

Coordinating Representation

How Business and Elder Law Counsel Can Work Together to Meet Clients' Needs

Elder law encompasses a wide range of legal fields in a single case. One such area is business law. Business owners are not immune to the problems inherent in aging or sudden disability. In fact, business ownership may add a layer of complexity to planning that requires the expertise of a business attorney. Likewise, when looking toward business succession planning or developing contingency plans for an owner's sudden disability, a business attorney might want to call on the expertise of an elder law attorney to make certain that any plan is either compatible with public benefits planning or provides the necessary coverage to pay for needed care.

A typical scenario might go like this: Ed is 52 years old. After retiring from the military, he started a golf shop that he owns with his buddy, Steve. Ed had a stroke two months ago

and has been in a rehabilitation facility ever since. It does not appear that he will fully recover and be able to return to the shop full time, if at all. Ed's wife, Diane, comes to you with two primary concerns: How does she pay for Ed's continued care? What income is available to her to support a family that includes minor children?

As an elder law attorney, you would need to consult a business attorney to advise on how the business ownership affects her questions. First, understanding how the business is structured and owned can help determine how the ownership interest will affect eligibility for Medicaid or veterans' benefits. Whether Ed's interest can be transferred or sold affects what kind of planning can be done to protect assets to achieve eligibility for public benefits.



By Jennifer L. VanderVeen

FAST FACT

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Steve has concerns about how the shop operations will be affected by Ed's disability, since Ed handled the bills and bookkeeping. As a business attorney, you would need to consult an elder law attorney so that any actions you take with respect to the business don't adversely affect Ed's public benefits eligibility.

Let's start with how an owner's business operations might be affected by a sudden disability. All business owners should have powers of attorney to set out not only their preferences for who should act on their behalf if they become incapacitated, but also what powers should be authorized. Michigan law can be unclear when it comes to the powers authorized under a power of attorney. Unlike the Uniform Powers of Attorney Act¹ or acts in states such as Indiana² or Illinois,³ Michigan statutes do not provide a "blueprint" of powers to be given under a power of attorney.⁴ This gives attorneys a relatively blank slate on which to craft a list of powers granted to an

agent. Additionally, powers of attorney granted in conjunction with certain types of business transactions are subject to a lower standard for execution.⁵ Business owners might have two separate powers of attorney: one for business relations and one for personal matters. If so, it is essential that those who have power delegated to them are aware of each other's authority and can work together.

Going back to our client scenario, one of the threshold issues for addressing Diane's and Steve's concerns is finding out who has authority to act on Ed's behalf. If Steve is running the business, the answer will depend on how the business is structured and how Steve and Ed divided responsibilities between themselves and any employees. Steve will also need to work with Diane to determine who is in charge of Ed's personal finances and who has authority to speak for the business.

What if there are no powers of attorney? The only available option may be to petition the court for a conservatorship. Under this scenario, the court will determine who manages Ed's finances, including his ownership interest in the business. A conservatorship does not need to be an all-or-nothing proposition. Working together, the elder law and business attorneys can identify the areas that need authorization for action to be taken and can craft the conservatorship to cover those gaps.

A second issue in this situation is income. Diane will presumably need some type of ongoing cash flow to support her family and pay for Ed's care. Depending on how income or profits from the business have been handled, there could be a negative effect on Ed's Social Security disability benefits. Social Security disability is based on one's lifetime average earnings—assuming that the work credit requirement has been met.⁶ Part of the requirement is that a certain number of credits must be earned within the 10 years before onset of a

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disability.⁷ If Ed hasn't been paying FICA taxes on his earnings or hasn't earned enough over the past 10 years to meet the work credit requirement, his Social Security disability may be in jeopardy. Diane will need to know what her rights are and whether financial assistance from the business may be forthcoming. Concerning any buy/sell or employment agreements, the business attorney can inform Diane of her rights. The elder law attorney can then incorporate those pieces into the disability puzzle. The Veterans Administration (VA) may also provide assistance in the form of a disability pension if Ed's medical expenses exceed his available income.

A related issue is how Diane will finance Ed's ongoing care. Securing Social Security disability is important for enrolling in Medicare. Unfortunately, there is a two-year waiting period for Medicare after Social Security disability approval,⁸ so Diane could face two years of payments for expensive health treatments—including home care or long-term facility care for Ed—before Medicare begins to help. Keep in mind that Medicare only pays for home care and long-term facility care in limited circumstances.⁹

What other options are available? Diane should consult with Steve to determine the possibility of continuing health coverage through the business. Do any agreements between Steve and Ed outline what the business pays for in the event of a disability? Business counsel should advise clients to address these types of circumstances, and may want to consult with an elder law attorney regarding issues that may arise and how to structure the various business agreements to avoid interfering with any form of public benefits eligibility.

Diane may be able to look to the VA for Ed's healthcare coverage; depending on his veteran status and available assets, he may be eligible for coverage.¹⁰ Many elder law attorneys are accredited by the VA to advise veterans on their eligibility and the steps they need to take to receive coverage.

Finally, Medicaid is the last resort for funding long-term or home care. Business assets are generally only exempt for purposes of Medicaid eligibility if the owner intends to return to work. In the short term, this strategy might work. But if Ed doesn't fully recover, the business attorney may need to assist the elder law attorney in showing that selling Ed's interest in the business would create a hardship for Steve or that the business interest is a nonsalable asset.¹¹ If Steve plans to buy Ed's interest in the business, the elder law attorney should also advise on structuring the buyout to maintain public benefits eligibility while still providing assets and an income stream to Diane.

Cases involving a small business owner's disability can be challenging. However, a coordinated effort by elder law and business counsel can ensure that both the business and the family are protected while providing the best care possible for the owner. ■



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ENDNOTES

1. Uniform Power of Attorney Act, Art 2 (2006).
2. Ind Code § 30-5-5-1 *et seq.*
3. 755 Ill Comp Stat 45/3-1 *et seq.*
4. MCL 700.5501 *et seq.*
5. MCL 700.5501(7).
6. Social Security Administration, *Social Security Benefit Amounts Disability Planner: How You Qualify* <<https://www.ssa.gov/planners/disability/dqualify.html>>. All websites cited in this article were accessed November 22, 2017.
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