Message from the Chair

By Stephen R. Elville, Chair

Winter greetings to all Members of the Elder Law and Disability Rights Section (ELDRS)! It’s the beginning of another exciting year, and as always, there is so much to do! Whether you are a solo practitioner, work in a small, medium, or large firm, are part of the pro bono or not for profit communities, have a corporate affiliation, or otherwise, the ELDRS needs your support – your time, talents, suggestions, and participation – and yes, even your financial support at our future fundraising events. And to be candid, the MSBA needs your support (and our Section’s support) too as it modernizes and adapts to the needs and requirements of its Members in a changed world. I’ll say more about this at another time, but for now here’s what’s on my mind.

I’m a big believer in personal and organizational mission and vision; or, in the case of our Section, purpose. So as we start this new year, I encourage all members of the ELDRS to begin by reading our Section’s Purposes as articulated in the Bylaws. You can view those on our new MSBA web page - I’ll include them here for your convenience:

“SECTION 2. The purposes of the Section are:
A. To bring together members of the Maryland State Bar Association interested in elder law and disability rights;
B. To promote the continuing legal education of the bar in elder law and disability rights;
C. To sponsor publications for the benefit of the bar and the public; and
D. To promote the delivery of free or reduced fee legal services to low income older adults and persons with disabilities.”

Next, I strongly encourage all Members to read and study the National Academy of Elder Law Attorney’s (NAELA) Aspirational Standards (The Aspirational Standards For The Practice of Elder Law and Special Needs Law Attorneys). I recently reviewed these in depth and was struck all over again by their importance to all of us as elder law attorneys, and by how they inspire a sense of foundation and purpose about what we do and what we stand for. Not a member of NAELA? Do not worry – the same recommendation applies. So as someone who believes in all things modern and progressive, but who also is a proponent of understanding and working from fundamentals, let us take a few minutes to explore an extremely brief description of the NAELA Aspirational Standards and learn why each one of us can benefit from them.

What are the NAELA Aspirational Standards and what is their

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purpose? Yes, the Aspirational Standards have a purpose too. In short, the Aspirational Standards provide important guidance to elder law attorneys in their daily practices and promote the holistic and ethical practice of elder law with a special emphasis on improving the lives of the clients we have the privilege to serve. A general description of the Aspirational Standards can be found online—you do not have to be a member of NAELA to review these. The Aspirational Standards were recently updated in 2017, and a complete description can also be found online. Lastly, the full Aspirational Standards are also available with Commentary, which can also be found online. To fully immerse yourself in these Aspirational Standards, I recommend reading the Preamble, then the extensive study of the Aspirational Standards themselves, and then several readings of the Aspirational Standards along with the full Commentary. Your accomplishment of this alone will make you a much better elder law attorney and will ground or re-ground you in the ethical and best practices of our profession as we represent and assist clients in elder and special needs law.

Having carried the ball down the field this far, let’s now push to the end zone. After gaining an understanding of the ELDRS’s Purpose, and after fully reviewing and studying the Aspirational Standards, all elder law attorneys should also review the Maryland Lawyer’s Rules of Professional Conduct (and have a copy on or near your desk), with special emphasis on Rules 1.6 (Confidentiality of Information) and Rule 1.14 (Client with Diminished Capacity), along with Comments.

You are now on your way to enhancing your elder law practice, and the ELDRS is here to support you. If you would like to discuss the materials mentioned in this article, or if you have questions about your ELDRS and the many educational and volunteer opportunities available, or if you have suggestions or other input of whatever nature, please contact me at steve@elvilleassociates.com, or call 443-393-7696. Remember that your ELDRS needs you and your active participation, and in exchange offers many resources to you to assist you in your elder law practice, the most significant of which is its Members. If you are not currently a member of the ELDRS, please consider joining today! I look forward to possibly meeting you or speaking with you this year as we work accomplish our Section’s Purposes.

Wishing you a great start to this 2019 year.

Steve Elville
MSBA Elder Law and Disability Rights Section Chair, 2018-2019

The Continuing Care Retirement Community – Too Good To Be True?

By Mary Jo Broussard Speier, Esq.

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Elder law clients often seek counsel about whether moving into a Continuing Care Retirement Community (CCRC) is the right next step for them. The Washington Metropolitan area is home to many beautiful and well run CCRCs. However, CCRCs are expensive. Before making a large and unsecured investment in a CCRC, a thorough review of the residency agreement is essential. This article explains what a CCRC is, how it operates, and why due diligence is so important before making a commitment to live there. CCRCs are often the best living choice for seniors, but only if they understand the contract they are entering into and are informed of the potential risks involved.

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What is a Continuing Care Retirement Community (CCRC)? A CCRC is a type of retirement community where different degrees of senior care from independent living, assisted living and skilled nursing care are all provided in a single community setting. CCRCs offer independent living units such as apartments, townhouses, or small single-family homes for incoming residents who are relatively healthy and self-sufficient. They may also provide certain convenience services including meals, housekeeping, and laundry, and certain amenities such as fitness centers, restaurants, libraries, and health clinics. Residents may move to the CCRC’s assisted living or skilled nursing facilities, as medically appropriate, when they are in need of assistance with the activities of daily living such as dressing, bathing and eating. The various levels of shelter and care can be housed on different floors of a single high-rise building or in the physically adjacent buildings of a campus setting.

The CCRC provides lifelong housing, household assistance and nursing care in exchange for a sizeable entrance fee and ongoing monthly fees. Entrance fees vary from $200,000.00 to $1,000,000.00 and monthly fees vary from $2,000.00 to $6,000.00 depending on the size of the independent living unit and the number of occupants.

A CCRC allows senior residents to move among and through independent living, assisted living and skilled nursing care in one community.

The Benefits of a CCRC: The most attractive feature of a CCRC is that it allows senior residents to move among and through independent living, assisted living and skilled nursing care in one community. A CCRC offers an independent life style for as long as possible, but also provides the reassurance that, as residents age or become sick or frail, they will most likely receive the care they need within the community. Seniors begin residency in independent living apartments, where they have the independence to live much as they did in their own home. A range of activities and amenities are provided for recreation and well-being. The community setting reduces isolation and provides companionship among its residents. It allows spouses and partners to be together in the same community when one’s health declines and needs a higher level of care.

Types of Agreement: CCRCs across the country follow several different models of operation. The CCRC contract is a legal agreement between the resident and a CCRC. This agreement generally secures living accommodations and some services over the long term. The most common types of CCRC agreements all require entrance fees (in varying amounts) and are as follows:

- **Type A (Extensive) Agreement:** Includes housing, residential services, amenities and unlimited, specific health-related services with little or no substantial increase in monthly payments, except to cover normal operating costs and inflation adjustments.
- **Type B (Modified) Agreement:** Includes housing, residential services, and amenities and a specific amount of healthcare with no substantial increase in monthly payments, except to cover normal operating costs and inflation adjustments. After the specified amount of healthcare is used, persons served pay either a discounted rate or the full per-diem rates for required healthcare services.
- **Type C (Fee-for-Service) Agreement:** Includes housing, residential services, and amenities for the fees stated in the resident agreement. Access to healthcare services require full fee-for-service rates. Type C is the most common type of agreement found in the Washington Metro Area and, thus, is the focus of this article.

Government Regulations. CCRCs are regulated; to the extent such regulations exist, by the Maryland Department of Aging pursuant to Title 10, Subtitle 4 of the Human Services Article, Annotated Code of Maryland and the Code of Maryland Regulations (COMAR) 32.02.01. Practically speaking, very little regulation exists for CCRCs. However, the Department does review annually the audited financial statement, disclosure statement and marketing of each CCRC. Each potential resident is entitled to a copy of this filing.

Entrance Fee Refund – Read the fine print. Potential residents are often told that their entrance fee is refundable when they terminate the residence agreement by moving out of the community or upon death. The refund may be at 100%, a lesser percentage, or at a gradually decreasing amount related to length of stay in the community. Some CCRCs allow potential residents to choose a plan by which the entrance fee refund completely dissipates over time. The structure and amount of the refund correlates to the amount of the entrance fee. For example, a 90% refund will demand a higher entrance fee, while a refund that decreases or phases

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out over time, will allow for a lower entrance fee.

The resident never receives interest related the entrance fee and the eventual refund may be decreased by any amounts the resident accessed from the entrance fee when transferred to an assisted living or nursing care unit. When a resident is transferred to such units in the community, the agreement may permit that resident to reach in or access his entrance fee to pay a portion of those costs if he lacks the resources to otherwise pay either privately or via long term care insurance. In addition, the entrance fee refund will be decreased by any unpaid monthly or ancillary fees due the CCRC for the care or otherwise upon termination of the agreement.

Upon termination, the refund is typically not paid until the resident’s independent living apartment has been occupied or reserved by another who has paid an entrance fee. For example, if it takes the CCRC a year or two to market and reoccupy the apartment, the CCRC is under no obligation to refund to entrance fee during that time. A reduction in occupancy levels can mean a former resident or his heirs will have to wait longer than expected for the refund.

Residents are unsecured creditors. Residents’ rights are primarily for services, with a contractual right to occupy. Residents have no right, title or interest in any part of the personal or real property owned or administered by the CCRC. Should the CCRC face financial distress or bankruptcy, entrance fees are not protected. Any claims residents have are subordinate to the claims of secured creditors such as tax exempt bond holders and mortgage lenders. Residents’ claims will be grouped with all other unsecured creditors, which generally includes everyone who does business with the CCRC for recouping any financial losses.

Assess the financial risk. Moving into a CCRC involves great financial and emotional investment. Many seniors sell their homes, often their primary asset, to pay the required entrance and ongoing monthly fees of a CCRC. As a result, their ability to support themselves in the long run is inextricably tied to the long term viability of the CCRC at large.

There are risk factors that, if present, may have adverse consequences such as declining occupancy or unexpected cost increases. It is important that the CCRC have high occupancy levels in order to generate the income to cover operational costs and to pay down loans and other financing. Moreover, there is no mandate that the entrance or monthly fees collected by a CCRC's stay in that particular community.

Often, the residency agreements permit the CCRC to use the resident’s entrance fee or monthly fees to subsidize other affiliated communities or build new CCRCs in Maryland and beyond with no requirement that residents be notified of such fee diversion.

The cost of living at the CCRC increases exponentially for a couple when one needs increased level of care in the assisted living or skilled nursing facility. The couple is not only responsible for the monthly fee associated with the independent living unit, but also the per diem rate for the assisted living unit or skilled nursing bed. The per diem rates tend to be costly and the resident’s financial wherewithal to pay into the future must be evaluated.

Reduce the Risk of Buyer's Remorse. From all appearances the communities are lovely and the benefits bring great peace of mind. But do not stop due diligence with the independent living units and the amenities. Ask to see the actual assisted living and nursing care units. Take a tour of the health care facilities to get a feel for the quality of care. Ask for references from families whose loved ones were residents of the nursing and assisted living facilities. Ask to review the survey ratings from the Maryland Department of Aging or organizations rating the quality of care in the assisted living and/or nursing care units of the CCRC.

Residents should read the CCRC rules and regulations to make sure they can abide by them. Failure to abide by the written rules and regulations can be grounds to involuntary discharge a resident from the community.

Once settled in, residents may find that the community is not what they thought it would be and their options to move out are limited due to the financial expenditure (entrance fee) made to enter the CCRC. Generally, they are not entitled to refund of their entrance fee until their unit is occupied by a new resident who paid an entrance fee. This may mean that the resident lacks the funds necessary to move somewhere else while he waits for his refund.

I suspect that most elder law attorneys have clients that are very happy living independently in CCRCs. However, it is not unheard of for a resident or the resident’s family to be surprised and dismayed by the increased financial costs and risks when independent living is no longer an option. Our senior clients make the best quality-of-life and financial decisions specific to their future when they are first educated about the pros and cons of CCRC living.
United States citizens often feel there is no alternative to the United States healthcare system. For most people, relocation for the purpose of acquiring medical care is unrealistic and undesirable. As practitioners in an increasingly globalized world, it is important we understand the various options available to our clients, including those outside of the United States.

In October of this year, my wife and I spent time visiting Bulgaria - a fascinating and beautiful country that we knew almost nothing about prior to our trip.

For context and as a two-second overview of Bulgaria’s recent history: Bulgaria, the birthplace of the Slavic language, was behind the Iron Curtain until the fall of communism in 1989. The Bulgarians have a bittersweet relationship with their communist history as it helped free them from Ottoman rule, but created an oppressive system.

During communist times, Bulgarians would travel hours to the capital, Sofia, to experience the only western-style department store in the country. Adults would ogle unaffordable goods and children would spend hours riding the only escalators in the country - a novelty to the Bulgarians at a time when Americans gave little thought to escalators. Since the fall of communism, Bulgarians have continued

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to embrace western culture. In 2007, Bulgaria joined the European Union.

Compared to the United States, my wife and I noticed quite a few more elderly and disabled people begging for “stotinki” (Bulgaria coins) than we would typically find in the United States. I asked several locals we interacted with about the Bulgarian healthcare system and how the Bulgarians care for the elderly and disabled (yes, I was the life of the party...). Despite limited firsthand familiarity with other healthcare systems, the general consensus was that the healthcare system in Bulgaria is lacking and care is expensive and often unattainable.

As with many European countries, the first stop for Bulgarians with less serious medical concerns is the local pharmacy. We were told most people avoid going to a doctor unless it is absolutely necessary. (A quick digression: I developed a cold while in Sofia and the local pharmacist, who was genuinely helpful, appeared to be 18 years old and wore a white lab coat over her Vans skateboard company sweatshirt - a peculiar and borderline unnerving combination.)

Throughout the cities, we saw many dentist offices and places that specialized in medical treatments for beauty (such as Botox), but we did not see offices for medical specialists.

My impression, which may be wrong, is that medical treatment, including specialized medicine, is obtained in hospitals rather than through office visits. A local guide lead us to believe that students capable of obtaining medical degrees, especially specialized medical degrees, leave Bulgaria with the hopes of obtaining greater prosperity elsewhere. (For comparison, we found online that the average salary for attorneys in Sofia is approximately $34,000 USD per year.)

We were told that Bulgaria has facilities similar to our nursing homes, but the cost of care is out of reach for most. Most people in need of care either rely on family or are left to fend for themselves, a gut-wrenching sight at times.

In one of the smaller cities, we happened upon a housing facility for elderly individuals. We are not sure if the facility we saw was for elderly people requiring care or solely for impoverished elderly people. Either way, the large mixed gender dormitory with bunk style beds closely resembled a low-end homeless shelter.

Among other difficulties, Bulgaria wrestles with a large population of agrarian “roma” people (a/k/a gypsies) and engrained work ethics from communist times. The exchange rate enables the United States dollar to go far compared to other countries. As an example, at a well-regarded restaurant in a smaller but touristy town, a multi-course dinner with drinks for two cost us approximately $11.00 USD.

As with the United States, the need for care does not discriminate based on economic means. Although neither my wife nor I are in a position to evaluate the quality of the medical care, we imagine an American seeking long term care in Bulgaria would receive the best care Bulgaria has to offer for a fraction of the cost.

Unlike Western European cities such as Paris, we received genuinely warm welcomes and an excited curiosity because we are American. Normally when speaking English with the Bulgarians, there was an unimpressed assumption that we were from England. Once we clarified that we were from “America” (they were unfamiliar with the “United States”) the people became excitable and animated over the novelty of interacting with someone from the United States. The Bulgarians graciously embraced our curiosity and were proud to show us their way of life.

My wife and I traveled independently and found the language barrier to be virtually non-existent. The Bulgarians switch from Bulgarian communication customs to international customs for tourists making communication effortless. To clarify - the Bulgarians shake their heads left and right for “yes” and nod up and down for “no,” but they switch for non-Bulgarians.

Though relocation to Bulgaria is impractical (and undesirable) for most, for clients with limited means and minimal care requirements, Bulgaria may be an option worth considering.

For anyone interested in traveling who may have questions, please do not hesitate to reach out to me at mlimsky@irwinlimsky.com.
There are essentially three options when an elderly or disabled person cannot live in her home without assistance: 1) Medical Care and Personal Assistance in the Home (“Home Care”) 2) Nursing Home Care 3) an Assisted Living Facility (ALF). Generally, Home Care and Nursing Home Care are the most expensive options, averaging $10,000-$12,000 per month in the Baltimore Metropolitan area (depending on level of care needed) in my experience. Assisted Living Facilities, on the other hand, average from $2500-$6500 per month depending on the level of care needed, geographical location and amenities at the facility. ALFs are generally cheaper than Home Care and Nursing Home Care, so should you advise your clients to live in an ALF when living at home alone is no longer possible?

What is an Assisted Living Facility (ALF)?

According to AARP.com:

[ALFs] are aimed at helping residents remain as self-sufficient as possible with the assurance of assistance when needed. A combination of housing, meals, personal care and support, social activities, 24-hour supervision and, in some residences, health-related services is usually provided. Assisted living facilities are a great choice for those who can’t live on their own, but do not need nursing care. As needs change, these facilities offer different levels of care at different costs – and some are even associated with nursing facilities should your loved one eventually need full-time nursing care.

In Maryland, there are a wide variety of ALFs, but most have employees on-site to help a resident with activities of daily living (ADLs). In “Memory Care” facilities, there is generally a locked unit to prevent residents from wandering off or purposefully absconding. Most residents in need of memory care suffer from dementia of one kind or another. The best “Memory Care” facilities have an open floor plan with many staff members on hand to give attention to and care for the residents. The unit takes up an entire floor and the elevators do not open without a staff code or keycard.

What are the Advantages of an ALF?

Less Expensive: As stated above, an ALF is generally cheaper than Home Care or Nursing Home Care. Nursing homes are more highly regulated and staffed with more expensive employees (generally speaking) than ALFs. Home Care Nurses and Nursing Assistants are typically more expensive than ALFs because they come to a client’s home and are usually dedicated to just the client. Warning: Some ALFs are incredibly expensive!

More Amenities: High-End ALFs sometimes have Happy Hours, games for residents, musical performances, and many more fun amenities. Some also provide transportation to medical appointments, adult daycare, and other necessary amenities. Nursing homes and client’s own homes obviously can’t compete with these kinds of perks. Warning: As you’ll read below, not all ALFs are created equal. Some have less or none of the amenities stated above.

Flexibility: As your client ages, she may need more assistance such as “Memory Care” – many ALFs provide three levels of care which are provided in the same location. A person will often not need to be uprooted as she declines, and almost all care can be provided in an apartment home setting. Warning: Again, some ALFs do not provide the flexibility stated above!

What are the potential Pitfalls of an ALF?

No Government Assistance: Very few of your clients, as it stands now in Maryland, will be able to get Medicaid (or any other government program) to cover the monthly cost of an ALF. This is similar to Home Care but completely different from Nursing Home Care. Currently there is a very long waiting list for Medicaid Waiver services, which could potentially cover people in their own home or going from their home to an ALF. The notable exception is a client that goes from a nursing home where she was “on Medicaid” to an ALF, but I find that situation is rare. There are other programs that may partially cover costs of an ALF (or Home Care), such as Veteran’s Administration Aid and Attendance.

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Generally, there is a large shortfall that must be paid from your client’s income and resources. Clients must often sell their homes to pay for an ALF in Maryland.

**Easy Access to the Market:** Although clients place great trust in ALFs, they are much more lightly regulated than Nursing Homes. Home Care is also lightly regulated, but clients/clients’ families have very much more control over their own home than the building where an ALF is located. Take a look at what COMAR 10.07.14.07A(5) provides as licensing requirements:

(5) At a minimum, the applicant shall provide:

a. Verification that the applicant or corporate representative is 21 years old or older;

b. Documentation of any prior denial, suspension, or revocation of a license or certification to provide care to third parties;

c. Identification of any individual or corporate owner of 25 percent or more interest in the assisted living program;

d. Documentation of any conviction and current criminal background check or criminal history records check of the owner, applicant, assisted living manager, alternate assisted living manager, other staff, and any household member;

e. Ownership information as specified on an addendum to the application;

f. Verification that the facility is owned, leased, or otherwise under the control of the applicant;

g. The level of care to be provided by the assisted living program, its location, and the name of the proposed assisted living manager;

h. Documentation of zoning approval, if zoning approval is required by the local jurisdiction in which the assisted living program will be located; and

i. Where applicable, approvals from the local health department, local or State fire authority, and local area agency on aging.

Notice that a facility may be leased (subsection f) and consider that a 1-4 bed ALF is only subject to a $50 per year licensing fee:

(3) Fees. The annual license fee schedule for assisted living programs is as follows:

a. (a) 1—4 beds — $50 annually;

b. (b) 5—15 beds — $75 annually;

c. (c) 16—49 beds: — $125 annually;

d. (d) 50—99 beds: — $165 annually;

e. (e) 100—149 beds: — $250 annually; and

f. (f) 150 plus beds: — $375 annually.

Id. at (3). Add these two regulations together: ALF owners are leasing houses as small as 1-4 beds, getting licensed, and accepting new residents. In my experience the leases can be as short as 12 months and the landlord (who is not affiliated with the ALF) may not renew the lease. It is a horrifying situation for clients who thought they would be taken care of but find that they could be out on the street, or moved from home to home. Most ALFs are legitimate but clients should always inquire about the ownership of the property where the ALF is located.

**Read the fine print:** ALFs hold tremendous power over clients’ lives but sometimes abuse that power. ALF owners try to mitigate their own liability in the resident agreement that is signed before placement. One common example is an arbitration clause, which curtails a client’s right to file a lawsuit against an ALF no matter how negligently the client was treated, how bad her injuries were, or if she died as a result of those injuries. Read the resident agreement before your client or her Power of Attorney signs!

**Who can help?** Many of us have heard of A Place For Mom and such placement agencies. Placement agencies usually do not charge a fee to the client, which is a very attractive arrangement. An attorney would likely wonder how this is possible. The answer: the ALFs pay a finder’s fee to the agencies. The fee is usually paid from the “administrative fee,” a fee paid prior to the move-in that is in addition to the monthly charge. The administrative fee can be $4,000.00 or higher and very rarely is lower than $1,500.00. Of course, a potential conflict of interest is possible. Some agencies are only employed by a select few ALFs and will thus narrow a client’s choices. Be careful to choose an agency that is contracted by most ALFs in your client’s geographical area of choice.

ALFs are an incredible resource for some clients, and most families are relieved that their loved one is in good hands. However, diligence must be shown in the selection of the perfect ALF.

You can reach Emmett with questions or comments by emailing him at ebi@ebilaw.com or calling 443-447-7493.