

**Stopping Medi-Cal Eligibility Rip-Offs:
A New Tool For Protecting Elders**
Steven Riess, JD, LL.M*

Understanding Medi-Cal eligibility is daunting, regardless of one's sophistication, competence, or professional experience; for the elder who is physically or mentally infirm and who may be anxious about institutionalization or other end-of-life issues, it can be an impossibility. For years, predators have exploited this combination of ignorance and fear by selling elders so-called Medi-Cal eligibility planning services at exorbitant prices. These plans often "guarantee" eligibility, although in most instances such guarantees are merely empty promises. Plans are aggressively pitched to elders regardless of their circumstances: to elders who are in good health and who may never need services covered by Medi-Cal; to elders who are nearly impoverished and who would qualify for benefits merely by applying; to couples with assets well within the Community Spouse Resource Allowance; to elders who have sufficient assets to pay for anticipated needs; even to some people in their 50's and in good health. In other words, these plans are sold to any one who will buy them.

Prices charged for these plans vary considerably, from a low of about \$10,000 to a reported high of \$65,000; most are in the \$15,000 to \$25,000 range. The actual price seems to depend largely on what the elder is able or willing to pay. Thus, although the services offered are typically the same, the price charged may be \$15,000, \$17,500, \$19,995, \$21,995, or \$23,500. In many instances if the elder shows resistance, the sales representative will "call his supervisor and get permission to reduce the price for that day only." In one instance, the elder told the sales representative that her funds were invested

in a certificate of deposit subject to a penalty for early withdrawal. The sales representative received “permission” to reduce the price by the amount of the penalty if the elder would immediately agree to the plan. If the elder does not have sufficient funds, he is often encouraged to borrow the money from relatives.

The services provided to purchasers of such plans typically follow a pattern. After the check is cashed, the “account representative” visits the elder’s home with a portable photocopier and copies all of the elders financial and estate planning records. Thereafter, a crude accounting is created. Regardless of whether the elder has an existing estate plan, he is usually referred to an “associated” attorney for creation or revision of estate planning documents. The fee already paid does not cover such legal services, and the elder typically pays an additional fee of between \$1,500 and \$3,000. Although the elder may have a variety of health issues and concerns, placement at a skilled nursing facility is typically not imminent. Accordingly, if the elder would then qualify for Medi-Cal, nothing further is done. If the elder later needs Medi-Cal covered services, the service may or may not assist the elder in completing an application. If the elder has assets, the service typically advises him to begin gifting. At this point, many elders balk at the advice to impoverish themselves so that they might someday become eligible for benefits. In one instance, a couple in their mid-sixties, in good health, and with an estate in excess of \$3 million were advised to gift all of their assets to relatives. At this point, many elders realize that they have been cheated.

Few attorneys have been willing to represent elders exploited by such predators, primarily because the amounts involved are relatively small and proving fraud or similar causes of action can be difficult. During 2008, the Legislature addressed this problem in

Senate Bill 1136 (Elaine Alquist – Santa Clara County). This bill, which passed both the Senate and Assembly unanimously and was signed by the Governor on September 28, 2008, revises the Consumers Legal Remedies Act (Civil Code sections 1770 *et seq.*). The Consumers Legal Remedies Act (CLRA) protects consumers from 23 enumerated unfair or deceptive acts or practices. A plaintiff who proves conduct in violation of the CLRA may recover actual damages, an injunction against continuing violations, restitution of property, punitive damages, reasonable attorney’s fees, and costs. Senate Bill 1136 supplements this list of deceptive practices with a new prohibition: charging or receiving an unreasonable fee to prepare, aid, or advise any prospective applicant for public social service benefits. The statute defines an unreasonable fee as an amount that is “exorbitant and disproportionate to the services performed.” In determining the reasonableness of the fee, the court is to consider factors such as: the time and effort required; the novelty and difficulty of the services; the skill required to perform the services; the nature and length of the professional relationship; the experience, reputation, and ability of the person providing the services; and any other relevant circumstance. A plaintiff who proves a violation of this new prohibition is entitled to all of the CLRA’s existing remedies: damages, injunctive relief, restitution, punitive damages, attorney’s fees, and costs. However in addition, the court is required to award the plaintiff treble actual damages.

The practical effect of this new provision is clear: any person (be he an elder or a younger), who is exploited by a Medi-Cal eligibility planning service need only prove that the fee charged was unreasonable and disproportionate to the services provided. Proving that the fee is unreasonable results in a mandatory award of treble actual damages and attorney’s fees. This new remedy significantly alters the economics of these

predatory practices for both the elder and the predator; a \$25,000 service fee will result in an award of \$75,000 plus reasonable attorney's fees. For rip-offs which occur after January 1, 2009 when the new law goes into effect, the elder should have considerably more success in finding an attorney to take his case; for the predator, the cost of doing business suddenly went up.

*Steven Riess is a San Francisco attorney specializing in elder financial abuse. In 2007, he wrote Senate Bill 611 (authorizing attachment in elder financial abuse); in 2008, he wrote Senate Bill 1140 (expanding financial abuse laws) and Senate Bill 1136 (revising the Consumers' Legal Remedies Act to prohibit the sale of exorbitantly priced Medi-Cal eligibility planning to seniors).