

Retirement Considerations

PART

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The book has three parts. Part I, Retirement Considerations, is directed at the legal issues that often arise around the time of retirement. It begins with a discussion of what elder law is and how it relates and reacts to the legal issues of aging clients who have retired or are contemplating retirement. Some retire because of a loss of physical vigor. Therefore, the physical reality of aging is described. Next come overviews of the chief sources of income for older clients—Social Security, employer-provided retirement benefits, and individual retirement accounts. Retirement frequently results in a loss of employer-provided health care insurance. Part I provides a description of Medicare, the federal subsidized health care insurance for those age 65 and older, and also examines veterans' benefits. Part I ends with an overview of other federal statutes that protect the elderly, including the Age Discrimination in Employment Act, the Americans with Disabilities Act, and the Federal Housing Act.

The Practice of Elder Law

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I. Why Elder Law?

The driving force behind the need for elder law and legal planning for later life is the growth of those age 65 and older—at present over 12,000 individuals turn 65 every day. Today about 13 percent of the population is age 65 and older, but that percentage will grow to 20 percent by 2040.¹ The ever-increasing number of older Americans creates challenges for society and the law.

Even more significant are the elderly who have suffered a decline in their physical or mental well-being. As individuals age past age 75, they inevitably suffer a loss of physical well-being. Of course, the rate, nature, and extent of that loss varies greatly; for some it is evident at age 70, others remain quite healthy well into their 80s. Nevertheless, whenever the decline in physical capacity occurs, it gives rise to increasing dependence on others. For example, the ability to drive a car is lost, the physical stamina required to maintain a house ebbs away, the ability to manage complex financial arrangements becomes problematic, vision is sometimes lost, and the energy is lacking to sit through long meetings with an investment advisor. Fortunately, there are reasonable responses to physical declines; some are obvious but others require an attorney's advice, planning, and creation of documents.

1. <https://www.census.gov/content/dam/Census/library/publications/2014/demo/p23-212.pdf>.

Although physical decline creates problems, mental decline is even more serious because it may mark the beginning of the end of an individual's autonomy. If the mental decline is severe enough, individuals lose the ability to make decisions on their own behalf and therefore cease to be independent legal actors. The consequences of mental decline can be so devastating that the mere possibility of mental decline and its devastating impact on an individual's life should be enough to cause an older individual to seek out legal assistance and to plan for its possible occurrence.

Physical and mental decline necessitates a legal response for almost all elderly, but that need rises in proportion to the assets owned by the affected individual. The rise in those age 65 and older contributes to the growth in elder law, but it is the rise in the number of those age 65 or older who have more than a minimum of assets that is the real cause for the demand of lawyers with specialized knowledge about the legal issues associated with old age. For an individual, the loss of mental capacity due to progressive dementia is a personal and family tragedy, but if they have assets, the loss of capacity becomes a financial problem that requires the assistance of an attorney. An individual with diminished mental capacity who owns significant assets needs a tailored response, not just the standard practice of resorting to a power of attorney or, even worse, the imposition of a guardianship or conservatorship.

Not surprising, as the need and demand for legal assistance for older clients has grown, attorneys have responded. Beginning in the 1980s, attorneys who are knowledgeable about the special needs of older clients have been referring to themselves as elder law attorneys. Although their practices vary, they share a focus on helping older clients resolve their legal problems. Also referred to as later-life legal planning, elder law usually involves addressing the issues that arise due to a lack of mental capacity, including inter alia, guardianship or conservatorship, planning and paying for long-term care, housing choices, pension and retirement benefit planning, veterans' benefits, qualifying for various public benefits, and estate planning including powers of attorney and surrogate health care decision documents.

The focus of elder law is to provide older clients with customized legal assistance to address the legal issues associated with aging. Of course, the practices of elder law attorneys vary greatly, with some focusing on planning, some on litigation, and others on providing holistic assistance to aging clients. Some elder law attorneys are solo practitioners; others practice in small partnerships; a few are partners in large, full-service law firms; and others head up law firms that employ not only attorneys but nurses, social workers, and elder law trained paralegals. Whatever the case, elder law attorneys typically are called upon to be knowledgeable in a number of legal fields, or at least be aware of the legal issues that can arise. For example, an elder law attorney typically engages in estate planning and so must understand the federal income tax consequences of an inherited IRA. Though most elder law attorneys do not accept elder abuse cases, all must be aware of the possibility of elder abuse and financial fraud and exploitation. Those

who write wills must be very alert to possible undue influence that so often occurs with an ageing client who has diminished mental capacity.

As with so many aspects of the practice of law, merely being an attorney with a generalized knowledge of the law is not enough. Specialized knowledge about the legal needs of the elderly is necessary. An attorney interested in practicing elder law or developing a practice with older clients must be familiar with the major government programs that impact the lives of the elderly, including Social Security, Medicare, and Medicaid. Elder law attorneys also need to understand the legal issues and the relevant law concerning health care of the elderly, both acute and chronic care, including the law of end-of-life medical treatment and an individual's right-to-die. Also, elder law attorneys usually draft wills and trusts, and because they are often dealing with clients with diminished capacity they must understand and be alert for undue influence and fraud, and they must appreciate how trusts can be a valuable aid to their clients. An elder law attorney should be familiar with federal estate and gift tax, federal income taxation of trusts, and relevant state inheritance and income taxes. Finally, they must know the signs of elderly abuse, neglect, and financial exploitation and how to respond if they suspect a client is being victimized.

In short, elder law is a practice that demands a great deal of substantive knowledge about the law. It also, however, requires the attorney to have strong "people skills"; an ability to effectively market a practice that rests on a large number of clients; and the judgment and wisdom to guide a client, and often the client's family, through emotionally difficult circumstances.

II. The Role of the Elder Law Attorney

The essence of elder law is planning for the contingencies that arise with advancing age and advising clients on how best to respond to those contingencies. Elder law attorneys deal with clients upon a continuum: those who are concerned with a possible future legal need associated with aging, those at the beginning stages of a life event that has or is about to give rise to a need for legal assistance, and those at a stage of life when remedial or "emergency" legal assistance is required. Whereas some elder law attorneys avoid litigation other than at the administrative level, for others litigation is a focus of their practices. Most elder law attorneys engage in some litigation but spend the majority of their time on advising, planning, and document preparation.

The practice of elder law can be roughly divided into the following three kinds of client needs:

1. Their concern about their finances in light of future care needs.
2. Their need for identifying those who can act on their behalf if they should lose mental capacity.
3. Their fear of dependency caused by physical or mental declines.

Financial concerns are not the same as financial planning. Elder law attorneys are not financial planners; they provide legal advice, not investment advice. The financial concerns addressed by elder law attorneys arise from client concerns about how to manage their financial affairs in the face of declining physical or mental abilities, how to pay for costly long-term care, and how to allocate resources to obtain the necessary care and assistance while providing adequately for a spouse and possibly leaving a legacy to children and grandchildren.

Older clients need legal advice as to how to protect their assets in the event that they should lose the physical or mental ability to do so. The elder law attorney has several responses, including creating a power of attorney, establishing a living trust, and placing accounts or property into joint ownership. Selecting the best response and selecting appropriate substitute decision makers are critical decisions for which the elder law attorney can provide valuable assistance.

Dependency in later life is unfortunately very common. It is sometimes the result of physical decline, but it is more frequently caused by mental decline, and more specifically, dementia. It is estimated that over 40 percent of those age 80 and older have some form of dementia, usually Alzheimer's disease, which is progressive, irreversible, and incurable. Chronic physical illness, such as rheumatoid arthritis, can also lead to dependency, and acute illness, such as multiple organ failure, can require daily assistance from others.

Clients who encounter personal dependency in their later life face two legal issues: how to best prepare for possible dependency and how to pay for the care they need because of the dependency. Addressing these problems is often the key component of an elder law practice, both because the client is concerned about their quality of life in the event that they become dependent, and because they are concerned with how to pay the high cost of personal and medical care that they may require in the future because of a debilitating mental or physical condition.

Some elder law attorneys focus their practices on planning for their clients' need for personal care necessitated by serious physical or mental decline. Their client base is often composed of individuals who have already experienced decline and need to make appropriate plans in the event that they decline even further. Some of these attorneys call this life care planning, and many belong to the Life Care Planning Law Firms Association (LCPLFA)—composed of law firms that offer proactive legal services, care coordination, and advocacy support to elderly clients and their families. The goal is to help clients understand their needs, assess possible solutions, recommend providers of care services, and monitor the care being received. Such firms often employ nurses, social workers, and other professionals as well as paralegals that work as a team to ensure that the client's needs are properly met.

Other elder law attorneys focus more on providing advice as to how to find appropriate care for their clients and how to arrange a client's affairs to pay for needed care, including assisting the client to become eligible for governmental benefit programs. In particular, elder law attorneys help clients become eligible

for and enroll in Medicaid, the joint federal-state program that pays for long-term nursing home care and increasingly for home- and community-based care. Merely gaining eligibility, however, is not the goal. Medicaid is a need-based program that requires applicants to spend down almost all of their savings and to spend effectively all of their income toward their care in order to become Medicaid eligible. Elder law attorneys assist their clients to achieve eligibility and still retain or pass on to family members as many assets as possible.

Medicaid planning is complicated and ever changing; it must respond to new state and federal laws, cases, regulations, and procedures. Elder law attorneys spend a good deal of time mastering the subject, keeping current with the law, understanding which alternative is best for each client, and translating all of that into effective planning as well as seeing that the plan works as designed. This is not a field that a lawyer can just dip into; as with so many other legal practices it demands dedication and commitment.

Elder law attorneys also advise clients on how to arrange for private payment of long-term care, including the purchase of long-term care insurance, moving into a continuing care retirement community, using an assisted living facility, and purchasing care in the home. Each of these solutions raises issues and problems to which a lawyer can offer assistance and solutions to enable the client to live a better, more satisfactory life.

The possibility of mental incapacity is so great for the older client that it is imperative for a client to create a plan that will lessen the personal and financial cost should they suffer a serious decline in their cognitive abilities. Elder law attorneys help the client to imagine the possibility of a loss of capacity, and to carefully consider the alternatives. After the client selects a course of action, the attorney will draft the appropriate documents.

The client must appreciate that the longer they live, the more likely they will experience a loss of mental capacity. Proper planning is essential. The cost of not planning may result in the client being placed under an involuntary conservatorship or guardianship. Fortunately, in almost all cases, with the help of an elder law attorney, the client can take steps to avoid the need for conservatorship or guardianship. The attorney will lay out the alternatives available to the client and advise them about who they should consider to make their financial and medical decisions for them, and the attorney will draft an appropriate legal document that enables the surrogate health care decision maker to be able to act in the best interest of the client.

Elder law attorneys must also protect their clients from those who would neglect, abuse, or exploit them. Fortunately, neglect and abuse of the elderly usually does not happen to elderly who have lawyers with whom they are in contact. Either the client will reveal the neglect and abuse to the attorney or the attorney will perceive it. Unfortunately, most neglected and abused elderly are not in contact with an elder law attorney and so must depend on family, friends, or other professionals to report the abuse and neglect to the appropriate authorities.

Financial exploitation, on the other hand, can happen even to an older person who has contact with an attorney. Some exploiters even attempt to enlist the attorney to unknowingly assist in the financial exploitation. The exploiter attempts to manipulate the attorney to assist in making lifetime gifts, creating joint property interests, or leaving a legacy in a will. Elder law attorneys must be alert to such attempts by being watchful for undue influence and fraud by third parties who present themselves as friends of the older person. Sometimes the elder law attorney must protect clients from themselves as they can be prone to covering up for the wrongdoings of those close to them, such as children and grandchildren. The elder law attorney may even have to resort to seeking involuntary conservatorship or guardianship for a client of diminished capacity whose property or person is at risk of exploitation or abuse.

Finally, although elder law can be a “one and done” deal—the client engages the attorney, the problem is solved, and the legal representation is over—that is not usually the case. More typically a client engages the attorney to meet a perceived need or problem, and while dealing with that need the attorney recognizes that the client’s needs, opportunities, and risks are much greater than the client imagined. Many elder law attorneys see themselves as engaging in a holistic practice that deals with the entirety of the client’s life rather than merely addressing a specific problem.

Whatever the exact nature of their practice, an elder law attorney must have a great deal of substantive knowledge about the law. They must also have strong “people skills” because a successful elder law practice rests on a large number of clients. Finally, an elder law attorney needs the judgment and wisdom to guide a client, and often the client’s family, through emotionally difficult circumstances.

Later-life legal problems are not discrete issues but are part of a larger, ever changing mosaic as an individual ages and changes. Because old age is not static, the client is best served by a continuous relationship that permits the attorney to adapt solutions to the changing needs and desires of the client and to the changing legal landscape.

III. Ethical Issues for Elder Law Attorneys

Like all attorneys, elder law attorneys must be careful to practice in an ethical manner. Elder law attorneys, however, face additional ethical issues that may arise when dealing with older clients. First, the attorney must be careful to properly identify who the client is. Second, elder law attorneys must be attentive to their clients’ degree of mental capacity.

A. *Who Is the Client*

For most lawyers, identification of the client is not a problem, but the issue often arises for elder law attorneys who are frequently initially contacted by the

children of an older person. The children are worried that their parent is declining physically or mentally and believe that the parent should consult with an attorney. The children often arrange the meeting with the attorney, bring their parent to the attorney's office, and expect to sit in and participate in the interview and initial planning. None of this poses a problem unless the children fail to realize that the parent, not they, is the client. The elder law attorney must make it clear at the beginning of the interview who the client is. Usually that means the older person. The children must be led to understand that regardless of their concern and involvement, and even if they expect to pay the attorney, the parent is the client.

The importance of identification of the client, and making the children aware that it is the older person, is critical. The Rules of Professional Responsibility repeatedly refer to an attorney's duties to the client. For example, Rule 1.4(a) states that the attorney must "reasonably consult with the client about the means by which the client's objectives are to be accomplished." Obviously, accomplishing a client's objectives requires identification of the client and making it clear to the children that it is the client's wishes that dictate what the attorney does, not the desires of the children. It is important for the children to understand that their parent's instructions to the attorney govern the relationship. That is not to say that the children's wishes are of no concern; only that the attorney must only take instruction from the older person. If the client, the older person, wants to give preference to the wishes or needs of their children or other family members, that is the client's right.

Identification of the older person as the client means that it is the older person to whom the lawyer owes duties of diligence (Rule 1.3), keeping them reasonably informed (Rule 1.4(a)(3)), and also keeping client communications confidential unless the client consents to information being shared with named persons (Rule 1.6(a)). When representing an older client, the attorney must take great care not to reveal confidential information of the client to the family absent having been given permission in writing to do so by the client. The attorney should inform the client about the confidentiality rule and ask whether the client gives consent to revealing information to their children or other individuals. The attorney should also point out that the client can share some information and hold back other information, and the attorney should advise the client on which information might be shared and which might best be kept confidential.

B. Dealing with the Client's Family

Many older clients are close to one or more family members, such as a child or grandchild, and want to share information as they seek out legal advice and try to make decisions that they hope will benefit both themselves and family members. The attorney must respect the client's concern for their family but still attempt to arrange discussions so that the older client is able to make autonomous decisions and not merely act as some, or all, of the family might want. To do so, the attorney needs to understand the family dynamics of those present and how the older

client relates to them. The older client may rely on a family member for transportation but otherwise have little to do with them. Or, in contrast, the client may be very dependent on a particular family member for caregiving and companionship and as a result have a deep emotional connection with that person. Even if the client is normally not dependent on others, if the client has a hearing or vision problem, they may rely on a particular family member to help them communicate with the attorney. They may want a family member present, and waive confidentiality, because they do not trust their hearing or memory. After the meeting with the attorney, they expect to review what happened at the meeting with the family member who was in attendance.

Some elderly clients receive financial support from a child; others benefit from free daily caregiving provided by a child. Whatever the nature of the assistance, the attorney should try to determine if it exists. If so the choices made by the older client may reflect the influence or sense of obligation created by such assistance. The client has the right to treat caregivers and benefactors differently from the other children, including sharing confidential information with them, but the attorney should make it clear to the client that they are not obligated to do so. And at some point, the involvement of a third party can rise to the level of undue influence. Given the nature of their clients, elder law attorneys must be alert to that possibility.

To lessen the chance of undue influence by family members, and to ensure that the client has the opportunity to make autonomous decisions, the attorney must attempt to meet alone with the client as much as possible. Even if the client objects and wants a family member present, the attorney must at least meet once alone with the client. During that meeting, the attorney must determine whether the client has sufficient mental capacity to engage the attorney, consent to a waiver of confidentiality, make decisions as to their person and property, and resist excessive importuning or undue influence by family members.

Once the attorney is satisfied that the client understands what is happening and is making independent choices, additional meetings that include family members should not be a problem. Nevertheless, as the planning continues, the attorney should consider carefully whether a particular topic under consideration requires at least a brief meeting alone with the client. If, for example, the client is planning a new will, the client should meet alone with the attorney to discuss the plan of distribution. The client's decision as to who to name as agent under a power of attorney also should be made by a meeting with only the client and the attorney present. Of course, a client cannot be forced to meet alone with the attorney, but a reluctance to do so should raise a red flag for the attorney. Absent a need for another party to assist the client to communicate with the attorney, there is almost no acceptable reason for a client to refuse to meet alone with an attorney. Whatever the purported reason, it is all too likely that the family member that the client ostensibly wants present is the true instigator and may be guilty of undue influence. Client resistance to meeting alone with the attorney may be the best reason for insisting on meeting alone with the client.

To maintain cordial relations with the client's family often requires the attorney to diplomatically explain why a private meeting with the client is required. If the attorney explains the reason for a private meeting, and what they hope to accomplish, the family is likely to understand and accept the need for the meeting. The attorney may also need to meet with some or all of the family without the client being present. If so, the attorney must make clear to the family that the older person is the client, the attorney does not represent the family members, and that whatever is revealed at the meeting may be passed on to the client. During such a meeting, the attorney can attempt to understand how the family perceives the older client in light of the client's mental and physical capacity. The attorney needs to know if the family believes the client has declined so much that they may lack sufficient mental capacity to engage in sophisticated planning or may no longer have the ability to make rational financial plans. If so, the attorney should take steps to determine the extent of the client's capacity and ability to engage in planning, such as using trusts or making gifts. If the attorney believes that the client has greater mental capacity than do family members, the attorney should document that belief in the event that the client's capacity is later challenged. Family suspicions about the client's mental capacity may indicate possible future challenges to gifts, transfers to a trust, and distributions under a will.

Although the attorney must be cautious when dealing with the family, the attorney must keep in mind that in most cases the family has the best of intentions (or at least some family members do) and is legitimately concerned with the well-being of the older client. It is possible, moreover, for the attorney to represent members of the family as well as the older person. Model Rule 1.7(b)(1) permits representation of multiple persons as long as there is no "concurrent" conflict of interests and, if there are, only if the attorney believes that "the lawyer will be able to provide competent and diligent representation to each affected client." In addition, each client must give informed consent in writing to the existence of the conflict and also be willing to share otherwise confidential information.

IV. Client Competency and Mental Capacity

Elder law attorneys are frequently faced with issues of client competency. The attorney must appreciate that under the law an individual either does or does not have the legal capacity needed to perform a particular act. Mental capacity is best thought of being measured in degrees of capacity. A decline in mental capacity usually takes place in increments, but at some point the decline incapacity is severe enough to cause the law to label the individual as incapacitated. Note, however, that legal capacity varies according to the transaction or the nature of the decision. For the elder law attorney these varying measures of capacity mean that a client may have capacity to perform some acts but not others.

The attorney must first decide whether the older individual has sufficient capacity to enter into an attorney-client relationship. To do so requires that the client have sufficient capacity to enter into a contract; that is, the client understands the nature and consequences of the proposed relationship with the attorney. Assuming that standard is met, the attorney should act in accordance with Model Rule 1.14, Client with Diminished Capacity, which requires the attorney to “maintain a normal client-lawyer relationship.” Presumably that means assisting the client to execute documents to the extent possible in light of the client’s capacity.

Testamentary capacity, the capacity to execute a valid will, is at the lower end of the legal capacity spectrum. At common law the testator has to:

- Understand the nature of the act of signing a will.
- Understand the nature and extent of their property.
- Know the identity of their heirs—the “natural objects of their bounty.”
- Understand how the will disposes of their property.²

The application of these tests is not easy. The more complex the estate, the higher degree of capacity required to meet the legal standard. The attorney must weigh the totality of circumstances when deciding whether to permit a client with lessened capacity to sign a will, with the likelihood of a possible will contest a factor to consider. The attorney must also keep in mind that capacity is measured at the moment of the signing of the will. A client can be mentally incapacitated prior to the execution of the will and incapacitated afterward, but can have a moment of lucidity when signing the will and so meet the test for testamentary capacity. The testimony of the subscribing witness, though not determinative, can go a long way to support a later finding, perhaps at a will contest, that the testator, at the moment of the signing, appeared to have testamentary capacity.

The common law standard for the capacity to execute a trust apparently was somewhat higher than testamentary capacity. However, the Uniform Trust Code states that the same capacity is required to execute a revocable trust as is required to execute a will.³ In practice, because trusts are often will substitutes or a will may pour-over into a contemporaneously executed trust, it makes sense for the two documents to require the same degree of capacity. Still, because of the greater complexity of a trust, the careful attorney may insist upon a marginally greater client capacity to execute a trust as opposed to a will.

Older clients sometimes wish to make substantial gifts, perhaps as part of Medicaid planning. To make a gift requires the same level of capacity needed to enter into a contract, which is a higher state of capacity than testamentary capacity. To enter into a valid contract, an individual must possess sufficient mental capacity to understand the nature and consequences of the act. An older person who wants

2. For a detailed discussion as to the levels of capacity required for various acts, see Lawrence A. Frolik & Mary F. Radford, “Sufficient” Capacity: The Contrasting Capacity Requirements for Different Documents, 2 NAELA J. 303, 307 (2006).

3. UNIF. TRUST CODE § 601 (2004).

to make a gift, therefore, must understand that if they make the gift they no longer own the property or asset and can no longer enjoy its use or the income in the future that it might produce. They must also understand that a gift is final. They cannot demand the return of the gift regardless of how much they need it or how much they regret having made it.

Similarly, if the client wants to appoint an agent under a power of attorney, state law will require that the client must have the capacity needed to make a contract. That same level of capacity is required if the client wishes to revoke or amend the power of attorney.⁴ The capacity needed to execute a valid, advance health care directive or to appoint a surrogate health care decision maker, however, depends upon the applicable state statute. To encourage the use of such documents, states typically only require a level of capacity similar to testamentary capacity or even lower. State statutes often permit the revocation of such documents even if the individual lacks legal capacity. In short, even clients with diminished capacity should be encouraged to sign a health care directive so long as they understand what they are doing. If they later lose capacity to the point that they can no longer give informed consent to decisions regarding their health care, the document that they are signing will mean that a person that they selected will make health care decisions for them rather than someone imposed on them by a court or an individual selected by default under a state statute.

When dealing with a client with diminished capacity, the attorney should proceed cautiously, making sure to not to assume the client comprehends what is happening, take time to explain the basics of what the attorney is trying to achieve, and use non-leading questions to assess the client's understanding. In particular, the attorney must be reasonably certain that it is the client's desires, as opposed to those of the family or a third party, that are being carried out. Yet the attorney must also keep in mind that many older persons welcome input from others. Still, the attorney must be alert for undue influence that results in the older individual undertaking acts that represent not their will, but that of a third party influencer.

Over the course of time, an attorney may conclude that the client's capacity has diminished to the degree that the client is at risk. Model Rule 1.14(b) states that the attorney who reasonably believes that a client is at risk of "substantial physical, financial or other harm," "may take" action to protect the client, including seeking the appointment of a guardian or conservator. Doing so, of course, means resorting to the court to make the determination that the client is legally incapacitated; the attorney does not make that determination. The commentary to Model Rule 1.14, however, suggests that protective action does not necessarily mean resorting to guardianship or conservatorship. The attorney can first attempt less drastic alternatives. The commentary suggests resort to a power of attorney, but that assumes the client has sufficient capacity to execute the power. The commentary also recommends bringing the client to the attention of adult protective

4. E.g., *Persinger v. Hols*, 639 N.W.2d 594 (Mich. Ct. App. 2001).

services and other supportive agencies. Here too, the assumption is that the client retains capacity, albeit diminished, and so the client retains the ability and the autonomy to make decisions. If not, guardianship or conservatorship may be unavoidable if the client had not yet appointed a surrogate health care decision maker, executed a power of attorney, or placed assets in a trust. Note that if the attorney takes action to protect a client with diminished capacity, Model Rule 1.6 implicitly permits the attorney to reveal otherwise confidential information about the client, but only to the extent reasonably necessary to protect the client's interests.

Most elder law attorneys are familiar with clients with reduced mental capacity. They usually suffer from dementia, typically Alzheimer's, which is progressive and at present untreatable. In light of the likely possibility that a client may have dementia, the attorney needs a checklist to adequately respond. That list of skills and knowledge should include the following:

- Understanding the signs of dementia.
- Understanding how best to communicate with a client who exhibits signs of dementia.
- Having a list of referral health care professionals who know how to deal with individuals with dementia.
- Being alert to possible ethical issues when dealing with a client with dementia, particularly how to avoid excessive or undue influence.
- Understanding the range of life-planning issues that arise for an individual with dementia.
- Knowing how to arrange the client's finances to avoid financial abuse and exploitation.
- Making sure the client has health care surrogate decision making documents in place, and, if possible, has left instructions either orally or in writing as to their preferred end-of-life care.
- Having an understanding with the spouse and the family about who the attorney will communicate with if the client's capacity continues to decline.

The attorney should also be familiar with screening tests that are used in the health care field to screen for dementia and diminished capacity. Although an attorney in theory could employ such a test, the wiser course is to have a psychiatrist or psychologist test the individual and interpret the results.

The simplest test is the "clock drawing" test. The individual is given a blank sheet of paper and asked to draw a clock with all of the numbers. Next the individual is asked to draw hands on the clock that indicate a specific time, such as a quarter to four. An individual who cannot successfully complete the task may have capacity issues although they may also merely have vision problems, hearing deficits, difficulty holding a pencil, or be unable to draw a picture for mental reasons other than dementia.

Perhaps the most commonly used test is the Mini-Mental State Exam (MMSE). In use since 1975, it asks 11 questions in an attempt to measure the individual's ability to recall, comprehend, and solve visual problems. Some professionals question its accuracy, but at a minimum it is useful in at least flagging a possible loss of capacity if properly interpreted by a trained professional. Other tests include the Montreal Cognitive Assessment and the Saint Louis University Mental Status test. Some professionals believe such tests are too inaccurate or too imprecise to be of much use, and prefer to rely on a half-day or even a full-day examination of the individual in order to properly assess the degree of decline in mental capacity and to identify the mental abilities and life activity skills that have suffered the most decline.

VI. Initial Meeting with the Client

The initial meeting with a potential elder law client, and possibly with members of their family, sets the tone for the relationship. Some elder law attorneys meet for a limited period, such as an hour, without charge, in order for both the potential client and the attorney to determine if the individual has legal needs that the attorney can address. More commonly, the initial meeting is not free but the charge for the meeting is incorporated into the total fee charged to the client if the attorney is engaged. If not, the individual is charged a set fee for the attorney's time.

Whether to charge for the initial meeting depends in part on whether the attorney wants to discourage individuals who are in effect looking for free legal advice as well as those who want to "shop around" among attorneys. If the attorney charges for the initial meeting, the individual is likely to be more serious about intending to hire an attorney and, in particular, has good reason to believe that they expect to hire this attorney. In contrast, an initial free consultation may be effective for an attorney trying to establish a client base. If so, the initial consultation should be "scripted" so that the attorney can uncover the individual's legal issues. The attorney should avoid giving answers or advice and even be somewhat vague about just what documents or actions the attorney expects to undertake. The goal is to impress the potential client that the attorney understands the individual's legal needs and is prepared to provide solutions, but not provide a detailed roadmap that the individual can take to another attorney in an attempt to bargain for a lower fee.

Elder law attorneys almost always use a set fee rather than hourly billing with the proviso that if the work requires increases because of changing circumstances the fee may be increased. Using a set fee requires the attorney to be able to determine both what work is required and how much time that work will require. A third consideration is what the market will bear. Some clients may have an idea of what other attorneys charge or at least have an idea of what they are willing to pay. It is therefore wise to either set a fee that is typical in the region or have an explanation

why the fee is higher than might be expected. Except in unusual circumstances the attorney should adhere to a set fee schedule. Lowering the fee for one client is the first step on a slippery slope. If other clients learn of the discounted fee, they too will demand it. It is far better to create a realistic fee schedule and explain to clients that the business of running a law office as well as the talents of the attorney require charging the scheduled fee.

If the client hires the attorney, a written engagement letter must be sent that includes the fee and the scope of representation including documents to be prepared. The engagement letter language that describes the fee should be worded in a manner that will permit an increase in the fee under appropriate circumstances. The letter should also state when the fee is to be paid and how much. For example, is it all due within 30 days or is only a portion due now with additional payments in the future? The letter should state whether the attorney accepts credit cards. The letter should also state whether the fee covers expenses such as mailing or copying or whether those will be billed for as incurred. If the latter, the attorney may want a deposit against which future expenses can be applied. An alternative is to charge an initial retainer against which the fee and expenses are charged, and to bill additionally if the retainer is exhausted. The engagement letter should require that the client sign a consent statement and return that signed copy to the attorney.

If the prospective client declines to hire the attorney, a non-engagement letter should be sent. If the individual left documents with the attorney, but the attorney has decided not to represent them, the attorney should return the original documents and explain that the attorney will not represent the individual, has retained copies of the documents, and is not charging the client for the consultation unless the charge for the consultation was disclosed to the individual at the beginning of the meeting and agreed to by the individual. If the individual engaged the attorney, but failed to pay the fee or retainer, the attorney should notify the individual that the attorney does not represent them because they have not paid the fee or retainer.

A. Client Information

After the client has engaged the attorney, the gathering of information begins. The attorney should have a checklist of questions, many of which can be answered by the client prior to the initial meeting. Based on that response, the attorney should be alerted to what additional information is needed. Sample questionnaires abound. Whatever questionnaire is used, it must be broad enough in scope and detailed enough in questions to elicit needed information and also reveal areas that the attorney should make additional inquiry about. The following topics should guide the client interview and questionnaire.

- **Personal data.** Including the client, their spouse, descendants, parents (if living), previous spouses, siblings, and significant others. Beyond names and addresses, the questionnaire should ask the client to flag individuals

with health problems, disabilities, mental health issues both past and current, and any other relevant conditions or circumstances.

- **Parental and sibling health history.** Because many chronic conditions appear to have a genetic component, family medical histories may be a guide to what may happen to the client. Even shared environmental or cultural backgrounds may be predictive.
- **Marriage history.** Both present and prior. If the client has been divorced, focus on the property settlement and any agreements as to pension or retirement fund rights.
- **Occupation or work record.** Many clients will strongly identify with their current or past employment. Knowing what the client did before retirement can be helpful in understanding how to approach them when explaining planning options. For example, explaining end-of-life choices to a retired nurse is different than explaining the topic to a former office administrator.
- **Retirement benefits.** Including pensions, 401(k) plans, other retirement income benefits, IRAs, and retiree health care benefits. If the client is married, be sure to inquire about the retirement benefits of both spouses.
- **Social Security benefits.** Ascertain the dollar amounts of both spouses and explain about the effect on the survivor's benefits when one spouse dies. If they are not yet taking benefits, determine when they expect to begin them.
- **Health of client.** Information should be sought about the current physical and mental health, prognosis of any developing or latent condition, relevant past medical history and client estimation of future health care needs, including personal care or need for assistance.
- **Religious beliefs.** To the extent that such beliefs might play a role in planning for end-of-life health care and funerals. Housing choices can also be affected by religious beliefs. The attorney needs to know enough about the client's beliefs so that the attorney can see that the beliefs are respected even if family members do not agree or are even hostile about them.
- **Secular values.** Many clients do not have religious beliefs but nevertheless have strong opinions as to what is moral, ethical, or proper behavior, particularly when it comes to health care, end-of-life care, funerals, and even housing choices.
- **Professional, community, and social affiliations.** Having the client give a brief summation of affiliations can assist in understanding who the client "is" and to whom they might turn should they need assistance and social support.
- **Relationship with children and their spouses.** The client will need to appoint agents under powers of attorney, surrogate health care decision makers, possibly executors and trustees, and identify possible caregivers. Essentially the questions are who does the client trust, who is available,

and who has the knowledge and appropriate temperament to successfully function in the position. Although the children's spouses are not often named, in some cases their hostile attitude about the obligations taken on by the child can interfere with the child performing well. The other demands on the child—personal, family, and financial—should also be understood.

- **Significant others and close friends.** Not every older client has a spouse. Some cohabit and others merely have close friends that they consider as “family.” Uncovering these relations requires careful questioning. Essentially, the attorney needs to know if someone other than or in addition to a spouse or family member has a special place of trust in the client's life.
- **Financial obligations.** Both legal and voluntary to children, grandchildren, parents, siblings, and even charitable pledges or moral obligations. The amount of support provided, and whether the client wants it to continue and, if so, under what conditions and subject to what limitations?
- **Legal documents and agreements.** Knowledge of and, if possible, copies of any current will, power of attorney, surrogate health care decision maker, revocable and irrevocable trusts, joint property, powers of appointment, long-term care insurance, Medigap insurance, life insurance, annuities, beneficial interests in a trust, rental leases as tenant or landlord, royalty rights, and mineral leases.
- **Client assets.** A complete list of all intangible assets including all bank accounts, bonds and securities in paper form, brokerage accounts, real estate, deferred annuities, and insurance products. Also all real estate and tangible assets including art, precious metals and collectibles, and any household effects that have significant market value.
- **Passwords.** For the home computer, bank accounts, and all other password protected sites. Insist that the client create either a handwritten version or use a computer password site and keep whichever up-to-date and be sure that the password site is accessible by a trusted third party or the attorney.

B. Dealing with the Client's Spouse

Often the older client is married. If so, the couple is likely to consider that both are clients. The attorney can represent both spouses, but only if the spouses agree in writing to the potential conflict of interest and to the disclosure of confidential information. Obtaining consent to the conflict of interest is usually not a problem because the personal and financial interests of the couple typically overlap. They both want to retain their autonomy, they both are usually willing to assist the other, and they both usually agree about their finances such as whether they are willing to expend their savings on their care or whether they want to pass their savings on to their children. Even if the couple is not in complete agreement, they are likely willing to work with the attorney to resolve their disagreements.

The sharing of otherwise confidential information may be more problematical. The attorney must emphasize that representation of both spouses means that the attorney must share all relevant information. The clients cannot selectively agree which information to share. If either spouse has secrets from the other that they do not want to reveal, they must not reveal that information to the attorney. Many attorneys will not represent a couple if one or both are not willing to waive confidentially as to the other spouse.

The attorney who represents a couple must help them decide how they will react to the care needs of the first spouse to suffer a physical or mental decline. It is important to learn this early in the representation because the answers will directly impact future planning. The couple must estimate how much personal assistance the well spouse will provide and what proportion of the couple's income and financial resource will be used to support the non-well spouse. If the well spouse is willing to provide care and maintain the non-well spouse at home, the need for paid care and institutionalization of the non-well spouse can be delayed with a corresponding savings of income and resources. The "cost" to the well spouse, however, can be considerable in terms of their health and psychological well-being. Even if the well spouse is willing to make that sacrifice, the attorney must lay out the probable scenario of the likely future of the non-well spouse. At some point the condition of the non-well spouse will have declined so much that they will require additional paid assistance and perhaps even institutionalization. The attorney should initiate a discussion as to how the projected cost of care of the non-well spouse will be met and how doing so will affect the quality of life of the well spouse. Often during that discussion it will become clear that the couple's assets and income will be unable to support the cost of care and so the couple should plan on eventually applying for Medicaid to pay for nursing home care or for state-provided home and community assistance to help pay for care in the home. If either of the couple is a veteran, the attorney should review the possible veterans' benefits available to them.

The couple may want to defer institutionalization by using paid in-home care, but the attorney should caution them that such care is expensive and may not best meet the needs of the non-well spouse. The attorney should also warn the couple about the difficulties of finding, supervising, and monitoring appropriate in-home care. If the couple insists on using in-home care, the attorney should note that they will need help in meeting the obligations that come with being an employer, such as payment of wage taxes including withholding for income taxes and the Social Security wage tax. If the couple plans to hire an agency to provide the care, the attorney should suggest that the couple either hire the attorney or a qualified employment attorney to review the contract of care to see that it meets the client's needs.

During the initial interview and throughout the planning process, the attorney must be careful to balance the needs of the two spouses. When discussing plans for long-term care for one spouse, the attorney must emphasize the couple's need

to have a contingent plan for the possible future care needs of the other spouse, keeping in mind that every dollar spent on the first spouse is one less dollar available for the other spouse. Of course, the decision on how to allocate their finances is up to the couple, but the attorney has the ethical obligation to make sure that both spouses fully appreciate the consequences of their decisions. The attorney should also emphasize that any plan may not prove to be the best plan in light of future developments. Later-life legal planning is a process. Unanticipated care needs, changes in finances and income, and changes in state and federal law may necessitate amending the original plan. The initial interview is only the beginning of a relationship with the attorney. The clients should plan on a regular review with the elder law attorney about their needs and whether their current plan remains the best approach.

C. Articulating Client Goals

A client typically seeks out an elder law attorney for a particular problem or concern. In all likelihood, however, the client's needs are much broader than those articulated. In most cases, those needs can be grouped into four areas of concern.

1. Long-term care in light of current or projected physical and mental decline.
2. Financial security including financial security for a surviving spouse.
3. Property management during life and distribution of property at death.
4. Housing that is affordable and appropriate in light of the client's current and projected physical and mental condition.

Clients often are focused on only one of these areas and usually fail to appreciate their interdependence. The attorney, therefore, must ask questions that force the client to consider how to plan for the variety of contingencies that go well beyond the immediate concerns that brought the client to the elder law attorney's office.

As the client begins to appreciate that later-life legal planning must be ongoing and respond to changing circumstances, the client may come to appreciate that they need a continuing relationship with the attorney. Or the attorney may convince the client that they have needs that will be best served by continuing to engage the attorney. If the client remains as an active client, the attorney's role is to help the client understand how declines in physical and mental capacity require the client to choose among the continuum of available options. The choices depend upon on the client's values, finances, and social and family support systems.

D. Understanding Available Solutions and the Need for Other Professional Involvement

As the client explains what is important to them, such as aging in place or not being a burden on their children, the attorney can begin to outline choices and

solutions that translate vague values and wishes into specific solutions. That may require calling for assistance from other professionals such as geriatric social workers, insurance professionals, and financial advisors.

Many elder law attorneys employ such professionals on their staff. Some employ nurses, social workers, or paralegals with extensive experience in dealing with the issues confronting older clients. Other attorneys employ or consult with other professionals as needed, or merely refer clients with the hope that the other professionals will reciprocate by referring their clients to the attorney. A few elder law attorneys have become licensed to sell insurance so that they can sell clients long-term care insurance when it is appropriate. Some attorneys have become licensed to sell financial products such as annuities or mutual funds in the belief that such products are often essential parts of effective planning in light of their clients' needs. The potential conflict of interest in an attorney selling a product that the same attorney recommends as part of proffered legal advice is obvious. Great care is required to avoid transgressing professional ethical rules.

Elder law attorneys should also be well informed as to the available community support services and housing options. Most states, counties, and even some cities offer services and support to the elderly, often without regard to financial need. The attorney should know what those services are and how to access them. For example, the attorney should know if there is a local senior center and what kinds of programs are available there. Adult day care centers may also exist that the attorney might want to recommend. Many religious entities offer support and outreach to the elderly. The attorney should have contact information for these groups in the event that the client wishes to seek their assistance. The attorney should also have a list of the nonprofit community entities that are a potential source of programming and assistance.

Elder law attorneys need to be familiar with the supportive housing available in their community. Many clients want to age in place, but to do so requires assistance with personal care. The attorney should have a list of agencies that provide in-home care. Giving the client the names of potential care providers is usually unwise. If the client hires the individual and that arrangement does not work out, the client may have doubts about the attorney's advice in other matters. Worse, if the client is harmed, abused, or victimized by an individual recommended by the attorney, it is possible that the attorney might be liable for having made the recommendation. The client can claim that the attorney failed to do due diligence prior to making the recommendation. It is far better to merely provide a list of agencies while noting that the attorney is not recommending them and has no personal knowledge about them; and add that there are other agencies that are not on the list.

It is also important to be familiar with the housing designed for the elderly that is available in their community including continuing care retirement communities, supported housing, assisted living, and nursing homes. The attorney might want to visit some of these facilities, both to be able to describe or recommend them

and also to establish relationships with the managers of those facilities. Being able to provide a client with a contact person at a facility can be very useful in assuring the client that they selected the right elder law attorney.

VI. Basic Estate Planning Documents

The initial interview with a client should disclose whether the client has the basic estate planning documents, including a will, a power of attorney, and a document that appoints a surrogate health care decision maker. The elder law attorney should ask to be provided copies of these documents and should review them. Doing so will frequently reveal that the documents are out of date or fail to comport with the client's current wishes. If the client agrees, the attorney should draft new documents.

A. Will

Older clients who have a will have often not reviewed it for several years. Consequently, the document may not express how the client now wants to leave their estate. Alternatively, the client may not have considered how changing circumstances may necessitate a new will. The attorney should discuss with the client the most likely events that may require a new will.

First, the previous wills of many older clients leave everything to the surviving spouse. If there is no longer a spouse or if the spouse named in the will has died, a new will is clearly in order. Even if the spouse is alive, they may have suffered a significant loss of mental capacity that makes leaving the entire estate to them unwise. A reduction of the gift to them or leaving the gift to them in a trust may be more sensible. If the spouse is in a nursing home or is receiving at home care and is receiving Medicaid or is likely to soon receive Medicaid, the client should only leave the minimum required by the state law to that spouse in order to minimize or avoid their becoming ineligible for Medicaid or other state assistance programs. In short, both the present and future physical and mental dependencies and needs of each spouse should be considered when drafting a new will.

The clients should also consider how much of their wealth is part of their probate estate and therefore subject to provisions in the will. Increasingly, wealth is held in IRAs, insurance proceeds, trusts, and jointly held property, none of which are governed by a will. The client needs to carefully review beneficiary designations including successor beneficiaries and review whether it is wise to continue to own jointly held property other than the family home.

Next, the client must review the appropriateness of gifts in the will to their children. When the previous will was executed, the children might have been minors or only young adults. An older client, however, one who is past age 70, will likely have children age 40 or 50. Those children may not be suitable for an outright gift. Problems in their marriage, their business, or with their finances might suggest

that a gift in trust is more advisable. If the client has grandchildren, they should be asked whether they wish to leave gifts to those grandchildren and, if so, should the gifts be left in trust.

B. Power of Attorney

The client should have a new power of attorney if only to avoid problems with third parties being reluctant to accept a power signed years ago. Because many states have amended their power of attorney statutes, even though a preexisting power might still be valid, it is advisable to sign a power that comports with the current state requirements. If the client has changed state residency since signing the previous power of attorney, the attorney should insist on the client executing a power that meets the requirements of the current state of residence. If the client has a winter or summer home, they should sign a second power of attorney that meets the requirements of the state where the property is located and that grants agent authority only to deal with that property. The client should also review who they have named as agent and successor agents, as the passage of time may dictate the need for new agents and possibly even new powers tailored to the client's current financial realities.

Finally, the attorney should ensure that the client has a document that appoints a surrogate health care decision maker in the event that the client lacks the capacity to make health care decisions. The document should appoint the agent and a successor, and also detail the kind and extent of end-of-life treatment desired by the client. If the client typically spends time in two or more states, the client should sign separate documents that meet the statutory requirements of each state. Some clients will have or will want a living will, which is a document that attempts to dictate their medical care in the event that they lose the capacity to do so. In most cases, it is preferable to have a single document that appoints the agent for health care decision making and also includes instructions as to the kind of care desired. Attempting to dictate care in the abstract is less effective than providing a surrogate health care decision making agent with appropriate powers and instructing them as to the desires of the client who signs the documents.

For a more detailed discussion of estate planning for an older client, see Chapter 11, Health Care Decision Making; Chapter 16, Trusts; and Chapter 17, Estate Planning with the Very Old Client.