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## ELDER LAW MINUTE

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I have only been involved in one legal malpractice action (as an expert witness) over the years, but have seen many cases of clients receiving poor advice.

The one time I was called to testify involved a trust designed to protect assets against the cost of long-term care. The trust was not properly drafted and instead of allowing the beneficiary to qualify for Medicaid, made it nearly impossible for that to happen. The family was not aware of this problem until they applied for benefits *pro se* and were rejected by the Department of Family and Children's Services.

I have run into several trusts and estates lawyers who feel competent to draft Medicaid trusts even though they do not represent clients in the application process. Since 1993, it is very difficult to draft a trust for a potential Medicaid applicant which will effectively protect assets. The primary exception is a Special Needs Trust for a disabled person under 65. But even in this safe harbor area, there are many technical requirements.

Another potential trap the general practitioner can fall into is preparing an *I Love You* will for the spouse of a chronically ill patient. Making this mistake forgoes the opportunity to pass assets to the next generation with no transfer penalty on the death of the first spouse to die.

Failing to recommend a power of attorney to a client with a progressive disease affecting cognition also may be considered malpractice. In addition to the cost of an unnecessary conservatorship, damages may also include assets which the probate judge will not allow to be protected.

What about advising a client that it will take five years for him to protect assets when it could have been completed in two years by living with one of the children?

I would be happy to consult with any of you about these issues if you have concerns. Thanks to Judge Johnny Warren for suggesting this topic.