

Ethical Considerations of Elder Law Practice - Trendiness and Traps

Elder law is a complex field where attorneys are faced with ethical challenges in almost every engagement. In this article, the author discusses common mistakes attorneys make when dabbling in elder law and ethical issues that arise in an elder law practice.

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I. Background - What is Elder Law

Elder law is a relatively new and very interesting field that seems to be attracting lawyers from other practice areas. That was my path to elder law. For the first part of my career, I practiced mostly in large corporate settings, working primarily on commercial real estate and corporate transactions. Overtime, I decided that I wanted to leave the big firm experience and start my own practice. I had always been interested in tax and estate planning. Since I had a life-long affinity for grandparents and grandparent-like figures, elder law was appealing. But, when I started out in elder law, no one warned me that the field was extremely complex and difficult to master, and that I would be faced with ethical challenges in almost every engagement.

There are three areas where I see most of the ethical issues I come across:

- A. Mistakes - Work done by other attorneys who make mistakes because they are trying to practice elder law, on the fly, without having committed to spending the necessary hours of time learning the law, reading cases, articles, statutes and attending continuing education classes.
- B. Money - Caregivers, family members, and relative strangers who want to get their hands on the elder person's money. This most often presents as individuals trying to gain control with powers of attorney for property. Powers of attorney for property are essential for Medicaid and asset protection planning, but can expose clients to great potential for abuse.
- C. Capacity - Issues of capacity often span across generations. I sometimes meet with adult children who do not realize their elderly parents are competent and insist their parents are losing it, when they are perfectly capable of signing estate planning documents. These same kids are often suffering from their own psychological issues or disabilities. Sometimes, people with significant issues present as being totally normal, and it takes careful attention to figure out family dynamics and who the bad actors may be.

II. Elder Law is Trendy - Don't Practice on the Fly.

It's all over the media that the baby boomer generation is now aging and is a huge consumer group for products and services, including elder law. The statistics back up the media hype. Perhaps this trendiness is one reason that on a regular basis I often come across mistakes made by other attorneys, without sufficient background in elder law. Ethically, attorneys should only represent clients when they have the knowledge to handle the matter. The ABA Model Rule of Professional Conduct provides:

Rule 1.1 Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation

Because elder law is a trendy area, I believe there is an increased risk of younger lawyers (and more experienced lawyers looking to expand or change practice areas) to jump in without realizing the great complexity involved, including the federal and state statutory framework, federal and state regulations, and the ever-changing case law. Attached as Exhibit A, are resources I recommend as helpful to learn the elder law area. In addition, below is a list of matters that the typical elder law client may need help with, and what an elder law attorney should generally know about, although it's not critical to master every area (for example, I refer out all guardianship and litigation work).

A: Estate planning, with a focus on potential future disability (special needs), long-term care, and Medicaid/asset protection planning, including:

1. Drafting powers of attorney to allow for gifting and Medicaid planning, while preventing theft and preserving the estate plan.
2. Drafting advance health care directives, taking into account the client's desires and continual advances in medicine, which makes it difficult to predict what medical treatments will be available in the future and will also be in conformity with the client's current wishes.
3. Special needs trusts, including spousal testamentary, third party and self-settled pay-back (OBRA) trusts.
4. Understanding income tax issues that relate to gifting before death (for Medicaid planning), and tax issues upon death.
5. IRAs and required minimum distributions.
6. Estate planning to avoid family fights, and especially fights over how best to take care of aging parents.
7. Funeral, memorial and cremation planning.
8. Guardianship and avoiding guardianship.
9. Probate and contested estates.

B: Medicaid, Medicare and Long-term care planning, including:

1. Medicaid eligibility - laws vary by state but must comply with federal law.
2. Medicaid civil rights law - this is a growing and important area.
3. Administrative law for appeals of Medicaid applications.
4. VA Benefits.
5. Family and third-party caregiver agreements.
6. Rental agreements for when the older person lives with an adult child.
7. Medicare coverage, advocacy and appeals.
8. Facility agreements with nursing homes, assisted living and continuous care communities.
9. Litigation and contested matters involving nursing homes, health care providers.
10. Long-term care insurance.

C. Guardianship and avoiding guardianship, including:

1. Understanding the various options for limited guardianships.
2. Understanding issues of incapacity.
3. Familiarity with elder care professionals such as care managers and professional fiduciaries who can serve as private guardians or as agents for “orphan” elderly.
4. Working with geriatric health and psychiatric experts.

III. Common Mistakes Made by Lawyers

(and persons trying to be their own lawyer).

Lawyers that do not primarily practice elder law often have elderly clients, and with the best intentions, try to help them with complicated elder law issues. These are some common misconceptions about elder law:

1. Revocable living trusts protect assets from Medicaid - wrong
2. Irrevocable Trusts with HEMS and other “support” provisions are not countable assets for Medicaid - wrong
3. A “quitclaim deed” somehow has magical powers that gets the asset out of the elderly person's name and protects the property from Medicaid recovery - wrong
4. A person's home is protected from Medicaid *forever* - as long as they have the “intent to return home” - wrong in most states
5. A person cannot qualify for Medicaid if they have any assets - wrong
6. It's too late to protect assets if an elderly person is already in a nursing home - wrong
7. It's okay to have more than one power of attorney for property (i.e. more than one adult child on different powers of attorney) - wrong
8. A power of attorney allows the agent to do anything they want - wrong
9. If grandma cannot remember what she ate for breakfast, she is not competent, and a guardianship is needed - wrong most times
10. A guardianship fixes everything - wrong most times

Also available as part of the eCourse

[2021 Special Needs Trusts eConference](#)

First appeared as part of the conference materials for the

17th Annual Changes and Trends Affecting Special Needs Trusts session

"ABA and National Alzheimer's and Dementia Resource Center Resources for SNT Trustees with Elder Orphan Beneficiaries"