

Determining the Client and
Family Dynamics

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“Happy families are all alike; every unhappy family is unhappy in its own way.”
- *“Anna Karenina”* by Leo Tolstoy

I. *Introduction.*

There is nothing like a dysfunctional family to impede an attorney’s planning for elderly clients. Whether arranging for nursing home care, drafting wills or advance directives, family issues from years past suddenly come back to the surface. A crisis can bring families together, but it can also uncover problems in the family that may never have been resolved.

II. *Defining the client.*

Determining “who” the client is the first step in representation. The practitioner may represent the elderly client alone, or consider representing multiple generations. The attorney must confirm who the client is as well as ensure that the terms of the representation are clearly defined. If the client does not have the capacity, the attorney should confer and work with the family to guarantee the protection of the elderly persons interests.

a. *Who is my client?*

¹ The traditional attorney client relationship is not always clear in Elder Law practice. Many times, it is the adult children that provide your first contact with the elderly client. When adult children come in for assistance in planning for their parents, the practitioner should make every effort to meet with the parent(s) alone. The National Academy of Elder Law Attorneys’ 2004 Aspirational Standards suggest that 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.”² Unless an attorney does not already represent the elderly person, they should solely represent the elderly or disabled person.³ This should also be communicated to the adult children, *so it is clear that the practitioner is representing the elderly person and not the adult children.*⁴

b. *Can or should I represent the entire family?*

¹ Holly J. Gilman, Gilman, Nicols, Hebner & Rixen, P.C. , Ethical Issues Facing The Elder Law Practitioner, University of Texas School of Law Intermediate Estate Planning, Guardianship and Elder Law Conference, August 26 & 27, 1999, Galveston, Texas. This article focuses on the variety of ethical issues that arise daily in an Elder Law practice, as well as the corresponding disciplinary rules.

² NAELA Aspirational Standards for the Practice of Elder Law, October 2004, available at www.naela.org, last visited December 22, 2005.

³ H. Clyde Farrell, Financing Long-Term Care in Texas, p. 29.

⁴Id.

The National Academy of Elder Law Attorneys in their October 2004 Aspirational Standards for the Practice of Elder Law suggests that joint representation of all family members may be beneficial.⁵ If there is no apparent potential conflict of interest, joint representation can further shared goals, common interests, family harmony, economic efficiency, consistency of action, and enhance the likelihood of serving the best interests of clients.⁶

In representing multiple generations, the attorney must ensure that the family members understand who the clients are, that confidences will and in some instances must be shared, and the potential risks of such representation. In such multigenerational representation each family member must sign a disclosure statement pursuant to Rule 1.05 of the Texas Disciplinary Rules of Professional Conduct.⁷ All parties should be advised to seek outside counsel prior to signing any disclosures.

c. How do I work with the elderly client and other family members?

The elderly client may come in to the practitioner's office with an adult child or children. The attorney should consider meeting with the elderly client alone first to assess capacity and the client's desires.⁸ A client's desires may not be communicated to the practitioner if the practitioner does not meet with the elderly client outside of the presence of the adult child.⁹ Meeting with the elderly client alone first may also assist the practitioner in determining if there is any undue influence coming from the adult child.¹⁰ Before meeting with the elderly client and adult child or family member, the practitioner must also advise the elderly client that what is said in front the family member may not be held confidential by the family member.¹¹ The practitioner may want to consider also communicating this in writing to the client, family, and adult children.¹²

d. Does the elderly client have capacity?

If unsure if the elderly client has capacity to contract for legal services or execute estate planning or other documents, the practitioner should recommend that the elderly

⁵ NAELA Aspirational Standards for the Practice of Elder Law, October 2004, available at www.naela.org, last visited December 22, 2005.

⁶ *Id.*

⁷ Texas Disciplinary Rules of Professional Conduct available at <http://www.txethics.org/reference>, last visited December 22, 2005.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*; see also H. Clyde Farrell, Financing Long-Term in Texas, p. 29 (2003).

client have a mini mental examination done by a physician to assess capacity.¹³ If the elderly client is found not to have capacity and has not previously executed the appropriate advance directives, speak with the family about the potential need for guardianship.¹⁴

e. *Making sure everyone is on the same page.*

Once the client is identified, a representation agreement or letter should be provided to the client(s) stating:

- i. The name(s) of the client;
- ii. The scope and objectives of representation;
- iii. The relevant foreseeable conflicts among the clients;
- iv. The lawyer's obligation of confidentiality as well as confirmation that the lawyers will share information and confidences among joint clients;
- v. The fee arrangement (hourly, flat fee or contingent); and
- vi. When and how the attorney client relationship may end.

III. *Ethical Issues.*

In addition to defining the client, working with families, there are a myriad of ethical issues related to family dynamics that the Elder Law Practitioner may face. Many adult children come to Elder Law Attorneys anxious to spend mom and dad down, although this may not be the best option for the elderly person. The practitioner will also have to address representation of both husband and wife, and be aware of abuse, neglect and financial exploitation of elderly clients.

a. *Ethical issues arising in Medicaid planning.*

Adult children may come to the attorney wanting advice on how to deplete mom or dad's assets in order to qualify their parents for Medicaid benefits. The practitioner should create a worst -case scenario to determine if Medicaid planning is appropriate. The client may have sufficient assets and income so that financially Medicaid is not an appropriate option. Also, there may be other reasons for not planning for Medicaid such as fewer choices of nursing homes, quality of care issues and the client's own values.

In addition to the appropriateness of gifting for Medicaid eligibility, the practitioner will have to consider capacity issues. An incapacitated

¹³ Holly J. Gilman, Gilman, Nicols, Hebner & Rixen, P.C. , Ethical Issues Facing The Elder Law Practitioner, University of Texas School of Law Intermediate Estate Planning, Guardianship and Elder Law Conference, August 26 & 27, 1999, Galveston, Texas.

¹⁴Id.

person cannot make gifts in order to “spend down” for Medicaid eligibility.¹⁵ Gifting to establish Medicaid eligibility for an incapacitated person may be done only if there is a properly executed Durable Power of Attorney (Statutory Durable Power of Attorney) made prior to incapacity that has *specific gifting language*.¹⁶

If the client no longer has capacity to sign a new power of attorney, the attorney will have to ensure that the agent under power of attorney follows the language of the power of attorney. For example, if the power of attorney limits gifts to the annual gift exclusion and the agent gifts more than the exclusion amount the agent is at risk of being accused of breach of fiduciary duty. The power of attorney may also be accused of self-dealing or financial exploitation if he or she makes gifts to himself or herself.

- b. *What are the ethical dilemmas in representing both the elderly husband and wife?*

The attorney should first establish that there is not a conflict in representing both the husband and wife. Possible conflicts might include one spouse communicating to the attorney in private that he or she is contemplating divorcing the other spouse. If there is no initial conflict, the practitioner should explain that should one arise, it could prevent representation of either spouse.¹⁷ The practitioner ought to explain that information shared by one spouse will not be held in confidence from the other spouse.¹⁸ The attorney should also have the elderly couple sign a joint representation disclosure that meets the elements Disciplinary Rule 1.06.¹⁹

- c. *What are my obligations in reporting abuse and neglect?*

If the attorney suspects that an elderly or disabled client is being abused, neglected or exploited, he or she **must report** this to the Texas Department of Protective and Regulatory Services (1-800-252-5400), as

¹⁵Id.

¹⁶Id. See this outline for other ethical issues arising within the context of representing the elderly client and working with the elderly client’s family or adult children, such as if the adult children want to establish Medicaid benefits and the elderly client appears uncomfortable with this planning option, or if the adult children’s motives for Medicaid eligibility appear to be for their own benefit.

¹⁷ Holly J. Gilman, Gilman, Nicols, Hebner & Rixen, P.C. , Ethical Issues Facing The Elder Law Practitioner, University of Texas School of Law Intermediate Estate Planning, Guardianship and Elder Law Conference, August 26 & 27, 1999, Galveston, Texas.

¹⁸Id.

¹⁹ H. Clyde Farrell, Financing Long-Term in Texas, p. 29 (2003).

required by the Texas Human Resource Code §48.051(a).²⁰ An attorney who fails to report abuse, neglect and exploitation is subject to *finis* and *confinement in jail*.

According to the Texas Human Resource Code, practitioners must report:²¹

Abuse: (A) the negligent or willful infliction of injury, unreasonable confinement, intimidation, or cruel punishment with resulting physical or emotional harm or pain to an elderly or disabled person by the person's caretaker, family member, or other individual who has an ongoing relationship with the person; or (B) sexual abuse of an elderly or disabled person, including any involuntary or nonconsensual sexual conduct that would constitute an offense under Section 21.08, Penal Code (indecent exposure) or Chapter 22, Penal Code (assault offenses), committed by the person's caretaker, family member, or other individual who has an ongoing relationship with the person.

Exploitation: the illegal or improper act or process of a caretaker, family member, or other individual who has an ongoing relationship with the elderly or disabled person using the resources of an elderly or disabled person for monetary or personal benefit, profit, or gain without the informed consent of the elderly or disabled person.

Neglect: the failure to provide for one's self the goods or services, including medical services, which are necessary to avoid physical or emotional harm or pain or the failure of a caretaker to provide such goods or services.

The attorney will most commonly see exploitation of the elderly or disabled persons finances through a power of attorney or trusted relationship. In order to detect abuse, exploitation and neglect the attorney should first discover if the elderly or disabled client has capacity, then inquire about the family dynamics by asking who is involved with the elderly or disabled person's daily care The attorney should also determine who and how the client's property is being managed, and speak with the client alone to find out what he or she truly desires.

IV. *Family Dynamics, or "You Never Loved Me!"*

Elder law attorneys can greater assist elderly clients by finding out who the key

²⁰ Martha Failing, Martha Failing P.C., New Reporting Requirements Regarding Exploitation Of The Elderly, South Texas College of Law, Representing The Elderly Client: Estate Planning, Special Needs Trust & Guardianships, May 16-17, 2002, Houston, Texas. This outline not only provides attorneys with the applicable reporting requirements, it also provides a procedural guideline as to what happens after the report is made.

²¹ Human Resource Code §48.002

players in the family are. The attorney will want to inquire as to who is providing assistance with activities of daily living, paying bills, and who is providing financial assistance. The attorney will also want to find out what the relationship between the family members is like. The attorney should keep in mind the individuals that are involved have additional responsibilities that impact the care they give the elderly client. Family members often make promises to their elderly family member that greatly impacts the functioning of the family and how that family gets along. Attorneys can help families make critical planning decisions by encouraging families to communicate before a crisis, maintain boundaries and hold family meetings to delegate responsibilities and share information.

a. *Who are the key players?*

One of the first questions the practitioner should ask is what is the relationship among the family members? The following information is important in drafting powers of attorney, wills and planning for long term care:

- i. Who is relied on most frequently for financial decision making;
- ii. Who stays calm in a crisis;
- iii. Who has a drug or alcohol problem;
- iv. Who is a spend thrift;
- v. What family members don't get along; and
- vi. Who are the extended family members?

b. *Families in transition.*

The practitioner should also look at the family dynamics in the larger scope. The 2000 census counted 25 million people over the age of 65, which is a 12% increase from 1990.²² The largest increase in the elderly population is in the "old old", meaning those persons who are 85 or older.²³ The number of persons who are 85 years or older increased by 38% in the 1990s, with the number of women increasing by 100 women for every 41 men.²⁴ The "baby boomer" also increased by 49% in the 1990s.²⁵ Additionally in 2000, there were an estimated 400,000 grandparents who had the primary responsibility of caring for their grandchildren.²⁶ One-

²² U.S. Census 2000.

²³ Id.

²⁴ Id.

²⁵ Id.

²⁶ A Profile of Older Americans: 2002, available at http://research.aarp.org/general/profile_2002.pdf (last visited December 22, 2003).

quarter of Americans are raising children while also providing the primary care for their aging parents.²⁷ This affected population is called the “sandwich generation”. Within this populace, the majority of caregivers are also females, many of them caring for their parents while raising children. This additional strain combined with the everyday stresses of working and maintaining relationships can greatly influence the family dynamics.

c. *Broken Promises.*

“I promised Mom I would never put her in a nursing home.” Every family makes promises to one other, usually in the context of a family crisis. However, not making a promise can be a difficult decision, and when a promise was made with noble intentions later proves unrealistic, the family should revisit their original aims and reevaluate them in their current circumstance.

In Mark Edinberg’s article “Six Keys to Successful Family Communication”²⁸ he discusses common promises family members make to elder family members:

- i. Promising to never place the loved one in a nursing home
- ii. Promising never to sell the family business
- iii. Promising never to sell the family home
- iv. Promising to "take care of a handicapped or incapacitated relative”
- v. Promising to continue a family feud (e.g. "Never talk to cousin Ned because of what he did in 1943, and promise me you will never forgive him or his children.")
- vi. Promising to not take a specific course of action about a stock or investment (e.g. "Never invest my money in banks")

The elderly family member may be afraid of being abandoned emotionally, unloved, and taken advantage of. They may be afraid of being abused or poorly cared for as their own family was in previous days. They don’t trust their families’ ability to make the best decisions for them (even if they don’t admit this, the "promise" has this lack of trust embedded in it, otherwise the promise wouldn’t be asked for). They may also unconsciously figure that what worked for them (e.g. owning a family business) is the best for their families whether their children think so or not.²⁹ The person eliciting the promise does so because of fear or an unmet

²⁷ The Sandwich Generation Definition, [available at http://www.thesandwichgeneration.com/](http://www.thesandwichgeneration.com/) (last visited December 23, 2003).

²⁸ Mark Edinberg, PhD, <http://64.233.187.104/search?q=cache:Xg0RQvff0QwJ:www.ec-online.net/Knowledge/Articles/promises.html+promises+promises&hl=en>

²⁹ Id.

need or concern. They are angry with someone else and do not want the other forgiven. They are afraid of what will happen to someone (or some thing) and somehow feel that their wish(es) are better than any their family may have in the future (without realizing that things can change in unexpected ways).

These promises are well intended, but can create unintended negative consequences. The daughter who promised her mother never to place her in a nursing home might have to quit her job to care for her mother. The resulting loss of the income may strain the financial well being of her family and thus diminish her ability to contribute financially to the care of her mother. Additionally, these promises also hurt family relationships and create a strained home environment. The promise to never sell the family business obligates the family to continue a business that may no longer be profitable or enjoyable for its individual members. The promise to never sell the family home keeps finances that could be used in the care of an older family member tied up in the property. The promise to take care of a handicapped or incapacitated person may create a serious financial burden for a family member, preventing the handicapped or incapacitated person from receiving the care that they need. The promise to continue a family feud can alienate members; and even when the cause of the rift is forgotten, the family remains damaged.

The easiest way to prevent being faced with a family promise that cannot be kept is to not make them. This is much easier said than done. When an elderly family member asks to not be placed in a nursing home, there is often an underlying concern: a fear of being left alone or abandoned. Once a promise is made that a family or family members know will be impossible to keep, it is important to revisit the promise and reframe the family's expectations. The risk the family runs in changing the "yes" to a promise include being yelled at, being called names, family ostracization, and disinheritance. However, these consequences will be worth the price paid in guilt and other negative consequences if the promise is kept.

Instead of making promises that may not be able to be kept is to talk for awhile with the relative about what is behind their need and then put some values together that everyone can agree on, such as:

- i. We want to do what is best for the entire family
- ii. We want to be sure to get the most out of these resources
- iii. We want to be able to make decisions if things change drastically.

V. *Communication.*

Practitioners often encourage clients to talk to other family members when a problem arises, usually to little avail. The practitioner can assist clients by encouraging them to communicate before a crisis occurs, getting as much information as possible on the elderly loved ones' financial and medical condition,

assisting the family in setting boundaries, and suggesting the family meet together.

a. *Communicate before a crisis.*

Communication during a family crisis is ranges from strained to non-existent. The best option is to communicate prior to the crisis when the family is not trying to make major decisions. Communication can be done informally during family dinners, or through a more formal family meeting as discussed below. Talking about what happens when mom can no longer stay at home *before* she falls and breaks a hip is always more fruitful.

b. *Gather information in advance.*

The family should talk to the elderly person to determine his or her preferences. Maybe the big fear of having to move mom from her home to assisted living is really an unrealized fear. It could be the case that mom is lonely and would enjoy living in a group setting.

c. *Boundaries.*

Frequently in families who have elderly family members needing care, one family member, usually a female, is responsible for the majority of care. Boundaries are necessary in setting expectations that do not include one person doing the majority of the work. For example, if mom is living with her daughter, the daughter needs to set specific boundaries so that she has her own time when other family members will relieve her. Many times other family members do not know that the primary caregiver is under strain or needs help, as the primary caregiver may consider it a failure on his or her part to ask for help. A well-rested and supported caregiver will provide better care to the elderly person and will be better prepared for the long haul.

d. *The Family Meeting.*

The family meeting can be used to communicate, problem solve and delegate responsibilities. If meeting with all family members in person is not feasible consider a conference call. The first meeting may not be successful because each person will come to the meeting with his or her own views and opinions. The first few meetings should only include close family members and the elderly person should not attend if she or he will become too upset that the meeting becomes unproductive.

- i. Set ground rules such as the meeting length, and a reasonable “to do” list
- ii. Everyone who has an interest should be included in the discussions.
- iii. Everyone should be encouraged to participate so that no one can later say, “I didn’t get to talk”.
- iv. Listen “generously”. Remember that there is usually more than one way to solve a crisis.

- v. Take notes so that things can be sorted out later; and ideas can be written down if more thought is needed.
- vi. Obtain the help of an objective outside party if needed. Many social workers are trained mediators and able to help families negotiate sensitive issues with a goal to having the best possible outcome.
- vii. If anger crops up, suggest a break so folks can “cool off” and hopefully come back to the table a little more willing to work through the challenges.
- viii. Be willing to compromise. Rarely does anyone get to have his or her way all the time and on every point.
- ix. Agree to disagree without being “disagreeable” if at all possible! Common courtesy and civility does matter in keeping things positive in family discussions.
- x. Have more than one meeting if needed and if appropriate so that ideas can be explored, phone calls made and new facts presented before a final decision is made.
- xi. End the meeting by affirming what was decided, what is left to be decided, and who is going to do what before the next meeting
- xii. Setting up a time for the next meeting if needed.

IV. *Bringing in back up.*

There are times when family tension and conflict is extreme to the point the elder law attorney will suggest that the family consider working with a professional or third party. Geriatric care managers³⁰, social workers, psychologists and counselors can work with families to address conflict and tension so that the planning for the elderly person may continue. Sharing the cost of the outside assistance allows each family member to feel as though he or she is contributing to the planning for elderly person’s care. The family may want to consider working with a third party such as a religious advisor, family friend, or other neutral moderator.

V. *Conclusion*

An attorney’s relationship with clients is greatly impacted by family dynamics. By ascertaining and addressing non-legal needs of elderly clients and their families’ the attorney will be able to greater assist the client.

³⁰ A list of geriatric care managers can be found at www.caremanager.org.