

25 Strategies to Prevent Financial Ruin from Long Term Health Care Costs

*A Special Report for Seniors, the
Disabled, and Their Families*

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Today's astronomical medical and health care costs are often overwhelming for those with chronic illness or serious injury. Protecting your money, income and assets is a primary concern if you need long term care. Yet surprisingly, few people realize how quickly financial danger can sneak up and overtake them, wiping out a lifetime of savings and the lifestyle they're accustomed to.

If you need care either at home or in a nursing facility, you've probably already discovered just how expensive it can be. If you have to pay without the advantage of Medicaid benefits, home care can range up to \$10,000 a month. Nursing facility care can be \$15,000 or more monthly, at some of the better establishments.

Individuals and families rarely have the monetary resources to support these costs for very long, without finally being thrust into poverty. Medicaid makes eventual impoverishment a certainty, since it will not provide benefits until you've exhausted your own reserves.

There is an effective solution to these difficulties most are unaware of. It can allow you to legally keep all or a good portion of your income, investments and property working for you, while Medicaid pays your medical and health care bills. These methods are available through an attorney or law firm with an Elder Law practice.

A major focus of Elder Law is on planning and paying for long term care needed by senior citizens and disabled people, and obtaining Medicaid eligibility for them. A common misconception is that you have to be poor or completely deplete your income and assets to get Medicaid. This is based on a lack of understanding of what federal and New York State laws allow. Elder Law attorneys serve a wide spectrum of clients with varying financial profiles, including some who have substantial reserves.

With proper planning, you can achieve Medicaid eligibility *and* maintain your financial status and lifestyle. You don't have to be destitute or spend all your assets; you simply have to qualify by meeting certain financial criteria. That's accomplished with a variety of planning approaches, including transferring assets, setting up trusts, creating annuities and using various other legal tools. A lawyer who is proficient in applying these techniques can gain many excellent benefits for you and your loved ones, often far beyond what you might think is available.

Following is a series of time tested and proven strategies for obtaining this advantageous outcome, all clearly explained. They address care both at home and at nursing facilities, for seniors and the disabled. You'll find specific, practical techniques that directly apply to your situation. Keep in mind that successful planning requires a particular mindset about how to approach your finances and future. In addition to workable procedures, this discussion is designed to impart a way of thinking about how to preserve what you have. It's critical to comprehending the larger picture of effective planning.

Please understand that the ideas, concepts and strategies in this Special Report are not legal advice. Medicaid planning is complex. Each case has unique facts that can affect the outcome, and requires individual attention and analysis. So while these are general principles that may apply in many situations, realize that your individual circumstances need to be thoroughly evaluated by a knowledgeable lawyer before any action is taken.

While many of the ideas in this Special Report might be of general interest, the report is oriented to residents of New York State. If you live elsewhere, you'll need to consult an Elder Law attorney in your state to determine how its laws specifically apply to your circumstances.

With that understanding, here are 25 ways to make sure you get the most comprehensive financial protection available, full coverage of all your medical and health care costs, and a much more comfortable future.

1. You can qualify. Many people have the false impression that Elder Law planning is not worth finding out about, because they think they're not eligible for Medicaid. They feel they have too much money, income and other assets to qualify, or that some of the specialized trust strategies used for asset protection are for rich people only. This is simply untrue.

With effective planning, most can qualify for Medicaid benefits. Elder Law strategies allow you to protect your home if you own one, and the monetary resources you've built up over a lifetime. The alternative is to deplete your reserves paying for your own care, which Medicaid would otherwise cover.

Additionally, many people who could be eligible for Medicaid payment of home care or nursing facility programs think they will be blocked by the "look back" and "penalty" periods. This results from a faulty understanding of these terms, which are explained in detail in this report. In New York, the look back and penalty periods apply only to nursing home applications. And even with these limitations, in many instances, you can be approved by Medicaid for nursing facility care and have it fully paid.

It pays to sit down with an Elder Law attorney and review the details of your unique situation. You may find it to be one of the best things you've ever done for yourself and your family. You get to retain the benefit of your savings, income and assets, and maintain your quality of life. When you pass on, it's a great gift to family members to inherit what would otherwise be lost to the cost of your care, either by you paying for it yourself or having to reimburse Medicaid.

Be proactive in pursuing government benefits *you're entitled to*, and have contributed to with your tax dollars.

2. Be clear on the downside. Understandably, no one likes to think about the prospect of suffering from a medical condition that sets off a prolonged decline physically, emotionally and financially, or that might strike a loved one. So instead of taking steps to prepare for potential problems in the future, most people delay or take no action at all. The consequence of this “wait and see” approach is often tragic.

Be aware of what can happen without good planning. If long term care is needed and you have money, income, property or other economic resources, Medicaid will insist you use them up before it pays any benefits. This is sometimes referred to as the “spend down.” If you own your home, Medicaid may be entitled to place a lien against it equal to the value of the benefits it provided. The end result is already predetermined: you'll eventually be almost penniless, and in poverty.

Here's an example of what can be accomplished, in a case Lamson & Cutner handled for an elderly couple with a significant net worth. Their assets and financial reserves were worth hundreds of thousands of dollars, and the husband, who was approaching 90 years of age, needed nursing facility care. We arranged for the transfer of several properties to his wife, along with other liquid assets. We then filed a Medicaid application for nursing home services. The planning steps we'd first taken allowed our client to qualify, and he was approved.

The outcome is that his care is now fully paid for by Medicaid, his wife's financial needs are provided for, and the cash and holdings they'd invested a lifetime of effort in building are secure. In addition, we've done estate planning for his wife to further protect the assets, so that regardless of what the future may bring in terms of her own medical and health needs, she is in the strongest possible financial position. (In most cases, further planning should be done to protect the assets in the hands of the well spouse.)

This couple won't lose what they'd worked for through ruinous health care expenses. The well spouse also has the financial ability to make her husband's stay at the nursing home as pleasant as possible.

3. Plan while you're still in good condition. Even if your health is good right now, you'll do yourself and your loved ones a big financial favor by planning for home and nursing facility care. If it turns out you don't need the assistance, you'll still gain the benefit of reducing your medical and health expenses by having Medicaid cover whatever your insurance doesn't.

If you eventually do need help, planning for it now could save 100% of your money, income and assets, which Medicaid would otherwise require you to pay towards your own long term care.

A careful job of planning considers all contingent factors. It's best to anticipate the need for home and nursing facility care simultaneously, so that if you do need to enter a nursing home you're financially prepared. The reason is that unlike the requirements for home care,

Medicaid has “look back” and “penalty” periods that apply to nursing home applications. Here’s what the look back and penalty periods are, and how they work.

Currently, when you apply for nursing home benefits in New York, Medicaid will evaluate the previous three years of financial data listed on your application. This is called the “look back” period. If there has been any transfer of money or assets to others within the look back period, Medicaid will impose a “penalty period” during which no benefits will be received.

Medicaid calculates the length of the penalty period by taking the amount of the transfer, and dividing it by their regional rate for monthly benefits in a nursing home. This is an established figure that varies by county. It is supposed to roughly correspond to the cost of nursing home care in a particular area. For example, in New York City the number for 2009 is \$9,838. (This number usually increases by a small amount each year.)

So if you gave your child a gift of \$100,000 and went into a New York City nursing home during the look back period, Medicaid would divide that amount by \$9,838, and not provide any benefits for 10.2 months. The penalty period starts as soon as you enter the nursing home, and have completed all of Medicaid’s eligibility requirements. During the penalty period, the nursing home’s bills will have to be covered on a private pay basis.

Using the above example, if the nursing home’s private pay rate is \$15,000 (better facilities currently cost this much or more), the Medicaid penalty would cost you \$156,000. If you’re in the nursing home prior to the time the penalty period actually begins, it could cost you an even greater amount. A financial disaster like this can be avoided with good planning, yet most people don’t do it. *Don’t make that mistake yourself.*

Looking ahead, it’s important to consider a recent change in the law that gradually extends the look back period to a five year time frame. Between February 2009 and February 2011 there will be a gradual phase in of this new requirement. That means any transfers you make now or in the future will be subject to the look back period for five years.

If you attempt to transfer cash and assets out of your name during the look back period in order to qualify, it will be too late to gain the maximum protection. You will then sacrifice at least 50% of what you have, even with planning.

Consequently, even if you’re healthy now, you’ll benefit by planning ahead. Admittedly, it’s not pleasant to consider. However, losing half or all of your net worth to long term care expenses, and possibly ending up penniless and in poverty, would be far more painful for you and your family.

By far, the most powerful use of asset protection strategies is with advance planning, before you need home or nursing facility health services. A good example is a case in which we helped a healthy client who does not currently need assistance. We transferred his house to a trust, so that in the event he does require Medicaid benefits, his home will not be subject to a lien.

Also, by planning early we increased his chances of moving past the look back period. If he eventually needs nursing home care after the look back period has expired, his transfer will

be exempt. That means the equity in his home will not eventually have to be used to reimburse Medicaid for the cost of his care. Instead, it will be fully available to his heirs after he passes on.

Take steps to preserve your finances and dignity while you're still healthy, and not in need of professional care to help with your day to day living needs. Having the financial ability to maintain the lifestyle you're used to, and your self respect is a kind of "medicine" that might be as vital to your wellbeing as anything you receive from doctors.

4. Understand the difference between Medicare and Medicaid. These are both medical and health programs provided by government to pay benefits to senior citizens and the disabled. That's where the similarity ends. They're completely different, and each has its own rules and regulations. Many people confuse the two, but their functions are quite distinct.

Medicare is medical insurance. It's just like any other medical insurance policy, except that the federal government provides it. It pays expenses related to short term, acute care and rehabilitation.

Medicaid is a federal, state and locally funded program. It provides benefits for those needing long term, supervised care, and who are permanently ill, injured or disabled. It's designed for people who have difficulties with the "activities of daily living," such as bathing, dressing, eating and going to the toilet. Medicaid also covers any medical expenses that are not covered by Medicare or other insurance.

A major benefit of being approved for Medicaid is that it will pay for long term care expenses that Medicare doesn't cover. You may also gain access to additional services, such as adult day care.

For example, Lamson & Cutner represented a single, middle aged man suffering from traumatic brain injury. We shifted his excess income to a protective trust, so that it could still be used to pay his bills. This qualified him to receive Medicaid benefits, and to be placed on the Traumatic Brain Injury Waiver Program list, which provides extra services for his special needs.

5. It's not too late. Even if you're already in a nursing home and are paying for care privately, it's not too late to initiate effective planning so that Medicaid covers your bills. In most instances, there are still procedures you can use to shield a substantial portion of your money and assets. You may be able to save as much as 40% to 50% of what you have.

Similarly, if your physical condition has deteriorated to the point where it's now obvious you'll need home or nursing facility care, steps can yet be taken to preserve your financial resources, and to protect your house, condo or coop. In fact, you're likely to be surprised by the advantages that remain available to you.

Here's an example of a case in which we helped a couple protect significant liquid assets. These results were obtained even though the planning was done after it became clear that

professional care was necessary. Our client was in her 80's, suffering from Parkinson's Disease. After a number of strokes, seizures and other serious complications, she became uncommunicative. Up to this point, all assets were held jointly with her husband. We arranged for the transfer of them all to him. This safeguarded the money from loss by "spend down," under Medicaid eligibility requirements.

We then filed an application for nursing home residency, which was approved. The beneficial end result: the couple's money was shielded against loss. It is now available for the husband to use on behalf of his wife, and to retain the lifestyle he's been used to. Again, these advantages were obtained with asset protection strategies that were implemented, in effect, "at the last minute."

6. Only hire an Elder Law attorney for Medicaid and long term care issues.

Medicaid has a maze of complex rules and regulations that most people find almost impossible to understand and navigate. Even attorneys have an exceedingly hard time getting accurate answers and helping clients, unless they're Elder Law practitioners. Wrong or incomplete advice can cost you a fortune. Here's an example.

We recently saw a client who had purchased a home in Brooklyn 40 years ago for approximately \$50,000. In an attempt to plan for Medicaid qualification, she transferred the home to her children. The only problem was that the person who advised her had no knowledge of Elder Law asset protection strategies and their tax ramifications.

The home is now worth approximately \$2,500,000. When her children sell it, they'll be facing a huge capital gains tax bill, which could be more than \$600,000. Yet this loss could have been avoided completely, simply by transferring it to her kids through the vehicle of a trust. With bad advice, she unknowingly created a disastrous tax and financial consequence for her and her family.

As the saying goes, a little knowledge is dangerous. And no knowledge is most detrimental of all.

An Elder Law attorney is not the same as an Estate Planning lawyer. This is a recurrent fallacy, based on a misunderstanding of the difference between Elder and estate law. Elder Law planning seeks to preserve your money, income and assets, to be used for your benefit and care *while you're still alive*. Estate planning focuses on distribution of your assets in a tax advantaged manner *after you die*.

While Elder Law strategies often involve estate and tax planning, the two practices are different. If you need long term home or nursing facility care, your needs will best be served by an Elder Law attorney.

One other important consideration: an Elder Law firm will have unique and indepth insight into the rights of senior citizens. For example, in one case we handled, a major bank had convinced a client to put a substantial sum into an annuity. This particular investment was totally inappropriate for an elderly person in his particular financial circumstances.

Normally, once money is placed in an annuity of the sort our client invested in, it cannot be withdrawn for several years without incurring a penalty. However, we contacted the bank, and informed them that our client needed his money for Elder Law planning. We explained our position that the bank's recommendation was improper, and asked for the funds to be returned to our client without any withdrawal penalty. The bank complied without a fight.

In another case, our client had accumulated thousands of dollars in credit card debt. We believe it is completely inappropriate for credit card companies to solicit elderly people with certain economic profiles as customers. In this instance, we were able to give the client advice that rapidly resolved her debt issues.

The moral of these stories: there's no substitute for getting the right advice.

7. Don't fill out your own application. Some people think they can save money on legal fees by preparing their own Medicaid applications. However, the application is a complicated document that most find confusing. Eligibility can often only be won with complex legal and financial planning, to bypass Medicaid obstacles. Even nursing home professionals, who deal with Medicaid on a daily basis, frequently refer prospective residents to an Elder Law firm for this reason.

Trying to complete your own application can be daunting. If you make mistakes due to unfamiliarity with government regulations, you may compromise or lose your ability to qualify for benefits. Loss of eligibility may ultimately have a devastating financial impact on you. So it's generally not a good idea to handle it yourself. Get professional assistance.

In addition, sometimes there are unusual issues, requiring special handling that only an Elder Law attorney can provide. In one case of this sort, Lamson & Cutner helped a middle aged, single woman who immigrated to the United States, and was subsequently diagnosed with cancer. She needed chemotherapy, medication, as well as physician and hospital coverage.

We transferred her assets out of her name, and filed a Medicaid application for her. She was approved for a level of benefits that gave her 100% coverage, and allowed her to choose her own doctors. Without the extra attention her case received, it's likely she would only have qualified for care that would have been the equivalent of an HMO.

8. Trusts shield your home and property. A trust is a legal structure that allows you to preserve income and assets that would otherwise be lost under Medicaid regulations. Trusts are among the main workhorses of Elder Law planning, and some of its most powerful tools. Here's how they function to protect your home and any appreciated property you hold.

Let's say you own a house, condominium or cooperative apartment worth \$500,000 in today's market. You bought it 40 years ago for \$35,000, and your loan is paid off. Now you need long term care. The problem is that while your home is an exempt asset for eligibility purposes, Medicaid may eventually force you to use its equity to reimburse the cost of your care. They'll do that by placing a lien against your property when you move out permanently or die. The lien will be equal to the amount of benefits paid.

Costs for long term care are exorbitant. That means after just a few years, the equity in your home will be exhausted by the amount of the lien Medicaid may eventually be able to execute. In effect, you'll be leaving your home to the Government to repay Medicaid, instead of to your children or other family members.

A trust strategy eliminates the entire problem. By transferring your home to a trust, you are no longer the owner. The house legally belongs to the trust. And your property is safe from being subject to a Medicaid lien.

In many instances, parents want to leave homes to children in their wills. Using a trust is a better vehicle than a will for this purpose. That's because the trust achieves Medicaid eligibility and protects its value. Your home can eventually transfer to your children, rather than be lost to the government. You don't have to move because you can state in the trust that you have a legal right to live there for the rest of your life. The beneficiaries of the trust can be the same people named in your will.

Additionally, your children will enjoy the benefit of tax savings. With the example of a \$500,000 home, when they receive the property through a trust and want to sell it after your death, their capital gains tax obligation is figured on the difference between its value at the time of your death, and the sale price. If it's worth \$625,000 when you die, and subsequently sells for \$650,000, that tax would be based on a gain of only \$25,000.

By contrast, if you had transferred the property to your children prior to your death without a trust, the tax would be calculated on the difference between the original purchase price of \$35,000 plus any capital improvements you made, and the sale price. So if your children sell it for \$650,000, the tax would be assessed on a gain of \$615,000, instead of \$25,000. The tax owed would then be much higher. Not a very attractive scenario. Clearly, the trust approach has major financial advantages.

An Elder Law attorney can draft a trust for you. You then simply appoint a person to manage the trust, usually one of your children, or a relative or friend, who is referred to as the trustee. Professional trustees are also available for hire if there's no one you feel completely comfortable with.

9. Use special trusts to guard cash, income, investments and other liquid assets.

Another way trusts can be used is to shield cash, and monetary assets that are readily convertible to cash. For example, if you have bank accounts, Certificates of Deposit and securities worth \$250,000, Medicaid will insist you use most of it to pay for your care, before it provides a dime of benefits. By transferring these financial reserves to a trust, they can no longer be regarded as your "resources" for Medicaid purposes. The assets are protected, and the income generated by them can be available to pay for your costs of living through the trust structure.

The trust is structured so that the money or income can be used to cover your expenses. That means the money can be spent to maintain the lifestyle you've worked hard to create.

Aside from protecting your assets from Medicaid eligibility requirements, use of a trust is almost always preferable to transferring money to children directly. Here's why. Most trusts protect the money from exposure to future creditors, lawsuits and legal liability. If a child gets in an auto accident and is at fault, suffers a business failure or a divorce, or even dies before you, the money could be exposed to potential loss. Money placed in most trust structures generally has better protection than funds held by individuals.

Yet another use of trusts is to protect any income you receive. Most senior citizens receive Social Security every month. Medicaid currently limits income to \$787 for an individual, and \$1,117 for a married couple. (These numbers usually increase by a small amount each year.) For example, if you're an individual who needs home care, income in excess of \$787 would have to be contributed to the cost of your own care.

Few people, if any, in New York can live on these amounts. Once again, trusts come to the rescue. With a pooled income trust, you can retain the benefit of all your income and have Medicaid pay for home care. Here's how it works.

Pooled income trusts are run by various charities. For investment and management purposes, your income is "pooled" together with the resources of other participants, however you have your own separate account, segregated for your needs only. As an example, let's say you receive \$1,672 a month in Social Security. The excess amount of \$885 over Medicaid's \$787 ceiling, is sent to the trust every month, which will follow your instructions on what expenses to pay. They'll pay your bills with this money.

Through the pooled income trust, your excess income can be used for food, monthly rent or mortgage, phone, electric, home repairs – just about anything you'd normally pay for, (except medical bills or medical insurance). The charity essentially functions like a bill paying service, and takes a small monthly processing fee. When you pass on, whatever is left in your account will be used by the charity to help others.

The net result of this strategy is you're able to save your excess income and use it to pay for the same things you regularly would. The alternative is losing it to the cost of your care under Medicaid regulations. So with this approach, you retain your lifestyle *while still qualifying* for Medicaid benefits.

In an actual case involving a married couple, a man needed 24hour care at home. His wife was no longer able to attend to his needs by herself. My partner, Carole Lamson, protected his income with a pooled income trust. Next, all his assets were transferred to his wife. Then a Medicaid application was filed for home care assistance, which was approved. In fact, we recently processed his recertification. The result: he obtained and continues to get around the clock, fully paid care. Just as important, the couple is able to comfortably maintain their quality of life and dignity.

In certain instances, it's not cost effective to set up a pooled income trust. For example, if your total income is \$892 a month, which is just \$105 over the \$787 monthly Medicaid limit, it may make more sense to simply use the excess to buy better supplemental medical insurance.

The money you spend to purchase the insurance reduces your monthly income and allows you to satisfy Medicaid eligibility requirements. In that situation, the trust might not be the best option. On the other hand, if you have about \$300 or more in excess monthly income, and a short life expectancy is not a factor, it generally makes sense to have the pooled income trust.

For most cases, if you have financial reserves and assets of any significant value, trusts can help you. So if you own appreciated real estate, you may benefit by setting up a trust to protect it. If you have significant liquid assets, these should also be placed in a trust. It might be the same one the real estate goes into, or another trust vehicle, depending on the circumstances.

Disabled people also gain special advantages through trusts. If you're disabled and have received a substantial sum through a personal injury lawsuit, an inheritance or a gift, trusts can protect you from loss of your government benefits. Without an asset protection strategy, Medicaid will insist that you use it to pay for your care.

Compounding this difficulty, you'll lose any Supplemental Security Income (SSI) you may be receiving from the Social Security Administration too, until the entire amount is spent down. That means instead of your cash windfall supplying a lifelong financial and quality-of-life improvement, you now have significant medical expenses Medicaid used to cover, and lost income. Here's a trust strategy that gives you a way around it.

If you're disabled and under 65, you can have a *first party Supplemental Needs Trust* set up for your benefit. By federal law, this structure protects the assets of a disabled person without jeopardizing Medicaid or SSI benefits. However, these are "pay back" trusts, meaning that whatever is left in the trust after you pass on must be used to reimburse Medicaid. You'll also hear these entities referred to as "self settled trusts."

If a relative or other person wants to provide money for your benefit, whether as an inheritance or a gift, there's an effective variation of the strategy. It's called a *third party Supplemental Needs Trust*. The funds go into the trust rather than to you directly, and you get to keep your benefits. With this trust, your age doesn't matter, and there's no "pay back" provision. Any person who wants to financially assist you can form this trust while alive, or have the trust become operative after he or she dies. If the creator of the trust is your spouse, he or she must set it up in a will.

Additionally, just as with most of the other trust vehicles already mentioned, a third party Supplemental Needs Trust gives you excellent protection against future creditors, not just Medicaid. If you end up in a lawsuit, the money is more effectively sheltered than it would be outside of a trust, giving you greater peace of mind about your financial security.

Here's a specific example of how these proven methods are used to safeguard your benefits, and preserve the money you received for your long term financial support:

In a case Lamson & Cutner handled involving disability, a young man was severely injured when he was improperly shoved by a security guard. He received a substantial cash settlement as a result of this injury. L & C assisted his grandmother in obtaining a court order authorizing the creation of a first party Supplemental Needs Trust, and

and L & C then prepared the trust. The young man got a major financial benefit through effective planning, as he was able to use the money from the cash settlement, without losing his SSI and Medicaid benefits.

Once again, every case is individual and unique, and you'll need proper advice on what trust configuration will deliver the maximum advantage. Different trust strategies apply to various economic and family situations, and according to whether you need home or nursing facility care. The bottom line is that in order to qualify for Medicaid benefits, money and assets have to be moved out of your name. Trusts are the most effective way to do it, and they're fully authorized for this purpose under Federal and New York laws.

10. Cooperative apartments require special handling. If you currently reside in a coop and want to implement an asset protection strategy that involves transferring it to a trust, you will need the coop board's approval. This is another good reason to retain an Elder Law firm, experienced in addressing these matters. If the board says no, an experienced attorney may still be able to persuade them to move ahead with the plan.

There are several approaches we've found have a track record of success with coop boards:

- explaining the Elder Law plan and why it is important to change the title to the apartment
- proving ability to pay the coop maintenance
- paying a certain amount of maintenance in advance
- posting a bond in a negotiated amount to defray the coop's expenses if the apartment ends up in litigation, or in other circumstances that could interrupt payment of maintenance, or delay a sale
- making a commitment as to who will or will not live in the apartment
- agreeing to specific conditions of sale after the owner dies

The goal is to convince the board that the transaction doesn't hurt them, and can be consummated in a way that won't expose the building to any additional risk. While no firm succeeds in getting board approval every time, a competent Elder Law attorney generally succeeds in a large majority of the cases.

11. Evaluate your 401k or IRA carefully. Medicaid will count your IRA or 401k as an available source of funds to pay for your care, unless it is in payout status. "Payout status" means that you have reached an age when you must take money out of your plan, and you are taking the required minimum distribution.

If it's not in payout status, it's probably going to be to your benefit to take the cash out and pay the tax on it, and then transfer it to a trust. This avoids your retirement account being counted as a resource that you will have to "spend down" under Medicaid eligibility

requirements. Instead, your money can be used for your benefit during your lifetime, and whatever is left can be passed on to your beneficiaries under the trust.

If it is in payout status, your retirement assets are not counted as resources, but the monthly payments that you receive from your IRA or 401k are counted as income. If you are receiving Medicaid home care benefits, excess income can be protected by a pooled income trust (discussed in Strategy No. 9 in this Special Report).

If you are receiving Medicaid benefits in a nursing home and your life expectancy is not long, it may be to your children's financial advantage to leave the retirement plan in payout status and allow the nursing home to collect the income from your IRA or other plan while you are still alive. Your kids will retain the benefits afforded by the taxexempt plan. In this way, more money would be left for them.

12. Take the lump sum option. If you are approaching retirement, and have an option to receive either a stream of income or a lump sum distribution from a pension or retirement account, it may be better to take the lump sum. Here's why.

If you eventually need nursing home care, any income streams you receive such as a monthly pension payment or Social Security will go to the nursing facility. It's a Medicaid requirement, and a way of forcing you to pay for at least part of your care. If you take the lump sum option, you have the opportunity to protect that money by putting it in a trust.

Taking a lump sum from a pension allows it to be treated as an asset that you can transfer to a protective trust structure. Otherwise, it will be considered as an income stream, which is vulnerable to nursing home contribution.

Legally, once the money is in a trust, you don't own it anymore. Yet the trust can be constructed so that money can be made available for your needs. So although by law the money is no longer yours, you still benefit from it. That means it helps you maintain your quality of life, and you can give whatever is left after you pass on to your loved ones.

By transferring your lump sum distribution to a trust, you may no longer have to use that money to pay for a nursing facility. Then you'll be eligible for Medicaid to pay all or a significant part of the cost.

In a case involving a widow in her 70's, suffering from Alzheimer's disease and other health problems, Lamson & Cutner assisted her in successfully obtaining Medicaid home care using this lump sum strategy. Money was taken from an IRA, and the aftertax balance was placed in a protective trust. Excess income was transferred to a pooled income trust. With this planning, she was able to retain the benefit of her financial reserves, instead of having to "spend down" her resources under Medicaid eligibility requirements.

We then filed a Medicaid application for home care, which was approved. This allowed her to maintain her sense of personal dignity, by receiving the health services she needed in the comfort and security of her own environment. Down the road, she may need nursing home

care, but by then the money that she took from her IRA will remain protected if it was put in the trust beyond the “look back” period (discussed above in Strategy No. 3).

13. Choose your trustee wisely. When an applicant for Medicaid decides to transfer assets into a trust, the trust must be irrevocable. That means you no longer have control of whatever money or assets you place in it. If you could control them, that would mean they’re still yours, and Medicaid would therefore insist that you use the funds to pay for your care.

You’ll appoint a trustee to manage the trust and make decisions on investing and disbursing your funds. Choose someone who you are confident has your genuine best interests and welfare at heart. To use an analogy, a trustee is like the president of a corporation. He or she is the boss. If you’re going to put your money in a trust, better pick somebody you can count on.

Control is a big issue for many people, especially if they’re currently in good health and have their wits about them. However, if you become ill and need home or nursing facility care, at a certain point it’s either put the money into a trust or lose it. You’ll forfeit the money anyway without appropriate asset protection planning, because under Medicaid regulations all but a small amount of your resources will go to pay for your care. Then you’ll rapidly deplete your financial base and end up with nothing.

Considering these factors, you’ll be in a better position with a trust strategy and appointing a trustee you have confidence in. There are legal restrictions on all trustees, and there aren’t many who would want to run the risk of stealing your money.

In some families, people are not comfortable turning over control of their money and property to a son, daughter, sibling or other relative, for a variety of reasons. Certainly, if the person you have in mind doesn’t have a history of being responsible, it’s not a good idea to make him or her trustee.

If you don’t trust your relatives or friends, hire a professional trustee. Retaining a professional trust company is also a good way to avoid conflict in a family, and break a deadlock when there’s an argument or concern about who will be the trustee. In addition, professional trustees have strict legal and fiduciary duties, so you can count on them to have a better understanding of what the law requires. Of course, you’ll have to pay a professional trustee. The fee is usually in the vicinity of 1% of the value of assets managed per year.

We represented a client who unfortunately had very strained relations with her three children. Yet one of the sons was very devoted to her, and had watched over her. The client had to enter a nursing facility for rehabilitation after sustaining a head injury. Although she eventually recovered to a point where it would have been feasible for her to return home, she elected to stay as a permanent resident. Her assets were moved to a protective trust and her son was made trustee, as he was the only one she felt comfortable with managing her significant resources.

We filed a Medicaid application to cover the cost of her nursing home care, and initiated additional planning strategies. The application was approved, providing full payment of the nursing home's services, while a significant portion of her financial reserves have been protected. Her son can now use these funds on behalf of his mother as needed, making her stay there more pleasant. After she passes on, whatever is left can be distributed to her heirs, which would not have been possible without this asset protection planning.

14. Annuities have an advantage. An effective strategy to protect cash and assets for someone who needs nursing home care, and who has transferred assets within the "look back" period is to use a private annuity strategy. It can preserve approximately 40% to 50% of your resources, if any transfers have been or are to be made during the "look back" period.

As an illustration, let's say you'll be entering a New York City nursing home. You have \$100,000 you want to protect from being lost to Medicaid requirements to pay for your own care. It's a two step plan.

First, about half of the amount is given as a gift to a child, sibling or other trusted person. That means there will be a "penalty period" in the neighborhood of 5 months. That's because \$50,000 divided by \$9,838, which is the Medicaid regional monthly rate for a NYC nursing home in 2009, equals 5.1 months. (Medicaid's regional rate usually changes each year, so that a "penalty period" calculation in 2010 or later will yield a slightly different result.)

In the second phase of the strategy, a private annuity is created for the remaining amount of roughly \$50,000. An annuity is a contract that makes specific payments at set intervals. By law, the private annuity itself does not incur a Medicaid penalty. Here the annuity is structured to create a stream of income, and will pay about \$9,700 per month for 5 months to you. You will then use this money, together with your other income, to pay the nursing home. That covers the cost of care during the "penalty period" imposed by Medicaid.

The end result: instead of losing the entire \$100,000 to pay for nursing home care, which Medicaid would otherwise require before paying any benefits, close to \$50,000 has been preserved. You've transferred the money to a trusted source, who'll use it on your behalf while you're in the nursing home. Whatever is left after you die can go to your loved ones, providing a financial benefit to your family it would never have had.

Now here's an important point. Some Elder Law firms will use a promissory note, instead of an annuity, for this strategy. In the above example, \$50,000 would be transferred to another party in exchange for a promissory note, specifying payment terms of \$9,700 a month for five months. However, we believe a properly prepared annuity is safer in the long run. Federal law specifically validates its use.

The recent Deficit Reduction Act of 2005 outlines several conditions involving annuity contracts that make them exempt from Medicaid penalties. This gives a solid statutory basis for the transaction, and stops it from being categorized as a penalized transfer of money.

In representing an 85 year old widow who had numerous investments, assets and property in Florida, we arranged for the transfer of everything she owned to her daughter. Next, we prepared a private annuity in an amount equal to approximately 50% of the value of her holdings, to offset a "penalty period" imposed on her by Medicaid. The net result was that we were able to save about half of her financial resources, which her daughter can now use for attending to her mother's needs, and making her stay at the nursing home as pleasant as possible.

After her mother passes on, the daughter will inherit whatever is left, which she would never receive had these planning steps not been taken.

15. Consider a reverse mortgage. Some seniors and disabled individuals want to avoid entering a nursing facility at all costs, and insist on receiving care in their own homes. For some, the problem is being able to afford the cost of maintaining their residence and current lifestyle. Often in these cases, the equity in their homes is the only financial resource they have.

A "reverse mortgage" can be a solution. Lenders that specialize in these arrangements will offer to pay you a fixed monthly income, based on the amount of equity in your property. In exchange for the monthly income you receive, the loan is repaid by the sale of the property when you move out or die.

Your Elder Law attorney can advise you whether a reverse mortgage may be appropriate, and tell you how to proceed.

16. Keep your Medicare insurance. In most instances, you'll have access to a wider range of doctors. Be careful about sales pitches for other coverage. There are a lot of plans out there that sound great on the surface, but don't provide you with the same access to providers and benefits you get through traditional Medicare "A" and "B". Even if you're on Medicaid, you'll probably want to keep your Medicare because you'll have a wider selection of doctors.

It's a good idea to review any proposed changes in your coverage with a knowledgeable insurance agent before switching.

17. Not just any Power of Attorney. A *Durable Power of Attorney* is a legal document that allows a trusted person to make decisions for you, even if you lose the mental capacity to do so. The problem is that many people have operative Powers of Attorney that are ineffectual for Elder Law planning purposes.

If you've obtained a standard Power of Attorney from a stationary store or downloaded one from the Internet, it simply will not be powerful enough to permit the necessary steps to be taken, if you can't act for yourself. These can include transferring assets, setting up protective trusts, or moving income to a pooled income trust. That's why it's to your advantage to have your lawyer draft a Durable Power of Attorney, which contains provisions to allow these actions to be implemented on your behalf.

Many feel that in signing a Power of Attorney they are losing control or power over their own lives. In fact, the opposite is true. Effective planning gives you more influence over what will happen in the future than you'd otherwise have. If you do not have a viable Power of Attorney for Elder Law planning purposes, decisions will still have to be made for you. Except then, they'll get made only after expensive guardianship proceedings in court, which will create delays.

Additionally, it means that a judge, who is a distant and unrelated third party, will be making decisions about your welfare. In that instance, you have less control than you would have had by effectively planning now for circumstances in which you're mentally incapacitated.

For these reasons, the advantages of a Durable Power of Attorney far outweigh the disadvantage of potential abuse. Needless to say, you'll want to pick someone to carry out your wishes whom you trust. One way to be secure and feel more comfortable with the arrangement is to retain the document in your possession, and advise the person you appoint as agent where it can be found if needed. It is not necessary to deliver it to him or her immediately.

A Durable Power of Attorney is a cornerstone of all effective elder and special needs planning. It allows you to specify who you'd like to be in charge, in the absence of being able to make your own choices. Having one that's properly drafted creates options for the best possible action to be taken on your behalf in a difficult situation, as opposed to closing off support and creating problems for your family.

18. Elder and estate planning go together. Everyone has heard stories of the havoc that is caused when someone with money and property dies without a Will. It's the truth. Not having a Will that clearly expresses your intentions and divides your assets is a recipe for family trouble.

Effective Elder Law planning can save *all* of your cash and assets if you plan early enough, or a substantial portion even if planning is done at the last minute. Keep this in mind: if you're on Medicaid, it will cover all of your medical and health expenses whether you're getting home or nursing facility care. So it's likely that you'll have enough money to maintain your quality of life, and still have something to leave to family members after you pass on.

Good planning anticipates that scenario, and includes specific measures to address distribution of your resources when you die. Since trusts are a central feature in many plans, you gain three special benefits they offer, which simple Wills do not provide.

First, when you die and all your cash and assets are in trusts, these holdings are not included in the probate of your estate. Probate is an involved legal process of collecting, accounting for and distributing a person's money and property after death. It is time consuming and expensive. Your children or other beneficiaries might not get the proceeds for months, or even years. With a trust, the trustee can make distributions quickly and efficiently after you pass on. It's very clean and efficient.

Second, if there are disgruntled relatives who disagree with the distribution of assets and pursue litigation, trusts afford greater protection than wills. They are harder to attack and dismantle. The reason that most trusts are a strong shield against future lawsuits is because the money or assets in them are neither yours nor the trustees. They're owned by the trust, which legally is a separate and distinct entity.

Attorneys for the unhappy parties will advise them of this, and so there's less likely to be a court battle. That means your wishes will be carried out without contest, and your family will avoid a dispute that could lead to an all out war.

Third, trusts offer more privacy than Wills. Your wishes can be kept secret, and carried out without knowledge of uninvolved parties. That's because in most cases you are not required to file trust documents with the courts.

For these reasons, it's wise to choose an Elder Law firm that has an estate lawyer on board. Inquire if it does before you retain one.

19. Health Care Proxy, not a Living Will. A *Health Care Proxy* is a legal document that authorizes someone you appoint to make medical and health care decisions for you, if you are unable to. These include end of life decisions. The idea behind a Health Care Proxy is that someone makes the determination you would have made, had you been able.

Therefore it's critical that your health care agent clearly understands your wishes concerning your medical and health care, and the circumstances in which you may choose not to have your life sustained.

Health Care Proxies are valuable for another important reason. They prevent and help resolve disputes within families. The health care agent has sole discretion in making decisions, and is operating based on your philosophy about medical choices. Legally, family members who disagree will find it almost impossible to interfere.

Without a Health Care Proxy there is a danger that physicians and hospitals will not act on family instructions, and an expensive guardianship court proceeding may have to be commenced to get action taken.

A Living Will is another vehicle for having your wishes carried out, but can be problematic. With a Living Will, you spell out your instructions in writing. The difficulty is in its interpretation. Common phraseology such as "if there is little hope of recovery, I would not want heroic measures to be taken to preserve my life," may mean different things to different family members.

Where one sees a hopeless situation, another believes there's a chance of recovery. Heroic to one, is ordinary to another. Consequently, there is simply no reliable way of writing a Living Will that covers all possible medical contingencies and viewpoints.

For those who are uncomfortable with a Health Care Proxy, a Living Will is seductive because it gives the illusion of control. In fact, a Living Will is likely to create opportunities for dispute, and could lead to a lawsuit. We don't recommend it.

Instead, pick someone you trust and feel will be committed to making the decisions you would make. No document can replace the informed judgment of an intelligent, compassionate person.

20. If you're not satisfied, hire another firm. You need to be comfortable with the firm handling your work. After all, they'll be devising a strategy that affects your entire life's savings and every asset you own. If for any reason you don't feel they're competent, find another firm. Listen to your gut as much as your mind.

Not every Elder Law firm uses precisely the same strategies. The firm you choose should be able to clearly explain the rationale behind its approaches. If you don't understand what your attorney is planning to do, or if you sense you're not receiving the kind of service you should be getting, get a second opinion and consider changing firms.

A good firm will be able to adapt proven methods to suit your circumstances. For example, we represented a client in her 80's who needed extensive and very costly dental procedures. We worked out an arrangement with her dentists whereby her liquid assets were applied to two prepaid medical caregiver contracts. This approach covered the dental treatment, and also allowed her to qualify for Medicaid nursing home care services, which now pays all of her long term medical and health care expenses.

Had we not used these procedures, Medicaid might have required her to use the money to pay for her own nursing home care, until her funds were exhausted. In that scenario, it's very possible she wouldn't have been able to use the dentists she wanted, due to her being forced to choose a dentist from the limited number of providers on Medicaid's approved list. So we got her a double benefit: her dental professionals of choice, and Medicaid.

Here's a critical point you should also consider. It's to your advantage to choose a firm that has a tax attorney on staff. Anytime you do financial transactions you may be at risk of creating adverse tax consequences. The big question is: how do you accomplish the Medicaid objectives, without creating a tax liability that offsets the benefits gained?

For example, whenever you plan to transfer appreciated property, you've got a capital gains tax issue to deal with. *Elder Law solutions must be integrated with tax considerations.* If the firm has a tax lawyer, you'll get more sophisticated tax treatment to enhance your planning.

21. Streamline your financial affairs. If you apply for nursing home care either now or in the future, Medicaid will request detailed information about your prior financial transactions. Every one of your banking and brokerage accounts will be scrutinized for the past three to five year "look back" period review. They all need to be documented on your application. Medicaid will want to see if you transferred any of your money or assets to others.

That means if you have many accounts, preparing your application becomes a lot more complicated and time consuming for you and your attorney. It's likely to increase the cost of your legal fees. Many banks offer gifts and other incentives to open an account. Some people create numerous accounts, even though they may not have a substantial amount of money, or adequate financial justification. If you don't need the additional accounts for a good reason, close them. When it comes to dealing with Medicaid, the cleaner and simpler, the better.

Also, the process of gaining approval for Medicaid benefits, and protecting your assets, will be considerably faster and easier if you organize your records. In particular, this includes bank accounts, IRA's, annuities, stocks and bonds, Certificates of Deposit, Keogh plans, money market and mutual funds, insurance policies, tax returns, pension information, and Social Security award letters.

The simplest system is to place each of the last three to five years of these records in its own individual accordion file. Arrange each category of statements chronologically, from the oldest to the most recent.

If you do nothing else, then at least throw all statements and receipts for each year in a box. This way you'll have a basic annual level of organization, which is better than none at all.

22. Consider staying in or moving back to New York. If you're planning to move out of state and anticipate needing long term care, think twice. If you've already moved to another state and are now in need of home or nursing facility care, returning to New York may be best, both medically and financially. That's because New York law is more generous in providing for long term care needs than most other states.

This is especially true for home care. Many states have very limited home care programs, and eligibility for their programs may be difficult to establish. New York on the other hand, has a huge home care program. There is a lot of funding for home care, and many providers.

We've had clients who retired to Florida. When their health started failing, they had to return to New York because they just couldn't get the kind of health care in Florida they could here.

Another reason New York is favored with regard to home care is that there's no "look back" period to check for transfers. There is also no penalty for transferring assets, hindering your ability to qualify. In New York State you can do effective planning, shift assets as needed and very quickly become eligible for home care. If you initiate an asset protection plan, you can sometimes become eligible in as quickly as a month or two.

23. Competent counsel means a better shot at quality care. If you require nursing home care, you'll have to choose a facility. Experienced Elder Law attorneys can suggest homes in your area you may want to consider. An established firm may also have relationships with some of the better residences, which may facilitate your acceptance at one of them.

Capable firms often receive referrals from many nursing facilities, to assist their prospective residents with preparing successful Medicaid applications. There are lawyers who have worked with quality homes many times, and maintain a strong rapport with their staffs.

One of a nursing home's primary concerns is getting paid for its services. When a competent Elder Law attorney says a client will get Medicaid, a facility will generally regard it as a reliable recommendation. The nursing home staff knows that if skilled lawyers handle your application, they can be more confident of Medicaid approval. Consequently, there's an increased chance of the home accepting you as a resident.

It's like any other business relationship. An attorney can present a solid application on behalf of a client. If there are two applicants for a vacancy, will a home be more responsive to someone whose case is handled by a law firm they know and trust, or a complete stranger? There's no guarantee of course, however it's another benefit of working with experienced Elder Law professionals, and stacks the deck in your favor.

Here's an example that shows how these relationships can work to your benefit. Lamson & Cutner represented a widow who was residing in a nursing facility on Long Island. We secured her assets and obtained Medicaid approval to pay the cost of her care. Just as important for this client, due to the strong relationship we had with the staff, she was able to keep a room she loved because of its extraordinary view.

Your attorney can also help persuade a nursing home to take you as a new resident with a "Medicaid pending" status. Then, even though Medicaid may not process your application until several months later, the establishment may still feel comfortable enough with potential approval and retroactive payment from Medicaid that they will accept you.

In instances of pending applications, you can see that if a nursing facility is dealing with a law firm they don't know, or with a person who files his or her own application, the admissions staff may worry about Medicaid approval. If they let you in and Medicaid rejects your application, they may have to go through an extended series of procedures involving hearings and court appearances. These are expensive, time consuming and expose them to risk.

Nursing homes don't want problem cases. If you're not going to pay for the care yourself, they want to know that you're eligible for Medicaid. This is another reason why it's to your advantage to have your application professionally prepared.

If you need home care, these same principles can work on your behalf. Some lawyers have excellent relationships with home care providers also.

24. Long term care insurance won't necessarily solve the problem. For many people, this is often a wasteful expenditure of funds that could be better used elsewhere. At current rates ranging between \$3,600 to \$10,000 a month for 8 to 24 hours per day of home health services, and up to \$15,000 a month or more for nursing facility care, the policy you'll need for full coverage is going to be expensive. Unless you can afford enough insurance to cover these stratospheric costs, you may require Medicaid assistance anyway.

Without asset protection strategies, you'll still be in a situation where Medicaid will force you to spend down your resources to pay for whatever the policy doesn't cover, before they provide benefits. That means eventually you'd be in poverty anyway.

If you're sufficiently wealthy, can afford a large enough policy, and don't intend to avail yourself of Medicaid benefits, long term care insurance might make sense. Otherwise, you'll get a better return on your money by hiring a competent Elder Law firm to create a plan that allows you to retain all of your cash, income and assets, or a substantial portion. Medicaid will then pay for all of your home or nursing facility care, and any medical expenses that your Medicare insurance doesn't cover. In that case, why would you need long term care insurance?

Here's a case example in which long term care insurance could not have delivered the range of financial benefits that Elder Law planning was able to. A husband and wife both needed home care. The main source of their income and savings was German war reparations, which are exempt from having to be paid towards the cost of one's own care. In this instance, hundreds of thousands of dollars were involved. Carole Lamson helped them qualify by first proving to Medicaid that all of their money was from the war reparations.

Then all their liquid assets were transferred to their children. With all their income and assets secure from Medicaid eligibility requirements that would otherwise force them to pay the bill for the services they needed, the couple was now able to get fully paid home care at no cost to them.

The mother subsequently needed nursing facility care. Lamson & Cutner prepared a Medicaid application that allowed her to enter a nursing home penalty free, due to the effective asset protection planning that was done in advance.

Consequently, the couple and their children gained a series of advantages that could not have been duplicated in a cost effective way with long term care insurance. Not only are all their medical and health care costs fully covered, but in addition their money and assets are safely in the family's possession, shielded from exposure to "spend down" requirements under government regulations.

25. Quality of life is paramount. Elder Law planning is an efficient means to a worthwhile end: your future quality of life. Asset protection strategies ultimately serve two functions.

First, they allow you to retain your financial wherewithal, so that you can continue to maintain your lifestyle by being able to afford it. The alternative is the dreaded Medicaid "spend down," compelling you to relinquish your money and assets for the cost of your own care. The inevitable impoverishment has a devastating emotional impact, and doctors will tell you that stress makes everything worse. Do you know people who suffered a major financial blow and subsequently got sick, or whose medical conditions then became worse? Don't let it be you.

Second, good planning creates options that may avoid serious consequences for your manner of living. For example, by having an Elder Law attorney set up a plan that provides Medicaid coverage of adequate home care, you may avoid or delay eventually having to enter a nursing home. Wouldn't you rather spend the rest of your life in the comfort and dignity of your own home?

Here is an example of how Elder Law planning can make a real difference with quality of life concerns. We helped a client who has a terminal illness, is incontinent and needs assistance with all her activities of daily living. At the time she retained us, she'd already employed a home care assistant she was comfortable with, and was paying for out of her own funds. We filed a Medicaid application for home care, which was approved.

In addition, one of the most important benefits to her was the fact that we were able to "vendorize" her attendant. Through contacts at the home care agency, we arranged for her attendant to become certified and accepted as its employee. The cost of her salary ended up being fully paid by Medicaid.

The happy result was that our client got the home care help she needed and retained her preferred assistant, all completely covered by Medicaid.

Of course, it's not always possible to eliminate the prospect of a nursing facility stay, because sometimes illnesses degenerate to the point where it's just not safe to stay at home. Yet in other cases, around the clock home care can supplant the need for a nursing facility. The peace of mind you experience in your own surroundings may have a psychological effect that contributes to keeping your disability stable, so that you never need to enter an institution.

Also keep in mind that if you do have to reside in a nursing home, the availability of extra cash that would otherwise be lost can be a significant factor in making things comfortable for you.

These are options only good asset protection planning can provide. The rule is: investigate everything that's available to you. It can make all the difference in the world for your material comfort in your remaining years.

Good planning equals a more secure and comfortable future.

You devoted a lifetime to building up your savings, and acquiring a home, investments and other assets. Don't be a financial victim, and lose it all due to fear and inertia. That's what stops most people from taking powerful steps to protect what they have.

While these strategies are complex, competent Elder Law attorneys know how to use them to your best advantage. Yes, many procedures, laws and regulations are involved that need to be adhered to. However, the approaches are straightforward, valid under Federal and New York State law, time tested and effective. They can make a major difference in the way the rest of your life works out, and how much peace of mind and comfort you'll enjoy.

These methods can also supply advantages that are of supreme importance to your loved ones. They want the best life that's possible for you, and asset protection planning is a way to achieve it. It also enables you to have something to leave to them, because the more you save now, the greater your legacy will be.

These strategies have provided financial security and a vastly improved lifestyle for many senior citizens and disabled people. They can work for you too, if you employ them.

If you need help, call us toll free at 1 (866) 524-1818. Representation of the elderly and disabled is our only practice area.

About David A. Cutner, Esq.

David A. Cutner, Esq. is an Elder Law attorney practicing in New York City. He is a founding partner of Lamson & Cutner, P.C., one of New York's preeminent Elder Law firms. The firm's practice is devoted solely to sophisticated elder and estate planning approaches for senior citizens and the disabled. As a compassionate advocate for the elderly and infirm, he is dedicated to protecting the rights and financial security of every client.

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