

A Multi-Disciplinary Elder Law Practice-

Some Thoughts

By Joseph T. Buxton, III, CELA

I have been in the general practice of law since the fall of 1978 and exclusively in estate planning and elder law since 1990. In 1998 I left my general practice firm and formed a separate law corporation devoted exclusively to estate planning and elder law.

Along the way it became abundantly clear to me that to be effective in assisting a client to preserve and protect their assets I needed to know a lot more about those assets, whether they be their real estate holdings, small business enterprises, annuities, 401K's, IRA's, 403(b)'s, 457 plans, mutual funds, variable annuities, fixed annuities, term life insurance, whole life, universal life, publicly traded securities, municipal bonds, investment trade bonds, closely held S-corporation stock, C-corporation stock, real estate investment trusts. This realization went beyond simply recognizing that I needed to understand more about these assets, but that estate planning and elder law is part of a much larger planning picture and that I may, in fact, have an affirmative obligation beyond providing the basic tools available to protect assets such as a will, revocable trust, power-of-attorney, advance medical direction, partnership agreement, incorporation, the creation of a limited liability company, and the like. Should I, as an estate planning and elder law attorney, provide the client advice or guidance with respect to the financial planning aspects of the

client's estate? Am I obligated, for example, to advise a client who just retired on a small pension from a defined benefit program with a home, \$50,000 of E-bonds and the balance of their investments in CD's, that inflation may undermine the client's lifestyle in retirement? More importantly, should an elder law estate-planning attorney advise the client on alternative investment strategies for those assets as part of the planning process?

To address these questions and to understand the financial planning process and assets in the client's estate, I enrolled in the Professional Financial Planning curriculum at Old Dominion University in Norfolk, Virginia. The university offered a six-part, evening program devoted to familiarizing non-financial professionals with the world of financial planning. Professionals from various disciplines, insurance, securities, taxes, estate planning, etc., were brought in for each segment of the program. Each segment was followed by an examination. The final segment devoted to the drafting of a comprehensive financial plan for a hypothetical client.

I then began to develop strategic relationships with various financial planners in the community to assist my clients with the financial aspects of the planning process. I began referring clients out to individual planners to deal with these issues. It seemed to work fairly well. The planners would often refer clients to my office for estate planning work. We would often collaborate in the funding of trusts and dealing with other issues, such as the creation of an irrevocable life insurance trusts funded by life insurance, establishment of a gifting program to transfer of assets to other family members utilizing the annual gift tax exclusion.

I was able to educate many of the planners on the process involved in re-titling assets, designation of beneficiaries on IRA's, etc. I would often involved the financial planner in post-mortem trust administration, transfer of accounts and other property as well as rebalancing or reinvesting assets passing through an estate or into a credit shelter trust.

At the same time, however, the financial services industry was going through turmoil. A consolidation was underway, banks were merging, insurance companies were demutualizing, and everyone was getting into the financial planning game.

Then came the melt down of the early 2000's. I began seeing clients whose IRA's, whose investment portfolios, and in many cases, whose life savings had been destroyed. In some cases, clients were returning after working with investment professionals, whom I had suggested that they consult for their financial planning needs. It became increasingly clear to me that to be an effective estate planner, the planner might need to take a more "hands on" attitude with respect to the specific assets making up the client's estate.

At the same time it appeared that those involved in the financial planning area, particularly the regional banks, national insurance companies, and brokerage houses were also looking at the opportunity to provide comprehensive planning for their customers and clients. Often their literature included in their services - estate planning. The question was now not should an estate planner provide financial planning advice - but how? Obviously, this question raises not only substantial issues regarding the planner's qualification but also inherent issues of conflict of interest as well as ethical considerations.

On the other side of the coin, if the attorney failed to make specific recommendations regarding the purchase of long term care insurance, the use of annuities, the funding of life insurance trusts with specific life insurance survivorship life insurance policies, does he fail in his professional responsibilities to provide proper planning advice to his client. Moreover, what would be the issues surrounding an elder law or estate planning attorney in participating financially in the sale of specific financial products? And, finally, if the elder law attorney or estate planner fails to include elements of financial planning in his practice, will other entities and organizations and individuals effectively invade the estate planning field?

With respect to the latter, one needs only look to the practice of real estate law. In Virginia, for example, the real estate bar ignored for far too long the interest of the title insurance industry in facilitating and ultimately handling real estate closing so that in the final analysis the practice of residential real estate closings passed to non-attorneys. As a result of the practice of residential real estate disappeared as the backbone of many law practices.

Change in the client's environment also forecasts the need to change how we view our practice. The increase of the federal estate tax exemption on January 1 to \$1.5 million and the prospect of future increases and possible repeal of the death tax at the federal level have removed some of the urgency for clients, particularly in the middle-class to address their estate planning needs.

As a result, many estate planners are moving into the field of elder law to bolster their practices by providing advice on how to preserve assets in the face of the risk of long-term care expenses. With the aging

population the need for asset protection over longer periods of time and more affirmative planning for disability or incapacity and need to preserve assets for a longer lifetime is also changing the face of traditional estate planning. . Trust funding and post mortem administration of trusts, the increase use of special needs trusts for disabled beneficiaries, specialized wills for community spouses designed to preserve assets at death from the grasp of the institutionalized spouse all demonstrate the changing nature of the estate planning environment.

Can we, as elder law professionals, afford not to incorporate financial planning as part of comprehensive planning services to our clients?

In the July 2003 issue of Financial Planning, Joseph J. Ponzio, President and lead portfolio manager at Meridian Financial Management in Elwood Park, Illinois opined, “the firm of the future will unite planner, asset manager, lawyer, and CPA”. In speaking to the financial planning community, he concluded, “the independent financial firm can no longer simply be a financial planning firm. A CFP or comparable designation although needed is no longer a sufficient distinction as the large regional firms push their representatives to further studies.” He goes on to say “your clients deserve and will demand a team of specialists. They will require an estate planning attorney, a savvy accountant, and a money manager who will invest not only in stocks, bonds, and mutual funds, but also in real estate and closely held businesses. Your clients will want their entire team ‘in-house’ and they will expect you, as the planner, to oversee all and to insure plan conformity.”

Mr. Ponzio is advocating the need for an “in-house team”. He questions why clients should have to leave your office for assistance with their finances and suggests that the financial planner should “help control how much they [their clients] spend on legal, tax and investment advice.” He goes on to suggest that when clients call they expect their professional advisor to “have every detail and answer regarding their financial lives.” Isn’t the elder law attorney in the best position to fulfill that expectation? Or do wait to see the day when financial planning organizations, banks, insurance companies, financial planning networks will have a team of “in-house” attorneys who are “authorized to practice law”?

If the estate planning-elder law community recognizes the unique position that the attorney has with the client and decides as a profession to incorporate financial planning into their business model we may in fact be not only better serving the client but also protecting our very profession.

Clearly, the concept of an attorney or elder law practitioner offering financial planning advice and participating in the various compensation arrangements that goes along with the sale of insurance and other financial products raises substantial ethical, legal and practical issues. Currently, many states prohibit lawyers from providing services in other disciplines while other states take a *laissez faire* approach, and still others have offered some guidelines, all embodied in the latest buzz word the “multi-disciplinary practice”.

For the moment, most states effectively prohibit financial planning organizations to practice law. Virginia, for example, has introduced legislation to make the unauthorized practice of law by non-attorney a

felony. Can the estate planning and elder law professional count on these laws to protect “their turf” indefinitely? My answer would be: Not if the client has his way, because the client is going to demand that his planner be competent in all aspects of a comprehensive asset planning and protection. I would suggest that we, as planners, have an opportunity to take the lead and be pro-active and incorporate financial planning into our practices. The hurdles are, however, substantial and many are not clearly defined, particularly from the bar perspective. One only has to look at the ABA’s opposition to multi-disciplinary practices by attorneys, yet the client will ultimately rule. They will either go to a financial planning organization that offers comprehensive wealth management, including legal services, or they will rely on their estate planner, elder law attorney to provide those same services.

The financial planning field is, however, highly regulated. In many respects, the financial planner has more layers of supervision, regulation and compliance requirements than the attorney. Can the attorney provide financial advice outside of the securities regulatory scheme? The answer is “yes”, so long as they are not paid for it. When an attorney or elder law practitioner provides financial advice incident to their services, they are exempt from the registration requirements, examination and licensing procedures applicable to registered investment advisors, registered investment advisor representatives, insurance sales.

The various requirements applicable to financial planners arise out of the Investment Advisors Act of 1940, the Securities Act of 1933, the Securities Exchange Act of 1934, the Investment Company Act of 1940, the Uniformed Securities Act adopted by various states as well as state insurance regulatory and statutory requirements. It may also be possible

to avoid the supervisory and regulatory requirements of these various federal and state acts for an attorney to provide financial planning services as a trustee.

However, if, as a practical matter, an elder law attorney intends to provide financial planning services for compensation, he must comply with the various registration requirements for individuals offering financial planning services. To sell insurance products, the attorney must be licensed by the applicable state insurance department and have taken the necessary exam and passed. Beyond insurance and fixed annuities, the attorney must also meet the federal registration examination requirements necessary to handle annuities, securities, and provide investment advice. Each of these areas requires separate examination and licensing as well as the formal affiliation with a broker/dealer.

Because of the interest in various planning organizations and in providing comprehensive estate and wealth planning for their clients, many insurance companies, dealer/brokers are reaching out to attorneys and certified public accountants to establish strategic alliances in order to market financial products to the attorney or CPA's client base. From my personal experience, this is not a very satisfactory arrangement since most of these organizations are interested only in access to your clients in order to sell products. If the estate planner and elder law attorney is to provide comprehensive planning to their clients, and get paid for it, then they must be willing to run the regulatory gambit required of all financial planners. They must become licensed to sell insurance, they must take the necessary examinations successfully to market annuities, mutual funds, securities, and provide investment advice. This will require extensive study as well as financial commitment on the part of the

planner. One alternative might be to hire a non-lawyer planner within the law firm and bind the planner to the same confidentiality and ethical requirements of an attorney by contract, with full disclosure of all pertinent facts to the client. The elder law client must be provided with a disclosure statement indicating that financial planning services are offered through licensed financial planner, who is also a lawyer, and that he or she will be compensated as a financial planner and not as an attorney at law.

Multitudes of other issues also need to be addressed if we, as a profession, consider the incorporation of financial planning into our overall planning services. Some of the pros for pursuing the concept of multi-disciplinary legal and financial planning practice would include:

- 1. An inherently better understanding of the client's overall financial and family picture.**
- 2. The opportunity to provide a more holistic planning solution to the client.**
- 3. A better understanding of the peripheral yet related areas associated with elder law, wealth preservation, long term care risk management, etc.**
- 4. The ability to better control the attorney liability by keeping everything in-house.**
- 5. The ability to convert the traditional elder law practice from a transactional business to a truly planning relationship for life-long services to the client as well as definable and continuing income stream to the elder law practitioner through renewals, commission, and continuing financial planning fees.**

6. The ability to market the process rather than the product, i.e. wills, trusts, powers-of-attorney, etc.

On the other hand, there are substantial cons to the multi-disciplinary practice, including:

1. The potential conflict of interest, both perceived and actual in providing legal advice to the client and “selling” products to the client.

2. The difficulty in the attorney adaptation to the marketing aspects of traditional financial planning.

3. The lack of firm focus and resources to devote to financial planning.

4. A general misunderstanding of financial products and the sale of products.

5. The potential loss of core business, including referrals from other financial planners who now view you as a competitor.

6. Increased budget and expenses for marketing.

7. The substantial compliance and licensing requirements to permit the elder lawyer to be compensated for his advice or products.

8. The administrative burden of complying with NASD, SCC, and state regulatory compliance requirements.

The prospect of including comprehensive wealth planning management and financial planning within the traditional elder law practice provides fascinating opportunities to the elder law practitioner while at the same time presenting substantial financial and time commitment requirements on the attorney. The reality is, however, unless the traditional estate planner and elder law practitioner plan to include more comprehensive planning in his practice, he may very well find that other organizations through lobbying and legislative mandates

may erode and eventually acquire some or all of their individual practice opportunities.

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