

A VALUES APPROACH TO TEACHING ELDER LAW

Charles P. Sabatino*

In 1987, I had the good fortune and terror of being invited to co-teach a seminar on Aging and the Law at Georgetown University Law Center. “Why not?” was my immediate response, and the result has been a twenty-three year extra-curricular vocation as an adjunct professor of law.

I learned certain realities of teaching right away, such as do not try to cram the universe into a weekly two-hour class. But other realities took longer to appreciate in full, such as the superior teaching value of personal experience over abstract mental exercises. One challenge that evolved slowly over the years was creating a structure for the course that was both conceptually sound and practical for teaching purposes.

It is easy to list a bunch of topics in serial fashion and teach students the basics of each, but that does little to instill an integrated understanding of Elder Law and the policy landscape that undergirds it. It is more difficult, but, I think, critical, to present a conceptual framework for Elder Law that ties together the essential elements in a practical, integrative way.

Many experts in the field have offered conceptual frameworks to define Elder Law.¹ Some of these experts focus on core legal topics or on the characteristics of the clientele, while others concentrate on the holistic, interdisciplinary nature of the practice.²

* © 2010, Charles P. Sabatino. All rights reserved. Director of the American Bar Association Commission on Law and Aging in Washington, District of Columbia, and adjunct professor at Georgetown University Law Center. A.B. Cornell; J.D. Georgetown. The Author was previously managing attorney and counsel for the Elderly Project of Legal Services of Northern Virginia.

1. *E.g. Theories on Law and Ageing: The Jurisprudence of Elder Law* (Israel Doron ed., Springer-Verlag Berlin Heidelberg 2009) (including a collection of perspectives from Elder Law scholars).

2. *See e.g. A.D. Bogutz, Elder Law: A Personal Perspective*, in *Theories on Law and Ageing: The Jurisprudence of Elder Law*, *supra* n. 1, at 2–3, 7 (describing the initial, discrete areas of law that served individual client needs and purposes, and the transition that is and will continue to take place in the field of Elder Law to a more holistic approach of

My own framework has evolved over the years into a paradigm that starts with the underlying values or goals of representing older persons and persons with disabilities. These core goals are the preservation and enhancement of dignity, autonomy, and quality of life.³ In truth, these goals apply to adults of every age, but, not surprisingly, they become particularly important and acutely stressed in the face of old age, chronic disease, disability, and frailty.⁴

Specific legal matters arise immediately from these goals—matters concerning decisionmaking capacity, surrogate decision-making, and protecting those with diminished capacity.⁵ Therefore, key legal topics of the seminar include durable powers of attorney, advance directives for healthcare, inter-vivos trusts, and guardianship.⁶ Beyond these matters concerning personal decisionmaking, a second more extensive set of Elder Law issues congeal around three rather expansive, but concrete, foci related to these fundamental goals: long-term care and health;⁷ housing (or, more generally, one's living environment);⁸ and financial well-being.⁹

This framework is reflected by the “Elder Law Paradigm” diagram, found at Figure 1.¹⁰ The paradigm's center is a circle,

serving all legal needs associated with advanced age).

3. Charles P. Sabatino, *Elder Law 2009–2039?* 30 ABA Bifocal 105, 105 (2009) (available at http://www.abanet.org/aging/pdfs/Jul_09_Ann_ABA_Bifocal_J.pdf); see e.g. CNN, *CNNhealth.com, Effects of Aging on Your Body*, <http://www.cnn.com/2007/HEALTH/07/27/life.stages/index.html> (updated Aug. 14, 2007) (describing some of the effects of old age or “senior adulthood” as being physical frailty and degeneration as well as greater susceptibility to chronic diseases); Monika Guttman, *USC Health Magazine, The Aging Brain*, <http://www.usc.edu/hsc/info/pr/hmm/01spring/brain.html> (accessed Aug. 19, 2010) (describing research into and physiological causes of mental ailments and diseases associated with advanced age).

4. Sabatino, *supra* n. 3, at 105.

5. *Id.*

6. *Id.*

7. *Id.*; see generally Lawrence A. Frolik & Richard L. Kaplan, *Elder Law in a Nutshell* chs. 3–7 (4th ed., Thomson/West 2006) (discussing Medicare, Medicaid, long-term care, and assisted living and how they relate to Elder Law).

8. Sabatino, *supra* n. 3, at 105; see e.g. Frolik & Kaplan, *supra* n. 7, at chs. 7–8 (explaining issues in housing that commonly arise in Elder Law, such as those surrounding assisted-living facilities and other living arrangements commonly used by the elderly).

9. Sabatino, *supra* n. 3, at 105; see generally Frolik & Kaplan, *supra* n. 7, at chs. 11–14 (discussing legal issues pertaining to receipt of social security and similar benefits, veterans benefits, and pension or similar plans typically used by seniors).

10. Sabatino, *supra* n. 3, at 106 (illustrating the relationship between core values, goals, and issues associated with Elder Law). A copy of this diagram is included *infra*

which represents the goals of dignity, autonomy, and quality of life.¹¹ These core goals are guided by the client's values, and not by the lawyer or others.¹² The issues most directly related to autonomy and personal decisionmaking are immediately under the circle.¹³ The triangle's points denote the concrete challenges or three major foci to these goals referenced above: long-term care and health, housing, and financial well-being.¹⁴ Several specific areas of content are listed, which directly relate to each of the triangle's points.¹⁵ Some subjects inevitably span across two or more areas.¹⁶ For example, Medicaid issues most obviously arise as a matter of long-term care,¹⁷ but they also arise as an issue of financial well-being,¹⁸ and they can possibly arise as an issue of housing in the context of nursing home or other residential care.¹⁹ Finally, each content area generally requires collaboration, or at a minimum communication by Elder Law lawyers with different disciplines; examples of these disciplines are listed beneath the content areas.²⁰ But even this paradigm does not encompass the diversity contained in Elder Law practices. Nevertheless, the paradigm encompasses the connectedness and purpose of those components present in many Elder Law practices.²¹

One advantage of the paradigm is that it avoids merely defining Elder Law by the clientele it serves.²² Not surprisingly, these goals and issues are more urgent and of higher priority for older or disabled persons and their families. But it is now common for

Figure 1.

11. Sabatino, *supra* n. 3, at 105.

12. *Id.* at 105, 107.

13. *Id.* at 107.

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*; see generally Frolik & Kaplan, *supra* n. 7, at 112–123 (discussing how Medicaid goes to those who are “categorically needy,” and those who could need and receive benefits for an extended period of time).

18. Sabatino, *supra* n. 3, at 107; see e.g. R.L. Kaplan, *A Law and Economics Approach*, in *Theories on Law and Ageing: The Jurisprudence of Elder Law*, *supra* n. 1, at 77 (listing Medicaid in a sampling of economic issues involving Elder Law).

19. Sabatino, *supra* n. 3, at 107; see Medicare.gov: The Official U.S. Government Site for Medicare, *Nursing Homes: Paying for Care*, <http://www.medicare.gov/nursing/payment.asp> (last updated May 8, 2009) (explaining that Medicaid, subject to restrictions, can be used to pay for nursing home costs).

20. Sabatino, *supra* n. 3, at 107.

21. *Id.*

22. *Id.*

Elder Law lawyers to serve a younger clientele. These clients have special needs or seek to do their own advanced planning.²³ Additionally, the paradigm permits considerable flexibility in the development of Elder Law.²⁴ While the general challenges and core goals will remain consistent over time, the financial planning options, housing options, healthcare options, and particular benefits are likely to change considerably over time.²⁵

The seminar is built upon this paradigm. Its title is “Aging and the Law,” rather than “Elder Law,” because my emphasis is as much on aging policy as it is on the practice of Elder Law. After an introductory class on the phenomenon of aging in America and Elder Law, the individual weekly classes cover the majority of topics shown in the paradigm, with one pause mid-course to step back and grapple with the ethical challenges unique to Elder Law.

With only one in-person class per week for thirteen weeks, the course is, by necessity, an introductory survey and not every possible topic is included. For example, in earlier years, I tried including age discrimination in employment and private pension issues, but those topics had to be sacrificed as I came to terms with the practical limitations of time.

My teaching goal, in addition to conveying an understanding of the nature of Elder Law, is to give students a basic, working knowledge and analytic approach to real problems seniors and their families face, from both a policy perspective and a practice perspective. Relatively few of the students at Georgetown take up an Elder Law practice directly out of law school. But regardless of their professional direction, the course offers them something that most of their coursework does not—knowledge and skills that will be immediately practical for problems they experience personally within their own family.

A threshold teaching challenge of the seminar format is how to get students to a level of knowledge quickly enough to enable them to participate in meaningful problem solving and discussion

23. *Id.*; see generally Frolik & Kaplan, *supra* n. 7, at chs. 5–14 (discussing assorted housing and care issues for the elderly and those with special needs, as well as matters related to financial income and financial planning relevant and common for senior citizens).

24. Sabatino, *supra* n. 3, at 107.

25. *Id.*

in the classroom setting. To do that, I have generally relied on *Elder Law in a Nutshell*,²⁶ a supplemental book, as the simplest vehicle to convey the nuts and bolts. All other materials, which are comprised of selected case readings, policy analyses and reports, drafting guidelines, and background on cutting-edge issues, are provided directly or through Internet links.

The seminar format presents students each week with a new problem confronted by the hypothetical family of John and Jane Elder, their two children (one from John's prior marriage), Jane's mother, and John's ex-wife. Normally, about half the class revolves around discussion of the presenting problem or problems and the other half is a more didactic presentation of the assigned subject.

The course requirements have always centered on a paper, rather than a final examination, because I believe that the student is more likely to gain long-term benefit from researching a topic and preparing a scholarly treatment of it. Some papers even make a meaningful contribution to Elder Law scholarship through publication. From the perspective of faculty workload, it also helps that the seminar size is normally under fifteen students, so the burden of paper review and grading is manageable.

When the University modified its writing requirements for students, the seminar's paper options changed. Students are given the option of using the seminar to satisfy their formal writing requirement, in which case they receive three credit hours for the seminar in recognition of the extra workload of research, drafting, intensive supervision, and final product submission. Students not enrolled in the writing requirement receive two credits and submit three shorter papers for the semester: one is legislative testimony for a mock hearing on an end-of-life issue; another is the drafting of a durable power of attorney for property management; and the third is on a topic of their choice. The major paper or the three shorter papers account for the largest portion of students' grades (sixty-five percent). Class participation and preparation account for the remainder.

Most years, it has been possible to incorporate a course requirement of accompanying the long-term care ombudsman on a site visit to a nursing home. Students are simply asked to

26. Frolik & Kaplan, *supra* n. 7.

observe and consider several questions on their site visit and report back to the class as a whole on their experience. Almost without exception, students report that the site visit is the most meaningful learning experience of the course, thus reinforcing the maxim that personal experience teaches far more effectively than abstract intellectual exercises.

A seminar such as this could be expanded in multiple directions; and at some point, if time, work, and passion combine just right, that will be my goal. The depth and breadth of the subject would easily fill a four-credit course load and enable more in-depth treatment of the topics. In addition, the subject benefits substantially from an expanded experiential component, perhaps by incorporating a full-fledged clinic option or externship.

Elder Law is also an ideal match for a medical-legal partnership. Medical-legal partnerships now function at over two hundred hospitals and health-center sites around the country.²⁷ These partnerships integrate attorneys and law students in a health setting to assist patients in navigating the complex community and government systems that hold solutions to social health determinants—for example, income and food supports for poor families, protection from utility shut-off throughout the winter, and mold removal from the homes of those suffering from asthma.²⁸ Law schools that can foster a partnership with a teaching hospital are ideally positioned to tap this natural synergy for the benefit of clients and students.

Whatever one's educational approach to teaching law and aging, interdisciplinary modalities will only become more important. The fundamental client goals of autonomy, dignity, and quality of life simply do not fit within the niche of any one profession.

27. Natl. Ctr. for Med. Leg. Partn., *Raising the Bar for Health*, <http://www.medical-legalpartnership.org/> (accessed Sept. 16, 2010).

28. *Id.*

FIGURE 1**AN ELDER LAW PARADIGM**