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Recommended Citation

Milan Markovic, *Lawyers and the Secret Welfare State*, 84 Fordham L. Rev. 1845 (2016).
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LAWYERS AND THE SECRET WELFARE STATE

*Milan Markovic**

INTRODUCTION

The United States assists its less fortunate citizens through a wide variety of federal and state programs.[1] However, public assistance is far more extensive in other developed countries.[2] To receive welfare benefits, U.S. citizens must meet stringent eligibility requirements[3] and work thirty hours a week or engage in community service.[4] Despite the passage of the Patient Protection and Affordable Care Act[5] (PPACA or "the Affordable Care Act"), Americans do not have national health insurance.[6] Few Americans

* Associate Professor of Law, Texas A&M University School of Law. This Article is part of a larger colloquium entitled *Lawyering in the Regulatory State* held at Fordham University School of Law. For an overview of the colloquium, see Nancy J. Moore, *Foreword: Lawyering in the Regulatory State*, 84 FORDHAM L. REV. 1811 (2016).

1. IRWIN GARFINKEL ET AL., WEALTH & WELFARE STATES: IS AMERICA A LAGGARD OR LEADER? 2 (2010).

2. *See* MICHAEL B. KATZ, THE PRICE OF CITIZENSHIP 15 (2001) ("The American welfare state . . . stands out for what it lacks."); *see also* GARFINKEL, *supra* note 1, at 107 ("[The United States] has also consistently lagged behind other rich nations in providing cash and social insurance benefits.").

3. Welfare in the United States is a federal program that is administered by the states pursuant to the Temporary Assistance for Needy Families program. *See* Personal Responsibility and Work Opportunity Reconciliation Act, Pub. L. No. 104-193, § 402(a)(1)(A), 110 Stat. 2105, 2113–14 (1996). Most states require individuals to be well below the federal poverty level to collect benefits. *See generally* GENE FALK, CONG. RESEARCH SERV., TEMPORARY ASSISTANCE FOR NEEDY FAMILIES (TANF): ELIGIBILITY AND BENEFITS AMOUNTS IN STATE TANF CASH ASSISTANCE PROGRAMS summary (2014), http://fas.org/sgp/crs/misc/R43634.pdf ("In July 2012, the majority of states . . . required that a single mother caring for two children earn less than $795 per month to gain entry to the benefit rolls—an earnings level representing about half of 2012 poverty-level income.") [http://perma.cc/4CFT-W8DU].

4. *See* Sylvia A. Law, *Ending Welfare As We Know It*, 49 STAN. L. REV. 471, 489 (1997). There is an exception for single parents with children six years of age or younger. *Id.*

5. Pub. L. No. 111-148, 124 Stat. 119 (2010).

6. The Affordable Care Act allows millions of Americans who were previously unable to acquire health insurance to purchase it but will still leave millions without coverage. *See id.*; Norman Daniels, *The Ethics of Health Reform: Why We Should Care About Who Is Missing Coverage*, 44 CONN. L. REV. 1057, 1065–67 (2012). This problem has been exacerbated by states' refusal to participate in the Medicaid expansion. *See* Emily Whalen Parento & Lawrence O. Gostin, *Better Health, but Less Justice: Widening Health Disparities After* National Federation of Independent Business v. Sebelius, 27 NOTRE DAME J.L. ETHICS & PUB. POL'Y 481, 502 (2013) (observing that in many states persons with income between 100 percent and 133 percent of the federal poverty line are eligible for

are able to claim paid family or medical leave, and some employers do not even provide unpaid leave.[7] Because of the limited nature of its public benefits regime, prominent commentators have characterized the United States as a "semi-welfare state."[8]

The semi-welfare state will likely persist. Americans have traditionally viewed entitlement programs as a discouragement to work.[9] Most existing federal programs were established to insure workers from risks such as disability and unemployment, not out of a sense of societal obligation to the needy.[10]

Notwithstanding the ambivalence toward "entitlements," the United States devotes a substantial portion of its budget toward various forms of public assistance. In 2014, the United States spent $851 billion in providing benefits to the elderly and disabled through the Social Security Program[11] and $836 billion on healthcare through Medicare, Medicaid, the Children's Health Insurance Program, and PPACA.[12]

In addition to direct expenditures, the federal government uses tax policy to incentivize the private sector to improve social welfare.[13] Political scientist Christopher Howard has argued that the United States maintains a "hidden welfare state" through its granting of tax deductions to individuals and businesses that engage in publicly beneficial activities.[14] However, the hidden welfare state predominately serves groups other than the poor.[15]

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subsidies to enable them to purchase insurance, but those below the poverty line are not and will be unable to purchase insurance); *see also* Lawrence O. Gostin et al., *Restoring Health to Health Reform: Integrating Medicine and Public Health to Advance the Population's Well-Being*, 159 U. PA. L. REV. 1777, 1780 n.6 (2011) (describing PPACA as, "at best, an incremental advance in changing the way health care is organized, financed, and delivered").

7. *See* 29 U.S.C. § 2612(c) (2012) (requiring covered employers to provide only twelve weeks of unpaid leave); *see also* Julie C. Suk, *Are Gender Stereotypes Bad for Women?: Rethinking Antidiscrimination Law and Work-Family Conflict*, 110 COLUM. L. REV. 1, 4 (2010) ("[T]he United States stands virtually alone in not providing women a legal guarantee of paid leave from work after the birth of a child.").

8. KATZ, *supra* note 2, at 15 ("America has what I have called a 'semi-welfare state'; others have referred to it as incomplete or truncated or have called America a welfare haggard."). The term "welfare state" connotes programs "designed to assure economic security to all citizens by guaranteeing the fundamental necessities of life." *Id.* at 9.

9. *See* Sandra R. Levitsky, *"What Rights?": The Construction of Political Claims to American Health Care Entitlements*, 42 LAW & SOC'Y REV. 551, 552 (2008).

10. *See id.*; *see also* William H. Simon, *Rights and Redistribution in the Welfare System*, 38 STAN. L. REV. 1431, 1432 (1986) (noting the disassociation between welfare rights and redistribution).

11. CTR. ON BUDGET & POLICY PRIORITIES, POLICY BASICS: WHERE DO OUR FEDERAL TAX DOLLARS GO? 1 (2015), http://www.cbpp.org/sites/default/files/atoms/files/4-14-08tax.pdf [http://perma.cc/752D-GH5T].

12. *Id.*

13. *See* CHRISTOPHER HOWARD, THE HIDDEN WELFARE STATE 3 (1997).

14. *See id.*

15. *See id.* at 33 ("[T]he visible welfare state serves a far greater proportion of individuals below the poverty line, and below the median income, than does the hidden welfare state."); *see also* GARFINKEL, *supra* note 1, at 40 ("Tax expenditures (savings in income tax payments) . . . [are an] alternative (and . . . less progressive) way[] to achieve some of the social goals of direct government spending—among them, providing health insurance, housing, or income security in old age.").

This Article suggests that the United States also maintains a secret welfare state. The secret welfare state exists because of lawyers' ubiquitous use of questionable practices in representing clients before benefit-granting government agencies, which enable thousands of individuals to collect public benefits who may not qualify for them.[16] This Article focuses in particular on lawyers' handling of evidence of nondisability in Social Security Disability Insurance (SSDI) proceedings and participation in Medicaid planning. Although lawyers' conduct in seeking to minimize their clients' tax obligations has received substantial scrutiny,[17] lawyers' conduct in asserting claims to public benefits has not.

The SSDI and Medicaid processes are structured as nonadversarial. Lawyers nevertheless appear to have institutionalized the nondisclosure of adverse information in SSDI proceedings and financial impoverishment techniques for Medicaid applications such that their clients are able to circumvent eligibility criteria with little risk of detection.

These tactics may not be unethical in some cases. Assessing the extent of a client's disability or financial status is difficult, and lawyers are expected to present claims in a favorable light.[18] Moreover, efforts to require attorneys to disclose adverse medical evidence in SSDI proceedings and to prohibit Medicaid planning have failed, reflecting a tacit acceptance of the secret welfare state and lawyers' maintenance thereof.

Nevertheless, lawyers' use of these tactics is not mandated by ethics rules and has harmful consequences. The funding for SSDI and Medicaid is limited. In assisting relatively advantaged individuals to obtain SSDI, Medicaid, and other public benefits programs, lawyers may be jeopardizing these programs' sustainability and the welfare of those who depend upon them.

Part I of this Article briefly introduces the SSDI and Medicaid regimes and lawyers' roles therein. SSDI hearings before the Office of Disability Adjudication and Review (ODAR) are ex parte, and ethics rules and SSA

16. Although this Article focuses on the role of attorneys in Social Security Disability proceedings and Medicaid, nonlawyers frequently appear in disability proceedings. *See* 20 C.F.R. § 404.1705(b) (2015) (allowing a claimant to "appoint any person who is not an attorney to be [his or her] representative in dealings" with the Social Security Administration); *see also* Drew A. Swank, *Non-Attorney Social Security Disability Representatives and the Unauthorized Practice of Law*, 36 S. ILL. U. L.J. 223, 234–35 (2012) ("Non-attorneys represent claimants ranging from eleven to fourteen percent of the more than 700,000 cases heard by the Social Security Administration each year." (footnotes omitted)). Some jurisdictions allow nonlawyers to engage in Medicaid planning whereas others do not. *Compare* Bd. on the Unauthorized Practice of Law of the Supreme Court of Ohio, Advisory Op. UPL 11-01 (2011), https://www.sconet.state.oh.us/Boards/UPL/advisory_opinions/UPLAdvOp_11_01.pdf (discussing Medicaid assistance and planning by nonattorneys) [http://perma.cc/Y9TX-STH5], *with* Fla. Bar, Advisory Op., 40 Fla. L. Weekly S14 (2015) (same).

17. *See, e.g.*, Michael Hatfield, *Tax Lawyers, Tax Defiance, and the Ethics of Casual Conversation*, 10 FLA. TAX REV. 841 (2011); Loren D. Prescott Jr., *Challenging the Adversarial Approach to Taxpayer Representation*, 30 LOY. L.A. L. REV. 693 (1997).

18. *See* MODEL RULES OF PROF'L CONDUCT r. 1.3 cmt. 1 (AM. BAR ASS'N 2013); *see also id.* r. 3.1 cmt. 1 ("The advocate has a duty to use legal procedure for the fullest benefit of the client's cause . . . .").

regulations would seem to require the disclosure of material information.[19] Nevertheless, the organized bar historically has resisted disclosing adverse evidence, especially adverse medical evidence, to ODAR judges.[20] Consequently, ODAR judges are often unable to decide disability cases on their merits.[21]

In terms of Medicaid, lawyers advise various financial impoverishment techniques to allow their clients to meet Medicaid's stringent income and asset eligibility requirements. These practices, known collectively as "Medicaid planning," can range from relatively uncontroversial tactics, such as transferring assets to third parties in order to make the transferor appear financially impoverished, to more questionable tactics, such as transferring assets to third parties that serve no purpose other than impoverishing the transferor and even "Medicaid divorce."[22] A federal law that prohibited Medicaid planning was held unconstitutional after a challenge by the New York State Bar.[23]

Part II scrutinizes whether failing to disclose adverse medical evidence and engaging in Medicaid planning can be justified ethically. Although nondisclosure of adverse information and participation in Medicaid planning may be justified in individual cases, their pervasiveness undermines SSDI and Medicaid and harms future beneficiaries as well as those with bona fide claims who might not have the means or sophistication to consult with SSDI and Medicaid attorneys. The existence of a secret welfare state that can be accessed by those who are neither disabled nor poor also diminishes public support for expanding public benefits programs.

Part III suggests that, rather than perceiving benefit-granting agencies as adversaries to be outflanked, attorneys could serve as gatekeepers of the public benefits regime.[24] This model of lawyering has been embraced by the tax bar and other segments of the legal profession and is necessary to

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19. *See id.* r. 3.3(d); *see also* 20 C.F.R. § 404.1740(b)(1).

20. *See* Robert E. Rains, *Professional Responsibility and Social Security Representation: The Myth of the State-Bar Bar to Compliance with Federal Rules on Production of Adverse Evidence*, 92 CORNELL L. REV. 363, 391–92 (2007) (detailing the American Bar Association's opposition to ethical reforms that would have mandated disclosure of adverse evidence in Social Security Disability proceedings).

21. *See* Drew A. Swank, *Money for Nothing: Five Small Steps to Begin the Long Journey of Restoring Integrity to the Social Security Administration's Disability Programs*, 41 HOFSTRA L. REV. 155, 174 (2012).

22. *See* John A. Miller, *Voluntary Impoverishment to Obtain Government Benefits*, 13 CORNELL J.L. & PUB. POL'Y 81, 91–97 (2003).

23. *See* N.Y. State Bar Ass'n v. Reno, 999 F. Supp. 710, 712 (N.D.N.Y. 1998) (enjoining enforcement). For a concise history, see Lisa Schreiber Joire, Note, *After* New York State Bar Association v. Reno*: Ethical Problems in Limiting Medicaid Estate Planning*, 12 GEO. J. LEGAL ETHICS 789, 801–04 (1999).

24. Gatekeepers are "parties who are able to disrupt misconduct by withholding their cooperation from wrongdoers." Reinier H. Kraakman, *Gatekeepers: The Anatomy of a Third-Party Enforcement Strategy*, 2 J.L. ECON. & ORG. 53, 53 (1986); *see also* Ronald J. Gilson, *The Devolution of the Legal Profession: A Demand Side Perspective*, 49 MD. L. REV. 869, 872 (1990) (suggesting that attorneys function as gatekeepers by acting as an ex ante screen).

ensure the sustainability of SSDI, Medicaid, and other benefits programs because of the limited capacity of the federal government to enforce eligibility criteria.

This Article concludes by calling for additional research on the role of lawyers in the American welfare state. In particular, it may be possible that the legal profession's central role in the distribution of public benefits is an obstacle to a fairer and more transparent social safety net.

I. LAWYERING IN THE U.S. WELFARE STATE

Lawyers represent clients before numerous state and federal agencies that administer public benefits. Attorneys' actions determine not only whether individual claimants will receive benefits, but also whether these programs are serving their intended beneficiaries.

With respect to SSDI and Medicaid, the institutionalization of certain questionable ethical practices likely allows thousands of Americans who do not meet eligibility criteria to qualify for these programs. Although the nondisclosure of adverse information in SSDI proceedings and participation in Medicaid planning can be justified ethically in some circumstances, lawyers have significantly altered the nature of these important entitlement programs.

A. SSDI Lawyers and the Nondisclosure of Adverse Evidence

SSDI provides cash benefits to individuals who cannot continue to work because of severe, long-term medical impairments.[25] The United States paid out approximately $141 billion to SSDI recipients and their families in 2014—an amount that equates to approximately four percent of the federal budget.[26]

The SSDI process generally proceeds as follows. To claim benefits, individuals must first file applications with the Social Security Administration (SSA) that detail their work and medical histories.[27] Federally funded state agencies known as disability determination services (DDS) process the applications.[28] To determine qualification for SSDI, DDS examiners compare claimants' medical impairments against the SSA's listing of impairments.[29]

25. *See* 20 C.F.R. § 404.1505 (2015).

26. *See* CTR. ON BUDGET & POLICY PRIORITIES, CHART BOOK: SOCIAL SECURITY DISABILITY INSURANCE 1 (2015), http://www.cbpp.org/sites/default/files/atoms/files/7-21-14socsec-chartbook.pdf [http://perma.cc/LP7X-N7DN]. The average cash award was $1129.61 for a disabled worker in March 2013. *See* WILLIAM R. MORTON, CONG. RESEARCH SERV., SOCIAL SECURITY DISABILITY INSURANCE (SSDI) REFORM: AN OVERVIEW OF PROPOSALS TO REDUCE THE GROWTH IN SSDI ROLLS 3 (2013), http://fas.org/sgp/crs/misc/R43054.pdf [http://perma.cc/LT5M-LNVG].

27. *See* MORTON, *supra* note 26, at 3.

28. *Id.*

29. *Id.*

If DDS denies a claim, the claimant may seek reconsideration and then appeal to ODAR.[30] At the ODAR stage, claimants receive hearings before ODAR judges who review claims de novo.[31] In rare cases, claimants who do not prevail in their hearings appeal to the SSA's Appeals Council and file suit in federal court.[32] Attorneys are involved in all stages of the SSDI process, but as a practical matter, attorneys have limited ability to influence the outcome of claims outside of ODAR hearings.[33]

More than 1300 ODAR judges decide approximately 700,000 claims a year.[34] Each ODAR judge typically hears thirty to forty cases a month.[35] The hearings are generally short and feature few witnesses.[36] The SSA is not represented, and ODAR judges conduct hearings in a nonadversarial manner.[37] Cases are decided based on the materials contained in the DDS files as well as any new materials submitted by claimants and their attorneys.[38]

Ethical rules and ODAR regulations would seem to require that attorneys disclose adverse evidence, including adverse medical evidence. Rule 3.3(d) of the Model Rules of Professional Conduct requires attorneys in ex parte proceedings to "inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse."[39] One state bar has specifically held that Rule 3.3(d) applies to SSDI proceedings.[40]

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30. *Id.* at 4.

31. *See* Rains, *supra* note 20, at 369.

32. One practitioner has described the Appeals Council as "Kafkaesque[:] . . . remote and inscrutable and plagued by inexplicable delays. . . . For most claimants, the Appeals Council is nothing more than a huge obstacle in the path to a federal court appeal." CHARLES T. HALL, SOCIAL SECURITY DISABILITY PRACTICE § 4:4, Westlaw (database updated Aug. 2015).

33. *Id.* § 1:5.

34. *See Hearings and Appeals*, SOC. SEC. ADMIN., http://ssa.gov/appeals/about_odar.html (last visited Mar. 27, 2016) [http://perma.cc/XDL4-66EM]. Of course, the SSA, as a whole, processes millions more annually. *See* Jon C. Dubin, *The Labor Market Side of Disability-Benefits Policy and Law*, 20 S. CAL. REV. L. & SOC. JUST. 1, 5 (2011).

35. *See* HALL, *supra* note 32, § 3:1.

36. *Id.* § 3:28.

37. *See* Swank, *supra* 21, at 170. ODAR judges are employees of the SSA but, as the Supreme Court has ruled, do not function as advocates or adversaries. *See* Richardson v. Perales, 402 U.S. 389, 410 (1971) ("The social security hearing examiner, furthermore, does not act as counsel. He acts as an examiner charged with developing the facts."); *see also* Sims v. Apfel, 530 U.S. 103, 110–11 (2000) (describing SSDI proceedings as "inquisitorial").

38. *See* Rains, *supra* note 20, at 370. ODAR judges are able to call the SSA's medical and vocational experts to testify, but few do so because of caseload pressure and budgetary constraints. *See* Frank S. Bloch, *The Role of Medical Personnel in the Social Security Administration's Disability Determination and Appeals Process: Some Proposals for Reform*, 15 MENTAL & PHYSICAL DISABILITY L. REP. 91, 93 (1991); *cf.* Swank, *supra* note 21, at 169 (arguing that eliminating the SSA's large backlog of cases is its overriding priority). Even when these experts do appear, they opine only on the evidence contained in the record and do not conduct their own analyses. *See* Bloch, *supra*, at 93–94.

39. MODEL RULES OF PROF'L CONDUCT r. 3.3(d) (AM. BAR ASS'N 2013).

40. *See* Ala. State Bar Ass'n Disciplinary Comm'n, Formal Op. 1993-06 (1993). *But see* N.C. State Bar, 98 Formal Ethics Op. 1 (1999) (claiming that SSDI proceedings are not ex parte because ODAR judges can develop the record). As Professor Robert Rains notes, the

In addition, SSA regulations long required claimants to produce evidence that is "material" to the disability determination, and the regulations were recently amended to require the production of evidence that "relates" to the determination.[41] Lawyers are also obligated "to assist the claimant in furnishing medical evidence that . . . [the SSA] can use to reach conclusions about the claimant's medical impairment(s)."[42]

Notwithstanding these authorities, the organized bar has been steadfast that disclosing unfavorable information in SSDI proceedings would violate attorneys' obligations to zealously represent their clients and maintain client confidences.[43] The bar defeated 2005 reforms that would have expressly required the production of unfavorable evidence.[44] The most recent amendments were opposed unsuccessfully on similar grounds even though they do not explicitly address adverse evidence.[45] In proposing these new disclosure rules, the SSA specifically noted that it does not currently receive complete evidence from SSDI practitioners.[46]

As commentators have noted, the bar's position that lawyers cannot disclose unfavorable evidence in SSDI proceedings is difficult to reconcile with state ethics rules.[47] Nevertheless, this position appears to reflect the views of many practitioners[48] and, as recently as 2012, was not contested by the SSA.[49]

It is difficult to discern how many individuals who receive SSDI are not medically impaired and are capable of engaging in remunerative work. Nevertheless, there are undoubtedly a substantial number. Although SSDI is not a form of unemployment insurance, SSDI applications increased 27.3

North Carolina ethics opinion replaced an earlier opinion that mandated disclosure without explaining the change of position. Rains, *supra* note 20, at 386.

41. *See* 20 C.F.R. §§ 404.1512, 416.912(a) (2015). For a discussion of the amendment and its purpose, see generally Robert W. Pratt, *Developing the Record in Disability Cases: A Conundrum for Lawyers and Judges*, SOC. SEC. NEWS, Spring 2015, at 4, 16.

42. 20 C.F.R. § 404.1740(b)(1).

43. *See* Rains, *supra* note 20, at 380–81.

44. *See id.* at 381–82.

45. Pratt, *supra* note 41, at 4.

46. *See* Submission of Evidence in Disability Claims, 79 Fed. Reg. 9663, 9664 (proposed Feb. 11, 2014) (to be codified at 20 C.F.R. pts. 404, 405, 416).

47. Confidentiality rules are not absolute and allow an exception for compliance with federal law. *See, e.g.*, Pratt, *supra* note 41, at 4, 16; Rains, *supra* note 20, at 390–91; *see also* Vt. Bar Ass'n, Advisory Ethics Op. 95-08 (1995) (suggesting that a lawyer's knowing concealment of information material to the benefit determination could constitute a fraud on the tribunal).

48. One prominent firm that represented 200,000 individuals before ODAR from 2001 to 2010 apparently "red flags" adverse medical evidence so that it is not disclosed to ODAR. *See* Damian Paletta & Dionne Searcey, *Two Lawyers Strike Gold in U.S. Disability System*, WALL STREET J. (Dec. 22, 2011), http://online.wsj.com/articles/SB10001424052970203518404577096632862007046 [http://perma.cc/BM56-334U].

49. In 2012, the SSA Commissioner testified that lawyers were not expected to submit adverse evidence to ODAR. *See* Charles T. Hall, *Commissioner Says Attorneys Have No Obligation to Submit Adverse Medical Evidence in Social Security Disability Cases*, SOC. SEC. NEWS (May 23, 2012, 2:45 PM), http://socsecnews.blogspot.com/2012/05/commissioner-says-attorneys-have-no.html [http://perma.cc/YV8W-7S9E].

percent and rewards by 20.3 percent from 2007 to 2009.[50] The increase in applications and awards from 2007 to 2009 can likely be attributed to the economic recession, not rising incidents of medical impairments among working Americans.[51]

Attorneys who do not disclose adverse evidence undermine the adjudication of SSDI claims even if they do not advance fraudulent claims. As a long-time ODAR judge has written,

> The purpose of a Social Security Act . . . is to provide assistance for those who cannot work due to a medically determinable impairment. Just as with any other welfare program, the goal is to determine eligibility for benefits. The only way to do this is to consider all of the medical and vocational information, not just the favorable information. The goal of the Social Security disability programs should not be to reward those who cheat or hide evidence the most successfully.[52]

The one-sided presentation of evidence at the ODAR stage may also explain why claimants are far more likely to prevail in ODAR hearings than in other stages of SSA review.[53]

Congress could seek to reform the administration of SSDI claims in various ways, including by making ODAR hearings adversarial.[54] But there would be less need for potentially costly reforms that direct monies away from beneficiaries if attorneys acknowledged that they had responsibilities to the SSDI process as well as their clients.[55]

B. Medicaid Planning

Medicaid is also being transformed through attorneys' tactics in representing individual clients. In particular, attorneys' participation in "Medicaid planning" allows middle-class and even upper-class Americans to transfer the costs of long-term care to the government.[56]

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50. *See* MORTON, *supra* note 26, at 14–15; *see also* JERRY L. MASHAW, BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS 34 (1983) ("The disability program could easily turn into a residual unemployment program. . . . The program thus requires very tight administration to maintain its integrity.").

51. *See* Swank, *supra* note 21, at 157–58.

52. *See id.* at 171 (footnotes omitted).

53. In 2010, for example, 62 percent of claims prevailed in hearings before ODAR judges, whereas 35 percent prevailed at the initial level and 13 percent at the reconsideration level. *See* MORTON, *supra* note 26, at 17–18.

54. *See generally id.* at 22–24 (analyzing proposed congressional reforms).

55. *See* Pratt, *supra* note 41, at 16. Even if SSA regulations unambiguously mandated disclosure of adverse evidence, it might not change attorney behavior because the SSA has a poor record of disciplining representatives who appear before it. *See* Swank, *supra* note 21, at 173. Nonattorneys are sanctioned at a higher rate than attorneys. *See id.* In addition, attorneys and nonattorney representatives can obviate the need for disclosure by simply not seeking out information that could potentially undermine their clients' claims. David Luban describes this phenomenon as "contrived ignorance." *See* David Luban, *Contrived Ignorance*, 87 GEO. L.J. 957, 970–71 (1999). One prominent SSDI firm has already mastered this tactic by delegating review of files to staff persons. *See* Paletta & Searcey, *supra* note 48.

56. *See generally* Timothy L. Takacs & David L. McGuffey, *Medicaid Planning: Can It Be Justified?: Legal and Ethical Implications of Medicaid Planning*, 29 WM. MITCHELL L.

Medicaid was passed as part of the Social Security Amendments of 1965.[57] It was designed to provide the poor and disabled with basic medical care, but is now the primary source of funding for long-term care.[58] Medicaid is administered by the states, although much of its funding derives from the federal government.[59]

Medicaid eligibility rules are stringent. Only certain groups—such as the disabled, elderly, and parents and their children—are able to claim benefits.[60] Income requirements are also very low, especially in states that have refused to participate in the PPACA's Medicaid expansion.[61] For example, to be eligible for Medicaid, parents must earn less than $27,310 in states that have accepted the expansion and less than $9103 in states that have not.[62]

Many elderly Americans rely on Medicaid to pay for their long-term health needs because Medicare generally only pays for acute, short-term care,[63] and long-term care is prohibitively expensive.[64] The Kaiser Foundation estimated that the median cost of a year of home health aide services was $45,800 a year in 2014, and nursing home care was $91,250.[65]

REV. 111, 131 (2002) ("Effective Medicaid planning guides the applicant through the minefield of potential ineligibility. The effective Medicaid planner helps an applicant preserve assets, while fitting within the financial criteria for Medicaid eligibility.").

57. Social Security Amendments of 1965, Pub. L. No. 89-97, tit. XIX, 79 Stat. 286, 343–53 (codified as amended at 42 U.S.C. §§ 1396–1396w-5 (2012)).

58. *See* John M. Broderick, *To Transfer or Not to Transfer: Congress Failed to Stiffen Penalties for Medicaid Estate Planning, but Should the Practice Continue?*, 6 ELDER L.J. 257, 260 (1998). In 2013, Medicaid was responsible for 51 percent of total American spending on long-term care. *See* ERICA L. REAVES & MARYBETH MUSUMECI, KAISER COMMISSION ON MEDICAID AND UNINSURED, MEDICAID AND LONG-TERM SERVICES AND SUPPORTS: A PRIMER 4 fig.3 (2015), https://kaiserfamilyfoundation.files.wordpress.com/2015/12/8617-02-medicaid-and-long-term-services-and-supports-a-primer.pdf [http://perma.cc/4FGY-WK4K].

59. *See* Takacs & McGuffey, *supra* note 56, at 123. The federal government pays a fixed percentage of what the state pays, with poorer states receiving a higher percentage. *See* CTR. ON BUDGET & POLICY PRIORITIES, POLICY BASICS: INTRODUCTION TO MEDICAID 4 (2015), http://www.cbpp.org/sites/default/files/atoms/files/policybasics-medicaid_0.pdf [http://perma.cc/L4PJ-R3C4].

60. *See* Roger A. McEowen & Neil E. Harl, *Estate Planning for the Elderly and Disabled: Organizing the Estate to Qualify for Federal Medicaid Extended Care Assistance*, 24 IND. L. REV. 1379, 1381 n.14 (1991).

61. *See* JULIA PARADISE, KAISER COMM'N ON MEDICAID & THE UNINSURED, MEDICAID MOVING FORWARD 2 (2015), http://files.kff.org/attachment/issue-brief-medicaid-moving-forward [http://perma.cc/6WBV-TS6C].

62. *Id.* at 3 fig.4.

63. *See* REAVES & MUSUMECI, *supra* note 58, at 3.

64. *See id.* at 3–4. The elderly represent less than 10 percent of Medicaid enrollees but are responsible for over a fifth of its total cost. *See* PARADISE, *supra* note 61, at 2 fig.2. These costs are likely to grow significantly as the population ages. Indeed, by 2050, one-fifth of the U.S. population will be over sixty-five, and a third of these individuals will have cognitive or functional limitations that will require long-term care. *See* CONG. BUDGET OFFICE, RISING DEMAND FOR LONG-TERM SERVICES AND SUPPORTS FOR ELDERLY PEOPLE 1 (2013), https://www.cbo.gov/sites/default/files/113th-congress-2013-2014/reports/44363-LTC.pdf [http://perma.cc/EHY4-PAQG].

65. REAVES & MUSUMECI, *supra* note 58, at 3.

Even individuals who can afford such sums may prefer to shift the cost onto the government to preserve their wealth for their heirs.[66]

The federal government has sought to prevent individuals from voluntarily impoverishing themselves in order to qualify for Medicaid. With some exceptions, any transfers of assets for less than fair market value within three years of the Medicaid application renders the transferor ineligible for Medicaid.[67] Any transfers to a trust within five years of the application also make the transferor ineligible.[68]

Lawyers have nevertheless devised numerous financial impoverishment techniques to allow clients to preserve wealth and qualify for Medicaid. They include having clients make gifts or transfers prior to the relevant "look-back" period, converting countable assets to noncountable assets, and prepaying for future expenses.[69] Some lawyers even counsel divorce as a Medicaid planning strategy, with the spouse in need of care receiving virtually none of the couple's property.[70]

Lawyers are often reluctant to discuss Medicaid planning and their role therein.[71] But Congress was sufficiently concerned about the practice that it criminalized Medicaid-related asset transfers in 1996.[72] The law, which came to be known as the "Granny Goes to Jail Act," was quickly repealed in the face of fierce public opposition.[73] A subsequent effort to criminalize the counseling of Medicaid planning was also stymied after the New York State Bar Association successfully enjoined its enforcement on First Amendment grounds.[74]

That Congress has been unable to prohibit Medicaid planning does not signify that all Medicaid planning strategies are ethical. Some strategies are clearly prohibited by existing ethics rules. For example, attorneys who backdate transfers of assets so that they occur outside of the "look-back"

66. An added complication is that wealth preservation may be in the best interests of a client's potential heirs but not of the client. For a useful discussion of the conflicts of interest that can arise in this context, see David M. Rosenfeld, *Whose Decision Is It Anyway?: Identifying the Medicaid Planning Client*, 6 ELDER L.J. 383, 389–93 (1998).

67. *See* 42 U.S.C. § 1396p(c)(1)(B) (2012).

68. *Id.*

69. *See* Miller, *supra* note 22, at 93–95. An example of converting countable assets to noncountable assets would be to use cash to make home improvements because "household goods" and "personal effects" are not counted as resources for Medicaid purposes. *See* 42 U.S.C. § 1382b(a)(2)(A).

70. *See* Miller, *supra* note 22, at 96.

71. *See generally* Takacs & McGuffey, *supra* note 56, at 134–35 ("Many elder law attorneys are sensitive about the public image associated with Medicaid planning. Medicaid planners are often accused of 'gaming the system' for their undeserving and overprivileged clients.").

72. *See* Joire, *supra* note 23, at 801 (citing the court's discussion of former 42 U.S.C. § 1320a-7b(a)(6) in *New York State Bar Ass'n v. Reno*, 999 F. Supp. 710, 712 (N.D.N.Y. 1998)).

73. *See id.* at 801–02.

74. *N.Y. State Bar Ass'n*, 999 F. Supp. at 715 (enjoining the enforcement of current 42 U.S.C. § 1320a-7b(a)(6)).

period engage in fraud and can be disbarred.[75] In addition, because elderly persons are not infrequently suffering from some form of diminished capacity, attorneys should not assist with Medicaid planning when it is not truly sought by their clients and is being urged by potential heirs.[76]

Even strategies that do not run afoul of current ethics rules may be unethical. Americans do not have a right to Medicaid benefits, and it is unclear why attorneys should be able to assist clients to engage in transactions that have no purpose other than Medicaid qualification.[77] Indeed, lawyers have been found criminally liable for executing substanceless transactions in the tax and securities contexts.[78] That these lawyers aided their clients in masking liabilities as opposed to claiming benefits should be irrelevant.[79]

Medicaid planning is nevertheless commonplace. Studies estimate that anywhere from 5 percent to 54 percent of current Medicaid beneficiaries have engaged in Medicaid planning.[80] Even if the lower estimates are accurate, as Medicaid planning is generally used by more affluent individuals, it predominantly benefits the nonpoor.[81] As with SSDI,

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75. *See* Toledo Bar Ass'n v. Cook, 868 N.E.2d 973, 978–81 (Ohio 2007) (upholding the disbarment of an Ohio attorney who backdated a deed that transferred ownership of a farm to qualify a client for Medicaid).

76. *See* MODEL RULES OF PROF'L CONDUCT r. 1.14 cmt. 3 (AM. BAR ASS'N 2013); Katherine C. Pearson, *The Lawyer's Ethical Considerations in Medicaid Planning for the Elderly: Representing Smith and Jones*, 76 PA. B. ASS'N Q. 1, 9 (2005).

77. *See* Jeffery L. Soltermann, *Medicaid and the Middle Class: Should the Government Pay for Everyone's Long-Term Health Care?*, 1 ELDER L.J. 251, 277 (1993) ("Medicaid is not an earned benefit, transferred at the end of one's productive life by a grateful state. It is instead a need-based poverty program."). Because of the limited resources of state Medicaid agencies, Medicaid-related transfers often go undetected. As the Government Accountability Office has documented, only twenty-four states require documentation of current and historical financial and investment resources. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, MEDICAID LONG-TERM CARE: INFORMATION OBTAINED BY STATES ABOUT APPLICANTS' ASSETS VARIES AND MAY BE INSUFFICIENT 13 (2012), http://www.gao.gov/assets/600/593053.pdf [http://perma.cc/73ZG-3Y5U].

78. For example, the Dallas law firm of Jenkins & Gilchrist designed tax shelters using options on currency exchanges that would never be triggered but nevertheless were booked as losses to offset capital gains. *See* TANINA ROSTAIN & MILTON C. REGAN, JR., CONFIDENCE GAMES: LAWYERS, ACCOUNTANTS, AND THE TAX SHELTER INDUSTRY 194–96 (2014). The law firm paid a $76 million fine to the IRS for aiding and abetting tax fraud and then closed. *See* Press Release, IRS, Jenkens & Gilchrist Admits It Is Subject to $76 Million IRS Penalty (Mar. 29, 2007), https://www.irs.gov/uac/Jenkens-&-Gilchrist-Admits-It-Is-Subject-to-$76-Million-IRS-Penalty [http://perma.cc/27EC-TGF9]. Similarly, a lawyer for Refco, a bankrupt financial services company, was found guilty of securities and wire fraud for preparing documents for transfers between Refco entities during accounting review periods so that Refco could mask its indebtedness. *See* Sung Hui Kim, *Naked Self-Interest?: Why the Legal Profession Resists Gatekeeping*, 63 FLA. L. REV. 129, 129–30 (2011).

79. Individuals seeking Medicaid benefits may be more sympathetic than large financial institutions and wealthy individuals, but attorneys' ethical responsibilities should not be contingent on subjective notions of desert.

80. *See* Jinkook Lee, *Medicaid and Family Wealth Transfer*, 46 GERONTOLOGIST 6, 8 (2006). A particular difficulty in assessing Medicaid planning's prevalence is that planning techniques vary widely and beneficiaries are understandably reluctant to discuss it. *See id.* at 12.

81. *See id.* at 9; *see also* Soltermann, *supra* note 77, at 276–77 ("[A] major piece of social engineering—the conversion of a need-based program [like Medicaid] for the poor to

lawyers have made a limited and circumscribed government program far more expansive than it was intended to be.

II. THE MACROETHICS OF SSDI AND MEDICAID LAWYERS

This Article has thus far described the controversy over lawyers' nondisclosure of adverse evidence in SSDI proceedings and participation in Medicaid planning without categorically condemning these practices. Whether nondisclosure and Medicaid planning are ethical will naturally depend on the circumstances. Assessing a client's disability and financial status also inevitably involves a great deal of subjectivity,[82] and attorneys are generally entitled to take "whatever lawful and ethical measures are required to vindicate a client's cause or endeavor."[83]

One can conceive of uncontroversial examples of nondisclosure and Medicaid planning. Indeed, as one state bar association has suggested, an attorney should not be forced to disclose a medical opinion that questions the severity of his or her client's impairment when the doctor performing it lacked the necessary qualifications and there is other very reliable evidence of impairment.[84] Under these circumstances, the opinion would not be material to a disability determination, and ODAR would be able to make an informed decision without it.[85] Moreover, lawyers should obviously be entitled to advise clients on the nuances of Medicaid eligibility, which would include informing clients that converting cash into household items or transferring assets to needy children would not disqualify one from receiving Medicaid.[86]

However, credible reports suggest that lawyers are reluctant to disclose even reliable evidence in SSDI cases and may assist with aggressive forms of Medicaid planning.[87] The organized bar's vigorous defense of nondisclosure and Medicaid planning, and its defeat of administrative and

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a more universal entitlement program—is underway in this country, and lawyers are inevitably involved.").

82. *See generally* Alice G. Abreu & Richard K. Greenstein, *Defining Income*, 11 FLA. TAX REV. 295, 320 (2011) ("Some realized accessions over which the taxpayer has dominion are income, others are not taxed despite the absence of a statutory or even administratively stated exclusion . . . ."); Matthew Diller, *Entitlement and Exclusion: The Role of Disability in the Social Welfare System*, 44 UCLA L. REV. 361, 386 (1996) ("[D]isabilty is not an objective status . . . . Virtually all individuals are capable of some form of productive activity. . . . [T]he establishment of eligibility criteria and the assessment of whether those criteria are met require reference to a normative view of the nature and intensity of the obligation to work.").

83. MODEL RULES OF PROF'L CONDUCT r. 1.3 cmt. 1 (AM. BAR ASS'N 2013).

84. *See* Vt. Bar Ass'n, Advisory Ethics Op. 95-08 (1995).

85. MODEL RULES OF PROF'L CONDUCT r. 3.3(d).

86. *See* 42 U.S.C. §§ 1382b(a)(2)(A), (c)(1)(C)(ii)(III) (2012). Ethical rules also prohibit lawyers from counseling or assisting fraud but not from advising clients as to the consequences of potential courses of conduct. *See* MODEL RULES OF PROF'L CONDUCT r. 1.2 cmt. 9.

87. *See* Mary Beth Franklin, *The Crackdown on Medicaid Planning*, KIPLINGER (Nov. 2007), http://www.kiplinger.com/article/insurance/T037-C000-S002-the-crackdown-on-medicaid-planning.html#b5dRZpFZu4Fcj9b2.99 [http://perma.cc/WB7Z-EG8H]; Paletta & Searcey, *supra* note 48.

legislative initiatives to curtail them, mean that lawyers have little to fear for continuing to engage in these practices. Furthermore, with relatively low fees earned on a per matter basis and substantial competition for SSDI and Medicaid work, few attorneys will wish to alienate potentially fee-paying clients by engaging (or failing to engage) in any actions that could interfere with their clients' ability to claim SSDI or Medicaid benefits.[88]

The nondisclosure of adverse evidence and participation in Medicaid planning nevertheless impose significant costs on the United States. First and most obvious, the cost to taxpayers is substantial when claimants receive yearly SSDI and Medicaid benefits that they likely would not have been awarded but for their lawyers' use of strategies to circumvent eligibility criteria.

Second, SSDI and Medicaid claimants who do meet eligibility criteria are harmed when individuals who are not medically impaired or financially impoverished receive benefits. The funding for SSDI and Medicaid is limited.[89] Benefits to individuals who do not meet eligibility criteria deplete the funds available to intended beneficiaries. Of equal concern is that those who are in most need of assistance will face skepticism and delay as administrators attempt to weed out undeserving claimants.[90] Some may even be denied benefits if they attempt to navigate these systems without experienced counsel.

Third, the future funding of SSDI and Medicaid is jeopardized when the public perceives that claimants and their lawyers are exploiting these

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88. The federal government caps representatives' fees in SSDI cases to either 25 percent of the past-due benefits or $6000, whichever is lower. *See* 20 C.F.R. § 404.1730(b) (2015); Maximum Dollar Limit in the Fee Amount Process, 74 Fed. Reg. 6080 (Jan. 29, 2009). While fee information for Medicaid planning is not as readily available, according to the American Counsel of Aging, attorneys' fees can range from $2500 for individuals with relatively simple estates to $10,000 for individuals with significant assets. *See* Am. Council on Aging, *Medicaid Planners: Pros & Cons of Public and Private Assistance*, MEDICAID PLANNING ASSISTANCE, http://www.medicaidplanningassistance.org/types-of-medicaid-planners#elderlaw-attorney (last visited Mar. 27, 2016) [http://perma.cc/EJ5L-2RWR]. Nonlawyers who provide Medicaid planning services generally charge less. *Id.*

89. The SSDI fund was on pace to be insolvent by 2016. *See, e.g.*, Jason J. Fichtner, *Social Security Disability Fund Will Run Empty Next Year*, MARKETWATCH (Apr. 3, 2015, 10:43 AM), http://www.marketwatch.com/story/social-security-disability-fund-will-run-empty-next-year-2015-04-03 [http://perma.cc/D93F-L7DX]. Government expenditures for long-term care are expected to comprise 3.3 percent of the GDP by 2050. *See* CONG. BUDGET OFFICE, *supra* note 64, at 4.

90. This is not merely a theoretical concern. To avert SSDI's insolvency and drastic cuts to beneficiaries, Congress recently reallocated benefits from the general social security fund to SSDI and, in so doing, required that DDS review of SSDI applications include reviews from doctors and psychologists, which is likely to lead to greater delays in processing applications. *See* Robert Pear, *Agreement Is Seen As Short-Term Relief for Medicare and Social Security*, N.Y. TIMES (Oct. 27, 2015), http://www.nytimes.com/2015/10/28/us/agreement-is-seen-as-short-term-relief-for-medicare-and-social-security.html?_r=0 [http://perma.cc/SMG9-9P5C]. As Professor Mashaw observes, efforts to reduce false positives (i.e., awards to applicants who do not meet eligibility criteria) will necessarily increase the number of false negatives (i.e., denials to applicants who do). MASHAW, *supra* note 50, at 84–85; *see also id.* at 129 (questioning whether the pursuit of best available evidence justifies the cost in terms of delay and administrative expenses).

programs. Both programs are frequently attacked on this basis.[91] If these attacks gain sufficient traction, political leaders may scale back these—and potentially other—programs that constitute the fragile American social safety net.

Fourth, even if these programs are not dramatically altered, the ability of comparatively advantaged individuals to qualify for SSDI and Medicaid may imperil progressive reforms of these programs.[92] There is likely to be no political impetus for formally loosening eligibility criteria when attorneys can qualify individuals for benefits who are neither severely impaired nor poor.[93] This disproportionately harms individuals who may be in genuine need but mistakenly believe that only the truly disabled and impoverished are able to receive benefits.

Defenders of these practices may argue that attorneys should be unconcerned with such considerations because their only obligations are to their clients.[94] Nevertheless, while "undiluted partisanship" on the client's behalf may be required in criminal defense and perhaps other adversarial contexts, lawyers should conceive of their roles differently when they

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91. *See, e.g.*, Jillian Kay Melchior, *SSA Scandal: Outrageous Judges Rubber-Stamp Disability Benefits to the Undeserving*, NAT'L REV. (June 12, 2014, 4:00 AM), http://www.nationalreview.com/article/380168/ssa-scandal-jillian-kay-melchior [http://perma.cc/BA2M-KECL]; Diana Conway, *My Turn: Cheating Uncle Sam for Mom & Dad*, NEWSWEEK (Jan. 27, 2003), http://www.elderlawnewyork.com/pdf/My-Turn-Cheating-Uncle-Sam-Mom-Dad.pdf [https://perma.cc/H27F-7M2L].

92. Professor Fred Zacharias has questioned the notion that lawyers will work in support of substantive progressive ideals. *See* Fred C. Zacharias, *True Confessions About the Role of Lawyers in a Democracy*, 77 FORDHAM L. REV. 1591, 1592 (2009). In his view, lawyers' devotion to clients' interests prevents them from promoting societal values. *See id.* at 1599.

93. The political preferences of low- and middle-class individuals are rarely translated into policy unless those views mirror those of wealthier individuals. *See generally* Benjamin I. Sachs, *The Unbundled Union: Politics Without Collective Bargaining*, 123 YALE L.J. 148, 150 (2013) ("[T]he poor and middle class have a major political problem today. The problem is that the government is strikingly unresponsive to their views.").

94. As commentators have observed, American lawyers largely have internalized Lord Brougham's belief that the attorney's only duty is to his or her client. *See, e.g.*, Russell G. Pearce, *Lawyers As America's Governing Class: The Formation and Dissolution of the Original Understanding of the American Lawyer's Role*, 8 U. CHI. L. SCH. ROUNDTABLE 381, 407–10 (2001) (reviewing empirical literature on the rise of the "hired gun" conception as the dominant ideology among U.S. lawyers); Thomas L. Shaffer, *The Unique, Novel, and Unsound Adversary Ethic*, 41 VAND. L. REV. 697, 697 (1988); *see also* Eli Wald, *Resizing the Rules of Professional Conduct*, 27 GEO. J. LEGAL ETHICS 227, 266 (2014) (criticizing the "hired gun" basis of the Model Rules). Lord Brougham famously declared, while defending Queen Caroline from charges of adultery, that

> an advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, among them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others. Separating the duty of a patriot from that of advocate, he must go on reckless of consequences, though it should be his unhappy fate to involve his country in confusion.

2 THE WHOLE PROCEEDINGS ON THE TRIAL OF HER MAJESTY, CAROLINE AMELIA ELIZABETH, QUEEN OF ENGLAND 2 (John Fairburn ed., 1820).

represent clients asserting claims on limited pools of government funds.[95] To restrict the secret welfare state's growth, lawyers must be willing to act as gatekeepers of public benefits programs.

III. ATTORNEYS AS PUBLIC BENEFITS GATEKEEPERS

An attorney is a "representative of clients, an officer of the legal system[,] and a public citizen having special responsibility for the quality of justice."[96] These roles sometimes conflict.[97] But lawyers qua representatives are not obligated to use all arguably lawful means to enable their SSDI and Medicaid clients to receive benefits.[98] Lawyers can, consistent with their ethical obligations, act as gatekeepers of Medicaid, SSDI, and other public benefits programs.

Contemporary ethics rules require lawyers zealously to pursue only their clients' "*legitimate* interests."[99] Clients who do not qualify for SSDI and Medicaid do not have a legitimate interest in receiving benefits. Even with respect to clients who do have cognizable claims to benefits, lawyers are not "bound . . . to press for every advantage."[100] They must also "avoid conduct that undermines the integrity of the adjudicative process."[101] When lawyers refuse to disclose adverse evidence in SSDI proceedings or to assist with Medicaid planning, they are choosing to privilege their clients' claims over other societal interests.

Undiluted partisanship on the client's behalf is especially unwarranted because of the nonadversarial nature of the SSDI and Medicaid regimes.[102]

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95. Professor Tanina Rostain has claimed that "undiluted partisanship remain[s] the default orientation of lawyering." Tanina Rostain, *Ethics Lost: Limitations of Current Approaches to Lawyer Regulation*, 71 S. CAL. L. REV. 1273, 1278 (1998). Even scholars who have been harshly critical of the partisanship ethos view it as justified in the criminal defense context. *See, e.g.*, David Luban, *Are Criminal Defenders Different?*, 91 MICH. L. REV. 1729, 1730 (1993); W. Bradley Wendel, *Public Values and Professional Responsibility*, 75 NOTRE DAME L. REV. 1, 48 (1999) ("Arguments for a strong adversarial ethic of loyalty in cases where an isolated individual is overwhelmed by the power of the state become distorted when they are applied in other contexts.").

96. MODEL RULES OF PROF'L CONDUCT pmbl. (AM. BAR ASS'N 2013).

97. *See, e.g.*, Rostain, *supra* note 95, at 1278; Wald, *supra* note 94, at 266.

98. The notion that lawyers should only be committed to their clients' interests was regarded as "monstrous" for much of the nineteenth and twentieth centuries. *See* Michael Ariens, *Brougham's Cost*, 35 N. ILL. U. L. REV. 263, 281–96 (2015). The ethic was adopted by the organized bar as part of an effort to improve the quality of criminal defense. *See id.* at 307–08. According to Professor Arians, it quickly gained traction among American lawyers generally because it served their material interests. *See id.* at 314. He also credits Professor Freedman for bringing about this shift. *See id.* at 309.

99. MODEL RULES OF PROF'L CONDUCT pmbl. (emphasis added).

100. *Id.* r. 1.3 cmt. 1; *see also* Wald, *supra* note 94, at 250 ("[A]llowing lawyers to act as unchecked client-centered representatives exposes the legal system and the public to abuse by clients.").

101. MODEL RULES OF PROF'L CONDUCT r. 3.3 cmt. 2.

102. For attorneys' duties in nonadversarial proceedings, see *id.* r. 3.3 cmt. 14; MODEL CODE OF PROF'L RESPONSIBILITY EC 7-15 (AM. BAR ASS'N 1980) ("[W]here the applicable rules of the agency impose specific obligations upon a lawyer, it is his duty to comply therewith . . . ."); *id.* at EC 7-15 n.25 ("But as an advocate before a service which itself represents the adversary point of view, where his client's case is fairly arguable, a lawyer is under no duty to disclose its weaknesses . . . ." (citing ABA Op. 314 (1965))).

The government has no interest in having valid SSDI and Medicaid claims go unpaid.[103] Nor does it employ individuals to advocate against claimants.[104] Consequently, when lawyers fail to disclose adverse evidence or use techniques that make their clients appear financially impoverished, the SSA and state Medicaid agencies are unable to readily differentiate deserving from undeserving claimants. Individual instances of nondisclosure of adverse evidence and Medicaid planning may have a minimal effect on the solvency of SSDI and Medicaid; collectively, they threaten the future of these programs and the welfare of those who depend on them.[105]

Of course, many SSDI and Medicaid clients are sympathetic individuals, and eligibility criteria for SSDI and Medicaid are quite stringent. Lawyers can and should advocate for different eligibility rules. However, it does not follow that lawyers should routinely assist clients to circumvent eligibility criteria until such a time as these programs are reformed.[106] Lawyers are not ethically required to advance all nonfrivolous claims to SSDI and Medicaid benefits.[107]

Indeed, rather than focusing their efforts on circumvention, lawyers could advise clients with weak SSDI and Medicaid claims of alternate sources of assistance. Advising clients on their available options is a core attorney function.[108] Individuals who are struggling to find work might be entitled to unemployment insurance and benefits under the Temporary Assistance for Needy Families program.[109] Elderly clients should be urged to purchase long-term care insurance, which may be less expensive than paying for Medicaid planning services.[110] It should not be assumed that clients have no alternatives besides seeking SSDI and Medicaid.

Although the lawyer qua zealous advocate is a more familiar archetype, lawyers are expected to serve as gatekeepers and push back against their

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103. *See* MASHAW, *supra* note 50, at 81.

104. *See id.*

105. Professor Luban has written of "collectively harmful actions" that are wrong by virtue of their collectively harmful character even if they are not individually harmful. *See* David Luban, *The Social Responsibilities of Lawyers: A Green Perspective*, 63 GEO. WASH. L. REV. 955, 963 (1995). Examples of permissible nondisclosure of adverse evidence and Medicaid planning that were discussed in Part I would be "collectively harmful."

106. In fact, as noted in Part II, such action makes it less likely that these programs will be made more generous in the future.

107. *See* Jones v. Barnes, 463 U.S. 745, 751 (1983). Lawyers are prohibited only from bringing claims for which "there is [no] basis in law and fact for doing so that is not frivolous." MODEL RULES OF PROF'L CONDUCT r. 3.1 (AM. BAR ASS'N 2013).

108. *See id.* r. 2.1.

109. Unemployment compensation is run jointly by the federal government and individual states. *See* 20 C.F.R. §§ 603–616 (2015). The provisions of the Temporary Assistance for Needy Families program are found in 45 C.F.R. §§ 260–284 (2015).

110. Long-term care insurance is readily available but currently covers only 7.2 percent of the United States's long-term care expenses. *See* Peter Kyle, *Confronting the Elder Care Crisis: The Private Long-Term Care Insurance Market and the Utility of Hybrid Products*, 15 MARQ. ELDER'S ADVISOR 101, 106 (2013).

clients' misguided objectives.[111] As Professor Zacharias has written, "[T]he lawyer's job consists as much of standing in the way of misguided client pursuits as of implementing client desires. No one except misguided practitioners and cynical criminal clients truly envision the lawyer's role as assisting wrongful ends."[112]

Attorney gatekeeping is especially embedded in tax law.[113] Because taxpayers wish to minimize their tax burdens whereas the government needs tax revenue to operate, lawyers and other tax practitioners are expected to ensure that their clients pay what they owe.[114] Federal law prohibits tax practitioners from taking positions to lower their clients' payment obligations unless there is "substantial authority" for that position.[115] With respect to the use of tax shelters, which were widely abused by high net worth individuals in the mid-1990s, the law now requires that a lawyer reasonably believe that the position is more likely than not to be sustained on the merits.[116]

The tax bar largely supported legislative and regulatory efforts that formalized tax lawyers' gatekeeping responsibilities.[117] The rise of the tax shelter industry led tax lawyers to realize that the single-minded pursuit of client interests undermined their standing and the value of professional expertise:

> As the market for tax shelters expanded, the path of least resistance was to participate. In the confines of their private offices, tax lawyers felt intense pressure to provide clients with opinions on questionable

111. For example, lawyers must disassociate themselves from client fraud and may even be required to disclose the fraud to harmed parties. *See* MODEL RULES OF PROF'L CONDUCT r. 4.1 cmt. 3. Rule 2.1 also envisions that lawyers will provide clients with their "honest assessment . . . [, which] often involves unpleasant facts and alternatives that a client may be disinclined to confront." *Id.* r. 2.1 cmt. 1. Scholars have especially focused on the role of lawyers qua gatekeepers of the capital markets. *See, e.g.*, John C. Coffee, Jr., *Can Lawyers Wear Blinders?: Gatekeepers and Third-Party Opinions*, 84 TEX. L. REV. 59, 67–72 (2005); Milan Markovic, *Subprime Scriveners*, 103 KY. L.J. 1, 30–38 (2014); *see also* Marc I. Steinberg, *The Corporate/Securities Attorney As a "Moving Target"—Client Fraud Dilemmas*, 46 WASHBURN L.J. 1, 2 (2006) ("The portrayal of the attorney as 'gatekeeper' is now a fixture in the attorney responsibility landscape.").

112. Fred Zacharias, *Lawyers As Gatekeepers*, 41 SAN DIEGO L. REV. 1387, 1405 (2004).

113. *See* William H. Simon, *Organizational Representation and the Frontiers of Gatekeeping*, 19 AM. U. J. GENDER SOC. POL'Y & L. 1069, 1073 (2011); *see also* Richard Lavoie, *Am I My Brother's Keeper?: A Tax Law Perspective on the Challenge of Balancing Gatekeeping Obligations and Zealous Advocacy in the Legal Profession*, 44 LOY. U. CHI. L.J. 813, 816 (2013) ("Over most of the modern income tax era, the prevailing view of commentators has been that the unique nature of the tax system requires tax lawyers to have an ethical obligation to create, nurture, and promote a fair tax system.").

114. *See* Lavoie, *supra* note 113, at 827 ("If taxpayers routinely report their taxes based on the most aggressive interpretation of the law, instead of an evenhanded one, then the fisc will be harmed.").

115. 26 U.S.C. § 6694(a)(2)(A) (2012); 31 C.F.R. § 10.34(a)(i)(B) (2015).

116. 26 U.S.C. § 6694(a)(2)(C); 31 C.F.R. § 10.34(a)(ii)(B).

117. *See, e.g.*, Tanina Rostain, *Sheltering Lawyers: The Organized Tax Bar and the Tax Shelter Industry*, 23 YALE J. ON REG. 77, 79 (2006); Simon, *supra* note 113, at 1073.

> transactions. The activities of the organized bar offered a space for the same lawyers collectively to resist these pressures.[118]

SSDI and Medicaid lawyers operate under many of the same competitive pressures as tax lawyers, and their actions also have a significant effect on the fiscal health of the United States. Yet neither lawyers who practice in these areas nor the organized bar have meaningfully addressed how lawyers can effectively represent their clients while averting a tragedy of the commons with respect to these public benefits programs.[119]

Lawyers may be unwilling to disclose adverse evidence in SSDI proceedings and to refrain from participation in Medicaid planning given that past legislative and administrative efforts to address these practices have failed.[120] Moreover, effective gatekeeping requires more than committing to not withholding information and to not using certain Medicaid planning strategies.[121] Lawyers must inform themselves about their client's situations so that they do not qualify clients for SSDI and Medicaid who are not medically impaired or financially impoverished and so that they may advise on alternatives.

One means to diminish the secret welfare state would be for the SSA and state Medicaid agencies to require lawyers to certify that, based on their review of the relevant client materials, there is a reasonable basis to believe that their clients qualify for benefits. This is in effect the operative regime in tax law.[122] Lawyers would make such certifications after reviewing their clients' work and medical histories for SSDI claims, and years of income and asset information for Medicaid claims. Lawyers who certify claims that do not have a reasonable basis would be subject to sanction.[123]

This proposal, if adopted, would not inhibit lawyers from representing SSDI clients with controvertible claims. Nor would it eliminate all forms of

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118. Rostain, *supra* note 117, at 118–19.

119. *See generally* Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243, 1244 (1968) (suggesting that resources that are open to all will eventually become depleted because it is in the self-interest of each individual to maximize his or her share).

120. Disciplinary rules that require attorneys to make disclosures are inherently difficult to enforce because regulators will have to learn both of the nondisclosure and the attorneys' purposeful involvement therein. For example, the U.S. Patent Office requires representatives to disclose all facts material to patentability pursuant to 37 C.F.R. § 1.56 (2015), but apparently no representative has been disciplined for failing to make the requisite disclosures. *See* Linda K. McLeod & Stephanie H. Bald, *Ethical Issues in U.S. Trademark Prosecution and TTAB Practice*, 10 J. MARSHALL REV. INTELL. PROP. L. 365, 373–74 (2011).

121. *See, e.g.*, STEPHEN N. BAINBRIDGE, CORPORATE GOVERNANCE AFTER THE FINANCIAL CRISIS 179 (2012) (arguing that due diligence is required for attorneys to function as effective gatekeepers); *see also* Markovic, *supra* note 111, at 4–5 ("Scholars have long debated whether attorneys should act as their clients' gatekeepers, but these debates presuppose that attorneys will have sufficient information to function as gatekeepers.").

122. *See* 31 C.F.R. §§ 10.22, 10.34(a) (2015).

123. *Cf. id.* § 10.51(a)(13) (stating that a practitioner may be sanctioned for "[g]iving a false opinion, knowingly, recklessly, or through gross incompetence, including an opinion which is intentionally or recklessly misleading, or engaging in a pattern of providing incompetent opinions on questions arising under the Federal tax laws"). Even unscrupulous attorneys are likely to be wary to certify such claims for fear of being disbarred. The Model Rules strictly prohibit "conduct involving dishonesty, fraud, deceit or misrepresentation." MODEL RULES OF PROF'L CONDUCT r. 8.4(c) (AM. BAR ASS'N 2013).

Medicaid planning.[124] However, in recognition of the nonadversarial nature of SSDI and Medicaid processes, attorneys would no longer be able to advance all nonfrivolous claims to benefits and would also have to conduct a sufficient investigation to assess their clients' claims.[125] A certification requirement would also not infringe upon attorney-client confidentiality because lawyers would not be required to disclose any client information to either the SSA or state Medicaid agencies.[126]

The SSA and state Medicaid agencies may not possess the statutory authority to regulate attorney conduct in this manner.[127] Many attorneys would also oppose any effort to increase their investigative burdens and to subject them to discipline for advancing nonfrivolous claims. Nevertheless, lawyers routinely opine on the legal soundness of their clients' positions in transactional contexts.[128] These opinions must be based on a transaction's specific facts and are expected to draw reasonable legal conclusions.[129]

An alternative to mandatory certification is a voluntary certification regime. A voluntary regime would likely not require legislative action and would presumably be more palatable to the organized bar. Administrative agencies would also be justified in subjecting certified claims to expedited and less exacting review.[130] Lawyers would, of course, be required to communicate fully the implications of certification to their clients so that they would be able to decide whether to have their claims certified.[131]

When representing clients before benefit-granting agencies, lawyers would ideally advocate for their clients while acknowledging weaknesses in their claims. However, such an ethical posture is weakly supported by the

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124. For example, transfers outside of the look-back period set by Congress could continue, whereas transfers within the look-back period would not unless lawyers could certify that they do not disqualify their clients from Medicaid.

125. *See* MODEL RULES OF PROF'L CONDUCT r. 3.1. Rule 3.1 already contemplates an investigation but requires only that the attorney is able to make good faith arguments on the client's behalf. *Id.* r. 3.1 cmt. 2.

126. *See id.* r. 1.6(a) ("A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent . . . .").

127. *Cf.* Loving v. IRS, 742 F.3d 1013, 1016–18 (D.C. Cir. 2014) (holding that an executive agency's authority to regulate representatives who appear before it does not extend to all persons who assist others in preparing filings for the agency).

128. *See generally* Morgan Shipman, *The Liabilities of Lawyers in Corporate and Securities Work*, 62 U. CIN. L. REV. 513, 523 (1993) ("Any lawyer doing business, corporate, commercial, securities, or real estate work will at times be asked, by his client, to supply the lawyer's opinion letter—concerning certain of his client's affairs, addressed to third parties who are not the lawyer's clients . . . .").

129. *See* Steven L. Schwarcz, *The Limits of Lawyering: Legal Opinions in Structured Finance*, 84 TEX. L. REV. 1, 12–13 & n.63 (2005) (collecting authorities).

130. Professor Robert Gordon has proposed the creation of a separate profession of legal counselors who would counsel clients to act consistently with the purpose of the law and would "give candid, truthful, and undistorted reports to authorities and third parties." Robert W. Gordon, *A New Role for Lawyers?: The Corporate Counselor After Enron*, 35 CONN. L. REV. 1185, 1210–11 (2003). He suggests that counselors should enjoy certain advantages over traditional attorneys that would make them more attractive to clients such as "expedited and presumptively favorable regulatory action, less scrutiny and more rapid approval by courts of . . . settlements." *Id.* at 1216.

131. *See* MODEL RULES OF PROF'L CONDUCT r. 1.4.

organized bar[132] and is largely foreign to SSDI and Medicaid practice. To ensure that benefit lawyers fulfill their gatekeeping function, the government could require or exhort attorneys to certify their clients' claims.[133]

CONCLUSION

This Article has contended that lawyers have created a secret welfare state through their use of controversial tactics in the representation of SSDI and Medicaid clients. Although the nondisclosure of adverse information in SSDI proceedings and participation in Medicaid planning may be ethical in certain situations, these tactics have transformed and expanded these public benefits programs. Future research should examine the impact of lawyering on other public benefit programs. The limited nature of the American welfare state may have created high demand for benefit lawyers who are willing to use aggressive and possibly unethical tactics to circumvent eligibility criteria.

The organized bar has opposed the government's efforts to require attorneys to disclose adverse evidence and curtail Medicaid planning out of a concern for the attorney-client relationship. However, as this Article has sought to argue, lawyers' duties to their clients do not obligate them to subvert the SSDI and Medicaid processes. The government's past reform efforts—heavy-handed though they may have been—would have ideally spurred a debate within the profession as to how attorneys can effectively represent SSDI and Medicaid clients without engaging in actions that undermine these benefits programs.

The SSA and state Medicaid agencies do not exist to deny benefits to needy Americans. Nor do they advocate against claimants. If attorneys focus solely on qualifying clients for benefits, they risk the long-term future of SSDI and Medicaid. Indeed, to ensure the sustainability of these programs, lawyers should not merely avoid actions that undermine these programs but also conceive of themselves as these programs' gatekeepers. In this capacity, attorneys can advance and advocate for cognizable claims while refraining from tactics that impede administrators' demarcation of meritorious claims from nonmeritorious ones.

Because of the partisanship of American lawyers and the competitive pressures of SSDI and Medicaid practice, lawyers are unlikely to embrace a gatekeeping role. Nevertheless, lawyers have gatekeeping responsibilities in a number of different areas, including analogous areas such as tax.

The American welfare state is sustaining relatively advantaged individuals and their lawyers as well as the truly needy. In the long-term, the United States would be well served by a more transparent public benefits regime. However, as long as attorneys remain integral, the SSA

132. Gordon, *supra* note 130, at 1211.

133. *See id.* at 1215 ("[T]here should be government mandates that for some representations and transactions, corporations must hire lawyers who have undertaken the role and accompanying obligation of counselors.").

and state Medicaid agencies need not countenance lawyers who conceive of their role solely in terms of facilitating access to benefits.