

Considerations in Co-Counseling with an Elder Law and Special Needs Attorney

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**A KEY ESTATE
PLANNING GUIDE**

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Introduction

- Elder law and special needs (ELSN) planning is a specialized area of the law but one that trust and estate planning (T&E) attorneys frequently encounter
- Co-counseling on complex matters leads to more thorough, effective planning for our clients
- Clients gain confidence knowing they are receiving well-rounded, expert advice from their team

Integrating ELSN into Estate Plans

Older Americans Needing LTC

- By 2033, 20% of Americans will be 65 or older and it is estimated **70%** will need some form of long-term care (LTC)
- Common misunderstanding that Medicare covers LTC costs
- Not every client can self insure and many do not have LTC insurance
- Annual LTC costs can exceed \$200k, wiping out middle class families

Americans with Disabilities

- More than 56 MILLION Americans living with a disability
 - Mental
 - Cognitive
 - Physical
- 19% of U.S. population
- 1 in 6 (or about 17%) of children ages 3 to 17 have one or more developmental disabilities
 - 1 in 44 children have autism averaging 1 in 27 boys and 1 in 116 girls

When and How to Bring in an ELSN Attorney

**Collaboration is
Often Critical**



Why Co-Counseling or Referring Out is Essential

Complementary Expertise:

- **Estate Planning Attorneys:** Provide broad-based knowledge on asset management and tax strategies.
- **Special Needs Attorneys:** Offer specialized insight into disability law and government benefits.
- **Elder Law Attorneys:** Focus on LTC, Medicaid planning, and elder rights.

Integrated Planning:

- Ensures that estate plans, special needs considerations, and elder care issues are all addressed in a unified strategy.
- Avoids conflicts and gaps in planning that could arise from handling these areas separately.

Consider Rule 1.1: Competence

- The Rules of Professional Conduct 1.1 require that the attorney have competence to handle the matter.

“In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field...”

Co-Counsel versus Referral

- Under what circumstances should a practitioner consider co-counseling with a ELSN lawyer or making a referral?
 - Very case specific
 - Case complexity
 - Sophistication of tax planning
 - Overall relationship between practitioner and client

The Role of a T&E Attorney

Common Responsibilities:

- **Wills and Trusts:** Crafting documents that define how assets are distributed after death.
- **Asset Protection:** Strategies to protect assets from creditors, lawsuits, and excessive taxation.
- **Tax Planning:** Minimizing estate and gift taxes.
- **Probate and Estate Administration:** Guiding families through the legal process after a death.

Client Focus: Families looking to protect their assets. Individuals seeking to ensure a smooth transition of wealth.

The Role of a Special Needs Attorney

Common Responsibilities:

- **Special Needs Trusts (SNTs):** Drafting and managing trusts that preserve government benefits while providing financial support.
- **Guardianship and Advance Directives:** Establishing legal guardianships or advance directives for individuals who enter adulthood and need supports.
- **Navigating Government Benefits:** Understanding and managing benefits like Medicaid and Supplemental Security Income (SSI).
- **Advocacy:** Protecting the rights of individuals with disabilities.

Client Focus: Families with children or adults with disabilities. Individuals needing to maintain eligibility for public benefits while receiving additional financial support.

The Role of an Elder Law Attorney

Common Responsibilities:

- **Long-Term Care Planning:** Advising on options for long-term care, including nursing homes and in-home care.
- **Medicaid Planning:** Strategies to qualify for Medicaid without depleting assets.
- **Estate Planning with a Focus on Aging:** Tailoring wills, trusts, and powers of attorney to the specific needs of aging clients.
- **Guardianship and Conservatorship:** Establishing legal arrangements for seniors who can no longer manage their own affairs.
- **Elder Abuse and Advocacy:** Protecting seniors from abuse, exploitation, and neglect.

Client Focus: Elderly individuals and their families planning for age-related issues. Families concerned about the future care and financial security of aging parents or relatives. Navigating family dynamics.

How to Establish a Co-Counseling Relationship

Selecting the Right Partners:

- Look for special needs and elder law attorneys with experience in cases similar to those of your clients.
- Establish a mutual understanding of each other's strengths and areas of focus.

Building a Collaborative Practice:

- Regular communication: Schedule meetings to discuss ongoing cases.
- Joint client meetings: Present a united front to clients to explain how the collaboration benefits them.
- Document sharing: Use secure platforms to share documents and updates.

Client Communication:

- Explain the benefits of co-counseling to clients: Increased expertise, reduced risk, and more comprehensive care and planning.
- Address any concerns about additional costs by emphasizing the value of a holistic approach.

Resources

Special Needs Alliance to locate a sophisticated special needs planning attorney:

<https://www.specialneedsalliance.org/find-an-attorney/>

National Elder Law Foundation for a **Certified Elder Law Attorney**:

<https://nelf.org/search/custom.asp?id=5427> or

<https://www.getelderlaw.com/find-a-cela/>

General Planning Considerations

Every Estate Plan Should Consider Special Needs Planning

Many trusts are created to last for generations with future generations yet to be born. Provide flexibility in trust documents, including:

- Ability to exclude a beneficiary from Crummey withdrawal rights
- Understanding impact of general powers of appointment on means tested government benefit for beneficiaries with disabilities
- Allow trust modifications by trust protector or disinterested trustee
- Consider decanting
- Include trigger language to allow a beneficiary's share to be protected in a third-party supplemental needs trust

Considerations for the Elder Plan

- Comprehensive power of attorney to allow comprehensive Medicaid planning and asset protection
- Comprehensive health care directives
- Carefully drafting to permit removal of settlor-trustee in event of incapacity, and mechanics involved.
- Navigating family dynamics, often with second marriages with avoiding pre-will contests through guardianship/conservatorship proceedings

Conclusion and Additional Information

Conclusion

- There are many elder law and special needs planning implications which all practitioners should consider.
- Many of the steps that can be taken to help clients address special needs beneficiaries and their own aging are outside the scope of what estate planning attorneys might consider their swim lane but making certain someone on the advisory team addresses them may be vital to clients.

Additional information

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