To Properly Advise Your Clients, You Need a Bucket List

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Introduction

I am a partner with the firm of McMillan Constabile Maker & Perone LLP. I have been practicing law for about fifteen years, and my main area of practice is elder law and trusts and estates. The field of elder law is somewhat all-encompassing in that it includes estate planning and administration, preparation of estate planning documents such as last wills and testaments, trusts, powers of attorney, statutory gift riders, health care proxies, asset protection planning for people with disabilities such as disabled children or those who require long-term care, and taxation.

I am also an accountant; prior to becoming an attorney I worked for two large accounting firms, Deloitte and Touche, LLP and Ernst and Young, LLP. When I was at Deloitte, I was an auditor; when I was at Ernst and Young I was a tax attorney in its estate and business succession planning practice. Combining my experience as an accountant with the law is what precipitated me to develop an interest in trusts and estates, which then molded into an obsession with elder law. I have been an accountant since 1996; consequently, I have a good amount of experience in tax matters, which has proven to be very fruitful in my practice areas, as there is an element of taxation that runs through everything I do. For example, whether I am advising a couple about their wills and trusts or speaking to a family about protecting the assets of a disabled family member, I find that all of these issues have a tax component. Essentially, if you have sufficient knowledge about taxes you will not have to reach out beyond the four corners of your office for assistance, which is a distinction that will separate you from your peers.

Rewards and Challenges of Elder Law

To be a successful elder law attorney you have to enjoy what you are doing; as the old saying goes, if you enjoy what you do you will never work a day in your life. When you enjoy what you do, the challenges that you face are not frightening or insurmountable.

I enjoy the analytical side of putting together an estate plan or asset protection plan for people. Clients present me with facts, some of which are irrelevant. The facts are puzzle pieces, especially since the facts are often puzzling to the clients. My job and my challenge is to take my knowledge and put the puzzle together within the confines of the law and, in most cases, this results in the preservation of assets for people. Simply put, an experienced elder law attorney can save people a tremendous amount of assets while also providing for the care they need today, which is very expensive. Moreover, you may have preserved assets for future generations, sometimes encompassing disabled children and others who are in dire need of support.

Overlaying all of this are the emotions of the client. Clients often come to me in a state of panic, fear, and bewilderment. I often tell people that I am not only an elder law attorney but also a social worker, geriatric care manager, psychologist, and psychiatrist. The truth is I am not, but you need to possess qualities and characteristics of all these professions to be a good elder law attorney. You need to have good a "bedside manner" and give clients the confidence that everything is going to be okay.

Ultimately, the greatest reward for a lawyer in this field is not a financial reward but getting a call from the client or their family later on down the road, saying, "You know, we were very skeptical when we hired you; we were not sure about our planning options, but we trusted you without having any guidance—and everything you told us worked out. Now we have been able to save X amount of dollars instead of spending it on the exorbitant costs of long-term care, or there is X amount of dollars set aside for my disabled child for the rest of his life." That is rewarding.

Understanding New York's Elder Law Principles

Medicaid is a federal program implemented by each state. In New York, elder law attorneys rely on the New York Social Services Law and the regulations promulgated thereunder for guidance. In addition to the Social Services Law, the Estates, Powers, and Trusts Law is often cited in the context of estate administration and certain types of trust preparation such as supplemental needs trusts for disabled beneficiaries.

Typically, elder law attorneys start the planning process by relying on a basic statute or regulation, but then we find that the practical side of the planning is found in secondary and tertiary resources. We often find guidance in fair hearing decisions, Medicaid reference guides, administrative directives, and seminars and lectures presented by our peers. Unlike other practice areas, the roadmap for many of our planning techniques can be found in these secondary and tertiary resources. The New York State Bar Association's Elder Law Section hosts meetings throughout the year that provide good information in this area.

An elder law attorney does not have to be the sole resource for those in need. The New York State Office of the Aging provides a plethora of resources for the elderly. Unfortunately, we are seeing many incidences of elder abuse—both physical and financial—these days, and a lack of knowledge is predominant in our society. Consequently, the Office of the Aging provides educational programs and serves as a resource for the elderly and their families. For example, an older person can contact the Office of the Aging and ask for information such as, "Who is a good elder law attorney in my area?" or "Can I meet with someone for advice regarding my government benefits, and are there any seminars or lectures I can attend?" I have worked with the Office of the Aging on several occasions, and we will often host educational seminars at a local library as a public outreach effort.

Top Challenges Facing Today's Practitioners

The top challenges facing today's practitioners are best addressed from two different perspectives: the perspective of an estate planning attorney and the perspective of an elder law attorney. From an estate planning perspective there have been a lot of changes in the law over the last few years. For instance, a couple of years ago there was a lot of uncertainty regarding the future of the estate tax exemption—which, in turn, created a lot of uncertainty with respect to the drafting of estate planning documents. As a result, many practitioners were racing against the clock to prepare wills and trusts in accordance with the existing laws, and also based on what we thought the laws might be in the future. Then the laws changed and we now have a $5.34 million federal exemption for estate planning purposes. At the same time, we also have to plan for state tax purposes. In 2014, New York's estate tax exemption increased from $1 million to $2,062,500. That exemption is scheduled to increase ratable over the next few years to $5 million. Many practitioners will ignore the state tax planning aspect of drafting these documents, however, this can cause unintended estate tax consequences.

The biggest challenge for an elder law attorney is to meet the goals of the client today when drafting a will, trust, or some other document, while having enough knowledge and insight to conform those documents to the ever-changing landscape of asset protection, such as Medicaid planning or planning for future disability. Basically, the documents that you are working on for a client today should be killing two birds with one stone—i.e., you are drafting documents that are well founded in the current law regarding estate and tax planning, but you are also introducing the asset protection perspective of an elder law attorney. I will often review documents drafted by non-elder law attorneys—i.e., a general practitioner or a local attorney who is a friend of the family or somebody they have worked with for many years. In many cases, such an attorney will draft a will for an individual or a couple that basically says, "When I die I leave my assets to my wife, and then to my kids." The challenge in today's world is thinking ahead, and considering whether such a will would be sufficient for an individual or a couple if they were to require long-term care. The answer is usually "no," which is why an elder law attorney should be consulted.

Representing Your Clients: The Three Buckets

When I first meet with clients I will say, "I am going to have three conversations with you—or one conversation that covers three different areas that I want you to think of as three distinct buckets. The first area that we are going to speak about will be your general dispositive estate planning scheme—in other words, what do you want to happen when you die? Where do you want your assets to go?" During this phase of the consultation I will obtain a summary of the client's assets and identify specific goals and objectives. I inquire about any minor children, trusts for children, and any family member who may have a disability. I spend a good amount of time explaining the differences between various planning techniques to fulfill the objectives of this first phase such as the differences between wills, revocable trusts and irrevocable trusts.

The next topic in this conversation concerns taxes, and I can usually figure out whether the client has a tax issue in short order simply by having an understanding of the client's assets and the current federal and state estate tax laws. If so, I will explain to the client the consequences of having a taxable estate and then recommend to them scenarios that I can implement in their documents to help preserve their assets and minimize their estate tax.

The third piece of the conversation—which, in my opinion is often the most important piece because it connects all three dots—is what happens if the client were to one day require long-term care. I often ask the client the following series of questions: "Can we agree that you may become ill one day and require long-term care?" followed by "And if you require long-term care, can we agree that there is a possibility you might require nursing home care?" followed by "How do you intend to pay for the cost of such care?" I then review the options available to the client to plan for long-term care. In that piece of the conversation I elevate the traditional estate planning exercise to what we would consider to be a well-rounded elder law plan that encompasses the planning techniques that I can offer the client to not only provide for their goals and wishes upon death but also protect their assets if they require long-term care—i.e., shelter their assets from exorbitant medical costs. I believe that if you discuss those three areas in-depth, then you have done a good job for the client.

The First Bucket: Dispositive Estate Planning

When I am discussing dispositive estate planning with a client, I always ask him or her if they are currently in a first or second marriage. If it is a second marriage, I need to know how they want to treat their second spouse, and if there is planning that they need to do to ensure that their spouse is not going to run away with the client's assets when the client dies. Also, does the client want to treat a second spouse's children of a prior marriage as their own children—i.e., do we afford them the same benefits as if they were the client's own children?

I also ask if the client has any minor children; if so, we need to talk about guardians and setting up trusts for the minor children. Even though New York State law treats a child under the age of eighteen as a minor, I always recommend to clients that we draft around that statute[1]—in other words, they should treat any child under the age of thirty as a minor. From my professional viewpoint, someone who is eighteen is far too young to inherit substantial assets. Therefore, I usually recommend that half of the client's trust be distributed to the child at the age of twenty-five and the balance at thirty. The logic behind that formula is that a child generally graduates college somewhere around the age of twenty-one or twenty-two, and at the age of

[1] N.Y. EST. POWERS & TRUSTS LAW § 1-2.9 (McKinney 2014).

twenty-five they may be in graduate school or starting their professional career; therefore, they are of an age when they could probably use some assets to pay for school or start a career. At the age of thirty, many people are getting married, or they may already be married and having children. Certainly, by the age of thirty you generally know if your child is going to be a spendthrift—and if that is so, you may decide that you do not want them to ever have your assets. On the other hand, most thirty-year-olds have matured enough to handle the distribution of the balance of a trust.

We will also have a discussion regarding where the client's property is located. For example, if the client has property in New York and another state, then that situation may necessitate the drafting of a revocable trust, which is set up to avoid probate in more than one state.

Another topic of discussion in this area is if the client has any family members with disabilities, such as a spouse or child; we want to be proactive and draft specific trusts to protect the assets of that disabled beneficiary. For instance, let us say that the client has a child with Down's Syndrome who is receiving Medicaid. Commonly, if you die your assets will pass to your child, but if your child is receiving Medicaid you need to keep in mind that Medicaid is a means tested program. In other words, if you have assets valued above a certain threshold you are going to be disqualified from your Medicaid. Fortunately, there is a certain type of trust in New York State called a supplemental needs trust, which basically says that the client's assets should not pass to the disabled beneficiary outright. Rather, they should be put in a special trust that will be used to supplement the lifestyle, needs, and care of the disabled beneficiary, but in no way shall that trust replace the government benefits/assistance that the beneficiary is already receiving. That trust is governed by EPTL Section 7-1.2. Section 7-1.2 of the EPTL is the codification of the seminal case *In re Escher*,[2] and provides a statutory framework of a supplemental needs trust that can be considered a safe harbor when preparing such trusts.

The Second Bucket: Tax Planning Strategies

The second bucket of estate planning discussion topics, as noted, involves tax planning strategies. I am able to identify whether the client's estate is in

[2] *In re Escher's Will.*, 426 N.Y.S.2d 1008 (N.Y. App. Div. 1980) *aff'd sub nom. Matter of Gross*, 420 N.E.2d 91 (N.Y. 1981).

a taxable position simply by knowing that the federal exemption is $5.34 million, while the state exemption is a little over $2 million—although it is scheduled to increase gradually over the next few years to $5 million, bringing it within the federal exemption range. Prior to the passage of this amendment,[3] many people were leaving New York State and moving to Florida because Florida has no estate tax, but now more people are likely to stay in New York.

In fact, prior to this change in the law, the estate tax exemption in New York State was only $1 million—and one of the major challenges estate planners faced involved preparing documents for people who did not have a federal estate tax because they had less than $5 million in assets, but who had a New York estate tax because they were worth more than $1 million. Now, however, fewer people are going to be subject to this estate tax planning issue—which means that they are less likely to leave the state, which may ultimately improve the state's economy. However, it remains to be seen if the money the state is losing because of the increase in the estate tax exemption will exceed the amount that it lost previously because of people moving out of state.

In any case, if the client is subject to an estate tax I will draft their documents accordingly, making use of such options as disclaimer trusts, credit shelter trusts, and different types of planning techniques that allow us to preserve their exemptions. For example, let us say that a husband and wife have a combined net worth of $15 million. If the husband has a basic will that says, "When I die I give everything to my wife," the wife is going to have a $15 million taxable estate upon her death. With proper planning, you would have been able to exclude $5.34 million from her taxable estate because of the $5.34 million federal exemption available to the husband upon his death. On the other hand, if you do not do the proper planning in your client's will, the wife will end up with $15 million tax-free, but then when she dies she can only pass $5.34 million to her children tax-free, which exposes approximately $10 million of her assets to federal taxation. By doing the proper drafting in your estate planning documents you can take that first $5.34 million exemption and put it into one of these special trusts that I have mentioned. By doing so, when the wife dies she will only

[3] *See generally* N.Y. TAX LAW § 952 (McKinney 2014).

have approximately $10 million in her name, and she is allowed to give $5.34 million to her children using her own exemption. Therefore, you have reduced her taxable estate by another $5.34 million. That amount of assets could be subject to a 50 percent tax rate. However, by working with a sophisticated estate planning elder law attorney the client may be able to save a couple of million dollars in taxes.

The Third Bucket: Preserving Assets for Long-Term Care

Again, the final bucket of a client consultation deals with preserving your assets in contemplation of long-term care, and it is the counsel that is provided in this area that separates a traditional estate planning attorney from an elder law attorney. Unfortunately, this issue is often overlooked by a lot of attorneys and their clients, and the end result may be that the client will have to spend more assets than they would ordinarily have to if they wind up needing long-term care someday.

I usually start this conversation by telling the client that there are limited ways to pay for their long-term care. When I ask the client, "How are you going to pay for your long-term care?" The client usually has no answer to that question. I will then tell the client that in my experience, there is a finite amount of ways to pay for their long-term care, particularly nursing home care. When a client engages in planning in advance of needing long-term care, I often plan with nursing home care in mind. That is because the Medicaid rules are very stringent when it comes to nursing home care, whereas they are more relaxed when it comes to home care.

Basically, the options that can be used to pay for long-term care consist of Medicare, long-term care insurance, privately paying for your care, or Medicaid. Medicare, at best, only pays for the first one hundred days in a nursing home. Most people do not have long-term care insurance—and if the client does not have it by the time they are meeting with me they probably cannot get it, or it may be very expensive. I always advise clients to consider their options when it comes to long-term care insurance.

I find that a lot of people are buying long-term care insurance in their early to mid-sixties. The problem is that if you buy it when you are too young the premium is going to be cheap but you are going to be paying it for a long time. On the other hand, if you buy it when you are older, the premium is going to be expensive but you are only going to be paying it for a short period of time. Therefore, the best time to buy long-term care insurance is when you are in your sixties—i.e., an age when the premium is not so high that it is cost-prohibitive, and you will not be paying it for very long.

My own philosophy on long-term care insurance is that if you can afford long-term care insurance you should at least explore it, and if you decide on purchasing such insurance, it should have all of the "bells and whistles" that are associated with a top-tier long-term care insurance policy, including inflation riders. For example, if a client tells me that they have long-term care insurance I will ask, "What is your daily benefit?" In other words, if you go into a nursing home, what will the insurer pay? If the client says, "They will pay $150 a day," I let them know that in New York State the average cost of a nursing home on a daily basis is $400 to $500 a day. Essentially, the client must be willing to buy a long-term care insurance policy with payments that are at least commensurate with today's rates. If the client can only afford a long-term care insurance policy that pays $150 a day, it is better to focus on Medicaid planning.

In most cases, however, Medicare and long-term care insurance can be eliminated as options, and the private pay option can deplete the clients of their resources. In New York State, nursing home costs can range from $12,000 to $15,000 a month. Therefore, the client's best option is typically Medicaid, which becomes the insurance of the middle-class when it is time to contemplate long-term care. Consequently, our discussion on protecting and preserving the client's assets in the event that they will need long-term care is usually centered on becoming Medicaid eligible. For example, there are different types of trusts that we can draft and other planning techniques that move assets from spouse to spouse or from parents to children, and while there is a whole universe of rules that go hand-in-hand with those planning techniques, if they work, the use of the client's assets will be minimized when the need for long-term care arises. While the client may have to spend some of their assets to finance their care, we are, in essence, trying to cap the cost of their long-term care.

Let us say that the client's assets are worth $1 million and I can preserve three-fourths of that amount, leaving the client with an ultimate exposure of just $250,000. In such a case the client is usually happy, because if you are in a nursing home for a very long period of time at a rate of $12,000 to $15,000 a month, you can very easily go through more than half a million dollars in a short period of time. Ultimately, the client could lose their house and whatever cash they have accumulated over their lifetime. Of course, if you have enough money to privately pay for long-term care or if you have long-term care insurance you do not need to do Medicaid planning—it is only those people who have moderate assets and no long-term care insurance that have to consider Medicaid planning to pay for their long-term care.

It should be noted that in the world of Medicaid planning there is a concept called the five-year look-back period. Basically, if I am going to do planning for a client that involves transferring their assets to a trust, a child, or any third party, there is a waiting period before they can apply for Medicaid, and that is five years. Consequently, the older the client, the less ability I have to do the planning that I normally do. We still may do it for people who are later on in years, but the likelihood of success is diminished. Also, New York State is what we call a "spend down" state; therefore, if you want to go on Medicaid in New York your income generally has to be used for the cost of your care, at least initially—i.e., you have to first spend down your income, and then Medicaid pays the rest. For example, the cost of a nursing home may be $15,000 a month, and your income may be $3,000 a month. After certain deductions from your income it will go to the nursing home, and then Medicaid will pay the balance, which is a small price to pay for the cost of care.

The Importance of Preserving Assets for the Next Generation

Asset preservation is especially important in today's socioeconomic environment. Many of my clients are parents in their sixties, seventies, and eighties, and their children are in their thirties, forties, and fifties. Many of those children are losing their jobs and homes; their divorce rate is currently over 50 percent; and some of them have drug habits or disabilities. Consequently, many of my clients' children have depleted their own savings—which is why it is even more important for my older clients to take steps to preserve their assets. Again, if I do my job right and my clients are willing to spend money on legal fees we can preserve a good portion of their assets for the next generation.

Most parents are worried about what is going to happen to their children if they die—i.e., how are their children going to be protected and taken care of?—and I am not talking about children in their twenties or younger; I am talking about middle-aged America. If a parent gets sick and ends up in a nursing home, and has to spend the equity in their house and their savings on the cost of their care at that facility, there is going to be very little left for their children, which is going to perpetuate the issues that these children are being faced with. On the other hand, if I do my job right I can help to benefit both my client and the next generation—and ultimately, the economy.

Other Estate Planning Documents: Advanced Directives

When I have finished discussing the three key estate planning issues I have focused on in this chapter, I will conclude with a very simple discussion of what we call advanced directives that are used in New York State—a power of attorney, a statutory gifts rider, and a health care proxy. Those documents are very important because they provide a mechanism for surrogate decision making—i.e., you are giving direction to someone in advance of your wishes, prior to you losing your capacity.

Power of Attorney

A power of attorney is created for financial purposes, and when executed, it is effective immediately. In a husband and wife scenario, a spouse will typically appoint their spouse to serve in that capacity; basically, it gives that person the ability to handle your financial affairs with banks, brokerage firms, and insurance companies. For example, if you lose your capacity to communicate after suffering a stroke, your spouse has the ability to stand in your shoes and handle your affairs.

If one spouse has already predeceased the other, then their children are usually successor agents under the power of attorney—i.e., they can step into your shoes and handle your financial affairs when there are bills to be paid and administrative tasks to be attended to. More important, from my perspective, if we are going to be implementing any kind of planning techniques for Medicaid purposes I need to have someone with the legal authority to be able to move assets around and handle the client's financial affairs.

The chief consequence of not having a power of attorney in a key situation is that I will have to commence what we call a guardianship proceeding—that is, a proceeding that is commenced in the State Supreme Court asking the judge to declare the client incapacitated and appoint somebody to handle their affairs both from a financial and a medical perspective. Unfortunately, this is a costly and lengthy process that involves the intervention and supervision of the courts. Also, I cannot do any of the planning that I would normally like to do for such a client until we get a guardian appointed, because I need someone with the legal authority to sign papers.

We are seeing a lot of guardianship situations these days, for a couple of reasons. First, many clients are not seeking proper information or they are ignoring information. Also, we live in a "do it yourself" type of society, and therefore, many clients are coming to us with no power of attorney, power of attorneys that were drafted by non-elder law attorneys, or which were obtained from the Internet. These forms are usually deficient from a planning perspective and lack certain powers that we need as elder law attorneys to properly represent our clients.

All too often, a client will say to me, "I have a power of attorney," and I will review it and wind up telling them it is not good enough. Many clients do not realize that the act of preparing a power of attorney is insufficient; it is the quality of the power of attorney that matters. For instance, as elder law attorneys, when we draft a power of attorney we will typically take what we call the statutory form and modify it. We add provisions that are commonly used to effectuate our planning techniques. These provisions are not in the boilerplate forms and cannot be found on the Internet, yet they are imperative to protecting one's assets.

Statutory Gifts Rider

There is another form that goes hand-in-hand with the power of attorney called the statutory gifts rider. Basically, under New York State law, if you want to give your agent the power to move or gift your assets, that power has to be explicitly stated in a statutory gifts rider, which needs to be attached to the power of attorney. Basically, you need to think of the power of attorney as an administrative document, because all of the items in a power of attorney are administrative—i.e., banking, insurance, and real estate transactions. If we modify a power of attorney, we may, as noted, add administrative provisions, such as the power to create a trust.

A statutory gifts rider is a document that lists the powers that the client's agent is being granted that may change the beneficial interest of a certain party. For instance, the power of attorney may have the power to create a trust; the statutory gifts rider is going to say that the agent has the power to transfer assets to the trust. Other powers might include the power to gift the client's assets in unlimited amounts to certain classes of individuals or the power to change beneficiary designations.

For example, let us say that your clients are a husband and wife; the husband has a life insurance policy and the wife is the beneficiary. However, the wife is in a nursing home on Medicaid. The husband has a stroke and he can no longer communicate. If I have a properly drafted power of attorney and statutory gifts rider, the couple's children can come to me and change the beneficiary designation for the husband who just suffered a stroke to his children. As a result, his insurance assets do not go to the wife who is in a nursing home if he predeceases her.

Essentially, a properly drafted power of attorney and statutory gifts rider gives the client's agent a great deal of authority. At the same time, the statute, as written, provides mechanisms and safeguards for the abuse of a power of attorney or statutory gifts rider. For instance, if the agent is acting contrary to the wishes of the principal or not in the best interest of the principal there are proceedings that could be commenced against the agent to remove them and force them to account for their actions. The statute in this area, as it was amended in 2009 and again in 2010, was prepared from the perspective of trying to protect against and curtail elder abuse.

Health Care Proxy

The third advance directive that is part of an effective estate plan is a health care proxy, which is basically a very simple document—you are simply appointing someone to make medical decisions on your behalf. It should be noted that there is a fourth document that I no longer use in my practice called a living will, which sets down in writing your wishes regarding end of life or palliative care.

In New York State, the health care proxy is embedded in the public health law,[4] and there is a statute that governs it. A living will, on the other hand, is not statutory—it is a creature of an attorney. Therefore, I find that a living will is very ambiguous; again, it uses terms such as "meaningful quality of life," "vegetative condition," and "artificial means of support"—and there is plenty of debate over whether someone is in a vegetative condition, or if they will have a meaningful quality of life if they are kept alive. Consequently, in my practice I have opted to rely on the statutory form, which is the health care proxy, which simply states, "I appoint my agent to make my medical decisions; my agent knows my wishes and he/she knows my wishes regarding artificial nutrition and hydration." If a health care proxy is presented to a doctor, he or she has to accept it. Of course, it is up to the client to have a discussion with their agent regarding their wishes in this area.

Ultimately, I believe that it is best to not present a physician with an ancillary document that has no statutory basis, that is ambiguous, and which may give that physician an opportunity to interpret it in a fashion that is favorable to the physician and not to you. However, most people are still drafting living wills as well as health care proxies because they do not understand what these documents actually mean.

I also believe in incorporating some flexibility into the process of drafting a health care proxy—simply because I have often found that what someone says ten years in advance of becoming sick and being on their death bed is not what they want when they are actually on their deathbed. For instance, I may have a client who has a lot of bravado when they are in good health and says, "I do not want to be kept alive if I am dying—just pull the plug on me." Ten years later he is in the hospital, his family is around him, and he is holding on for dear life, saying, "I do not want to die." Indeed, in many cases people change their attitude when they are actually facing death. Certainly, if the individual is still capable of making his own decisions he has the constitutional right to say, "I do not want to die." However, let us say that at one point, a patient is telling his wife, "I do not want to die—keep me alive," but then he loses his capacity to speak to the physician. At that point, the health care proxy will come into play. If that health care proxy was drafted ten years ago with a living will attached to it that says, "I do not want to be kept alive with any kind of life sustaining treatment," you are going to have a

[4] N.Y. PUB. HEALTH LAW §§ 2980-94 (McKinney 2014).

problem with the doctor. On the other hand, if there is no living will and there is only a health care proxy, things could be very different. If the husband opens his eyes for a split second and says, "Honey, keep me alive—I love the way you cook dinner," she could turn to the physician and say, "Here is the health care proxy, I am his agent, and he wants to be kept alive." In that case, the doctor has to listen to the wife. Essentially, these issues are very important, and the implications of drafting a health care proxy or living will can have dire consequences if they are not thought through.

Conclusion

The practice of elder law is a rewarding practice area, yet riddled with complexities. Many people are unaware that there is even a practice area such as elder law. Unlike many other practice areas, the technicalities of the practice area make it difficult to engage a client. I find that by utilizing the three bucket methodology, I can break down the conversation into smaller pieces, providing the client a better chance of understanding, which in turn allows me to implement the necessary planning to accomplish their goals and objectives.

Advice for Attorneys

The aging baby boomer generation has clearly dictated the socioeconomic trends in this area, and they are going to need more estate planning and health care as they enter this phase of their lives. At the same time, New York State is constantly looking for ways to put money back into the system—and unfortunately, Medicaid is one of those areas that are always on the chopping block. However, I believe that what our legislators, government officials, and the general public need to understand is that it is not the estate planning techniques that elder law attorneys use to preserve their clients' assets that are draining the system—the system is being drained by fraud, consumer abuse, and mismanagement, and if those areas were properly managed, more money would be put back into the system. Consequently, we would not have to try to change the overall Medicaid system and risk hurting those who have worked hard their whole lives, paid into the system, and are just looking to benefit from what the government has to offer when the time comes.

The advice that I often give to attorneys who are looking to practice in this area is that elder law and estate planning is riddled with issues that can get you into a lot of trouble. For example, it is not good enough to know how to draft a trust; you need to know the tax consequences of that trust. It is not good enough to tell someone to transfer their house to their kids, because you need to know the Medicaid planning and tax consequences of transferring that house to your children. Essentially, if you do not have a modicum of knowledge in three key areas—Medicaid planning, estate planning, and the tax laws—you need to align yourself with another professional who does, and who is willing to train and teach you so that you do not commit malpractice. If you are not properly trained, you not only run the risk of doing something wrong, you are doing a disservice to the people who are relying on you for your expertise. Unfortunately, when you make a mistake in this area it is usually not recognized until it is too late; in this area of practice it is not that easy to get a second bite of the apple.

Key Takeaways

- Educate your clients using the three bucket methodology—that is, discuss the client's general dispositive planning first, followed by estate tax planning, and finally asset protection planning. This practice will help the client focus on the important aspects of their overall plan and understand the necessity of all three.
- Note that a good draftsman in this area will draft documents not only from an estate tax perspective or a simple dispositive planning perspective but also with mindfulness of the ultimate Medicaid consequences or the asset protection piece of the equation. You should be drafting documents that are well founded in the current law regarding estate planning, while also introducing the asset protection perspective of an elder law attorney.
- Discuss the advanced directives used in New York State—a power of attorney, a statutory gifts rider, and a health care proxy. Those documents are very important because they provide a mechanism for surrogate decision making—i.e., you are giving direction to someone in advance of your wishes prior to you losing your capacity.
- Keep in mind that if you do not have a modicum of knowledge in three key areas—Medicaid planning, estate planning, and the tax laws—you need to align yourself with another professional who does and who is willing to train and teach you so that you do not commit malpractice.

Salvatore M. Di Costanzo is a partner with the firm of McMillan Constabile Maker & Perone LLP, located in Larchmont, New York and Yorktown Heights, New York. Mr. Di Costanzo is an attorney and accountant whose main area of practice is elder law, which consists of wills, trusts, probate and administration of estates, Medicaid planning, asset preservation, nursing home and home care planning, and planning for individuals with special needs. Prior to being a partner with McMillan Constabile Maker & Perone, LLP, Mr. Di Costanzo was an attorney with Ernst & Young LLP in its estate and business succession planning group, where he provided estate planning and income tax services for individuals, corporate executives, and closely held business owners, as well as estate and trust taxation and administration services. Prior to practicing law, Mr. Di Costanzo was an auditor with Deloitte & Touche LLP in Stamford, CT. He earned a BBA in accounting from Siena College and a JD from Pace University School of Law. Mr. Di Costanzo is a member of the National Academy of Elder Law Attorneys (NAELA) while also being a member of the elder law sections of the New York State Bar Association (NYSBA) and Westchester County Bar Association (WCBA). He is a past chair of the elder law section of the WCBA, current co-chair of the estate tax planning and estate administration committee of the NYSBA elder law section and a current member of the executive committee of the NYSBA elder law section. Mr. Di Costanzo serves on the board of directors of the WCBA, the Harrison Children's Center, and the NY Chapter of NAELA. He is licensed to practice law in New York, Connecticut, the United States Supreme Court, United States District Court for the Southern District of New York, and the United States Tax Court. Mr. Di Costanzo is a frequent author and lecturer on current elder law and tax topics. In 2013, Mr. Di Costanzo was selected by the rating service, Super Lawyers, for inclusion in its 2013 Super Lawyers – New York Metro Rising Stars ranking as a leading elder law attorney. Only 2.5 percent of New York attorneys were chosen for this honor. In 2014, he was the recipient of the Above the Bar Award as the leading attorney in Westchester County under the age of forty.

APPENDICES