The Future of Elder Law Practice©

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THE FUTURE OF ELDER LAW PRACTICE

By Rebecca C. Morgan

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† ©2010, All Rights Reserved. Boston Asset Management Chair in Elder Law; Director, L.L.M. in Elder Law; Director, Center for Excellent in Elder Law, Stetson University College of Law. In preparing to write this essay, the author surveyed elder law attorneys for their opinions about the future of the practice. This essay is not intended to be an empirical study and the responses are not offered as authoritative data and should not be relied on as such. The results are intended for illustrative purposes instead. The author would like to thank those who completed the elder law survey for this article; the William Mitchell Law Review; Professor Kim Dayton at the William Mitchell College of Law; Stetson University College of Law for the support provided; Professors Brooke Bowman, Roberta Flowers, Theresa Pulley Radwan, Edward D. (Ned) Spurgeon, and Adjunct Professor Mary Alice Jackson for their feedback; and especially Michael Pierce, third-year law student at Stetson, for his invaluable and speedy research, and Shannon Mullins from faculty support for the excellent survey and charts. Portions of this paper were presented at the annual meeting of the Washington State Chapter of the National Academy of Elder Law Attorneys on November 5, 2010.)
I. INTRODUCTION

It is always interesting to write about the future because there is a great chance that any predictions given in the article will be proven wrong with the passage of time. Yet there is value in writing about the future because, among other things, it identifies current issues and trends; the reality; problems and challenges; and, most of all, it causes the reader to contemplate the possibilities that the future holds.

Over the years, there have been articles examining in some way the future of elder law, including an article I wrote in 2007. So it is now three years later, and since then the economy bottomed out.  

out, the government bailed out some of the banks and some in the automobile industry, and health care reform was achieved. These occurrences are more than enough to revisit one’s view of the future of elder law.

So, in this essay, rather than only giving my thoughts about the future, I decided to also ask some elder law practitioners for their opinions about the future of elder law practice. A short survey was constructed, consisting of six multiple-choice and two narrative questions, and sent to four listservs to obtain opinions about the future of elder law.

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8. See Morgan, Elder Law in the United States, supra note 3, at 124–41 (reviewing select areas of law and examining demographics and the approach of elder law attorneys to clients’ problems).

9. The author’s opinion of the future of elder law will be discussed in this essay. See infra Part VII.A. A portion of this essay will discuss the opinions about the future of elder law of those who have completed the survey. See infra Part X. This essay is not intended to be an empirical study and the responses are not offered or intended to be authoritative data and should not be relied on as such. Instead the results are intended for use as illustrations.

10. This survey was not designed to be an empirical study; it was designed to elicit opinions from elder law attorneys about the future instead. The responses should not be relied on as empirical results. Instead the results are intended for use as illustrations.

11. Using their own definition of elder law, the attorneys were asked six multiple choice questions: (1) how many years they had practiced elder law; (2) how many more years they intended to practice elder law; (3) the primary reason they chose to practice elder law; (4) what areas of elder law did they expect to expand; (5) what areas of elder law did they expect to contract; and (6) what changes have they made in the past year in their practices or were planning to make in the next year in their practices. The attorneys were also asked two narrative questions: (1) their definition of elder law; and (2) their opinions on the
future of elder law. After briefly discussing the history, the definition, and the practice of elder law and reviewing some of the demographic information about the clients, this essay will note the survey results, look at how others envision the future of elder law, examine some substantive areas of law as they pertain to the future of elder law, and conclude with some thoughts about the future of elder law practice.

II. WE WERE DOING ELDER LAW BEFORE ELDER LAW WAS COOL

In order to put the future in perspective, it is important to look at the past. Elder law in some form has been around for almost forty years. The National Senior Citizens Law Center (NSCLC) and the ABA Commission on Law and Aging focus on the future of elder law. The attorneys’ responses to the survey are discussed in this article. Because the narrative answers are so varied, they are used as illustrations and not quantified. See Elder Law Survey (June 21–26, 2010) (results on file with author).

12. All four listservs are for elder law attorneys. One is run by the ABA, two by NAELA, and one by a private attorney. For more information about the listservs, see infra notes 79–82 and accompanying text.

13. To that end, the attorneys were not asked a lot of questions about their practices, such as how many years have they practiced law, what memberships in elder law organizations they hold, etc.

14. See infra Part II–IV.

15. See infra Part V, VIII.

16. See infra Part VI.

17. See infra Part VII, X.

18. See infra Part IX, X.

19. See infra Part XI.

20. The title for this heading was suggested by my colleague, Roberta K. Flowers, William Reece Smith Jr. Distinguished Professor of Law, who teaches ethics and elder law in the Elder Law LL.M. program at the Stetson University College of Law.

21. For example, the NSCLC was founded in 1972. About Us, NSCLC, http://www.nsclc.org/NSCLC/about-us/whoweare (last visited Nov. 10, 2010); see also Gill DeFord, Twenty Years of the National Senior Citizens Law Center: A Personal Recollection, 26 CLEARINGHOUSE REV. 117 (1992).

22. The NSCLC website describes their mission: Since 1972, the National Senior Citizens Law Center has worked to promote the independence and well-being of low-income elderly and disabled Americans, especially women, people of color, and other disadvantaged minorities. . . . Because we believe in publicly-funded safety net programs, we work to preserve and strengthen Medicaid, Medicare Part D, Social Security and SSI. To guarantee fair treatment, we work for greater access to
legal issues facing America’s elders. The National Academy of Elder Law Attorneys (NAELA) was formed in 1987. The National Academy of Elder Law Attorneys (NAELA) was formed in 1987. Initially, elder

federal courts for citizens and for better enforcement of consumer’s legal rights in safety net programs.


[T]o strengthen and secure the legal rights, dignity, autonomy, quality of life, and quality of care of elders. It carries out this mission through research, policy development, technical assistance, advocacy, education, and training.

The Commission consists of a 15-member interdisciplinary body of experts in aging and law, including lawyers, judges, health and social services professionals, academics, and advocates. With its professional staff, the Commission examines a wide range of law-related issues, including:

- Legal Services to Older Persons
- Health and Long-term Care
- Housing Needs
- Professional Ethical Issues
- Social Security, Medicare, Medicaid, and Other Public Benefit Programs
- Planning for Incapacity
- Guardianship
- Elder Abuse
- Health Care Decision-making
- Pain Management and End-of-Life Care
- Dispute Resolution
- Court-Related Needs of Older Persons with Disabilities


24. General Information, NAELA, http://www.naela.org/Public/About/General_Information/Public/About_NAELA/General_Information/About_Gen_Info.aspx?hkey=39f4525-510a-4af1-b4ab-6076c4b568d (last visited Nov. 11, 2010). The NAELA website describes NAELA as follow:

[A] professional association of . . . attorneys who are dedicated to improving the quality of legal services provided to seniors and people with special needs . . .

The focus of the Academy is to provide members continuing legal education programs on a broad range of Elder Law topics. Face-to-face meetings and workshops facilitate networking and professional growth opportunities for like-minded attorneys practicing throughout the country. Virtual and archived seminars offer convenient educational
law was an unfamiliar term to many and was viewed as a “niche” area of practice. It has since grown to a general practice area within which elder law attorneys may specialize. Over ten years ago, Michael Gilfix, in his article about the creation and development of elder law, described elder law as the “next step in the evolution of estate planning.”

opportunities for members, while simultaneously providing specialized education needed to strengthen practice skills. . . . The Academy seeks to provide support to other organizations serving seniors and people with disabilities. NAELA also advocates on public policy issues facing seniors and people with special needs, but does not provide direct legal services to the public.  


25. I have been involved in elder law since 1981, and early on I had individuals express consternation over the concept of a practice area of “elder law” and, in fact, individuals would quip that I was too young to practice elder law or that elder law was for “old” attorneys. See Morgan, Elder Law in the United States, supra note 3, at 107 n.24, 105–10 (highlighting one definition of elder law while also illustrating that the definition may change depending on who one asks); see also, Frolik, Elder Law Redux: Ten Years After, supra note 3, at 2 (“Ten years ago when I told a corporate or personal injury lawyer that I taught elder law, their reaction was usually a polite, but quite blank, stare as they obviously had no idea what I was talking about.”); Russo, supra note 24, at 2–4 (discussing how the name “NAELA” was chosen); Gilfix, Creation and Evolution of Elder Law, supra note 3, at 7 (“[W]e did not develop the term ‘elder law’ until a decade or more later.”). See also Frolik, Elder Law Redux: Ten Years After, supra note 3 at 1, n.2 (discussing the rock and roll band Ten Years After and its hit “I’d Love To Change the World”).

26. See, for example, Gilfix, Creation and Evolution of Elder Law, supra note 3, at 7, stating the following about the term “elder law”:

I suppose that few of us could look back to 1973 and say that our elder law career began then. In part, this is because we did not develop the term “elder law” until a decade or more later. In part, it is because the concept was in its most nascent stage. In part, because few NAELA members were then old enough to practice law!

27. See Morgan, Elder Law in the United States, supra note 3, at 106 (“Elder law has now been a recognized practice area for almost thirty-five years, although for private practitioners most of the growth has occurred in the past twenty years.” (footnote omitted)); see also Frolik, Elder Law Redux: Ten Years After, supra note 3, at 2 (stating that elder law continues to expand in scope); Sabatino, supra note 2, at 107 (“Regardless of the slant one takes in fashioning their elder law practice, it is clear that the field has become an established practice area.”).

III. WHAT IS ELDER LAW?

What is elder law? It depends, to some extent, on who is asked. According to Black’s Law Dictionary, elder law is “[t]he field of law dealing with the elderly, including such issues as estate planning, retirement benefits, social security, age discrimination, and healthcare.”

It would seem that over time, elder law has grown from a specialty area to a general practice area within which one may “specialize.”

NAELA describes elder law in a more specific way:

Rather than being defined by technical and legal distinctions, Elder Law and Special Needs Law is defined by the clients to be served. In other words, the lawyer who practices Elder Law or Special Needs Law works primarily with seniors and people with disabilities. Elder Law and Special Needs Law attorneys focus on the legal needs of the elderly and people with disabilities, and use a variety of legal tools and techniques to meet the goals and objectives of their clients.

Because the client defines the practice, the NAELA definition provides a broad umbrella of practice under which an elder law attorney could handle a number of matters. The National Elder Law Foundation (NELF), the entity that certifies attorneys in

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29. BLACK’S LAW DICTIONARY 595 (9th ed. 2009).
30. For this article, I view “elder law” as a general practice area or an umbrella under which there are a number of discrete areas of practice.
31. Why an Elder Law or Special Needs Law Attorney?, NAELA, http://www.naela.org/Public/Library/Fact_Sheets/Why_and_Elder_Law_Attorney_is_a_Good_Choice/Public/About_NAELA/Fact_Sheets/Why_an_Elder_Law_Attorney_is_a_Good_Choice.aspx?hkey=2372949f-1d70-4c7a-8681-cb72b3a9100f (last visited Nov. 11, 2010); see also supra note 24 and accompanying text. The NAELA “definition” goes on to provide the following:

Using this holistic approach, for example, an Elder Law practitioner will address general estate planning issues and will counsel clients about planning for incapacity with alternative decision making documents. This attorney will also assist clients in planning for possible long-term care needs, including nursing home care. Locating the appropriate type of care, coordinating private and public resources to finance the cost of care, and working to ensure the client’s right to quality care are all part of the Elder Law practice.

Id.
32. Id.
elder law,\textsuperscript{34} is specific about the subject areas that form the discipline of elder law.\textsuperscript{35}

Charles Sabatino takes a different view from the approach used by NELF.\textsuperscript{36} Attorneys practicing elder law demonstrate “tremendous variability in what substantive areas they focus on within . . . elder law.”\textsuperscript{37} Elder law as a practice is not static, but evolves and grows into new areas of law.\textsuperscript{38} Many elder law attorneys represent younger clients, “either the adult children of elder clients

\textsuperscript{34} Currently, there are 419 attorneys certified by NELF. In addition, North Carolina’s State Board of Legal Specialization has an agreement with NELF that allows North Carolina attorneys to be dual certified (NELF and North Carolina) by taking the NELF exam and meeting each program’s criteria. Florida has a separate state certification in elder law. Forty-six states allow or recognize certification in elder law in some form. E-mail from Lori Barbee, Exec. Dir., Nat’l Elder Law Found., to author (July 5, 2010) (on file with author).

\textsuperscript{35} Helen Cohn Needham, Elder Law Comes of Age, NAT’L ELDER L. FOUND., http://www.nelf.org/elderlaw.htm (last visited Nov. 11, 2010).

\textsuperscript{36} Id.

\textsuperscript{37} Id.

\textsuperscript{38} Id. (giving special needs trusts as an example of a new area of law practiced by elder law attorneys).
or persons with disabilities who benefit from the . . . expertise of elder law attorneys.”

Mr. Sabatino offers another approach to defining elder law, focusing on “autonomy, dignity, and quality of life” as the underlying goals of legal representation. Noting that specific individual decision-making autonomy issues “arise directly from these [three] goals,” Sabatino organizes the remaining legal issues “around three quite broad, but concrete, foci connected to these underlying goals: housing (or more broadly, one’s living environment); financial well-being; and health and long-term care.”

Sabatino developed a paradigm illustrating this framework, organized the various legal issues that a client may face under the categories identified, and matched them with the respective interdisciplinary collaboration for each of these broad areas. This approach, Sabatino believes, offers a distinct advantage because it refrains from defining the practice by the clients. It allows for

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39. Id.  
40. Id. (noting that those three values apply to any adult, regardless of age, but take on increasing importance and are emphasized in situations of “chronic disease, frailty, and disability”).  
41. Id. (summarizing the elder law paradigm).  
42. Id. at 105–07. Mr. Sabatino describes the paradigm as follows: The center of the paradigm is a circle, representing the goals of autonomy, dignity, and quality of life. These goals are directed by the values of the client and not by the attorney or others. Directly below the circle are the issues most related to personal decision-making and autonomy. The points of the triangle represent the three major foci or concrete challenges to these goals mentioned above: housing, financial well-being, and health and long-term care. Several specific content areas are listed that relate directly to each of these points of the triangle. Some subjects unavoidably span across more than one area. . . . Finally, each of the content areas typically requires collaboration, or at least communication, by elder law attorneys with other disciplines, examples of which are listed under the content areas. Even this paradigm does not capture all the diversity of elder law practices—where, for example, are grandparent’s rights issues? Nevertheless, the paradigm captures the purpose and connectedness of those components in most elder law practices.  
43. Id. at 107, noting the following: It is not surprising that these goals and issues have a higher priority and urgency for older or disabled individuals and their families. But, it is increasingly common for elder law attorneys to serve the younger generations of elder clients who seek to do their own planning or who have special needs.
greater flexibility for elder law to grow and change than a more concrete definition might.\footnote{44} 

In an article published in early 2010, Professors Nina A. Kohn and Edward D. Spurgeon examined elder law teaching and scholarship.\footnote{45} Early in the process of conducting their study, the authors convened a working group that developed a definition of elder law for use in the study.\footnote{46} This “working definition” defined elder law as follows:

[A] specialized area of law focused on counseling and representing older persons or their representatives on later-in-life planning and other legal issues of particular importance to older adults. Unlike many other areas of the law, elder law is defined primarily by the client population to be served, not by a distinct set of legal doctrines.\footnote{47}

Based on their findings, the authors noted that this definition created by the study group conformed with how elder law is taught in the law schools in the United States.\footnote{48}

To some, the term “elder law” and the specific definitions may be limiting. For example, by defining the practice by the elder client, there may be a missed opportunity to have adult children as clients. Michael Gilfix, who wrote an article in 1999,\footnote{49} argued that the practice is more elastic than a concrete definition provides.\footnote{50} More than ten years later, Gilfix believes that the need for flexibility is even more important now than it was in the early years of elder law practice,\footnote{51} although recognizing that some attorneys may prefer a more limited definition of the practice.\footnote{52}

\footnote{44. Id. (“While the core goals and general challenges remain the same over time, the particular benefits, or financial planning options, or housing options, or health care options and issues are likely to change significantly over time.”).}
\footnote{45. Kohn & Spurgeon, supra note 3.}
\footnote{46. Id. at 415, 415 n.7 (explaining the study group was composed by a mix of experts in the field, with many academics).}
\footnote{47. Id. at 429–30 n.63 (internal quotation marks omitted) (explaining that the study group looked at other earlier definitions and descriptions of elder law from organizations, such as NAELA, and also from articles).}
\footnote{48. Id. at 430.}
\footnote{49. Gilfix, Creation and Evolution of Elder Law, supra note 3.}
\footnote{50. Id. at 7 (“[T]he practice, in other words, can be neither circumscribed nor delimited. It is an inherently broad, responsive practice.”).}
\footnote{51. See e-mail from Michael Gilfix, Fellow & Co-Founder of Nat’l Acad. of Elder Law Att’ys, to author (July 1, 2010) (on file with author) (explaining that he feels even more strongly today that elder law is viewed too restrictively and,}
The research shows that there are some “standard” definitions of elder law, but there are also definitions based on experience or perceptions. But it is important to understand how those in practice do in fact define elder law. Despite these “official” definitions, its definition is in the “eye of the beholder.” It matters what the client thinks it is, and it matters how the attorney in practice defines it.

It does appear that elder law is established as a discrete practice area. A number of law schools offer courses in elder law, a number of attorneys teach as adjuncts in elder law courses, instead, should be practiced with “broad, multi-faceted expertise” to account for the multiple issues and generations it implicates).

52. See id.
First, “elder law” is still viewed too restrictively by many practitioners. As I said in the original article, it is a field that must not limit its focus to an issue, like Medicaid planning. [It] must respond to the diverse planning needs of the client. A client expressing concern about the cost of long term care presents many more issues than just asset preservation planning. Also presented are myriad tax issues, depending on the size of the estate and nature of assets, management issues, and multi-generational planning issues.

53. See infra Part VI.D for a discussion of survey results.
54. This is somewhat borne out in the responses to survey question seven, which asked for a narrative answer to the question, “[h]ow do you personally define elder law?” Elder Law Survey, supra note 11. There are almost as many definitions as there are answers to that question (sixty of seventy-three responding). Id. There are some words frequently used, such as estate planning, long term care, planning, etc. See id. The areas of law mentioned include veterans’ benefits, guardianships, probate, Medicaid, special needs, public benefits, and various types of planning. Id. It is impossible to quantify the definitions without being subjective. As a result, the narrative answers are used as illustrations. Two attorneys’ thoughts were unique: One, in defining elder law, including the idea of “cleaning up after unplanned transitions,” and the other describing elder law as “serving as the experienced tour guide for a trip no one wants to take.” Id.

55. Professor Frolik, in his 1993 article, shares an anecdote from an attorney who was practicing elder law without realizing it. Professor Frolik relates a conversation at a conference where an attorney in attendance asked him to explain elder law. After Professor Frolik “explained the kind of practice to which [Professor Frolik] thought the term applied, [the attorney replied]: ‘Oh, that’s what I do. I guess that I’ve been an elder attorney for years and never knew it.’” Frolik, Elder Law: A Historical Perspective, supra note 3, at 2 n.2.

56. Kohn & Spurgeon, supra note 3, at 418–19 (noting 112 of 192 law schools offer courses in elder law, with about 25% of those schools offering more than one elder law course).

57. Id. at 419–20 (noting about half of law schools use tenured or tenure-track faculty; one-third of law schools use adjuncts exclusively and suggesting possibility of trend to use adjuncts). See id., for a discussion of the type of elder law classes offered.
are several journals devoted to elder law, and there are a number of articles published about elder law. There are even blogs devoted to elder law. Elder law attorneys use Twitter and Facebook, as well as other social networking media, specifically for their elder law practices.

IV. AN ESTABLISHED PRACTICE

In 2010, it seems safe to say that elder law is an established practice area. For example, a survey done by the ABA Commission on Law and Aging in 2009 revealed that more than half of state bars have elder law committees or sections and close to 9000 members of the ABA noted that elder law was a concentration in their practices. NAELA has over 4100 members, and NELF has certified 419 attorneys in elder law.

58. Id. at 423–28 (noting a little more than half of those responding to the survey author articles in the field of elder law, with full-time tenured and tenure-track academics more likely to publish than adjuncts or non-tenure track faculty; and reciting the law school journals devoted to elder law, including The Elder Law Journal (University of Illinois College of Law), Elder’s Advisor (Marquette University Law School), and the Journal of International Aging Law and Policy (Stetson University College of Law); in addition, NAELA has a journal.

59. A quick search on Westlaw in the database of bar journals, CLE materials, and law review documents (abbreviated “jlr”) with the search terms “elder law” in the title (ti( “elder law”)) resulted in 209 items. Of course, it is possible that the number of articles is larger, because the article may concern elder law but not use elder law in their title. See generally Kohn & Spurgeon, supra note 3 (discussing elder law scholarship).

60. There are a number of blogs devoted to elder law. Some blogs are authored by private attorneys and some are state specific. One blog is run by an elder law professor. See e.g., Kim Dayton, ELDER L. PROF BLOG http://lawprofessors.typepad.com/elder_law/ (last updated Nov. 17, 2010) (Professor Dayton teaches at the William Mitchell College of Law and is the Director of the Center for Elder Justice and Policy).

61. When asked about the changes in the past year or in the upcoming year that they planned to make in their practices, thirty-five (48%) indicated a greater use of technology and twenty-two (30%) indicated the use of social media for marketing. Elder Law Survey, supra note 11; see also infra Part VI.D. (discussing survey results).

62. See, e.g., Sabatino, supra note 2, at 107 (“Regardless of the slant one takes in fashioning their elder law practice, it is clear that the field has become an established practice area.”).

63. Id. (noting thirty-two state bars had elder law sections and seven had committees, with a total of 19,491 members; and 9000 ABA members indicate elder law is part of their practices, but that number likely doesn’t reflect those who do elder law work but don’t hold themselves out as elder law attorneys).

64. E-mail from Pete Wacht, Exec. Dir., Nat’l Acad. of Elder Law Att’ys, to author (July 1, 2010) (on file with author) (noting 4150 attorneys are members of
As discussed earlier, in a groundbreaking article published in early 2010, Professors Kohn and Spurgeon examined elder law teaching and scholarship.\textsuperscript{66} A substantial number of law schools are offering courses in elder law,\textsuperscript{67} and according to Professors Kohn and Spurgeon, there is a strong student demand for the subject area.\textsuperscript{68}

V. THE BABY BOOMERS: THE COOL GENERATION GROWS UP\textsuperscript{69}

Clearly, demographics play a role in the growth of elder law. Since elder law is defined by the clients,\textsuperscript{70} it is logical that the more elderly people there are, the greater is the likelihood that the practice will grow.\textsuperscript{71} Although elder law practice is not just about the baby boomers, it is important to give some attention to them and their impact on elder law. Over the years, there has been a lot of attention paid to the sheer number of baby boomers as they age.\textsuperscript{72}

\textsuperscript{65} See supra note 35 and accompanying text.

\textsuperscript{66} See Kohn & Spurgeon, supra note 3.

\textsuperscript{67} See supra note 56 and accompanying text.

\textsuperscript{68} See Kohn & Spurgeon, supra note 3, at 421 (suggesting that one reason for student interest may be the view that the course will help prepare for careers in fields related to elder law). The students of today are the attorneys of tomorrow, so one might think that the more law schools that offer elder law courses, the better the chance that the number of attorneys practicing elder law may grow.

\textsuperscript{69} A lot has been made of the sheer number of boomers and what they will mean to society and to social and government programs. The boomers have been given “cute” nicknames, such as the “Silver Tsunami” or “Silver Surge.” See, e.g., Patricia Barry, The Boomers Are Coming ‘Silver Surge’: Who Will Take Care of Aging Boomers?, AARP BULLETIN (May 2008), http://www.aarp.org/relationships/caregiving/info-04-2009/silver_surge__who.html.

\textsuperscript{70} See infra notes 73–77 and accompanying text.

\textsuperscript{71} See infra Part VII.A. See e.g., Sabatino, supra note 2, at 108 (“One can envision two very different possible futures for elder law. One vision foretells that elder law, driven by society’s relentless aging demographics, will continue to mature into an established multi-faceted practice field . . . . The other vision sees those same demographic forces as driving virtually all lawyers in myriad types of practices to become competent in elder law knowledge and skills.”).

\textsuperscript{72} See infra note 124 and accompanying text (discussing media stories as baby boomers achieve aging milestones).
It is not so much their characteristics but their number\textsuperscript{73} that has given policy-makers and others pause. For example, former Chairman of the Federal Reserve, Ben Bernanke, has said on more than one occasion that the number of older persons will present an issue.\textsuperscript{74} Most recently, in his testimony before the U.S. House of Representatives Committee on the Budget,\textsuperscript{75} he noted the role of the aging of American citizens in “putting upward pressure on the deficit.”\textsuperscript{76} Chairman Bernanke explained it this way:

\begin{quote}
[T]he number of persons expected to be working and paying taxes . . . is rising more slowly than the number of persons projected to receive benefits. Notably, this year about 5 individuals are between the ages of 20 and 64 for each person aged 65 or older. By the time most of the baby boomers have retired in 2030, this ratio is projected to have declined to around 3. In addition, government expenditures on health care for both retirees and non-
\end{quote}


\begin{quote}
Even after economic and financial conditions have returned to normal, however, in the absence of further policy actions, the federal budget appears to be on an unsustainable path. A variety of projections that extrapolate current policies and make plausible assumptions about the future evolution of the economy show a structural budget gap that is both large relative to the size of the economy and increasing over time.
\end{quote}

\textit{Id.} He stated that one of the main reasons is the worker to retiree ratio, and “[t]o avoid sharp, disruptive shifts in spending programs and tax policies in the future, and to retain the confidence of the public and the markets, we should be planning now how we will meet these looming budgetary challenges.”\textit{ Id.}

\textsuperscript{75} \textit{Id.}

\textsuperscript{76} \textit{Id.}
retirees have continued to rise rapidly as increases in the costs of care have exceeded increases in incomes.\textsuperscript{77}

So now that it is established that there are a lot of baby boomers and they are going to have a significant impact on some social and government programs, what does that mean for the future of the practice of elder law?

VI. WHAT DO THOSE WHO ARE DOING IT SAY ABOUT IT?

As mentioned previously, I asked elder law attorneys their opinions on the future of elder law.\textsuperscript{78} I constructed a short, eight-question survey\textsuperscript{79} using Zoomerang.\textsuperscript{80} The survey was sent to a total of four listservs: NAELA Council of Advanced Practitioners (CAP);\textsuperscript{81} NAELA Young/New Attorneys (YNA) section;\textsuperscript{82} a private elder law

\textsuperscript{77} Id.
\textsuperscript{78} See supra note 10 and accompanying text.
\textsuperscript{79} Using their own definition of elder law, attorneys were asked six multiple-choice questions: (1) how many years they had practiced elder law; (2) how many more years they intended to practice elder law; (3) the primary reason they chose to practice elder law; (4) what areas of elder law did they expect to expand; (5) what areas of elder law did they expect to contract; and (6) what changes have they made in the past year in their practices or were planning to make in the next year in their practices. Elder Law Survey, supra note 11. The attorneys were also asked two narrative questions. Id. One question asked their definition of elder law and the other about their opinions on the future of elder law. Id. The responses to the survey are discussed in this essay. Id. Because the narrative answers are so varied, they are used as illustrations and not quantified. Id.

\textsuperscript{80} Zoomerang is an online survey software. Zoomerang, http://www.zoomerang.com (last visited Nov. 18, 2010).

\textsuperscript{81} NAELA CAP was established by NAELA in July 2005, to recognize NAELA members who are “innovators of the profession, instrumental in leading the future of Elder Law, a major source of speakers, writers, and leaders of NAELA programs [and] NAELA’s role models . . . .” About CAP, NAELA CAP, http://www.naelacap.org/about_cap.html (last visited Nov. 18, 2010). To be eligible for membership in the invitation-only organization, an attorney must be a member of NAELA for ten years, Martindale Hubbell AV rated, and either a fellow of NAELA or a Certified Elder Law Attorney (CELA). Id. There are also categories for academic members and legal services attorney members. Id. CAP has sixty-nine active members. E-mail from Kirsten Brown Simpson, Dir. of Membership & Mktg., Nat’l Acad. of Elder Law Att’ys, to author (July 1, 2010) (on file with author); Welcome To the Council of Advanced Practitioners, NAELA CAP, http://www.naelacap.org (last visited Nov. 11, 2010).

\textsuperscript{82} The NAELA website states the following about the YNA section: “The Young/New Attorneys Section focuses on the smooth integration into NAELA of young attorneys and/or those who are new to Elder Law. The criteria for this Section are that you be 35 years old or younger or that you have been practicing Elder Law for less than ten years.” Exclusively Offered to NAELA Members Nine Sections for Substantive Networking, NAELA, http://www.naela.org/Public/MemberServices
attorney list,85 and the ABA Real Property, Probate and Trust Law elder law listserv.84 Because I was seeking opinions and not conducting an empirical study, I did not send the survey to more listservs.86 I also recognized the possibility that some attorneys were members of more than one list.86 Attorneys were told the purpose of the survey (use for this article) and their responses would be anonymous. Individuals were given the opportunity to e-mail me directly rather than complete the online survey, acknowledging that if that was done, the response would not be anonymous. Seventy-three attorneys completed the survey and two attorneys chose to e-mail me their responses.88

The first question in the survey asked the attorneys to indicate the years that they had practiced elder law, in five year increments.89 I did this because I wanted to compare the responses to the other questions by the years in practice. This was done to

83. The private attorney list was founded and is managed by Robert B. Fleming, a well-known elder law attorney in Tucson, Arizona, who has served on the NAELA board and is the immediate past-president of NELF. FLEMING & CURTI, PLC, http://www.elder-law.com/about-us/robert-b-fleming/ (last visited Nov. 11, 2010). According to Mr. Fleming, this list has approximately 256 members; most likely, all are attorneys and a large portion is NAELA members. E-mail from Robert B. Fleming, Fleming & Curti PLC, to author (June 21, 2010) (on file with author). As far as the composition of the list members, Mr. Fleming describes the members as in their mid-fifties and who have practiced for roughly thirty years. Id.

84. The Elder Law, Disability Planning and Bioethics Group is a committee of the ABA Real Property and Trust and Estate Law Section. This group “consists of three committees that focus on legal concerns of the elderly and persons with disabilities, along with legal and ethical issues related to new medical technology.” Elder Law, Disability Planning and Bioethics Group, A.B.A., http://www.abanet.org/dch/committee.cfm?com=RP539000 (last modified Sept. 16, 2010). According to group chair Michael Kirtland, there are 332 members of the group and most (but not all) of the group are members of the listserv. E-mail from Michael Kirtland, Chair, Disability, Planning & Bioethics Grp., to author (June 24, 2010) (on file with author).

85. It is possible that the e-mail and survey link were forwarded to others who may not have been members of one of the four lists.

86. As noted by Robert Fleming, a large portion of the members of the private attorney listserv are NAELA members. See Fleming, supra note 83. However, I did not send the survey to the general NAELA list, only the CAP and YNA list, which minimizes the chances of duplication.

87. Two attorneys chose to e-mail me their answers directly in the body of their e-mails. Their responses are not included in the survey totals or percentages.

88. Elder Law Survey, supra note 11.

89. Id.
see if there was a difference in opinion about the future of the practice between those who have practiced elder law for a long period of time versus those who were relatively new to the practice. To further achieve that goal, I deliberately chose the NAELA CAP list\textsuperscript{90} and the NAELA YNA list, rather than the general NAELA member list. After compiling the survey results, the results were sorted based upon the years of practice.

A. The Practice Experiences of Elder Law Attorneys

It is helpful to look at the practice experiences of those attorneys who answered the survey. As noted previously, I received seventy-three replies to the Elder Law survey.\textsuperscript{91} Question one asked how long the attorneys have practiced elder law.\textsuperscript{92} Eight of those responding (11\%) have been in elder law practice five years or less, eight (11\%) have been in practice between six and ten years, ten (14\%) have been in practice between eleven and fifteen years, twenty-two (30\%) have been in practice sixteen to twenty years, thirteen (18\%) have been in practice twenty-one to twenty-five years, five (7\%) have been in practice twenty-six to thirty years, and seven (10\%) have been in practice more than thirty years.\textsuperscript{93}

\textsuperscript{90} Note that to be eligible for consideration for CAP, an attorney only needs to have been a member of NAELA for ten years, so it is possible that the members of CAP are not necessarily those who have been in practice the longest. \textit{About CAP}, supra note 81. Robert Fleming’s list includes attorneys who have been in practice thirty or more years. \textit{See} Fleming, supra note 83.

\textsuperscript{91} \textit{See} Elder Law Survey, supra note 11. Note that seventy-two attorneys answered questions two, three, and five. \textit{Id.} Of the two narrative questions, sixty attorneys provided their definition of elder law and sixty-one offered their view of the future. \textit{Id.} Because the narrative answers are so varied, they are used as illustrations and not quantified.

\textsuperscript{92} \textit{Id.} Note that the attorneys were not asked how long they have practiced law, just how long they have practiced elder law. \textit{Id.} It is possible that the individual is an experienced attorney who is new to elder law.

\textsuperscript{93} \textit{See} id.
How many years have you practiced elder law?

![Bar chart showing the distribution of years practiced by attorneys]

When asked the second question, “[a]ssuming you are currently practicing elder law, how many more years do you expect to practice elder law?,” the answer getting the largest percentage was the choice “[u]ntil I retire.” Twenty-seven (38%) chose this option. Sixteen (22%) attorneys chose six to ten years, fourteen (19%) chose eleven to fifteen years, ten (14%) chose sixteen to twenty years, and five attorneys (7%) selected one to five years.  

94. See id.

95. See id. This may or may not be surprising, given the high percentage of responses to the question about why they chose elder law. As discussed further below, forty-two of the attorneys completing the survey (58%) indicated they chose to practice elder law because of job satisfaction and two (3%) indicated it gave them a better quality of life. See id. Keep in mind that the survey did not ask how many years the attorneys had been practicing law, so elder law may not have been the first practice area for some. It is also possible that those who picked a specific time frame may have been quantifying how many years of practice left before they retire.

96. See id. These responses could lead to the conclusion that the attorneys plan to continue to practice elder law for some time. It cannot be said that those attorneys will practice law until they retire, since that was an option; thirty-eight (52%) chose that option. See id.
How many years do you expect to practice elder law?

B. Why Practice Elder Law?

For the third question, “[w]hat is the primary reason you chose to practice elder law?” forty-two attorneys (58%) indicated they chose the field because of job satisfaction, while eight (11%) indicated they chose it because they like working with people who are elderly. 97 Seven (10%) chose it because older persons are underrepresented, six (8%) because of the business, and two (3%) because the practice of elder law gave them a better quality of life. 98

97.  See id.
98.  See id.  One might conclude that job satisfaction and better quality of life are similar enough that they should be considered together.
What is the primary reason you chose to practice elder law?

![Bar chart showing reasons for choosing to practice elder law]

- I like dealing with people who are elderly: 42
- I like the issues faced by clients who are elderly:
- I like helping this segment of the population as I think they are underrepresented:
- I get a lot of job satisfaction from this practice area:
- A better quality of life for me:
- It's where the business was/is:
- 2

C. Changes to the Practice?

The fourth question asked was “[w]hat area of elder law do you think will most likely expand in the next three to five years?”

Twenty-nine (40%) thought all areas of elder law practice would expand, while ten (14%) thought areas not listed would expand.

99. *Id.*

100. The survey listed the following practice areas, without any definition: guardianships, planning for long term care, paying for health care (Medicare), Medicaid, end of life decision-making, nursing homes, housing, alternatives to guardianship (include powers of attorney), estate planning, special needs planning, and consumer frauds. *See id.* Note that for questions four and five there are some areas that were not included on the list, such as litigation and veterans' benefits. *See id.*

101. *Id.*
Eight (11%) thought planning for long-term care and special needs planning would expand. There were a few who selected the choice “other.”

What area of elder law do you think will most likely expand in 3–5 years?

- Guardianships
- Planning for long term care
- Paying for health care (Medicare)
- Medicaid
- End of life decision-making
- Nursing homes
- Housing
- Alternatives to guardianship (include powers of attorney)
- Estate planning
- Special needs planning
- Consumer frauds
- None will expand
- All will expand
- Other

102. See id. For the remaining responses, please see accompanying chart.
103. These were: “[e]lder law litigation”; “[f]inances/retirement/money management”; “litigation”; “life care planning” (mentioned twice); “elder mediation”; “financial exploitation litigation cases/abuse of trusts litigation.” See id.
Concomitantly, for the fifth question, “[w]hat area of elder law do you think will most likely contract in the next three to five years?” thirty-three attorneys (46%) indicated that none of the areas will contract; however, twenty (28%) indicated that they thought Medicaid would contract. 104

What area of elder law do you think will most likely contract in 3–5 years?

- Guardianships
- Planning for long term care
- Paying for health care (Medicare)
- Medicaid
- End of life decision-making
- Nursing homes
- Housing
- Alternatives to guardianship (include powers of attorney)
- Estate planning
- Special needs planning
- None will contract
- All will contract
- Other

104. See id. The remaining categories drew a few responses. For the remaining responses, please see the accompanying chart.
The sixth question asked “[w]hat changes do you anticipate making to your elder law practice in the next year (or have made in the last year)?” Twenty-eight (38%) indicated an increase in staff, thirty-five (48%) indicated a greater use of technology, twenty-two (30%) indicated the use of social media for marketing, and twenty (27%) indicated an increase in the marketing budget. Ten (14%) were adding associates, while six (8%) were reducing staff.

105. Id.
106. See Elder Law Survey, supra note 11.
107. See id. For the remaining responses, please see accompanying chart.
What changes do you anticipate making to your elder law practice next year?

- No changes
- Reducing staff
- Expanding staff
- Adding associates
- Reducing the number of attorneys
- Increasing marketing budget
- Decreasing marketing budget
- More attorney education
- Less attorney education
- More use of technology
- Less use of technology
D. Is There a Difference of Opinion Between the New Elder Law Attorneys and the Experienced Elder Law Attorneys?

The last two questions were narrative, asking “[h]ow do you personally define elder law?” and “[w]hat is your view generally of the future of elder law as a practice area and why?” I wanted to compare responses by years of practice, thinking that those new to the practice would be enthusiastic about it. I also wondered whether they might be more enthusiastic about the practice of elder law than those who had practiced it for a long time or whether the more experienced practitioners are as enthusiastic—if not more—because, after all, they are still doing it. So in this section, I briefly discuss the views of those who are new to elder law and those who are more experienced.

I received eight responses from those who have practiced elder law for five years or less. Five of the eight offered their opinions of the future. I would characterize four of the five as enthusiastic about it because of the words they used. While four of the five in my view were positive, one response could be characterized as somewhat positive “so long as elder law attorneys change and adapt to the different way people age.” The remaining four identified the population as one factor for their optimism: “I think elder law will continue to expand rapidly, given the boom of our aging population and how much longer we live with chronic illnesses. I believe our focus may begin to turn more to quality of care issues and long-term planning issues (and away from emergency and short-term Medicaid planning), as Medicaid in our state . . . [is] only just now adopting the DRA rules”; “I believe that the future of elder law is bright. The older population is getting more education and will know that they need to start protecting their assets and planning for the future”; “Boomers expect attention to their (our) needs. The incredible advances in medical technology will exponentially increase and so will the issues of longer life. Elder law will evolve and become even more important than it is now”; “I believe it will continue to
some reference to the population as part of the basis for their outlook for the future of elder law.\textsuperscript{114}

All seven of those who indicated they had practiced elder law for thirty or more years responded to the narrative question about the future.\textsuperscript{115} In my view, several attorneys used words that I would characterize as a positive view of the practice.\textsuperscript{116} However, unlike the new elder law attorneys, most of them did not reference the aging demographic.\textsuperscript{117}

Although more closely aligned to years in practice to the “truly experienced elder law attorneys,” the five attorneys with twenty-six to thirty years of elder law practice shared characteristics with the new attorneys. Like the new attorneys, they saw demographics, baby boomers, or aging society as part of their view for the future, with all five making some mention of this.

expand, since the demographics are going that way (more of the population (baby boomers)) are becoming elderly.” \textit{Id.}

114. \textit{Id.}

115. \textit{Id.}

116. One attorney declined to try to predict the future; one thought as more attorneys practice elder law, the “ability to charge excessive fees will contract” and one thought the bar associations should do more to help elders avoid being victims of fraud. \textit{Id.} As for the four who responded optimistically about the future, the responses ranged from “limitless,” “busy as ever . . . future changes in the law will be challenging but the business will still expand,” and “continue to be a thriving area of law, especially in a tight economy coupled with family members who feel ‘entitled’ to receive assets now, or who are genuinely concerned about how to provide quality long term care for the elderly family members” to we have a Tsunami of individuals aging into the areas of law defined under ‘elder law’, in need of sophisticated estate and disability planning. The age of the onset of disability is becoming ever younger due to the prevalence of [disabling] auto-immune disorders, increasing the need. Our society is not at all equipped to address the issues faced by this population, and seems to have no willingness to do so until a family member is affected. As such, the future involves not only personal planning, but societal planning to address the needs of the current elder population, and the tens of millions about to enter that status. \textit{Id.}

117. \textit{Id.}

118. The five mentioned the aging society, demographics or baby boomers in their answers to question 8 (“[t]he field will expand for a number of years as a result of the baby boom wave then contract as boomers die or the legislature chooses to reduce funding for the services elders need”; “I see expansion in the provision of legal and ancillary services to clients who are older. The elderly must deal with ever more complicated laws and regulations. And the demographic reality is that our society is aging”; “I am NOT a good prognosticator—in 1990, I was saying we should expand from Medicaid into estate tax because Medicaid was not going to [last] forever. That said, the practice will follow the demographics and changes in the law. That means it will . . . grow with the elderly population
Interestingly, the experienced elder law attorneys (twenty-one to twenty-five years of practice) offered comments that may be perceived as positive about the future, but some of the attorneys also offered cautionary comments on a variety of topics.¹¹⁹

VII. AND NOW THAT ELDER LAW IS COOL... WE'RE STILL DOING IT... THE FUTURE OF ELDER LAW?

A. What I Think

Elder law is a practice area that provides significant job satisfaction and provides a quality of life to attorneys.¹²⁰ In my prior article about the future of elder law, published in 2007,¹²¹ I wrote in the conclusion that “[e]lder law in the United States is truly a growth industry, driven by the increasing population, the growing complexity of the issues, laws and policies, and the interest and recognition of elder law by the attorneys in the United States.”¹²²

I think this still holds true on all levels. It is clear that the demographics are tilting as more and more baby boomers will hit the “magic” age of an older person.¹²³ In fact, the press provides stories about baby boomers as they achieve various aging milestones.¹²⁴ So the population numbers appear to have a direct

¹¹⁹. Three of the thirteen attorneys made comments about public benefits/entitlements/Medicaid planning diminishing and one described elder law as having “become commoditized. Have to think out of the box and be willing to work hard to succeed.” See id.
¹²⁰. Forty-two of seventy-three attorneys (58%) indicated the primary reason they chose to practice elder law was job satisfaction and two (3%) chose a better quality of life (for a total of 61%). See id. See supra note 95 and accompanying text for a summary of the responses to the multiple choice questions.
¹²¹. Morgan, Elder Law in the United States, supra note 3.
¹²². Id. at 140.
¹²³. It is always interesting to think about at what age someone is considered “old,” although there is often a bright line age for certain programs and benefits, such as Medicare (sixty-five) and Social Security (was sixty-five, is increasing until it tops out at sixty-seven). Id. at 117; Enrolling in Medicare, medicare.gov, http://www.medicare.gov/basics/socialsecurity.asp (last visited Sept. 19, 2010). However, the numeric age, although a benchmark for eligibility for programs, may not be a good measure for what is “old.”
impact on the future of elder law.  

B. What Others Think

Sabatino’s article covers the time span of 2009–39. He offers two possibilities for the future of elder law, using various trends as a guide. Diversification has occurred in elder law, some more obvious than others. The more obvious diversification has occurred from a “cross-disciplinary vision” of elder law attorneys. To an extent, some elder law attorneys have “push[ed] the envelope of multi-disciplinary practice . . . to provide clients with one-stop planning for high-priority legal, financial, and health needs.” Sabatino sees this type of diversification continuing in the elder law practice.

The second type of diversification—the less expected—comes from new areas of practice under the elder law umbrella, such as special needs trusts for people with disabilities. It is possible that, over time, other new practice areas may be added to the umbrella


125. A number of the attorneys in their comments made reference to demographics as positive for the future of the practice. See Elder Law Survey, supra note 11. Charles F. Robinson, a nationally known elder law attorney and futurist, sees the baby boomers as a group that may require the service of elder law attorneys; but he also recognizes that the economy tempers the provision of these services by the attorneys, as clients may put off planning or updating their documents. Interview with Charles F. Robinson, Principal, Law Offices of Charles F. Robinson (July 13, 2010) (notes on file with author).

126. Sabatino, supra note 2, at 105–09.

127. Id. at 107.

128. Id. Sabatino notes that those elder law attorneys with cross-disciplinary components in their practices have added “social work, nursing, and financial management” to their practices so that they may offer “comprehensive services to aging clients.” Id.

129. Id.

130. Id.

131. Id. As Sabatino notes in his article, NAELA revised its “tag line” and mission statement in 2003 to incorporate special needs. Id. at 107–08. See Morgan, Elder Law in the United States, supra note 3, at 108 n.30; see also NAELA, http://www.naela.org (stating on website banner: “Leading the Way in Special Needs and Elder Law”) (last visited Nov. 11, 2010).
of elder law in response to the needs of clients.\textsuperscript{132} Sabatino sees two possibilities for the future of elder law: (1) an “established multifaceted practice field”,\textsuperscript{133} and (2) attorneys in myriad practice areas

\textsuperscript{132} For example, I see a need for elder law attorneys to know more about consumer frauds and scams that are targeted to their clients, especially financial scams, as those are becoming more and more prevalent. See, for example, Anne Barnard, \textit{A Novel Twist for Prosecutors of Hate Crimes}, \textit{N.Y. Times}, June 22, 2010, at A1, available at http://www.nytimes.com/2010/06/23/nyregion/23hate.html, stating the following: [1] In Queens since 2005, at least five people have been convicted of, or pleaded guilty to, committing a very different kind of hate crime—singling out elderly victims for nonviolent crimes like mortgage fraud because they believed older people would be easy to deceive and might have substantial savings or home equity. See also Jason A. Frank & Fay L. Gordon, \textit{Recession’s Effect on the Elderly}, 43 Md. B.J., Jan./Feb. 2010, 20, 22 (2010) (noting that “with a tanking economy, seniors are prime targets for financial abuse.”). Charles F. Robinson noted two areas where growth may be occurring, as something of an offshoot of special needs trust. Interview with Charles F. Robinson, supra note 125. One is the area of consulting with personal injury attorneys on various issues, including Medicare set-asides. Id. The other, if an estate tax is enacted, is the area of health care component as part of estate planning or consulting with estate planners about the area in which elder law attorneys hold special expertise, such as a care component, disability, or incapacity. Id.

\textsuperscript{133} Sabatino describes this vision as “taught in every law school, anchored securely in the bar, and populated by small or solo firms, as is the case today.” Sabatino, supra note 2, at 108. “Organizations such as NAELA will continue to thrive, and even the ABA will give birth to a formal elder law section.” Id. Perhaps supporting this version of the future, it is interesting to note that slightly over half of the law schools in the United States offer courses on elder law. See Kohn & Spurgeon, supra note 3, at 418–19 (noting 112 of 192 law schools offer courses in elder law, with about twenty-five percent of those schools offering more than one elder law course). As Kohn and Spurgeon discussed in their survey, about half of law schools use tenured or tenure-track faculty and about one-third of law schools use adjuncts exclusively. Id. at 419–20. Kohn and Spurgeon discuss how the use of adjuncts may impact scholarly outputs in elder law—noting that “adjuncts typically do not currently write in the field.” Id. at 423–24. They also discuss the integration of elder law issues into the law school curriculum—comparing how doctrinal faculty integrate elder law issues into other courses while most adjuncts do not. Id. at 423–24. As far as doctrinal faculty integrating elder law issues into other courses, see issue four, volume thirty of the \textit{Stetson Law Review}, the issue, published in the Spring of 2001, was entitled “Elder Law Across the Curriculum.” For a perspective from an adjunct teaching elder law, see Alex L. Moschella, \textit{Elder Law in Law Schools}, supra note 3. A small number of members of NAELA teach as adjuncts. Id. at 27.

Kohn and Spurgeon conclude that elder law is poised to become part of the “mainstream” law school curriculum. Kohn & Spurgeon, supra note 3, at 451. But even though in the past fifteen years the number of courses offered has more than doubled and there was a significant increase in student interest, elder law in law schools is at a critical moment. Id. Obstacles still remain, including staffing by adjuncts, a significant number of law schools not offering courses, and the lack of
becoming versed in elder law. 134 With this second vision, “elder law slips into the landscape of” many types of practice and the distinct field of elder law becomes harder to maintain. 135 It is possible that new packaging and labels for the field may emerge, but such relabeling would be driven both by changes in the law and economic forces. 136 As laws change from age-based eligibility towards needs-based criteria, there will be an increasing focus on income security for future retirees. 137

elder law scholarship placement in the higher ranked journals. Id. Kohn and Spurgeon plan a Phase II of their study that will generate “concrete, manageable recommendations” to influence the future of elder law both “positively and productively.” Id. In Phase II, Kohn and Spurgeon will develop a survey and collect other interview data from the elder law legal academic and professional communities on how legal education and legal scholarship may be improved and further developed. E-mail from Edward D. Spurgeon, Professor of Law and Dean Emeritus, Univ. of Ga. Sch. of Law, Univ. of Utah Coll. of Law, to author (July 5, 2010) (on file with author). After the data is collected, Kohn and Spurgeon will analyze the data, incorporate their own thinking, and write an article with “constructive recommendations for the further development of legal education and scholarship.” Id.

134. Sabatino, supra note 2, at 108. Sabatino goes on to note that if all attorneys become versed in elder law, then elder law would lose its discrete identity. Id.

135. Id.

136. Id. Sabatino gives two examples of relabeling: “life care planning” and “life services planning.” Id. For those unfamiliar with the concept:

Life Care Planning is a holistic, elder-centered approach to the practice of law that helps families respond to every challenge caused by chronic illness or disability of an elderly loved one. The goal of Life Care Planning is to promote and maintain the good health, safety, well-being, and quality of life of elders and their families. Elders and their families get access to a wider variety of options for care as well as knowledgeable guidance from a team of compassionate advisors who help them make the right choices about every aspect of their loved one’s well-being. Life Care Planning, AGING OPTIONS, http://agingoptions.com/care-services/life-care-planning/ (last visited Nov. 20, 2010).

As far as changes in legislation that could impact elder law practices, Sabatino references Medicare and Medicaid as examples. Sabatino, supra note 2, at 108. For an example of legislation that impacted elder law practices, see Janet L. Lowder et al., Medicaid Planning Update: The Post-DRA 2005 World, 19 OHIO PROB L.J. 235 (2009). In an interview with Charles F. Robinson, noted elder law attorney and futurist, Robinson commented on the future of Medicaid, commenting that the experienced elder law attorneys with whom he has talked are taking the position that the “public benefits side of elder law” is disappearing and in some states already has. Interview with Charles F. Robinson, supra note 125.

137. Sabatino, supra note 2, at 108. Sabatino notes that “[t]he boomer generation is too massive to be able to sustain benefits based solely or primarily on age. Thus, needs-based criteria will increasingly drive eligibility for public benefits, and the necessity to maximize one’s own resources to prepare for the
Sabatino also notes the development of elder law in other countries, with the possibility of cross-border issues arising in client matters. Sabatino finds that elder law “will continue to be an exciting and evolving calling for lawyers most moved by the goals of autonomy, dignity, and quality of life for aging members of society . . . of any age.” Thus, one could conclude that for those attorneys who choose elder law for those and related reasons, demographic data will have less relevance in the choice of practice.

Gilfix, in 1999, described elder law as a still-evolving area of specialization, and noted that he has “long referred to elder law as the next step in the evolution of estate planning.” He noted:

[E]lders, like individuals of any age, are complex and have both needs and problems. They have health, financial, planning, and personal issues that cannot be set aside, deferred, or segregated while purely legal planning is put into effect. The practice, in other words, can be

future will increase.” Id. Sabatino gives two examples of this already happening: increase in full retirement age for Social Security and income thresholds to determine the amount of a Medicare beneficiary’s Part B premiums. Id.


139. Id. at 109 (ellipsis in original).
140. Recall that in the elder law survey, forty-two attorneys (58%) indicated they chose to practice elder law because of job satisfaction; eight (11%) indicated they chose the field because they like dealing with people who are elderly; seven (10%) preferred elder law because they feel the elderly are underrepresented; and two (3%) indicated it gave them a better quality of life. See Elder Law Survey, supra note 11. Those reasons would indicate a strong future for the practice—attorneys choosing to practice elder law for its intangibles—job satisfaction or quality of life. Those who are looking for a practice area where that occurs would seem likely to stay in that practice area. See supra note 86 and accompanying text.

141. Gilfix, Creation and Evolution of Elder Law, supra note 3, at 7 (internal quotation marks omitted).
neither circumscribed nor delimited. It is an inherently broad, responsive practice.\textsuperscript{142}

Gilfix takes the position that elder law attorneys must think broadly and plan for multiple generations,\textsuperscript{143} recognizing that children of clients also must plan for the future.\textsuperscript{144} All areas of practice, not just elder law, evolve over time, whether from changes in the law, court rulings, changes in technology, or just the changing needs of the clients.

\textbf{VIII. THE RELEVANCE OF DEMOGRAPHICS?}

So how relevant are the demographic numbers? Clearly some of the attorneys who answered the survey felt that the numbers are important, because almost half referenced baby boomers, demographics, or aging in their responses to the question about the future of the practice.\textsuperscript{145} A recent report from the Census Bureau\textsuperscript{146} noted that by 2050 individuals who are sixty-five or older are anticipated to total 88.5 million, which is about double the current number.\textsuperscript{147} The report largely attributes this increase to the baby boomers, because they will start to reach the “magic” age of

\begin{quote}
142. \textit{Id.}
143. \textit{See id.}
144. Wondering whether Gilfix’s opinion has changed in the intervening years since he wrote his article, I e-mailed him and asked. Gilfix responded, discussing the multifaceted issues that can be faced by clients in an elder law practice (giving an example of the estate tax) and offered the following:

I feel even more strongly about 2 things. First, “elder law” is still viewed too restrictively by many practitioners. As I said in the original article, it is a field that must not limit its focus to an issue, like Medicaid planning, it must respond to the diverse planning needs of the client. A client expressing concern about the cost of long term care presents many more issues than just asset preservation planning. Also presented are myriad tax issues, depending on the size of the estate and nature of assets, management issues, and multi-generational planning issues.

E-mail from Michael Gilfix, \textit{supra} note 51.
145. \textit{See Elder Law Survey, supra note 11.}
146. \textsc{Vincent K. Grayson & Victoria A. Velkoff}, U.S. Census Bureau, \textsc{The Next Four Decades: The Older Population in the United States: 2010 to 2050} (2010), \textit{available at} \url{http://www.census.gov/prod/2010pubs/p25-1138.pdf} (providing information about “how the age structure of the overall population and the composition of the older population in terms of age, sex, race, and Hispanic origin are expected to change over the next four decades”). In the report, “older population” means sixty-five and older. \textit{Id.}
147. \textit{Id.} The number of Americans aged sixty-five and older is projected population 40.2 million in 2010. \textit{Id.}
\end{quote}
sixty-five in 2011. What is the impact of this population? Succinctly, this population projection will present challenges “to policy makers and programs, such as Social Security and Medicare. It will also affect families, businesses, and health care providers.”

By 2030, almost all of the baby boomers will have moved into that category of “older persons,” meaning that 19% of the population will be sixty-five or older in 2030, up from 13% in 2010. This increase will continue as the boomers continue to age, impacting the “oldest-old,” who are projected to be nineteen million in 2050. This aging of the population will also have an impact on the dependency ratio. This is relevant when examining the future viability of Social Security.

What of the future? As noted above, the Chairman of the Federal Reserve has indicated that the aging of American citizens is “putting upward pressure on the deficit.” This is not the first time that Chairman Bernanke has expressed concerns about the impact that the aging of America has had on the federal deficit and...

148. Id. (The word “magic” is somewhat tongue in cheek, but also recognizes the entrenched—and to some extent, realistic—view of age sixty-five as the threshold of “older,” “old age,” or eligibility for some programs, such as Medicare (keeping in mind that age sixty-five is no longer the threshold for full retirement age for Social Security)).
149. Grayson & Velkoff, supra note 146.
150. Id. at 3. There is a really helpful chart on the second page of the report showing the baby boomers’ relevance in “shaping the overall population.” See id. at 2.
151. The term “oldest-old” refers to those aged eighty-five and older. Id. at 3 n.6.
152. Id. at 3.
153. Id. Grayson and Velkoff stated the following in their report:
Dependency ratios are an indicator of the potential burden on those in the working-age population. The total dependency ratio is projected to increase from 67 to 85 between 2010 and 2050, the result of a large increase in the old-age dependency ratio . . . . The old-age dependency ratio sees a rapid increase between 2010 and 2030, from 22 to 35, as all of the baby boomers move into the 65 years and over category. After 2030, the old age dependency ratio continues to increase slightly to 37 by 2050. Id. at 3–4.
155. Bernanke, Testimony, supra note 74.
the future of Social Security and Medicare. In a 2006 speech, Chairman Bernanke, using Social Security Trustees’ interim projections, noted the following:

[B]y 2030—by which time most of the baby boomers will have retired—the ratio of those of working age to those sixty-five and older will have fallen from five to about three. By that time, older Americans will constitute about 19 percent of the U.S. population, a greater share than of the population of Florida today.


157. Bernanke, Speech, supra note 156. Bernanke examined the demographics from an economic perspective:

[T]he implications of demographic change can also be viewed from a broader economic perspective. As I will discuss, the broader perspective shows clearly that adequate preparation for the coming demographic transition may well involve significant adjustments in our patterns of consumption, work effort, and saving. Ultimately, the extent of these adjustments depends on how we choose—either explicitly or implicitly—to distribute the economic burdens of the aging of our population across generations. Inherent in that choice are questions of intergenerational equity and economic efficiency, questions that are difficult to answer definitively but are nevertheless among the most critical that we face as a nation.

Id. The Patient Protection and Affordable Care Act (PPACA) will have an impact on the solvency of Medicare. See, e.g., How the Affordable Care Act Will Make Medicare Stronger into the Future, HEALTHCARE.GOV, http://www.healthcare.gov/foryou/seniors/strengthening/index.html (last visited Nov. 11 2010) [hereinafter Affordable Care Act] (outlining how the PPACA will reduce Medicare waste, fraud, error, and abuse); Health Insurance Reform and Medicare: Making Medicare Stronger for American’s Seniors, HEALTHREFORM.GOV, http://www.healthreform.gov/reports/medicare/medicare.pdf (last visited Nov. 11, 2010) [hereinafter Health Insurance Reform].

Mr. Bernanke in the 2006 speech outlined some of the concerns that might be considered as reasons for those provisions of PPACA:

The outlook for Medicare is particularly sobering because it reflects not only an increasing number of retirees but also the expectation that Medicare expenditures per beneficiary will continue to rise faster than per capita GDP. For example, the Medicare trustees’ intermediate projections have Medicare spending growing from about 3 percent of GDP today to about 9 percent in 2050—a larger share of national output than is currently devoted to Social Security and Medicare together.

The fiscal consequences of these trends are large and unavoidable. As the population ages, the nation will have to choose among higher taxes, less non-entitlement spending, a reduction in outlays for
In addition, the Social Security Trustees’ report continues to discuss the solvency of Social Security as the baby boomers will begin to reach their full retirement ages.\textsuperscript{158}

Although significant attention is being paid to the baby boomers as the leading edge of this cohort turns sixty-five in 2011, it is not all about the boomers. Clients of all “elder ages” are facing issues, such as income security or paying for retirement,\textsuperscript{159} which have taken on a new importance as a result of the economic difficulties of the past few years.\textsuperscript{160} Clients who are not working may entitlement programs, a sharply higher budget deficit, or some combination thereof.

\textsuperscript{158} See, for example, Bd. of Trs., The 2009 Annual Report of the Board of Trustees of the Federal Old-Age and Survivors Insurance and Federal Disability Insurance Trust Funds, H.R. Doc. No. 111-41, at 69 (2009), available at http://www.ssa.gov/OACT/TR/2009/tr09.pdf, stating the following:

For the combined OASDI [Old Age, Survivors, and Disability Insurance program] trust funds to remain solvent throughout the 75-year projection period, the combined payroll tax rate could be increased during the period . . . benefits could be reduced during the period . . . or some combination of approaches could be adopted. Significantly larger changes would be required to maintain solvency beyond 75 years.

\textsuperscript{159} See generally Cong. Budget Office, supra note 154; Special Comm. on Aging, supra note 154.

\textsuperscript{160} See Deborah Thorne et al., The Increasing Vulnerability of Older Americans: Evidence from the Bankruptcy Court, 3 Harv. L. & Pol’y Rev. 87, 88–89 (2009). The authors comment on the economic downturn:

The rising proportion of older Americans in bankruptcy may warn of other social and economic problems. Our previous research indicated that medical problems are implicated in many of the bankruptcies of senior citizens. More recent issues, however, may foreshadow even greater numbers of bankruptcies among older debtors. The data we report on here were collected before the sharp reverses in the stock market that devastated many retirement plans. People who had assets to cushion the blow of rising housing costs or to deal with the unpaid portion of medical bills may now find themselves taking on debt, debt that makes them vulnerable for future bankruptcies. Even seniors with no investments in the stock market and homes that are paid off may find themselves sharply constrained. For example, reports have surfaced about rising numbers of elderly who cannot move into retirement communities because they cannot sell their homes; as a result, retirement communities have too many vacancies and older people who need care facilities are stranded in their homes.

\textit{Id.} at 88–89 (footnotes omitted).

be concerned that they may outlive their savings, and if they are lucky enough to find a job, may need to go back to work. Those baby boomers who are nearing retirement age may wonder whether they will have enough to retire. The solvency of


162. See, e.g., U.S. Bureau of Labor Statistics, Record Unemployment Among Older Workers Does Not Keep Them Out of the Job Market, ISSUES LAB. STAT., Mar. 2010, available at http://www.bls.gov/opub/ils/pdf/opbils81.pdf (discussing unemployment issues among older workers). Recent reports “suggested that the increased labor force participation of older workers reflects both the need of many near retirees to work after large losses in their retirement accounts and the need of older workers in general to ensure adequate postretirement incomes to address increased life spans.” Id. (citing Kristie Engemann et al., The Effect of Recessions Among Demographic Groups, FED. RES. BANK SAINT LOUIS (2010)), available at http://research.stlouisfed.org/publications/review/10/01/Engemann.pdf. The report goes on to discuss and note the correlation between change in pension types and older persons working, concluding the following: [T]he recession that began in December 2007 has affected all demographic groups, including older workers. Their unemployment rate, although lower than that for younger workers, recently reached record-high levels. Once unemployed, older workers tend to remain jobless for longer periods than younger workers. Despite the recession—or perhaps because of it—older workers continued to increase their participation in the job market, at least through mid-2009. Whether the long-term pattern of growing labor force participation rates among older workers will continue beyond the recession remains to be seen. Id. at 2.

Medicare and the out-of-pocket costs of health care, even for those on Medicare, are other issues to consider.\(^{164}\)

**IX. CHANGES IN LAWS AND PROGRAMS?**

What do Social Security and Medicare have in common for an elder law practice? They have to be considered a part of any planning that elder law attorneys do for their clients. Affording health care, living with disabilities or chronic health problems, and having enough money for long-term care are important for clients and important for elder law attorneys to discuss with clients. Will the clients incur large amounts of debt, for whatever reason, and need to consider bankruptcy as an option?\(^{165}\)

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164. One outcome of the PPACA is the projected extension of the viability of Medicare. See, e.g., Affordable Care Act, supra note 157; Health Insurance Reform, supra note 157 (citing The Bd. of Trustees et al., 2009 Annual Report of the Boards of Trustees of the Federal Hospital Insurance and Federal Supplementary Medical Insurance Trust Funds (2009), available at http://www.cms.hhs.gov/reportstrustfunds/downloads/tr2009.pdf) (comparing the Medicare “status quo” with “solutions” which will take effect with the new legislation)).

165. See Theresa J. Pulley Radwan & Rebecca C. Morgan, Today's Elderly in Bankruptcy and Predictions for the Elderly of Tomorrow, 6 NELA J. 1 (2010) (considering the reasons why the elderly file for bankruptcy protection); see also Frank & Gordon, supra note 132, at 20, 24–25 (discussing current housing and other financial issues facing the elderly). See Thorne et al., supra note 159, at 88. The authors stated the following:

The implications of a sharp rise in the proportion of older Americans in bankruptcy are particularly problematic because, unlike their younger counterparts, older Americans typically have fewer years left in the full-time workforce. Consequently, they will have a far more difficult time recovering from financial collapse. Younger people may well have another thirty years or more in the workforce after their bankruptcy filings, years in which they can rebuild retirement accounts, pay off mortgages, set aside some savings, and otherwise reestablish their financial security. Some will take on a second job or return to school for additional training. Unfortunately, those options are typically closed to people in their later years, who find themselves with few assets and unmanageable debts.
Laws change. Government programs change. As a result, the options for clients may change. Perhaps one of the biggest changes to occur in the last few years (or at least since 2007 when the prior article was written) has been the adoption of health care reform. Some of the changes phase in over time, so it will be some time before the full impact of the law’s changes is known.

Medicare coverage will cost higher-income beneficiaries more, although some changes may save beneficiaries money.

The bankruptcy data may also signal a significant change for intergenerational familial economic relationships.

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167. Id.

168. Beneficiaries with higher income thresholds are already paying higher premiums than the standard Part B premium for their Part B coverage. See 42 U.S.C. § 1395r(i) (2006). As a result of PPACA, the income thresholds for determining these increased premium rates stay at the 2010 level through 2019. See Patient Protection and Affordable Care Act § 5402 (adding 42 U.S.C. § 1395r(i)(6)). Additionally, starting in January 2011, these higher-income beneficiaries will also pay higher Part D premiums. See Patient Protection and Affordable Care Act § 3308 (amending 42 U.S.C. § 1395w-113(a)(1)(F), adding 42 U.S.C. § 1395w-113(a)(7), and amending 26 U.S.C. § 6103).


In 2011, the cost the beneficiary will pay for drugs while in the coverage gap will be reduced. See Patient Protection and Affordable Care Act § 3301, amended by Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, § 1101, 124 Stat. 1029 (2010); see also Medicare Program: Medicare Coverage Gap Discount Program Model Manufacturer Agreement and Announcement of the June 1, 2010 Public Meeting, 75 Fed. Reg. 25, 555–59 (May 26, 2010); Vicki Gottlich, Affordable Care Act and Medicare: 5 Points Elder and Special Needs Law Attorneys Should Know, 22 NAELA NEWS 1212–13 (2010).

Thereafter, other provisions will be phased in until 2020 when the gap will be closed and the beneficiaries will just have the twenty-five percent co-pay. See Patient Protection and Affordable Care Act § 3301, amended by Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, § 1101, 124 Stat. 1029 (2010).

Additionally, in 2011 there will no longer be out-of-pocket costs for some preventative services covered by Medicare, and there will be a free “health risk
The expansion of Medicaid coverage no later than 2014 to individuals under sixty-five who are not otherwise eligible will bear watching.\textsuperscript{170} The Patient Protection and Affordable Care Act (PPACA) also provides some opportunities for more community care options for those in need of long-term care, including the Community Living Assistance Services and Supports (CLASS) program.\textsuperscript{177}

\section*{X. \textit{It Is a Growing Practice Area}}

I think it is clear, from the research and from the attorneys’ answers to the elder law survey, that flexibility in an elder law practice is important\textsuperscript{172} in order for elder law attorneys to be responsive to the needs of the clients.\textsuperscript{173} It would be reasonable to assume that clients expect elder law attorneys to have knowledge of a variety of things. In order to effectively represent the client, the attorney needs to consider a number of options, programs, laws, and other variables.

In the future, clients, as they do now, will have specific concerns about health care and planning and paying for the long-term.\textsuperscript{174} Those are areas where elder law attorneys excel.\textsuperscript{175} Forty assessment” and a personalized plan of care for beneficiaries. See Patient Protection and Affordable Care Act §§ 4103–4 (amending 42 U.S.C. §§ 1395l, 1395x and adding 42 U.S.C. §§ 1395x(a) (2)(FF), (hhh)).\textsuperscript{170} See Patient Protection and Affordable Care Act §§ 2001(a)(1), 10201.


\textsuperscript{172} The responses to the question asking which areas of elder law would expand or contract are illustrative, with forty percent believing all areas listed will expand and forty-six percent believing none will contract. See Elder Law Survey, supra note 11. See supra notes 87–89 and accompanying text; see also Sabatino, supra note 2, at 108; Gilfix, Creation and Evolution of Elder Law, supra note 3.

\textsuperscript{173} I recognize that the ethics rules require competency on the part of the attorney, and I am not suggesting by this comment that elder law attorneys should represent clients in matters in which the attorneys lack competency. However, if the client needs are changing, then the attorneys should gain competency to address those changing needs. An example of the changing needs is special needs trusts, as used by Sabatino as an example. See Sabatino, supra note 2, at 107.

\textsuperscript{174} See Carole Fleck, Running out of Money Worse than Death: Older Americans’ Greater Fear is Outlasting Their Savings, Poll Reports, AARP BULLETIN (July 1, 2010), http://www.aarp.org/work/retirement-planning/info-06-2010/running_out_of_money_worse_than_death.html (discussing a recent poll by Allianz Life Insurance Company of North America in which sixty-one percent of respondents indicated that they had a greater fear of running out of money than dying.
percent of the attorneys think all of the elder law areas listed will expand in the next three to five years; planning for long-term care and special needs planning is a distant second, with eleven percent believing each of those two areas will expand.\textsuperscript{176} Forty-six percent think none of the areas listed will contract, although twenty-eight percent thought Medicaid would.\textsuperscript{177}

A. Why Will Elder Law Be a Vibrant Practice Area?

To me, there are a number of reasons why elder law will continue to be a vibrant area of practice. In fact, my list of reasons has expanded since 2007.\textsuperscript{178} First, the laws, regulations, and programs have become more complicated.\textsuperscript{179} It may be harder for clients to comprehend their meaning, and clients may need elder law attorneys more than ever before to help them.

Second, clients’ needs for planning have expanded to encompass many more factors than perhaps when elder law was in its infancy. Clients may not only need to plan for their estates, but also plan for paying for long-term care, aging in place, providing for a family member with a disability, and more.

Third, with budgets being what they are, there may be fewer dollars available to fund programs; and taken with my first point about the level of complexity, the knowledge elder law attorneys have about available programs and requirements becomes more valuable.\textsuperscript{180}

Ninety-two percent believe the U.S. has a retirement system crisis; and of those in the forty-four to fifty-five age group, slightly more than half expressed concern that they will not be able to pay for their basic costs of living when they retire).\textsuperscript{175} Sabatino notes the possibility of attorneys in other practice areas becoming versed in elder law topics, but not practicing elder law. \textit{See} Sabatino, \textit{supra} note 2, at 108.

\textsuperscript{176} \textit{See} Elder Law Survey, \textit{supra} note 11.

\textsuperscript{177} \textit{See id.} Keep in mind that I did not provide definitions of those practice areas and only used the word “Medicaid” that which might be interpreted to mean the availability of Medicaid benefits (contracting because of budget cuts) or Medicaid planning.

\textsuperscript{178} The reasons are not listed in any particular order.

\textsuperscript{179} One attorney’s response captured that thought succinctly: “We’re all getting older and it’s not getting any easier.” \textit{See} Elder Law Survey, \textit{supra} note 11.

\textsuperscript{180} \textit{See supra} note 179 and accompanying text.
Fourth, the characteristics of the boomers as a cohort\textsuperscript{181} may mean that they will want an attorney to help them with their planning.\textsuperscript{182} However, the baby boomers are not the only clients; other elders and members of their family also need elder law attorneys. For example, when a family member needs nursing home care, or a caregiver needs to know about programs and services, plans need to be made and documents need to be drafted.

Fifth, we have to recognize the role that human nature may play. Some people just do not plan, for whatever reason, or, as is often times the case, the clients are in a crisis and need help.\textsuperscript{183} Family dynamics prove important.\textsuperscript{184} There will be an increasing number of issues, some different than before, and, as a result, clients will need more help.\textsuperscript{185} This will lead clients to seek the

\textsuperscript{181} I recognize that the characteristics attributed to the boomers as a group may not apply to every individual in the baby boomer generation, but it is still interesting to consider those characteristics. See Kane, supra note 73; see also, e.g., MARGARET H. KREINER, OHIO ELDER LAW § 19.1 (2009) (noting how each new generation will be different and how elder law will change to fit the clients’ needs); VINCENT J. RUSSO & MARVIN RACHLIN, NEW YORK ELDER LAW AND SPECIAL NEEDS PRACTICE, § 1:21 (2009) (noting boomers’ expectations may be different from current clients because of different value systems).

\textsuperscript{182} In response to question eight “What is your view generally of the future of elder law as a practice area and why?” a fair number of those responding made some reference to demographics. See Elder Law Survey, supra note 11.

\textsuperscript{183} See, e.g., KREINER, supra note 181 (noting how each new generation will be different and how elder law will change to fit the clients’ needs). Charles F. Robinson touched on the failure to plan, noting that a big issue is how to merge real and perceived needs using as an example the first signs of chronic illness. Interview with Charles F. Robinson, supra note 125. Robinson notes that a sense of emergency is required to move individuals into acting. Id.

\textsuperscript{184} Family favoritism does exist and impacts both planning and caregiving. I always like to use the Smothers Brothers as an example when discussing how family favoritism comes into play in elder law. In 2009, in a blog on the New York Times, where the subject was a story about studies on family favoritism, the researcher interviewed Dr. Karl Pillemer, who noted “the Smothers Brothers were right.” Paula Span, Mom Always Liked You Best, N.Y. TIMES BLOG (Nov. 3, 2009, 1:41 PM), http://newoldage.blogs.nytimes.com/2009/11/03/mom-always-liked-you-best/.

\textsuperscript{185} Morgan, Elder Law in the United States, supra note 3, at 137–38 (quoting Robert Fleming, “[E]lder law will expand in lawyers’ (and the public’s) consciousness to include more guardianship, more non-tax-driven estate planning, and more consultative practices helping seniors deal with a variety of stressors and difficulties in their lives—like dealing with grandchildren, spendthrift children, pets and property, or recovering from scams and exploitation, or navigating an increasingly fragmented and balkanized benefits system.”) (alteration in original). One attorney described it this way:

Often in this Recession many older persons and their families do not know what is next or what to do next. It is natural for them to zipper their wallets and wait. Fewer elders are planning for the future. More
services of elder law attorneys. The paradigm designed by Charles Sabatino represents core values that will not change over time.186

Sixth, clients’ needs change. Mr. Sabatino gave special needs trusts as an example of how the practice might expand to encompass other areas.187 As I suggested earlier, consumer frauds, scams, and related issues, such as financial exploitation, are, in my view, things that need to be addressed more by elder law attorneys.188 For example, over the years there have been reports of abuses by agents under powers of attorney—one of the frequently used planning documents—and such abuses may not soon be curtailed.189 Elder law attorneys need to consider the possibility of

find themselves in crisis situations, often arising from what they did wrong or failed to do . . . . The market for Elder Law services is expanding as the Boomers and their parents age. More sophisticated private payment long-term care planning is necessary as Medicaid programs are becoming much more restrictive. In the short term the Elder Law market is contracting due to government disincentives aimed at Medicaid planning, as well as the [Recession]. Elder Law attorneys can encourage market expansion through enabling clients and their supporting individuals how to control their future before and after retirement, plan for quality care, maintain financial flexibility, and appreciate the risks if they do not take such actions.

See Elder Law Survey, supra note 11.

186. See Sabatino, supra note 2, at 105–07.

187. See id. at 107 (giving special needs trusts as an example of a new area of law practiced by elder law attorneys).

188. See supra note 136 and accompanying text.

189. Turney P. Berry, David M. English & Dana G. Fitzsimons Jr, Disclose. Disclose! Disclose? Longmeyer Distorts the Trustee’s Duty to Inform Trust Beneficiaries, PROB. & PROP., July/Aug. 2010, at 12, 14 (“The current high unemployment rate and severe market losses will no doubt tempt others to try to drain resources from the elderly through abuses of powers of attorney and positions of confidence.”); Lawrence A. Frolik, Protecting The Elderly: Keep Powers of Attorney in Check, TRIAL, April 2009, at 42, 43 (noting “[h]ow prevalent are these abuses? We don’t really know. Some indicators suggest that financial exploitation of the elderly—including theft, forgery, fraud, undue influence, and coercion—is widespread and on the rise. Abuse of fiduciary duties, including those related to durable powers of attorney must also be prevalent, but many of them never come to light—or before a court.”); Andrew H. Hook & Lisa V. Johnson, The Virginia Uniform Power of Attorney Act, 44 U. RICH. L. REV. 107, 108, 128 (2009) (noting “[Durable Power of Attorney] is an essential disability and incapacity planning tool which allows a principal to appoint an agent to manage their property, finances, and personal affairs . . . . [and] the problem of power of attorney abuse appears to be slight compared to the volume of powers of attorney that are used legitimately. Where abuse occurs, the problem is typically abuse of a valid power of attorney or a power of attorney obtained through duress . . . .”) (footnotes omitted).
such problems, counsel their clients about them, and incorporate safeguards where appropriate in the planning documents.\textsuperscript{190}

Seventh, and significantly, job satisfaction of elder law attorneys will continue to draw and keep attorneys in this practice area.\textsuperscript{191} As the survey indicated, the attorneys like what they do and appear to intend to keep doing it.\textsuperscript{192}

\textbf{B. Considerations for the Future of the Elder Law Practice}

The future comes with some things to consider, however.\textsuperscript{193} First, as noted earlier, a practice is subject to changes in laws, regulations, and programs, so some level of diversification is important.\textsuperscript{194} A significant portion of elder law practice is state-specific and that also needs to be considered when thinking about the future. There seems to be an increase in litigation in certain areas;\textsuperscript{195} so will that affect the scope of an attorney’s practice or effect job satisfaction?

\begin{itemize}
\item \textsuperscript{191} Forty-two attorneys (58\%) in the elder law survey indicated they chose to practice elder law because of job satisfaction. See \textit{Elder Law Survey}, supra note 11.
\item \textsuperscript{192} See \textit{Elder Law Survey}, supra note 11.
\item \textsuperscript{193} Although the survey responses could be described as positive, as discussed in supra note 192, there were some cautionary comments offered.
\item \textsuperscript{195} Doug Chalgian, \textit{Elder Law Litigation and the Lessons I’ve Learned}, MICH. B. J., Jan. 2010, at 38, 41 (stating “[e]lder law litigation is on the rise.”).
\end{itemize}
Second, government programs may be unlikely to sustain benefits at today’s level. As noted by some of the attorneys, it appears that the areas of elder law may expand, some more than others, and it is possible that others will contract.

Third, the economy definitely has and will continue to have an impact, both positive and negative, on the practice. Some clients may be more inclined to do things on their own by using the resources available on the Internet. Clients struggling to make ends meet may put off any kind of long-term or estate planning.

196. See Sabatino, supra note 2, at 108. For example, some attorneys commented on public benefits, especially Medicaid: “[M]edicaid programs are becoming more restrictive.” As Medicaid rules become more restrictive, and the Medicaid program contracts, I think it only follows that the practice of elder law will shrink. This already seems to be the case since the 2006 changes in the law.; “Those who practice the old fashioned way of emphasizing asset protection planning will probably see their practice decline significantly.”; “Too many attorneys believe Elder Law is only Medicaid planning. Medicaid is only a tool to help your client get what they need. Elder Law encompasses so much more.” See Elder Law Survey, supra note 11.


198. See id.; see also Elder Law Survey, supra note 11.

199. A recent article by Jason A. Frank and Fay L. Gordon discusses the changes in the elder law practice from the recession and notes a direct impact on the practice because of the recession. Frank & Gordon, supra note 132. They describe elder law practice as “driven by both case flow and cash flow.” Id. They note elder law attorneys reporting fewer clients, more clients having problems paying their bills and a change in the client’s needs for counseling. Id. Some clients are drafting their own legal documents or having attorneys only doing part of the work. Id. The article makes suggestions on how elder law attorneys may adapt to these changes, including changing fees and costs, and marketing strategies. Id.

Charles F. Robinson referenced a multidisciplinary practice group meeting daily for coffee, and commenting about the emotions of people, the economy, and politicians (local, state, and federal levels). Interview with Charles F. Robinson, supra note 125. Robinson noted that these emotions factor into determining where we are going. Id. No one is talking about problems and solutions but focusing on political ideology instead. Id. He thinks these emotions are “clouding the crystal ball. Until we can get back to problem solving at all levels, our problems are going to get worse.” Id.

200. Frank & Gordon, supra note 132, at 22–24.
Fourth, as the practice expands, there is more competition, and not just from other attorneys. There are a number of other professionals who offer services for elders and their families, often not in conjunction with elder law attorneys but in competition with them.

Fifth, it is worth noting the points raised by Kohn and Spurgeon in their article about elder law in the academic setting. If law schools play a role in the development and longevity of a practice area, their findings and comments bear further study.

Sixth, the role of technology must be considered. It comes as good and bad. So much information is now available on the internet for those who know how to find it. Many government agencies are putting increasing amounts of information on the web where it can be easily accessed. With the economy, some clients may be putting off legal work, or looking to save money by finding forms and information on the internet.

201. A few attorneys commented about the increasing number of elder law attorneys. A few of those comments were couched in terms of the competence of attorneys. See Elder Law Survey, supra note 11 (“It will continue to grow and attract attorneys who want to make a lot of money.”; “I expect significant growth, which will attract an influx of attorneys from other practice areas. Already I see a number of dabblers . . . [which] will create further growth for the specialists who get to fix their mistakes.”) Charles F. Robinson noted that attorneys are moving from other practice areas into elder law and thus there is increased competition from these “new to elder law” attorneys. Interview with Charles F. Robinson, supra note 125.

202. See infra note 203 and accompanying text.

203. See, e.g., Robinson, supra note 4. This was also mentioned by one attorney about the future, noting “[a]t the same time other professionals—such as financial planners, accountants, care managers, and facility staff members—are counseling elders and their families in areas where Elder Law attorneys have predominated.” See Elder Law Survey, supra note 11.


205. A discussion of any correlation between law school curriculum and development of practice areas is beyond the scope of this article but bears further thought.

206. See, for example, Frank & Gordon, supra note 132, at 25 stating the following:

One attorney has noted a significant change in retaining clients from his phone consultations. He said that a year ago 75 percent of his phone and in-person consultations resulted in his being retained; this has decreased to about 25 percent. He is concerned that potential clients are calling with questions to complete their own legal work when they are unable to hire a lawyer.
Technology is a given in the law practice, though the extent to which it is used varies. As noted earlier, I asked “[w]hat changes do you anticipate making to your elder law practice in the next year (or have made in the last year)?”

Forty-eight percent (thirty-five) of the attorneys indicated a greater use of technology and thirty percent (twenty-two) indicated the use of social media for marketing. All kinds of technology and social media are being used in elder law: web pages, blogs, Facebook, Twitter, and more. Firm web pages seem routine and may be expected by clients. The role, importance, and effectiveness of technology need to be understood. For example, a website and a blog provide clients with two points of entry to an elder law attorney.

However, in using technology, it is important to consider the audience. Some clients are more technologically adept than others, although that is not necessarily age-specific. Consider as well who is looking for the information—is it the client or is it a younger family member who may be extremely sophisticated about accessing online information? Some technology provides an easy and inexpensive way for an attorney and client to communicate, such as using videoconferencing systems over the internet. If the client is not able to leave home without great effort, videoconferencing can allow the client to consult with the attorney in comfort and safety.

207. See Elder Law Survey, supra note 11.
208. See Elder Law Survey, supra note 11 and accompanying chart.
210. See id.
211. Elder Law Survey, supra note 11. For a discussion about using technology and social media, see Ward, supra note 209.
212. Interview with Charles F. Robinson, supra note 125.
214. Interview with Charles F. Robinson, supra note 125 (noting advantages of using Skype and similar types of technology to consult with clients).
Seventh, consider the role of medical technology and lengthening life. How will that impact the practice of elder law? For example, what if there is a cure for dementia? Will there be less need for guardianships and more need for long-term planning?

Eighth and finally, one more point to consider about the future of the elder law practice—it would seem that the first generation of elder law attorneys may soon be reaching the point in their practices where, if they plan to retire, they may start doing so. If a number of this first generation do in fact retire, what, if any, impact will this have on the future of the practice?

XI. CONCLUSION

“You’ve Got to Be Careful If You Don’t Know Where You’re Going, ’Cause You Might Not Get There!”

—Yogi Berra

As younger adults, the assumptions we may have held for our future as “older persons” likely have changed, rocked by economic circumstances—such as loss of jobs, pensions, and retirement portfolios—coupled with rising health care costs, insufficient retirement savings, and a general apprehension about the future. Elder law has become an “umbrella” practice. It is an established practice area, although I believe that certain areas of elder law are more susceptible to change than others.

There is more to elder law than the demographics, and it continues to be a practice area where clients will need the services provided by elder law attorneys. The future for all of us, those

215. Charles F. Robinson noted that even though it is hard to predict the future, there is a need for a new paradigm in this area. Id. Since, in his opinion, none of the existing rules work, there would be a significant benefit in figuring out new rules. Id. Without a breakthrough on Alzheimer’s disease, the numbers there will demolish the entire system. Id. There are three growth areas: baby boomers, children with autism, and Alzheimer’s disease. Id. We need a new paradigm to deal with chronic illnesses and to handle long term care issues. Id. (noting some innovations have been established, such as the Program of All-Inclusive Care for the Elderly (PACE), and noting that these are without enough spaces for everyone who would benefit).

216. This article is one effort at examining some of the issues; there are more questions to be asked and more issues to be considered.


218. See supra note 31 and accompanying text.
older persons and those soon to be older persons, may not be what we thought it would be.

One respondent to the elder law survey echoed my thoughts in the answer to why I think the practice of elder law has a solid future: “[w]e’re all getting older and it’s not getting any easier.” Elder law attorneys can help us know where we are going and make it easier for us.

219. See Elder Law Survey, supra note 11.