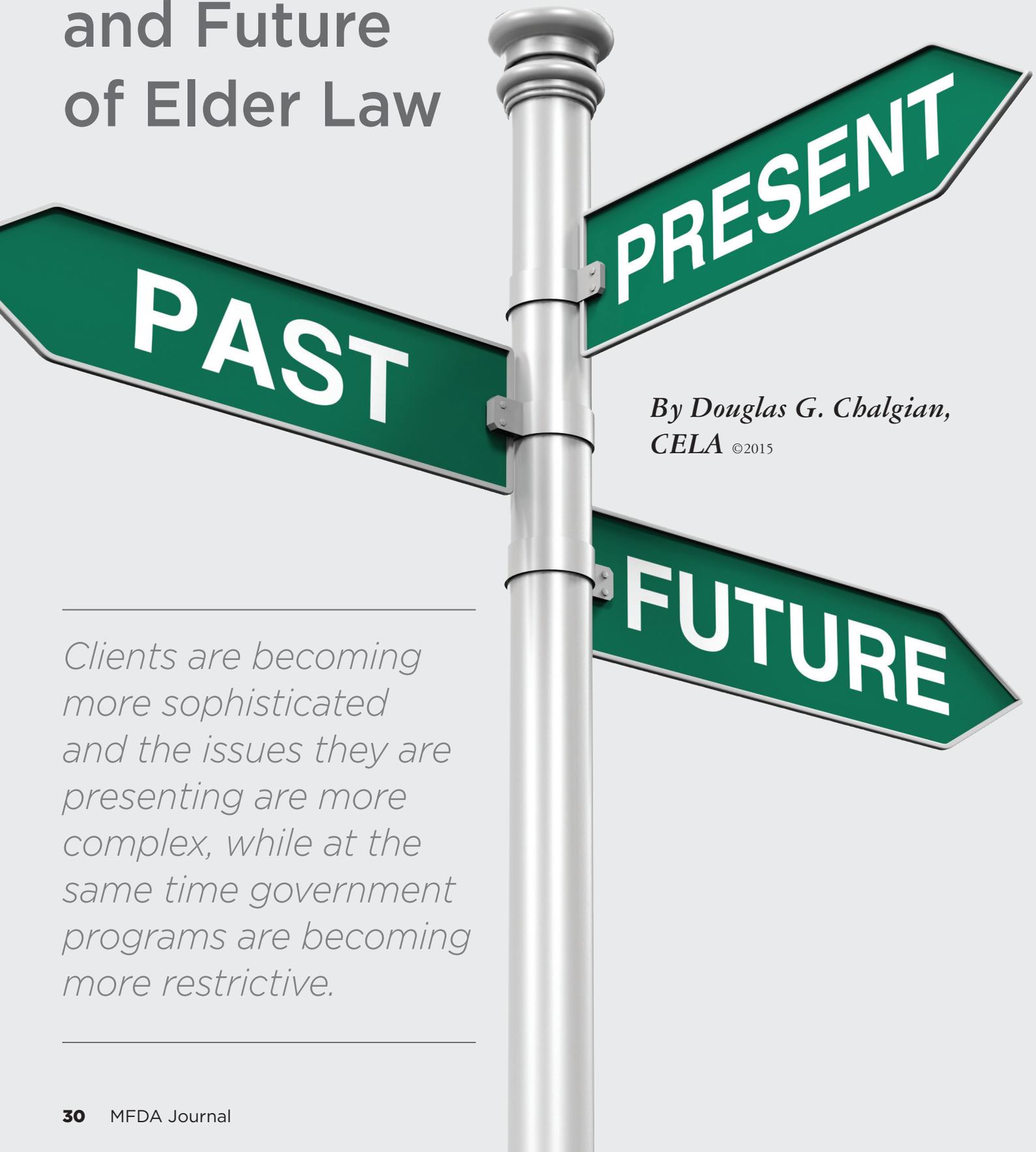


The Present, Past and Future of Elder Law



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For obvious reasons, I interact with a lot of people who are looking for an “elder law” attorney. The label seems to have caught on. So I will take this opportunity to explain what I understand “elder law” to be, look back at where it came from, and look ahead to where it may be going.

A young but growing specialty

Elder law is a specialized area of legal work that involves traditional estate planning, but focuses more particularly on issues that clients face as they age, and especially legal issues associated with the late stages of life, such as long-term care planning, surrogate decision-making and end-of-life care.

This is a young practice area, probably no more than 30 years old. The founding of the National Academy of Elder Law Attorneys in 1987 probably provides the best marker for its start.

Still, among lawyers, the practice area remained an afterthought for much of the 20th century. Although many attorneys will now claim a long history in elder law, the truth is that, at the turn of the century, very few lawyers dedicated any significant portion of their time to this type of work. In the past 15 years, that has changed, and the number of lawyers involved in elder law work has grown dramatically.

For many, the attraction of elder law was primarily an attraction to what is known as government benefits planning—helping clients “protect assets” and qualify for needs-based government benefits, such as Medicaid and some forms of assistance through the Veterans Administration. Knowledge of these programs can be particularly beneficial for clients receiving care in nursing homes or receiving long-term care in other settings. In fact, for many lawyers and lay people, the term “elder law” has become synonymous with “Medicaid planning.”

There is a downside to the close association between elder law and government benefits planning, and to the way this practice has grown in relation to this topic. For a significant portion of newly minted elder law attorneys, providing advice on government benefits offers a simple business model wherein they can assist clients with implementing one of a handful of planning techniques designed to “protect assets” and qualify for assistance, and charge handsomely for their services. This can result in an inclination by these lawyers to push clients toward decisions in which their advice would be beneficial—that is, situations in which Medicaid benefits or VA benefits could be obtained, as opposed to offering advice that considers alternate

care options in which such planning is not necessary.

In addition, the marketing of this type of planning has created a sense among many older people that they need to do radical things, such as create irrevocable trusts or give their assets away, in order to avoid losing their life savings. Adding to this dynamic is the reality that, in many cases, the reason the planning may be necessary is because the older adult is suffering from a cognitive impairment (like Alzheimer’s disease). As a result, the people often meeting with the lawyer and making these decisions are the children of the older adults, and these children can sometimes be more focused on protecting their inheritances than protecting their parents. In short, the current focus of much of what is now promoted as “elder law” is too often about protecting assets as opposed to coming up with a plan to provide the impaired older adult with the highest quality of care, even if those decisions do not involve government benefits, and even if the private resources of the older adult may be wholly or partially dissipated by those care costs.

The Future

But elder law is maturing. Attorneys who want to sustain themselves in this practice will be the ones who know more than a few simple asset protection strategies. Clients are becoming more sophisticated and the issues they are presenting are more complex, while at the same time government programs are becoming more restrictive. In addition, the aged population is transitioning from the WWII generation to the baby boomers, and the priorities of these two populations are not the same. As a generalization, baby boomers are less interested in making sure their children get an inheritance and more interested in having quality of care options as they age.

So, at least from this author’s perspective, the key elements of change will be:

- ▶ **Focus on Autonomy.** The first generation of elder law attorneys thought it was enough to help people appoint agents to make decisions for them if they became unable to make decisions for themselves. The future will focus instead on capturing the wishes of the clients while they are competent, and creating documents that assure those wishes will be implemented when the time comes. This will include expressions about whether the client does or does not want asset protection planning done, if by doing so their quality of care options will be reduced or limited.

- Holistic Advice.** Elder law practitioners regularly confront the reality that the concerns and challenges their clients face are often only partially legal in nature. Helping clients decide the right environment in which an impaired loved one receives care raises issues about costs and decision-making authority, but most critically involves questions about what the impaired adult needs, as well as what type of care will make them most comfortable. More sophisticated elder law firms are already employing social workers and case managers as part of their teams in order to bring this perspective into their planning. That trend will continue.
- Fiduciary Services.** Banks and other professional fiduciaries are usually good at managing money, but they rarely have the skills or expertise to make care choices for impaired adults. As elder law firms evolve to include professionals from other aging disciplines, such as social workers and care managers, they will also develop the willingness and ability to assume the role of fiduciary so that a lawyer or social worker who has a close relationship with the client is able to implement the decisions of their clients when the need arises.
- Protection of Vulnerable Adults.** On a darker front, the financial exploitation of vulnerable adults is an epidemic and will continue to be so for the foreseeable future. Few elder law firms are currently set up to handle litigation. Whether that litigation will arise out of traditional will and trust contests, or as a result of guardianships, handling litigation requires specialized staff and skilled trial lawyers. Many

elder law attorneys now practice in small, one- or two-lawyer operations—firms that are big enough to do government benefits planning, but not big enough to handle complex litigation. This will change.

Conclusion

Elder law is young, and really only grew into a significant practice area in the last 15 years. However, the manner of practicing elder law that most small elder law firms have developed is already outdated. While elder law will continue to be an important practice area, the nature of the work will change, as will the business models of the firms that are likely to remain in the years to come.

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