

# Family Matters in an Elder Law Practice

by  
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## Introduction

The title to this essay has multiple meanings, depending on your view of the practice of elder law. Am I saying *family* matters? Or, am I saying family *matters*? Or, perhaps, I am saying both. I intended the title to be somewhat cryptic, because it is true in an elder law practice that often *family* matters, and sometimes the subject of the representation is about a family's *matters*. In this piece, I endeavor to briefly examine the role of family (especially as caregivers), ethical issues, family dynamics and the implications on the representation of the client when a family is involved in the client's life, along with a few thoughts and recommendations. With this volume of the *Journal of the American Academy of Matrimonial Lawyers* devoted to elder law, I thought it an appropriate topic for attorneys who practice family law as well as those who practice elder law. Part I looks briefly at the role of family, especially caregivers. Part II discusses family dynamics. Part III offers a number of suggestions for handling the various issues that occur. Part IV, the conclusion, answers the question I opened with, family matters.

## I. The Role of Family with the Elder Law Client

Those who have practiced elder law for some time know that it is not that unusual for a family member to be involved with the client in some way.<sup>1</sup> Often the elder client is being helped by a

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<sup>1</sup> See *Aspirational Standards for the Practice of Elder Law With Commentaries*, 2 NAELA J. 5, 7 (2005), [https://www.naela.org/App\\_Themes/Public/PDF/Media/AspirationalStandards.pdf](https://www.naela.org/App_Themes/Public/PDF/Media/AspirationalStandards.pdf) [hereinafter *Aspirational Standards*]

family member, or a family member is the caregiver. The family member's involvement may be as simple as the family member driving the parent to the attorney's office for a meeting. It may be more complicated, with the family member and client involved in some joint matter. In other instances, a family member may serve as a fiduciary for the client. Typically the family member is helping the elder, and doing a splendid job. Unfortunately, in other instances, the family member's involvement may become harmful, for example, when the family member is exerting undue influence over the client or in some way abusing or exploiting the client.

#### A. *Family as Caregivers*

In many instances a family member is a caregiver, and for most it is a positive experience. A significant number of family members will find themselves as caregivers for an elder relative at some point in time.<sup>2</sup> Caregiving is a full time job, a true 24/7/365 type of job. It is an important job. It is important for the elder law attorney to know if there is a family member providing care for the client and consider the legal matters that may arise from that relationship.<sup>3</sup> There are numerous resources available

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(specifically Standard A.1, Client Identification, and comments to Aspirational Standard A.1). The comment notes that “[i]n some cases, the client will have an initial meeting with the Elder Law Attorney; but in other cases, a family member may have an initial meeting with the Elder Law Attorney to discuss matters pertaining to the client without the actual client being present. Other times, the family member may accompany the client to the initial meeting.” *Id.* at 7. At this writing, the NAELA Aspirational Standards are undergoing revision.

<sup>2</sup> AARP PUB. POL'Y INST. & NAT'L ALLIANCE FOR CAREGIVING, CAREGIVING IN THE U.S.: 2015 REPORT 6 (2005), [http://www.caregiving.org/wp-content/uploads/2015/05/2015\\_CaregivingintheUS\\_Final-Report-June-4\\_WEB.pdf](http://www.caregiving.org/wp-content/uploads/2015/05/2015_CaregivingintheUS_Final-Report-June-4_WEB.pdf). One of the key findings in the report is that

[a]n estimated 43.5 million adults in the United States have provided unpaid care to an adult or a child in the prior 12 months. About 18.2% of the respondents interviewed reported being caregivers. The estimated prevalence of caring for an adult is 16.6%, or 39.8 million Americans. Approximately 34.2 million Americans have provided unpaid care to an adult age 50 or older in the prior 12 months.

*Id.* (citations omitted).

<sup>3</sup> The legal matters can run the gamut from naming the caregiver as fiduciary, to the client signing a personal care contract with the caregiving child, to

for family caregivers<sup>4</sup> and many reasons family members serve as caregivers. As one resource discussing caregiving explains,<sup>5</sup> the impact of family caregivers on the elder relative cannot be underestimated:

Family caregivers play a key role in delaying and possibly preventing institutionalization of chronically ill elderly patients. Although neighbors and friends may help, about 80% of help in the home (physical, emotional, social, economic) is provided by family caregivers. When the patient is mildly or moderately impaired, a spouse or adult children often provide care, but when the patient is severely disabled, a spouse (usually a wife) is more likely to be the caregiver.<sup>6</sup>

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unequal distributions under a will, to claims of undue influence asserted by the non-caregiving children against the caregiving sibling.

<sup>4</sup> See, e.g., AARP, *Caregiving*, <http://www.aarp.org/home-family/caregiving/> (last visited May 1, 2016); Admin. for Cmty. Living, *Administration on Aging (AoA)*, *National Family Caregiving Support Program (OAA Title III)*, [http://www.aoa.acl.gov/AoA\\_Programs/HCLTC/Caregiver/](http://www.aoa.acl.gov/AoA_Programs/HCLTC/Caregiver/) (last visited May 1, 2016) (“provides grants to States and Territories, based on their share of the population aged 70 and over, to fund a range of supports that assist family and informal caregivers to care for their loved ones at home for as long as possible”); Family Caregiver Alliance, *National Center on Caregiving*, <https://www.caregiver.org/national-center-caregiving> (last visited May 1, 2016) (“works to advance the development of high-quality, cost-effective policies and programs for caregivers in every state in the country. Uniting research, public policy and services, the NCC serves as a central source of information on caregiving and long-term care issues for policy makers, service providers, media, funders and family caregivers throughout the country.”).

<sup>5</sup> THE MERCK MANUAL (PROFESSIONAL VERSION), <http://www.merckmanuals.com/professional> (last visited May 1, 2016).

<sup>6</sup> Daniel B. Kaplan & Barbara J. Berkman, *Family Caregiving for the Elderly*, MERCK MANUAL PROF. VERSION, <http://www.merckmanuals.com/professional/geriatrics/social-issues-in-the-elderly/family-caregiving-for-the-elderly> (last updated July 2013). The section continues:

The amount and type of care provided by family members depend on economic resources, family structure, quality of relationships, and other demands on the family members’ time and energy. Family caregiving ranges from minimal assistance (eg, periodically checking in) to elaborate full-time care. On average, family caregiving consumes about 4 hours a day.

Although society tends to view family members as having a responsibility to care for one another, the limits of filial and spousal obligations vary among cultures, families, and individual family members. The willingness of family members to provide care may be bolstered by supportive services (eg, technical assistance in learning new skills, counseling services, family mental health services) and supplemental

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Consider the number of family members providing care, and the likelihood of a client being cared for by a family member increases dramatically. According to a recent report,<sup>7</sup> in the United States “[t]here are 40.4 million unpaid caregivers” for those individuals who are at least 65 years old. Within that 40.4 million caregivers, “nine-in-ten are providing care for an aging relative, and a plurality is caring for a parent.”<sup>8</sup> A Bureau of Labor Statistics report on uncompensated caregiving for elders released in September of 2015 reports the data in a number of ways, including activities, amount of time spent, caregiver age, and family structure.<sup>9</sup> When increasing longevity is factored into the need for caregiving, the planning for an elder law client’s needs becomes more complex,<sup>10</sup> as if it were not already complicated enough.

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services (eg, personal care [assistance with grooming, feeding, and dressing], home health care, adult day care, meals programs). Supplemental services may be provided on a regular schedule or as respite care for a few hours or days.

*Id.*

<sup>7</sup> Renee Stepler, *5 Facts About Family Caregivers*, PEW RES. CTR. (Nov. 18, 2015), <http://www.pewresearch.org/fact-tank/2015/11/18/5-facts-about-family-caregivers/>.

<sup>8</sup> *Id.* at *Fact One* (citing to Bureau of Labor Statistics, *Unpaid Eldercare in the United States—2013–14 Summary*, #USD15-1851 (Sept. 23, 2015), <http://www.bls.gov/news.release/elcare.nr0.htm>).

<sup>9</sup> Bureau of Labor Statistics, *supra* note 8.

<sup>10</sup> See, e.g., Janice I. Wassel & Neal E. Cutler, *Family Aging and the Practice of Elder Law: A Financial Gerontology Perspective*, 3 NAELA J. 67, 71 (2007). The authors note as well that increased longevity means that the roles played by family members will continue much longer than might have been true in the past.

Improvement in life expectancy has added more than years to life; it has added years to a person’s responsibilities in a family role as son, daughter, (daughter-in-law, son-in-law), parent, spouse, and grandparent. This longevity factor alone has had profound consequences for family aging. Recent changes in other demographic factors—such as the timing of marriage, divorce, and fertility—are simultaneously altering the number of years spent in family roles, thereby changing the demands on families and family members and their resources. Financial Gerontology and Elder Law practitioners need to consider these factors when advising middle-aged or older clients and their families.

*Id.* at 69.

## B. Family Favoritism

Those growing up in the 1960s will remember the Smothers Brothers,<sup>11</sup> a comedy duo popular in that time and beyond. Besides being brothers, they were perhaps prescient regarding family matters in an elder law practice, that is the issue of family favoritism. Despite what the client might say to the attorney, there is a likelihood that the client does have a favorite child. In the words of the Smothers Brothers, “Mom always liked you best.”<sup>12</sup> Researchers have shown that family favoritism really is a “thing” and that it can have significant implications on the dynamics of the family.<sup>13</sup> A 2009 article in the *New York Times* cited researchers who have studied the issue of family favorites.<sup>14</sup> If you are not an only child, you may be in for a shock from the results of the following research:

The notion that parents cherish all their children equally—or at least say they do—is so entrenched in our culture that colleagues warned Karl Pillemer, a gerontologist at Cornell University embarking on the

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<sup>11</sup> The Smothers Brothers, <http://www.smothersbrothers.com/> (last visited May 1, 2016). For those unfamiliar with their work, here is a brief explanation from their biographies: “The Smothers Brothers have been described as comedic treasures, comic geniuses, rare, original and peerless. Time has been an essential ingredient in their success. They have been considered ahead of their time, masters of timing and practitioners of timeless comedy. Justifiably, time has provided another term . . . An American Classic.” The Smothers Brothers, *Smo Bro Bio: The Smothers Brothers Biography*, [http://www.smothersbrothers.com/smobro\\_bios/sb\\_bio\\_.html](http://www.smothersbrothers.com/smobro_bios/sb_bio_.html) (last visited May 1, 2016).

<sup>12</sup> The comedy routine entitled “Mom Always Liked You Best” was released on an album by the same name on August 17, 1965, by Mercury Records. See, e.g., Karen S. Gerstner, *A Message to Clients . . . Avoiding Probate Court Litigation*, 22 PROB. & PROP. 56 (Mar./Apr. 2008) (“Whether you go back to Cain and Abel, or only as far back as the Smothers Brothers (“Mom always liked you best”), sibling rivalry is the chief factor in many disputes arising after a parent dies.”) *Id.*

<sup>13</sup> See, e.g., Paula Span, *Depending on the Favored Child*, THE NEW OLD AGE BLOG, N.Y. TIMES (Oct. 20, 2012), [http://newoldage.blogs.nytimes.com/2012/10/20/depending-on-the-favored-child/?\\_r=0](http://newoldage.blogs.nytimes.com/2012/10/20/depending-on-the-favored-child/?_r=0); see also P. MARK ACCETTURA, BLOOD & MONEY: WHY FAMILIES FIGHT OVER INHERITANCE AND WHAT TO DO ABOUT IT 24–26 (2011) (discussing parental favoritism, that it “occurs naturally and benignly” but regardless, in some instances “children often feel slighted”).

<sup>14</sup> See Paula Span, ‘Mom Always Liked You Best,’ THE NEW OLD AGE BLOG, N.Y. TIMES (Nov. 3, 2009), <http://newoldage.blogs.nytimes.com/2009/11/03/mom-always-liked-you-best/>.

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first of many studies of family favoritism, that his research would prove futile. No mother, they insisted, would admit to caring more for one son or daughter than another.

So much for that. His team's interviewers, talking to mothers ages 65 to 75 in the Boston area about their adult offspring, found that most were perfectly willing to name favorites. "Most mothers have very distinct preferences," Dr. Pillemer said. "There's one to whom they feel most emotionally close, one with whom they have the most conflict. Parental favoritism is a fundamental part of the family landscape throughout life." In other words, he added, "the Smothers Brothers were right."<sup>15</sup>

Because parents do have favorites, consider the reasons for the favoritism. Is it based on gender, birth rank, or something more? One author relates birth ranking to a family power dynamic.<sup>16</sup> This power dynamic impacts all of the family's conversations and relationships.<sup>17</sup> Siblings may position themselves to gain status and power within the family, which concomitantly leads them to compete.<sup>18</sup> This competition may continue after the parent has died, even turning into what one expert calls "[t]he game of Who Got More?"<sup>19</sup> When inheritance is the topic, the competition may become more fierce, since "[i]nheritance is a particularly dramatic instance of the competition inherent in sibling relationships—a competition that can take many forms and be played out in innumerable ways."<sup>20</sup>

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<sup>15</sup> *Id.*

<sup>16</sup> DEBORAH TANNEN, *YOU WERE ALWAYS MOM'S FAVORITE! SISTERS IN CONVERSATION THROUGHOUT THEIR LIVES* 57 (2009).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 74. Dr. Tannen explains that "in the pain of loss, [sometimes] siblings vie for what is left." *Id.* She goes on to relate that "lingering resentments and even rifts among siblings resulted from disputes about inheritance." *Id.*; see also David W. Woodburn, *Effective Client and Attorney Communication Methods in Trust and Estate Matters*, in *TRUSTS AND ESTATES LITIGATION AND DISPUTE RESOLUTION, LEADING LAWYERS ON DEVELOPING CASE STRATEGIES, ANALYZING NEGOTIATIONS, AND ACHIEVING CLIENT GOALS* \*7 (2008) (discussing how family dynamics can dredge up long-ago issues, feelings, etc.).

<sup>20</sup> TANNEN, *supra* note 16, at 76; see also Audrey Light & Kathleen McGarry, *Why Parents Play Favorites: Explanations for Unequal Bequests*, 94 *AM. ECON. REV.* 1669, 1679 (2004) (study showing "that a variety of motives highlighted in the literature come into play when mothers determine the allocation of their estates. Relatively few mothers intend to differentiate among their children in making bequests, but those who do are equally likely to provide expla-

Consider whether family caregiving ties into family dynamics, or more specifically, family favoritism. As noted above, within the family, parents do have favorites among their children. That holds true even as far as a parental preference for the child to serve as caregiver.<sup>21</sup> As time passes, elders may place greater importance on positive relationships than more difficult ones.<sup>22</sup> This leads to a preference by the parent of which child the parent wishes to serve as caregiver.<sup>23</sup> It is not too far of a stretch to understand that when picking a caregiver from among one's children, the parent will likely pick the child who the parent trusts to do the job rather than the child who may cause anxiety or chaos in providing care to the parent.<sup>24</sup>

It is undisputed that family caregivers play an important and invaluable role in the lives of their elders. Contemplate the reasons why the elder law attorney may consider family in an elder

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nations that are consistent with altruism and explanations that suggest exchange.”); Judith G. McMullen, *Keeping Peace in the Family While You Are Resting in Peace: Making Sense of and Preventing Will Contests*, 8 MARQ. ELDER'S ADVISOR 61, 80–82 (2006) (discussing symbolism of inheritance and how it leads to litigation, along with concepts of fairness, sibling rivalry, etc.).

<sup>21</sup> See J. Jill Sutor et al., *The Role of Violated Caregiver Preferences in Psychological Well-Being When Older Mothers Need Assistance*, 53 GERONTOLOGIST 388 (2013), <http://gerontologist.oxfordjournals.org/content/53/3/388.full>. “Studies of parental favoritism in adulthood have shown that older mothers typically have clear preferences as to which children would be serving the role as caregiver.” *Id.* at 389 (citations omitted).

<sup>22</sup> See, e.g., *id.* The authors' position is based on “Carstensen's theory . . . of socioemotional selectivity, which posits that as people age and their time perspective alters, they focus on interpersonal relationships that are most rewarding and increasingly withdraw from those that are not. This may help to explain why mothers prefer adult child caregivers whose socioemotional characteristics increase the likelihood of positive experiences and reduce the risk of negative experiences when in need of assistance.” *Id.* (citations omitted).

<sup>23</sup> *Id.* (citations omitted) (explaining that “mothers strongly preferred children as caregivers with whom they shared a common outlook on life as well as a common set of life experiences. Not surprisingly, their concern with experiential similarity also led them to prefer daughters more than sons. Mothers also disproportionately preferred those children as caregivers with whom they had the most stable history of supportive exchanges.”). Note that the study was focused on mothers.

<sup>24</sup> See, e.g., *id.* (“[C]onsistent with socioemotional selectivity theory, the mothers are selecting those children whom they have the greatest confidence will be a source of reassuring support but not selecting those whom they think will be a source of unmet expectations or conflict.”).

law practice? Because *family* matters, and with family members as caregivers, in many instances the elder's legal problem becomes a family *matter*.

C. *Family in the Representation: Influencing or Supporting the Client? Ethical Considerations*

In some instances a family member may be helpful to the attorney representing the elder, but there are ethical parameters within which the elder law attorney must operate in these cases. Although in some instances the elder client may want the family involved in some way, the attorney must never forget to whom the attorney owes the duties that flow from legal representation.<sup>25</sup> The family is not recognized as an entity client under the Model Rules of Professional Conduct,<sup>26</sup> so at the outset of the representation the attorney must always determine who is the client as quickly as possible.<sup>27</sup>

## II. Family: The Good, the Bad and . . . Family Dynamics

In an elder law practice then, it is possible, and more likely probable, that family will at a minimum have some impact on the attorney's representation of the client because the family somehow will influence the client. This may be benign influence, such

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<sup>25</sup> The duties that arise from the representation of the client are set out in the Model Rules of Professional Conduct, and include competence (Rule 1.1), diligence (Rule 1.3), confidentiality (Rule 1.6) and loyalty (Rules 1.7 and 1.9). See also MODEL RULES OF PROF'L CONDUCT, pmbl. (2015).

<sup>26</sup> ABA, *Model Rules of Professional Conduct*, [http://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct.html](http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct.html) (last visited May 1, 2016).

<sup>27</sup> See *Aspirational Standards*, *supra* note 1, at 7 (Standard A.1, Client Identification). The comment to the standard explains "[i]t is to the client that the lawyer has professional duties of competence, diligence, loyalty and confidentiality. This is especially important in Elder Law, because family members may be very involved in the legal concerns of the older person or person with disabilities, and they may even have a stake in the outcome." *Id.*; see also Attorney Grievance Comm'n of Md. v. Coppola, 19 A.3d 431 (Md. 2011) (discussing, among other issues, client identification; the parent was initially the client, but the attorney subsequently did the bidding of adult children regarding forging the client's signature on estate planning documents).

as offering an opinion or a comment. But the influence may move beyond that into negative or even undue influence.

The elder law attorney cannot just stop at the point of recognizing family involvement. The attorney must go beyond the recognition of the family and inquire into the family dynamics, because these dynamics, whether good, bad, or really bad, will come into play. Family dynamics matter whether the client is doing estate or long-term care planning, making decisions about end of life, entering into contracts, or is alleged to be incapable, to name a few. Will family members with a long history of dysfunction suddenly all get along just because the mother is now 85 and in need of caregiving? Family dynamics developed during childhood still play out even though the children are now adults who are helping the parent with caregiving in some way.<sup>28</sup>

#### *A. The Family: Family Dysfunction Goes to Court*

Unfortunately, in many instances, family dynamics, sibling rivalries,<sup>29</sup> family rivalries, or family dysfunction, whatever one might wish to call it, spills over from the family boundaries and into litigation. The family dynamics may be the driver for the

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<sup>28</sup> This essay is not about family dynamics, and I will not delve into the psychological underpinnings of family dynamics and why family members may interact with each other as they do. It is the author's position, however, that attorneys must at least consider and inquire about family dynamics in the representation of the elder.

<sup>29</sup> See, e.g., ACCETTURA, *supra* note 13, at 26–29 (discussing sibling rivalry, its pros and cons, and how parents become drawn into the rivalry). The author notes that

sibling rivalry in the twenty-first century is largely a competition for the parental prizes of love and recognition. Competition is natural; all families, no matter how wealthy or urbane, suffer through feelings of competition and jealousy.

The illness or death of a parent breathes new life into old and perhaps dormant rivalries. Resentments over past inequities or transgressions are rekindled as siblings jockey to determine who will be in charge of aging parents and who will inherit prized possessions. The rivalries of the sandbox are reincarnated in the struggle over who will be the leader or who will get dad's gold watch. . . . With the stakes so high, it is not surprising that inheritance and other family disputes are felt as life and death struggles with the potential of turning into scramble competitions where nobody gets anything.

*Id.* at 28–29.

litigation, or in other instances, its cause.<sup>30</sup> Because some family dynamics may be so negative, a court may reference the family's dynamics either by way of explaining how the case got to the point at the time of the opinion or as a basis for the court's ruling. It is illuminating to examine a few case excerpts, not to discuss the issues raised in those individual cases, but to illustrate how negative family dynamics play out in the courts, surely not what the parent hoped for or intended.<sup>31</sup>

For example, in *Rabner v. Titelman*,<sup>32</sup> a recent federal district court case in which the plaintiffs sued their uncles, agents under a durable power of attorney and trustees of trusts, the court described the family as follows:

[T]his case reads as if it is a Hollywood soap opera script with family members squabbling over their prospective interests in various trust funds, one of which is valued at over \$2,000,000.00. The only present beneficiary of the trusts is non-party Joan Kaplan, ("Mrs. Kaplan"), an 89-year old widow that lives in Beverly Hills, California, and suffers from macular degeneration, among other ailments. Two of her grandchildren . . . have sued their uncles . . . under a breach of contract theory in an effort to enforce a purported agreement under which Plaintiffs would have been paid \$400,000.00 immediately rather than wait until Mrs. Kaplan's death to recover their share of the remaining funds in the trust as residual beneficiaries.<sup>33</sup>

In discussing the background in this case, the court offered a further description and opinion of the family dynamics:

It is unfortunate that the hard work of the prior generations of the Titleman and Kaplan families to create this wealth and their considerable planning to leave it for the benefit of their offspring and other heirs has devolved into this type of dispute. Perhaps, the old adage that "money is a curse" is true?<sup>34</sup>

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<sup>30</sup> See, e.g., *Huggins v. Randolph*, 45 Misc. 3d 521, 527 (N.Y. Civ. Ct. Kings County 2014) (discussing elder abuse action and noting "petitioner, a vulnerable senior, states that he is in fear of his son and . . . fled his home as a result of that fear").

<sup>31</sup> These cases were not chosen for any specific purpose other than the family's relationship was described by the court. This is not an exhaustive list of cases either, just a sample for illustration purposes.

<sup>32</sup> Civ. No. 15-1313, 2016 WL 1613444 (W.D. Pa. Apr. 22, 2016) (citations omitted).

<sup>33</sup> *Id.* at \*1 (citations omitted).

<sup>34</sup> *Id.* at \*2 (citations omitted). In footnote 4 of the opinion, the court notes its unsuccessful attempt to get the parties to resolve the dispute by availing themselves of alternative dispute resolution. *Id.* at \*2 n.4.

In *Estate of Schooler v. Schooler*,<sup>35</sup> an unpublished opinion, the trial court described the family as

totally dysfunctional and unable to cooperate, and it appears that every act by one side appears to be opposed by the other, meaning the three brothers versus [Jane]. And the [trusts and estate] face the potential of being overwhelmed by huge attorney fees and administrative claims related to the family dysfunction and controversy.<sup>36</sup>

The court went further, “the controversy existing among the family is rather huge, complicated, and . . . the family, as a whole, is dysfunctional.”<sup>37</sup>

In *Lingo v. Lingo*,<sup>38</sup> the court viewed the siblings’ dynamics as the cause of the litigation.<sup>39</sup>

The true impetus for this litigation is the unfortunate mutual antipathy between Archie and Dinah. Their dislike goes beyond mere sibling rivalry and includes behavior unbecoming to business people of mature years, reaching its zenith-or nadir-in a public brawl between Archie and Dinah in August 2006 that required police intervention. The extreme dislike between brother and sister permeated the trial in this matter and tends to taint the testimony of the principals involved. This antipathy, quite sincere in its own right, is no doubt exacerbated by the fact that the outcome of this litigation will determine whether several million dollars in assets are ultimately inherited by either Archie or Dinah, upon the demise of the nonagenarian Mrs. Lingo.<sup>40</sup>

The court later described the daughter, though loving, as having breached her fiduciary duties, because she

came to regard Mrs. Lingo’s property as her own, and disposed of it as she saw fit, converting hundreds of thousands of dollars of Mrs. Lingo’s funds into her own accounts, treating the trust account as her personal checking account, hiring her boyfriend to do extensive renovations on trust property, etc. While Dinah no doubt saw that as her right as her mother’s beneficiary, in fact it was the act of a faithless fiduciary.<sup>41</sup>

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<sup>35</sup> D062877, 2014 WL 5305910 (Cal. Ct. App. Oct. 17, 2014) (regarding an estate dispute).

<sup>36</sup> *Id.* at \*1 (alteration in original).

<sup>37</sup> *Id.* at \*2.

<sup>38</sup> C.A. No. 1622-MG, C.M. No. 4483-S, 2009 WL 623720 (Del. Ch. Feb. 26, 2009) (two consolidated cases, a dispute among trustees and a guardianship matter).

<sup>39</sup> *Id.* at \*5.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at \*15.

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In the New Jersey trial court case of *In re Sipko*,<sup>42</sup> the judge was persuaded that “this is a case that absolutely did not have to be brought and really should not have been brought . . . .” [The Judge] went on to observe that “the emotion involved in this family and what happened to disrupt this family was very extreme, and so in [the judge’s] view the father pursued this action, not for any financial reason, but because of the dysfunction in the family.”<sup>43</sup>

A Missouri appellate court made similar comments regarding a family in a guardianship matter:<sup>44</sup>

[T]here was voluminous testimony from the siblings regarding their consistently, acrimonious relationships with one another and the strained associations they have maintained as a result of their mother[’s] . . . advancing age and her often inconsistent desires as to her residency and finances. Among the family problems elucidated at trial were recitations of long-term family disagreements; accusations and fears that one sibling or another would not allow access to [the mother] were she to reside with one or the other; testimony regarding significant periods when the siblings had no contact with each other or their mother; allegations regarding undue influence over their mother’s legal, medical, and financial affairs; and general concerns that their mother would not be adequately cared for by one or the other of the parties to this matter.

While there was much testimony centering around dissension between Appellant and her brother . . . , there was also testimony relating to disagreements between Appellant and her sister . . . , who technically is not a party to this action. The record shows that [sister] had an estranged relationship with Appellant and expressed doubts about whether, in the event Appellant was appointed guardian, Appellant would permit visitation with her mother . . . . Also, testimony revealed that [sister] was greatly concerned about Appellant’s emotional ability to care for [mother]. Appellant admitted that she and [sister] have communicated only once since 2000 and the time of the hearing, and then only about the pending litigation.<sup>45</sup>

Generally speaking, when a court is selecting a guardian, typically a family member is given a statutory preference in appoint-

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<sup>42</sup> 2010 WL 772249 (N.J. Super. Ct. App. Div. Mar. 8, 2010) (appeal of attorney fees from estate litigation).

<sup>43</sup> *Id.* at \*3 (discussing appropriateness of attorney fee award).

<sup>44</sup> *In re Benson*, 124 S.W.3d 79 (Mo. Ct. App. 2004) (appointing public administrator over family member).

<sup>45</sup> *Id.* at 82.

ment, as long as it would be in the best interest of the person.<sup>46</sup> The Missouri appellate court in the above case noted that family disagreements can be the reason for a court to appoint a public administrator as guardian rather than a family member, because it would be in the best interest of the person for that to be done.<sup>47</sup>

In a similar case in Florida<sup>48</sup> concerning whom to appoint as guardian, the appellate court affirmed the trial court and stated that

it is clear that the trial court did not abuse its discretion in appointing nonfamily members as guardians of the Ward and her property. The Magistrate was presented with evidence that the family was “dysfunctional,” that the siblings were unable to get along and cooperate with each other to care for their mother, and that there were serious conflicts about how the family business should be run, inclusive of the Ward’s assets and money in general. Some of the siblings had made choices which could be in conflict with and affect the Ward’s financial stability, such as, for example, setting up an irrevocable trust containing questionable terms. Some of the siblings had created “alliances” to the exclusion of other siblings. They were unable to come together on simple issues, including the core issue concerning their mother’s care. As evidenced by this appeal, they could not even agree on the designation of a guardian. In view of family dynamics, appointing one of the siblings as a guardian for any purpose would clearly not be in the Ward’s best interests.<sup>49</sup>

In yet another case concerning the conduct of the conservator, an unpublished trial court opinion in Connecticut dealt with

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<sup>46</sup> See UNIF. GUARDIANSHIP & PROTECTIVE PROCEEDINGS ACT § 310(a)(4)–(6) (1997/1998) (priority to spouse, adult child, or parent, after priority to guardian, one nominated to be guardian, or health care agent). Section 310(b) allows the court to bypass the statutory priority if in the person’s best interest. *Id.*

<sup>47</sup> *Benson*, 124 S.W.3d at 84–85.

Given the testimony regarding the extensive familial history of fingerprinting, mistrust, alienation, and manipulation, and that it likely was of a continuing and ongoing nature, we discern the Probate Court believed there was significant dissension among Wanda’s children which was not in her best interest. The record reveals that the conflict in this family goes beyond the “typical family differences.”

*Id.* at 85.

<sup>48</sup> *In re Guardianship of Stephens*, 965 So.2d 847 (Fla. Dist. Ct. App. 2007).

<sup>49</sup> *Id.* at 851–52.

challenges to a financial report filed by the conservator.<sup>50</sup> The court described the family relationship as “a contentious interne-cine battle,”<sup>51</sup> and noted that “[p]erhaps better than anyone else, [the judge] knew of the performance of [the conservator] and knew what it took to successfully work toward and advocate for [the conservatee’s] interests in the toxic family atmosphere that presented itself during the pendency of her conservatorship.”<sup>52</sup>

Although family dynamics may cause the filing of a petition for determination of guardianship, that is no guarantee that a guardianship will be established because of those dynamics.<sup>53</sup> In another case, the court noted that although there was evidence that the father, the person alleged to be incapacitated, might have needed help, the action may be more due to the family dynamics rather than the person’s need. In this case, the court acknowledged that medical experts “presented evidence that . . . [the father] may need help” but went on to note that

this need seems to be arising from the pressure from his children. Their constant fighting over who should be in charge of [the father] and his money is putting him under tremendous stress, which affects his memory and his ability to handle his own affairs. The evidence from these sources indicates that a limited guardianship of the estate would be appropriate to protect those assets from his children. The record overwhelmingly supports, and the trial court strongly recommended, the conclusion that a conservatorship would be appropriate to allow [the father’s] assets to be protected from all of his children, to allow him to live without the constant battles for control by the children, and to allow his assets to be used for his benefit alone. However, neither [medical expert] . . . indicated that [the father] was incapable of handling his own assets if he were not subject to the constant interference and pressure of his children’s demands. At no time did either of them testify that [the father] was incompetent, just that his “unique circumstances” and family dynamics made managing difficult.<sup>54</sup>

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<sup>50</sup> *In re Follachio*, No. HHBCV084018829, 2009 WL 4250692, at \*1 (Conn. Super. Ct. Oct. 29, 2009) (unpublished).

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at \*3.

<sup>53</sup> *In re Guardianship of Miller*, 932 N.E.2d 420 (Ohio Ct. App. 2010) (denying daughter’s petition to determine father incapacitated).

<sup>54</sup> *Id.* at 426–27.

The court further noted that the family dynamics were longstanding, amounting to “past sibling rivalry dating from childhood on.”<sup>55</sup>

The South Carolina Supreme Court dealt with family dynamics in a will contest.<sup>56</sup> In this case, the family members might be described as committing psychological abuse and financial exploitation of the testator, a former federal appellate judge.<sup>57</sup> The trial court offered an unflattering picture of the family—“[t]he evidence presented points to the conclusion that the Williams Children were churlish, spoiled children, who took advantage of Testator’s generosity. While unattractive, such conduct and demeanor does not amount to undue influence.”<sup>58</sup>

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<sup>55</sup> *Id.* at 425 n.2.

The record indicates, as referenced above, that numerous letters and documents were filed by the children. These filings frequently related to past sibling rivalry dating from childhood on. There were numerous letters addressing who was a favorite of Ann Miller, Clair’s deceased wife, and who hated her and why. Other letters addressed alleged alcohol and drug abuse, suicide attempts, marital infidelities, domestic-abuse allegations, the possible murder of Ann, and other difficulties that were parts of the lives of the five children. Any time one child filed a document, the others then filed a response indicating why that child should not be believed. In addition, other family members, including sisters of the decedent, ex-husbands, in-laws, and grandchildren, were drawn into the conflict by the children. None of these documents had any relation to whether Clair was competent, but rather were blatant attempts to influence the court against another sibling.

*Id.*

<sup>56</sup> *Russell v. Wachovia Bank, N.A.*, 578 S.E.2d 329 (S.C. 2002) (contesting will and challenging trust on grounds of undue influence).

<sup>57</sup> *Id.* at 332.

There was evidence that the Williams Children [grandchildren] were disrespectful to Testator, and frequently yelled at Testator about money. The Williams Children engaged in physical fights in front of Testator. There was evidence that [granddaughter] monitored Testator’s telephone calls while he was in his home, and sometimes told Testator which clothes to wear. [Granddaughter] would not allow Testator to regulate the thermostat in his house. The Williams Children spent large amounts of Testator’s money, sometimes charging as much as \$12,000 in a month.

*Id.* at 332–33.

<sup>58</sup> *Id.* at 334.

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In another will contest in which the decedent's sons challenged the disposition from their mother to their stepfather, the court accorded little weight to the sons' characterization of their mother's relationship with their stepfather<sup>59</sup> and, in fact, mentioned that this case was not unusual in its facts, but instead involved "a not unfamiliar family dynamic."<sup>60</sup> The day before a serious surgery, the mother and stepfather created estate planning documents prepared by an experienced estate planning attorney,<sup>61</sup> and on the day of her surgery, the mother also updated a letter to her two children about her property disposition.<sup>62</sup> As the mother's health declined, it appeared that two of her sons were equating inheritance with a show of their mother's love.<sup>63</sup>

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<sup>59</sup> *In re Estate of Bickling*, No. Civ. A. 20002, 2004 WL 1813291 (Del. Ch. Aug. 4, 2004). The court opined that "the sons' litigation strategy has largely involved an attempt by them to disparage their mother's feelings for and relationship with [the current husband] and to contrast those supposedly cool feelings with her love for them." *Id.* at \*1. In a footnote, the judge described their testimony as unreliable:

With reluctance, I indicate my view that the testimony of David, Steven and their significant others was so colored by their own desires that it was unreliable and not a helpful guide to discerning the truth. Even accepted at face value, the testimony does not support their claims as it fails to demonstrate undue influence by Ralph or a lack of testamentary capacity by Sylvia on May 8, 2001. Rather, it involves at best a rosy-eyed reading of ambiguous statements by Sylvia about her financial wishes for them and an inconsistent and exaggerated perspective on her mental state and relationship with Ralph. Although Ralph's own testimony was hardly a model of clarity or directness, I discerned no convincing evidence of improper conduct or influence on his part.

*Id.* at \*5 n.22.

<sup>60</sup> *Id.* at \*1.

<sup>61</sup> *Id.* at \*3-5.

<sup>62</sup> *Id.* at \*4. Perhaps presciently, the mother's letter to her sons provided this language: "Please see that the following is done without any bickering, arguing or friction." *Id.*

<sup>63</sup> *Id.* at \*5.

In essence, David conflated the question of whether his mother loved him with the question of whether she was leaving him money. In this behavior, David was joined by Steven. Although at trial, they indicated that they only wanted to know what their mother actually wanted, their behavior and demeanor belies that and it seems to me extremely likely that their overtures to their mother put her in a very awkward situation whereby the communication of her genuine testa-

Unfortunately, some “[p]eople often believe that their share of a loved one’s estate reflects how highly they were regarded by the person who passed.”<sup>64</sup>

### B. *The Family Structure and Family Dynamics*

The family structure may have an impact on the type and amount of family dynamics. A first marriage family has family dynamics. A family created by a subsequent marriage, often referred to as a “blended family,” may have complex family dynamics due to the blending (or attempted blending) of two families into one.<sup>65</sup> Famous families or ordinary families, all families have the potential for dysfunction. For famous families, typically their dynamics (especially negative dynamics) play out in the headlines,<sup>66</sup> which adds another layer to the dynamics within

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mentary intentions to them would anger and hurt them, as they apparently placed a high value on their mother’s attentiveness to their economic needs. They forced a situation in which Sylvia had to disclose her will to them during a time period when her health and, in particular, her mental abilities were far worse than on May 8, 2001. Frankly, I find it hard to-and do not-credit David and Steven’s testimony about events of this period as it is clear to me that their anger at the contents of the will impairs their ability to recall events in a fair and balanced way. In this regard, it is notable that they-and their significant others-credit Sylvia’s lucidity at various times when it is to their advantage but not when it is not. All in all, I find it much more likely that Sylvia wished to keep the sons in the dark about the will until she died precisely to avoid the emotional pain Steven and David’s intense actions began to cause her (and Ralph). I do not believe she ever freely and rationally told them the will and deed did not reflect her true intent. I also find no evidence that Ralph improperly concealed the will; instead, his behavior is consistent with Sylvia’s seeming desire to keep the sons out of her hair about financial matters.

*Id.* (footnote omitted); see also TANNEN, *supra* note 16, at 72–76 (noting how a gift can be a catalyst for comparisons by siblings).

<sup>64</sup> *Estate of Bickling*, 2004 WL 1813291, at \*12.

<sup>65</sup> See Martin J. Ganderson & Jessica M. Booth, *Premarital Issues in Second Marriages: What to Plan for the Second Time Around*, 2010 NAELA INST. 5-1 (May 11–15, 2010) (conference material) (“[F]amily dynamics associated with the family created by a second marriage can be significantly different from the family dynamics associated with the traditional family.”).

<sup>66</sup> See, e.g., *Hill v. Hunt*, Civ. Action No. 3:07-CV-2020-O, 2009 WL 5125085 (N.D. Tex. Dec. 29, 2009) *In re Advance Health Care Directive of*

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the family, being played out in a spotlight of fame. Thus, any family, famous, infamous or not, blended or traditional, can have issues with family dynamics.<sup>67</sup>

### III. What's an Elder Law Attorney to Do?

Family dynamics can certainly create ethical nightmares for an elder law attorney. Elder law attorneys need to have some practices in place to learn about and appropriately respond to the family matters of the client. Here are some suggestions.<sup>68</sup>

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Sumner M. Redstone, No. BP168725, 2016 WL 2620287 (Cal. Super. Ct. May 9, 2016) (former girlfriend claiming undue influence by daughter); *In re Conservatorship of Kasem*, No. BP145805 (Cal. Super. Ct. L.A. County Central Dist. June 20, 2014); *Rooney v. Aber*, No. BS129686, 2011 WL 515473 (Cal. Super. Ct. Feb. 13, 2011) (petition for order to stop elder abuse); *Testimony of Mickey Rooney to U.S. Senate Special Committee on Aging* (Mar. 2, 2011), [www.aging.senate.gov/imo/media/doc/hr230mr.pdf](http://www.aging.senate.gov/imo/media/doc/hr230mr.pdf); Russ Buettner, *Appeals Exhausted, Astor Case Ends as Son Is Sent to Jail*, N.Y. TIMES (June 21, 2013), [http://www.nytimes.com/2013/06/22/nyregion/astors-son-his-appeals-exhausted-goes-to-prison.html?\\_r=0](http://www.nytimes.com/2013/06/22/nyregion/astors-son-his-appeals-exhausted-goes-to-prison.html?_r=0); *Casey Kasem's Daughter Fights for New Guardianship Visitation Laws*, FORBES (June 3, 2015), <http://www.forbes.com/sites/trialandheirs/2015/06/03/casey-kasems-daughter-fights-for-new-guardianship-visitation-laws/#7e43a1ba2fbc> (dispute between current wife and children of prior marriage on access to and care of father); *Hunt Heirs Locked in Bitter Fight over Who Should Have Hands on Funds' Fortunes* (Feb. 14, 2014), <http://www.dallasnews.com/news/community-news/dallas/headlines/20130214-hunt-heirs-locked-in-bitter-fight-over-who-should-have-hands-on-funds-fortunes.ece> (describing a family feud over two family trusts: “[m]embers of the family . . . say the lawsuit is ‘hogwash,’ ‘a fairy tale’ and the handiwork of a greedy son, a spendthrift wife and an aggressive attorney, angling ‘for a one-time, early, large piece of money.’”). These are just a few examples.

<sup>67</sup> As actor Mickey Rooney said to the U.S. Senate Special Committee on Aging, “[i]f elder abuse happened to me, Mickey Rooney, it can happen to anyone.” *Testimony of Mickey Rooney to U.S. Senate Special Committee on Aging*, *supra* note 66.

<sup>68</sup> Some of these suggestions come from leaders in the field of elder law. Others are my suggestions and still others are from authors of articles.

A. *Use Care About Which Case to Take and Whom You Represent*<sup>69</sup>

Careful screening and selection of cases are important, regardless of the area of law one practices.<sup>70</sup> Getting caught up in a dysfunctional family's fight over who should be named mother's agent, or who is mother's favorite, does not help the attorney's well-being and may simply enable the family to continue their negative dynamics.<sup>71</sup> Recognize that although each side may think he or she is "right," that is not always the reality. When a family member ends up losing, he or she may concede defeat gracefully or blame the attorney. Instruct staff when

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<sup>69</sup> Thanks to attorney Howard S. Krooks for this suggestion. Email from Howard S. Krooks (May 5, 2016) (on file with author).

<sup>70</sup> See, e.g., Deborah E. Gillis, *In a Tough Economy, the Importance of Effective Client Screening*, L. PRAC. TODAY, A.B.A. L. PRAC. MGMT. SEC. (Nov. 2008), <http://apps.americanbar.org/lpm/lpt/articles/mgt11084.shtml>. As far as which prospective clients to decline, the author suggests the following:

Some clients and some client matters are not the right ones for you. Recognize and listen to that negative gut feeling you get when you first interview a potential client.

Use your best judgment but generally decline a client who:

- has unreasonable motives or a hidden agenda . . .
- has unreasonable expectations about the outcome, cost or time involved
- wants you to guarantee a particular outcome . . .
- doesn't take responsibility for his or her own actions, arrives at your door at the last minute and expects immediate attention
- doesn't want to accept an objective evaluation of the case . . .
- expects rushed closings or transactions and is pressuring you to do something that just doesn't feel right

This type of client is generally high maintenance and crisis producing. He or she consumes significant time and energy and may be slow in paying, if they pay at all. This is often the kind of client who will make malpractice claims and discipline complaints.

*Id.*; see also Sheila Blackford, *Recognizing Difficult Client Types*, 36 ABA L. PRAC., July/Aug. 2010, at 41, [http://www.americanbar.org/publications/law\\_practice\\_home/law\\_practice\\_archive/lpm\\_magazine\\_articles\\_v36\\_is4\\_pg41.html](http://www.americanbar.org/publications/law_practice_home/law_practice_archive/lpm_magazine_articles_v36_is4_pg41.html) (discussing clients who are angry, vengeful, obsessed, emotionally needy, dishonest, depressed, and unwilling).

<sup>71</sup> Attorney Howard Krooks offers this insight regarding case selection: "be on the 'right' side of a case . . . [avoid] representing people who . . . have not acted with good intentions and/or with the best interests of the elderly person in mind." Email from Howard S. Krooks (May 5, 2016) (on file with author).

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screening prospective clients on how to recognize destructive family dynamics.<sup>72</sup> Remember: experience as an attorney matters. This family matter may be a brand new situation for the client, but not to the attorney. Model Rule 1.1, competence, is there to ensure that attorneys are competent to handle the matter.<sup>73</sup>

B. *Ask About the Family*

When meeting with a client initially, the attorney gathers much information about the client and the client's family.<sup>74</sup> Not only does the attorney need to know about the family structure, the attorney also needs to know about the family's dynamics.<sup>75</sup>

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<sup>72</sup> Attorney Evan Farr offers his process of avoiding this dysfunctional family situations: "My way of dealing with difficult clients or dysfunctional families is simply not to. My Client Service Team screens all potential clients and we simply won't deal with these types of families. I got into Elder Law to help people who want my help. Life is too short to deal with negative family drama and conflict." Email from Evan H. Farr (May 5, 2016) (on file with author).

<sup>73</sup> Attorney Hy Darling explains

As elder law lawyers, we often have the ability to be creative and utilize techniques we have learned in the practice and often from prior cases, whether the result was positive or negative. Oftentimes, a bad result or reading a case provides us with the ability to keep that result from occurring in the future. One of the issues I hear a lot is that the client wishes to leave funds other than equal to the kids for some reason. It is up to us to determine whether we feel it is appropriate so that we can defend the decision in the future. Whether we feel the client is 'right' or 'wrong' in their decision is not material, but we need to have the history and evidence to substantiate what we have written. There is NO right or wrong so long as we are convinced that the client is able to make an unfettered informed decision.

Email from Hy Darling (May 12, 2016) (on file with author).

<sup>74</sup> See, e.g., Woodburn, *supra* note 19, at \*12 (discussing the importance of obtaining the family's history).

<sup>75</sup> See, e.g., Anderson, Brogan & Yonkers, *Family Harmony: Disharmony Alert for Your Family Harmony: How to Bomb-Proof Your Estate Plan*, <http://upelderlaw.com/family-harmony/> (last visited May 9, 2016) (describing an elder law firm's work on family harmony, discussing "ten innovative measures to lessen the risk of disharmony"); FOULSTON SIEFKIN, FOULSTON SIEFKIN ESTATE PLANNING: ESTATE PLANNING TO PRESERVE FAMILY HARMONY (2014), <http://www.foulston.com/Downloads/Family%20Harmony.pdf> (describing one firm's focus on family harmony in estate planning); Timothy P. O'Sullivan & Robert Anderson, *Achieving Family Harmony in Estate Plans/Practice Tools*

The client may be hesitant to admit to a favorite, to infighting by the children, or to children's feelings of entitlement,<sup>76</sup> but the attorney has well-grounded reasons for asking for such information. It is important that the attorney not just inquire about the first generation, but also inquire about grandchildren (and great-grandchildren). The attorney should not stop at asking for details about the immediate family or the blood relatives. It is important for the attorney to learn about the spouses, significant others, and partners of the first and second generations, because those individuals may hold great sway over the opinions of the blood relatives.<sup>77</sup>

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*and Trust Provisions*, 2010 NAELA ELDER & SPECIAL NEEDS L. ANN. MEETING, 2010 NAELA INST. 15-1.

<sup>76</sup> See, e.g., James Leese, *Best Estate Plans Take Family Dynamics into Consideration*, in BEST PRACTICES FOR STRUCTURING TRUSTS AND ESTATES, LEADING LAWYERS ON DRAFTING A FLEXIBLE PLAN, PROTECTING THE CLIENT'S ASSETS, AND LEVERAGING TAX STRATEGIES (2015 ed.). "A sense of entitlement is one [of] the uglier conditions you will see in practice, for it often morphs into an even uglier condition called greed. By and large, my clients express a desire for their family not to simply be given wealth because of who they are, or for what they expect, but instead to be a steward of these gifts and to appreciate the responsibility that comes with them." *Id.* at \*1; see also Jeffrey N. Pennell, *Estate Planning for the Next Generation(s) of Clients*, ALI-CLE COURSE MATERIALS, SU030 ALI-CLE, at 387 n.13 (Feb. 14–15, 2013):

The growing concern over misuse of durable powers of attorney and litigation designed to recover unequal lifetime transfers, often to the powerholder personally, reveals that children fight for wealth these days even before their surviving parent is dead. . . . And changes in family structure and traditions may generate more litigation yet. A veritable tsunami may occur as Baby Boomers inherit, and fight over their inheritances. This trend will further burgeon and accelerate as we add new dynamics like same sex arrangements, adult adoption, and the new biology. We know already that elective share litigation is increasing because of multiple marriages and the inevitable disputes between blood heirs and successive spouses.

<sup>77</sup> See, e.g., Ganderson & Booth, *supra* note 65. In discussing drafting prenuptials for clients entering into a subsequent marriage, the attorney should inquire extensively:

Prior to drafting a prenuptial agreement for a client it is important to gather as much information regarding the client's personal and financial situation as possible. With regard to the client's personal situation, the attorney should inquire about the client's familial relationships and the client's relationship with his or her prospective spouse and prospective spouse's family. The attorney should obtain information

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In addition, the attorney needs to know whether the client has had prior relationships and whether those relationships resulted in marriage or children. Sometimes those involved in a prior relationship with the client resurface and wish for a role in the client's life. If the client is part of a blended family, the attorney must inquire about that family and the client's relationship therein.<sup>78</sup> It may not be that hard to imagine a blended family in which the parent is the cement that holds the blended family together, and once the parent has died, the family relationship may become acrimonious.<sup>79</sup>

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about the client's prospective spouse, including his or her relationship with the client's children, his or her wishes, and his or her experience with financial matters. Information with regard to prior marriages of the client should be discussed, including any continuing responsibilities from a prior marriage (for example, alimony or a requirement to designate a former spouse as beneficiary of a particular life insurance policy), and copies of any separation agreements or divorce decrees should be reviewed by the attorney.

*Id.*

<sup>78</sup> See, e.g., Linda S. Ershow-Levenberg, *Elder Law Planning for Older Couples in Second Marriages*, in *BEST PRACTICES FOR LONG-TERM PLANNING AND NURSING HOME PROTECTION: LEADING LAWYERS ON UNDERSTANDING THE LONG-TERM CARE NEEDS OF ELDERLY CLIENTS—CREATING CUSTOMIZED SOLUTIONS, AND DEVELOPING ASSET PROTECTION STRATEGIES* (2011) (discussing items that the attorney should inquire about in the initial meeting); see also Oregon State Bar Ass'n Formal Ethics Op. 2005-86 (addressing whether an attorney may represent a husband and wife in drafting wills, the opinion notes that in a subsequent marriage, the interests of the husband and wife may not be in sync and thus there is a potential for conflict, noting "spouses with children by prior marriages may have very different opinions concerning how their estates should be divided," and declining to indicate "whether, or under what circumstances, the interests of the spouses would be directly adverse, or that a significant risk of materially limited representation would result in such cases.").

<sup>79</sup> See, e.g., Ganderson & Booth, *supra* note 65. The authors said that [i]n a blended family, a close familial relationship may not exist between stepparents and stepchildren. In some situations, the stepparent and stepchildren may get along amicably as a matter of respect for the spouse/parent who is the only connection in the relationship. In these situations, the conflict of interest between a stepparent and stepchild may not be apparent, especially to the spouse/parent who has a loving relationship with both his or her spouse and his or her children. Naturally, the client thinks the best of both his or her new spouse and his or her children from a prior marriage. The client, however, may not have

Concomitantly, the attorney needs to ask about why the client wants to make distributions to family members in a certain way. Is this because of family dynamics, a prior gift to a child, or a decision that one child has greater needs than the other? Reasons matter, and knowing those reasons help the attorney counsel the client and include the appropriate clauses in documents.<sup>80</sup>

### *C. Have a Process to Handle a Third Party's Presence*

An elder law attorney should not be surprised if a third party comes to the appointment with the client but needs to be prepared for the occasion when it happens. This occurrence is especially likely in elder law, because family members are often involved in the elder's life, whether as a caregiver or just as a child. A great tool that every elder law attorney should have is a brochure from the American Bar Association Commission on Law and Aging, *Why Am I Left in the Waiting Room: Understanding the 4 C's of Elder Law Ethics*.<sup>81</sup>

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considered that the new spouse and the children from a prior marriage may act differently after the client's death. The client may be the only reason the parties have any form of a relationship. The attorney could address these issues with the client by providing examples of conflicts which could arise between the spouse and children.

*Id.*

<sup>80</sup> Based on comments from attorney Hy Darling. Darling explains his practice as follows:

When a client tells us they want to leave all assets to the kids equally, we then have to ask why! Very often a parent has made a gift to a child, paid excessively more for one child's education than other, bailed a child out of a divorce or creditor issue, etc. which may warrant a less than equal distribution.

Email from Hy Darling (May 12, 2016) (on file with author).

He also suggests the following:

I also don't like to treat children less than equal within the will or trust unless necessary. The Will is the last document that will be remembered, that is probated, and is public. Therefore, I often have unequal distributions made by prior gifts, non-probate distributions, and sometimes by having a child who may have borrowed money sign a note. These "notes" are frequently converted to gifts!!!! So it's important to memorialize these transactions in writing.

*Id.*

<sup>81</sup> ABA COMM'N ON L. & AGING, *WHY AM I LEFT IN THE WAITING ROOM: UNDERSTANDING THE 4 C'S OF ELDER LAW ETHICS* (2015), <http://www>

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Meeting alone with the client is critical on many levels. The client is the one to whom the attorney owes the duties that flow from the representation. The client is the one to give the attorney direction. If a third party is present, the attorney may have difficulty ascertaining if what the client tells the attorney is free of influence, voluntary, and a true description of the client's wishes and instructions.

The National Academy of Elder Law Attorneys (NAELA)<sup>82</sup> adopted the Aspirational Standards for the Practice of Elder Law in 2005.<sup>83</sup> As part of these standards, the commentary to Standard A.1 (Client Identification) notes:

It is to the client that the lawyer has professional duties of competence, diligence, loyalty and confidentiality. This is especially important in Elder Law, because family members may be very involved in the legal concerns of the older person or person with disabilities, and they may even have a stake in the outcome.<sup>84</sup>

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[.americanbar.org/content/dam/aba/administrative/law\\_aging/EthicsBrochure.pdf](http://www.americanbar.org/content/dam/aba/administrative/law_aging/EthicsBrochure.pdf) (explaining client identification, confidentiality, conflicts of interest, and client capacity).

<sup>82</sup> NAELA is the preeminent organization of elder law and special needs planning attorneys. See NAELA, [www.naela.org](http://www.naela.org) (last visited June 19, 2016).

<sup>83</sup> *Aspirational Standards*, *supra* note 1; see also ABA COMM'N ON L. & AGING, *supra* note 81.

<sup>84</sup> *Aspirational Standards*, *supra* note 1, at 7. The commentary to standard A.1 goes on to provide:

In some cases, the client will have an initial meeting with the Elder Law Attorney; but in other cases, a family member may have an initial meeting with the Elder Law Attorney to discuss matters pertaining to the client without the actual client being present. Other times, the family member may accompany the client to the initial meeting. Accordingly, the identity of the "client" must be clarified at the earliest stage so that the attorney (a) understands and identifies whose interests are being addressed in the legal planning and legal representation process, (b) understands and clarifies to whom the attorney has professional duties of competence, diligence, loyalty, and confidentiality, (c) clarifies what steps can and cannot be taken after an initial consultation if the client is not present, and (d) arranges at the earliest possible time for private, direct and personal communication with the client, preferably face to face. The attorney should take special care to make sure that each of these four objectives is met, especially in cases where the client may have diminished capacity.

*Id.*

An elder law attorney should have a process in place for the time when a family member accompanies the elder to the interview,<sup>85</sup> The commentary to NAELA's Aspirational Standard A.2 suggests the following:

When other family members bring or accompany a client to an attorney meeting, the attorney should carefully explain why a confidential meeting is important. Ideally, the attorney should meet with the client or prospective client in private at the earliest possible stage. The attorney should take steps to ensure that the client's wishes are identified and respected. If the client objects to a private meeting, the attorney should explain that such a meeting is necessary because the attorney only represents the client and must have the client's input unencumbered and uninfluenced by others.

This is especially true when the family member bringing the client to the meeting is gaining any advantage over other similarly situated family members or when asset transfers are being considered. In the private consultation, the attorney should seek to ensure the absence of direct or indirect pressure on the client to make particular decisions.

If the attorney determines that it is clearly not in the client's best interest to meet privately with the attorney, the attorney may allow non-clients (including children) to be present at the initial meeting or throughout the representation. If a physically frail elder client insists that a younger family member be present for the entire meeting, the attorney should make sure the client understands the benefits of a private, confidential meeting but nevertheless rejects the opportunity to meet privately. In addition, the attorney must be careful to note any indication of discomfort by the client or influence by the younger family member. The attorney should note the content and tenor of comments, how supportive or dominating the family member may be, and how consistent or inconsistent the client's stated objectives are with prior wishes evidenced by estate planning documents or other expressions of intent. Nevertheless, the attorney should meet at least once with the client alone before the representation is completed.<sup>86</sup>

Using the 4 C's brochure from the American Bar Association's Commission on Law and Aging can be helpful in explaining to the third party why the elder law attorney needs to meet with the client alone.<sup>87</sup> The third party may be given the brochure to read in the waiting room while the attorney talks to the client. If the attorney knows that a third party is going to accom-

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<sup>85</sup> For an overview of the issue, see Roberta K. Flowers, *To Speak or Not to Speak: Effect of Third Party Presence on Attorney Client Privilege*, 2 NAELA J. 153 (2006).

<sup>86</sup> *Id.* at 8-9 (citations omitted). Quoted with permission.

<sup>87</sup> ABA COMM'N ON L. & AGING, *supra* note 81.

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pany the client to the interview, the attorney might consider mailing the brochure to the client in advance of the appointment, to set the stage for meeting with the client alone.

Professor Roberta K. Flowers writes about the ethical issues in elder law that stem from a third party's presence.<sup>88</sup> Professor Flowers describes how important client identification becomes in an elder law practice.

Elder law is different. Attorneys representing the elderly deal in the "murky landscape of human frailty and emotional turmoil." The Elder Law attorney is often presented with legal issues that are "deeply intertwined with a family's interpersonal, emotional, economic, and social dimensions." Therefore, family members want to be deeply involved in the representation, rendering inapplicable the traditional view that the attorney's role is to represent a single client and disregard the rest of the world. The relationships between the client and family members cause Elder Law attorneys to constantly address the issue of client identification, an issue that is easily resolved in most representations outside the Elder Law arena.<sup>89</sup>

Is it ok for the family to be involved? In other words, does *family* matter? The answer is perhaps. It is very definitely case specific. Professor Flowers explains that there are different views about family involvement, as well as different reasons proffered for their inclusion.<sup>90</sup> Of course, the decision of whether the family is to be involved is up to the client. As NAELA Aspirational Standard B.3 (Conflicts of Interest) provides, the elder law attorney might "[t]reat[ ] family members who are not clients as

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<sup>88</sup> Flowers, *supra* note 85.

<sup>89</sup> *Id.* at 155 (citations omitted).

<sup>90</sup> *Id.*

In certain circumstances, the client may insist that a friend or family member accompany the client into the interview. The client may feel that he or she needs the family member or friend present during the interview for physical or emotional assistance. Even if the client does not insist, it may appear that the client is very anxious about meeting with the attorney alone, and therefore the presence of the third person will comfort and possibly calm the client. Sometimes, allowing a family member to attend may assist the attorney in efficiently and accurately obtaining all relevant information from the client and the family. Finally, some attorneys believe it is vital to observe the interactions between the family members in order to understand the family dynamics, and to determine if the elderly client is acting on his or her own behalf, or at the behest of an assertive family member.

*Id.* (citations omitted).

unrepresented persons but accord[ ] them involvement in the client's representation so long as it is consistent with the client's wishes and values, and the client consents to the involvement."<sup>91</sup> Model Rule 1.14, Client with Diminished Capacity, contemplates that the involvement of a third party might be appropriate in some circumstances, when the attorney is attempting to maintain as normal as possible a client-attorney relationship with a client who has diminished capacity.<sup>92</sup> The comments to NAELA Aspirational Standard A.2 express a preference for meeting with the client alone,<sup>93</sup> but also contemplate the involvement of third parties in some instances.<sup>94</sup>

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<sup>91</sup> *Aspirational Standards, supra* note 1, at 11.

<sup>92</sup> Model Rule 1.14(a) directs the attorney to maintain as normal a client-attorney relationship as possible:

When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of . . . mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

Comment 3 recognizes that a third party's presence may allow the attorney to maintain the normal relationship:

The client may wish to have family members or other persons participate in discussions with the lawyer. When necessary to assist in the representation, the presence of such persons generally does not affect the applicability of the attorney-client evidentiary privilege. Nevertheless, the lawyer must keep the client's interests foremost and, except for protective action authorized under paragraph (b), must look to the client, and not family members, to make decisions on the client's behalf.

MODEL RULES OF PROF'L CONDUCT r. 1.14.

<sup>93</sup> *Aspirational Standards, supra* note 1, at 8 (A.2) ("Meets with the identified prospective or actual client in private at the earliest possible stage so that the client's capacity and voice can be engaged unencumbered. If the attorney determines that it is clearly not in the best interest of the client for the attorney to meet privately with the client, the attorney takes other steps to ensure that the client's wishes are identified and respected.")

<sup>94</sup> *Id.* at 8–9, cmt. (A.2) ("If the attorney determines that it is clearly not in the client's best interest to meet privately with the attorney, the attorney may allow non-clients (including children) to be present at the initial meeting or throughout the representation. If a physically frail elder client insists that a younger family member be present for the entire meeting, the attorney should make sure the client understands the benefits of a private, confidential meeting but nevertheless rejects the opportunity to meet privately. In addition, the attorney must be careful to note any indication of discomfort by the client or

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An attorney cannot forget about the lack of protection of information when a third party is present.<sup>95</sup>

If a non-client, third party is going to be included in the conversation, it is essential to define the role of that person before the beginning of the consultation. If that person is acting either formally or informally as an agent of the attorney and client, the communications may remain protected by the privilege. If, on the other hand, the third party is merely there to lend support, the privilege may be waived. The attorney and client must be aware of the consequences of their choices and take steps to protect the information to the fullest extent possible.<sup>96</sup>

D. *Recommend the Use of Independent Third Parties to Serve as Fiduciaries*

In certain cases, naming a child as a fiduciary is just a disaster in the making. This may be true in instances in which the family dynamics are strained, the adult children are in high-competition with each other for their parent's love and attention, or the clients are in a second or third marriage with adult children from the original marriage. Although counseling may help, it may be better for the client to name an independent agent or

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influence by the younger family member. The attorney should note the content and tenor of comments, how supportive or dominating the family member may be, and how consistent or inconsistent the client's stated objectives are with prior wishes evidenced by estate planning documents or other expressions of intent. Nevertheless, the attorney should meet at least once with the client alone before the representation is completed.").

<sup>95</sup> For a discussion, see Flowers, *supra* note 85, at 161-68.

<sup>96</sup> *Id.* at 168. Professor Flowers goes on to suggest in cases where the third party is not there in a "protected" capacity, and the client insists on the third party's presence, then

the attorney should fully advise the client of the effect of the third party's presence, including the possible discovery of the underlying documents to the communications. The attorney should bring both the client and the third party into the interview room and fully explain the risks, including that the information might not remain confidential because the third party's presence waives the privilege. It is important for the client to understand that the attorney could be required to disclose the information in court. The client should be told all the alternatives and benefits of talking to the attorney alone.

*Id.* at 172 (citations omitted).

trustee rather than the current spouse or the adult child, to minimize the likelihood of disputes.<sup>97</sup>

When the client becomes incapacitated, and a divorce is part of the planning for long-term care benefits, seek a neutral person to serve as conservator or guardian for the purpose of the divorce, rather than the healthy spouse. If a collaborative divorce is being used, then it may be possible as part of the mediation to address the issues there.<sup>98</sup>

E. *Recommend Separate Counsel*<sup>99</sup>

In some instances in estate planning, each spouse needs his or her own attorney when, for example, their estate planning goals are not the same or there is a conflict of interest.<sup>100</sup> That scenario is also appropriate in situations that do not involve estate planning. “[W]ithout [this] component, it is very difficult if not impossible to make any progress on the case. It also eliminates an argument later on that whatever may have been agreed to should now be reversed due to a lack of counsel in the negotiations.”<sup>101</sup>

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<sup>97</sup> Thanks to attorney April Hill for this suggestion. Email from April Hill (May 11, 2016) (on file with author). Thanks also to attorney Stuart D. Zimring for a similar suggestion. Email from Stuart D. Zimring (June 6, 2016) (on file with author).

<sup>98</sup> Thanks to attorney Patricia (Patty) Dudek for this suggestion. Email from Patricia Dudek (May 11, 2016) (on file with author).

<sup>99</sup> Thanks to attorney Howard S. Krooks for this suggestion. Email from Howard S. Krooks (May 5, 2016) (on file with author).

<sup>100</sup> See, e.g., ACTEC Commentaries on the Model Rules of Professional Conduct, Rule 1.7 at 101-05 (5th ed. 2016). The Commentary notes that in estate planning in some circumstances it may be better for the attorney to represent both spouses in estate planning. (“[A] lawyer usually represents multiple clients jointly. Representing a husband and wife is the most common situation. In that context, attempting to represent a husband and wife separately while simultaneously doing estate planning for each, is generally inconsistent with the lawyer’s duty of loyalty to each client. Either the lawyer should represent them jointly or the lawyer should represent only one of them.” *Id.* at 102-03.

<sup>101</sup> *Id.*

#### F. *Confirm With the Client Whether Information Is to Be Shared*

Within families, the client may choose to share information provided by the attorney with family members. The client may not want any information shared.<sup>102</sup> In some instances, the client may prefer to authorize the attorney to share information with others. The elder law attorney may ask the client whether the attorney is authorized to release any information to third parties, and if so to whom.<sup>103</sup> Not only must the attorney know who is allowed information, the attorney also needs to know the scope and amount of information the attorney is permitted to share.<sup>104</sup> The client's consent to release information should be obtained in writing and included in the engagement agreement. But it is important that the client understands that the client can revoke that consent at any time.<sup>105</sup> Since client consent is involved, look at

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<sup>102</sup> In some instances, the client does not want information shared. *See, e.g.,* S.D. Ethics Op. 2007-3 (2007) (attorney not authorized to give agent copy of client's will when "[c]lient confirmed that he does not want his Will changed, or for any person to know its contents during his lifetime." The niece was an agent and not a client under the circumstances.).

<sup>103</sup> *See, e.g., Aspirational Standards, supra* note 1, at 11 (B.3) ("Treats family members who are not clients as unrepresented persons but accords them involvement in the client's representation so long as it is consistent with the client's wishes and values, and the client consents to the involvement.").

<sup>104</sup> *Id.* at 15 (C.1) (determine the client's wishes regarding the sharing of information). The comment to C.1 notes:

After educating clients about confidentiality, Elder Law Attorneys should determine to whom they can disclose confidential information in accordance with the clients' wishes, and the objectives of such disclosure. When clients request disclosure, Elder Law Attorneys should help clients understand the possible risks and consequences of disclosure. The waiver or release of confidentiality should be placed in writing, as more specifically detailed in Standard A-3.

*Id.*

<sup>105</sup> *See, e.g., id.* at 16 (C.3) ("Strictly adheres to the obligation of client confidentiality, especially in representation that may involve frequent contacts with family members, caretakers, or other involved parties who are not clients."). The comment explains:

When the client wants the Elder Law Attorney to share information with family members or others, the client should give the attorney written consent to do so, specifying the scope of the information to be disclosed. In all instances, the client should be told the consent is optional and revocable at any time. Before the consent has been signed,

the Model Rules to determine the scope of consent. Rule 1.0, Terminology, defines “informed consent” as “the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.”<sup>106</sup>

How the information is to be shared is another matter. Does the client want the attorney to provide the children with copies of documents given to the client? Is the attorney authorized to talk by phone with the children? May the attorney talk with children individually or only in a group? Should there be a family meeting at which the attorney is present? Is the information to be shared during the client’s life, or in the case of estate planning documents, after the client’s death?<sup>107</sup> These may seem to be splitting hairs, but when dealing with families and family dynamics, precision becomes important, and the elder law attorney must have clear parameters regarding communications with third parties.

If the client chooses to share information with the family at a family meeting that includes the elder law attorney, the attorney should observe the family dynamics and watch the body language. One attorney always wants to talk with the family member who says the least.<sup>108</sup> “Those who speak or shout loud and often may do so from a position of emotional involvement that pushes them to feel more responsible or ‘entitled’ while the quiet ones may have just as much interest in the matter and some thoughtful observations and perceptions of the problem areas.”<sup>109</sup>

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the attorney should advise the client about any ramifications regarding the disclosure of the information.

*Id.*

<sup>106</sup> MODEL RULES OF PROF’L CONDUCT r. 1.0(e).

<sup>107</sup> See, e.g., Philadelphia Bar Ass’n Ethics Op. 2007-6 (Apr. 2007), <http://www.philadelphiabar.org/page/EthicsOpinion2007-6?appNum=2> (answering a question about whether an attorney should send an estranged daughter a copy of the decedent’s will even though the will was not admitted to probate).

<sup>108</sup> Thanks to attorney Rick Courtney for this suggestion. Email from Richard Courtney (May 5, 2016) (on file with author).

<sup>109</sup> *Id.*

### G. *The Impact of the Client Sharing Information*

Although the client may authorize the attorney to share information with third parties, does the client want to disclose the details of everything such as which child will inherit what amount from the client's estate, who the client has chosen to serve as agent under the durable power of attorney, who is not going to be remembered in the will, etc.? Does the client only want certain information disclosed? Should the client keep her plans confidential or share them with the family?<sup>110</sup> The client knows best how disclosure will affect the family, and it is the client's information to share.<sup>111</sup> Sometimes the information can be the catalyst for conflict amongst family members.

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<sup>110</sup> One elder law firm, Anderson, Brogan and Yonkers, as part of their services to further family harmony, in *Family Harmony: Disharmony Alert for Your Family Harmony: How to Bomb-Proof Your Estate Plan*, suggest "[a] pre-death meeting to 'clear the air' regarding parental harmony wishes" and "[a] 'clear the air' settlement conference" after the parent has died. Anderson, Brogan & Yonkers, *supra* note 75. Another approach, known as holistic estate planning, is done as part of the planning process, as compared to mediation, and involves facilitated family discussions on difficult topics designed to reach agreement and avoid subsequent litigation. Emily E. Beach, *Nudging Testators Toward Holistic Estate Planning: Overcome Social Squeamishness on the Subjects of Money and Mortality*, 26 OHIO ST. J. ON DISP. RESOL. 701, 703–04 (2011).

Candid conversations both highlighting and incorporating the topics of money and mortality are crucial to the accomplishment of holistic estate planning's goals. Failing to share estate plans openly within a family will not only frustrate the estate planning process, but lead to feelings of distrust among its members. Nevertheless, many potential testators and beneficiaries may be unwilling to take advantage of holistic estate planning simply to avoid these topics. Even within those families that do use this method of mediation, individual family members may be reluctant to participate wholeheartedly in the process for this reason. Unexpressed thoughts, opinions, and emotions cannot be meaningfully incorporated into the estate planning process, and may crop up later in the form of will contests or other interfamilial litigation.

*Id.* at 706–07 (citations omitted).

<sup>111</sup> One author takes a position in favor of disclosure at least when disinheritance is the topic. *See, e.g.*, Leese, *supra* note 76, at \*5 ("It is extremely important for the parents to take responsibility for their actions as opposed to subjecting their other children to the wrath of the child who has been treated differently. From my experience, those parents who do not tell the child that he

The attorney should counsel the client about the impact of sharing information, or whether keeping the information secret would be a better course of action for the client. If the client does decide to share her plans, it might be helpful to discuss with the client how that disclosure will occur, who will be present, and the circumstances surrounding the discussion. Will the client share the information with the family as a group, or share with family members individually? Would (or should) the attorney be involved in the meeting? Will sharing the information head off a family dispute or serve as a catalyst for one?<sup>112</sup> In the case of a caregiver or fiduciary, would the client want to authorize the caregiver or fiduciary to periodically share information with family members?<sup>113</sup>

#### H. Referrals to Mediation or Eldercare Coordination

Mediation be a good alternative to help resolve family conflicts, under appropriate circumstances.<sup>114</sup> In some instances,

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or she is going to be disinherited or treated differently will create, in the mind of the child who is affected, suspicion of the other children—including such thoughts that the other children must have forced mom or dad into doing what was done. Rightfully, at least in my experience, it is the parent's responsibility to bear the fallout of those decisions, not the rest of their family.”).

<sup>112</sup> See, e.g., Dana G. Fitzsimons, Jr., *Guardianship Litigation & Pre-Death Will Contests Are on the Rise*, 36 EST. PLAN. 39, 40 (2009) (noting a trend toward unrestricted availability of information and law requiring more fiduciary disclosures).

<sup>113</sup> See, e.g., Twyla Sketchley, *When You Become Your Parents' Caregiver*, 38 MONT. LAW. 8, 9 (Apr. 2013) (identifying lack of information as a cause of family conflicts and suggesting a regular schedule for communication).

To avoid many of these conflicts, a caregiver should develop a simple communication plan and provide it the remainder of the family. Email is readily available so this is the easiest and most cost effective way to communicate. The caregiver should set aside specific time each week to write a summary of the week, including basic medical, financial and activity information, and email it to all family members. She should also make the elderly parent available to communicate with the family, which may require her to call family members for the parent. A sign of abuse and exploitation is isolation of an elder, marked by family members being unable to communicate with the elder. . . .

*Id.*

<sup>114</sup> See ACCETTURA, *supra* note 13, at 214 (suggesting “facilitative mediation” as a way to resolve family disagreements); see also, e.g., Leona Beane, *Should Mediation Be Available as an Option to Reduce Litigation in Contested*

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mediation may be an effective way to minimize the harm that might occur from family infighting.<sup>115</sup> Another option for those families with troubling dynamics might be a referral to eldercare coordination.<sup>116</sup>

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*Guardianship Cases*, 74 N.Y. ST. B.J., June 2002, at 27, 29 (citations omitted) (“A mediated agreement leading to the appointment of a specific named guardian with specific tailored powers could have great value when the issues might otherwise foster highly contentious litigation, reflecting a ‘power struggle’ among members of a dysfunctional family seeking to acquire ‘control’ over the elderly or disabled person. Quite frequently, there are many ongoing disputes among the family members. The legal issues presented in court are usually not the underlying issues causing the family turmoil. Sometimes there are no contested legal issues, but there are still family disputes or concerns that need to be addressed.”). Attorney Hy Darling also considers the use of dispute resolution. He explains:

If the matter gets “messy” early, we suggest a social worker, mediator, or arbitrator to enter the situation in order to keep ‘peace within the family’ before the legal battle ensues and develops into a war. Once the lawsuit is filed, the family harmony is dissolved and is very hard to repair, especially after the affidavits and statements are made about one person vs. another.

Email from attorney Hy Darling (May 12, 2016) (on file with author).

<sup>115</sup> See, e.g., Eido Walny & Kelly Dancy, *Family Feuds: Mediating Estate and Probate Disputes*, 88 WISC. LAW. 24, 25 (Sept. 2015) (“No matter the number of beneficiaries or the size of the estate, family feuds about inheritances can result in permanent estrangement. Mediation is a cost-effective, efficient mechanism to resolve such disputes, mend, and even strengthen formerly broken ties.”); see also Beach, *supra* note 110, at 703-04, 709-10, 714.

<sup>116</sup> Sue Bronson & Linda Fieldstone, *From Friction to Fireworks to Focus: Eldercaring Coordination Sheds Light in High-Conflict Cases*, 24 EXPERIENCE 29 (Fall/Winter 2015). “More typically, as differences of opinion surface over the care of an elder or someone feels unappreciated or ignored, strong emotions arise. Those feelings may trigger frictions dating back to childhood grievances. Or the inclusion into the discussion of unwanted family members, blended family members, and new relationships leaves some feeling excluded. Or financial struggles begin an avalanche of new issues. When those around the table are not able to work out differences on their own, help may be available through elder mediation.” *Id.* at 30.

The authors observe that

[T]he process of eldercaring coordination has been developed to help manage high-conflict family dynamics so that the elder, family members, and stakeholders can:

- address their non-legal issues independently from the court;
- work with others in their support network to address the care and needs of the elder, avoiding delays and resulting in better decisions;

Eldercaring coordination focuses on improving relationship dynamics so that the elder, family members, and others in supportive roles can better collaborate with professionals able to help them make the onslaught of tough decisions ahead and support each other during times of transition. It is a dispute resolution option specifically designed for high-conflict cases involving issues related to the care and needs of elders in order to complement, not replace, other services such as provision of legal information or legal representation; individual and/or family therapy; and medical, psychological, or psychiatric evaluation or mediation.<sup>117</sup>

Eldercare coordination seems well suited to deal with family conflicts, because it is designed to “help with those cases where spite, intimidation, or vengeance comes into play.”<sup>118</sup> Clients who are open to mediation or eldercare coordination should be counseled on the process, costs, time frame, confidentiality and the enforceability (or lack thereof) of any agreement obtained in the process.

#### *I. Counseling the Client About Goals and How the Family Dynamics Affect Those Goals*

As a counselor at law, the attorney should also consider explaining the ramifications that family dynamics may have on the client’s legal goals. Model Rule 2.1 provides that when the lawyer advises the client, the lawyer “[i]n rendering advice . . . may refer not only to law but to other considerations such as moral,

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- foster the elder’s and the family members’ capacity for self-determination;
  - promote safety by monitoring situations at high risk for abuse or neglect;
  - provide a support system for the elder and family members during times of transition; and
  - reduce the need for protracted court intervention and free precious judicial time by addressing matters in high-conflict cases involving elders for whom dispute resolution processes have been unavailable or have proven ineffective.

*Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 32. The article gives examples of where eldercare coordination would be helpful, including in incapacity proceedings, guardianship proceedings, and situations where one family member denies the others access to the parent. *Id.* As well, life care planning law firms frequently deal with family conflicts. Email from attorney April Hill (June 13, 2016) (on file with author).

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economic, social and political factors, that may be relevant to the client's situation."<sup>119</sup>

One attorney, writing about family dynamics in estate planning,<sup>120</sup> takes the position that clients do not want their children's relationship to disintegrate into infighting; clients may in fact be blind to the likelihood of that happening:

A common belief among parents is that their children are all going to get along when they die, because they currently get along. When educating and counseling clients, it is a good idea to give them a healthy dose of reality. When the parents die, they are no longer the glue that potentially holds those children together. Other parents know the problem exists and want to incorporate some plan to avoid conflict, either because their children do not get along, or have personal experience from when their own parents died or know friends who have had such horrible experiences when a parent died.<sup>121</sup>

What is the client's goal? Is the goal really transferring the client's property to the next generation? Would that goal remain

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<sup>119</sup> MODEL RULES OF PROF'L CONDUCT r. 2.1. Comment 4 to Rule 2.1 notes that

Matters that go beyond strictly legal questions may also be in the domain of another profession. Family matters can involve problems within the professional competence of psychiatry, clinical psychology or social work . . . . Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation. At the same time, a lawyer's advice at its best often consists of recommending a course of action in the face of conflicting recommendations of experts.

As well a portion of comment 2 is helpful: "[a]dvice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant." *Id.*

<sup>120</sup> Leese, *supra* note 76. ("This chapter, instead of focusing on the traditional aspects of transfer and tax, will focus on a softer subject—considering family dynamics within the plan, so as to consider how to preserve family relationships and family values.")

<sup>121</sup> *Id.* at \*2. The author explains:

Most clients do not want their children to fight over inheritances. However, poor planning can result in children, of any age, fighting over the minutiae such as a couch, sewing machine, or a car. Sibling arguments over inheritance or control of the assets can lead to dysfunction and potential disruption of the children's relationships and their relationships with every other family member going forward, often for generations.

*Id.*

the same if the client knew that in doing so the family would be fractured beyond repair?<sup>122</sup> Again, what is the client's goal? What is important, family unity or distributing the property?

If clients are candid about their concerns for their children after the clients have died, the attorney can counsel the client about provisions that may be included in estate planning documents to help alleviate the potential for disintegration of the family relationship.<sup>123</sup> Drafting may be helpful, but in some instances more must be done, whether the client writes a letter to the family to be read after the client has died, or in some way explains post-death the reasons for the client's decisions, and the client's hopes for the family going forward.<sup>124</sup>

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<sup>122</sup> Timothy O'Sullivan, *Resting in Pieces: Traditional Estate Planning Fosters Family Disharmony*, in Timothy P. O'Sullivan & Robert Anderson, *Achieving Family Harmony in Estate Plans/Practice Tools and Trust Provisions*, 2010 NAELA ELDER & SPECIAL NEEDS L. ANN. MEETING, 2010 NAELA INST. 15-1 ("If given a choice between preserving family harmony and maximizing the value of assets passing to family members upon their deaths, most parents unquestionably would choose to preserve family harmony. In fact, not infrequently clients will tell their attorneys that they 'would rather give my estate to charity rather than have my children fight over my estate.'").

<sup>123</sup> See generally *id.* ("article summarizes several selected strategies, which may significantly reduce, if not totally avoid, family disharmony in that most vulnerable of situations when adult children become primary beneficiaries under their parent's estate plan."); see also James B. Stewart, *In Sumner Redstone Affair, His Decline Upends Estate Planning*, N.Y. TIMES, MEDIA (June 2, 2016), [http://www.nytimes.com/2016/06/03/business/media/in-sumner-redstone-affair-his-decline-upends-estate-planning.html?\\_r=0](http://www.nytimes.com/2016/06/03/business/media/in-sumner-redstone-affair-his-decline-upends-estate-planning.html?_r=0) (interviewing several experts who suggests drafting may be the way to avoid certain problems such as how capacity would be determined).

<sup>124</sup> One method of doing so is an ethical will, "a personal letter or message from the client to his or her family. It can be in the form of a written letter or an audio recording. While it is not a legal document, for many clients it is a valuable addition to the estate plan." Andrew H. Hook & Thomas D. Begley, Jr., *Lawyering for Older Clients: A New Paradigm*, 1 NAELA J. 269, 291 (2005). The ethical will can include such information as "a family history or tree; personal hopes, values and beliefs; forgiving others or asking forgiveness; and explanations for decisions made during life." *Id.* Thanks to attorney Stuart D. Zimring for the suggestion of the client handwriting a letter to the family to explain unequal devises, delivered after the client's death. Email from Stuart D. Zimring (June 6, 2016) (on file with author).

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Consider whether it would be appropriate for the attorney to discuss with the client strategies to minimize family disharmony, as a lawyer, not a therapist.<sup>125</sup> For example, assume the client is to sign a durable power of attorney and tells the attorney she wants her two children to be named as co-agents, so she does not hurt the feelings of either child. In discussing this with the client, the attorney learns that one child would be a poor choice of agent and counsels the client accordingly. The attorney could discuss with the client strategies to minimize any family disharmony that might occur as a result of one child being in charge and the other not.<sup>126</sup> The point is that educating the client about the options available to accomplish the client's goals is critical, but it is also critical to educate clients about how to make possible a different, better reality for the client's family.<sup>127</sup> It is also important to realize that once the client has died, family tranquil-

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<sup>125</sup> See, e.g., MODEL RULES OF PROF'L CONDUCT r. 2.1; see also, e.g., Anderson, Brogan & Yonkers, *supra* note 75.

<sup>126</sup> Mark Accettura, in his book, suggests that one consider her role in the family conflict and see the conflict from the point of view of those with whom there is conflict. ACCETTURA, *supra* note 13, at 193–194. Accettura suggests that the parent lead the way in smoothing over conflicts and working toward prevention of family conflicts since the parents “are in the best position to create family peace and minimize future fighting.” *Id.* at 194. Accettura offers a “recipe for family harmony”:

## Ingredients:

1 part love	1 part trust
1 part forgiveness	1 part tolerance
1 large olive branch	1 part understanding

Remove unrelated ingredients like in-laws that will only spoil the elixir.

Mix ingredients lovingly without bruising. Allow stubborn ingredients time to rise to the occasion. Keep contents in transparent container until ready to serve. Check often.

*Id.* at 196.

<sup>127</sup> See also Leese, *supra* note 76. The author “believe[s] that the priority of our profession with regard to trust and estate clients requires spending extra time with the clients to educate them about their options, and then lead them to an understanding of those long-term planning opportunities that can protect their children and provide opportunities for their children to become productive citizens and/or protect them in the event of failed marriages, creditors' claims, drug and alcohol abuse, or developmental disabilities.” *Id.* at \*5.

ity may dissolve, and the elder law attorney has to be prepared for handling emotional family members.<sup>128</sup>

#### IV. Conclusion

Families are important. They provide joy, love, support, angst, worry, and a whole host of other emotions for those lucky enough to be part of one. In elder law, families are part and parcel of the practice, whether as caregivers or supporters of the clients, or their adversaries. In client representation, elder law attorneys must recognize that family dynamics, good or bad, impact the representation of the client. The elder law attorney should gather information from the client about family relationships, ask the hard questions about the family, and then counsel the client about how family dynamics will affect the implementation of the client's goals.

Not every family is dysfunctional, not all siblings have negative rivalries, and although there may be favorites in every family, that does not need to be a bad thing. So, to return to my initial question about the title of this essay, is it *family matters* or *family matters*? Hopefully this essay shows that the answer is both. In elder law *family matters*, and there are *family matters* to address in the representation. Since elder law is often viewed as a holistic practice of law,<sup>129</sup> elder law attorneys are well equipped to handle all “family matters.”

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<sup>128</sup> Hy Darling explains how this is handled in his practice:

Wills are very emotional. Very often, the family has not even started the mourning process when we initiate the probate documents. Our office prefers not to have a “reading of the will” (That’s for TV), but very often, the family is in town for only a short time, and we may need to get signatures on the documents and discuss the estate administration with all family together as opposed to separately. These meetings sometimes elicit all the dirty laundry from the past, and I attempt to have another conference room available in the unfortunate event that I need to separate the family. A rule within our office is that at these meetings, we do not allow the inlaws . . . to attend. They may not be in the room as they are the ones who usually stir up the problems.

Email from Hy Darling, (May 12, 2016) (on file with author).

<sup>129</sup> See, e.g., *Aspirational Standards*, *supra* note 1, at 18 (D.2) (“[a]pproaches client matters in a holistic manner, recognizing that legal repre-

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sentation of clients often is enhanced by the involvement of other professionals, support groups, and aging network resources”).