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Avoiding Fraud in an Elder Law Practice

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Avoiding Fraud in an Elder Law Practice

I. INTRODUCTION

As elder law attorneys it is imperative that we know the boundaries between zealous advocacy and outright fraud. Inevitably, if you practice elder law long enough, you will be engaged in a conversation that goes something like this: "So, did your mother make any gifts in the last 5 years? Those create a penalty under Medicaid laws." Answer: "How would the state know?" Your right response: "You have a duty to report those gifts on the Medicaid application and it would be Medicaid fraud to fail to report them." Client response: "Oh!"

The purpose of this presentation is to better arm you with an understanding of the laws and ethics rules governing fraud, primarily in the Medicaid and VA application process. There will also be a discussion of some practical ways to avoid these problems.

II. ETHICAL CONSIDERATIONS

A good place to start is to consider your ethical obligations under the Texas Disciplinary Rules of Professional Conduct (hereafter disciplinary rules or DR). Let us consider the definition of "tribunal". In the terminology section of the disciplinary rules, a "tribunal" is defined as:

"Any governmental body or official or any other person engaged in a process of resolving a particular dispute or controversy. Tribunal includes such institutions as courts and administrative agencies when engaging in adjudicatory or licensing activities as defined by applicable law or rules of practice or procedure, as well as judges, magistrates, special masters, referees, arbitrators, mediators, hearing officers and comparable persons empowered to resolve or to recommend a resolution of a particular matter …."

Thus, Texas Health and Human Services (THHSC), an administrative agency, a caseworker from THHSC assigned to a particular case, and a THHSC Hearing officer would all fall within the definition of a "tribunal." The same would go for the Veterans Administration, or a VA adjudicator for those who practice in the VA Aid and Attendance benefits world.

This is important because of Texas DRPC Section 3.03(a). That section provides that a "lawyer shall not knowingly:

(1) Make a false statement of material fact or law to a tribunal;

(2) Fail to disclose a fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act;

(3) In an ex parte proceeding, fail to disclose to the tribunal an unprivileged fact which the lawyer reasonably believes should be known by that entity for it to make an informed decision;

…

(5) offer or use evidence that the lawyer knows to be false."

The THHSC is a tribunal, as is the VA. Knowingly making false statements to either body or assisting the client in making false statements would be in violation of this disciplinary rule. There is a materiality provision. It is only false statements "of material fact" that are prohibited. For example, what if THHSC improperly calculates copay for the applicant, but in favor of the applicant by $10.00? Would it be in violation of the disciplinary rule to fail to alert THHSC of this error? Is this material? On the other hand, as will be seen below, there are other laws in this area which may be of more importance. We shall see if there is a materiality modifier in those statutes.

The disciplinary rules go on to prescribe remedial steps necessary when the attorney discovers the falsity of the evidence. Specifically:

"(b) If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall make a good faith effort to persuade the client to authorize the lawyer to correct or withdraw the false evidence. If such efforts are unsuccessful, the lawyer shall take reasonable remedial measures, including disclosure of the true facts."

Again, there is a materiality modifier. Remediation is only necessary where the lawyer discovers that he or she has offered "material evidence" and comes to know of its falsity. Clearly, if the attorney knows about the falsity prior to the application, there is a duty to refuse. That is made clear in the comments to DR 3.03. In comment 5 it is pointed out:

"On occasion a lawyer may be asked to place into evidence testimony or other material that the lawyer knows to be false. Initially in such situations, a lawyer should urge the client or other person involved to not offer false or fabricated evidence. However, whether such evidence is provided by the client or by another person, the lawyer must refuse to offer it, regardless of the client's wishes".

Comment 6 goes on to state that "if the request to place false testimony or other material into evidence came from the lawyer's client, the lawyer also would be justified in seeking to withdraw from the case."

Title search: Avoiding Fraud in and Elder Law Practice

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