

## **Running Your Elder Law Practice**

### **I. Introduction**

§ 1.1 This seminar and outline is the “merger” of ideas from two elder attorneys’ separate practices and combined professional experience of 30 years plus. Even though our individual practice experiences have varied and currently are different between solo and multi-attorney/staff firms, we have attempted to combine our thoughts for the “best practice” advice for the attorney managing an active elder law practice. Throughout the outline we still provide our individual voices, offering nuances from each of our own training and current practices.

We have divided the seminar into eight major areas:

- I. Areas of Practice and Professional Training for the Elder Law Attorney
- II. Essential Perspectives & Personal Skills for the Elder Law Attorney
- III. Special Ethical Issues in Elder Law and Helpful Procedures
- IV. Office Setup and Use of Technology
- V. Administration and Project Management
- VI. Effective Billing
- VII. Getting the Word Out: Getting & Keeping Good Clients

With each major area, there is a general discussion, then specific lists of recommended “do’s and don’ts”, and where applicable, “valuable skill sets”. These are from our perspective and are not necessarily applicable to all elder law attorneys. Finally, at the end, there’s a list of helpful practice resources. We hope you not only glean helpful practice tips, but also enjoy the same meaningful affirmation of your role as an elder law attorney that we shared and encountered in preparing for this seminar.

### **II. Areas of Practice and Professional Training for the Elder Law Attorney**

#### **A. Elder Law Practice Areas**

§1.2 In this section, the authors discuss the areas of elder law they practice and the amount of time they spend on each one.

What are some of the areas of practice? Where do you concentrate your time? What is the percentage of practice areas?

J. Lampertius: The areas of elder law I practice and their relative proportions of time vary from month to month, depending on client needs. There's an overlap between areas. For example, estate planning for elderly or special needs often involves analysis of potential need for government benefits. However, we separate these areas into categories because of differences in systems, forms and client expectations on billing.

Elder Care Estate Planning and Advocacy: 20%  
Special Needs Estate Planning and Advocacy: 20%  
Medicaid and Government Benefits: 15%  
Guardianship and Conservatorship Hearings: 10%  
Decedent's Estate and Trust Administration: 15%  
Real Estate Sales for Fiduciaries: 10%  
Estate, Gift and Income Tax Advising and Returns: 10%  
Succession Planning for Businesses and Vacation Properties: 5%

R. Chang: While the proportion of time spent in my practice varies depending on client needs, the profile of approximate time spent in the areas of practice is as follows:

Special Needs Planning: 25%  
Estate and Incapacity Planning: 20%  
Medicaid Planning and Asset Protection: 10%  
Guardianship & Conservatorship: 10%  
Fiduciary Services (e.g., Trustee, Guardianship, Conservatorship): 10%  
Special Needs Advocacy: 5%  
Trust Administration: 5%  
Elder Advocacy: 5%  
Decedent's Estate Administration: 5%  
Mediation 5%

I also assist in a very limited manner to help families to plan for eligibility for Veterans Aid & Attendance pension benefits to help pay for care, but the assistance largely involves estate planning and within the purview of long-term care planning.

What are the demographics of your client base?

J. Lampertius: The demographics of our client base involve a wide range of ages, but generally most of our clients are between 55 to 90 years old, with a number now cresting beyond 100 years old. Our clients vary much in the size of their income and assets. Most of our clients have property ranging between \$250,000 to \$5 million in assets, comprised generally of their home, a possible cottage, bank savings, retirement plans and life insurance. Their retiree pension income will vary from the minimal Social

Security of a single retiree to couples with combined pensions and Social Security over \$6,000.00 a month. Our clients span a full range of race, ethnicity, religious background, sexual orientation and citizenship, but generally have one thing in common: they come to us because they are concerned about the life care of a person with disability or a loved one.

R. Chang: My clients are typically between those in their 50s up to 100 years old. The younger clients typically represent adult children or other family members, who are seeking assistance with an older adult in their family, and the older clients consist of individuals who need help themselves, or are spouses. My clients have property ranging from about \$50,000 up to about \$500,000, largely consisting of their homestead, bank accounts, retirement plans, investment accounts and life insurance. They also have monthly income ranging from about \$500 up to \$3,000 a month individually. Many of the older adults in need of assistance have worked hard all their lives and saved money to the best of their ability. However, due to the costs of long-term care and their health conditions, they need additional assistance to promote quality of care and life. My clients are quite diverse in race, ethnicity, religious background, sexual orientation and citizenship as well.

#### Time, Economics and Meaning of with Practice Areas?

J. Lampertius: As an elder law attorney, I concentrate most time in estate planning for the elderly and for persons with special needs. We spend approximately 40% of our time on estate planning, with half generally planning for elderly care situations and half generally planning for a child with special needs. Because our estate planning is by fixed fee, it is our bread and butter, but rarely does the flat fee match our full hourly time. We do this purposefully to provide extra value of time to the client. We generally make hourly rate time when we need to assist with specialized interventions involving care options, government benefits, court intervention, special tax situations or administrations at death. Because we concentrate on quality of care and life in our practice, most often we team with family, care professionals and community resources. Our most meaningful work often involves a client with a spouse or child at home with disability who needs protection financially and medically. We have found that our time and economic success relates directly to the quality and responsiveness of solutions presented to the client.

R. Chang: Regarding issues related to elder law, the bulk of my time is spent with long-term care and estate planning, as well as planning for incapacity. Medicaid planning and asset protection and assistance with obtaining Medicaid benefits for long-term care can also be fruitful, typically in a situation where there is a spouse, as there are fewer options to plan for single individuals. However, Medicaid planning and asset protection

and application for Medicaid benefits services tend to be a smaller portion of my practice than many other elder law attorneys, as a part of my protocol is to really help the individual and their families understand and explore long-term care options that promote the use of least restrictive living environments and honoring choice and independence, particularly home & community based care, which frequently includes care that is not covered by Medicaid (or they are not eligible for the MI Choice Waiver program). I do not encourage or condone Medicaid planning to achieve inheritance preservation. Similarly, I tend to be conservative with my involvement with planning for eligibility for VA Aid & Attendance pension benefits for the same reasons, and also due to the conflicts between eligibility for VA Aid & Attendance benefits and Medicaid benefits. I do not assist with the actual application for VA Aid & Attendance benefits. Because so many parents of children with special needs are also aging, a good portion of my practice also consists of coordinating long-term care planning for a parent along with planning for their loved ones with special needs.

#### When do you refer out?

J. Lampertius: We will assist a fiduciary on nearly all aspects administering an estate or trust during disability or death. This includes handling the specialized issues with real estate, including retention or sale by the fiduciary, as well as specialized estate, gift and income tax issues. We will not serve as a fiduciary, however, and when there no suitable family member, we will often refer out to the family's accountant, bank trustee, care managers and public administrators as necessary. We will assist the fiduciary on most estate, gift and income tax issue, bringing in specialized tax counsel when helpful. Because of our estate planning, real estate and tax training, we often assist with issues involving the family farm, cottage and business, conducting business entity planning and succession planning with buy/sell agreements. We will refer out most litigation except probate and estate trust litigation to intervene for our client's protection. Our most frequent referral out is to other estate tax planning and Medicaid planning attorneys, providing a "second look" involving more complex irrevocable trusts or strategies. The client relationship often is strengthened by involving other specialists, even other elder law attorneys as necessary.

R. Chang: I tend to refer out any contested matters and litigation, as those matters tend to be very time consuming and I am a "one-person show" at my office. I also will refer out for tax issues, estate tax and gift planning, corporate or business matters, and more complex real estate matters. If I am involved with more complex Medicaid planning matters, I will also enlist the assistance and input of other attorneys as well.

#### **B. "Do's & Don'ts" for Elder Law Practice Areas**

§1.3 The following are “do’s and don’ts” for selecting and practicing your elder law practice areas.

J. Lampertius:

*Do:* Choose the areas of elder law you prefer to specialize and practice in -- you need not “do it all.”

*Don’t:* Try to assume legal areas you are not familiar with, especially tax, real estate and court litigation, unless you’re prepared to bring in assistance. Once you have the assistance and gain the technical experience, you’re in a better position to take on the more complex matters.

R. Chang:

*Do:* Focus on customer service. Qualities and skills that promote good customer service make a world of difference, particularly to these families who are facing some really difficult and trying times.

*Don’t:* Think that elder law just equates to just estate planning, Medicaid planning and asset protection. There are significant social services, resource development and advocacy components to this field of work.

*Don’t:* Just “dabble” in elder law without adequate training and education, or assistance. This is a very specialized area of law, and legal services can have a significant and detrimental impact on the older adult if executed incorrectly.

**C. Professional Training for the Elder Law Practice**

§1.4 Being a successful elder law attorney means knowing several different areas of the law, including probate and estate planning, government benefits, tax, and real estate law, as well as other professional areas like social work and gerontology.

J. Lampertius:

*“Cross Training” in Multiple Areas of Law is a Requirement.* An elder law attorney must be able to issue spot, identify care strategies and draft documents for such strategies in multiple practice areas as government benefits, trust, probate, tax and real estate law. There are accelerated ways to achieve these skill sets - -especially ICLE seminars and training in elder law and estate planning. The certificate in estate planning through ICLE provided an essential educational platform for me, even though I had practiced already in estate planning for a number of years. See resource list below.

*Specialization Training in Government Benefits is a Must.* Although government benefits cannot be the only area of specialty of an elder law, to be competent, an elder law attorney must understand the law and regulations with Social Security programs, Medicare and Medicaid.

*Linkage with Social Work, Gerontological and Medical Professionals and Community Resources is Essential.* Because the arena of elder law often involves care solutions linked with other disciplines, an understanding of other professionals and resources in gerontology, dementia and care coordination is essential. Estate planning for the elderly and disabled cannot be conducted in a vacuum without linkage to essential community supports and benefits. For me personally, my post-graduate training with the Wayne State University Institute of Gerontology in 1993 -1994 provided invaluable information, contacts and resources which I have used throughout my career as an elder law attorney.

R. Chang: Continuing education in areas related to elder law is of course important, and to stay on top of the ever-changing landscape of laws, rules and regulations. However, it is also imperative that the elder law attorney becomes well-versed and familiar with health care, mental health, and aging issues, particularly clinical issues. Attorneys should be a part of a multidisciplinary support network for an older adult. Familiarity with aging network providers and services is a must.

My training and education in gerontology (Graduate Certificate in Gerontology) has been invaluable, particularly with specializing in quality dementia care. In order to advocate for quality of life and care, an attorney should have an in-depth understanding of what exactly consists of a quality of life and care. Effective communication skills, particularly with individuals with cognitive disabilities (e.g., dementia) are also very valuable. In addition, mediation and conflict resolution skills and understanding of family dynamics are also very helpful skill sets in assisting my families and their loved ones.

### **III. Essential Perspectives and Personal Skills for Elder Law Attorneys**

#### **A. Keeping Perspective as an Elder Law Attorney**

§1.5 There are some perspectives that one should not lose sight of when specializing in elder law:

- *Why do we do what we do?* It is important to remind ourselves regularly of why we choose to practice elder law. For many of us, these reasons are more esoteric and intrinsically reinforcing, such as wanting to help others.

- *The goals of elder law.* Similarly, elder law attorneys much keep sight of the goals of elder law, which may include:
  - Promoting independence;
  - Protecting dignity, including the dignity of risk;
  - Improving quality of life and care;
  - Promoting self-determination and preserving choice; and,
  - Honoring personhood and the human spirit.

J. Lampertius: I enjoy the branding as an “elder law” and “special needs planning” attorney, but often have to illustrate to other professionals that this involves much more than government benefits and Medicaid planning. I truly am an estate and life care planning attorney who specializes in issues of the elderly and persons with disability. In fact, the clear majority of our clients, other than our adult clients with special needs, do not rely on Medicaid. I believe more people understand the fuller life care dimensions “elder law” today than ten or twenty years ago. Many more people understand today it involves tasks for achieving help with life care at home or in the full continuum of care, and managing disability from a medical and financial standpoint.

*Positive of elder law:* elder law provides a lot of meaning compared to other practice areas where there is less appreciation from the client. I really enjoy the direct work with clients. I went into this field because of experiences with pastoral care for elders at nursing homes and subsequent training in gerontology. Protecting client’s preferences and strengthening the client’s quality of life provides much satisfaction and community good.

*Pitfall of elder law:* the increased pressure because of the vulnerability of our clients and their loved ones and need for ethical, responsive solutions.

*Positive with elder law:* we get to be more creative in linking medical and financial resources than standard estate planning which traditionally has focused solely on death, probate avoidance and taxes.

R. Chang:

*Positives of elder law:* I went into elder law specifically because of my background and first career in working with older adults, particularly with individuals with dementia, as a limited licensed psychologist. I have always enjoyed working with older adults, and assisting others gives me great satisfaction. To be able earn a stable living by helping others is an opportunity I am truly grateful for.

I love being able to help families and their loved ones, particularly because of my previous experience in a variety of long-term care settings as a clinician. I also have a great passion for promoting quality of care and life, self-determination and personhood, which I see as fundamental goals for an elder law attorney.

Most of all, I love the stories that I get to hear, and the life lessons learned from my clients. I am honored to be involved with the making the last part of an individual's life the best and as meaningful as it can be. My clients give so much back to me as well - I learn about so much about life from my clients, and the value of that is priceless.

*Pitfalls of elder law:* I believe it can be easy for one to give "too much" oneself in this field. It is hard not to become emotionally involved and attached with clients; you often become part of the "family." I also find it difficult to work with family members whose primary focus is on inheritance preservation. Too many individuals come to me for planning not understanding that the Medicaid program is for people who are truly indigent, and that the quality of care and life can be compromised if the sole focus is on preserving an estate. Worst of all, it is so very emotionally difficult to be involved in situations related to elder abuse and financial exploitation.

#### *Do's & Don'ts: Keeping Perspective as an Elder Law Attorney*

*Do:* Find positive ways to remind ourselves of why we do what we do to keep motivation levels high and avoid burnout (e.g., keep all thank you notes in one place that are easily accessible). Writing and participating in this seminar, as well as other educational events, has done so for us.

*Do:* Find humor in situations. Laughter is the best medicine.

*Do:* Seek first to understand your client's story and concerns. They will read right away whether you really care. Remember the specialness of the person you're working with and leave yourself at the door.

*Do:* Learn to under-promise and over-deliver.

*Do:* Consider *pro bono* assistance and support for the charities which assist your clients. The overlap with the client's interests is a very meaningful affirmation of your care.

*Do:* Identify and review the least restrictive interventions and actions to accomplish the goals of your clients. (e.g., guardianship vs. alternatives to guardianship, home and community based services vs. institutional care).

*Don't:* Assume that just because the older adult can't express themselves effectively or accurately, that they don't understand. You may be surprised to find how much a person really does understand, especially with persons with dementia to listen for the "gist" of the conversation, rather than paying attention to whether they get the actual words right.

*Do:* Educate yourself on exactly what quality of life and care really means, and how to promote a meaningful life. A meaningful life is just as important when one is young and as when one is old. Especially understand what defines quality dementia care and the importance of therapeutic activity programming.

*Do:* Question whether the actions and solutions may be viewed as paternalistic. Protection and safety must be balanced with preserving the dignity of risk. We take risks every day (e.g., driving). Life would not be meaningful without an element of risk.

*Do:* Learn from your clients, not just about law, but life in general. Clients can give back to you in many rewarding ways, and not just monetarily.

## **B. Essential Personal Skills for Elder Law Attorneys**

§1.6 Some essential skills when working with older adults and their families include:

- *Developing rapport and relationships.* They never teach this in law school, but the ability to develop rapport and solidify relationships with clients is crucial. Clients are reaching out for help in situations that are very stressful and often very personal.
- *Active Listening Skills.* Listening takes time and patience. However, taking the time to allow clients to express themselves will result not only in better information about the situation, but greater client satisfaction with your services.
- *Effective communication skills.* So often clients express gratitude for us taking the time out to educate and explain documents, processes or recommendations. This is particularly important with the older adult, as all too often (frequently due to stereotypes and assumptions of older adults), older adults are "written off" as not being able to "learn new tricks". Even more important is the ability to communicate with those who are non-traditional communicators (e.g., those with expressive language challenges like those with dementia, non-verbal communicators).

- *Conflict resolution skills and understanding family dynamics.* Many of the issues we encounter as elder law attorneys involve conflicts, particularly with family members. Conflict competency and conflict resolution skills can be very helpful.
- *Empathy and validation of emotions.* To empathize with your clients means to have the ability to recognize the feelings associated with a particular situation (e.g., what it is like to be in a nursing care facility, to lose independence, to have a disability) and to express that recognition to others. Validation of the emotional states that the clients are experiencing also will help to building a better rapport, connection and trust with your clients.
- *Mindfulness and Acceptance.* When working with clients who are often in highly emotional and difficult situations, it is important to be practice being mindful, or “fully present” when spending time with the client, and to accept them as they are in that moment, without judgment. Not only will this improve your ability to effectively communicate and assist our clients, but also prevent burnout as well.

### Do's & Don'ts: Essential Personal Skills for Elder Law Attorneys

*Do:* Build client rapport through regular check-ins, discussion of options and feedback.

*Do:* Take extra time to make sure your clients, particularly those who are older, understand the process and recommendations. It is particularly important when working with those with cognitive disabilities (e.g., dementia). They should be given the opportunity to understand and participate in decision-making in their own lives.

*Don't:* Forget to involve the client in progress along the way and dilemmas as they present themselves. We err in picking up the phone and communicating.

*Do:* Consider dictating a summary of the situation and your advice in the client's presence at the end of your meeting. It's a helpful recap for them and ensures you have correct understandings in the client's presence.

*Do:* Understand people have different styles of communication. Remember that body language comprises 55% of communication, tonality 38% and spoken words only 7% (Albert Mehrabian, 1962). This says a lot about the importance of meeting in person, and less about electronic communications. The “eyes are the windows to the soul.”

*Do:* Learn how to effectively communicate with older adults who have dementia and other cognitive impairments. Remember, behavior is communication.

*Do:* Validate a client's feelings. Acknowledge their emotional states. ("I can understand why you are frustrated right now").

*Do:* Consider sending a card or even flowers when there is a loss of a client. My staff also often wants to sign the card, too.

*Do:* Be "fully present" when meeting or interacting with clients. Leave your problems and judgments at the door and give your client 100% of your attention.

### **C. Taking Care of Yourself as an Elder Law Attorney**

§1.7 An elder law attorney also needs to be able to protect themselves from stress and burnout, as it is very easy to become intensely involved with emotionally-charged situations.

- *Dealing with grief & loss.* Elder law attorneys frequently experience the death of clients or the client's loved ones.
- *Setting limits and boundaries with clients.* This may be necessary when a client needs extensive assistance, particularly when it relates to emotional support (e.g., calling on cell phones, weekends etc).
- *Achieving balance and equanimity.* Believe it or not, there is more to life than our work. Particularly when this line of work involves giving so much of ourselves to others, it is so important to balance our lives with other activities we enjoy. Striving for equanimity and balance of the mind will allow us to maintain calm in times of stress, anxiety and pain.

#### *Do's & Don'ts: Taking Care of Yourself as an Elder Law Attorney*

*Do:* Learn about the resources of hospice and palliative care. Understanding the stages of grief in death and dying.

*Do:* Allow yourself to go through the grieving process. We will often attend funerals and celebrate the lives of older adults. However, be sure to use discretion to determine when it is appropriate to attend (e.g., avoid upsetting other family members if there were hard legal decisions).

*Don't:* Over-commit on deadlines. Build a buffer in time for "speed bumps". Easier said than done, but if the copy machine is going to go down, it will . . .

*Don't:* Stack appointments. Give yourself some time in between appointments to gather your thoughts.

*Do:* Consider curbing hours when you're available. I and my staff explain I cannot do evening or weekend appointments because of family obligations.

*Do:* Set aside regular vacation days, especially around holidays. The general public understands you're not working over the 4th of July, the Friday after Thanksgiving, before the New Year, and is less understanding at other times. In addition, courts are usually more accommodating for time off when it's wrapped around public holidays. On the flipside, this time is more important for family and friends – not to be preoccupied with work.

*Don't:* Schedule work during important family holidays or trips. Don't be wired to e-mail and let mobile office technology hold you hostage. Give sufficient notice to clients so they respect this precious time.

*Do:* Keep a file of the nice cards and thank you notes to re-affirm your work, especially when you're tired.

*Don't:* Forget to nurture your own spirit, whether it is through art and creativity, play time, being in nature, or through religion or spirituality.

#### **IV. Special Ethical Issues in Elder Law and Helpful Procedures**

##### **A. Who is the Client? Are We Strengthening the Client's Well-Being?**

§1.8 J. Lampertius: Quite often our planning and advocacy involves persons who are already physically and/or mentally compromised or incapacitated. Other times it involves contemplating a time in the future when the client or a loved one will be challenged with disability or death. Issues of substituted judgment, disability and diminished capacity are a central concern in our field of work. Unlike other attorneys, elder law and special needs planning attorneys have a special ethical question we consistently encounter compared to other attorneys: we need to identify who we serve as the client and to be clear about expectations in the relationship.

A corollary to the fundamental question of "*Who is the client?*" is "*Are you strengthening the client's fundamental well-being?*" (Kind of a "Hippocratic Code" applied to elder law.)

Answering these two questions prevents the many technical ethical dilemmas special to elder law. Losing sight of these two anchors can unintentionally lead to many problems with communications, adequacy of representation, conflicts of interest and even

facilitate a fraudulent or abusive situation. Below is a list of these special ethical dilemmas.

R. Chang: Often my clients are family members of the older adult who contact me for assistance. It is important in these circumstances to remind myself on a regular basis regarding “Who is the client?”

Not only is this question relevant to the issue of maintaining confidentiality, but it is important to keep in mind whose interests I am representing and the role that they play. These interests may sometimes differ, for example, between what role, interests and standards a fiduciary must fulfill, versus the individual’s wishes and preferences. (e.g., Trustee vs. Patient Advocate).

Regardless, I am also a firm believer in preserving self-determination (i.e., ability to make choices in one’s own life) and maximizing independence whenever possible. I therefore still encourage my clients who are the proposed fiduciary (often family members), or a fiduciary, to consider the wishes and concerns of the individual who is in need of assistance, and to allow the older adult to participate in decision-making and be as independent as possible in the areas where they are still able to.

*Do’s & Don’ts: Who is the client? Are we strengthening the client’s well-being?*

*Do*: Identify the client as a first order of business, even before the appointment, if possible. Is it the person with disability? Is it the fiduciary for the person with a disability? We may actually assist both over time, but our anchor of our duty of loyalty to the primary client should not change.

*Don’t*: Wait to identify the client until after meeting with the client or family members.

*Do*: Meet with the client in private, even excusing family members from the office, for the essential items of capacity assessment.

*Do*: Explain to the person calling for an initial appointment regarding another person’s estate planning about the obligation to meet in private with *the client* to assess the client’s capacity and independent preferences.

*Do*: Use a client engagement agreement, letter or writing whenever possible that identifies the client, clarifies the scope and objectives of representation, identifies foreseeable conflicts, confirms waivers of confidentiality, sets out fee expectations and explains rights with closure. When the letter cannot be produced at the outset, you may

wish to at least dictate a short memo about such understandings in the client's presence and then follow up with the retainer letter.

*Do:* Clarify the wishes, preferences and interests of the clients versus the older adult or person with a disability, if you are representing someone other than the older adult or person with a disability (as a fiduciary).

*Don't:* Consider financial stability as the only goal when assisting an older adult. Quality of life and care must also be considered.

## **B. Determining Capacity**

§1.9 J. Lampertius: Even before representation is established, the elder law attorney must establish that the prospective client has sufficient cognitive function and appreciation to exercise informed consent to enter into the lawyer-client engagement. Once this capacity is confirmed, then the elder law attorney must take appropriate steps to obtain the independent preferences of the client.

There are a number of helpful assessment tools and multi-disciplinary resources designed to help understand a client's cognitive functioning. Most important is avoiding categorical labels of capacity unless necessary, because it often is on a continuum, rarely applies to all areas of life and can vary by the day or even hour.

Most difficult is the proper steps in navigating a client with diminished capacity, who is not fully appreciating certain circumstances. At the outset, if other family members are present in the room, the initial contact and assessments become much more complicated, especially when the client has diminished capacity. When diminished capacity exists, protecting the free will of the client and guarding against undue influence by others are essential tasks.

When a client falls into diminished capacity and there is unsafe behavior toward themselves or another, the issues become even more complex. See "do's and don'ts," *below*, for further discussion on intervention in these circumstances.

R. Chang: Issues surrounding capacity regularly surface in the area of elder law, ranging from the ability to enter into an attorney-client relationship to the ability to execute documents to the need for a guardian or conservator. Along with diminished capacity, there are issues related to abuse and financial exploitation as well as undue influence.

I take great care, therefore, in ensuring that I get a good sense of a client's capacity, depending on the scope and nature of the legal services provided, and to review and/or obtain the necessary documentation to support my observations and conclusions (e.g., medical records, psychological evaluations). I also document thoroughly and carefully my observations and actions along the way.

### Do's & Don'ts: Determining Capacity

*Do:* Presume capacity unless evidence proves otherwise.

*Do:* Take steps to maximize capacity when assessing capacity (e.g., home visits, meet with them when they are most alert, consider medications).

*Do:* Involve an independent witness or witnesses when possible to assess the client's capacity and preferences. Consider utilizing administrative assistants and paralegals in the initial interview when questions about capacity exist, or even an independent evaluator as a social worker to assist on such questions.

*Don't:* Allow client family members to sit in and in effect help or prompt answers during initial assessments of capacity and understandings about confidentiality and client preferences. Even if the client insists on meeting with the family member who arranged the appointment, ensure this opportunity for a private meeting is not skipped.

*Don't:* Rely on standardized tests (e.g., Mini-Mental Status Exam) alone to determine capacity to sign estate planning documents. Formal testing can be helpful for an objective measurement, but are not necessarily conclusive regarding the individual's legal capacity to sign documents. For example, a poor outcome on the "clock test" may indicate a compromised executive judgment for financial matters, but the client may have the ability to have a strong and clear discussion about health matters and their preferences, enabling the execution of a basic Health Care Durable Power of Attorney.

*Do:* Utilize other medical and mental health professionals to assist in the determination of capacity, and if necessary, get second or third opinions.

*Don't:* Assume that just because someone has memory loss, cognitive impairment, a diagnosis of dementia, or difficulty with expressive communication skills, that they do not have the requisite capacity.

*Don't:* Assume that a medical or mental health professional has the expertise and skills to weigh in on whether a client possesses legal capacity. Not all of them are trained or familiar with the legal standards of capacity, and many will inappropriately conclude an

individual does not have capacity (e.g., a general practitioner simply relying on the Mini-Mental Status Exam). Moreover, conclusions regarding capacity by healthcare professionals can be influenced by the professional's own assumptions and stereotypes of older adults and those with dementia.

*Do:* Suggest referrals to, or obtain documentation from, geriatric assessment clinics, neuropsychologists, or neurologists when assessing capacity.

*Do:* Assess legal capacity to sign documents at the moment the client is actually signing the document(s). Engage in dialogue with the client and observe him or her as a whole person to assess the client's actual functional status. Clients do better in a conversational format, especially when they're nervous about their short term memory issues. Conduct this in front of witnesses who can affirm and support your evaluation and impressions.

### **C. Maintaining Confidentiality**

§1.10 Elder law often requires frequent interaction with other family members, caregivers, financial professionals, accountants and medical persons. It may also involve representing a married couple, multiple family members or multiple different fiduciaries for the same person. The duty of confidentiality to the client is uncompromising except in very narrow circumstances involving certain death or substantial bodily harm, crimes and fraud and securing legal advice about compliance with ethics. Even experienced counsel have to establish and maintain clear understandings and systems about confidentiality. Other professionals, as insurance and financial agents, do not necessarily understand this until clarified. In addition, there is no such thing as estate planning "by committee" or majority vote.

#### *Do's & Don'ts: Maintaining Confidentiality*

*Do: Carefully explain the duty of confidentiality to the client and other persons involved.* This should be conducted as early as possible in the relationship to avoid misunderstandings.

*Do: Obtain client approval of disclosures.* Before sharing any information with other family members or professionals, obtain client approval.

*Don't: Allow "secrets" in joint representation.* If joint representation exists for a married couple or multiple fiduciaries, clarify that such representation must be "open book" when interests overlap. In other words, information that affects multiple clients will need to be shared or ethical walls must be established at the beginning.

*Do: Maintain record in the file with whom you have permission to communicate. We'll try to clarify this in the initial retainer, when possible, then as it arises with a memo to the file with notation in the jacket of the file.*

#### **D. Identifying Potential Conflicts of interest**

§1.11 J. Lampertius: Elder law involves a balancing act; rarely is there a strategy without positives and negatives. These tensions often arise between competing values and outcomes. For example, inheritance preservation may be a client's own goal or even creating a "rainy day" fund for themselves or a loved one with disability.

Inheritance preservation may be a goal of the client. But whose motivation is this satisfying? Is inheritance preservation subtly impacting the quality of care or even relegating the elder to nursing home status, where the Medicaid bias exists?

When there is a "double jeopardy" situation of an elder with a child or spouse with a disability, preservation of inheritance as security is often a primary and necessary goal. As an elder law firm, we generally decline situations where inheritance preservation alone is the only goal and it is not preserving the security of a vulnerable person. This arises when there is a single parent and it's clear the healthy children are motivated by inheritance preservation alone and not by the care of their parent.

R. Chang: Potential conflicts of interest arise frequently in my elder law practice. The issues that I see often relate back to the issue of "Who is the Client". In addition, potential conflicts of interest arise in the common scenario where an adult child is acting as fiduciary for a parent, for example, and requests to engage in Medicaid planning wherein the goal is more geared towards "inheritance preservation", or when there is gifting involved to an adult child who is also acting as fiduciary to obtain eligibility for government benefits.

Another example of a potential conflict of interest that appears regularly is where a family member is named to serve as a fiduciary when the individual is incapacitated, and the same family member is a remainder beneficiary of an estate or trust. I will point out these potential conflicts of interest whenever I am able.

#### **Do's & Don'ts: Identifying Potential Conflicts of Interest**

*Do: Make clients aware of any potential conflicts of interest from the outset.*

*Do: Clarify whose interests are driving the action or steps being taken.*

*Do:* Clarify in writing the limits of your representation and carefully explain your duty and right to withdraw upon conflicts of interest, especially when there is joint representation of a married couple or multiple family members.

## **E. Maintaining Attorney Competency in Elder Law**

§1.12 There are two aspects of elder law:

- *Proactive planning*, which is estate planning document, care plan and strategy driven; and,
- *Reactive intervention*, when there are not adequate estate planning tools or a care plan in place. This may involve a sudden hospitalization or need for court intervention.

Both aspects are necessary and legitimate aspects of our services. The same legal standard of competency applies to both circumstances. The attorney must respond with legal knowledge, skill, thoroughness and reasonable necessary preparation.

Both proactive planning and reactive interventions require specialization in this field and consistent education. Elder law cannot be just something an attorney “dabbles” in. Much of the proactive planning aspect of elder law and special needs law involves correcting the inadequate tools drafted by attorneys or other professionals who paid no heed to care strategies in times of disability or possible need for government benefits. When reactive interventions are necessary for a client without adequate planning, there is no room for incompetent advice, as it directly impacts care and financial loss.

### *Do's & Don'ts: Maintaining Attorney Competency in Elder Law*

*Do:* Keep up on continuing education in elder law.

*Do:* Educate yourself on clinical (health and mental health) issues as well regarding elder law.

*Don't:* Be afraid to use other attorneys as a sounding board or to refer to others if you are unsure about a particular area.

## **F. Avoiding Fraud / Identifying and Dealing with Abuse**

§1.13 J. Lampertius: We as elder law attorneys consistently have to set clear lines and limitations on conduct that is unethical or illegal. Our rules of confidentiality and the client's right for "zealous advocacy" must avoid advocacy that capitulates to client requests for fudging the rules, or "cutting corners" of legality. For instance, in government benefits reporting with Medicaid or Social Security, a client may be reluctant to reveal that bond or discovered cash and privately ask you to just skip it. In addition, there are a number of special needs trusts we encounter in which the client has not properly reported the existence of the trust or its assets with Social Security or Medicaid, even after assistance with a prior attorney.

We will proactively explain that the fact that a Medicaid application is an affidavit, and the route of non-disclosure will end up with worse consequences than just dealing with it. If necessary, we will point to a written retainer which allows for us to withdraw on taking positions we consider unethical.

Whereas we can assist with legitimate asset preservation, there is the important step of avoiding common misperception that the elder law attorney is a "shell game" artist, which finds loopholes in the law to take advantage of public benefits. The credibility of our advice and trust in the community is directly related to avoiding misperceptions about our intent and role.

More subtle is the pressures that come with aligning with marketing seminars in the financial industry or fear based advertising about spending down for Medicaid. As elder law attorneys "educational seminars" about care planning, taxes, Medicaid or VA rules are a community good and effective form of getting the word out. When there's pressure, however, to endorse that insurance policy, annuity or financial plan being sold, the ethical line becomes crossed.

Most difficult is the encounter of a potentially abusive situation involving a client. Because elder abuse is prevalent and no longer tolerated in our society, numerous task forces have been created across the state between police departments, courts, financial institutions, medical providers and the legal community for a unified response. In fact, last year's legislative amendments to the Durable Power of Attorney statute were focused on curbing such abuse.

Identifying the "red flags" of elder abuse -- physical or financial -- has always been the role of an elder law attorney, but now more than ever it is an essential requirement of the elder law attorney. If the abuse involves a client and fiduciary, tensions arise with the duty of confidentiality. Assistance by other professionals, as the counselor, social worker, accountant or geriatric care manager, to confront the problem can be helpful.

Ultimately, we have encountered occasions in which reporting to Adult Protective Services and/or seeking help through the court is necessary.

R. Chang: Avoiding fraud and identifying and dealing with abuse are interrelated to the issues surrounding capacity and “Who is the Client.”

I take very careful steps when engaging in planning to ensure there are safeguards in place to prevent financial exploitation (e.g., trust protector, review of accountings) in estate planning.

I am also very careful to remind my clients that they need to be completely honest and truthful regarding the disclosure and reporting of assets or income to governmental agencies that determine eligibility for government benefits.

In addition, part of my practice also involves helping clients to deal with possible exploitation or abuse. Thus, I will educate family members on the signs of potential abuse or exploitation and work with them to address these suspected abuse (e.g., flagging bank accounts). My practice also involves at times the need to assist the family to seek criminal and civil remedies regarding elder abuse and exploitation.

What is a particularly tricky situation for me regarding suspected abuse and exploitation is the fact that I am a mandatory reporter under MCL 400.11a because I am a limited licensed psychologist. Thus, when deemed appropriate, I will advise my clients from the beginning that I am required under law to report a suspected neglect or abuse.

#### *Do's & Don'ts: Avoiding Fraud / Identifying and Dealing with Abuse*

*Do*: Make very clear from the start of your representation of the need for truthful disclosure regarding eligibility for government benefits.

*Don't*: Disregard complaints and fears of elder abuse or exploitation, even if they seem minor.

*Do*: Educate yourself to identify the “red flags” of financial or elder abuse and know the resources in your community for help, especially social workers and caring attorneys who serve as local public administrators. They can offer helpful guidance for private and public interventions.

*Don't*: Allow entrapment by a client or fiduciary pressuring against disclosure of assets or trusts. Make clear the expectation of potential withdrawal from representation in such circumstances.

*Don't:* Participate in any marketing or advertising that has connotations of fear-based messages.

## **V. Office Setup and Use of Technology in Your Elder Law Practice**

### **A. Accommodating the Elder Law Client**

§1.14 When you are providing services to an older adult, there needs to be adequate consideration to normal age changes (e.g., sensory, mobility) as well as persons with disabilities or health issues. Here are some considerations to keep in mind:

- *Location of office.* Be sure the office is easy to find and provides ample parking, especially parking spots for persons with disabilities.
- *Minimizing fall risks.* Remove any impediments to free and uninhibited access in the hallways and remove and other objects on the floor that may add to the risk of falls (e.g., throw rugs).
- *Lighting.* Be sure to have adequate lighting for individuals to be able to see, as well as reducing glare (e.g., shiny conference tables, glass).
- *Accessibility for persons with disabilities.* Be sure your office is accessible by those who rely on assistive devices for ambulation (e.g., wheelchairs). Be sure that your bathrooms stalls have sufficient room to accommodate those with disabilities and other environmental modifications (e.g., grab bars).
- *Office vs. home visits.* Home visits can be very helpful for those who are caregivers and have trouble finding respite care so they can leave the home, or if transportation is an issue, especially if the individual has significant mobility challenges. Home visits can also be helpful in trying to maximize capacity for persons with dementia and other cognitive disabilities, especially those that have difficulty adjusting to new environments. However, careful consideration must be made when doing home visits to ensure that the older adult is free from pressure or undue influence from family members that may be present at the time of the meeting (e.g., assisting an older adult with completing an estate plan).
- *Time of day of appointment.* This may be also very important in maximizing capacity. Some individuals may be more alert and lucid during certain times of the day than others. For example, individuals with dementia tend to be more alert when they first wake up. Or, administration of medications and/or side effects, or issues with blood sugar levels, can result in the older adult having less clarity at certain times of the day.

- *Alternative communication methods.* Be sensitive and accommodate for any sensory impairments (e.g., hearing, vision) an older adult may have, and be sure to comply with the Americans with Disabilities Act for those that may need, for example, an American Sign Language (ASL) interpreter. Find out from others that know the individual well, communication techniques that may be helpful (e.g., use shorter sentences). Also remember that behavior is communication (e.g., nonverbal signs, body language, facial expressions, vocalics).
- *Assistive technology.* Be familiar with and use various forms of assistive technologies (e.g., ambulation, communication, sensory impairments) when applicable.

## **B. Using Technology in Your Elder Law Practice**

§1.15 We as elder law attorneys tend to obtain and retain a lot of sensitive information, especially related to identity (e.g., Social Security Numbers, DOB), finances and health information. While it is not within the scope of this session to review the details related to maintaining confidentiality and use of technology, it is important for the elder law attorney to be sensitive to this issue and ensure that you are doing everything you can to protect your client's information (e.g., password protecting documents, proper research on cloud-based providers).

## **C. Witnessing Documents**

§1.16 J. Lampertius: I avoid using witnesses who are beneficially interested or involved in care. I prefer to use trained independent witnesses, preferably staff, if possible. I typically conduct training with staff on their role in witnessing and notarization.

I am very careful about videotaping. It can preserve a client's testimony, but most older clients are intimidated about being recorded. Instead, I consider handwritten letters of intent by the client guiding crucial issues.

I typically request the witnesses take notes during the interview on weaker situations, and will de-brief with the witnesses on their impressions *before* signing. I also request the witnesses to write up their general impressions about the client's orientation and appreciation of key decisions as fiduciaries, powers, gifting and inheritance.

I also exercise caution when doing hospital signings and ensure there are clear expectations between the client, family and social worker/staff nurse about your role and duties. Where possible, we also refrain from out of office signings, due to the lack

of control over privacy and environment. I find the professional atmosphere of the office protects against interruptions and client distractions.

R. Chang: Because I have a solo practice, have no staff, and primarily do home visits. I ask that the client provide their own witnesses. I ask that these witnesses are not related to the individual and have no direct dealings with the individual's estate plan, and of course are not prohibited by law to act as a witness (e.g., under a Patient Advocate Designation).

To preserve privacy of the client, I ask that the witnesses be available only when called (e.g., neighbors), or to show up later so that I have time to review documents in private with the individual first. Choosing witnesses carefully can also help with any potential challenges to estate planning documents (e.g., a psychologist as a witness).

### Do's & Don'ts: Office Setup and Use of Technology in Your Elder Law Practice

*Do*: Be familiar with normal age changes and how to accommodate these changes, especially related to sensory impairments (e.g., hearing, vision).

*Do*: Locate your office on the first floor of a building near handicapped parking.

*Do*: Have a clear map of directions to mail or e-mail with client's initial letter.

*Do*: Remember geography matters. Our offices are like dental offices. The length of the drive affects people's willingness to work through things, provide verifications, etc.

*Don't*: Keep chairs or other furniture in the swing room of a walker or wheelchair. Same with phone cords, carpets, magazine racks and plants. Consider strong supportive arm chairs that don't swing back and provide stability for transferring from walker to seat.

*Do*: Minimize glare in meeting areas, avoiding harsh lighting.

*Don't*: Use cold marble or metal surfaces for your signing table because of the glare.

*Do*: Be prepared to make temperature adjustments for the older person's comfort.

*Do*: Consider using a larger font on estate planning documents.

*Do*: Remind family members to ensure that their loved ones have their basic needs met right before a meeting (e.g., toileting, meals).

*Do*: Use a portfolio system to bind and organize the client's estate plan documents.

This can include helpful schedules about funeral wishes, where important documents are stored and advisors.

*Do:* Be creative in your attempts to effectively communicate with and understand the individual (e.g., using written words, pictures). Effective communication can take time and patience, but it is imperative that the older adult has every opportunity to communicate his or her wishes and preferences.

*Do:* Interview other family members and caregivers to obtain tips on how to maximize the older client's ability to participate in meetings.

*Don't:* Forward any information electronically (e.g., email) without property security and password protections.

## **VI. Administration and Project Management in Your Elder Law Practice**

### **A. Overview**

§1.17 Elder law firms can vary between solo attorney to multiple attorney and support staff firms. Regardless of size, effective in-house and out-of-house support is invaluable for the numerous demands and roles in the elder law practice. The economics of such help, however, is a constant balancing act in firm administration. Crucial goals are creating the systems, training and retaining these supportive working relationships, preferably over a long period of time.

Some of the issues related to administration and project management are as follows:

- Delegation of duties;
- Witnesses for estate planning documents;
- Telephone calls;
- File management protocol;
- Use of technology;
- Time management and setting expectations
- Client involvement; and,
- Working with other attorneys.

### **B. Delegation of Duties**

§1.18 The following “do’s and don’ts” relate to delegating duties in your elder law practice.

J. Lampertius:

*Do:* Refine and practice *effective* delegation. Respect the delegate with clear expectations and regular check in. Provide a context for the assignment, break down tasks, explain limitations, and set deadlines or target dates. Walt Disney would provide uplifting notes and comments after hours to his observations of work by his film artists. It would also allow him to “re-circle” about problem areas the next day.

*Do:* Differentiate roles among attorneys *and* staff, breaking tasks between systematic items and tasks requiring careful drafting, strategy and supervision by the attorney.

*Do:* Cluster similar tasks with yourself and certain staff members. Do this clustering in regular short staff meetings. I ask my office administrator to take notes as she serves as the “hub” of communications, tasks and calendaring in our office.

*Do:* Encourage staff and attorneys to carry a yellow pad to maintain delegation notes when discussing matters. Stop to offer a pad if it’s “on the fly” delegation.

*Do:* Provide clear task sheets with the matter. We use a task request sheet with dictation memo for explanations when things are left on desks. This allows the staff member to prioritize their desk and tasks.

*Do:* Educate clients at the outset on the cost savings and responsiveness through the team of staff and other attorneys. Introduce those persons and the best ways for all persons to communicate during the initial meetings.

R. Chang:

*Do:* Follow up with your clients about their experiences and ensure it was satisfactory if you delegate out to other attorneys or professionals for assistance and keep your referral network up-to-date accordingly.

### **C. Time Management and Setting Expectations**

§1.19 The following “do’s and don’ts” relate to time management and setting expectations in your elder law practice.

J. Lampertius:

*Don’t:* Switch continually between different unrelated tasks. It makes you appear “really busy”, but actually causes inefficiency and stress. If you’re consistently “bouncing on one foot,” reacting to urgencies, you can more easily fall or be pushed over.

*Do:* Plan your week and day to work smart. Reserve 20 to 30 minutes each day without interruption on this subject. It's amazing how many creative "win win" solutions come from clearing your mind and thinking through projects.

*Do:* Set aside at least a morning or afternoon once a week for administration. For example, our bookkeeper is on Mondays. That time is set aside for handling payroll, bills, taxes, insurance matters and profit sharing.

*Do:* Dictate a memo immediately in the estate plan meeting or promptly after to clarify objectives and steps for staff members, and refresh understandings for yourself.

*Do:* Create systems for specialty areas as estate and trust administration at death, taxes, Medicaid, Guardianships/Conservatorship, real estate and accountings.

*Do:* Use a one-page summary task sheet for standard tasks and deadlines for the particular client's project. This sheet ensures timely coverage of requirements, identification of responsible persons and serves as a "roadmap" of the stages in an administration to staff and clients.

We use such sheets for decedent's estates, Guardianships, Conservatorships, trust and estate income tax returns, final Form 1040s, estate and gift tax returns and Medicaid applications.

#### R. Chang:

*Do:* Set expectations clearly with your client regarding your availability, especially during crisis situations.

*Do:* Set limits with your client and remind them of the scope of your representation if their requests for assistance far exceed the assistance that was originally requested, especially if it is very time consuming.

*Do:* Expect to be involved in crisis situations with your clients and being a key player to getting that crisis resolved (e.g., removing firearms from the home of an individual with questionable capacity).

*Do:* Try to accommodate your client's schedules and needs, but be sure to do so in a manner that works with your private life. I do not mind meeting with clients in the evenings and weekends as I have no other consistent personal demands that restrict my availability (e.g., child care). However, I do still balance providing flexibility with the need for privacy and "down time" in my personal life.

*Don't:* Try to solve a crisis yourself. Consider a multidisciplinary approach.

#### **D. Telephone Calls and Emails**

§1.20 The following “do’s and don’ts” relate to handling telephone calls and emails in your elder law practice.

##### J. Lampertius:

*Do:* Consider assistant making reminder calls at least two days before appointments, confirming questions and refreshing directions (like the dental office). My office administrator does that every Friday for the coming week.

*Do:* Return client’s calls or e-mails within 24 hours. Set that expectation up front. If you can’t get back to the client, have your assistant call or e-mail back the client and set a convenient time to confer. This can buy you time, but also help the client know you’re responding and care about his or her immediate dilemmas.

*Don't:* React to e-mails or other form of fast forms of communication. If it’s in writing, you may regret a “flash” response. Lincoln would write many letters and let them “season” in a desk drawer, many of which he would then decline to mail.

*Do:* Consider you and staff generally creating fresh e-mail messages rather than replying or forwarding on multiple layer messages. Confidential information can inadvertently be sent out, which you might not see buried deeper in the message.

##### R. Chang:

*Do:* Return phone calls and respond to emails as soon as possible, within 24 hours. Many issues and questions from clients related to elder law can have a significant impact on an individual’s life and well-being, so be sure to intentionally give priorities those calls.

*Do:* Keep your emails brief and avoid covering too many topics or requests within one email. It can be easy for the client to lose track and miss information or tasks.

#### **E. File management protocol**

§1.21 The following “do’s and don’ts” relate to file management protocol in your elder law practice.

J. Lampertius:

*Do:* Use color code files for the type of file matter. We use manila files for the “Estate Plan” files, blue for “Medicaid” files, burgundy for “Decedent’s Estate” files and red for “Trust Administration” files. As matters change (for example, from an estate plan to a decedent’s estate), we’ll hold these different files together in a red-rope.

*Do:* Create standardized sections in multi-section file folders for notes, correspondence and standard areas as probate filings, asset verifications, etc. This allows multiple attorneys and staff members to enter notes, correspondence and documents in an organized manner.

*Do:* Bind files in their sections, marking them with 3-M notes for quick access. This prevents problems from dropped files, file commingling and general “discombobulation”.

*Do:* Consider creating an immediate scan of signed estate plan documents, giving the clients all of their originals in an estate planning portfolio. We scan all checklist information, verifications and completed documents, retaining in the manila estate plan file only an original second copy of the Will and Financial Durable Power of Attorney.

*Do:* Maximize scanning of closed files, saving the bulky stuff in electronic format, shredding the rest. Systematize the way scanned files are saved in the client directory.

*Do:* Consider use of a professional shredding service. We have a secured locked shred box where we toss out papers with client information. As we have been scanning closed files, the shredding truck comes about once a week.

*Do:* Use a different color for incoming faxes which are printed. We use a yellow colored paper, which allows the fax to stand out and be quickly identified. We would immediately scan faxes to the client file before circulation. Now our faxes are linked as a PDF to e-mail, and then saved to the client computer file.

R. Chang:

*Do:* Consider a system of tracking and organizing files in accordance with those files that need action by the attorney or other staff and those files that are awaiting a response from a client (e.g., I stack files on a certain location on my desk. While it may look like a disaster zone to an outsider, I know exactly where my files are at!).

**F. Use of Technology**

§1.22 The following “do’s and don’ts” relate to using technology in your elder law practice.

J. Lampertius:

*Do:* Automate repetitious tasks with technology. We maintain estate planning templates in Word with merge for standard items and use Hot Docs for probate administrations.

*But Don’t:* Let automated technology lull you out of specially drafting each situation and skipping careful read and proof of your documents. The speed and ease of word processing can be the quickest way to malpractice. Our true value-add is the tailoring of templates for the particular client’s situation and legal strategy.

*Do:* Maintain templates by carefully keeping record of changes to templates for whom and when updates have occurred. I mark the sheet as a “template edit”, designate the template (as “joint trust”), date the edit and put the name of the client for whom I made the edit. We then keep a separate binder for each type of our trust and estate plan templates. The template edits are then circulated and/or discussed with other attorneys and staff.

*Don’t:* Allow multiple persons to adjust firm templates. We have one person who enters edits as a “template”, and allow access to templates only as a “New” document in Word. This is important as there is one uniform template system for all estate planning documents in a firm of multiple attorneys.

*Do:* Keep a record of specially drafted distributions, which can apply to other client situations.

*Do:* Keep a master Excel sheet for all active clients and deadlines on the same matter separate from the client files and calendar. This serves as a protection to double check for proper calendaring errors. For example, all clients with deadlines on estate and gift tax returns are listed in one excel spreadsheet, based on date of gift, date of death, alternate valuation date, return due date, date of extension and whether extension was filed.

*Do:* Keep a master public calendar for all persons in the firm. We use a public calendar system in Microsoft Office Outlook. For each appointment, we use the attorney’s initials and identify the client and the task (as IEP for initial estate planning appointment). We mark the calendared item when the appointment is confirmed and include any special

notes in the memo section of the item. We print a color copy of the calendar each day, and at the end of week, for the coming week, which is circulated to all staff.

*Don't:* Commingle your social internet media and professional internet media. Other clients and professionals don't want to hear about your impressions on politics and music.

*Do:* Consider "Linked In" as a professional social media. You can set parameters and even privately remove contacts from your list.

R. Chang:

*Do:* Save an offline or printed version of your calendar and task lists if you use an online calendaring service (e.g., Gmail).

*Do:* Be cautious and research adequately cloud-based technologies and other off-site storage options (e.g., to ensure confidentiality)

## **G. Client Involvement**

§1.23 The following "do's and don'ts" relate to client involvement in your elder law practice.

J. Lampertius:

*Do:* Maintain clear checklists for standard client matters, which can then be individualized to the client. Example: Medicaid verification checklist for a single person or married couple.

*Do:* Return client originals right away as a standard policy if possible. If you have to retain a set of originals for copying, then ensure the items are inventoried when they are left off.

*Don't:* Conduct trust funding without clarifying in writing the responsibility of the client alone to sign and complete such documents. If assisting with delivering forms, clarify responsibilities.

R. Chang:

*Do:* Provide written checklists and to-do lists, and provide clear, step-by-step instructions to the client. You may want to consider "piecemeal-ing" tasks so as not to

overwhelm the older client if they have trouble with following through due to stress, cognitive or physical limitations etc.

## **H. Working with Other Attorneys and Resources- Internal and External**

§1.24 An effective elder law attorney needs to maintain direct communications and contact with clients and/or fiduciaries as they navigate systems. At the same time, the elder law attorney must be able to identify and assist with resources- either internal or external- to assist with complex medical and financial planning issues. Those issues often involve working with other attorneys who specialize in areas as tax, real estate, litigation, Medicaid and probate matters. In addition, the issues often involve coordinated efforts with other financial or care management professionals.

Internally or externally, working with other attorneys with different practices other than elder law can involve a nice diversification and source of referral business. When there are multiple attorneys of different practice areas in the same firm, it is important that the “internal” culture support the patience, responsiveness and accommodations necessary for elderly and persons with disability. This can contradict the approach of other attorneys, who may be working with an entirely different model in communication, accommodation and even billing.

When there are multiple attorneys in the same firm conducting elder law, a division of roles can assist responding in a cost effective and timely fashion. For example, an associate attorney or attorney who is “of counsel” may be able to help with hearings, communications and drafting documents. This “team” approach can be very helpful, but it takes clarity and consistency in roles, communications, systems and templates to work well.

Elder law involves accommodations and a different business model than that occurring with other law practices, as for example, personal injury or corporate law. Cultural tensions can exist over the patience, responsiveness and accommodations necessary for the elderly and persons with disability with the business model of other law practices.

### *Do's and Don'ts: Working with Other Attorneys and Resources- Internal and External*

*Do:* Maintain a list of outside specialists to whom we refer and whose contact information we forward.

*Do:* In multiple attorney elder law firms, maintain a consistent approach in routine systems as estate planning, probate and Medicaid as much as possible.

*Don't:* Allow for inconsistent approaches among multiple attorneys to similar tasks such as deed recordings or escrow, calendaring of deadlines or retention letters.

*Do:* Consider “master” firm calendars for deadlines, meetings, hearings for all attorneys to prevent errors, duplication or overlap.

*Do:* Conduct regular firm attorney and paralegal meetings about flow of work, delegation of tasks, deadlines and project management.

*Don't:* be afraid to share resources and assist or get help from other attorneys. There are plenty of clients for everyone, and the ultimate goal should be client satisfaction and quality and competent legal services.

## **VII. Elder Law Practice and Effective Billing**

### **A. Overview**

§1.25 Unlike other industries, which are paid indirectly for their product, or the medical field, which is generally covered for their cost through insurance, attorneys have to directly bill their clients for their services. Unlike large firms, elder law attorneys rarely work in anything larger than small to medium size firms. Our clients are not large corporations with a budget for legal services, or cases with contingency fees unrelated to the client's pocketbook. Rather, our fees and costs come directly from a client's household budget. Thus, effective billing is very personal between the elder law attorney and client. The quality of billing management affects much more than finances; it is the first indication of client satisfaction or dissatisfaction with our services. *How* you bill clients and *how often* you bill them is an essential part of client communications with a major impact on your relationship.

### **B. Hourly vs. Flat Fee Billing**

§1.26 J. Lampertius: In all areas of our work, our fees are based on our time. However, most of our estate planning is based upon a flat fee, which is our best estimate of time for the initial appointment, drafting and subsequent signing appointment. We keep record of our time even in our flat fee matters, but generally do not mail a detail of this actual time. We keep it as an internal record. The time record on flat fee matters also allows us to credit work and fees between multiple attorneys and our paralegal.

In any other area of ongoing projects for estate or trust administration, advice on special needs or Medicaid, we each account for our hourly time.

R. Chang: While there are some attorneys who will charge flat fees for “life care planning” or other services (e.g., Medicaid and asset protection), I prefer to bill hourly for everything aside from drafting estate planning documents.

The draw of clients to flat fee billing is understandable (e.g., no surprises or “runaway” billing). Due to the nature of the help that my clients need and their ability to pay or afford legal services, however, I prefer to be able to individually tailor my time spent, services and level of assistance based on the specific needs of the client. My clients seem to appreciate this model of billing and my rationale.

Providing regular billing statements, staying in regular communication, demonstrating regular efforts to be sensitive to fees and time spent on matters, and being mindful of their economic circumstances seem to satisfy those clients who would otherwise prefer flat fee billing. I have only very rarely encountered complaints from clients about my statements and charges (I can confidently say less than a handful).

### **C. Retainers**

§1.27 J. Lampertius: We nearly always work by written retainer, unless there is a one-time consultation and closure after the advice or assistance. As discussed above, the retainer letter not only clarifies fees and expenses, but sets forth objectives, communications and ethics in the representation. This is especially important as we often represent the client and their fiduciary. In addition, joint representation of spouses and multiple different fiduciaries is common.

R. Chang: I do not typically require retainers, in order to simplify my billing and office administration processes (because I am a solo practitioner with no staff or outside assistance), unless the matter or assistance requested appears to require more significant time. However, in those circumstances where estate planning are concerned, I will advise clients that once drafts are sent for estate planning documents, a payment for a percentage of the flat fee is expected based on what I individually work out with the clients at the time, with the balance due at the time of signing.

Admittedly, obtaining a retainer is a “good business practice” for attorneys and firms. Nevertheless, I can confidently say that no more than a handful of my clients have failed to pay me in all my years as a solo practitioner. Building a good relationship, providing good customer service, and encouraging honest and regular communication are keys to having a faithfully paying client.

### **D. Payment Plans**

§1.28 J. Lampertius: Our estate planning flat fees are paid one-half up front and the other half at the signing meeting. Otherwise, we try to give our best estimate of overall cost up front, with escrow of such funds at the outset in client trust through a refundable retainer. We then account monthly for time and expenses to the client. When we need to submit a Medicaid application, to prevent argument by DHS that our refundable retainer is an available asset, it is then made irrevocable. Occasionally the client requests to “pay over time” and we will then personalize the request to say a series of payments.

R. Chang: I frequently will work with clients for payment plans in order to accommodate, especially those with limited assets and/or monthly income. I will also bring up the option of payment plans with my clients in the very beginning of the attorney-client relationship, in certain circumstances so that they are not embarrassed to approach the subject on their own and overcommit to paying a fee they cannot really afford. The majority of my clients are honest and paying clients, who respect and adhere to the payment arrangements we established.

#### **E. Free Consultations**

§1.29 J. Lampertius: We will not quote flat fees over the phone before we have met the client and assessed the situation. At the same time, clients will occasionally request a “range” of cost before initial making an initial estate planning appointment. We explain that we offer a free consultation for a half hour to enable us to assess accurate cost, but both spouses must be present. This free half hour often turns into an hour, but rarely do clients choose not to proceed. If they do balk, by patiently not trying to bill them, they often return and retain our assistance.

In addition, we are careful to clarify the purpose of the appointment with the client up front. We do not do free consultations about Medicaid planning or care planning. Rather, we ensure the client and their fiduciaries are informed up front to complete a long term checklist and the current estate planning documents.

R. Chang: Regarding estate planning, I will advise potential clients that I can review their circumstances and make recommendations regarding what documents they should consider and a quote in the initial meeting, with no obligations to follow through. They will typically proceed with the recommendations.

I will not typically provide free consultations for other matters (e.g., care advocacy & planning, Medicaid planning). I will advise potential clients that the scope of my representation can be in stages, where they can enlist my services for a limited initial consult with recommendations of next steps (e.g., limit to 2 hours), and the opportunity

to decide whether or not to enlist my services thereafter depending on their satisfaction with our initial meeting. Rarely have I been turned away by a potential client for not providing a “free” initial consultation. My clients understand and appreciate the value of the information and recommendations that I provide from even the first meeting.

## **F. Setting Limits with Clients**

§1.30 J. Lampertius: We rarely allow a “lone ranger” spouse for an initial estate planning appointment involving both spouses, unless there are special medical or spousal circumstances preventing the other spouse from participating. This avoids ethical dilemmas, prevents duplication of advice and ensures we’re all on the same page about the joint representation. It also weeds out indecisive shoppers or overly controlling spouses, who don’t have a legitimate reason why their spouse cannot participate.

When a child or family member is making an appointment about the elderly individual, we are careful to walk through the ethics of the representation, their current fiduciary relationship and the objectives of the meeting. We are careful to differentiate the role of advising the fiduciary versus the role of advising the elderly person or person with a disability. We rarely mail drafts, but rather meet to review documents. This allows changes to be conducted in direct dialogue. It avoids the problem of unsigned documents and lack of control on confidentiality.

R. Chang: I occasionally will have to set limits with clients regarding my time and activities and my ability to assist them. Many times, clients are in crisis and need support, including emotional support (sometimes more than legal support), which is beyond the scope of my representation or ability (e.g., due to time constraints), especially since I am a solo practitioner with no other office support.

## **G. Reducing Fees/Courtesy Credits**

§1.31 J. Lampertius: As a regular practice, we “sprinkle” courtesies throughout our hourly billing, especially for client calls or matters the client considered “educational”. We will also explain at the outset that we do bill for our time analyzing issues in conferences, even over the telephone. We do not bill for copying, administrative assistant time, but do bill for the paralegal’s time in compiling verifications and calendaring important tasks and deadlines.

Because of multiple persons in a team relationship assisting a project (an associate attorney, a paralegal), we will usually prorate time in hourly entries for a portion of the briefing. This prevents impressions of duplicative billing in accomplishing effective

delegation between attorneys and paralegal. It also allows us to shift repetitive tasks out of attorney rates to paralegal rates, which clients appreciate. Clients will then proactively seek out the paralegal and administrative assistant for routine or clerical matters on communications and meetings.

Generally, we're happy with client's responses and prompt payment of our bills. Our office administrator will speak with a client who is over thirty days late in payment to clarify if there is any problem.

R. Chang: I will often provide a "courtesy credit" when I bill a client. I believe it is a good practice to review the total fees incurred and to really evaluate the value of the services provided to the client compared against the fees incurred, especially because I do not have paralegal or other more cost effective staff to delegate work to. In addition, courtesy credits may be given based on the experience of the client and the level of client service provided (e.g., time it took to complete a particular task, any mistakes by me or misunderstandings).

I will also consider reducing my hourly rate due to the economic circumstances of the client or provide pro bono services. While it is not economically feasible for me to do this as much as I would like to, I am a firm believer that everyone should have the opportunity to access quality legal services, regardless of their socioeconomic status or ability to pay.

#### Do's & Don'ts: Elder Law Practice and Effective Billing

##### J. Lampertius:

*Do*: Bill at the outset and while the "glow of appreciation is still in the client's eyes."

*Do*: Educate your client on the expectations for prompt payment. Most completely understand you're a small business with accountability for your time and expenses.

*Don't*: Mail out bills any later than the end of the month. Late billing is like yesterday's newspaper and probably the fastest way to client complaints. Late billing does not work in many elder law matters, where spend down and cash flow concerns are paramount.

*Do*: Err in providing detailed and descriptive billing. The most common attorney complaint is the one-line bill for hundreds, if not thousands of dollars "for professional services". Detailed billing reflects a "golden rule" of providing the same clarity and justification of legal costs as we may demand for ourselves. It also ensures respect by the probate judge when costs and fees are accounted for.

*Do:* Put notes with billing to make it more personal.

*Don't:* Fail to proof bills for entry errors involving especially name spellings, duplication or excess detail on confidential matters. When you edit and proof bills, clients will recognize your conscientiousness and appreciate your courtesies.

*Do:* Let the client know when the bill is final and thank the client. Remind the client of anything remaining to do.

*Do:* Excel in your quality of billing. It has a completely direct impact on economic success and receivables. It will beat the standard client's have encountered with other offices. I'm surprised at the low standard of billing out there, especially with the large firms we have worked with and engaged directly ourselves. Name misspellings and patent inaccuracies are inexcusable, even if billing is done by a different department.

*Don't:* Allow receivables to fester. Seek to resolve issues with the disenchanted client ASAP. It's not worth the headwind, nor the negative energy on collecting. Fortunately, our relationship is so personal and direct in elder law that receivables should not be a problem. For if there's a problem, it needs to be worked out right away, reserving the right to withdraw if problems persist.

*Do:* Personally monitor and scan checks upon receipt, circulating such payments to the firm attorneys to ensure awareness of client "flow". Strictly differentiate between retainers to be escrowed with state bar client trust account and earned fees, deposited to firm general accounts.

*Do:* Ensure your billing system is maintained separate from your accounting system for checks deposited. This serves as a form of accountability, and forces a double check to ensure payments and client trust are handled correctly.

*Don't:* Fail to scrutinize payments and expenses from client trust account with records. New bar rules have strict reporting requirements to the State Bar Ethics Committee by banks in the event of any bounced client trust check. Good attorneys have found themselves in serious predicaments over handling client trust accounts.

### R. Chang:

*Do:* Be clear who is the client and maintaining client confidentiality, when there is another family member who is willing to pay for the older client's fees (which is a fairly common scenario in elder law).

*Do:* Clearly set expectations of the nature and scope of services/representation provided. Because issues and needs related to an older adult can be vast and change frequently, it can be easy to become involved with an issue that may be significantly more time consuming than originally anticipated.

## **VIII. Getting the Word Out: Gaining and Keeping Good Clients**

### **A. Overview**

§1.32 J. Lampertius: To succeed an elder law attorney must be an entrepreneur. An elder law attorney must first be a specialist and develop an in-depth understanding of the multiple technical segments and community resources, but that's not enough. The word of your service has to get out. "Marketing" your skill sets is not a bad word. At the same time, "marketing" is not the right term if it connotes sales and schemes to stack up clients. Because those clients are generally vulnerable, and pressures are high, such schemes inevitably focus on closing the sale, rather than humbly centering on the client's needs. Rather, client's desire honest service, hard work and creative technical relief to their worrisome and often complex dilemmas. A healthy perspective also acknowledges we are only one part of the solution to their medical, disability and death issues. As such, the best way for us to gain and keep good clients is to be a legal solution provider with excellent service and value beyond our costs. Our linkage of clients to community resources and other specialists provides not only value to the client, but a recognition of our good work to those specialists. When it is done effectively, word travels fast in the community about your helpful legal presence. Nothing beats the word of mouth recognition by clients and community resources.

R. Chang: It is important for an elder law attorney to "market" in a manner that is true to them and in a fashion that is reflective of their values. It is also important to be mindful of how services are marketed, especially when the older adults can be quite vulnerable (e.g., fear-based incentives vs. information or peace of mind).

Based on my practice as a solo practitioner, I have found one of the best methods for getting the word out about me and my services is to give back to the community and share the information and knowledge that I have through volunteer work and providing community education (e.g., workshops, articles), especially information that may not always be specific to legal issues *per se*, but information gained as a clinician and from the hundreds of past teachers (my clients). It is helpful to humbly convey recognition that the legal issues are a part of a much broader picture regarding life and the human condition.

My client base has largely been established by word-of-mouth and my referral network (e.g., social workers, long-term care providers). I believe the attention paid to developing a unique and meaningful relationship with every client is truly the cornerstone of a quality elder law practice. Provision of quality legal services must be client-centered and tailored based on the specific needs of the client.

## **B. Do's & Don'ts: Gaining and Keeping Good Clients**

§1.33 The following “do’s and don’ts” relate to gaining and keeping good clients in your elder law practice.

### J. Lampertius:

*Do:* Write a handwritten thank you note to clients after completing a major project or estate plan for the opportunity to serve them.

*Do:* Think about the overall well-being of a client beyond the task at hand. Point out to the client how the firm can help them review that real estate sale, or clarify the handling of the family cottage.

*Don't:* Sign up blindly for expensive ads or monthly fees for marketing memberships without scrutinizing and asking: is that really you? I have found the quality of the person referring you has a direct relationship on the trust established with the client. The client doesn't “come out of the blue”, but rather because of a person's word about your character and work.

*Do:* Consider writing an educational newsletter on current law changes and topics faced by clients. Those newsletters have a wonderful impact with referral sources, but also serve as a resource for prospective clients. I keep them handy for questions presented by clients in estate planning appointments, especially about special needs trusts or handling of retirement benefits.

*Do:* Have a website where you post the types of specialty work you conduct as “trigger points” for referrals. Post your writings and newsletters to demonstrate you are a reliable source of useful and timely information.

*Do:* Give your time in educational seminars, especially with non-profit agencies attempting to provide reliable information. If you are lecturing on taxes, estate planning or elder law at the request of a financial planner or institution, emphasize the informational aspect only and your independence.

*Don't:* Collect prospective clients' names with financial planners allowing the hook of your estate planning services to secure their consultation. Your independence and integrity as your own professional are not to be leveraged for other's commissions and sales.

R. Chang:

*Do:* Give back to the community by providing reduced fee and pro bono services, and/or volunteering at non-profit organizations.

*Do:* Recognize that you learn from your clients as much as they learn from you.

*Do:* Provide good customer service. Put yourselves in the client's shoes. What would you want from your elder law attorney?

*Do:* Show that you care. It is the small thoughtful gestures of kindness that can set you apart: write a get well card, send a note of encouragement, send a thank you note; forward an article to a client that he or she may be interested in, or send flowers during a difficult time.

*Don't:* Ever stop your efforts on getting the word out about you and your services, particularly any special skill sets you have. This is a high client volume business with high turnover of clients.

*Don't:* Lose sight of the bigger goals of elder law when crafting recommendations for a client (e.g., promoting well-being, quality of care and life).

### **C. Valuable Skill Sets**

§1.34 J. Lampertius: The most valuable skill sets for me personally to get and keep good clients have been first, a caring and friendly spirit; second, a responsiveness to the client's needs; and third, my expertise on current and creative technical solutions; and fourth, a community presence.

R. Chang: The valuable skill sets for me to getting and keeping good clients are to stay true to my values, volunteer regularly in the community, be kind and caring and provide client-centered services (i.e., tailor services to the specific needs of the client), and provide quality services. I am a firm believer that the quality of one's work and client satisfaction speaks the loudest.

## **VIII. Supplemental Resources**

### **A. Referrals**

§1.35 Consider developing a network of other health care providers and professionals, including:

- Geriatric Assessment Clinics
- Home and Community-based Care
  - Home Health Aides & Nursing
  - Housekeepers and Companion Services
  - Adult Day Programs
  - Respite Care
  - Senior Centers
  - Therapists (OT, PT, SLP)
  - Visiting Physicians
- Residential Care
  - Adult Foster Care/Homes for the Aged
  - Assisted Living
  - Skilled Nursing Facilities
- Continuing Care Retirement Communities
- Hospice & Palliative Care
- Resource Development/Referral Centers
  - Geriatric Care Managers (social workers and nurses)
  - Area Agencies on Aging
  - Alzheimer's Association and other similar organizations
- Finances
  - Tax Accountants
  - Financial Advisors
  - Financial Planners
  - Financial Institutions]

However, be cautious to ensure providers identify and disclose any referral fees or ownership interests with other care providers or other professionals (e.g., the home care agency is linked to the assisted living facility or accountant sells annuities). In addition, be cautious of free referral services as many get referral fees and do not have direct knowledge about the quality of care of the provider.

## **B. Other Resources: Books, Articles, and Websites**

§1.36 We rely heavily on the wonderful educational and training materials provided by ICLE. The resources provided by the ICLE Partnership are invaluable. Training through the ICLE probate and estate planning certificate is very helpful. Here are some other resources that we use:

Sample Compendium of Books & Articles we keep near our desks for frequent reference:

American Psychiatric Association, Diagnostic and statistical manual of mental health disorders: DSM-5 (5th ed.) (American Psychiatric Publishing, 2013)

Bush, Thomas E., Social Security Disability Practice (James Publishing, 2013)

Cameron, John, Michigan Real Property Law Principles and Commentary (3rd ed.) (ICLE 2012)

Choate, Natalie, Life and Death Planning for Retirement Benefits, The Essential Handbook for Estate Planners (7th ed.) (Ataxplan Publications, Revised 2011)

Estates and Protected Individuals Code / Michigan Trust Code with Reporters' Commentary by John H. Martin and Mark K. Harder (ICLE, updated periodically)

Keeva, Steven. Transforming Practices: Bringing Joy and Satisfaction to the Legal Life (Transaction Books, 1999).

Keeva, Steven., A Mindful Law Practice (ABA Journal, Mar. 2004, p. 78).

Jones, Tricia S. & Brinkert, Ross. Conflict Coaching: Conflict Management Strategies and Skills for the Individual (SAGE Publications, 2008).

Kardasis, A. et al. Mom Always Liked You Best: A Guide for Resolving Family Feuds, Inheritance Battles & Eldercare Crises. (Agreement Resources, 2011).

Michigan Land Title Standards (6th ed.), Real Property Law Section of the State Bar

Riskin, Leonard L. Awareness and the Legal Profession: An Introduction to the Mindful Lawyer Symposium (April 2, 2012), 61 J. Legal Educ. 634 (2012). Available at SSRN: <http://ssrn.com/abstract=2048502>

Taylor, Richard. Alzheimer's From the Inside Out. (Health Professions Press, 2007)

U.S. Master Tax Guide (CCH, updated annually)

Wright, Peter and Pamela, Wrightslaw, From Emotions to Advocacy, The Special Education Survival Guide (2nd ed.) (Harbor House Law Press, Inc.)

Sample websites we frequently use:

Natalie Choate's website on handling retirement benefit accounts: [www.ataxplan.com](http://www.ataxplan.com)

ABA Commission on Law and Aging: [www.americanbar.org/groups/law\\_aging.html](http://www.americanbar.org/groups/law_aging.html)

Alzheimer's Association: [www.alz.org](http://www.alz.org)

American College of Trust & Estate Counsel commentary on the Model Rules of Professional Ethics, especially about diminished capacity and interventions for clients: [www.actec.org/public/commentariespublic.asp](http://www.actec.org/public/commentariespublic.asp)

Centers for Medicare and Medicaid: <http://www.cms.gov/>

Michigan Medicaid Bridges Eligibility Manual and Policy Manuals:  
[www.mfia.state.mi.us/olmweb/ex/bem/bem.pdf](http://www.mfia.state.mi.us/olmweb/ex/bem/bem.pdf)  
[www.mfia.state.mi.us/olmweb/ex/html/](http://www.mfia.state.mi.us/olmweb/ex/html/)

National Academy of Elder Law Attorneys: [www.naela.org](http://www.naela.org)

National Center on Elder Abuse: [www.ncea.aoa.gov](http://www.ncea.aoa.gov)

National Senior Citizens Law Center: [www.nsclc.org](http://www.nsclc.org)

Social Security Administration: [www.ssa.gov](http://www.ssa.gov)