

Elder Law: a new practice area comes of age

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In recognition of the world's rapidly aging population, the United Nations has declared 1999 the International Year of Older Persons. The purpose of the Year is to foster international awareness of the importance of the seniors' role in society and the need for intergenerational respect and support. This is especially significant in Canada, where our seniors make up 12 percent of our total population and will account for an estimated 23 percent of the population by 2041.

The Year will also give us a chance to focus on legal and ethical issues affecting older persons. In this regard, a number of provincial divisions of the Canadian Bar Association intend to hold conferences on elder law.

The term "Elder Law" may still be unfamiliar to many in Canada but likely not for much longer. Elder Law increasingly refers both to a loosely defined group of legal issues and to a unique multidisciplinary approach that recognizes the connections among the legal, social and health needs of older persons and their families.

Its emergence springs from demographic trends, from the concern that older persons are at great risk of losing personal and financial autonomy because of physical and mental impairment and from the fact that older persons and their families are more mobile and more diverse than ever before, as care-giving within families frequently takes place over great distances and in a growing variety of home and community-based settings.

Elder Law practitioners will play an important role in helping clients and professionals serving this population, plan for and manage incapacity, protect against abuse and exploitation and maintain personal autonomy. Elder Law encompasses a broad range of issues, including:

- estate, life, financial and disability planning;
- legal capacity counseling;
- nursing home residents' rights and quality of long-term care issues;
- elder abuse and exploitation;
- age and disability discrimination in employment and housing; and
- senior divorces, marriages and common law unions (e.g. December-December and May-December marriage contracts).

Elder law attorneys are expected to bring to their practice more than just legal expertise. They should understand how to counsel older persons, be aware of the special ethical issues that may arise in the course of the representation, and be familiar with the aging process and the network of aging services that might meet their client's needs.

Chief amongst the ethical issues confronting lawyers who practice for the elderly is answering the question: "Who is the client?" A second difficult matter is how to determine whether the client has the capacity to make decisions and to sign documents.

As Ontario lawyer Milton W. Zwicker point out. "Elder Law is not about wills and estate planning as most lawyers believe. It's about elder care, with law being only a part. Thus, you must bring to this area more than expertise in the appropriate area of law.

"You must understand and cater to the special needs of the elderly," says Zwicker. "This requires an 'elder-friendly' office, one that can assist older clients with a range of legal and quasi-legal matters. Developing your practice in this new area is an opportunity to investigate how you can offer legal services in a creative way."

In the United States, Elder Law is one of the fastest-growing areas of law. Approximately 25 state bar associations now include Elder Law sections or committees, which are engaged in a variety of tasks including information-sharing and support for members, education and training of the legal community, consumer education and advocacy.

In Canada, publicly funded elder law services have not yet developed to any great degree, with the exception of the Advocacy Centre for the Elderly (ACE) in Toronto. Judith Whal, its Executive Director, explains that ACE is a community legal clinic that provides legal services to low-income seniors in Ontario.

Open since 1984, and funded by the Ontario Legal Aid Plan, ACE is run by five lawyers and four support staff and provides direct client service, including advice and representation, before courts and tribunals, to approximately 3,000 seniors each year. ACE lawyers and service providers to seniors on elder law issues.

Given demographic changes, Elder Law will be a necessary feature of every legal practice in the future. Arthur I. Fish, a former sole practitioner now practicing with Borden & Elliot in Toronto, notes that “Canadian lawyers will increasingly find themselves serving older clients or family members seeking to protect or assist older relatives.

“It is likely that lawyers who practice in estates and trusts or family law will be the first to experience these new client demands,” said Fish. “Over time, however, the banking, financial and insurance industries will increasingly call for legal advice on issues that arise in dealing with older Canadians.”

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Family law lawyers are also seeing a burgeoning new practice area as they address such issues as senior divorces, mental capacity and guardianship issues. Howard J. Feldman, a Toronto family law practitioner, finds “the recent surge of seniors with family law problems both amazing and distressing: in short, octogenarian separation is hard to understand.

“One needs a whole new set of skills and a handle on a variety of associated issues to serve this community well,” Feldman observes. “In an instant, the family law lawyer is, or must become, an expert in elder law.”

The problems of our aging population are going to become more intense. The Canadian Bar Association must continue to foster the debate of such social issues as discrimination against the elderly, housing and long-term care, economic security, adult protection legislation, the ethics of health care, and the provision of legal services to the elderly.

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Les aînés: un créneau en croissance

À l'occasion de l'Année internationale des personnes âgées, des divisions de L'ABC entendent tenir des conférences sur le droit des aînés. Cette nouvelle discipline se définit grosso modo comme une série de questions légales utilisant une approche multidisciplinaire et reflétant les liens entre les besoins spécifiques des aînés en matière de soins de santé, de services juridiques et de services sociaux.

Les avocats, avocates et notaires qui représentent et conseillent les aînés peuvent grandement les aider à planifier en vue de leur incapacité éventuelle, les protéger contre l'exploitation et les abus, et faciliter le maintien de leur autonomie. Les champs d'intervention comprennent la planification financière et successorale, la planification en vue de l'incapacité, les droits des résidents des maisons de soins, les protections contre la discrimination en matière d'emploi et de logement, etc.

Conseiller efficacement les personnes âgées et leur familles exige plus que la seule compétence juridique. Il faut savoir comment s'adresser à elles, se familiariser avec les ressources disponibles pour répondre à leurs besoins propres, connaître le processus du vieillissement et les questions éthiques qui peuvent se soulever en cours de mandat.

Selon Milton W. Zwicker, avocat ontarien, « le droit des aînés ne se limite pas aux testaments et à la planification successorale. Développer ce segment de marché vous oblige à trouver des façons créatives de fournir des services juridiques».

À la différence de États-Unis où le droit des aînés compte parmi les secteurs d'activités en expansion rapide - , le Canada n'a pas encore développé des services juridiques financés par des fonds publics sur une large échelle.

Avec la tendance démographique qui se dessine (on estime que les aînés qui représentent actuellement 12% de la population canadienne, constitueront 23% de celle-ci en 2041), il y a fort à parier que le droit des aînés deviendra une spécialité courante dans l'avenir.

«Les juristes oeuvrant en droit familial et successoral seront probablement les premiers à devoir répondre aux besoins de cette nouvelle clientèle mais, avec le temps, la demande proviendra vraisemblablement de plus en plus des institutions financières, bancaires et d'assurances qui auront à traiter avec une clientèle plus âgées », prédit Arthur I. Fish avocat chez Borden & Elliot à Toronto.

Pour Howard J. Feldman, un avocat oeuvrant en droit de la famille, un conseiller juridique doit présenter de nouvelles aptitudes et compétences afin de bien servir sa communauté.