

The Merging of Estate Planning and Elder Law

By Scott M. Solkoff, Esq¹



Two major pressures are moving the practices of Estate Planning and Elder Law together. The dominant pressure is one of demand. For most Americans, the greatest threat to their financial well-being is not taxes. It is the cost of incapacity and long-term care. Addressing these needs with the ethics and skills of an attorney are in high demand. The second pressure is the continuing erosion of value proposition. This second pressure is further broken down twofold: perceived commoditization and the reduced market for tax planning.

Those who routinely deal with high net-worth clients are largely insulated by these pressures. The very wealthy can bear the storm of incapacity and long-term care and they are more apt to understand the value of good lawyering relative to taxes. Given today's large exemption amounts, however, only one-tenth of one percent of Americans are subject to federal estate, gift and generation-skipping tax exemptions.² Most Americans need a different approach, one that blends the Estate Planning and Elder Law toolboxes.³

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² Tracy Craig, "Is Estate Planning Now Dead?" (Kiplinger, May 1, 2018) accessed at <https://www.kiplinger.com/article/retirement/T021-C032-S014-is-estate-planning-now-dead.html>; Tax Policy Center, Briefing Book, accessed at <https://www.taxpolicycenter.org/briefing-book/how-many-people-pay-estate-tax>. These are approximate numbers which will vary with death rates and estate valuations among other factors.

³ This is not the only area of potential value boosting. Consider legacy planning and other approaches which also speak to the client's core desires and needs.

Estate Planning Attorneys are therefore looking to diversify their practices, address prevalent problems and preserve or increase their income streams. Many are wedding Elder Law to their existing practices. Elder Law is among the fastest growing areas of law and has a great level of personal reward. For Estate Planning attorneys, it is also a relatively easy practice area to incorporate since Elder Law and traditional Estate Planning are not-too-distant cousins. This blog post explains the core practice components of an Elder Law practice and how to determine whether Elder Law is right for you.

First, let's address the most significant distinctions between Elder Law and traditional Estate Planning. In Elder Law, the focus is on the lifetime needs of the client and only then, what happens after death. Forward-thinking Estate Planning attorneys have also put the client's lifetime needs first, but this emphasis is in the DNA of Elder Law. Post-mortem planning weighs heavily in the Elder Law Attorney's arsenal but it is not central.

The shift from post-mortem emphasis to that of lifetime needs goes far beyond inter-vivos trusts and powers of attorney. It shifts the thinking towards quality of life through incapacity planning, long-term care planning, access to health care and end-of-life decision-making. The counsel of the Elder Law Attorney has a significant impact on quality of care, peace of mind and quality of life.

The Elder Law Attorney can have a diverse client base. Elder Law clients can have ten dollars to tens of millions of dollars. For the very wealthy, Elder Law is about protecting oneself with knowledge and documents to get the best care possible, guide family caregiving, protecting against incapacity and leaving a legacy. It is about knowing how to work the

long-term care system and using the law to achieve better results as sickness and death inevitably march closer. For all the rest, mainly the middle class and the upper middle class, Elder Law is also about avoiding impoverishment due to the cost of long-term care.

A Common Elder Law Client

Dorothy and Sam Baker lived modest lives. Dorothy was a teacher and Sam a furniture salesman. They always put money aside and saved for their retirement. Dorothy recalls seeing that jacket in the department store window in 1959 and not buying it so they could put that money aside. They were careful. While Sam served in the military, Dorothy held down the fort at home. They put two children through college, the first in the family to go to school. In 2010, they moved to Florida to live the rest of their years in sunshine and closer to the kids.

Shortly after, Sam started his decline into dementia. His short-term memory went first and then it got worse. That "rainy day" had come. By the time she came into my office, she was paying \$4,000 a month for home health. If and when a nursing home becomes necessary, she knows it will cost about \$10,000 a month. They saved \$425,000 plus an apartment worth \$100,000, a significant sum when one considers their lifetime income.

Now, in addition to the stress of caregiving and the emotional trauma of slowly losing her husband to this terrible disease, Dorothy is scared about money. If nothing is done, they will likely be impoverished and then be solely reliant on whatever the government will cover. Sam will go without necessary care and Dorothy will be left with very little money for the rest of her life. When Dorothy comes to you, she

comes with Sam and the two kids. They look to you for help.

By incorporating Elder Law into your practice, this is an example of how you can do well by doing good. You can help Sam and Dorothy by legally (and ethically) protecting their remaining life savings against the cost of long-term care. You can help them to access Medicaid and V.A. benefits, benefits which are overly complicated to access without a knowledgeable lawyer.

Since Medicaid and/or V.A. benefits can pay for home care, assisted living and nursing home care in even the best of facilities, this planning can save the Elder Law client tens or hundreds of thousands of dollars. For someone like Sam and Dorothy, this is done not out of greed but by necessity to avoid impoverishment.

I know I am incredibly fortunate to work in an area of law where I can bring that degree of tangible assistance. I get hugs and checks. Because the value is so manifest, clients are more than willing to pay the Elder Law Attorney a fair fee for this help. On top of feeling good about what I do, this means I can also get paid! Indeed, the fees paid to Elder Law Attorneys are often higher than those charged for typical and even advanced Estate Planning. This is partly because of the increased knowledge necessary and the scope of services the client requires.

The Elder Law practice requires certain core competencies and then optional components. The initial core competencies include the following subjects:

1. Incapacity Planning and Dealing with Incapacity
2. Estate Planning through wills and trusts
3. Medicare
4. Medicaid
5. V.A. Benefits
6. Special Needs Planning
7. Social Security
8. End-of-life decision-making
9. Retirement benefits

Beyond these subjects are other components which some Elder Law Attorneys choose to add to their practices but for which many others develop referral relationships. These might include:

1. Guardianship
2. Addressing abuse, neglect and exploitation
3. Resident rights in assisted living facilities or nursing homes
4. Long-term care insurance advocacy
5. Involuntary commitments for dementia-related issues
6. Public policy advocacy
7. Estate and Trust Administration
8. Tax planning
9. Grandparental rights
10. Age discrimination in housing and work
11. Litigation including nursing home abuse

Elder Law, properly practiced, utilizes a multi-disciplinary approach which makes use of community resources to further the clients' needs. Forming relationships with social workers, care managers, guardians, social service agencies, facilities and others becomes very important to success. These relationships help the client and form a referral network.

Attorneys' fees in Elder Law cases reflect the demonstrably substantial value proposition. If planning can save hundreds of thousands of dollars in long-term care costs, people are willing to pay for high-level counsel. Just as high net worth tax planning can show clear savings to wealthy clients, so too for the bulk of Americans when it comes to long term care costs. Add to the financial value the Elder Law Attorney's greatest deliverable — Peace of Mind — and you have a formula for great value and the earning of a great living.

Is Elder Law right for you? I believe we are past the point that such cross-pollination was optional. You do not have to change name plates to that of Elder Law Attorney (though the public is now well aware and acceptant of that term). It is simply about wedding the practice areas in a way that serves your target client base. If you want to expand your practice and revenue, Elder Law expands that client base tremendously. If you are an attorney who plans to work exclusively with the very wealthy, Elder Law is useful in guiding that client on working the health care and long-term care systems to their advantage.

The very wealthy do not require Medicaid or need-based V.A. benefits, but they will benefit from caregiving counsel and more expansive incapacity documents. If, on the other hand, you are an attorney who plans to work primarily with the middle class and upper middle class,

incorporating Elder Law into your practice can be very rewarding if not essential.

For Estate Planning attorneys who see their appointments and value proposition dwindling with increases in the estate tax exemption, increased use of online solutions and artificial intelligence, Elder Law is more immune to such issues. Elder Law is right for you if you see this decline in your Estate Planning practice now or you see its inevitability in the near future. Elder Law issues can be depressing and too delicate for some. It can be depressing working with death and dying every day. It can also be upsetting to see the strains of caregiving on families. This you must consider.

On the other hand, it is because these issues are so challenging that the Elder Law Attorney delivers great value. If you get annoyed with people who require "hand-holding," Elder Law is not for you. The practice requires patience and true empathy. If you are looking for a way to balance your work and life, Elder Law can be helpful. Elder Law Attorneys can make good money and still be in control of their schedules. If you are a solo practitioner or in a small firm, Elder Law is almost always a good fit to the business model.

Elder Law can work well in large firms but you will first need the buy-in of your partners to understand the different fee structures (e.g., usually flat fee in Elder Law) and the different cultural issues (e.g., working with infirm older people with diminished capacity). As well established are the educational opportunities and tools, the opportunity for Elder Law is just beginning. After all, seventy-seven million Baby Boomers are starting to require our services!

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