that makes it personal to the students. If they can visualize themselves in the situation being discussed, they will grasp and remember it much better. It also gets the students more involved in the class discussions.⁴

By using stories and the students' personal experiences as a foundation, I find it much more effective to convey the various laws and legal concepts in a way that is engaging, understandable, and memorable. Like hanging ornaments on a tree, the students can attach the new things they are learning to what they already know or understand. As a result, students are more easily able to recall and comprehend the concepts when needed.

Further, I ask questions and encourage discussion. Often different students are asked to argue opposite sides of an issue, or one student is asked to argue one side and then switch, arguing the opposite side. Although I prefer to let students voluntarily respond rather than be called on, if a student is not participating—or if it looks like the student is surfing the Internet rather than paying attention to class—I will call on the student.⁵

ledge of the Law Enough? 45 S.D. L. Rev. 554, 555 (2000).

3. See Julie A. Oseid, *It Happened to Me: Sharing Personal Value Dilemmas to Teach Professionalism and Ethics*, 12 Leg. Writing 105, 121 (2006) (discussing the need to alter the facts of the story and change the names of the individuals involved when discussing real-life events in the classroom, in order to protect client confidentiality per the Model Rules of Professional Conduct).

4. In a seminar class, the goal of a professor is to help students develop an expertise in a certain area of the law, while also emphasizing practical lawyering skills, by often using teaching methods other than the Socratic method. Steven I. Friedland, *How We Teach: A Survey of Teaching Techniques in American Law Schools*, 20 Seattle U. L. Rev. 1, 25–26 (1996). Class discussion helps students better understand substantive material, and the discussion also aids in cultivating communication and interpersonal skills. *Id.* at 31.

5. A national study found that law school “[s]tudents who frequently used their laptop to take notes, review ideas from past lectures, or read a self-prepared case brief were more likely to come to class prepared, contribute to class discussions, and synthesize material across courses. They were also more likely to work hard to meet faculty expectations.” Ind. U., *Law School Study Links Laptop Computer Use, Student Engagement*, <http://newsinfo.iu.edu/news/page/normal/9555.html> (released Jan. 7, 2009). But the study

II. MATERIALS USED IN CLASS

Most of the materials that are used in the course have been written by me and provided to the students in a spiral-bound book. This manual is updated before the beginning of each semester. Further, for the survey class, the students purchase a textbook published by LexisNexis entitled *Elder Law: Readings, Cases and Materials*, authored by A. Kimberly Dayton, Molly M. Wood, and Julia Belian.⁶ This is not a typical law school casebook. Instead, in addition to some relevant cases, it includes excerpts from many articles, Web sites, and other publications that relate to various subjects. This book is used for the materials covering ethics, abuse, discrimination, housing, and end-of-life issues. The readings for all other subjects covered in this course are contained in the materials I have written. Also, the written materials are supplemented with copies of articles, cases, or anything else of interest that is applicable to the topics being discussed. For example, when the Terri Schiavo drama was unfolding, the students were given copies of the court decisions and reports of the investigating physicians.⁷ These materials sparked lively discussions.

III. THE FIRST CLASS

The first class is extremely important because it sets the stage for the entire course. Since the courses are discussion-based and the size is usually twelve to sixteen students, I want everyone to know a little about the others who are sharing this journey, so they are, hopefully, a bit more comfortable opening up and

also noted that “students who frequently used their laptops during class to surf the Web, email[,] or instant message were much less engaged overall. Third-year students were more likely than other law students to participate in such distracting activities during class.” *Id.*

6. A. Kimberly Dayton, Molly M. Wood & Julia Belian, *Elder Law: Readings, Cases, and Materials* (3d ed., LexisNexis 2007).

7. The seven-year legal battle between the parents and husband of Terri Schiavo, a Florida woman diagnosed as being in a “persistent vegetative state,” began in 1998 when her husband requested court permission to remove the life support she had been on since 1990. Abby Goodnough, *Schiavo Dies, Ending Bitter Case over Feeding Tube*, <http://www.nytimes.com/2005/04/01/national/01schiavo.html> (Apr. 1, 2005) (noting the case “produced a wrenching national debate about the rights of incapacitated people and when their lives should end if they left no specific instructions”).

expressing their views. In addition, I want to know what motivated them to take this class. Approximately an hour is used to accomplish this, which is half of the time allotted for the first class.

We start the first class by going around the room and having each student introduce him or herself. The students tell us what year they are in school, why they are in this class, and what they hope to learn. Before the first student speaks, I assure the students that it does not matter to me, and certainly will not impact their grade, if they are only in the class because they need the hours or are merely curious. As each student speaks, I will often comment on what was said and, if appropriate, point out what area of the course relates to that student's interests.

Every class has a range of responses. Some students have chosen the class because they are actually interested in practicing Elder Law. When asked why, the answers range from current family situations (grandparent or parent needing long-term care, person with a disability in the family, medical crisis, et cetera) to the student's belief that an Elder Law practice will be very financially rewarding because the student's marketing research concerning current demographic and population trends indicated that the field of Elder Law will not have a shortage of clients and will be a potentially lucrative and fruitful area of law to practice.⁸ Although I am not sure why, this response never fails to make me smile.

In past classes, there have been students who are working in the local prosecutor's office or are former police officers who are interested in elder abuse and exploitation issues. Others have worked in nursing homes or with agencies that serve people who have disabilities. Some have been trust officers and have administered trusts, some have been nurses or social workers, and some

8. There were 39.6 million people age sixty-five and older living in the United States in 2009. Administration on Aging, *Aging Statistics*, http://www.aoa.gov/aoaroot/aging_statistics/index.aspx (last modified June 30, 2010). This number is expected to increase to fifty-five million by 2020 and to 72.1 million by 2030 (around 19.3% of the population). Administration on Aging, *A Profile of Older Americans: 2009*, at 5, http://www.aoa.gov/aoaroot/aging_statistics/Profile/2009/docs/2009profile_508.pdf (accessed Jan. 6, 2011). In 2008, over half of the individuals age sixty-five years and older resided in nine states: California, Florida, New York, Texas, Pennsylvania, Illinois, Ohio, Michigan, and New Jersey. *Id.* at 8.

have experienced or are currently experiencing family situations that directly relate to the topics we will be covering.

If a student mentions pertinent family circumstances, such as a grandparent beginning to show signs of dementia, I will often comment that it is not unusual for an Elder Law attorney to encounter situations like this. I tell the class that we will be covering topics that address this, such as how to deal with a client who is showing signs of dementia, how to pay for long-term care, what public benefits are available to assist with these expenses, and how guardianship and durable powers of attorney fit in.⁹

It is amazing what life experiences many of these students have, and knowing about the experiences brings richness to the class for the rest of the semester. Throughout the course, for example, we will turn to the nurse when questions arise about healthcare issues, and to the trust officer when we are discussing trust administration. Each student is able to share a bit of his or her expertise drawn from life experiences that brings a touch of authenticity to the subjects being discussed. Also, getting the students to talk a bit about themselves, and then reinforcing and encouraging them, starts the process of getting them to open up and share their thoughts throughout the course.

I point out that this course covers many aspects of real life and touches on things that will impact everyone sitting in the room in a very personal and possibly highly emotional way. I suggest that as soon as their parents or grandparents find out they are learning about the topics covered in this course, they will be asked questions. For example, I might challenge them, "Mention to your parents you are studying about long-term care insurance and I bet many of you will start getting questions about the product and what they should look for when considering purchasing it."¹⁰

9. "Dementia planning, which includes Medicaid planning, is practically a subspecialty in itself. It requires property management planning, long-term care arrangements, planning for surrogate health[care decision]making as well as making final estate planning arrangements." Lawrence A. Frolik, *The Developing Field of Elder Law Redux: Ten Years After*, 10 *Elder L.J.* 1, 6 (2002); see *infra* pt. IV(F) (discussing paying for long-term care); *infra* pt. IV(G) (explaining public benefits); *infra* pt. IV(H) (discussing guardianship); *infra* pt. IV(I) (explaining the distinction between financial and healthcare durable powers of attorney).

10. *Infra* pt. IV(F) (discussing long-term care insurance).

I tell the students a bit about me and my law practice so that they will know the perspective I am coming from. I point out that many of the topics we will be discussing are things I routinely run into in my law practice. I also tell them that the practice of Elder Law is one of the most satisfying legal practices in existence. Elder law attorneys are paid in two forms: one is money for services rendered, and the other is the deep gratitude expressed by the people that we help.

After our introductions, we handle classroom logistics and cover some basic ground rules. If possible, the classroom is arranged in a square formation so the students can all see each other.¹¹ The purpose is to promote discussion among the students.

I tell the students that the course is not a lecture course; it is a discussion course. I expect the students to read the assignments before class and be ready to discuss the topics. I point out that one-third of their grade is based on class participation and that it will be painfully obvious to everyone if they do not prepare for class. The rest of the grade is based on a final exam.¹²

Next, I inform them that this is an introduction level course. It is a broad overview of the various topics that make up the specialty of Elder Law. Almost all of the many subjects we will cover are deep enough to be a law school course all by themselves. I explain that we are barely scratching the surface.

We then review the course syllabus, and I briefly introduce and describe each topic that we will cover. The students are often surprised by the breadth of the topics. This is their first introduction to how broad the area of Elder Law is.

To help students get their minds around the scope of Elder Law before we delve into it too deeply, I give a few Web site addresses and encourage the students to peruse them at their

11. At this point, I also pass around a seating chart and e-mail confirmation sheet for the students to fill in. I want to learn the students' names as quickly as possible and a seating chart helps immensely. If a student prefers to be called a different name than the one on his student records ("Nate" instead of Nathaniel, for example), I ask the student to put that on his seating chart. Also, I want to be able to reach the students via e-mail if necessary. Often students will prefer that I use a different e-mail address than the one provided by the school. I tell them how they can contact me. Since I am an adjunct professor, I do not have an office in either law school. But I make myself as available as possible. I am willing to talk with a student at the school before or after class, meet with a student at my law office, or talk over the telephone anytime that is convenient. Often their questions arrive via e-mail.

12. *Infra* pt. V (discussing final exam format).

leisure and follow some of the links. I also suggest they Google “elder law” and see what comes up. The Web sites I provide are usually the National Academy of Elder Law Attorneys (NAELA.org), the Kaiser Family Foundation (kff.org), the Centers for Medicare & Medicaid Services (cms.gov), Families USA (familiesusa.org), and the Center for Medicare Advocacy (medicareadvocacy.org), among others.¹³

This portion of the first class sets the stage for the remainder of the semester. The students know the topics they will be studying, they know a little about each other, they have each spoken in class, and they know a bit about their professor. I hope that they are beginning to become comfortable and are excited or at least curious about the remainder of the semester.

IV. SUBJECTS COVERED

Each course I teach cuts a wide swath through the tangle of common areas that comprise the field of Elder Law. The shorter course is focused on the aspects of Elder Law that an estate planning attorney encounters. The longer course includes all of the subjects covered in the shorter course, plus others. The remainder of this Article summarizes how I present the topics covered in the longer introduction survey course.

13. A professional association made up of attorneys in both the public and private sectors, the National Academy of Elder Law Attorneys (NAELA) focuses on providing continuing education to Elder Law attorneys and supporting other organizations that serve the elderly and those with disabilities. NAELA, *General Information*, http://www.naela.org/Public/About/General_Information/Public/About_NAELA/General_Information/About_Gen_Info.aspx?hkey=39ff4525-510a-4af1-b4ab-607f6c4b568d (accessed Jan. 6, 2011). The Kaiser Family Foundation is a non-partisan organization that provides policy analysis and research on healthcare issues in the United States. The Henry J. Kaiser Family Found., *About the Kaiser Family Foundation*, <http://www.kff.org/about/index2.cfm> (accessed Jan. 6, 2011). The Centers for Medicare & Medicaid Services' (CMS) is an Operating Division of the United States Department of Health and Human Services and is the federal agency that administers the Medicare and Medicaid programs. Centers for Medicare & Medicaid, *About CMS, Mission, Vision & Goals: Overview*, <http://www.cms.gov/MissionVisionGoals/> (last modified June 1, 2010). Families USA is a nonprofit organization that advocates for affordable and high-quality healthcare for American consumers. Families USA, *About Us*, <http://www.familiesusa.org/about/> (accessed Jan. 6, 2011). Established in 1986, The Center for Medicare Advocacy aims to promote fair access to Medicare for the elderly and disabled through advocacy and education and provides legal assistance to help individuals in need obtain Medicare. Ctr. for Medicare Advocacy, Inc., *About the Center for Medicare Advocacy*, <http://medicareadvocacy.org/AboutUs/AboutTheCenter.htm> (accessed Jan. 6, 2011).

A. What Is Elder Law?

The class starts with an overview of the demographics of our population as it is aging. This is followed by a discussion of what Elder Law is. The National Elder Law Foundation (NELF) describes Elder Law as a legal specialty that is defined by the client served rather than a type of law.¹⁴ It is displayed as a horizontal collection of many different and diverse areas of law that affect people who are older or who have a disability. But no Elder Law attorney I know actually practices in all of the different areas that the NELF definition contains. Instead, Elder Law attorneys choose one or more of the areas of Elder Law and drill down into them to become proficient in those areas. For example, an Elder Law attorney may focus his or her law practice on representing low-income people needing housing assistance. This type of practice requires the attorney to be well versed in landlord-tenant and housing laws, and with details of all government benefit programs that concern housing. In addition, the attorney must be ready and able to go to court to enforce the legal rights of his or her clients.

On the other hand, another Elder Law attorney may focus his or her practice on estate planning and taxation, such as wills, trusts, and durable powers of attorney.¹⁵ Often this includes drafting special needs trusts to manage assets of a client who has a disability while preserving the client's eligibility for need-based government benefits such as Supplemental Security Income (SSI) and Medicaid.¹⁶ Because this attorney's law practice is more transactional, he or she may never go to court. Another Elder Law attorney may choose to focus on Medicare and health issues, or on long-term care issues, in which case the attorney must be well

14. NELF defines Elder Law as

[T]he legal practice of counseling and representing older persons and their representatives about the legal aspects of health and long[-]term care planning, public benefits, surrogate decision[m]aking, older persons' legal capacity, the conservation, disposition and administration of older persons' estates and the implementation of their decisions concerning such matters, giving due consideration to the applicable tax consequences of the action, or the need for more sophisticated tax expertise.

Natl. Elder Law Found., *Rules and Regulations*, <http://www.nelf.org/randregs.htm> (revised Oct. 2010).

15. See *infra* n. 76 and accompanying text (discussing estate planning); *infra* n. 67 and accompanying text (discussing durable powers of attorney).

16. See *infra* nn. 83–84 (discussing the special needs trust exception to Medicaid).

versed in Medicaid, Social Security, SSI, and veterans' benefits laws.

It is also important to point out that there is no settled definition of "elderly."¹⁷ Many of the laws we study have threshold ages, but few use the same age. Also, the practice of Elder Law includes assisting people who have disabilities regardless of age.¹⁸ It does not matter whether the disability is physical or mental, or whether the person was born with the disability or developed it later in life through an accident, disease, or the aging process. The laws that are covered in the class, such as SSI and Medicaid, are the same laws whether the recipient is elderly or is young and has a disability.¹⁹

One of the unique aspects of an Elder Law attorney is the awareness, and at least cursory understanding, of all areas of Elder Law and how they intersect with other areas of the law.²⁰ Also, an Elder Law attorney usually has a holistic approach to the practice of law. Elder Law attorneys often assist clients in non-legal ways, such as locating an assisted living facility or nursing

17. Gerontologists have used the term "old age" to describe individuals sixty-five and older. Frolik, *supra* n. 9, at 4. "Old age" is then further divided into three brackets including the "young old" (ages sixty-five to seventy-five), the "old" (ages seventy-five to eighty-five), and the "old-old" (those older than eighty-five). *Id.*

For elder law attorneys, the old-old are becoming the foci of their practice. Of course, elder law attorneys have clients of all ages. Because of the vicissitudes of aging, however, the very old have a particular need for legal assistance. When coupled with the rapid growth in those over age eighty-five, it is not surprising that elder law attorneys so often find themselves sitting across from a very old client. *Id.* at 5.

18. NAELA modified its mission statement in 2003 to include individuals with disabilities. Rebecca C. Morgan, *Elder Law in the United States: The Intersection of the Practice and Demographics*, 2 *J. Intl. Aging L. & Policy* 103, 108 n. 30 (2007).

19. See U.S. Soc. Sec. Administration, *SSI Eligibility Requirements: Who Is Eligible for SSI?*, <http://www.ssa.gov/ssi/text-eligibility-ussi.htm> (accessed Jan. 6, 2011) (explaining Social Security requirements); Centers for Medicare & Medicaid Services, *Medicaid Eligibility: Are You Eligible?*, https://www.cms.gov/MedicaidEligibility/02_AreYouEligible_.asp#TopOfPage (last modified Dec. 14, 2005) (explaining what groups of individuals are eligible for Medicaid).

20. NELF has grouped Elder Law issues into three categories: healthcare, autonomy, and income protection. Morgan, *supra* n. 18, at 108–109. Healthcare comprises matters such as long-term care and arranging for payment of healthcare services. *Id.* at 109–110. Autonomy might include preparing for incapacity, housing decisions, guardianship choices, or any other decisions related to maximizing an individual's independence. *Id.* at 110. Income protection includes such issues as estate and tax planning, bankruptcy, the preservation of assets, and retirement income. *Id.* at 109.

home, or suggesting home care agencies or organizations that can support not only the client but also his or her family.²¹

B. Ethical Considerations

The legal aspects of the course start with a study of the ethical issues that an Elder Law attorney often encounters. These include those issues inherent to joint and multiple representation, and what an attorney can and should do when working with a client who has diminished capacity—whether the client is experiencing that when the attorney first meets the client or is slowly losing mental capacity during the course of the representation.²² The Rules of Professional Conduct as they exist at the national and state levels are covered.²³ NAELA's Aspirational Standards are also reviewed since they do an excellent job of addressing some of the unique dilemmas that an Elder Law attorney can face.²⁴

I tell the students that this course is intentionally starting with ethics because ethical issues are encountered every day in an Elder Law practice and these rules and guidelines are needed as a

21. "[E]lder law has come to be recognized not only by the legal tasks performed by the lawyers, but by the attorney's function as a counselor to the client and/or the client's family . . ." *Id.* at 107.

22. The Model Rules recognize that there may be times when a client will have diminished capacity or his or her capacity will diminish during the course of representation. The rules allow the attorney to take reasonable protective action when the client is at risk of substantial harm, while stressing the importance of sustaining a normal client-lawyer relationship. Model R. Prof. Conduct 1.14 (ABA 2010).

23. Lawyers involved in multijurisdictional practice are subject to the disciplinary jurisdiction of each state in which they practice. Duncan T. O'Brien, *Multistate Practice and Conflicting Ethical Obligations*, 16 Seton Hall L. Rev. 678, 678 (1986). The Model Code of Professional Responsibility was adopted by almost every state, making practice in more than one state substantially similar. *Id.* at 679. But the drafting of the new code, The Model Rules of Professional Conduct, has created conflicting standards among the several states dependent upon which version they have adopted and any modifications made thereto. *Id.* at 679–680.

24. NAELA was founded in 1987 as a professional association dedicated to improving the quality of legal services provided to seniors and people with special needs, and its primary focus is on educating its members and advocating for the needs of people who are elderly or have a disability. Natl. Acad. Elder L. Attys., *About NAELA*, http://www.naela.org/Public/About/Public/About_NAELA/About.aspx?hkey=3ae07a3c-c172-4565-a52b-091d49e31841 (accessed Jan. 6, 2011). NAELA's Aspirational Standards are guidelines for the practice of Elder Law that supplement state rules of professional conduct in order to enhance the services provided to clients. Natl. Acad. Elder L. Attys., *Aspirational Standards for the Practice of Elder Law*, 1 NAELA J. 211, 212 (2005).

touchstone for many of the decisions an Elder Law attorney will have to make.

C. Elder Abuse

Elder abuse is the next subject covered. This topic never ceases to draw some very strong responses from the students. In addition to providing an overview of the various types of abuse that people who are older or have a disability are subjected to, the students read a few shocking cases that illustrate how depraved elder abuse can be.²⁵ No matter when this class is being taught, there are always news stories about an elderly person being abused, and sometimes these are events that happened in the local community. I often bring clippings of those stories to class to illustrate the point that this is not some theoretical or hypothetical discussion: these are real events happening to real people right here in the students' own neighborhood.

When we are discussing financial exploitation, I share actual incidents that have happened to some of my clients (always changing the names and identifying facts to protect their identity). I do this in a story-telling manner interspersed with questions such as what they think is happening, what they would do if they were a family member, and whether their actions would be different if they were instead the victim's attorney. Of necessity, this draws on many of the ethical rules that guide and restrict an attorney's action when dealing with clients who may have diminishing capacity.

25. See National Center on Elder Abuse (NCEA), *Major Types of Elder Abuse*, http://www.ncea.aoa.gov/NCEARoot/Main_Site/FAQ/Basic/Types_Of_Abuse.aspx (accessed Jan. 6, 2011) (identifying seven types of elder abuse—(1) physical abuse; (2) sexual abuse; (3) emotional or psychological abuse; (4) neglect; (5) abandonment; (6) financial or material exploitation; and (7) self-neglect); see also John B. Breaux & Orrin G. Hatch, *Confronting Elder Abuse, Neglect, and Exploitation: The Need for Elder Justice Legislation*, 11 *Elder L.J.* 207, 208 (2003) (categorizing elder abuse generally as abuse and neglect in domestic settings, abuse and neglect in institutional settings and residential care, and financial exploitation).

According to the best available estimates, between [one] and [two] million Americans age [sixty-five] or older have been injured, exploited, or otherwise mistreated by someone on whom they depended for care or protection. The frequency of occurrence of elder mistreatment will undoubtedly increase over the next several decades, as the population ages.

Natl. Research Council, *Elder Mistreatment: Abuse, Neglect, and Exploitation in an Aging America* 1 (Richard J. Bonnie & Robert B. Wallace eds., Natl. Acad. Press 2003).

We discuss the federal and state laws, criminal and civil, that address elder abuse. If possible, a local prosecutor or a spokesperson from the state Attorney General's office will address the class on this topic. In one class, a student was working in a local prosecutor's office on an elder abuse case that was getting ready to go to trial and, with his supervisor's permission, made a presentation to the class on their investigation and the prosecution process. The graphic story and pictures he was able to share had a profound impact on the class.

D. Discrimination—Age and Disability

Next up is a review of some of the types of discrimination that are leveled against persons who are older or have a disability. This is limited to age and disability discrimination.²⁶ The discussion is started by asking whether any of the students have ever had broken bones, been on crutches, had to use a wheelchair, or suffered some sort of physical injury or disability. Usually, at least one person in the class has experienced this first-hand. If so, and if the student is willing to share, we talk about the reality of what it is like to have a physical disability, both in terms of physical access issues as well as how others treat the student. Even if a person has not personally experienced this, he or she often has relatives or friends who have. The purpose of this discussion is to get the students to start identifying with a person who has a physical disability.

We talk about ageism²⁷ and how people tend to view elderly people as senile, feeble, helpless, and ineffective. Of course, these are merely stereotypical myths and can be countered with educa-

26. "[Age discrimination] reflects the stereotypic beliefs and attitudes about a group of people based upon their advanced age. The manifestations of ageism could be seen in any number of discriminatory behaviors reflecting the negative stereotyping of older adults, with the effect of inducing systematic disadvantages." Erlene Rosowsky, *On Ageism: Reflections from a Mental Health Professional*, 8 J. Retirement Plan. 5, 5 (2005). Disability discrimination refers to individuals with a physical or mental disability that limits at least one major life activity who encounter inequity because of fear, myths, and stereotypes. Claudia Center & Andrew J. Imparato, *Redefining "Disability" Discrimination: A Proposal to Restore Civil Rights Protections for All Workers*, 14 Stan. L. & Policy Rev. 321, 321–322 (2003).

27. Ageism is defined as "prejudice towards, stereotyping, or discrimination against persons based solely on chronological age." Monique M. Williams, *Invisible, Unequal and Forgotten: Health Disparities in the Elderly*, 21 Notre Dame J.L. Ethics & Pub. Policy 441, 443 (2007).

tion and knowledge, not unlike racial or sexual discrimination. We discuss how the media tends to characterize older people as “old geezers” who are forgetful, mentally stuck in the distant past, hard of hearing, talked to as though they were children, and often laughed at.²⁸ Many times the students will share stories of their first-hand experiences witnessing such discrimination.

It has been my experience that every person, especially one who is older, is interesting to talk with if we just take the time to discover who that person is. I share with the students a few stories about clients of mine who had surprising life experiences, such as the two who survived the Bataan Death March, or the frail elderly woman who was a Ziegfeld girl during the Roaring Twenties. I encourage them to take the time to genuinely get to know their grandparents or other older people they come in contact with; I assure them they will not regret it.

The federal laws dealing with age and disability discrimination are reviewed, and we consider what the world was like before and after the passage of those laws, whether they are being adequately funded and enforced, and what needs to be done to improve our future.²⁹

E. Housing Issues

When the class turns to housing, the session starts with a discussion of what the students think a home is. What is it about a physical space that makes it a home? The students toss out words and concepts such as protection from the elements and other people, safety, comfort, control, pride, a place to sleep, and a place to keep things that are important to you. The focus becomes the fact that every person seeks to have a place he or she can call home, and without one life is much more stressful and incomplete. The students begin to realize that it does not really matter

28. Eddy Ramirez, *Ageism in the Media Is Seen as Harmful to Health of the Elderly*, L.A. Times 20 (Sept. 5, 2002) (available at 2002 WLNR 12475990) (discussing the media's negative characterization of elderly people).

29. See e.g. Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213 (2006) (establishing equal opportunity provisions for individuals with disabilities); Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621–634 (2006) (establishing equal opportunity provisions to prohibit arbitrary age discrimination in employment); Fair Housing Act, 42 U.S.C. §§ 3601–3631 (2006) (establishing equal opportunity provisions that provide protection against discrimination in housing).

whether a person owns or rents his or her home; it is these other aspects that are most important. We talk about whether any of the students have ever been without a place they could call home. Although most of the students have never experienced this, occasionally there is a student who is willing to share about that experience and what it was like. By the time this discussion is over, the students are acutely aware of how important it is for a person to have a place he or she can call home, and why it is imperative that an Elder Law attorney be sensitive to this issue.

We then break into a discussion of the different ways a person experiences a home. The conversation reviews the legal issues inherent in owning a home, renting a home, and living in a nursing home. For home ownership, the discussion covers concepts and laws concerning methods of titling the ownership of a home, the tax impact and practical aspects of giving a home away, methods of paying for a home, mortgages, and reverse mortgages.³⁰

Whether a home is owned or rented, we discuss ways that people can “age in place,” whether through architectural design or agencies providing assistance, which allow people to stay in their homes as long as possible no matter what their mental or physical condition.³¹ This also includes a review of continuing care retirement communities.³² We not only discuss conceptually what they are and how their programs are usually designed, but we also review the contractual issues that can arise.

Lastly we discuss nursing homes.³³ Occasionally there will be a student who has never visited a nursing home, in which case I

30. See Lawrence A. Frolik, *Residence Options for Older and Disabled Clients* 37–65 (ABA 2008) (examining the impact of mortgages, property taxes, reverse mortgages, sales and leasebacks, and other issues on an individual’s housing decisions).

31. “In conventional homes without accessibility features, older adults can make changes to the home or receive services in the home to remain independent.” Connie J. Evashwick, *The Continuum of Long-Term Care* 147 (3d ed., Thomson Delmar Learning 2005). The National Aging in Place Counsel recommends renovations that can be made to entryways, bathrooms, bedrooms, kitchens, and the backyard to help seniors remain independent in their homes; it also recommends products to make life simpler and safer. Natl. Aging in Place Council, *Age in Place: Practical Advice*, http://www.ageinplace.org/practical_advice/default.aspx (accessed Jan. 6, 2011).

32. Continuing care retirement communities contain apartments and duplexes for independent seniors, assisted living units, and private nursing rooms, allowing residents to move within the community. Jane Adler, *Retirement Communities with Continuing Care Can Be a Practical Choice*, 14 *Experience* 42 (Winter 2004).

33. “A nursing home is one type of institutional living arrangement in which resi-

strongly encourage that student to do so. Usually, though, most of the students have been in a nursing home, and sometimes there will be a student who has worked in a nursing home. Both the good and bad aspects of nursing homes are explored.³⁴ In this process, we cover the Nursing Home Reform Act of 1987,³⁵ along with the state laws³⁶ and agencies³⁷ regulating nursing homes. We pay particular attention to the rights of a nursing home resident and how they are enforced,³⁸ the Administration of Aging,³⁹ the

dents—usually older persons who cannot care for themselves—pay a fee to live in a facility [that] provides shelter, food, medical care, and assistance in daily functions, as needed.” Gerard Mantese et al., *Issues Relating to the Care of the Elderly in Nursing Homes*, 73 Mich. B.J. 176, 177 (Feb. 1994).

Nursing homes may be either freestanding facilities, units of hospitals, or integral components of multilevel centers. . . . The common feature is that people who are not able to remain at home alone, because of physical health problems, mental health problems, or functional disabilities, reside at the facility and receive some level of nursing care, ranging from personal care to intensive skilled care, under medical direction.

Evashwick, *supra* n. 31, at 69–70.

34. “In addition to basic nursing care and supervision, nursing homes offer social services, rehabilitation therapies, nutrition counseling and dietary assistance, dental care, and pastoral care. Homes also administer medications, provide meals, and conduct recreational and social activities on a daily basis to keep people physically occupied and mentally stimulated.” Evashwick, *supra* n. 31, at 73. Unfortunately, complaints about nursing home neglect and abuse commonly concern failure to supervise and failure to treat. Mantese, *supra* n. 33, at 179–180.

35. The Nursing Home Reform Act (NHRA) is included in the Omnibus Budget Reconciliation Act of 1987, and establishes national minimum standards of care and rights for individuals in short- and long-term nursing home facilities including: mandatory creation of an individualized medical plan for each patient; state monitoring of facilities; service and training for staff members; and emphasis on proper mental, physical, and psychosocial care for all patients. 42 U.S.C. §§ 1395i-3, 1396r (2006).

36. See e.g. Fla. Stat. § 468 (2009) (governing nursing home administrators); Fla. Stat. § 400 (2009) (regulating nursing homes and related facilities); Fla. Stat. § 415 (2009) (dealing with adult protective services); Fla. Admin. Code Ann. r. 59A4 (2009) (establishing minimum standards for nursing homes within the state of Florida).

37. The federal government, through CMS, oversees the nursing industry by “producing and maintaining federal regulations with which all homes that wish to participate in Medicare and Medicaid must conform.” Kieran Walshe, *Regulating U.S. Nursing Homes: Are We Learning From Experience?* 20 Health Affairs 128, 130 (2001) (available at <http://content.healthaffairs.org/cgi/reprint/20/6/128.pdf>). On a local level, “[t]he state survey, licensing, and certification agencies are responsible for surveying or inspecting nursing homes to check their compliance with the regulations, investigating complaints, and reporting the results to the CMS.” *Id.*

38. NHRA’s Resident’s Bill of Rights establishes: the right to freedom from abuse, mistreatment, and neglect; freedom from physical restraint; privacy; accommodation of medical, physical, psychological, and social needs; the right to participate in resident and family groups; the right to be treated with dignity; the right to exercise self-determination; the ability to communicate freely; the right to participate in review of one’s care plan and to be fully informed in advance of any changes in care, treatment, or status in the facility;

Area Agencies on Aging,⁴⁰ the long-term care ombudsman program,⁴¹ and the protections against involuntary discharge.⁴²

F. Long-Term Care Planning

The focus of the class then turns to long-term care. We define what is meant by “long-term care” and how a person can receive and pay for it.⁴³ We review the progression from family assistance—whether in a person’s own home or moving in with other

and the right to voice grievances without discrimination or reprisal. *See supra* n. 36 and accompanying text (discussing the codification of the NHRA).

39. The Administration on Aging is the principal agency designated to carry out the provisions of the Older Americans Act of 1965, as amended at 42 U.S.C. §§ 3001–3058ff (2006). It is the lead agency within HHS on all issues concerning aging. *See* U.S. Dept. of Health & Human Servs., *Administration on Aging*, <http://www.hhs.gov/about/opdivs/aoa.html> (last revised Nov. 25, 2003) (explaining the Administration on Aging).

40. Area Agencies on Aging (AAA) are mandated by the Older Americans Act (OAA) of 1965 (as amended 42 U.S.C. §§ 3001–3058ff (2006)) to provide comprehensive and coordinated community-based services to assist elder persons and their families. Mary Pat Toups, *A Guide to Elder Law: The Newest Specialty*, 23 W. St. U. L. Rev. 101, 102 (1995).

41. Long-term care ombudsman programs provide facility referral services, investigate complaints against care facilities, and serve as mediators to resolve problems confronted by residents in long-term care facilities. *Id.* at 108.

42. Discharge or transfer from a nursing home requires thirty-days’ notice to the resident and family members or representatives, except in cases of medical emergency or danger to resident health, welfare, or safety. Joan M. Krauskopf et al., *Elderlaw: Advocacy for the Aging* § 12:34 (2d ed., West 2009). The notice is intended to minimize the stress of involuntary transfer and provides an explanation of the appeals process. *Id.* The relevant portion of Title 42 of the United States Code provides as follows:

A nursing facility must permit each resident to remain in the facility and must not transfer or discharge the resident from the facility unless—

- (i) the transfer or discharge is necessary to meet the resident’s welfare and the resident’s welfare cannot be met in the facility;
- (ii) the transfer or discharge is appropriate because the resident’s health has improved sufficiently so the resident no longer needs the services provided by the facility;
- (iii) the safety of individuals in the facility is endangered;
- (iv) the health of individuals in the facility would otherwise be endangered;
- (v) the resident has failed, after reasonable and appropriate notice, to pay (or to have paid under this subchapter or subchapter XVIII of this chapter on the resident’s behalf) for a stay at the facility; or
- (vi) the facility ceases to operate.

42 U.S.C. § 1396r(c)(2)(A) (2006).

43. Long-term care does not involve rehabilitation and therapy with the goal of getting better; instead, it is designed for those who need assistance to do the normal activities of daily living that we all take for granted. Morgan, *supra* n. 18, at 122–123. Activities of daily living are self-care activities that a person performs daily, including dressing, bathing, and using the toilet. *Id.*

family members—to paying an agency to provide home care, through assisted-living facilities and continuing care retirement communities, and finally ending with nursing home placement.⁴⁴

We then move on to discuss how a person pays for long-term care. Because income programs and Medicaid are covered later in the course, the focus here is on long-term care insurance.⁴⁵ We cover what this product is, why it exists, what the options are when designing a policy, what a consumer should look for, and how an Elder Law attorney often plays a role in the process. The requirements to qualify for a Long-Term Care Partnership policy are explained.⁴⁶ Occasionally, a person who sells long-term care insurance will address the class and explain the process of designing a policy to meet the needs of the client. This is done for two reasons. First, the agent is well versed in the details of the insurance and can explain them in understandable terms. Second, having an opportunity to meet and listen to an actual agent gives students a preview of what they will encounter if they go into Elder Law practice, which can require working with agents in the course of representing clients.

G. Public Benefits

We then begin the journey into public benefits. This starts with breaking down the primary government benefit programs between those that are need-based and those that are not. After summarizing each program and describing how they relate to each other, the most common programs are covered in depth. We start with the programs that provide income only, and then explore those that provide benefits other than income.

44. “The average cost of care in a nursing home ranges between \$3,000 and \$6,000 per month, depending on geographic location, type of facility, level of care, services received, and other factors.” Evashwick, *supra* n. 32, at 76.

45. *Infra* pt. IV(G) (discussing public benefits).

46. Section 6021 of the Deficit Reduction Act of 2005 authorized all states to establish a long-term care partnership program that for Medicaid eligibility purposes provides “for the disregard of any assets or resources in an amount equal to the insurance benefit payments that are made to or on behalf of an individual who is a beneficiary under a long-term care insurance policy if [certain] requirements are met.” 42 U.S.C § 1396p(b)(1)(C)(iii) (2006).

1. Social Security

The first of the government programs covered is Social Security.⁴⁷ Virtually all of the students have had a job that was subject to Social Security withholding, so we start by discussing how they are building up quarters of coverage and are on their way toward fully insured status. The more a student is personally able to relate to these laws, the easier it is for the student to absorb and learn how the program works. We then review the concept of how certain family members can tap into the Social Security system through a “worker,” and how important that is for a surviving spouse or a child who became disabled prior to age twenty-two. We then turn to how the benefits are calculated, how one becomes eligible to receive benefits, how much one receives depending on their relationship to the Social Security worker, and how these benefits can be increased or reduced.⁴⁸

2. Supplemental Security Income (SSI)

The next government income program covered is SSI.⁴⁹ This is the students’ first introduction to need-based eligibility rules, so care is taken to describe this in an understandable way. For example, I begin by explaining the three criteria that must be met for a person to be eligible to receive SSI. For a person to receive SSI, he or she must fall into an eligible category, have low income,

47. 42 U.S.C. § 7 (2006). Social Security was enacted in 1933 as a social program run by the federal government and funded through payroll taxes, providing retirement, survivor, and disability benefits. Soc. Sec. Online, *Social Security Handbook § 100*, http://www.ssa.gov/OP_Home/handbook/handbook.01/handbook-0100.html (accessed Jan. 6, 2011).

48. Benefits are payable when an individual cannot work (perform “any substantial gainful activity”) because of an illness or injury that is expected to last for more than a year or result in death, when a worker is sixty-two or older and planning to retire, when an individual is within three months of turning sixty-five independent of retirement plans, or when a worker dies. The amount is calculated based upon the worker’s age and whether he or she has enough credits to qualify, and the benefits can be paid to children, spouses, former spouses, surviving spouses, and even parents of an eligible worker. Soc. Sec. Online, *Social Security Handbook § 119*, http://www.ssa.gov/OP_Home/handbook/handbook.01/handbook-0119.html (accessed Jan. 6, 2011).

49. Title XVI of the Social Security Act, 42 U.S.C. §§ 1381–1385 (2006). SSI is a Federal income supplement program funded by general tax revenues to help aged, blind, and disabled people who have little or no income and assets by providing cash to meet basic needs for food and shelter. Soc. Sec. Online, *Supplemental Security Income (SSI)*, <http://www.ssa.gov/ssi> (accessed Jan. 6, 2011).

and possess few assets.⁵⁰ When we talk about the asset requirement, I explain that if I spread out everything I own on the table in front of me, starting with the cup of coffee I am drinking (which I point to), my pen (which I take out and lay down on the table), my car, house, clothes (dirty and clean), retirement accounts, life insurance, law practice, et cetera (for all of which I have pointed to a spot on the table as I named them), we would refer to these things as my assets. SSI calls them my “resources” because they can be converted to cash and spent on my food or shelter.⁵¹ The SSI rules allow me to take some of these resources off the table (at which point I illustrate sliding some of my assets off the table onto the floor next to me). These are “exempt.”⁵² The resources remaining on the table are “available” to be used for my food and shelter, and “countable” toward the maximum of \$2,000 that SSI allows me to keep and be eligible to receive SSI benefits.⁵³

We then delve into the details of exempt resources and the penalties imposed if resources are given away.⁵⁴ Following this, we discuss in depth the SSI income rules, including in-kind support and maintenance.⁵⁵

50. Eligible categories include persons who are above the age of sixty-five, blind, or permanently and totally disabled. Soc. Sec. Online, *SSI Eligibility Requirements*, <http://www.ssa.gov/ssi/text-eligibility-ussi.htm> (accessed Jan. 6, 2011). Limited income is calculated from wages earned at work, free food or shelter, and money from other sources such as Social Security disability, workers compensation, unemployment benefits, and friends or relatives. *Id.* Assets include cash, bank accounts, land, vehicles, and other resources. *Id.*

51. *Id.*

52. Resources that are exempt for SSI eligibility include the following:

the home you live in and the land it is on; household goods and personal effects; your wedding and engagement rings; burial spaces for you or your immediate family; burial funds for you and your spouse[...]valued at \$1,500 or less [unless irrevocable]; life insurance policies with a combined face value of \$1,500 or less; one vehicle, regardless of value, if it is used for transportation for you or a member of your household; [... or,] grants, scholarships, fellowships, or gifts set aside to pay educational expenses for [nine] months after receipt.

Soc. Sec. Online, *SSI Resources*, <http://www.ssa.gov/ssi/text-resources-ussi.htm> (accessed Jan. 6, 2011).

53. When determining eligibility, the value of your resources is one factor. *Id.* If the value of your resources is above the \$2,000 allowable limit, you cannot receive SSI benefits that month. *Id.*

54. If resources are given away or sold for less than their worth, the individual may be ineligible to receive SSI benefits for up to thirty-six months, depending upon the value of the resources transferred. *Id.*

55. In-kind support and maintenance refers to food or shelter that an individual receives for free or less than its fair market value. Soc. Sec. Online, *SSI Income*, <http://www.ssa.gov/ssi/text-income-ussi.htm> (accessed Jan. 6, 2011).

3. Medicaid

The next stop is Medicaid. I have warned the students since the first class that the section on Medicaid will be the densest, followed closely by the SSI section. I encourage the students to read the relevant materials more than once before class. We start with the history of the Medicaid law. Title XIX of the Social Security Act defines Medicaid.⁵⁶ Because it is structured as a partnership between the federal and the state governments, there are two sources for the rules and regulations that comprise the law. I point out that each state has a different Medicaid program, and the laws and regulations are constantly being changed at both the federal and state levels.⁵⁷

Entering the Medicaid world is compared to Alice falling down the rabbit hole or passing through the looking glass: she enters a world that looks like hers, but is different. Logic applies to decisions being made, but it is not the same as in her world. For example, normally one would skimp and save money in case it is needed later, but in the Medicaid world, a person must continually spend and cannot accumulate money or they will be disqualified. Many “Red Queens” are running around changing the laws as they see fit (Congress, the Department of Health and Human Services, the Centers for Medicare & Medicaid Services, state legislatures, state agencies administering the Medicaid program, et cetera), and it seems as though they are often doing so on a whim. There are guides like the Cheshire cat (caseworkers, social workers, hospital discharge planners, Elder Law attorneys, well-meaning friends and neighbors), but not all of them are accurate or helpful. There are words used that have multiple meanings depending on the context within which they are used,

56. Title XIX of the Social Security Act, 42 U.S.C. §§ 1396–1396w-2 (2006). Medicaid is a federally mandated, state-administered program that provides for medical expenses by making payments directly to healthcare providers for the benefit of eligible low-income individuals and families. U.S. Dept. of Health & Human Servs., *Medicaid Program—General Overview*, <http://www.cms.gov/MedicaidGenInfo/> (accessed Jan. 6, 2011). Qualified caseworkers in each state evaluate individuals’ eligibility based upon income, assets, and resources thresholds. *Id.*

57. “Within broad national guidelines established by federal statutes, regulations, and policies, each state (1) establishes its own eligibility standards; (2) determines the type, amount, duration, and scope of services; (3) sets the rate of payment for services; and (4) administers its own program.” Medicaid, *Annual Statistical Supplement*, 65 Soc. Sec. Bull. 45, 45 (2003).

such as “income” and “spend down.” It does not take much thought to find many parallels between Wonderland and the Medicaid world. I tell the students that they will have a much better chance of understanding how Medicaid works if they remember that they have entered a different world.

We then begin to cover the details of the Medicaid program, starting with the eligibility requirements, which are related to the SSI rules we have already covered.⁵⁸ I use plenty of examples when explaining the asset transfer penalty rules.⁵⁹ I find that if the students can follow the math examples they have a much better understanding of how this works. I also use stories to illustrate the exceptions so that the students can relate the rules to a visual picture.

Next, the class touches on the history and current status of Congress’ attempt to criminalize Medicaid planning—including a bill mockingly referred to in the media as the “Granny Goes to Jail” bill—first trying to put “granny” and then “granny’s” lawyer in jail.⁶⁰ The division of assets rules are covered next, and the discussion includes plenty of illustrations.⁶¹ The students often chuckle when Gomez Addams ends up in a nursing home while Morticia is able to continue to live in the cool old house! Lastly,

58. Medicaid provides medical assistance based upon threshold levels for income and resources. *Id.* To be eligible an individual must fall into one of the following mandatory eligibility designations: children under age six whose family income is at or below 133% of the federal poverty level (FPL); pregnant women whose family income is below 133% of the FPL; SSI recipients (in most states); recipients of adoption or foster care assistance; members in special protected groups; children under the age of nineteen in families with incomes at or below the FPL; and certain Medicare beneficiaries. *Id.* States can also provide Medicaid coverage to “categorically related” groups that share characteristics of the mandatory groups. *Id.*

59. Asset penalty transfer rules refer to restrictions that impose a penalty on individuals who transfer assets without receiving fair value in return. Elder Law Answers, *Medicaid Rules*, http://elderlawanswers.com/elder_info/elder_article.asp?id=2751 (accessed Jan. 6, 2011). The penalty is a period of ineligibility that is determined by dividing the amount transferred by what Medicaid determines to be the average private pay cost of the services in the state. *Id.*

60. The original “granny goes to jail” legislation was Section 217 of the Health Insurance Portability and Accountability Act (HIPAA), Pub. L. No. 104-191, 110 Stat. 1936 (1996), and the repeal and replacement occurred the next year in Section 4734 of the Balanced Budget Act of 1997, Pub. L. No. 105-33, 11 Stat. 522-23 (1997).

61. “To determine the length of time an improper transfer disqualifies someone from Medicaid benefits, take the amount of money transferred and divide by your state’s transfer penalty divisor. (Florida’s is \$5,000.) The resulting answer is the number of months the person is ineligible for Medicaid.” Sean W. Scott, *The Medicaid Handbook* 36 (Masveritas Publishing 2007).

we discuss the concept and details of estate recovery, including how TEFRA liens are imposed and enforced.⁶² Later in the course, we cover the rules relating to Medicaid and trusts.

H. Guardianship and Conservatorship

After Medicaid, the focus shifts to issues that arise if a person becomes mentally incapacitated.⁶³ This starts with reviewing what happens if a person loses mental capacity and there has not been any advanced planning (guardianship and conservatorship), and ends with what can be done to minimize the risk that a guardian will need to be appointed (durable powers of attorney).⁶⁴ The evolution of the various standards the courts have used to determine whether a person is incapacitated is reviewed, along with the process that is followed when a guardianship proceeding is initiated.⁶⁵ We then review the duties of a guardian and conser-

62. Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA), Pub. L. 97-248 (1982), codified at 42 U.S.C. § 1396p(a) (2006). In an attempt to recover Medicaid costs from estates of Medicaid beneficiaries, states are authorized to attach property liens to property owned by Medicaid long-term care recipients while they are still alive to serve as a security interest. Diane Lourdes Dick, *The Impact of Medicaid Estate Recovery on Nontraditional Families*, 15 U. Fla. J.L. & Pub. Policy 525, 541 n. 18 (2004).

63. The term “incapacitated” has varying meanings based upon the context, and “a person may be found to possess mental capacity to make some decisions, but not others.” Jonathan Herring, *Entering the Fog: On the Borderlines of Mental Capacity*, 83 Ind. L.J. 1619, 1625 (2008). There are, however, four principles common among the definitions of competence:

(1) A presumption exists in favor of a person having capacity[;] (2) [c]ompetence means one possesses an ability to understand one’s current medical condition, the possible treatments, the risks associated with those treatments, and their consequences[;] (3) [o]ne must possess the ability to use relevant information in a rational way to reach a decision[;] and] (4) [o]ne must be able to communicate one’s decision.

Id. at 1624.

64. “A guardianship is a judicially created relationship in which one person, called a guardian, is appointed by the court to act on behalf of another, called the ward, whom the law regards as incapable of making decisions concerning his or her personal affairs.” Timothy P. Brouillette, *Guarding against Guardianship and Conservatorship*, 1998 Neb. Law. 6, 6 (May 1998). “A conservatorship is a judicially created relationship in which the court appoints a person, called a conservator, to act on behalf of another individual, called a protected person, with respect to that person’s financial decisions and property when the protected person is unable to do so.” *Id.*

65. To institute guardianship proceedings, an attorney obtains a medical report and then prepares a Petition for Appointment of a Guardian, which contains the following: the name, address, age, size of estate, and diagnosis of the respondent; the name, address, age, and occupation of the intended guardian; and an explanation of that person’s relationship to the respondent. Pauline G. Dembicki, *What You Should Know about Adult Guardianships*, 42 Prac. Law. 73, 77–78 (1996). Then, adult relatives and known agents under

vator, along with the standards used to guide a guardian's decisions concerning what actions to take, or not take, on the ward's behalf.

I. Durable Powers of Attorney

Next, the history and local state's laws concerning durable powers of attorney are covered. The focus here is on financial durable powers of attorney,⁶⁶ because healthcare is covered later. Design aspects are discussed, such as whether the durable power of attorney should be springing (not effective until the happening of a pre-defined event, such as incapacity of the principal) or effective when signed (who should, and should not, be named as the attorney-in-fact and successors, and what powers can and should be granted).⁶⁷

J. Medicare

Healthcare is the next subject, with the focus being on Medicare and Medicare supplement plans.⁶⁸ The basics of Medicare

powers of attorney are notified, the sheriff serves notice of the guardianship on the respondent, and a court-appointed attorney evaluates the case. *Id.* "If there are no objections, if the medical report is appropriate, if notice requirements are met, and if service of process is sufficient, the plenary order for appointment of a guardian is usually entered on the return date. At the same time the court declares the respondent to be disabled." *Id.* at 78.

66. "Principals in the United States can create two different types of durable powers of attorney. The first type is a financial durable power of attorney, which grants an agent authority to manage a principal's financial affairs. The second type is a health[care] durable power of attorney, which grants an agent authority to make health[care] decisions." Jennifer L. Rhein, *No One in Charge: Durable Powers of Attorney and the Failure to Protect Incapacitated Principals*, 17 *Elder L.J.* 165, 171 (2009).

67. Some of the additional powers to consider inserting in a durable power of attorney include specific power to handle tax matters and sign IRS form 2848 to appoint a representative that will be recognized by the IRS, the power to establish and fund trusts for the benefit of the principal and any family members, and the power to gift. Care should be taken to properly design the power to gift to match the principal's wishes. For example, if the principal wants the attorney-in-fact to have maximum flexibility to gift for Medicaid eligibility purposes, then the power to gift should be very broad and, if acceptable to the principal, the self-dealing rules should be suspended so the attorney-in-fact can gift to him- or herself without breaching any fiduciary rules.

68. 42 U.S.C. § 1395 (2006); 42 C.F.R. §§ 405–421 (2010). Medicare is health insurance for people age sixty-five or older, under sixty-five with certain disabilities, and any age with End-Stage Renal Disease. Medicare, *Medicare Benefits*, <http://www.medicare.gov/navigation/medicare-basics/medicare-benefits/medicare-benefits-overview.aspx> (accessed Jan. 6, 2011) [hereinafter *Medicare Benefits*].

Parts A, B, C, and D are covered. The purpose and design of Medicare supplement plans are discussed. Part A covers inpatient hospital care, inpatient skilled nursing facilities, hospice care services, home healthcare services, and inpatient care in a Religious Nonmedical Health Care Institution.⁶⁹ Part B covers medically necessary services like doctor visits, outpatient care, home health services, and some preventative services.⁷⁰ Parts A and B are considered traditional or original Medicare. Part C plans, referred to as Medicare Advantage Plans, are usually HMOs or PPOs that are offered by private companies approved by Medicare that cover emergency and urgent care, and extra coverage such as vision, hearing, dental, and wellness programs.⁷¹ They must cover all of the services of original Medicare (Parts A and B) except hospice.⁷² Part D encompasses Medicare's prescription drug plan.⁷³ Further, many individuals participating in original Medicare A and B plans also purchase supplemental coverage from a private insurance company, which provides coverage to fill the gaps in Medicare such as paying the deductibles and co-pays. These are referred to as Medicare Supplement Plans or Medigap Plans.⁷⁴

K. Estate Planning and Property Ownership

I discovered early on that even though law students may have taken courses on estate planning, estate taxation, and even will-drafting clinics, they do not have an overall understanding of the estate planning process. Therefore, we spend a class session on an overview of estate planning in the real world from a future client's point of view.⁷⁵ I tell the students that I want to give them a helicopter view of estate planning—I want them to see estate

69. *Medicare Benefits*, *supra* n. 69.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. Estate planning “involves the process of ensuring the clients’ financial well-being by making certain that their estates are preserved and managed and the clients and their beneficiaries are protected according to their intentions, both while they are living and after they die.” Fla. Bar Continuing Legal Educ., *Basic Estate Planning in Florida* §1.1 (6th ed., Lexis 2009). Subjects include the following: planning for disability, gift, and estate taxes; homestead; joint ownership issues; living trusts; wills; healthcare surrogates; marital transfers; powers of appointment; fiduciaries; and community property issues. *Id.* at vii–viii.

planning from a different perspective, similar to how flying over their home in a helicopter would give them a different perspective of their neighborhoods.

It is important for the students to understand that estate planning applies to all of us, even students at a young age. In order to accomplish this, I first ask the students, “How many of you think you will never die?” This is followed by nervous laughter and, of course, a hand or two shooting up. Then I ask, “When you die, do you think you can take your possessions with you?” We end up agreeing on two things: someday all of us will die, and when we die, we cannot take anything with us. Therefore, the things we own when we die must go somewhere else. This is what estate planning is all about—deciding where we want our “stuff” to go when we are no longer here.

Also, to be able to make appropriate decisions, we must know certain things, such as what our possessions are, to whom we want to leave them, and what the applicable laws are. If we think that we will not die for many years, we cannot make any decisions because there are too many unknowns: What will we own when we are seventy-eight years old? How many children, grandchildren, or others will there be? What will the tax laws be? In order to have sufficient information to be able to make appropriate decisions, we have to think about dying now because we know only what we own today, who is in our family now, and what current laws are applicable.

Yet most people do not want to think about dying now, so we get around this by playing a game. The game is called “I’m dead. Where does it go?” I analogize this to playing a board game. If we were playing Monopoly, we would pull out the board, set up the game, immerse ourselves in the game to compete, and try to win and, when the game is over, we would close up the board, put the game away, and return to our normal life.

The same is true with the estate planning game. In this game, we seriously pretend we are not alive right now, make thoughtful decisions about where we want our assets to go, sign documents to make sure that happens, and then forget about this for a few years. We do not want to think about our death all of the time; we would be depressing company and our friends would stop spending time with us. But just like concentrating to win at Monopoly, we want to think seriously about our estate plan for a short time so that we can make appropriate decisions. Then,

every three to five years, we should play the game again to keep things up-to-date as our lives change. We do not buy all of our clothes to last us for the rest of our lives when we are twenty; we buy them throughout our lives as styles change, our size changes, et cetera. Our estate plan is the same—it needs to change as our life changes.

By the time this discussion is over, the students are fully engaged and can personally identify with the estate planning process. We then start exploring the various estate planning topics. These include the following:

- probate (what it is, how it works, advantages and disadvantages, how to qualify for it, and how to avoid it);
- how a last will and testament fits into the overall process (a will is merely written instructions of how to distribute property passing through probate; it has no control over property that does not go through probate);
- options for distributing property upon death (outright or in trust);
- what trusts are and how they are designed to carry out the goals of the client based on the beneficiary's circumstances (or, more accurately, the client's perception of the beneficiary);
- what a revocable living trust is and when to use one to accomplish a client's estate planning goals; and
- how estate taxes, or the lack thereof, may impact a client's estate plan.⁷⁶

L. Introduction to Trusts for Persons Who Are Elderly or Have a Disability

After we cover the basics of estate planning, the class digs deeper into trusts and how they are designed differently depending on what the person establishing the trust wants to

76. See generally Jerome A. Manning et al, *Manning on Estate Planning* (6th ed., P.L.I. 2009) (discussing topics within estate planning).

accomplish.⁷⁷ The distinction between self-settled and third-party-settled trusts is explained,⁷⁸ along with when each type of trust should be used.⁷⁹ We also review each of the four distribution standards that can be found in a trust.⁸⁰ These standards are used to guide the trustee in making decisions about what and when to distribute from the trust for the benefit of the beneficiary. One of the purposes of this exercise is to help the students understand the distinction between a trust that must support a beneficiary (and thus causes the trust assets to be countable for SSI and Medicaid eligibility purposes), and a trust that can be used for the benefit of a person without disqualifying them from either of these programs.

M. Using Trusts for Medicaid Planning

This section of the course examines the rules from OBRA '93 concerning how trusts are treated for Medicaid eligibility pur-

77. One scholar describes Elder Law attorneys' trusts uses as follows:

Elder law attorneys are familiar with the same trust vehicles as more traditional estate planners: the probate avoidance living trust, testamentary trust, irrevocable life insurance trust, credit shelter trust, QTIP and power of appointment marital deduction trusts, charitable lead trust, charitable remainder annuity trust, grantor retained interest or annuity trust, and the personal residence trust. . . . The particular trust uses [that appear] to be more highly developed by elder law practitioners than by traditional trusts and estates lawyers are: [grantor revocable trust disability provisions; disabled beneficiary supplemental care trusts; healthcare decisions protection in trusts; and healthcare cost issues and trusts, encompassing trusts (or provisions in trusts) particularly designed to preserve public benefit rights permitted by law.]

Cynthia L. Barrett, *Advising the Elder Client: Trusts and Medicaid Eligibility*, 43 *Prac. Law.* 57, 58 (Oct. 1997).

78. A trust is self-settled when assets belonging to the trust beneficiary (or, for Medicaid and SSI purposes, belonging to the beneficiary's spouse) are transferred to the trust. A trust is third-party settled when none of the trust assets formerly belonged to the trust beneficiary or the beneficiary's spouse, but instead are from a third person.

79. Third party-settled trusts are used when a person wants to establish and fund a trust for the benefit of another person, such as a parent for a child. Self-settled trusts are used when a person transfers his or her own assets into a trust that will benefit the person or his or her spouse. This can be as basic as establishing and funding a revocable living trust for the purposes of avoiding probate at death. In the special needs context, a self-settled trust is used when a person receives a personal injury award or inheritance, or when a person becomes disabled and is trying to protect current assets and qualify for SSI or Medicaid.

80. All trusts have a section that guides the trustee when deciding when and how to make distributions from the trust for the benefit of the beneficiary. These are referred to as "distribution standards." The four trust distribution standards are support, discretionary support, pure discretion, and special needs, which can be either strict or discretionary.

poses.⁸¹ As part of this lesson, the self-settled special needs trust exceptions found in 42 U.S.C. § 1396p(d)(4)(A) and (C) are described in detail.⁸²

N. Estate Planning for Parents of Children with Disabilities

The unique estate planning issues facing a parent of a child who has a disability are reviewed so that the students know what options a parent in this situation has for leaving assets for the benefit of the child with the disability. These options range from (1) distributing outright to the child; (2) distributing the child's share to another person and imposing a moral (not legal) obligation on that other person to use the money for the benefit of the child with a disability; (3) completely disinheriting the child and leaving the child totally dependent on the public benefit system; and (4) leaving the money in a trust for the benefit of the child. If a trust is chosen, it can be a support trust or a third-party-settled special needs trust. All but the last option will either disqualify the child from Medicaid and SSI, or not adequately protect the money for the child.⁸³

81. "The Medicaid trust provisions in OBRA '93, 42 U.S.C. § 1396p(d), considerably altered the use of trusts to hasten Medicaid eligibility. Most pre-OBRA '93 Medicaid driven trusts are no longer effective." Barrett, *supra* n. 78, at 61.

82. OBRA '93 significantly limited the ability of individuals to shield their assets in order to be eligible for Medicaid benefits. But Section 1396p(d)(4) permits exceptions for three types of trusts: a special needs trust for disabled individuals under sixty-five years old; an income trust that permits preservation of most government benefits; and a special needs pooled trust. Jacqueline d. Farinella, *Come on in, the Water's Fine: Opening up the Special Needs Pooled Trust to the Eligible Elderly Population*, 14 *Elder L.J.* 127, 128–129 (2006). A first-party, or self-settled, special needs trust is funded with assets owned by the beneficiary and must be established by the beneficiary's legal guardian or conservator, the beneficiary's parent or grandparent, or a court. Katherine N. Barr et al., *Top 15 Tips for Estate Planners When Planning for Special Needs*, 24 *Prob. & Prop.* 38, 38 (Mar./Apr. 2010). Further, it must be irrevocable and for the sole benefit of the beneficiary who is under the age of sixty-five and disabled, and any remaining assets at death are paid back to Medicare. *Id.* On the other hand, a third-party special needs trust is limited only in that a beneficiary must neither be able to revoke or terminate the trust, nor have legal authority to direct the use of the assets for support or maintenance. Barrett, *supra* n. 78, at 58.

83. See generally Barbara D. Jackins et al., *Special Needs Trust Administration Manual: A Guide for Trustees* (iUniverse, Inc. 2004) (explaining the rules governing special needs trusts, including how trust distributions affect government benefits, and a trustee's duty to help manage the trust to enhance the beneficiary's quality of life).

O. End-of-Life Issues

The semester concludes by focusing on the myriad of issues that swirl around the end of a person's life. This includes topics such as viatical settlements,⁸⁴ physician-assisted suicide, palliative care and hospice care, anatomical donations, and the Uniform Anatomical Gift Act.⁸⁵ Also studied are the laws that struggle to define when a person is truly dead,⁸⁶ the laws and cases⁸⁷ dealing with a person's right to die, the Patient Self-Determination Act,⁸⁸ surrogacy statutes, healthcare durable powers of attorney, advanced directives, and the right of sepulcher.⁸⁹ These sections always spur lively debate and, in some cases, virtual horror over

84. "A viatical settlement is a process by which a terminally ill individual can sell his or her life insurance policy to an investor who pays the insured a discounted face value and then collects the policy benefit upon the insured's death. . . . In its purest form, therefore, a viatical settlement is a way in which dying people can acquire access to resources to benefit the last days of their lives." Anna D. Halechko, *Viatical Settlements and the Elderly: Potential Advantages and Hidden Dangers*, 6 N.Y.C. L. Rev. 135, 135 (2003).

85. The Uniform Anatomical Gift Act was drafted by the National Conference of Commissioners on Uniform State Laws (NCCUSL) with the intent of encouraging the general public to make more anatomical gifts, to honor the wishes of individuals regarding the right to give anatomical gifts, and to preserve the current organ donation system. See Natl. Conference of Commissioners on Unif. St. Laws, *Uniform Anatomical Gift Act*, <http://www.anatomicalgiftact.org/DesktopDefault.aspx?tabindex=1&tabid=63> (providing the full text of the Revised Uniform Anatomical Gift Act).

86. For example, the Uniform Determination of Death Act (UDDA) was enacted by NCCUSL in 1980 with the intent of defining death in various circumstances. See The National Conference of Commissioners on Uniform State Laws, *Determination of Death Act*, [http://www.nccusl.org/Update/select Final Acts & Legislation, select Determination of Death Act, select Final Act](http://www.nccusl.org/Update/select%20Final%20Acts%20&%20Legislation/select%20Determination%20of%20Death%20Act/select%20Final%20Act) (accessed Jan. 6, 2011) (stating that the UDDA provides a comprehensive basis for determining death in all situations and advocating that states should adopt the UDDA).

87. *E.g. Cruzan v. Dir., Mo. Dept. of Health*, 497 U.S. 261 (1990); *In re Quinlan*, 355 A.2d 647 (1976).

88. The Patient Self-Determination Act (enacted on November 5, 1990 as Section 4206 and 4751 of the Omnibus Budget Reconciliation Act of 1990, P.L. 101 508, and codified at 42 U.S.C. Sections 1395cc(a) Subpart E—Miscellaneous SEC. 4751 (2006)) was enacted as an amendment to the Omnibus Budget Reconciliation Act of 1990, and seeks to inform patients of their rights regarding decisions toward their medical care by requiring healthcare facilities, not individual doctors, to provide adult patients with information about advance healthcare directives upon admission. ABA, *Health Care Directives: What Is the Patient Self Determination Act?* http://www.abanet.org/publiced/practical/patient_self_determination_act.html (accessed Jan. 6, 2011).

89. The right of sepulcher refers to the right of the next of kin to perform a ceremonial burial and provide for the disposition of the decedent's remains. Russell E. Haddleton, *What to Do with the Body? The Trouble with Postmortem Disposition*, 20 Prob. & Prop. 55, 56–57 (Dec. 2006). It derives from the common law right of a decedent to designate his or her desired funeral arrangements. *Id.* When the wishes of the decedent are unknown, the next of kin may make funeral and disposition arrangements in most states. *Id.*

what can be done—or not done—to a human body during a person's last days.⁹⁰

P. Case Study and Review

Finally, the last class is reserved for a case study and review of what the final exam will consist of. The case study is similar to a question that will appear on the exam. It is in the form of a short story followed by a series of questions. After reading the facts, the students identify and discuss the potential issues and, with my guidance, identify appropriate answers. The students have previously been told that there will not be a formal review of the course, but they may use this class session to ask about any aspect of the materials covered in the course. Sometimes we use the entire class time because there are lots of questions; other times this class is shorter.

V. FINAL EXAM

The students are given two hours for the final exam, which normally consists of two types of questions. One involves a short story followed by a series of related questions (a format similar to what was used in the last-class case study). I usually include four or five of these types of questions. The remaining questions are short answer questions. At times I will use multiple choice questions. Each question lists the points that the question is worth, so the students may determine which questions should consume more of their time.

The exam is closed book. The few times I allowed open book exams, some students did not finish the exam. And interestingly, the overall quality of the answers was lower than when the exam was closed book.

VI. STUDENT REVIEWS

Every semester, the law schools ask students to evaluate their professors. Most of the students who take my classes say

⁹⁰ See generally Traci McKee, *Resurrecting the Rights of the Unclaimed Dead: A Case for Regulating the New Phenomenon of Cadaver Trafficking*, 36 *Stetson L. Rev.* 843 (2007) (discussing traveling museum exhibits that display dissected human bodies).

that they enjoyed the course and would recommend it to others. They often comment that they were not expecting the course to be as helpful and practical to them personally. To me, that is a high compliment and an indication that they are being introduced to Elder Law in the way I envisioned.

VII. CONCLUSION

Introducing Elder Law to law students is a richly rewarding experience. I am continually reminding myself how fortunate I am to have the opportunity to do this. Not only does it force me to keep current with the many facets of Elder Law that are covered in the courses, but it allows me to help students better understand a segment of the law that deals with situations all of us will encounter at one time or another as we travel through life. Even if a student does not choose to practice as an Elder Law attorney, at the very least the knowledge gained will be useful in the student's personal life. I encourage any Elder Law attorney who has the inclination or desire to teach to jump in without reservation if an opportunity to do so presents itself. You will not regret it.