

Elder Law: Planning for the unexpected

The Autonomy Group Legacy Planning, PC

The following guide includes adapted information from various sources and the website of the National Academy of Elder Law Attorneys, of which The Autonomy Group Legacy Planning, PC Attorney Soraya Martial-Wright, Esq. is a member



What is Elder Law?

Elder Law is defined by the client to be served. In other words, the lawyer who practices Elder Law may handle a range of issues but has a specific type of clients – seniors.

Elder Law Attorneys focus on the legal needs of the elderly, and work with a variety of legal tools and techniques to meet the goals and objectives of the older client.

Under this holistic approach, the Elder Law practitioner handles estate planning issues and counsels clients about planning for incapacity with alternative decision-making documents. The attorney would also assist the client in planning for possible long-term care needs, including nursing home care. Locating the appropriate type of care, coordinating private and public resources to finance the cost of care, and working to ensure the client's right to quality care are all part of the Elder Law practice.

What is NAELA?

The National Academy of Elder Law Attorneys, Inc. (NAELA) was founded in 1988 as a professional association of attorneys who are dedicated to improving the quality of legal services provided to the elderly.

The primary focus of the Academy is education. The Academy sponsors continuing legal education programs on Elder Law for attorneys throughout the year and provides publications and educational materials to its members on a wide range of Elder Law topics.

Questions & Answers When Looking For an Elder Law Attorney

Legal problems that affect the elderly are growing in number. Our laws and regulations are becoming more complex. Actions taken by older people with regard to a single matter may have unintended legal effects. It is important for attorneys dealing with the elderly to have a broad understanding of the laws that may have an impact on a given situation, to avoid future problems.

Unfortunately, this job is not made easy by the fact that Elder Law encompasses many different fields of law. Some of these include:

- Preservation/transfer of assets seeking to avoid spousal impoverishment when a spouse enters a nursing home
- Medicaid
- Medicare claims and appeals
- Social security and disability claims and appeals
- Supplemental and long-term health insurance issues.
- Disability planning, including use of durable powers of attorney, living trusts, "living wills," for financial management and health care decisions, and other means of delegating management and decision-making to another in case of incompetence or incapacity.
- Conservatorships and guardianships

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- Estate planning, including planning for the management of one's estate during life and its disposition on death through the use of trusts, wills and other planning documents
- Probate
- Administration and management of trusts and estates
- Long-term care placements in nursing home and life care communities
- Nursing home issues including questions of patients' rights and nursing home quality
- Elder abuse and fraud recovery cases
- Housing issues, including discrimination and home equity conversions
- Planning for eligibility for certain Veterans Administration benefits
- Age discrimination in employment
- Retirement, including public and private retirement benefits, survivor benefits and pension benefits
- Health law
- Mental health law

Most Elder Law Attorneys do not specialize in every one of these areas. So, when an attorney says he/she practices Elder Law, find out which of these matters he/she handles. You will want to hire the attorney who regularly handles matters in the area of concern in your particular case and who will know enough about the other fields to question whether the action being taken might be affected by laws in any of the other areas of law on the list. For example, if you are going to prepare a new will and your spouse is ill, the estate planner needs to know enough about Medicaid to know whether it is an issue with regard to your spouse's medical care planning.

Attorneys who work primarily with the elderly bring more to their practice than an expertise in the appropriate area of law. They bring knowledge of the elderly that allows them and their staff to ignore myths relating to aging and the competence of the elderly. At the same time, they take into account and empathize with some of the true physical and mental difficulties that often accompany the aging process. Their understanding of the afflictions of the aged allows them to determine more easily the difference between physical versus mental disability of a client. They are more aware of real life problems, health and otherwise, that tend to crop up as persons age. They are tied into a formal or informal system of social workers, psychologists and other elder care professionals who may be of assistance to you. All of these things will hopefully make you more comfortable when dealing with them and ease your way as you try to resolve your legal problem.

Finding an Elder Law Attorney

Your first question may be, "How do I find an Elder Law Attorney?" Before making the effort, step back a moment and try to determine whether you actually have a legal problem in which an attorney needs to be involved. If you're not sure, ask your clergy, your social worker, your financial advisor, or a trusted friend to help you decide whether this is a legal issue rather than a medical or a social services issue. Legal expertise is expensive and it serves you well to know that you actually need legal assistance before seeking an attorney.

There are many places to find an attorney in your city or state who specializes in problems of the elderly. The NAELA website (www.naela.org) includes a **searchable directory** of attorneys who belong to NAELA. Also, you may check with local agencies to obtain good quality local referrals.

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Some of the agencies you may want to call include:

- Alzheimer's Association
- Legal Services for the Elderly
- AARP (American Association of Retired Persons)
- Children of Aging Parents
- Health Insurance Association of America
- National Citizen's Coalition of Nursing Home Reform
- Social Security Administration Office
- Your State Bar Association
- Support Groups for specific diseases
- Hospital or Nursing Home Social Service Department

Most of the above agencies can be found in the yellow pages under the heading "Associations."

If you know any attorneys personally, ask them for a referral to an Elder Law Attorney. An attorney may be in a good position to know who handles such issues and whether that person is a good attorney. Such persons are often the best and safest sources of referrals.

Ask Questions First

Ask lots of questions before selecting an Elder Law Attorney. You don't want to end up in the office of an attorney who can't help you. Start with the initial phone call. It is not unusual to speak only to a secretary, receptionist or office manager during an initial call or before actually meeting with the attorney. If so, ask this person your questions.

- How long has the attorney been in practice?
- Does his/her practice emphasize a particular area of law?
- How long has he/she been in this field?
- What percentage of his/her practice is devoted to Elder Law?
- Is there a fee for the first consultation and if so, how much is it?
- Given the nature of your problem, what information should you bring with you to the initial consultation?

The answers to your questions will assist you in determining whether that particular attorney has the qualifications important to you for a successful attorney/client relationship. If you have a specific legal issue that requires immediate attention, be sure to inform the office of this during the initial telephone conversation.

Once You Have Found an Attorney

When you have found an appropriate attorney, make an appointment to see him/her. During the initial consultation, you will be asked to give the attorney an overview of the reason you are seeking assistance, so be sure to organize and bring all the information pertinent to your situation.

After you have explained your situation, ask:

- What will it take to resolve it?

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- Are there any alternative courses of action?
- What are the advantages and disadvantages of each possibility?
- How many attorneys are in the office?
- Who will handle your case?
- Has that attorney handled matters of this kind in the past?
- If a trial may be involved, does he/she do trial work? If not, who does the trial work? If so, how many trials has he/she handled?
- Is that attorney a member of the National Academy of Elder Law Attorneys?
- How are fees computed?
- What is his/her estimate of the cost to resolve your problem and how long will it take?

Discussing Fees

There are many different ways to charge fees and each attorney will choose to work differently. Be aware of how your attorney charges. You will want to know how often he/she bills. Some attorneys bill weekly, some monthly, while some bill upon completion of work. Ask about these matters at the initial conference, so there will be no surprises! If you don't understand, ask again. If you need clarification, say so. It is very important that you feel comfortable about the fees that you will be responsible to pay.

Some attorneys charge by the hour with different hourly rates for work performed by attorneys, paralegals and secretaries. If this is the case, find out what the rates are. Other attorneys charge a fixed price (sometimes called a flat fee) for all or part of the services. This is not unusual, for example, if you are having documents prepared. Your attorney might use a combination of these billing methods.

In addition to fees, most attorneys charge for out-of-pocket expenses. Out-of-pocket expenses typically include charges for copies, postage, messenger fees, court fees, disposition fees, long distance telephone calls and other such costs. Find out if there will be any other incidental costs.

Get It in Writing

Once you decide to hire the attorney, ask that your arrangement be put in writing. The writing can be a letter or a formal contract. It should spell out what services the attorney will perform for you and what the fee and expense arrangement will be. REMEMBER – even if your engagement agreement remains oral and is not put into writing, you have made a contract and are responsible for all charges for work done by the attorney and his/her staff.

Make It a Good Experience

A positive and open relationship between attorney and client benefits everyone. The key to getting it is communication. The communication starts with asking the kinds of questions contained in this

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document. Use the answers to the questions as a guide not only to the attorney's qualifications, but also as a way to determine whether you can comfortably work with this person.

If your concerns are given short shrift, if you don't like the answers to these questions, if you don't like the attorney's reaction to being asked all those questions, or if you simply don't feel relaxed with this particular person, **DO NOT HIRE THAT PERSON**. Only if you are satisfied with the attorney you hire from the very start will you trust him or her to do the best job for you. Only if you establish a relationship of open communication will you be able to resolve any difficulties that may arise between the two of you.

If you take the time to make sure that you are happy right at the beginning, you can make this a productive experience for both you and the attorney. You will thank yourself, and your attorney will thank you.

Estate Planning & Probate

Estate planning is an opportunity to make wishes known about your health care and asset distribution and to determine what person(s) will be responsible for carrying out those directives. If you do not leave a Last Will and Testament or trust, many of your assets will be distributed according to applicable state laws. There are laws in each state governing the rights of surviving spouses, heirs, and next of kin in the absence of a Last Will and Testament.

A complete estate plan should include:

1. A Last Will and Testament; *
2. A durable health care power of attorney naming an agent (and an alternate) responsible for medical decision-making;
3. A living will or other advance directive giving instructions concerning the type of care one wishes to receive (or avoid) in the event of a terminal illness or persistent vegetative state; and
4. A durable financial power of attorney naming an agent (and an alternate) responsible for asset and financial management.

Estate planning may also include the creation of trusts & recommendations about beneficiary designations.

**In some cases, trusts are used with or in place of wills.*

Probate

Probate laws, practice, and costs vary from state to state. A qualified Elder Law attorney will be able to advise you about your state. It is also important to meet with a qualified Elder Law attorney after a spouse dies because certain tax returns may need

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to be filed to save taxes on the surviving spouse's death.

What You Need To Know

In preparing an estate plan, it is essential to administer all your assets. Do a complete inventory of everything you own before contacting your estate planner. You will need to make decisions about what to include in your estate plan.

Determine who will inherit your property upon your death. If capacity or vulnerability is an issue, consider naming a trustee to handle financial affairs for him or her. Designate an Executor or Personal Representative to administer your estate, as well as an alternate for this role. Special arrangements may be needed if there are particular family issues, such as children from a previous marriage of either spouse or any recipient with a disability.

In the event of a disability, decide who will be your decision-makers for your finances and health care options. Finally, consider the difficult questions of what type of care you would want or not want in the event of terminal illness. If you have special desires concerning disposition of your remains, explain these desires during your planning conference as well.

These are complicated & personal issues. The advice of a qualified Elder Law attorney is essential to protect your financial health and welfare and to ensure that your health care wishes are known and carried out.

Some insurance vendors call themselves estate planners as do some accountants and financial planners. Often, these individuals will be selling some type of product or service. Use caution in attending free seminars about living trusts or other arrangements.

The law is constantly changing, and books or materials on the Internet are not always up to date. While there are pre-printed forms readily available for wills, powers of attorney, living trusts, and living wills, these may not be valid in your state.

What About Asset Protection?

Long term care costs are very high now, and constantly rising. Many of us may not be able to afford thousands of dollars a month for care. The government has programs that can help pay for long term care, but your home or other assets could be at risk. Elder law attorneys help you put a plan in place to prevent you from losing your home or savings in the event you need significant long-term care in the future.

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Who Will Need Care?

- ♦ Most studies are consistent in showing that 1 in 2 people will need some type of long term care.
- ♦ The type, frequency and percentage of people who will need long term care increases greatly for persons over age 70.
- ♦ Dept. of Health and Human Services estimates 70% of all people over age 65 will need some type of long term care.

Some statistics

- Baby Boomers Began Turning 70 in 2016 at the rate of 10,000 per Day – in 2017 they are 78 million strong, ages 53-71
- 1 in 5 Adults is a Caregiver of an Older American
- The Average Net Worth of an Older American is \$232,000
- Persons over 65 Today = 45 Million
- In 2020 there will be 56 Million Seniors
- In 2040 there will be 79.7 Million Seniors
- By 2050, the U.S. Census Bureau predicts there will be 86.7 Million citizens age 65 and older living in the U.S. – 21% of the total population
- In 1965 average life expectancy for a male was 66.8; for a female it was 73.7
- The Society of Actuaries recently released new mortality tables showing increased longevity for 65-year-olds:
 - 65-Year-Old Males = 21.6 yrs. to age 86.6
(up from 19.6 yrs; 10.4% increase)
 - 65-Year-Old Females = 23.8 yrs. to age 88.8
(up from 21.4 yrs; 11.3% increase)

The Alzheimer's Factor

- ♦ Alzheimer's increased by 46.1% as a cause of death between 2000 and 2006, while causes of death from prostate cancer, breast cancer, heart disease and HIV all declined during that time period.
- ♦ Every 70 seconds, someone in America develops Alzheimer's. By mid-century, someone will develop Alzheimer's every 33 seconds.
- ♦ 1 in 8 people over age 65 have Alzheimer's

How Will Care Be Paid?

- ♦ National average hourly rate for home health aides - \$21/hour
- ♦ Assisted living - \$39,516/year
- ♦ Nursing home - \$75,825/year

Payment Options

- ♦ Pay with your own savings.
- ♦ Purchase long term care insurance.
- ♦ Implement a legal plan to protect your home and your savings.
- ♦ A combination of all of the above.

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Medicare & Long-term Care

- ♦ Health insurance program for persons age 65 or older or who have been determined to be disabled
- ♦ Will not provide for long-term care, only rehabilitation in a facility for up to 100 days following admission to a hospital for 3 midnights

Medicaid & Long-term Care

- ♦ Federal program based on federal rules, but administered by the states
- ♦ Income and asset rules
- ♦ As long as a person qualifies Medically and financially, that person will receive benefits (in a nursing home)
- ♦ Only program that will pay for long-term care
- ♦ Medicaid is a means-based program
- ♦ Medicaid is viewed as the “payor of last resort” for medical care, nursing homes and home health care
- ♦ Medicaid’s Long-Term Care Populations Include People with Diverse Needs

Persons with mental retardation and developmental disabilities

- *supervision and cueing in meal preparation and money management and transportation to employment*
- **Persons with mental illness**
- *supervised housing with onsite psychiatric care and medication management*
- **Persons with spinal cord injuries and traumatic brain injuries**
- *environmental modification for wheelchairs and other assistive technology and personal care*
- Medicaid’s Long-Term Care Populations Include People with Diverse Needs

Persons with Alzheimer’s disease and dementia

- *supervision and cueing in dressing and bathing*
- *transportation to adult day care*

Persons with neuro-degenerative conditions

- *personal care*

Asset Protection To Become Medicaid Eligible

- ♦ Between 15% - 25% of older persons spend-down to become eligible for Medicaid nursing home care. A significant number “private pay”
- ♦ Among those persons who spend-down:
 - *9%-15% transferred assets (mean amount = \$4,000)*
 - *13% transferred assets within 4 years of entry (mean amount = \$5,400)*
- ♦ 4 in 10 elderly people could become eligible for Medicaid by using a qualifying trust to preserve assets, but less than 10% (4% of those eligible) create this trust

What We Want to Avoid

- ♦ Running out of money.
- ♦ Leaving the home unprotected.
- ♦ Risking the health of family or spousal caregivers.
 - ♦ Family caregivers, especially spousal caregivers, are at far greater risk or serious health

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problems or death.

The Goal

- ♦ To age with dignity.
- ♦ To access the best care possible.
- ♦ To take control over who will manage finances if you are unable to and under what circumstances.
- ♦ To leave the legacy you choose, not what the state chooses for you.

The Next Step

- ♦ If you or a loved one would like to explore how an Aging in Place plan would work for you, contact us or an Elder Law Attorney of your choosing. We would be honored to serve you and your family!

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