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## Book Review - LONG-TERM CARE ADVOCACY, by Eric M. Carlson, Matthew Bender & Co., New York and San Francisco, 1999

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**LONG-TERM CARE ADVOCACY, by Eric M. Carlson.<sup>†</sup> Matthew Bender & Co., New York and San Francisco, 1999**

Reviewed by Jan Ellen Rein<sup>\*</sup>

Recent socioeconomic changes—the aging of America, the technological revolution, the commodification of health care, spiraling health care costs and the atomization of the family unit (to name but a few)—have profoundly affected the way older Americans (and their families) experience disability, chronic illness and gradual death. With increasing numbers of Americans ending their lives in hospitals, nursing homes and other institutional settings,<sup>1</sup> prospects of realizing the dream of dying peacefully at home attended by loving friends and relatives are dwindling.

Institutional long-term care<sup>2</sup> for the elderly takes place in nursing homes, residential care facilities, continuing care retirement and other assisted living facilities. Federal, state and local laws, regulations, program instructions and manuals cover staffing requirements, formation of care plans, admission contracts, discrimination in admissions, involuntary transfers, appeal procedures, level and quality of care, contractual relations between provider and resident, Medicare and Medicaid eligibility and coverage, state recovery and a whole lot more. The number and complexity of these laws, regulations and instructions—not to mention judicial and agency interpretations of them—is simply staggering.<sup>3</sup> Judges have described

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1. The epidemiology of dying in America has changed significantly since the turn of the century, when most people died at home. Though the actual rates are unclear, most people now die in hospitals. It is thought that about eighty-three percent of patients die in nursing homes or hospitals . . . . The remaining seventeen percent die at home.

Ernie W.D. Young, *Ethical Issues at the End of Life*, 9 STAN. L. & POL'Y REV. 267, 267 (1998) (citing Council on Scientific Affairs, *Good Care of the Dying Patient*, 275 JAMA 474, 475 (1996) and INSTITUTE OF MEDICINE, *APPROACHING DEATH: IMPROVING CARE AT THE END OF LIFE* 39 (Marilyn J. Field & Christine K. Cassel eds., 1997).

2. Eric Carlson defines long-term care as “medical and non-medical care provided to individuals who cannot live independently.” ERIC M. CARLSON, *LONG-TERM CARE ADVOCACY*, §1.01 (1999) [hereinafter LTC ADVOCACY].

3. Referring to the federal Medicaid statutes, 42 U.S.C.A. §1396, one expert commented, These enactments are so complicated that only with specialized legal advice can citizens receive the benefits accorded to them by Congress without running afoul of its rules . . . . [T]hese measures often appear to be last-minute compromises in long omnibus budget bills. The result has frequently been poorly drafted, ambiguous provisions that fail to meet Congress' goals.

Harry S. Margolis, *A Proposal for Reform of Medicaid Rules Governing Coverage of Nursing Home Care*, 9

the federal Medicaid statute, for example, as a “serbonian bog”<sup>4</sup> and “an aggravated assault on the English language, resistant to attempts to understand it.”<sup>5</sup> Ordinary citizens making “life altering”<sup>6</sup> long-term care choices for themselves or their loved ones simply cannot navigate this vast and treacherous terrain without expert legal guidance. But even the lawyers they turn to are justifiably mystified and overwhelmed by this crushing body of new and unmaturing law. Even Peter Strauss, a veteran elder law practitioner, referring to one Medicaid provision, lamented: “[n]o matter how many times I read this section I cannot be certain of its meaning.”<sup>7</sup>

It is against the backdrop just described that one must measure the value of Eric Carlson’s single volume treatise on long-term care advocacy (hereinafter “LTC Advocacy”). LTC Advocacy is the first and only legal treatise entirely devoted to long-term care issues. The nine chapters following the treatise’s introductory chapter address nursing home services and the impact of nursing home reform laws (chapter 2), nursing home admissions and admission agreements (chapter 3), transfers, discharges and readmissions (chapter 4), residential care facilities (chapter 5), continuing care retirement communities (chapter 6), Medicaid long-term care eligibility, resource rules and penalties (chapter 7), Medicare, Medicare HMO and private payment issues (chapter 8), private long-term care insurance (chapter 9) and litigating tort, contract and other claims against long-term care facilities (chapter 10).

LTC Advocacy is designed to provide practical guidance to attorneys advising, assisting and advocating for older individuals and their families who must rely on care in nursing, residential and continuing care facilities. In keeping with the treatise’s practice oriented design, each chapter offers five parts as follows:

Legal background, providing practical analysis of each topic area; Relevant State Statutes, highlighting variations between federal law and the laws of each state and the District of Columbia; Checklists; Forms; and Appendices (listing state ombudsman programs, model laws and regulations governing

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STAN. L. & POL’Y REV. 303, 303 (1998). For an extensive critique of Medicaid long-term care policy, see Jan Ellen Rein, *Misinformation and Self-Deception in Recent Long-Term Care Policy Trends*, 12 J.L. & POL. 197 (1996).

4. Joel C. Dobris, *Medicaid Asset Planning by the Elderly: A Policy View of Expectations, Entitlement and Inheritance*, 24 REAL PROP. PROB. & TR. J. 1, 12 (1989) (quoting *Feld v. Berger*, 424 F. Supp. 1356, 1356 (S.D.N.Y. 1976)).

5. *Id.* (quoting *Friedman v. Berger*, 409 F. Supp. 1225, 1226 (S.D.N.Y. 1976)).

6. LTC ADVOCACY, *supra* note 2, at xxiii.

7. Peter J. Strauss, *Medicaid Revisions in 1993 Budget Act*, N.Y. L.J., Sept. 30, 1993, at 3, 31 (referring to 42 U.S.C.A. § 1396 p(d)(3)(B)).

long-term care insurance, and other pertinent statutory and regulatory provisions).<sup>8</sup>

One cannot overstress the importance of having all of the laws, regulations and judicial interpretations governing long-term care issues gathered in one place nor can one fail to appreciate the monumental amount of research Carlson undertook to produce this volume.

The legal analysis provided is thoroughly documented by citations to case law, statutory law, relevant treatises and expert commentary. Explications of even the most technical statutes and rules are made understandable through plain language and the effective use of concrete examples and illustrations. In Chapter 7, for example, Carlson illustrates income calculations under Medicaid's Minimum Monthly Needs Allowance formula.<sup>9</sup> Later in the chapter, Carlson illustrates the Medicaid planning strategy of keeping enough assets to "ride out" a period of Medicaid ineligibility (triggered by an asset transfer) prior to applying for Medicaid assistance.<sup>10</sup> Planning and litigation strategies are provided throughout the "Legal Background" portion of each chapter. Practitioners are further assisted by the many highlighted practice notes that punctuate the text. These practice notes give lawyers who are new to the field immediate access to practical wisdom that would ordinarily take many years to develop. In Chapter 6 on Continuing Care Communities, for example, Carlson suggests that if a CCRC provider "fails to provide mandated disclosure, a resident's attorney should argue that the provider has waived the right to demand or enforce terms in a subject matter in which disclosure was deficient."<sup>11</sup> A particularly helpful practice note in Chapter 7 on Medicaid advises:

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8. Matthew Bender & Co.'s prefatory description of LONG-TERM CARE ADVOCACY, Pub. 1054 (Sept. 1999).

9. LTC ADVOCACY, *supra* note 2, § 7.11[5].

10. The illustration reads:

[A]ssume that an individual gives away \$35,000 in January 2000, in a state that has calculated an average private-pay rate of \$3,500 monthly. If the individual applies for Medicaid reimbursement for nursing facility care in January 2001, she will be eligible: the penalty period of 10 months (\$35,000/\$3,500) would have begun in January or February 2000 (depending on the state's policy) and expired effective November 1, 2000, or December 1, 2000, respectively.

*Id.* § 7.12[2]. While observers may differ on the social fairness of Medicaid planning (or, tax planning for that matter), few would deny that lawyers are duty bound to inform their clients of all strategies legally available to them. Of course, lawyers can and should also advise their clients of the risks as well as the benefits of such planning strategies. See Rein, *supra* note 3, at 304-05. The article as a whole argues, *inter alia*, that until this nation provides some viable protection to those middle class families who are too rich to qualify for public benefits but too poor to pay privately for long-term care, Medicaid planning will remain a moral and practical necessity for some families.

11. *Id.* § 6.08[1].

For the purposes of Medicaid eligibility, there never is a reason to give away assets directly from a revocable trust. The look-back period can be reduced from 60 months to 36 months by transferring the assets from the trust to the individual, who then can give those assets away.<sup>12</sup>

The analysis does not, however, confine itself to laws and legal rules and strategies. It also presents the human considerations that are so important in this kind of planning. Chapter 6 on Continuing Care Retirement Communities, for example, devotes a section to the quality of life advantages and disadvantages of life in such a community, pointing out that limitations on “a resident’s ability to pick up and move elsewhere” may be a ‘deal breaker’ for some individuals.<sup>13</sup> Another section discusses the financial risks residents assume in entering CCRC contracts and suggests steps clients can take to reduce those risks.<sup>14</sup> Chapter 9 on Long-Term Care Insurance gives similar attention to human concerns by discussing how to determine whether or not long-term care insurance is needed or desirable. Section 3 of Chapter 9, for example, gives statistics and other data individuals can use to determine their likelihood of requiring care in a nursing facility.<sup>15</sup>

The Carlson treatise has other features that make it particularly user friendly. Each chapter begins with a list of common client questions. Reference is made after each question to the section of the text that addresses that question. The beginning of Chapter 6, for example, includes the question whether CCRC “entrance payments [are] protected from the risk that a provider might become insolvent or abscond with the residents’ money?”<sup>16</sup> Immediately following this question is a reference to Section 6.08[2][a] which discusses the problem, relevant state statutes and risk reduction strategies. This enables even the greenest practitioner to anticipate and prepare for the questions the client will raise at the initial interview. At the other end of the spectrum, each chapter contains a checklist attorneys can use to make sure they have ‘covered all the bases.’ The checklist for Chapter 6 on Continuing Care Retirement Communities has a category on CCRC solvency. The solvency checklist asks, *inter alia*, “[w]hat financial reserves are held by the provider? What financial reserves are required by the state?” and “[d]oes the provider have a Standard and Poor’s credit rating?”<sup>17</sup> The latter question refers the reader to relevant text and a list of rating services (which appears in the Appendices). This list of rating services makes it easier for practitioners and consumers to evaluate the increasing variety of products, living arrangements and services being marketed in the long-term care and long-term care insurance arena.

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12. *Id.* § 7.12[6].

13. *Id.* § 6.04.

14. *Id.* § 6.08.

15. *Id.* § 9.04[3].

16. *Id.* at ch. 6.

17. *Id.* § 6.201[1][b].

From client questions and legal analysis to state statutes, checklists and forms, Carlson's treatise guides the practitioner every step of the way.

Although the preface to this treatise states that it is "a useful resource" for legal practitioners and professionals from other fields who work at long-term care facilities, hospitals, governmental and private social welfare agencies, the treatise also provides a valuable reference for professors and scholars in the fields of law, gerontology, bioethics and the many other disciplines that intersect with long-term care issues. After all, professors and scholars usually begin their discussions with some background on the basic law. Insights from practitioners also enhance teaching and scholarship. Instead of having to sift through the voluminous and diverse literature just to get the basic law and practical insights on long-term issues, for example, professors teaching Elder Law and Health Law, legal scholars and academics from other disciplines can now turn with confidence to Carlson's treatise. However, just as the knowledge and practical insights of practitioners inform teaching and scholarship, the theoretical and policy insights of professors and scholars can benefit practicing attorneys and other practicing professionals. This leads to the observation that the law review and other legal articles cited in the treatise are almost exclusively of the practical or technical genre. But citations to the theoretical and policy oriented literature would also be of assistance to the many practicing attorneys who work to improve long-term care policy through political action, testimony before legislative bodies and policy argumentation in courts throughout the land.<sup>18</sup> Citations to the scholarly literature would also benefit us professor and scholar types. Carlson himself is a perceptive and articulate commentator on long-term care policy issues. His policy insights—borne of years of intense experience with long-term care issues—would be a welcome addition to the treatise's legal analysis.

The latter comments are not intended in any way as criticism of the treatise which is, after all, intended and represented as a practice oriented manual. The comments are more by way of precatory suggestions for Carlson to consider (and, perhaps reject) for future revisions or editions of LTC Advocacy. With or without the academic ingredient, LTC Advocacy is an invaluable resource, a major contribution to the field and a tremendous personal achievement by Carlson.

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18. The National Academy of Elder Law Attorneys, which has thousands of members, has, through its publications, legislative work and legal advocacy, become a major player in the long-term care policy arena.

