

Elder Law Practice Considerations

by
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1. **WHAT IS ELDER LAW?**

Elder Law is an umbrella of services that an attorney can provide his clients to assist them in aging with as much dignity and independence as possible. Elder Law encompasses, but is not limited to, the following areas¹:

- § Healthcare Decision Making, including Advance Directives
- § Guardianship
- § Estate Planning
- § Special Needs Trusts
- § Probate and Estate Administration
- § Medicare
- § Medicaid²
- § Long-term Care Insurance
- § Housing Options
- § Nursing Home Abuse and Neglect
- § Social Security Benefits
- § Supplemental Security Income

¹ See generally, LAWRENCE A. FRANK & RICHARD L. KAPLAN, ELDER LAW: IN A NUTSHELL (Thomson West 2002) (1999). This easy- to -read text does not discuss any one area in depth, especially since many public benefit programs are state specific, but it provides an excellent overview of a number of Elder Law topics.

² See H. Clyde Farrell's outline on Medicaid Planning in Texas in his publication, Financing Long-Term in Texas (2003).

- § Veteran's Benefits
- § Pension Plans
- § Age Discrimination in Employment

2. THE GROWING NEED FOR ELDER LAW ATTORNEYS

- a. The need for Elder Law Attorneys is shown by the increase of the elderly population, which has and will continue to grow dramatically.
 1. The 2000 census counted 25 million people over the age of 65, which is a 12% increase from 1990.³
 2. The largest increase in the elderly population are the "old old", meaning those persons who are 85 or older.⁴
 3. The number of persons who are 85 years or older increased by 38% in the 1990s, with the number of women increasing by 100 women for every 41 men.⁵ The "baby boomer" increased by 49% in the 1990s.⁶
- b. The increase of medical technology means people are living healthier and longer lives. It also means that there is an increase in issues relating to financing long-term care and planning for incapacity and *an increase in need for Elder Law Attorneys*.
- c. One- quarter of Americans are raising children while also providing the primary care for their aging parents.⁷ This population is affectionately called the "sandwich generation". Additionally, in 2000, there were an estimated 400,000 grandparents who had the primary responsibility of caring for their grandchildren.⁸

3. THE NECESSITY OF A MULTI-DISCIPLINARY PRACTICE

³ U.S. Census 2000.

⁴ Id.

⁵ Id.

⁶ Id.

⁷ The Sandwich Generation Definition, available at <http://www.thesandwichgeneration.com/> (last visited December 23, 2003).

⁸ A Profile of Older Americans: 2002, available at http://research.aarp.org/general/profile_2002.pdf (last visited December 22, 2003).

Providing adequate legal representation to clients involves a holistic understanding of the client; addressing more than just legal issues adds a unique aspect and value to your practice.

- a. The following professionals should be considered essential resources when representing elderly clients:
 1. **Geriatric Care Managers:** Geriatric Care Managers are great to assess client needs, determine appropriate housing and facility placement, arrange for home health services, and counsel families in planning for the elderly client's transition from their home to a facility. Geriatric Care Managers are also useful for busy, out of town or out of state caregivers. To find a Geriatric Care Manager near you contact: National Association of Professional Geriatric Care Managers. <http://www.caremanager.org>.⁹
 2. **Home Health Care Agencies:** These agencies assist clients to remain at home for as long as possible by providing meals, medication reminders, skilled nursing care, sitters, and transportation.
 3. **Certified Public Accountants:** CPA's provide assistance in income tax issues related to Special Needs Trust, Medicaid planning, and estate administrations.
 4. **Insurance Agents:** Practitioners assisting couples apply for Medicaid nursing home benefits should consider obtaining long-term care insurance for the community spouse.
 5. **Financial Planners:** Financial planners are useful if purchasing an annuity to qualify for Medicaid nursing home benefits is appropriate and to manage client assets following Medicaid eligibility.
 6. **Funeral Home Directors:** Attorneys can purchase a pre-need funeral contract for Medicaid planning clients in order to convert cash, a countable resource to a pre-need funeral contract, an exempt resource.
 7. **Therapists/ Social Workers:** These professionals can provide support to stressed out caregivers, clients who are dealing with grief and loss from the death of a loved one, and families dealing with the guilt from placing a loved one in a nursing home. Caregivers, who are often involved with the legal planning for their elderly parents or relatives, are easier for the practitioner to work with if they are receiving care and support.
 8. **Other Community Resources:** Attorneys will benefit from seeking referral and resources guidance from local organizations, such as Sheltering

⁹ You Have Your Role and We Have Ours: Cultivating Successful Relationships with Elder Law Attorneys, available at <http://www.naela.org> (last visited December 22, 2003). This article provides an in-depth discussion on how Elder Law Attorneys can successfully work with Geriatric Care Managers.

Arms and the Houston chapter of the Alzheimer's Association

- b. The practitioner should remember that they may be the only contact the client has made in regard to the multitude of problems and issues the elderly and their families are facing.

In addition to addressing not only the legal needs of your clients, the attorney can assist the client with important, but non-legal issues. This assistance will help to establish client trust and bring a multi-disciplinary aspect to your office.

4. **INCREASE YOUR CLIENT BASE THROUGH NETWORKING**

- a. **Using Your Staff To Increase Your Client Base:** Attorneys should provide all staff members with business cards, but should also counsel their staff on the solicitation rules for attorneys. Additionally, frequent office meetings are a great resource to brainstorm marketing and networking ideas. The practitioner may also want to consider sending staff to networking groups (discussed below) to save the attorney time, educate staff, and increase firm visibility.
- b. **Local Networking Groups:** Attorneys can increase their client base by attending local networking groups for professionals (not just lawyers) in the geriatric community, such as the Elder Care Network (281-568-1459).
- c. **Speaking Engagements:** An Elder Law attorney's practice will benefit by the practitioner giving talks at community centers such as the YMCA, or other local groups such as the Alzheimer's Association (713) 266-6400 or (1800) 272-3900, United Way of Texas Gulf Coast, Elder Services Providers Network (ESN) Interagency on Information and Referral (713) 685-2771, Chamber of Commerce Elder Committees, hospice organizations, and church groups.
- d. **Contact Other Professionals:** The attorney can increase their clientele by mailing out brochures describing the services the firm offers to financial planners, discharge planners at hospitals, Certified Public Accountants, Assisted Living Facilities. Other attorneys, such as estate planners and probate attorneys who may have Elder Law issues arise in their practice, but not have the desire or background necessary to address them, can be great referral sources.
- e. **Advertising:** Elder Law Attorneys can announce their services by advertising in the Senior Guidance Directory, published by the Houston Junior Forum, Senior Guidance Program, (713) 529-9991, and Senior Options for Houston and Surrounding Areas. Attorneys should contact the Texas State Bar for advertising requirements.

- f. **Professional Organizations.** Membership in professional organizations is a great way to network and increase referrals. The practitioner should consider joining professional organizations such as the National Academy of Elder Law Attorneys, 520-881-4005, www.naela.org; Houston Bar Association Elder Law Committee; Attorneys in Tax and Probate; Disability and Elder Law Attorneys; and Solos Supporting Solos.

5. ESTABLISHING YOUR FEES

- a. **Flat Versus Hourly:** Elder Law attorneys should consider flat fees, since clients like to know in advance how much they will be spending. Even if the attorney charges a flat fee rate, he or she should track their hours to determine if the appropriate flat fee is being charged. Attorneys may establish a flat fee by assigning a value to each step or task that is required.
- b. **The “Reverse Contingent Fee” Question:** A reverse contingent fee is a fee that is determined by the amount of money the lawyer will save the client. For example, in a Medicaid case, if the attorney is able to save the client \$50,000 in nursing home costs by obtaining Medicaid benefits and charges a 10% reverse contingent fee, the client will pay the attorney \$5,000. The American Bar Association addressed reverse contingent fee setting in its Formal Opinion 93-373.¹⁰ The ABA concluded that reverse contingent fees in civil cases are not prohibited by the Model Rules, as long as the fee is “reasonable under the circumstances” and the client has been fully informed.¹¹ It should be noted that this opinion was based on civil suits where the defendant had already had damages assessed against him and was appealing the court’s decisions, *and not on administrative appeals that are frequently used in Medicaid planning cases.*¹²
- c. **Anti-trust Considerations:** Some professional groups, such as the National Academy of Elder Law Attorneys (NAELA), have rules prohibiting the sharing of specific fee information. For more information, contact NAELA at <http://www.naela.org>.

6. WORKING WITH EXISTING CLIENTS

A client may come into your office to have their wills done, but this one client contact may lead to working with the client on other areas in the practice of Elder Law, for example:

¹⁰American Bar Association Formal Opinion 93-373 (1993).

¹¹Id.

¹²See id.

- a. A client may need revisions to his or her Will, Advance Directives, Powers of Attorney, and Declaration of Guardian. These must be changed if a person who is previously designated becomes incapacitated and can no longer serve as designated and there are no alternates provided. The spouse of child may not have all of these documents or realize how important they are before a person reaches incapacity.
- b. Medicaid planning also requires additional work after the benefits are established. Within one year after the Medicaid application is approved, the spouse must convert all assets into their name only. This could include drafting deeds, assisting in changing banking account ownership, and vehicle registration.
- c. The attorney should advise the community spouse in a Medicaid planning case to draft a new will and directives. If the community spouse dies and his or her will leaves everything to the spouse in the nursing facility, then resource limit for Medicaid for a single person will cause the institutionalized spouse to lose Medicaid benefits. Advance planning can help preserve part of the estate for the benefit of the institutionalized spouse.
- d. Often after a person enters a nursing facility, he or she dies within a short period of time. This could happen for a number of reasons. It could be because they are very sick when they enter or they cannot adjust to institutionalization. The families often ask for help with probate issues and administration of their estate.

7. ETHICAL CONSIDERATIONS

- a. **Who is my client?** ¹³ Every Elder Law attorney should ask this question. Many times your first contact with the elderly client will be through the adult children. Unless the elderly person is not already represented by an attorney, the practitioner should solely represent the elderly or disabled person.¹⁴ This should also be communicated to the adult children, *so it is clear that the practitioner is representing the elderly person and not the adult children.*¹⁵
- b. **Does the elderly client have capacity?** If the practitioner is unsure if the elderly

¹³ Holly J. Gilman, Gilman, Nicols, Hebner & Rixen, P.C. , Ethical Issues Facing The Elder Law Practitioner, University of Texas School of Law Intermediate Estate Planning, Guardianship and Elder Law Conference, August 26 & 27, 1999, Galveston, Texas. This article focuses on the variety of ethical issues that arise daily in an Elder Law practice, as well as the corresponding disciplinary rules.

¹⁴This is the authors' opinion. This view is also shared by H. Clyde Farrell in his outline, Financing Long-Term Care in Texas, p. 29.

¹⁵Farrell, p. 29.

client has capacity to contract for legal services or execute estate planning or other documents, recommend that the elderly client have a mini mental examination done by a physician to assess capacity.¹⁶ If the elderly client is found not to have capacity and has not previously executed the appropriate advance directives, speak with the family about the potential need for guardianship.¹⁷

- c. **How do I work with the elderly client and other family members?** The elderly client may come in to the practitioner's office with an adult child or children. Consider meeting with the elderly client alone first to assess capacity and the client's desires.¹⁸ This may not be communicated to the practitioner if the practitioner does not meet with the elderly client outside of the presence of the adult child.¹⁹ Meeting with the elderly client alone first may also assist the practitioner in determining if there is any undue influence coming from the adult child.²⁰ Before meeting with the elderly client and adult child or family member, the practitioner must also advise the elderly client that what is said in front of the family member may not be held confidential by the family member.²¹ The practitioner may want to consider also communicating this in writing to the client, family, and adult children.²²
- d. **What are the ethical dilemma in representing both the elderly husband and wife?** The attorney should first establish that there is not a conflict in representing both the husband and wife. Possible conflicts might include one spouse communicates to the attorney in private that he or she is contemplating divorcing the other spouse. If there is not a conflict initially, the practitioner should explain that should one arise, it could prevent representation of either spouse.²³ The practitioner should explain that information shared by one spouse will not be held

¹⁶ Holly J. Gilman, Gilman, Nicols, Hebner & Rixen, P.C. , Ethical Issues Facing The Elder Law Practitioner, University of Texas School of Law Intermediate Estate Planning, Guardianship and Elder Law Conference, August 26 & 27, 1999, Galveston, Texas.

¹⁷Id.

¹⁸Id.

¹⁹Id.

²⁰Id.

²¹Id.

²²Id.; see also H. Clyde Farrell, Financing Long-Term in Texas, p. 29 (2003).

²³ Holly J. Gilman, Gilman, Nicols, Hebner & Rixen, P.C. , Ethical Issues Facing The Elder Law Practitioner, University of Texas School of Law Intermediate Estate Planning, Guardianship and Elder Law Conference, August 26 & 27, 1999, Galveston, Texas.

in confidence from the other spouse.²⁴ The attorney should have the elderly couple sign a joint representation disclosure that meets the elements Disciplinary Rule 1.06.²⁵

- a. **What are some the ethical issues arising in Medicaid?** An incapacitated person cannot make gifts in order to “spend down” for Medicaid eligibility.²⁶ Gifting to establish to Medicaid eligibility for an incapacitated person may be done only if there is a properly executed Durable Power of Attorney (Statutory Durable Power of Attorney) made prior to incapacity that has *specific gifting language*.²⁷
- f. **What are my obligations in reporting abuse and neglect?** If the attorney suspects that an elderly or disabled client is being abused, neglected or exploited, he or she **must report** this to the Texas Department of Protective and Regulatory Services (1800-252-5400) as required by the Texas Human Resource Code §48.051(a).²⁸ *An attorney who fails to report abuse, neglect and exploitation is subject to fines and confinement in jail.*

The Texas Human Resource Code requires reporting of :²⁹

1. **Abuse:** (A) the negligent or wilful infliction of injury, unreasonable confinement, intimidation, or cruel punishment with resulting physical or emotional harm or pain to an elderly or disabled person by the person's caretaker, family member, or other individual who has an ongoing relationship with the person; or (B) sexual abuse of an elderly or disabled person, including any involuntary or nonconsensual sexual conduct that would constitute an offense under Section 21.08, Penal Code (indecent exposure) or Chapter 22, Penal Code (assaultive offenses), committed by

²⁴Id.

²⁵ H. Clyde Farrell, *Financing Long-Term in Texas*, p. 29 (2003).

²⁶Id.

²⁷Id. See this outline for other ethical issues arising within the context of representing the elderly client and working with the elderly client’s family or adult children, such as if the adult children want to establish Medicaid benefits and the elderly client appears uncomfortable with this planning option, or if the adult children’s motives for Medicaid eligibility appear to be for their own benefit.

²⁸ Martha Failing, *Martha Failing P.C., New Reporting Requirements Regarding Exploitation Of The Elderly*, South Texas College of Law, *Representing The Elderly Client: Estate Planning, Special Needs Trust & Guardianships*, May 16-17, 2002, Houston, Texas. This outline not only provides attorneys with the applicable reporting requirements, it also provides a procedural guideline as to what happens after the report is made.

²⁹ Human Resource Code §48.002

the person's caretaker, family member, or other individual who has an ongoing relationship with the person.

2. Exploitation: the illegal or improper act or process of a caretaker, family member, or other individual who has an ongoing relationship with the elderly or disabled person using the resources of an elderly or disabled person for monetary or personal benefit, profit, or gain without the informed consent of the elderly or disabled person.
3. Neglect: the failure to provide for one's self the goods or services, including medical services, which are necessary to avoid physical or emotional harm or pain or the failure of a caretaker to provide such goods or services.

The attorney will most likely see exploitation of the elderly or disabled persons finances through a power of attorney or trusted relationship. In order to detect abuse, exploitation and neglect the attorney should find out if the elderly or disabled client has capacity, inquire about the family dynamics, ask who is involved with the elderly or disabled person's daily care, determine what and who is managing the client's property, and speak with the client alone to find out what his or her desires really are.

8. **OTHER PRACTICAL CONSIDERATIONS**

The additional touches your clients will appreciate, remember and love you for include:

- a. Having wing back chairs in your office (they are easier for older and disabled persons to get in and out of) with easy to clean material for incontinent clients.
- b. Keeping a supply of Depends on hand for emergencies.
- c. Providing coloring books or toys for young children who are visiting your office. Your initial contact with your client will often be through their adult children who are not only caring for their aging parents, but are also raising a family of their own.
- d. Choosing an office location with easy parking and access. Clients will appreciate an easy to find location, adequate parking and hallways that are wide and clear for those who use mobility devices, such as walkers and wheelchairs.
- e. Working with law office staff who have training in issues such as dementia, Alzheimer's, caregiving, and the aging process.
- f. Visiting an office with a comfortable feel to it. You may be the first attorney the family as ever contacted and a non-threatening environment makes a huge difference.

