

Last Words: Long-Term Care Due Diligence for Professional Financial Advisors

by **Stephen A. Moses**

Never have so many professionals given such bad advice to such damaging effect to so many people than today's financial advisors on long-term care planning. Many financial advisors, including financial planners, do not understand this critical subject in all its ramifications, and many fail to advise the public wisely and objectively, with disregard to their personal financial advantage. To date, most advisors have not been held to legal or professional account for giving bad advice about long-term care. This safe harbor of public ignorance and judicial indifference will not continue much longer, however. More than ever before and even more so in the future, financial professionals must understand the risks and costs of long-term care and the consequences of poor counsel and inadequate planning. Here's a primer.¹

Long-term care for chronic illness or frailty is the single largest financial risk most older Americans face. Studies indicate that 43 percent of people over the age of 65 will spend some time in a nursing home and that 9 percent will spend five years or more. At an average annual cost of \$55,000 a year, and much more in the future, a long-term nursing home stay can quickly devastate a family financially. Even the popular new option of assisted living averages \$25,000 a year. The cost of most seniors' preferred alternative—to receive care in their own homes—can easily exceed the cost of institutional care when a patient requires more than a few hours of assistance per day. The supply of free care from spouses and adult children is dwindling as more and more women—the traditional caregivers—enter the workplace. Thus, a growing number of older Americans will become increasingly dependent on professional long-term care services as the cost of such services continues to skyrocket.

A Disastrous Mess

But this is nothing new. Almost everyone knows, at least intellectually, that long-term care is a big, expensive risk. What most people do not realize is that America's long-term care service delivery and financing system is a disastrous mess. Seven major nursing facility chains have declared Chapter 11 bankruptcy in the past two years. Between 10 and 20 percent of all nursing home beds in the country are in bankrupt facilities today. Hundreds of home health agencies have gone under financially. Many new assisted-living facilities are filling far more slowly than anticipated. Long-term care stock prices are down precipitously. New capitalization by debt or equity is almost nonexistent for publicly held long-term care companies.

Caregivers are in desperately short supply, whether they are low-wage nurses' aides in long-term care facilities or unpaid friends and family in private homes. Formal long-term care services are too expensive for most Americans to afford, yet Medicare and Medicaid pay too little to assure quality home care or nursing home care. Litigation against nursing homes and assisted living facilities for providing allegedly poor care is on the rise and is driving liability insurance premiums through the roof. Only seven percent of seniors and virtually none of the baby boomers own private insurance, which could help them pay the catastrophic cost of long-term care. America's gigantic and rapidly aging baby boom generation guarantees that the challenge of long-term care will become greater and far more expensive with time. As of now, long-term care is well on its way to trumping Social Security and Medicare as our country's most challenging social problem.

Given this reality, one would think most Americans would be aggressively seeking professional advisors and financial products to protect themselves from the huge and growing risks of long-term care. But that is not happening. The country is in denial. "Won't happen to me"; "never go to one of those places"; "shoot myself first" are the common refrains. Yet—given the fact that half of all people over the age of 85 already have Alzheimer's disease—when the time comes, most ailing seniors won't remember why they bought the gun! What is going on? How is it that the risk and cost of long-term care are so high while the public's concern is so low? The answer is simple, but rarely understood. For the past 35 years, Americans have been able to ignore the risk of long-term care, avoid the premiums for private insurance and wait to see if they ever need expensive professional long-term care. When they do require care, they can and do routinely transfer most of the cost to Medicaid, Medicare and to the financially strapped long-term care providers who rely on those fiscally starved government programs for most of their revenue.

Precisely why and how this happens is a subject for another article. For now, all that matters is that most people who fail to plan for long-term care end up in nursing homes on Medicaid. That is what has anesthetized the public to the financial risk of long-term care. Today, however, our welfare-financed, institution-based long-term care system is failing and the public has not yet realized that this safety net of the past will no longer be adequate in the future. They have not awakened to the reality that preferred alternatives for long-term care, such as quality home care and assisted living, require the ability to pay privately. To be able to pay privately without potentially catastrophic expense requires the foresight to plan early, save, invest or insure for long-term care costs. The only alternatives are to risk severe financial exposure or rely on publicly financed nursing home care if chronic long-term illness strikes. Today, we are in a transitional phase between the collapse of America's traditional long-term care system and the public's awakening to this danger. Unfortunately, many of the professional financial advisors who should be alerting the public to these new risks have largely reneged on that responsibility.

Ignorant Advisors

Under the current circumstances, we should expect every responsible professional financial advisor—including attorneys, CPAs and financial planners—to urge anyone and everyone who will listen to prepare to pay privately for long-term care in the future. Some give such advice, but alas, many don't. Many financial advisors are simply no more aware of the risks of long-term care than the people they advise, and for the same reasons. Someone must pay for long-term care, they assume, because we don't see thousands of Alzheimer's patients wandering unattended in America's streets. Who pays? Who knows? Medicaid, Medicare or Santa Claus? Who cares? That is the attitude and it is understandable. The vast majority of all professional long-term care services are indeed paid for by Medicaid or Medicare and the proportion of long-term care costs borne "out-of-pocket" by private citizens has gone steadily down over the years, as government financing has steadily increased. We might be able to excuse as reasonable the ignorance of advisors who fail to comprehend the need for long-term care planning if it were not that the consequences are becoming so grave.

The behavior of many other financial counselors is neither understandable nor forgivable. These are the "Medicaid estate planners" who advise clients not to save, invest, insure or pay privately for long-term care, but rather to impoverish themselves artificially for the purpose of qualifying for Medicaid nursing home benefits. This practice is doubly damaging. It injures the client and the long-term care system. Medicaid is a means-tested public assistance program. It is welfare intended as a safety net for the genuinely needy. The program has a dismal reputation for problems of access, quality, reimbursement, discrimination and institutional bias. In short, someone who retains personal wealth can purchase red-carpet access to top-quality care in the private marketplace at the most appropriate level—home care, assisted living or nursing home care. Once that wealth has been shifted to heirs by a complicit attorney or financial planner, however, the client becomes dependent on nursing home care financed by a welfare program that pays so little (often less than the cost of care) that it is bankrupting America's service delivery industry.

Is it possible that credentialed financial professionals are giving advice of this kind to the public in America today? Yes. In fact, this may be the most common advice provided by attorneys, accountants, financial planners and many insurance agents (who market annuities as a Medicaid planning device) throughout the United States. For example, one survey found that "...a majority of [financial planners] felt that an individual with a catastrophic illness should consider transferring assets to family members in order to qualify for Medicaid."² (Although this study is now 12 years old, I think the results would again be borne out by new research.) An attorney advised "...if the individual happens to have about \$82 million lying around, he or she could even buy a painting by Renoir to hang on the walls of the house...[which he called] burying money in the treasure chest of the house."³ (A home and all contiguous property, regardless of value, are exempt for purposes of determining Medicaid nursing home eligibility, as is a business including the capital and cash flow of unlimited value.) A best-selling self-help book on Medicaid planning suggests:

So is there any practical way to juggle assets to qualify for Medicaid—before losing everything? The answer is yes! By following the tips on these pages, an older person or couple can save most or all of their savings, despite our lawmakers' best efforts...Here are the best options: Hide money in exempt assets...Transfer assets directly to children tax-free...Pay children for their help...Juggle assets between spouses...Pass assets to children through a spouse...Transfer a home while retaining a life estate...Change wills and title to property...Write a durable power of attorney...Set up a Medicaid Trust...Get a divorce...."⁴

Web sites and public seminars providing similar advice abound. It seems the big bucks in long-term care are to be made by promoting a free ride on public assistance (with the help usually of expensive professional advice) rather than by convincing people to take responsibility for their own long-term care and shoulder the burden of years of personal saving or insurance premiums.

Care of Questionable Quality

Whether professional advisors are merely ignorant of long-term care risks or actively culpable by providing irresponsible, self-serving advice to clients, the consequences for the public are the same. People who fail to save, invest or insure for long-term care end up dependent on Medicaid nursing home care, whether they spend down into impoverishment or dodge the spend-down liability with the help of a Medicaid planner. The gerontological literature on the access and quality deficiencies of Medicaid-financed nursing home care is extensive. People dependent on Medicaid often have a harder time finding a nursing home bed and confront longer waiting lists than private payers. Quality of care in nursing homes heavily dependent on Medicaid financing is often questionable. Medicaid rarely pays for home care or assisted living, which most seniors prefer, and when it does pay, it pays so little that access and quality are suspect. Because nursing homes need full-pay private patients to balance the low-pay Medicaid majority, they often discriminate—legally or otherwise—by providing better rooms, food or amenities to private payers than to Medicaid residents. Finally, every state Medicaid program in the country is required by federal law to seek recovery, after the patient dies, of all benefits paid from any remaining estate, including a home that was exempt while the patient was alive. Someday, heirs and loved ones of ill-advised elders are going to turn with a vengeance on professional advisors who failed to give good advice or actively promulgated bad planning options. That day is coming sooner rather than later.

We already see the tip of the iceberg of potential malpractice risk regarding long-term care due diligence. Twelve years ago, one expert wrote:

During the last thirty years, the number of suits alleging attorney malpractice in an estate planning context has skyrocketed.... The malpractice revolution has begun. The defenses of privity and the statute of limitations have been routed. Different types of errors in estate planning are coming under judicial scrutiny. Many other errors are ripe for such scrutiny.⁵

More recently and specifically, another writer warned:

Many of the appellate decisions in the attorney malpractice field involve cases brought by the former clients—and non-clients—of elder law attorneys....The most frequently litigated legal issue in cases against elder law attorneys concerns the question: to whom did the attorney owe a duty? [that is, the vulnerable senior or the heir with a conflict of interest]....A related question is whether an attorney has an obligation to inform his or her client of subsequent events that have an impact on the estate plan (e.g., amendments to Medicaid laws and regulations or changes in family circumstances that render moot or ineffective provisions in testamentary instruments).⁶

In 1999, an article in *The Elder Law Journal* admonished:

Attorneys who represent elderly clients, or who wish to expand into this rapidly growing area of the law, have a

professional responsibility to advise their clients of the available funding options and of the consequences of not planning for the contingency of prolonged and expensive LTC.... Attorneys who advise clients about future financial security and concerns fulfill their professional obligation when they provide informed counsel in the area of LTC....If [attorneys] are not informed about the nuances of LTC insurance, they may be held liable if a client sues them for negligence. In our litigation-prone society, there are few professions or occupations outside of medicine and public accounting where the practitioner is so exposed to risk. Hence, it is in their own self-interest that lawyers consider all options when planning for medical, financial, and quality of life decisions for elderly clients.⁷

Although the foregoing excerpts specifically address the malpractice vulnerability of lawyers, the principles apply equally to any and all professional financial advisors. Certainly, financial planners have a similar fiduciary responsibility to their clients with regard to long-term care risk and expense.

In summary, many professional financial advisors in the United States have given, are giving and will probably continue to give bad advice about long-term care planning. Many ignore altogether the emotional and financial consequences of failing to plan for long-term care. At the least, these careless advisors know not what they do. Others, however, address the issue of asset protection in a manner that leaves infirm seniors impoverished and vulnerable to inferior, publicly financed nursing home care. These advisors use their professional acumen to grant an early inheritance to their clients' heirs while pulling down a big fee for themselves. Both kinds of advisors—the ignorant and the irresponsible—bear a professional responsibility to learn the facts and mend their ways. The consequences for their clients are the same—welfare dependency, loss of independence, and health care vulnerability. Malpractice suits and stern judicial scrutiny cannot be far behind when the prestigious *New York Times* editorializes against the blatant and often unethical misuse of the [Medicaid] program by well-to-do patients in nursing homes.

These patients exploit legal loopholes to transfer their wealth to their children, thus technically impoverishing themselves and providing themselves with inexpensive nursing home care. What was supposed to be a program for the poor has turned into a boondoggle for everyone else....The system is a scandal. (April 14, 1996)

Due professional diligence in the field of long-term care requires that all professional advisors (1) understand the consequences of failure to save, invest or insure for long-term care; (2) advise their clients candidly of these dangers; and (3) recommend responsible financial tools to prevent such negative outcomes. In many, or even most, instances, the best alternative for advisors who are generalists may be to recognize that long-term care is a highly specialized field and refer clients to trusted experts in that specialty.

Endnotes

1. This article was commissioned by The Constellation Group, a financial planning firm in West Hartford, Connecticut, founded by Fraser Allport. For more information, consult the company's Web site: www.theconstellationgroup.com.
2. Peter Bacon, et al., "Long-Term Catastrophic Care: A Financial Planning Perspective," *Journal of Risk and Insurance*, Vol. LVI, No. 1, March 1989, p. 153.
3. Mary Schroeder, "Elder Law Expert Outlines Features of Asset Transfer, Power of Attorney," *Financial Services Week*, Vol. 3, No. 20, July 9, 1990, p. 19.
4. Armond D. Budish, *Avoiding the Medicaid Trap: How to Beat the Catastrophic Costs of Nursing-Home Care* (New York: Henry Holt, 1989.)

5. "Attorney Malpractice in Estate Planning: You've Got to Know When to Hold Up, Know When to Fold Up," *The University of Kansas Law Review*, Vol. 28, No. 2, Winter 1989, pp. 193–281; this quote at p. 193 and p. 279.
6. Paula Izzo, "Loss-Prevention Strategies for the Elder Law Attorney," *The Elderlaw Report*, Vol. VIII, No. 1, July/August 1996, pp. 1–2.
7. Robert Hayes, Nancy Boyd and Kenneth Hollman, "What Attorneys Should Know About Long-Term Care Insurance," *The Elder Law Journal*, Vol. 7, No. 1, 1999, pp. 1–32; this quote is on p. 4.

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