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Education and Estate Planning

Education is crucial to effective estate planning. This article presents an overview of programs in the state of Michigan aimed at educating interns, clients, attorneys, and other professionals in estate planning issues.

By William Josh Ard

Introduction

One of my major roles at the Thomas M. Cooley Law School’s Sixty Plus Elderlaw Clinic in Lansing, Michigan is working with the estate planning program. Much of my work in the clinic and the organizations in which I participate—including several entities of the State Bar of Michigan and other advocacy groups for seniors—involves education. Not only must interns be educated, but also clients, their families, attorneys, and other professionals.

Education is truly a crucial issue in estate planning. This article is based on my personal experiences with these educational concerns. I hope that these remarks are universal enough to be of benefit to readers in different states and in different situations. Whether we are in legal education or private practice, education is at the heart of much of what we do.

Background Situation

Sixty Plus Elderlaw Clinic

Thomas M. Cooley Law School is relatively new, having opened in 1972. The prime founder was President Thomas Brennan, who led the school continuously (and, as of this writing, was set to retire at the end of 2001). President Brennan resigned as Chief Justice of the Michigan Supreme Court to actualize his vision of a law school in the state capital that would offer high-quality legal training to students who might otherwise be unable to attend law school. The consistent admissions policy has been to offer a chance to students whose qualifications exceed the established floor.

Although Cooley’s policies have remained consistent, the composite picture of entering classes has
changed with the times, consisting of more females and minorities. The increase in minority enrollment is due in large part to the abandonment of affirmative action policies by many state law schools.

Cooley has tried to make programs convenient for students. The school operates on a trimester system and new classes are admitted each trimester. Historically, one trimester held mostly morning classes, one afternoon, and one evening. In recent years, weekend classes were also added. Hence, it is possible to receive a law degree while attending only on weekends.

Paradoxically, the Sixty Plus Elderlaw Clinic, founded in the late 1970s by then-professor Fred Baker, is one of the oldest elder law clinics in the nation. In accord with the national spirit of the time, Prof. Baker did not get much support from school administration, who allowed him to start a clinic as long as it was clear that everyone involved did so on a volunteer basis. In fact, student interns received no law school credit for participating.

Times have changed. In recent years, national legal education experts have viewed clinical education very highly, as witnessed by the American Bar Association’s influential McCrate report. The elder law clinic is now a major recruiting tool for applicants. Today’s student interns receive credit for participation and pay appropriate tuition. All clinical faculty members are on tenure-track lines.

For several years, the only way that Cooley students could receive school-sponsored clinical training was through the Sixty Plus program. In recent years, the school has vastly expanded the options available to students, who can now participate in an externship program. Typically, placements are in law offices, prosecutor’s offices, and the like. Further, new clinical programs such as the Innocence Project have been created. Because there are now more options, there is not as large a waiting list for Sixty Plus as there was a few years ago.

The regular Sixty Plus Elderlaw Clinic is a two-term commitment. First-term interns are paired with second-term interns. Together, they work as a team and receive supervisory sessions. These interns may deal with the gamut of issues Sixty Plus covers, including estate planning, landlord-tenant issues, property disputes, consumer problems, guardianships and conservatorships, probate, and many other civil matters.

A few years ago, Sixty Plus added an Estate Planning clinic to accommodate evening and weekend students. This program operates solely on evenings and weekends and is a one-term commitment. The interns interview clients; draft estate planning documents (including wills, advance medical directives, and durable powers of attorney), and then assist clients in executing them.

**Legal Background in Michigan**

The work at the clinic is grounded in the legal environment of the state of Michigan. Several statutes and regulations are particularly relevant.

The probate code was repealed and replaced by the Estate and Protected Individuals Code [EPIC] effective April 2000. EPIC is much closer to the Uniform Probate Code than the code it replaced. EPIC includes laws dealing with wills, intestacy, durable powers of attorney, advance medical directives, trusts, non-probate transfers, and protective proceedings.

A common means for non-probate transfers is through joint ownership. Many types are available in Michigan: joint tenancy with survivorship (in which the remainder interests cannot be extinguished without the consent of all joint owners), joint tenancy without survivorship (without this restriction), and tenancy by the entireties for married couples.

Revocable trusts also are a means to avoid probate. EPIC, to a large degree, subjected revocable trusts to the same procedures for creditor claims as probate. All assets in a revocable trust are subject to creditors’ claims. Just like probate, if notice is published the claims period cuts off in four months. Otherwise, it extends for three years.

EPIC established procedures for pay on death (POD) and transfer on death (TOD) accounts. Basically existing laws on Totten trusts were extended to other types of entities, such as stocks, bonds, and mutual funds.

Obviously, one means to avoid probate is to give property away while alive. Unfortunately, not everyone understands that doing such things as signing a deed constitutes a current gift that cannot be undone by the grantor by simply making a new document.

Michigan is the home of both Dr. Jack Kevorkian and a Right to Life-dominated legislature. It is one of only three states that have no statutory authorization for living wills. It does authorize the appointment of a health care proxy, called a patient advocate, to speak for the patient when she or he is
unable to participate in health care decisions. Even this designation is rather tightly controlled. All patient advocates must sign an acceptance form, whose content is specified by the legislature. Among the standard provisions is one forbidding the patient advocate to use the designation to perform an abortion, no matter the age of the patient. Unless the patient is receiving Medicaid or other public assistance, there is no family consent statute. Some medical facilities have a policy of allowing family consent, but there is no legislative requirement that they do so, nor a statutory waiver of liability.

Michigan largely relies on the common law of powers of attorney, except that statutes allow for the creation of a durable power of attorney. There are no statutory powers of attorney, no requirements that third parties must not unreasonably reject powers of attorney, nor any fee-shifting statutes if court proceedings are required to remedy the malfeasance of an attorney in fact.

Michigan has the dubious distinction of granting the largest number of guardianships of any state in the nation, although it is far from the largest in population. The law is clear that a court cannot grant any more powers to a guardian (to make decisions about one’s body) or to a conservator (to control one’s property) than the person could have granted himself or herself (while competent) through patient advocate designations and durable powers of attorney. Many of the recent amendments to EPIC have been designed to address perceived problems in the protective system.

Medicaid considerations are very important for moderately wealthy and poor elderly persons considering estate planning. Typically, there is a much greater potential loss of wealth to pay for nursing home costs than could be lost on probate costs or estate taxes. Also, there is a need to ensure that durable powers of attorney allow for proper Medicaid planning activities. For example, individuals who do not want to authorize gifts by their agents in general might well favor transfers to their spouses if this would facilitate qualification for Medicaid.

Michigan is one of a very small number of states that has not implemented any estate recovery for Medicaid. In several other ways, Michigan rules are rather liberal. For example, annuities with uneven, balloon payments have passed muster.

There is no statute that defines the practice of law in Michigan. Instead, the legislature has granted broad deference to the Supreme Court to determine what constitutes the practice of law through case law. This case law indicates that drafting estate planning documents for someone else does involve the practice of law. Trust companies are authorized to draft trusts that they themselves are parties to.

Interns at the Sixty Plus Elderlaw Clinic are allowed to practice law under the supervision of licensed attorneys according to Michigan Court Rule 8.120. Thus, under proper supervision, they can draft documents for clients.

It has always been a crime for an attorney in fact to use the document to steal from the principal. Nevertheless, it has sometimes been difficult to obtain convictions. A recent statute that became effective in September 2000 may make prosecution and conviction easier. Section 174a of the penal code criminalizes financial exploitation of vulnerable adults by a person in a position of trust. An attorney in fact is clearly a person in a position of trust. Among the types of financial exploitation forbidden are fraud, deceit, misrepresentation, and unjust enrichment.

Marketing Efforts in Estate Planning

Michigan citizens are inundated with advertisements dealing with estate plans. Many of these advertisements are based on a fear of probate. While attorneys run some of these ads, many are run by so-called “trust mills.” The trust mills invite participants to come to seminars at restaurants or use telemarketers to try to gain entry to homes. Typically, the message is rather simplistic—probate is bad and living trusts are good because they avoid probate. Most, but not all, of these organizations charge very high prices for poor-quality products.

The Attorney General’s Consumer Protective Division has investigated many of these mills for possible violations of the Consumer Protection Act through the use of deceptive marketing. One action has been filed. The State Bar is also actively considering bringing injunctions for the unauthorized practice of law. One difficulty, however, is that most of the mills have at least one attorney on staff who theoretically could supervise the production of documents.

Community Involvement

I have been involved in several organizations that educate the public in estate planning issues. Many
of these efforts have involved consumer protection. Consumers have paid large sums for inappropriate or poorly drafted estate products. In some instances, the harm from inappropriate products has gone well beyond the initial purchase price.\(^{15}\)

Several committees and sections of the State Bar of Michigan have taken an active role in educating the public about estate planning issues. For example, the Elder Law and Advocacy Section has educated the elderly, their families, and other advocates on elder issues, including those dealing with estate planning. The Unauthorized Practice of Law Committee has traditionally concentrated its efforts on bringing actions against malefactors practicing law without a license. This can be slow work, as the committee can go after only one person at a time and, in most instances, cannot do no more than obtain an injunction forbidding future improper conduct. It can also be rather expensive. In many instances, educating the public as a prophylactic measure (rather than obtaining injunctions against one person at a time) can prevent more bad acts. The Probate and Estate Planning Section and the Consumer Law Section have supported these efforts.

In addition, other organizations have undertaken educational efforts in estate planning:

- The Senior Exploitation Quick Response Team (SEQRT) largely consists of state and some federal agency personnel who regularly meet to discuss how to combat financial exploitation of the elderly.
- The Senior Advocates Consumer Coalition focuses on consumer issues, including the marketing of inappropriate, poor-quality estate planning products to the elderly.
- The Elder Law Task Force of the Michigan Poverty Law Program (MPLP), sponsored by the University of Michigan Law School, provides support for legal service attorneys throughout the state.

In addition, there is the state AARP and the state Office of Services to the Aging.

**Education Within the Clinic**

To be eligible to practice law under Michigan court rule,\(^{16}\) a student must have completed at least 40 hours of course work. Usually, participants are not accepted into the Estate Planning program until their last term on campus, in order to give all applicants a chance to participate. As a result, new interns have a considerable experience with legal education, a background that is both helpful and harmful.

In Wills and other classes, students will have become familiar with analyzing legal questions and providing legal analysis, while other useful skills have not been developed in coursework. Although students will have analyzed portions of existing wills, they will not have been required to draft any portion of a will, much less to draft a portion to meet a particular client objective. If, in an examination, they have determined that a particular statement creates legal difficulties, they have not been asked how it could have been rewritten to avoid the problem. Students will have worked only with textbooks, primarily casebooks, but not with actual clients. These are all skills that they have to use in the clinic.

Interns have to learn more than theoretical issues. They also have to learn how to operate within the procedures of a law office. The challenges are even greater than this. Interns have to learn how to teach their clients, and sometimes the clients' agents, about estate planning documents and how to use them.

**Educating Interns to Be Effective in Estate Planning**

Education comes in many forms. Most learning comes from hands-on work with actual problems. It is not fair either to the interns or the clients to begin with a sink-or-swim approach. Two or three weeks of lectures predate any actual contact.

Skills are not adequately learned in a vacuum, without any experience to which to apply them. While a just-in-time approach to education is attractive, the ability to seek the best answers is enhanced by previous exposure to the answers in discussions. The approach is to present material, have it available in readily accessible form, and then guide interns as to how to find the answers when the problems actually arise.

Before interns draft documents for their real clients, they draft documents for one another. The purpose of this exercise is to increase familiarity with the types of interview questions needed and the use of the software drafting programs.

The first interview with a client is conducted in front of the entire group by a supervisor, who discusses with the interns why certain things are done.
Obviously, it is important to select a suitable client who will not get confused or exhausted by this elongated interview.

Interns receive support and supervision throughout their work in the clinic. In the regular clinic, interns always meet clients jointly with their partners. In the Estate Planning clinic, in most instances, a supervisor or teaching assistant is always present when interns meet clients. In all instances, no document is saved to the system hard drive, much less mailed, before a supervisory attorney has approved it.

There are many differences between interacting with textbooks and interacting with actual clients. These differences are often exacerbated when dealing with elderly clients. Quite possibly, the nature of clients is more critical for the essence of elder law than the nature of the legal issues.

There are several challenges involved in having law student interns communicate with elderly clients about estate planning. For example:

- Many elderly individuals have difficulty hearing and reading text.
- Many elderly individuals have great difficulty giving short answers, which interns might expect, and are more comfortable with longer, narrative responses.
- There is a social dissonance in roles. Older clients are more entitled to respect. Highly knowledgeable experts are more entitled to respect. Students perceive themselves as novices but may be perceived by others as experts. This role confusion makes successful communication more difficult.
- Interns are not used to explaining legal issues to others less knowledgeable. Most of their explanations have been to professors using the so-called Socratic method. The odd thing about these interchanges is that in normal usage, one doesn’t ask a question when one already knows the answer. There are major difficulties in moving from the student role to the teacher role, a role the interns must play in explaining matters to clients.

These problems are addressed in different ways. We provide technological support to clients with hearing or visual problems. We emphasize techniques for successful communication in classes. Quite probably, more is learned from modeling the interactions of professors and teaching assistants with clients. Thus, we attempt to have a supervisor present during all client interactions.

Many educational issues in estate planning involve ethics. We discuss why others should never be in the room during intakes. Often, interns initially do not see the harm or risks. We introduce various scenarios in attempts to raise awareness. Interns have to be taught how to meet clients alone when the client wants to have someone else in the room. We suggest various things that can be done to convince clients that this is in their best interest and in the best interest of their loved ones. One obvious attack on a will, benefiting one child differentially, arises if that child is allowed to accompany the client at intake or execution. There are times when the client refuses to be seen alone and leaves without an intake, but this is quite rare. It is interesting to note that we have been more successful at convincing children quickly that they should not be present than we have in convincing their parents.

Husbands and wives present special problems. A major concern is when we can draft estate planning documents for both spouses. They do not have to have mirror-image documents, but we must zealously represent a client. Therefore, in cases of couples, we require that they share their plans with each other before we agree to represent both.

For durable powers of attorney, the choice of an agent who will not be overly tempted by the power is critical. We work with interns in recognizing potential problems and in raising them with clients. Interns need to know how to raise concerns without offending clients. Interns also need to know that agents can make certain reasonable demands. For example, a child might say that he would agree to serve as his mother’s patient advocate but would not agree with some facets of his mother’s medical views. In that case, the mother needs to find another agent or realize that a different directive is necessary to obtain the consent of her preferred agent.

A good part of what one must learn to be a successful intern is to learn to work with office procedures. Although our attitude is to engage in continuous improvement, correcting problems as they are recognized, interns have to learn to conform to us rather than vice versa. Of course, this is what graduates will face if they go to work for an existing firm. Training interns in how to comply with
office procedures is one of the most time-consuming parts of the program.

The education involves both values and details. In order to learn and remember the proper way to handle the execution of documents, it helps to understand the purpose of each step and the potential problems that might arise if these steps are not followed.

Interns have completed a basic wills course, but that does not ensure that everything important has been retained. Few incoming interns have a solid understanding of what a power of appointment is, why one might be given, and why someone would want to disclaim any powers of appointment not exercised in a will. Lacunae are even more widespread in the basic knowledge of powers of attorney and patient advocate designations. Interns are called upon to explain options to clients and to explain the basic purpose of various conditions. The ability to explain presupposes prior knowledge. Some misunderstandings are common enough that we can address them in pretraining. Others have to be addressed after they appear.

Educating Clients

Much of our effort in working with clients deals with education. Some come to us seeking wills and have never thought about the advantages or means by which to prepare for possible incapacity before death. Clients will be better served if they are educated in the possibilities. A more difficult task is correcting false beliefs and expectations. Many clients have attitudes that probate is a fate worse than death and something that should be avoided at all costs.

Clients do not address estate planning with an empty mind. Many have prior experiences with friends and relatives. Many have heard marketing pitches from trust mills or have had them repeated by friends. In terms used by cognitive scientists, clients have a schema of estate planning. They will naturally interpret events and conversations using the framework provided by the schemas. If what they hear does not correspond to the schemas, it may be simply rejected or ignored. If we are to satisfy the needs of clients, we cannot always simply give them what they say they want. We need to learn what their important concerns are, find the appropriate means to satisfy these concerns, and teach them that these means are in fact what they want. To accomplish this, we need to first discover what their schemas are and then try to educate them as to the true state of affairs.

If a client had a bad experience in the probate of a relative’s estate, we want to learn why. If the client feels that the problem was with the probating attorney, we inform him or her that we will agree to represent his or her personal representative at no charge if that is desired. If the client feels that the problem involved the process itself, we inform him or her that the process has been greatly simplified in the past few years.

Some clients are able to say little more than that they want to avoid probate. In those cases, we ask what it is that they want to avoid. If it is going to court, we inform them that normally their estate requires no court appearances and that everything can be done by filing papers with clerks. If the problem is cost, we compare the costs and risks of various ways of proceeding and see if alternative means accomplish their goals.

Obviously, some clients are better off with other means. If so, those should be considered. For example, most of our clients have simple distribution plans with no risk of estate taxes. For these clients, putting “paper” assets in pay-on-death accounts naming their preferred beneficiaries is a good solution. If the problem is the delay, we explain the facts. With either a revocable trust or a probate estate, no assets should be distributed to beneficiaries until all claims have been considered and the valid ones paid. With either means, assets that need to be sold can be sold quickly, as soon as the personal representative obtains letters of authority. The prudent thing to do is to put the proceeds in escrow accounts until claims are settled.

Some clients do not understand the purpose of documents very well. Durable powers of attorney are particularly confusing, and clients need to know that they are no longer in effect after they die.22 Clients must understand their attorneys in fact cannot do anything for them then, unless they are doing so as personal representatives. Some clients believe that the document means that their attorneys in fact can order them what to do as soon as it is signed. Many have no understanding of what duties a fiduciary has. All of this needs to be explained so that clients appreciate what the documents do.

Clients have to evaluate all the options, including those they had not considered. Clients often had
not considered that one or more of their designated beneficiaries might predecease them. Most had not thought about whether they would prefer grandchildren to inherit per stirpes or per capita by representation. In these and other cases, the options have to be explained to clients. In some cases, they have to be led to consider how to weigh alternatives.

All estate planning documents we draft require agents. It would be naïve to assume that agents could read the documents and know exactly how to perform their duties. In most instances, we are unable to have detailed discussions with the agents and in fact often have no discussions with the agents at all. We write letters to agents who might assist our clients during their lives and provide them with general question-and-answer sheets about their duties, but this, too, is not sufficient. We try to educate our clients in what they need to discuss with their agents. This is especially important if a patient advocate is to convey one’s values and desires to a doctor. We also try to educate our clients in what information they need to provide for their agents. If a client expects someone to manage their financial affairs pre- or post-death, it is very beneficial to give the agent detailed information about finances.

Our estate planning documents do not speak for themselves. We need to educate clients about what to do with them. Generally, we have to educate clients to teach their agents what to do with them as well. For example, advance medical directives need to be made a part of one’s medical records in order to become effective.\(^2\)\(^3\) A power of attorney has no effect on a financial institution until a copy of it is presented.

Typically, clients seeking estate planning documents do not consider exploitation a major risk, but unfortunately it may be. A large percentage of financial exploitation of the elderly by relatives and caretakers has been facilitated by powers of attorneys and wills. We need to teach clients about these risks and how to lessen them. One way to do so is to avoid certain types of people as attorneys in fact. Simplistically speaking, anyone who might be overly tempted to take advantage of a vulnerable adult should not be chosen. Among those who might be tempted are children who have substance abuse or gambling problems that have resulted in overwhelming debts, or those who depend on their aging parents for support. Certainly, a person with a criminal background should not ordinarily be chosen either.

We educate clients about the risks of not choosing proper agents, and the steps that can be taken to minimize the risks of exploitation. One simple step in a durable power of attorney is to require attorneys in fact to make regular reports to someone else, which tends to protect the client. Someone who might be tempted to take advantage of them might not if they are afraid that their acts could be easily discovered by the person to whom they have to give reports. It also tends to protect the attorneys in fact.

As financial exploitation becomes more frequently reported by the media, false reports will doubtlessly occur. This is the pattern found in child sexual misconduct. Secrecy breeds suspicion. A sister is less likely to suspect a brother of exploiting their mother if the sister receives regular reports of all activities conducted by the brother under the authority of the durable power of attorney.

**Educating Agents**

For estate planning documents to work as planned, agents must perform relatively well. There is no reason to believe that they will automatically do the right thing. The problem is not that agents know what to do yet fail to do so, but rather that the agents do not know what to do. An unfortunate pattern often occurs: A client understands a power of attorney at the time of signing but loses some capacity five or ten years later and no longer can manage her affairs or explain the role of an agent to her son. The son never understood powers of attorney. Is there any surprise that the documents are frequently misused in such circumstances?

Education seems to be the answer, but this answer is difficult to realize. We rarely have any direct interaction with agents. To avoid any ethical problems, we never conduct an intake with family or friends in attendance. It is rare that we can meet with agents face to face. Fortunately, there are other means to educate agents.

A basic means of education is through the documents themselves. The rhetoric of estate planning documents is especially complex. They are written with many different audiences in mind. The legal system, in case of litigation, is one audience, but generally not the most important one. Much of the content is intended to aid agents in what to do. A standard will template instructs to pay just debts. This statement is not legally necessary, because personal representatives have a legal duty to pay debts
whether not this is mentioned in the will. One cannot protect an estate against creditors’ claims by having a clause in the will forbidding payment. The major purpose is to remind clients now and personal representatives later that creditors have to be considered before any distributions are made to beneficiaries. In essence, the purpose of this statement is to educate personal representatives.

Another means we use to educate personal representatives is through standard question-and-answer sheets we have prepared—one for attorneys in fact (durable powers of attorney) and one for patient advocates (advance medical directives). We make these available to agents in the hope that they will learn what their duties and responsibilities are. We have not yet prepared a similar document for personal representatives, as we are much more concerned about preventing harm to our clients while they are alive. Moreover, we offer to assist personal representatives in probating estates for wills that we drafted.

Education Beyond the Clinic
Various groups concerned about the elderly are also interested in educational efforts. This does not refer to sales presentations disguised as educational seminars. Many marketers advertise sessions to provide education about legal options, but the purpose is to convince attendees to buy the products for sale. These sales presentations are a major reason why there is a need for educational efforts so that these messages are not the only ones presented.

Even with these limitations, there are many efforts being made within the state by numerous sponsors. While most of these efforts are targeted at the consumers that might fall prey to marketing, others are directed at attorneys or at other professionals. Those directed at attorneys serve four major purposes:

1. To educate attorneys about messages their clients may hear and how to combat them;
2. To educate attorneys about ethical problems if they aid and abet unscrupulous marketers;
3. To educate attorneys about efforts that are being undertaken to combat these marketers; and
4. To educate attorneys about how to remedy problems created by inappropriate estate planning.

The efforts directed at other professionals have a similar range of purposes. The particular messages are designed for the appropriate groups. For example, law enforcement is more concerned with criminal violations, and financial professionals are more concerned about making appropriate recommendations to clients.

Educating the Public
A major rationale for educating the public is that it is much more cost-effective to prevent victimization by fraudulent marketing than it is to correct problems once they occur. It is important to educate both potential purchasers and those individuals to whom potential purchasers listen. For example, some people are attracted to inappropriate estate planning products on the basis of friends’ or relatives’ recommendations.

Several entities in the State Bar of Michigan have been involved in educating the public about estate planning issues. The Standing Committee on the Unauthorized Practice of Law investigated several claims that trust mills were engaged in the unauthorized practice of law. At the time this article is being written, no enforcement action has yet been authorized, as it has proven difficult to find proper victims. According to the old maxim that ignorance is bliss, many purchasers of trust kits die happy, believing that they spent their money wisely. The State Bar generally does not undertake an enforcement action unless it is clear that a consumer was actually harmed by the activity. Another problem in enforcement is that most trust mills have at least one state-licensed attorney on staff who could, theoretically, supervise the production of legal documents.

Rather than waiting for the best cases to bring enforcement actions, the committee proposed that the State Bar actively warn consumers about trust mills. Although public-service announcements could be produced at a relatively low cost, the committee recommended running paid advertisements. Public-service announcements are aired at times that advertisers do not want, presumably for good reasons. There was little purpose in the campaign unless it reached consumers. After investigation, the committee decided that radio advertisements maximize coverage for the money, especially in reaching a largely elderly audience. The stations selected were those that have been used by the state AARP in its publicity efforts.
The Probate and Trust Law and Elder Law and Advocacy Sections of the State Bar made significant contributions to help defer the costs of the advertisements. These sections, in conjunction with the Unauthorized Practice of Law Committee, and other bar entities made suggestions about the ad copy. These reviews were sometimes difficult. For example, the Elder Law and Advocacy Section council objected strongly to early scripts that appeared to portray the elderly as helpless victims. However, agreement was made upon a final version and the ads were aired during the fall of 2001.24

These bar entities have also continued to work on other means of presenting understandable information about estate planning to the public. The brochure, “Don’t Trust Trust Kits,” has been one of the most popular bar offerings.

The Elder Law and Advocacy Section has provided information to the public about other issues as well, including alternatives to guardianships and conservatorships. The section produced a brochure on alternatives to guardianships, which was provided to all probate courts in the state and other groups. The section also has disseminated information about durable powers of attorney and advance medical directives.25

The Attorney General’s Consumer Protection Division has actively pursued trust mills. It has brought an action against one corporation, but has also devoted considerable attention to consumer education about estate planning decision-making.

The state Office of Services to the Aging [OSA] has contributed greatly to educational efforts dealing with estate planning. A number of its issue alerts deal with estate planning, especially warning consumers to be wary of certain offers. OSA has sponsored several trainings on the issues. Currently, Sixty Plus Elderlaw Clinic is coordinating training efforts on alternatives to guardianships at four sites around the state.

The state AARP has been actively involved in warning its members of consumer frauds. In this effort, it has taken an active role in warning about fraudulent marketing of trusts and other estate-planning products.

**Educating Attorneys**

Continuing legal education programs in Michigan have devoted time to educating attorneys about estate planning issues. The Institute for Continuing Legal Education [ICLE], based in Ann Arbor, has issued many publications and sponsored numerous seminars educating attorneys about changes in probate laws. The Michigan Poverty Law Program, sponsored by the University of Michigan, has also conducted training programs for legal services attorneys about estate planning issues. Several sections of the state bar, especially the Probate and Trust Law and Elder Law and Advocacy Sections, have sponsored training programs, including programs in conjunction with ICLE.

Some of the educational efforts go into other issues as well. In one ICLE-sponsored seminar, emphasis was on attorneys getting into difficulty if they are assisting clients who might be, knowingly or unknowingly, violating the new state statute on financial exploitation of vulnerable adults. Many actions commonly taken by attorneys in fact are arguably criminal. For instance, if an attorney in fact takes some of her parent’s assets and adds some of her own funds and buys a jointly owned apartment to accomplish a spend down for Medicaid purposes, this is arguably criminal. This could be viewed as unjust enrichment, a triggering event under the statute, especially if she has siblings who would not profit from the transaction. Few attorneys have considered the consequences of this new criminal statute, a point I also addressed in an article in *Michigan Lawyers Weekly*.28

The State Bar Ethics Committee issued an opinion in summer 2000, RI-325, which is partially educational in its intent. The opinion states that any attorney who works with trust mills is likely to be in violation of several ethical rules, a position reached by courts in Kansas.30 One of the purposes of its promulgation is to warn attorneys not to fall victim to entreaties from the trust mills.

**Educating Other Professionals**

Many other professionals are also important in the total environment affecting estate planning. Adult protective service workers are charged with investigation of potential financial exploitation, physical abuse and neglect, and so need understanding of what are acceptable uses of durable powers of attorneys and advance medical directives. They also need to know what are reasonable purchases of legal products and what might be scams. The Elder Law and Advocacy Section of the State Bar and the state Office of Services to the Aging have conducted training
sessions for adult protective service workers on these topics.

The Elder Law and Advocacy Section, the Office of Service to the Aging, the state Family Independence Agency (the agency that houses adult protective service workers), and the Prosecuting Attorneys Association sponsored a three-day conference in November 2001 on issues concerning vulnerable adults. Sessions at the conference dealt with powers of attorney, advance directives, and fraudulent estate planning products.

Law enforcement personnel often need additional education in abuses conducted by attorneys in fact. Although many officers express the belief that disputes over powers of attorney could only be a civil matter, in fact, a large percentage of criminal financial exploitation of the elderly has been facilitated by the use of powers of attorney. Successful criminal prosecution requires knowledge all along the line—law enforcement, prosecutors, and judges. The Office of Services to the Aging has attempted to arrange such training for each group.

Another important part of the puzzle is the financial community. Education of this specific group can play a role in training financial workers to encourage appropriate titling of assets, and use of appropriate powers of attorney, and to cooperate with investigations of possible financial exploitation.

Other educational efforts are directed in the area of alternatives to guardianships. A recently-passed Michigan statute requires that all probate courts provide information about alternatives to guardianships to petitioners, but providing information at that time might be too late. Some of the alternatives, such as durable powers of attorney and advance medical directives, require that the vulnerable person is competent at the time of execution. Therefore, it is necessary to disseminate the information well before the situation deteriorates to the point that a petition for guardianship is filed. In addition to educating vulnerable persons and their families, it is helpful to educate others who might advise families.

Perhaps the group that is the most critical in the equation is the medical profession. Informal surveys indicate that the first suggestions about filing for guardianships come from the medical profession. This seems to be the standard advice whenever an elderly person shows any signs of vulnerability. Typically, medical personnel are not aware of the difference between guardianships for making decisions about one’s body, and conservatorships for control over one’s property. Generally, there is not much knowledge in the medical community about other arrangements, such as representative payees. Although it is difficult to attract medical professionals to seminars, this is a crucial group for educational efforts in reducing unnecessary protective proceedings.

**Summary and Conclusion**

Education is central to elder law, and this is especially true for estate planning. Clients need to be educated. Education is needed to correct the false messages from marketers and false information from family and friends. Education is needed to make clients aware of their options. Education is needed to teach them how to use the documents they obtain.

Agents need to be educated. Estate planning documents are not self-executing. No matter how good the documents are, they are only as successful as their users will allow them to be. Agents need to know what they can do, what they cannot do, and what their options are.

Other professionals need to be educated as well. This aids both in correcting problems and in preventing their initial occurrence. Among those who need to learn are adult protective service workers, law enforcement, prosecutors, judges, and medical and financial professionals. Education must be the responsibility of individual attorneys helping their clients; however, others, including bar associations and sections, elder law organizations, and other interest groups, should provide primary support.

**Endnotes**

1. EPIC is codified beginning at MICH. COMP. LAWS § 700.1101.
3. Article VII, Part 5 Claims Against a Decedent’s Revocable Trust, codified beginning at MICH. COMP. LAWS § 700.7501.
4. MICH. COMP. LAWS § 7506(a) and (b).
5. MICH. COMP. LAWS § 7506(c).
6. Article VI, codified beginning at MICH. COMP. LAWS § 700.6101.
7. **Mich. Comp. Laws§ 700.5506 et seq.**

8. The statute for family consent is part of the Social Welfare Code§ 400.66h. While this article was being proofed, Michigan enacted a new statute that arguably grants family consent over a patient with a terminal illness. MCL§ 333.5655, effective October 1, 2002.

9. See **Mich. Comp. Laws§ 700.5501 et seq.**

10. For example, there are several statutes that place additional requirements on professional guardians, such as changes to **Mich. Comp. Laws§ 700.5106.**

11. **Mich. Comp. Laws§ 600.916** makes it unlawful to engage in the unauthorized practice of law, but does not define what is meant by that term.


13. **Mich. Comp. Laws§ 750.174a.**


15. For example, several individuals have been denied Medicaid benefits to pay their nursing home bills because they applied when their home was owned by their revocable trust. Had they owned it directly, they would have qualified.

16. **Mich. Comp. Laws§ 8.120.**

17. There is actually a considerable literature on how language proficiency changes during the life span. A review of this literature and its applicability to elder law is beyond the scope of this article.

18. Again, a remark about this literature. While there is considerable discussion about roles in doctor-patient interactions, there is much less discussion of these matters with regard to legal discourse. That discussion, also, is beyond the scope of this paper.

19. This is a major problem in training teaching assistants, especially those who are not native speakers of English. I developed and conducted the first trainings in this field for the University of Michigan during the 1980s.

20. Our support has been low tech so far. We provide relatively inexpensive amplifiers for hearing and magnifying glasses that can be placed flat on the page and moved from spot to spot.


22. Presumably some interpret *durable* to mean past death.

23. See **Mich. Comp. Laws§ 700.5506(2).**


27. A seminar held in July 2000 about representing vulnerable clients.


31. **Mich. Comp. Laws§ 700.5303(2).**