

# Texas Elder Law FaxLetter

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A FREE BUSINESS AND LEGAL UPDATE OF CURRENT EVENTS AFFECTING THE ELDERLY ♦ OCTOBER 2003 EDITION

## MEDI- MINUTES

### DHS Announces Rescission of Transfer Penalty Divisor



The Texas Department of Human Services (DHS) has announced that it has rescinded its earlier decision to reduce the transfer penalty divisor and has advised that the transfer penalty divisor shall remain at \$2908. In the September issue of the *Texas Elder Law FaxLetter*, it was reported that DHS had announced that the transfer penalty divisor (which is used to determine any penalty for gifts made within the applicable look-back period prior to applying for long-term care Medicaid) had been surprisingly reduced from \$2908 to \$2858 (the minimum gift to create one month of Medicaid ineligibility) effective September 1, 2003. As indicated in the September issue of the *Texas Elder Law FaxLetter*, it was shocking that the penalty divisor had been reduced since the federal law indicates that the divisor is supposed to represent the average private pay cost of a nursing home in that locality (Texas uses a statewide average) and the announcement was tantamount to DHS stating that the average cost of a nursing home had dropped over the last 2 years (even though DHS's own web site indicated that the present statewide average is over \$3400 per month). This would have affected many people who had used aggressive monthly gifting in reliance upon the rules DHS had previously published (including many who relied upon the advice of DHS caseworkers in preparation for applying for long-term care Medicaid).

The announcement to rescind was made on September 13 in San Antonio by an attorney representing DHS at a meeting of the Texas Chapter of the National Academy of Elder Law Attorneys. As indicated in last month's *Texas Elder Law FaxLetter*, if DHS had not rescinded the reduction of the transfer penalty divisor, then it was almost a certainty that DHS would have been sued. DHS had already received a pre-litigation letter advising that if they did not rescind the new divisor there would be suit for violation of federal law by deliberately understating the cost

of private-pay nursing home care in Texas. Although DHS has still probably understated the cost of private-pay nursing care (as evidenced by their own web site figures), it is not as likely that suit will be filed since potential Medicaid applicants have not detrimentally relied on a previously published divisor and Medicaid rules in determining the amount that could be gifted within the Medicaid rules established in the Medicaid Eligibility Handbook – as would have been the case if there had been a reduction of the divisor as initially announced.

## WASHINGTON WATCH

### Charitable Giving Bill Passes House

On September 18, the US House of Representatives passed the Charitable Giving Act with an overwhelming vote of 409 to 13. The legislation is designed to promote charitable giving by

- Allowing taxpayers who do not itemize deductions to deduct a portion of their charitable contributions;
- Provide incentives for individuals who are 70½ and older to make tax-free contributions to charity from their IRAs;
- Raise the cap on corporate charitable contributions from 10% to 20%; and
- Establish a compassion capital fund to provide technical and capacity building assistance for small charities and faith-based organizations.

The Senate's companion bill, the CARE Act, was passed earlier this year.

Source: [www.house.gov](http://www.house.gov) 9-18-03

## NATIONAL NOTES

### Low HIPAA Compliance Prompts CMS to Implement Contingency Plan

The Centers for Medicare & Medicaid Services (CMS) recently announced that it will implement a contingency plan to

accept noncompliant electronic transactions after the October 16, 2003 compliance deadline. This will take some of the heat off of thousands of healthcare providers who are struggling to achieve compliance with the new electronic format mandated under the Health Insurance Portability and Accountability Act (HIPAA). So, healthcare providers that bill Medicare and Medicaid for services may continue to submit non-compliant electronic transactions, and expect to have those transactions processed, as long as the contingency plan remains in effect.

CMS decided to implement the contingency plan after reviewing statistics showing an unacceptably low number of compliant claims being submitted. The agency will regularly reassess the readiness of providers to determine when the contingency plan will cease.

Source: CMS 9-23-03

## ANNOUNCEMENT!

### Michael B. Cohen Elected Treasurer of Texas Chapter of NAELA



Michael B. Cohen was elected as Treasurer of the Texas Chapter of the National Academy of Elder Law Attorneys (NAELA) at its statewide meeting on September 13, 2003 in San Antonio. He also serves on the Board of Directors of the Texas chapter of NAELA.

## OUT & ABOUT

Michael B. Cohen will be teaching a course entitled "Aging Successfully and with Dignity: A Symposium for Those Approaching Their 60s and Beyond" at Southern Methodist University-Legacy in Plano on October 18, 2003. For registration information, contact SMU Professional Courses for Adults at 214-768-8446.

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