

2021 EDITION

# Elder Law in Virginia

Editor: Christopher M. McCarthy



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## Elder Law in Virginia

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VIRGINIA LAWYERS PRACTICE HANDBOOK

ELDER LAW IN  
VIRGINIA

*Fourth Edition*

Editor:

Christopher M. McCarthy  
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## CHAPTER 2

### FINANCIAL SECURITY

#### 2.1 OVERVIEW

**2.101 The Evolving Role of the Elder Law Attorney.** Once considered a practice dedicated exclusively to Medicaid planning and other wealth preservation techniques, elder law now encompasses an array of complex issues and disciplines associated with today's aging and disabled populations. The modern elder law attorney must be versed in both traditional asset protection and estate planning as well as a number of topics related to incapacity, health and long-term care, social security, housing, age discrimination, and elder abuse and fraud.

Managing these diverse and often complex issues requires a basic understanding of financial products and services as well as the financial planning process in general. At the very least, today's elder law attorney will assist with an array of financial activities, including the conversion of assets for Medicaid eligibility purposes, the retitling of financial accounts into trust accounts, and the change of beneficiary designation forms. He or she may even be called upon to calculate future income needs, review a client's investment portfolio, or determine the suitability of certain insurance policies and commercial annuities.

This need for more comprehensive financial solutions has resulted in the emergence of a different type of elder law practice, one that is actively involved in delivering a more holistic wealth management solution to its clients. Although this can still be accomplished through a traditional referral-based model whereby financial advice and services are simply outsourced, many elder law attorneys are considering more contemporary arrangements, such as strategic partnerships with financial service providers or in-house delivery through the creation of their own multi-disciplinary practice.

**2.102 Adopting Financial Planning as a Core Competency.** The need for an elder law attorney to understand basic financial planning principles has increased dramatically in recent years. For many clients, it is often difficult to determine where the role of the financial planner ends and the role of the elder law attorney begins. This confusion is exacerbated by the fact that

non-attorney entities such as banks, brokerage houses, and insurance agencies, as well as trust companies and CPAs, are now touting many traditional “estate planning services.” It will become increasingly important that today’s elder law attorney be able to explain to his or her clients not only the various roles, functions, and disciplines associated with the financial planning aspects of wealth management and preservation but also the interdependence and delivery of those roles, functions, and disciplines.

### **2.103 Ethical, Competency, and Practical Considerations.**

Beyond providing mere clarity about the financial planning process in general, an elder law attorney will inevitably become actively involved in dealing with those financial planning issues tangential to his or her own legal advice and counsel. In doing so, the elder law attorney must always be aware of his or her role as fiduciary and trusted advisor to the client as well as the liability and professional responsibilities associated with those key positions.

A licensed attorney may provide general investment advice and financial planning guidance in conjunction with providing legal services.<sup>1</sup> In this context, as long as the attorney is not compensated for financial planning advice, no additional licenses, degrees, or certifications are required or necessary. Providing this advice and guidance, however, can raise serious ethical issues and, in some cases, expose the attorney to increased liability or even a claim for malpractice. Under the Virginia Rules of Professional Conduct, a lawyer must always provide competent representation to a client.<sup>2</sup>

It may be particularly difficult for an elder law attorney to avoid those risks and liabilities. Whether the attorney is assessing a client’s assets for Medicaid eligibility, determining the impact of life insurance on a family’s gross estate, or simply reviewing the investment policy statement of a special needs trust, financial planning principles will always be involved. An elder law attorney unwilling or unable to develop a core competency in these areas should consider involving other professionals who can assist in providing financial advice without undermining the attorney-client relationship or the attorney’s corresponding duties. A client’s best interest must always be the goal.

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<sup>1</sup> Va. Code § 13.1-501 *et seq.*

<sup>2</sup> Va. RPC 1.1.

## 2.2 THE FINANCIAL PLANNING PROCESS

**2.201 Fundamental Steps.** The financial planning process consists of six fundamental steps: client engagement, data collection, analysis of information, plan design, plan implementation, and plan monitoring.

**2.202 Client Engagement.** Client engagement includes the process of explaining the services to be provided as well as defining the roles of both the advisor and the client. An elder law attorney actively engaged in financial planning should use a formal engagement letter or retainer agreement that sets forth, in writing, each party's responsibilities, timeframe for plan implementation, compensation, and conflicts of interest.

**2.203 Data Collection.** Data collection is the gathering of information pertinent to the client's financial goals, needs, and planning objectives. This step should include both qualitative and quantitative data and may include such things as a personal financial statement, risk tolerance assessment, tax returns, investment policy statements, insurance policies, and estate planning documents. An intake sheet or formal client questionnaire may be useful in this step of the process.

**2.204 Financial Analysis.** Financial analysis involves assessing the client's current situation and determining which of the client's goals can be met under the current circumstances. Software and other analytics tools may be used in determining present and future values, assets and liabilities, cash-flow needs, and the allocation of risk as well any corresponding estate, gift, and income tax implications.

**2.205 Plan Design.** Plan design is the actual development and presentation of the various strategies needed to accomplish the client's stated financial goals. This step often includes a "comprehensive financial plan" that outlines integrated recommendations for accumulating, preserving, and transferring the client's wealth. A financial plan is most valuable if it includes alternative recommendations, strengths and weaknesses and probabilities of success and failure.

**2.206 Plan Implementation.** Plan implementation involves carrying out those recommendations agreed to by both the client and the advisor. A client may need help in evaluating risk, selecting financial products, liquidating and investing assets, and choosing tax and legal counsel. At times, the elder

law attorney may be called upon to be the plan “quarterback,” coordinating the planning process with the client and his or her other advisors.<sup>3</sup>

**2.207 Plan Monitoring.** Plan monitoring is the process of periodically reviewing the financial plan and assessing its progress. The plan should be modified to reflect any changes in personal, business, and family circumstances and also be reviewed to address current economic or legal issues. Meeting frequency is typically determined by the client’s wishes as well as the complexity of the plan or the amount of assets being managed.

### 2.3 THE ELDER LAW ATTORNEY AS A FINANCIAL PLANNER

**2.301 A New Approach.** Many aspects of elder law are transactional in nature. A client may have requested traditional documents such as powers of attorney, medical directives, and wills or required assistance in qualifying for Medicaid or needed help with the administration of a loved one’s estate. The modern approach, however, recognizes the need for more holistic solutions and positions the elder law attorney as the client’s life-long trusted advisor and financial planner. This new planning paradigm is based on relationships and values, not forms and transactions. It also requires the acquisition of new skills, more knowledge, and an array of financial products and services.

**2.302 Acquiring Skills and Expertise.** In order to provide more comprehensive financial solutions, an elder law attorney must acquire additional knowledge in the areas of risk management and insurance, investments and retirement planning, and, if necessary, asset protection and wealth transfer. Beyond core competency required to pass any state or federal licensing exam, an elder law attorney may wish to pursue additional education specifically in the areas of financial planning or wealth management. Many colleges and universities now offer graduate level degree and certificate programs to acquire that knowledge.

Another way to garner expertise and build client credibility is to pursue one of many industry designations. These credentials signal to a would-be client that the elder law attorney has an extremely high level of knowledge and professionalism as well as the ability to properly align financial products and

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<sup>3</sup> See *infra* ¶ 2.3.

services within the underlying legal objectives. The most recognized designations currently are the Certified Financial Planner<sup>®</sup> (CFP),<sup>4</sup> Chartered Life Underwriter (CLU), Chartered Financial Consultant (ChFC), and Certified Trust and Financial Advisor (CTFA). Each of these designations have education, experience, and ethics components as well as formal examination and continuing education requirements.

**2.303 Elder Law Attorneys Providing Financial Planning Services.** An elder law attorney must exercise care when providing both legal and financial planning services. Investment management, in particular, is considered a separate discipline and is thus subject to Virginia's rules regarding "multidisciplinary practice."<sup>5</sup>

The Virginia Bar Ethics Council has discussed the appropriateness of multidisciplinary practice in Virginia at length.<sup>6</sup> Multidisciplinary practice requires the relationship between the client and an elder law attorney providing financial advice to be that of a financial planner and his or her client. It is not an attorney-client relationship since, under the rules, the attorney cannot offer financial and legal advice at the same time. It is imperative that the elder law attorney provide the client with full written disclosure as to the separate nature of these roles. All financial services should be offered through an independent business entity, such as a limited liability company or corporation.

There are several legal ethics opinions pertaining to ancillary business activities by an attorney. The most comprehensive discussion of this question is addressed in a legal ethics opinion entitled "Ancillary Business."<sup>7</sup> The opinion discusses a non-legal consulting firm that was established by a law firm to provide consulting services to law firm clients and others. Based on this opinion and others it would be proper for an attorney in Virginia to offer financial planning services through a separate legal entity created for that purpose as long as there was full disclosure to the attorney's clients of the attorney's financial interest in such a business. The separate entity would nevertheless be required to have appropriately licensed representatives. These may be law firm attorneys or independent financial advisors assisting law firm

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<sup>4</sup> The list of CFP<sup>®</sup> Board Registered programs is available at [www.cfp.net/get-certified/certification-process/education-requirement/certification-coursework-requirement/find-an-education-program](http://www.cfp.net/get-certified/certification-process/education-requirement/certification-coursework-requirement/find-an-education-program).

<sup>5</sup> See paragraph 1.604 of Chapter 1 of this book for further discussion of multidisciplinary practice.

<sup>6</sup> James M. McCauley, *The Delivery of Legal Services Through Multidisciplinary Practices*, 4 Rich. J.L. & Pub. Interest 101 (2000) (updated Mar. 9, 2011). The McCauley article may be found at [www.vsb.org/site/regulation/legal-services-multidisciplinary-practices](http://www.vsb.org/site/regulation/legal-services-multidisciplinary-practices).

<sup>7</sup> See [www.vacle.org/opinions/1658.htm](http://www.vacle.org/opinions/1658.htm) (LEO 1658).

clients with their financial planning needs under agreement with the attorney or law firm. That agreement must include provisions to protect client confidential information and financial data together with the commitment of the financial services organization to comply with all laws and regulations pertaining to the delivery of financial services and products.<sup>8</sup>

**2.304 Conflicts of Interest.** One of the most challenging issues facing an elder law attorney wishing to provide financial advice is dealing with conflicts of interest. The attorney must make a full and complete disclosure of the separate nature of the financial planning service and must ensure that clients are aware that the attorney is not practicing law when those services are provided for a fee. The disclosure should be in writing, acknowledged, and signed by the client and clearly state that the financial planning advice is independent from the legal advice and services.<sup>9</sup>

The elder law attorney must also be clear that he or she will not allow business or personal interests in financial planning services to affect representation of the client as an attorney. The attorney must disclose to the client, in writing, the fees that will be charged to the client for financial planning services both directly and indirectly. These fees may be in the form of investment management fees or commissions on product sales. The attorney must also advise the client of the availability of financial planning services from third parties unaffiliated with the attorney and encourage the client to seek independent advice and counsel if necessary. It is imperative that the client understands that he or she is waiving certain potential conflicts of interest by using the attorney's independent financial planning services.<sup>10</sup>

The best interest of the client must always guide the elder law attorney's actions. That said, many clients are currently seeking a "one-stop shop" alternative for bundled wealth management solutions. The elder law attorney is in a uniquely competitive position because he or she can offer in-house legal, tax, and wealth management services in a way that banks, broker-dealers, insurance companies, and CPAs cannot.

**2.305 Collaboration with Allied Disciplines.** Many elder law attorneys will not want to offer financial planning services. They may not want to incur the time, expense, or risk associated with learning a new discipline or

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<sup>8</sup> The financial planner is also subject to substantial licensing requirements, regulatory supervision, and continuing education standards. *See* Appendix 2-1.

<sup>9</sup> *See* Appendix 2-2.

<sup>10</sup> *See* Va. RPC 1.7; LEO 1564; *cf.* LEO 1515.