



## An Agricultural Law Research Article

# **Family Farm Succession Planning: Balancing Professional Responsibility with Client Needs for Help with Family Relationship Issues**

by

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## **FAMILY FARM SUCCESSION PLANNING: BALANCING PROFESSIONAL RESPONSIBILITY WITH CLIENT NEEDS FOR HELP WITH FAMILY RELATIONSHIP ISSUES<sup>1</sup>**

*John C. Becker, Matthew S. Kaplan and Jon Nussbaum<sup>2</sup>*

### **I. INTRODUCTION**

Legal professionals serving estate and business planning clients confront a wide variety of individual and family situations. Some of these situations raise distinct professional challenges in terms of how one de-

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<sup>1</sup> Funding for the research reported in this article was provided by the Children, Youth, and Families Consortium at The Pennsylvania State University. Craig Fowler, Margaret Pitts, and Jennifer Davis assisted in designing the study and conducting interviews. Roland Freund and David Dowler, Penn State Cooperative Extension educators, and Marion Bowlan, Director of Farm Link-PA, were instrumental in helping to recruit families for the study.

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finances and delivers his or her professional expertise. It is often difficult to find balance between ethical responsibilities that are focused on a professional's obligation to his or her client and personal desires to successfully conclude the representation in a manner that will generate positive relations between the client and other family members who are affected by the client's decisions and with whom the client must live.

In this article, we suggest that legal practice in the realm of farm family succession planning is a particularly complicated area of practice, having a clear need to fully understand communication by and between professionals, clients, and others and a great potential for breakdowns in communication between these parties. Succession planning includes estate planning to be sure, but it also incorporates other key functions such as business, retirement, and investment planning.<sup>3</sup> Much of the research that has been done up to this point has involved academic research that focused on social science oriented methodology to understand farmers' views about retirement and estate planning.<sup>4</sup> To support our contention concerning the complexity of this topic from a professional service provider perspective, we draw upon results of a research study conducted by faculty and students of Penn State University of how farm families communicate and make decisions regarding farm succession planning. Interviews conducted with multi-generational members of nine farm families in Pennsylvania revealed excessive levels of inaction, misunderstanding, and conflict that served to impede succession planning efforts. Further, it was found that problematic family communication dynamics contribute to some farm families' failures to take the necessary succession planning actions even when information was available on the tax, business organization, and investment aspects of the estate

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<sup>3</sup> See Pennsylvania Department of Agriculture's Center for Farm Transitions, <http://www.agriculture.state.pa.us/farmtransitions/cwpl/> (last visited Mar. 19, 2007) (the website contains a variety of articles about farm succession and estate planning).

<sup>4</sup> RUTH GASSON & ANDREW ERRINGTON, *THE FARM FAMILY BUSINESS* (CABI International 1971); Errington, Andrew (1998), *The Intergenerational Transfer of Managerial Control in the Farm-Family Business: A Comparative Study of England, France, and Canada* 5 *THE JOURNAL OF AGRICULTURE EDUCATION AND EXTENSION* 2; Errington, A. (2002), *Farmers Face Retirement in England, France, Canada and the USA* Conference Paper for *Carry on Farming?* University of Plymouth, Seale-Hayne Campus (Sept. 2002); Fetsch, R. *Some Do's and Don'ts for Successful Farm and Ranch Family Estate Transfers*, 37-3 *JOURNAL OF EXTENSION* 1, 1-7 (1999). Another source of recent research involving business succession models comes from academic research in the field of entrepreneurship, e.g., Cabrera-Suarez, K. *The Succession Process From a Resource and Knowledge Based Review of the Family Firm*, 15 *THE FAMILY BUSINESS REVIEW* 37 (2001).

planning decision process. These interviews present the typical comments and perceptions that professionals may confront in this practice area.

In this paper, we will examine the legal practice implications associated with research findings about how family-level interpersonal challenges can complicate succession planning efforts. In particular, how can the diverse interests of different parties, identified through these interviews, be served in a professionally responsible way that achieves client objectives and fulfills professional obligations? In this article, professional obligations will be defined in the context of the Model Rules of Professional Responsibility that apply to legal professionals engaged in providing one or more aspects of succession planning services. The Model Rules were chosen over other Ethical Practice or Professional Responsibility Rules because of their broad basis for examining the role of legal professionals in client settings and their neutrality on a national scale. Rather than approach this issue from the viewpoint of reported cases that address specific instances, our analysis starts by focusing on what clients describe as their interests and uses that begin to address the professional responsibility obligations as stated in the rules and as expressed in Ethics Opinions issued across the country.

To help set the stage for analysis of a lawyer's professional responsibility obligations, the next section provides an overview of the dynamics taking place in a family farm succession planning situation, with particular emphasis on the role of family relationships and communication dynamics issues. This section is followed by a presentation of family interview results from the Penn State study which illustrates various ways in which communication challenges faced by farm families can impede the succession planning process. This section is followed by a discussion of relevant tenets of professional responsibility in a legal practice setting that arise when providing legal consultation on matters that have profound implications for the entire family and how members relate with one another. The paper concludes with a series of recommendations for how legal professionals can accommodate family communication issues without abdicating or compromising ethical responsibilities to their clients.

## II. STARTING POINT: THE DYNAMICS OF FAMILY FARM SUCCESSION

It is clear that the farm population is aging. In the United States there are three times as many primary farm operators over age 65 as there are

under the age of 35<sup>5</sup> which means that a significant number of these primary farm operators will be turning over ownership of their production enterprises in the near future to a relatively small number of younger farmers. In addition to growing concerns about how to meet the retirement needs of older farmers, there is disconcerting evidence about how it has become increasingly difficult to find young people to continue with family traditions of farming.<sup>6</sup>

Another set of factors which has a profound effect on the sustainability of small family-owned and operated farms relates to farm succession planning. Succession planning refers to a comprehensive approach to plan for the transfer of a family business from one generation to the next.<sup>7</sup> Included in the areas addressed in succession planning are state and federal tax, labor management, business organization and capitalization, family dynamics, financial management and enterprise management considerations.<sup>8</sup> Fewer than half of the families have individually designed succession plans.<sup>9</sup> Many families do not know how to develop a plan or where to start developing it. The consequences of this may be severe if a farm is allowed to pass by testamentary or intestate process to heirs who fragment the productive assets through partition among the testamentary or intestate heirs.<sup>10</sup> If one or more heirs are involved in the business and rely on it as a primary income source, that heir may be forced to purchase the shares of other heirs to keep the business operating under her or his control. Incomplete or inadequate farm succession planning often results in heirs who are incapable of running the farm business,<sup>11</sup> family conflict, prolonged legal battles, and partition of family-owned and operated farm business assets to satisfy heirs who want to "cash in" their share of the business rather than invest in it.

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<sup>5</sup> USDA, USDA, National Agricultural Statistical Service, 2002 Census of Agriculture, United States Data XXX, Table 60 (2002).

<sup>6</sup> See National Farm Transitions, <http://www.farmtransition.org/aboutnetw.html> (additional information regarding barriers to entry to farming).

<sup>7</sup> Pennsylvania Department of Agriculture Center for Farm Transitions, <http://www.agriculture.state.pa.us/farmtransitions/cwp/view.asp?a=3&Q=138043>.

<sup>8</sup> *Id.*

<sup>9</sup> Farm Succession and Retirement Research: Selected Findings from England, France, Canada, and the United States (October 26, 2002) Statement of John Baker, Presented at the American Agricultural Law Association annual meeting in Indianapolis, IN.

<sup>10</sup> In this context, partition refers to the ability of either a tenant in common or a joint tenant with right of survivorship to choose to sell his or her own interest in the jointly held property rather than continuing to own it.

<sup>11</sup> See K. Gorchach's description of the "Farmer's Boy" in Gorchach K. and Serega Z. (1995) editors, *Family Farming in the Contemporary World: East West Comparisons*.

Much is already known about the business aspects of planning for farm succession, for instance the transfer of managerial control of the farm business to the succeeding generation during the life of the owner of the business. For example, farm families benefit from professional consultations,<sup>12</sup> choosing successors with strong leadership skills,<sup>13</sup> and developing timelines for transferring managerial roles and enacting formal transfers.<sup>14</sup>

Relatively little, however, is known about why families wait to make farm transfer arrangements. Is the decision made on specific grounds or does it arise by default as a result of a failure to act? This is a significant problem in farm succession since the process is complex, potentially costly, time consuming, and challenging. The lack of planning is often attributed to families having insufficient knowledge about the process and the consequences associated with taking (or not taking) action. However many estate planning professionals, including lawyers, accountants, insurance specialists, financial and investment service people, and outreach educators, develop and deliver information via consultation services, presentations, websites and the distribution of printed materials; so lack of information would not appear to be the primary problem.<sup>15</sup> Much of this information is general in nature and directed at the tax, business organization or investment aspects of the estate planning decision process and the issues it must address.

From a business decision-making perspective, a farm transfer is a rational decision-making process model that is power-holder centered. Information is provided to the person with the most power in the situation for instance, the head(s) of household with the expectation that the person's use of that information will be in the best interest of the family business.<sup>16</sup> Rational decision-making models may neglect the fact that people live in complex, often turbulent family environments and do not

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<sup>12</sup> Robert. J. Fetch & Toni. S. Zimmerman, *Marriage and Family Consultation with Ranch and Farm Families: An Empirical Family Case Study* 25 JOURNAL OF MARITAL AND FAMILY THERAPY 485, 485-501 (1999).

<sup>13</sup> A. B. Ibrahim, *A Study of Succession in a Family Firm* 14 FAMILY BUSINESS REVIEW 245 (2001).

<sup>14</sup> A. Kimhi and R. Lopez, *A Note on Farmers Retirement and Succession Considerations: Evidence From a Household Survey* 50 JOURNAL OF AGRICULTURAL ECONOMICS 154, 154-162 (1999).

<sup>15</sup> A simple 'Google' search of the words "farm succession planning" turns up over 1,000,000 hits. The information is there, but it is not being read or it is being read but not understood.

<sup>16</sup> John Baker, Michael Duffy, & Adrienne Lamberti, *Farm Succession in Iowa* (2001) (unpublished manuscript, on file with San Joaquin Agricultural Law Review).

behave in economically predictable ways, especially when contending with stressful issues.<sup>17</sup> This characterizes life on many family farms.

The complexity of life in small family-owned and operated farms often relates to express or implied family relationship and communication issues that typify the family unit. Robert Fetsch drawing on his research with Colorado families that own and operate farms, estimates that over half of the state's 27,000 farm and ranch operations have intergenerational conflicts which involve lack of agreement on how to handle the operation, as well as problematic family relations issues that emerge from these differences.<sup>18</sup> Beyond being extremely stressful for family members, disagreement and conflict regarding planning for the future of the farm, including disagreement regarding which family members share in farm planning discussions and decision making, often leads to disharmony within the family and financial problems with farm operations.<sup>19</sup> In addition, these conflicts can lead to behavior that reinforces the lack of family discussions concerning farm succession.

Communication is critical to helping farm families develop workable succession plans that result in profitable and productive family businesses that continue to maintain harmonious family relationships. Communication that helps to promote respect, understanding, trust, and complementary behavior between predecessor and successor increases the likelihood of success in the succession process.<sup>20</sup> When younger family members do not receive information, and are not involved in goal setting or decision-making, they are less likely to stay in farming, and the family is more likely to encounter "teamwork difficulties" and family conflict.<sup>21</sup> When there is open communication and shared decision-making, there is less conflict, greater cohesion within the family, more agreement on ba-

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<sup>17</sup> P. Boss, *Losing a Way of Life? Ambiguous Loss in Farm Families*, at 1, 11 (The University of Minnesota Cooperative Extension, Publ'n No. BU-7614-F, 2001).

<sup>18</sup> R. J. Fetch, *Ranching and Farming with Family Members* (Colorado State University Cooperative Extension Publ'n No. 10.217, 1998), available at <http://www.ext.colostate.edu/pubs/consumer/10217.htm>.

<sup>19</sup> D. H. Wiegel and R. R. Weigel, *Family Satisfaction in Two-Generation Farm Families: the Role of Stress and Resources* 39 FAMILY RELATIONS 449, 449-455 (1990), R. G. Stelling and M. K. Helling, *Goals and Principles of Intergenerational Transfer of the Family Farm*, 26 FREE INQUIRY IN CREATIVE SOCIOLOGY 201, 201-202 (1998).

<sup>20</sup> K. Cabrera-Suarez, *The Succession Process From a Resource and Knowledge Based View of the Family Farm*, 15 FAMILY BUSINESS REVIEW 37 (2001).

<sup>21</sup> D. N. Laband & B. F. Lentz, *Occupational Inheritance in Agriculture*, 65 AMERICAN JOURNAL OF AGRICULTURAL ECONOMICS 311, 311-314 (1983); D. H. Wiegel & R. R. Weigel, *Family Satisfaction in Two-Generation Farm Families: The Role of Stress and Resources*, 39 FAMILY RELATIONS 449, 454 (1990).

sic issues within the family, and family members report less stress and more satisfaction with their family lives.<sup>22</sup>

#### A. About the Study

Interviews were conducted with sixteen adult members from nine families in Pennsylvania that have family farms with annual sales between \$100,000 and \$249,000, and whose operators report farming as their major occupations. Families were selected from different parts of the state (at least to include representation of families from the eastern and western parts), they were engaged in more than one type of farming (dairy and vegetable), and they represented diverse generational configurations (for example, two and three generation families).

The results reported below are based on study participants' responses to the following questions that were included in a semi-structured interview guide:

- 1) Demographic questions, such as the type of farm, number of years the farm was in the family, and number of children and grandchildren;
- 2) Questions on perspectives of farming, such as perceptions of the role of the farm in their quality of life and plans for the future, and perceptions of the family business facet of the farm;
- 3) Questions about how decisions were made about the farm, such as, the decision-making responsibilities of family members, the way family members behave and the roles they take during family discussions about the farm;
- 4) Questions about farm transfer discussions, such as whether discussions have taken place, the frequency of discussions, who was involved in them, and the general tenor of such discussions;
- 5) Questions about the farm transfer process, such as, how family discussions influenced what the family did regarding the transfer process, overall perceptions of the farm transfer process, concerns associated with the farm transfer process, such as, how family relationships might be affected, and the role of non-family members in the transfer process; and

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<sup>22</sup> P. S. Davis, *In the Founder's Shadow: "Conflict in the Family Firm"*, 12 FAMILY BUSINESS REVIEW 299 (1999); R. J. Fetch & T. S. Zimmerman, *Marriage and Family Consultation with Ranch and Farm Families: An Empirical Family Case Study*, 25 JOURNAL OF MARITAL AND FAMILY THERAPY 485, 485-186 (1999); LARRY JANSSEN ET AL., *THE STRUCTURE OF FAMILIES AND CHANGES IN FARM ORGANIZATION AND STRUCTURE* 512 (Arne Hallman ed., 1993).



- 6) Questions about general communication dynamics within the family, such as, the level of openness of communication, comfort levels associated with family communication, how disagreement is handled, expressed, resolved, and any other patterns of communication.

In consideration of his or her participation in this study, each family member was assured that no identifying information concerning him or her would be retained or divulged. Study results are provided below in three major sections: (a) the level of experience families in the study have in terms of addressing farm transfer issues, (b) the communication and relationship dynamics of these families, and (c) dilemmas faced by these families as they tried to figure out how to address succession planning issues. Demographic information about families participating in the study is presented in Table 1 (see Appendix A).

### *B. Experience Addressing Farm Transfer Issues*

The nine families included in the Penn State study had varying degrees of experience in discussing farm succession planning issues and taking action to enact their plans. For classification purposes, the families fit into the following experience level categories, with three families in each category:

- 1) *Extensive experience* considering or discussing farm succession issues: These families have already developed their farm transfer plans, and have taken positive actions to enact their farm transfer plans.
- 2) *Moderate amount of experience* considering or discussing farm succession issues: These families have begun to develop succession plans and consider ways to implement their plans.
- 3) *Limited experience* considering or discussing farm succession issues: These families have not begun to develop farm transfer plans.

The characteristics of families fitting into each of these categories are further described below. As the amount of experience that families have in addressing farm succession planning issues is a crucial variable in this study, this information is provided for each family respondent quoted throughout this paper.

### *C. Families with Extensive Experience*

Three families that spent a lot of time and effort addressing and resolving questions about how they would pass on the family farm shared the following characteristics:

- 1) Respective roles were worked out. There was clarity in terms of who was considered the most likely successor(s), and how assets would be divided among children. The mother of one of the families noted that this resolution gave her and her husband a sense of relief as they could now step back from the burden of farm management. She also noted that her children had some relief as they could factor the succession planning decisions into their life plans.
- 2) There was clarity in the decision-making process. Different members within each of these families described the same decision-making process.
- 3) There was clarity in the rationale for resolving farm transfer issues in a timely manner. Family members articulated an awareness of the negative financial implications, such as, inheritance taxes and holding off with transfer decisions. The sense of urgency for taking action to keep the farm in the family was conveyed by members of the older generation by phrases such as “must be done while we’re alive.”

However, the specific strategies and processes followed by these families varied substantially. Two of the families had purchased adjacent farmland, including homesteads as a way to broaden the options and opportunities for individual siblings. One family chose a legal strategy to initiate a gradual process of change of ownership; they established a formal partnership between the retiring family member and the primary successor. Another family was exploring other options such as setting the farm up as a corporation or a trust. The level of family involvement in the decision-making process also varied. In one family, members were basically just informed as to the will of the parents. The father researched the issues, met with professionals, had a few meetings with individual family members, and then developed a plan that he felt best met everyone’s needs. In the other two families, the adult children had opportunities to present their ideas and concerns. These families arrived at their farm transfer plans through regular family-wide conversations.

#### *D. Families with Moderate Experience*

Respondents in the three families in this category also ascribed a high level of importance to developing farm succession plans, although, for various reasons they had not finalized or begun to enact their plans. Young adult members of these families were clear on the general intent of their parents regarding commitment to keeping the farm within the family. However, the specifics were not clear; this includes things such

as how assets will be divided up among siblings, and specific roles and responsibilities for each family member.

One of these families was clearly on its way to developing a plan. Family members had spoken about and agreed, in principle, to a process in which the older adult owner would begin a systematic process of retirement, giving more and more ownership and decision-making responsibility to his son and son-in-law. The problem was that there were different perceptions about the timing of this process. The father felt no sense of urgency to finalize the farm transfer plan, but the son-in-law expressed some discomfort with the slow movement toward finalizing the paperwork. In the other two families, it was not clear who would be the successor. Both of these families had a lead candidate for successor, but it wasn't clear whether these individuals would want to take over the farm.

#### *E. Families with Limited Experience*

In the families fitting into this category, there were even more unknowns, particularly in terms of the question about who will be the successors, and there was less of a sense of urgency to figure things out. The father of one family acknowledged that despite not knowing who would run the farm in the future, he did not see this as something that needed to be resolved soon. He stated, "Well, I'm not anxious about it. It's maybe something that could wait a little."

The fathers of the other two families expressed more of a sense of urgency to make progress with their succession planning. In the words of one of these fathers, "We're at the point where we have to do something." Yet, for varying reasons, these families exhibited a sense of inertia in terms of moving forward with the succession planning process. This is particularly evident in the following quote from a son in one of these families: "I'm not sure it [the completion of the farm transfer process] will occur until someone dies... or till both [father and mother] die." The sections below examine in more detail how internal family variables, such as family communication dynamics, career decisions, and marital relationships as well as external variables (for example, economic factors) serve to inhibit progress in these families' succession planning endeavors.

### III. FAMILY DYNAMICS

#### *A. Issues Involving Control*

For most of the families in the study, when it came to the topic of farm succession planning, there was recognition that the process is not, and

can not be, driven unilaterally by the senior generation. To varying degrees, parents tried to incorporate children's perspectives, concerns, and lifestyle decisions into discussions and decision-making about the future of their farms.

"One of them [priority items] is to do something on the will. I don't think I want to come to them with 'this is the will' I want to come to them with a skeleton of what the will looks would look like to see if I [can better] appreciate their opinions..."<sup>23</sup>

Several fathers noted that a crucial part of the decision-making process involved taking cues from their children, and picking up on their expression of interest in farming. Several comments alluded to the farm going to the one who "shows up." One father stated,

"He (older son) did not have the patience... Our younger son had all the patience in the world to go ahead and do farming and he stuck around all the time. They're both doing what they want to now. It worked out better."<sup>24</sup>

The following comments reflect how parents tried to be subtle in their efforts to exert influence with their children.

"I whisper in their ears."<sup>25</sup>

In describing how he and his son who is in college make decisions, a parent said, "It's like the old Abbott and Costello routine – 'Who's on first?' Who's in charge? I try and avoid telling 'em [his children] what to do."<sup>26</sup>

The father of another family expressed regret in not having done more to involve family members in succession planning discussions:

"I guess sometimes as men we kind of take things on our own and maybe sometimes we make decisions we should have stopped and sat the whole family down. I think that'd be the best you know... Sometimes I think still looking back it would have been better off sometimes sitting the whole family, everybody saying we're going to do it this way I think that is the best way to go... I think as a rule [having frequent family conversations about farm succession issues] is important if you want your children to stay and take the farm on... Better to get them involved to get them to take an interest in it. I think that's important."<sup>27</sup>

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<sup>23</sup> Confidential Interview by Craig Fowler, et al., (N.D.) (father, family with a moderate amount of experience); *see supra* note 1.

<sup>24</sup> Confidential Interview by Craig Fowler, et al., (N.D.) (father of a family with extensive experience) This family sold the farm to their younger son who is now in charge of farm-related decisions; *see supra* note 1.

<sup>25</sup> Confidential Interview by Craig Fowler, et al., (N.D.) (father of a family with a moderate amount of experience); *see supra* note 1.

<sup>26</sup> *Id.*

<sup>27</sup> Confidential Interview by Craig Fowler, et al., (N.D.) (father of a family with extensive experience); *see supra* note 1.

### B. Trust

The more trust there is between parents and children, the greater the likelihood that a controversial issue, such as succession planning, will be addressed. Trust can cover the expectation that parents will do "the right thing" for their children, or that parents will "take care" of their children in ways that serves the children's best interests. For example, a young adult son of one family in our study stated the following:

"I know dad said he won't hold the hammer to us you know if we have a catastrophe that we can't pay the bills... He'll work with us and I don't see that being a problem."<sup>28</sup>

Another respondent noted how trust leads to mutual understandings about the future behavior of all parties:

"They trust me ... and... I trust them."<sup>29</sup> "They trust me" refers to the father being fair to his children in terms of their inheritance, and the "I trust them" refers to the father's expectation that his children will care for him when he needs care in the future.

In comments where trust was not strongly stated, impatience with the pace of decision-making and frustration with perceived indifference replaced the favorable expectations. To these people, a "wait and see what they do" attitude may not be worth waiting for.

### C. Clients as Passive Communicators

Many of the respondents in the study can be portrayed as passive communicators. When responding to questions about how families reach mutual understanding on issues related to family relations and plans for the family farm, respondents placed more emphasis on what was implicitly understood rather than explicitly communicated. The following comments, made by families with varying levels of experience addressing farm succession planning issues, allude to an intrinsic understanding of respective roles and responsibilities:

"They know what they can do and what they can't do."<sup>30</sup>

As long as kids know our wishes."<sup>31</sup>

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<sup>28</sup> Confidential Interview by Craig Fowler, et al., (N.D.) (son of a family with moderate amount of experience); *see supra* note 1.

<sup>29</sup> Confidential Interview by Craig Fowler, et al., (N.D.) (father of a family with limited experience); *see supra* note 1.

<sup>30</sup> Confidential Interview by Craig Fowler, et al., (N.D.) (father of a family with limited experience); *see supra* note 1.

<sup>31</sup> Confidential Interview by Craig Fowler, et al., (N.D.) (mother of family with extensive experience); *see supra* note 1.

[After noting that there has been very little discussion about the topic of actually transferring the farm] "They know its' [sic] going to be passed down... That they're eventually going to get it." This respondent also referred to the implicit understanding he shared with his father when he obtained the farm: "I don't know if my grandfather ever expected it to be sold but it was kind of a nonverbal agreement between my dad and me that we would get the farm out of debt and keep it in the family."<sup>32</sup>

[In response to the question of whether the topic of transferring the farm had been discussed in his family] "Uh probably not specifically. I think it's just everybody kind of knows what's going to happen because of the way it was done between my dad and his dad."<sup>33</sup>

#### *D. Awareness of Family Interdependencies*

Respondents made a variety of comments indicating an awareness of how family members are interdependent, for instance, how the goals and actions of individuals in the family affect other members of the family. In one family, for example, the father realized that his decision about retirement would affect the financial well-being of all family members.

"We would certainly like to remain in our own house as long as possible and as long as we can afford to do so. Even though it might use up some of their inheritance, we would like to do that... You know, stay here."<sup>34</sup>

The son-in-law of this family described a string of related events; he noted that his father-in-law's decision about retirement affects whether he is needed to run farm, and this in turn affects whether his wife [a third grade teacher] needs to keep her job.

Several respondents noted how family cooperation in farm transfer efforts can lead to win-win situations.

"It kind of had to work in a chain because I had just built a house and my brother who had took over the farm he bought the house that I built cause he just got married and then I bought the [adjacent] farm." [Note: The father co-signed for the loan.]<sup>35</sup>

"I think this thing ought to be set up so that both gain. Everybody gains. We want everybody to gain... I think the boys would gain because their net worth would improve and they would get the opportunity to make more decisions

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<sup>32</sup> Confidential Interview by Craig Fowler, et al., (N.D.) (father of a family with a moderate amount of experience); *see supra* note 1.

<sup>33</sup> Confidential Interview by Craig Fowler, et al., (N.D.) (son of a family with a moderate amount of experience); *see supra* note 1.

<sup>34</sup> Confidential Interview by Craig Fowler, et al., (N.D.) (father of a family with a moderate amount of experience); *see supra* note 1.

<sup>35</sup> Confidential Interview by Craig Fowler, et al., (N.D.) (son family with extensive experience); *see supra* note 1.

that I'm making now. I would think that I would gain to be able to relax a little bit and still help them."<sup>36</sup>

### *E. Waiting for Decisions to be Made or Action Taken on Key Issues*

In nearly all of the families participating in the study, respondents (particularly from the older generation) noted how they had received information and advice from professionals knowledgeable about farm transfer issues, including lawyers, estate planning attorneys, tax consultants, extension educators, and insurance agents. However, in many cases, families were not ready or able to move forward on the advice they received. Parents of four of the families in the study, forty-four percent, made comments indicating significant delays in their families' succession plans due to unresolved issues or uncertainty tied to the lives of individual family members. The two most common types of personal issues that were seen as inhibiting or delaying efforts to establish or finalize farm succession plans were those related to children's career choices and issues related to their children's personal relationships.

The following comment from a father looking to finalize succession plans provides an illustration of how parental uncertainty tied to the son's career decision can lead to delays.

"... Right now I would kind of like to see if [his eldest son] wants to keep on farming down here... He's going to have to let us know... I guess that's what we were doing... sitting back waiting 'till this three year [is over]."<sup>37</sup> ["Three year" refers to a 3-year plan the father worked out with his son; his son rents the farm and progressively buys equipment, cows, etc. and takes on increased ownership responsibilities.]

The following comments made by parents indicate a concern about relationship issues in the lives of their children:

"I'd like to make sure that if he gets married the marriage is stable before we go ahead and start getting him involved in the business and then have a divorce or messy situation like that."<sup>38</sup>

"I was going to set up an agreement between him [oldest son] and me but I was kind of waiting. [Referring to his son's marriage:] I didn't trust her and

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<sup>36</sup> Confidential Interview by Craig Fowler, et al., (N.D.) (father of a family with a moderate amount of experience); see *supra* note 1.

<sup>37</sup> Confidential Interview by Craig Fowler, et al., (N.D.) (father of a family with extensive experience); see *supra* note 1.

<sup>38</sup> Confidential Interview by Craig Fowler, et al., (N.D.) (father of a family with moderate amount of experience); see *supra* note 1.

here last month she picked up and moved out. So I'm glad in that respect [referring to waiting]; otherwise she would have had half of this."<sup>39</sup>

"I mean they're interested and [his son] is certainly interested in what's going on around here but as far as ever getting a part of it, help manage it, or help own it or anything else I just don't see it. One reason is his wife wouldn't have too much to do with the farm." [Speaking of a son-in law:] "Her husband's not a farmer. He was never raised on a farm and it'd be a major mistake to try and educate him on farm life."<sup>40</sup>

The father of a family with a moderate amount of experience summed up the challenge of dealing with such personal issues with the following comment, "It's easier to talk about farm issues than family issues." Considering that the two sets of issues are intertwined, it is no surprise that family and personal issues have a large impact on what is done with the farm business.

#### *F. To Treat Children Fairly or Treat Children Equally*

One of the most difficult issues parents face is the question of whether to treat children fairly or treat children equally. Equal treatment negates the argument that one child is favored over any other child, and so from a parent's viewpoint, it is a safe decision to make. But is it the best decision to make from a succession planning viewpoint? In many cases the decision to treat children equally is based on the belief that few other decisions are available. Some of those interviewed were aware of some options available to them, but proceeded with caution insofar as they also recognized that treating children differently can place stress on family relationships.

For several of the families in the study, choosing a successor was a complicated, somewhat challenging decision to make. Part of the difficulty lies in the fact that even current farm operators recognize how this decision making process involves competing concerns and difficult decisions. On one hand, the current operator needs to ensure that somebody in the family is ready and willing to continue to own and manage the farm. With declining numbers of young people choosing farming as their career, the challenge is clear.<sup>41</sup> Decisions become further complicated when concerns about maintaining fairness and avoiding conflict arise between the siblings. From a parent's perspective, choosing to

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<sup>39</sup> Confidential Interview by Craig Fowler, et al., (N.D.) (father of a family with limited experience); *see supra* note 1.

<sup>40</sup> Confidential Interview by Craig Fowler, et al., (N.D.) (father of a family with limited experience); *see supra* note 1.

<sup>41</sup> 2002 Census of Agriculture, USDA, National Agricultural Statistical Service.



equally divide property among all his or her children is the safe solution. If all children received the same amount, the equal treatment eliminates complaints from children who feel that a larger share is an indication that one child is favored over others. While this decision favors the current operator, it may significantly impair the ability of one child to purchase the share of siblings who are not involved in the farm business.

Quotes from the fathers of two families help illustrate the potential tension between trying to be fair to all siblings and ensuring that the farm continues as a farm. The first quote is from the father of three children; two had chosen other careers and the third was the primary candidate to take on the farm.

"I would dearly dread the idea that because of the fact that we're passing on something of value it would cause some kind of conflict in the family... You know, I don't want that to happen. On the other hand I feel that the farm cannot really be easily split in thirds and make it a profitable enterprise."<sup>42</sup>

"Whether we got the right thing done now I'm not sure about that... We hope it's going to be halfway fair for the other two kids [who] can't expect to get as much out of the deal as you would expect the kids who work here to get out of it."<sup>43</sup>

The second father quoted above further noted that he and his wife agreed to give ownership of the farm to the one child who wanted to be involved in running the farm. The other siblings, who chose to do other things with their lives, would not get the farm. He felt this was fair to all and would not cause a conflict: "I don't think that's a conflict because they've chosen their professions that they want to follow."

The idea of treating the child who stays on the farm (and helps it survive as a farm) differently from those who do not comes up in several contexts as is evident in the following quotes:

"To be honest with you, you can't be fair to all of them. Can't treat them all alike. I see that it's impossible and still keep it a farm. ... But they will be compensated in some other way."<sup>44</sup>

"I mean it's a hard decision for dad to make. You know he'd like to make it affordable to us, but yet be fair to my two sisters ... and I have another brother that's not involved. And how you do that and make it fair you know

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<sup>42</sup> Confidential Interview by Craig Fowler, et al., (N.D.) (father of a family with moderate amount of experience); *see supra* note 1.

<sup>43</sup> Confidential Interview by Craig Fowler, et al., (N.D.) (father of a family with limited experience); *see supra* note 1.

<sup>44</sup> Confidential Interview by Craig Fowler, et al., (N.D.) (mother in a family with extensive experience); *see supra* note 1.

that they don't say on down the road you gave 'em the farm an' that kind of stuff and' we kind of worked through some of that."<sup>45</sup>

Concerns about fairness seemed to be exacerbated in the larger families.

"I think it depends on how many fingers there are in the pie. The more you've got, the more complicated it is. You know if you've got two kids and only one wants to farm that's not too difficult to work out."<sup>46</sup>

"This farm couldn't support everybody if all five of our children said they wanted to farm. You know we couldn't have supported everybody so somebody had to go do something else."<sup>47</sup>

How the fairness issue is handled has a major implication for prospects for farm continuity. If other siblings share in the ownership and decision-making of the farm, for example, this can make it harder to manage the business part of the operation, such as by reinvesting profit into the business during crucial times.

"What do they have to do in order to keep the farm running? I mean do they let everyone in on the decision making that don't understand the farm or do they let people that run it and help manage it make the decisions?... Why should they (other family members) get a third of the profit at year-end when it should go back into the farm...?"<sup>48</sup>

### G. Addressing Economic Concerns

Several comments raised the point that the economic reward from agricultural operations is marginal in many cases when only one family is dependent on its income. Adding the financial needs of another family to the demands of the business increases pressure to produce more income. The succession plan may not succeed if efforts to find new income sources are unsuccessful. Although concern about the business ability to generate income to support more than one family is not unique to agriculture, it does support the often stated notion that farmers are "cash poor and asset rich." Families that rely on income from current operations face the need to make do with limited resources, while those who control the land assets are in a better position if a high demand for

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<sup>45</sup> Confidential Interview by Craig Fowler, et al., (N.D.) (son of a family with moderate amount of experience); *see supra* note 1.

<sup>46</sup> Confidential Interview by Craig Fowler, et al., (N.D.) (daughter of a family with limited experience); *see supra* note 1.

<sup>47</sup> Confidential Interview by Craig Fowler, et al., (N.D.) (son of a family with moderate amount of experience); *see supra* note 1.

<sup>48</sup> Confidential Interview by Craig Fowler, et al., (N.D.) (son-in-law of a family with moderate amount of experience); *see supra* note 1.

land exists in the area. In that situation, control of land is more important than control of the business in which the land is used.

There were also economic concerns tied to issues of marriage and divorce. The concern that parents raise about how in-laws relate to the family farm business is a volatile issue insofar as there is a very real potential impact on the entire family's economic interests. However, there is simply no easy way to address this concern without raising some risk that the evolving relationship between the new "in-law" and the parents might be significantly affected.

The parents' concern about the future of a child's relationship if expressed as hesitance to bring the "in-law" into the family (and the family business) could be the wedge that drives the child's relationship apart. At what point do parents put aside their concerns for economic interests in favor of allowing the children to live their own lives and make their own decisions?

#### *H. Dealing with Disagreement*

Respondents articulated a range of strategies for dealing with disagreement. Some families noted that they prevent the escalation of disagreement into conflict by avoiding or postponing difficult conversations. For example, the adult son of one family stated,

"Well I don't like a lot of conflict and he [father] doesn't like a lot of conflict... So there's times when I have avoided the issue of transfer cause I think there probably would be some conflict and so just no point talking about it."<sup>49</sup>

Procrastination as a disagreement strategy supports the notion that over time some problems will simply fade away as a result of little or no attention paid to them. However, for many families, this avoidance ultimately leads to poor decision making that potentially can have significant economic, legal and interpersonal ramifications.

Viewing disagreements from the avoidance perspective is not surprising. Avoiding trouble is part of what the succession planning process is designed to do. However, this avoidance mechanism, for instance, bypassing sensitive decisions in favor of the peace and harmony solution, has the potential cost of leading to choices that reflect worse outcomes than what was bypassed.

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<sup>49</sup> Confidential Interview by Craig Fowler, et al., (N.D.) (son family with limited experience); *see supra* note 1.

#### IV. HOW FAMILY DYNAMICS AND DILEMMAS AFFECT THE ATTORNEY ADVISOR

This discussion of family dynamics and dilemmas presents the professional advisor with a clear set of challenges in topic areas where the professional may not be well equipped to move from the role of advocate protecting a client's interests to the role of facilitator within a family. For example, re-establishing trust among family members is a difficult task when an advisor speaks only with her client. Counseling someone to transfer business control to a younger generation before the person is ready to do so is another difficult assignment often facing the advisor. Making the transfer now may seem clear to all but the person who needs to act to complete the transfer. In the following discussion of professional responsibility concerns, an advisor's professional obligations are discussed with a view toward recognizing issues related to the dynamics and dilemmas that clients present.

Reliance on implied understandings between family members runs counter to the approach that legal professionals typically follow with their clients. Advisors approach their responsibilities with the dual goals of protecting client interests and avoiding ambiguous situations wherever possible. Allowing implied understandings flowing between two or more parties to play a major role is decidedly risky from an advisor's perspective. Members of a family that run a farm may share a host of assumptions about their roles and responsibilities, but an advisor is likely to formalize as many of these assumptions as possible to deal with anticipated events, such as the death or disability of a family member, or an economic downturn. These efforts may be interpreted as unnecessary or as providing an advantage to one party and a disadvantage to the other. This may have the undesired result of increasing the potential for conflict between family members.

#### V. A LAWYER'S PROFESSIONAL RESPONSIBILITY OBLIGATIONS IN FAMILY FARM SUCCESSION PLANNING

Putting aside issues and concerns from the perspective of farm families, this section will examine the farm succession planning undertaking in the context of the rules that govern the delivery of professional legal services. In each of the following sections, we add commentary regarding how these rules work in the context of helping clients who are often embroiled in complex family relationship dilemmas to find workable farm succession planning solutions.

*A. Competence*

In all types of professional service, a lawyer is required to provide, and clients will expect, competent representation.<sup>50</sup> Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. It has been said that perhaps the most fundamental legal skill that all lawyers must possess is the skill of determining the particular type or kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge.<sup>51</sup> "Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners."<sup>52</sup> It also includes adequate preparation.<sup>53</sup> The required attention and preparation are determined by what is at stake. "An agreement between the lawyer and the client regarding the scope of the representation may limit the matters for which the lawyer is responsible" and alert the client to the extent of the lawyer's competencies in the matter presented by the client.<sup>54</sup>

These considerations are typical of how a legally trained professional would approach a problem with logical thinking and analysis directed at the goals of protecting interests and avoiding ambiguities. However, this approach is most likely to avoid the "interpersonal issues" that would or could arise in the representation. A client who makes it clear to her professional advisor that she is simply unwilling to give up control of a business may miss the negative impacts which continued control have on a succeeding generation's development of management expertise needed to operate the business effectively in the future. A difficult situation is created when the professional must communicate to the client that the client's position is unwise or is likely to be detrimental to accomplishing the desired outcome of the representation. Achieving technical expertise in applying legal solutions to problems may do little to deal with the personal problems and challenges clients often present.

Succession planning is not simply trying to avoid the costs associated with the transfer of assets from one generation to the next with which most probate and estate planning lawyers are familiar. These costs and expenses have been significantly reduced in recent years and may be

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<sup>50</sup> MODEL RULES OF PROF'L CONDUCT R. 1.1 (2002).

<sup>51</sup> MODEL RULES OF PROF'L CONDUCT R. 1.1 cmt. (2002).

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

reduced even further in the near future.<sup>55</sup> If transfer costs and expenses have been reduced as impediments to effective succession planning, what other factors increase the chance that the succession planning process will produce a plan that can be effectively implemented? Succession planning also includes a formidable requirement for professionals to navigate the troubled waters of interpersonal family relationships while maintaining compliance with ethical and professional responsibilities. A professional may face the need to encourage family members to “open up” to their family members in ways they have been unwilling to do. This dimension of competence can lead to more effective representation through more effective problem solving results.

### *B. Professional Communication*

In the family dynamics discussion the need for effective communication within a family and among family members is clear. Professional advisors will find they also have professional obligations that directly affect the way they are able to communicate with their clients and with the clients’ family. Lawyers are obligated to promptly inform clients and clients only, of any decision or circumstance concerning the matter that the client presents and explain this information in a manner to “permit the client to make informed decisions regarding the representation.”<sup>56</sup> This obligation includes a requirement to “reasonably consult with the client about the means by which” the lawyer believes the client’s objectives are to be accomplished and comply with reasonable requests for information.<sup>57</sup> Non-clients may be as interested in having the information as the client, but the obligation to communicate runs in only one direction, namely to the clients. As will be discussed later in regard to confidentiality, violating that duty places the attorney in considerable jeopardy.

An attorney-client relationship exists “after the client requested the lawyer to render legal services and the lawyer agreed to do so.”<sup>58</sup> But there are some duties, such as that of confidentiality that attach when the lawyer agrees to consider whether a client-lawyer relationship will be

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<sup>55</sup> See Andrew Chamberlain, *Death and Taxes: The Economics of the Federal Estate Tax*, TAX FOUNDATION SPECIAL REPORT, No. 142 (May 2006) For example, it has been estimated that as a result of the 2001 amendments to the Federal Estate Tax law, 26 U.S.C. A. Section 2001-2704 fewer than 2% of decedents in the United States between January 1, 2002 and December 31, 2010 will face the need to file a Federal Estate Tax Return and of that number many will not have a Federal Estate Tax to pay.

<sup>56</sup> MODEL RULES OF PROF’L CONDUCT R. 1.4 (2002).

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

<sup>58</sup> *Id.*, at SCOPE (17).

established.<sup>59</sup> The existence of this relationship depends on the intent of the parties and can draw on express or implied conduct which creates the expectation that professional services will be rendered.<sup>60</sup> In many situations that have a legal consideration in them, those who are not considered clients may not appreciate the technicalities that are at work in even this simple aspect of a professional relationship. If the lawyer's engagement comes not by contact with the client herself, but through a family member who purports to act on behalf of a parent, such as under the specific terms of a power of attorney issued by the parent, the relationship requires clarification. In this type of case, the client would be the parent for whom the attorney in fact is exercising specific power and authority.<sup>61</sup> If there is a reasonable basis to believe that the contact with the lawyer is made for some improper purposes, such as to engage in fraud or undue influence, the lawyer must decline or withdraw from the representation.<sup>62</sup> If the contact is made by a child who requests that documents be prepared for signature by a parent in order to appoint the attorney in fact for the parent, and the motive appears to be proper, the lawyer must clarify that the lawyer's client is the parent who will sign the document.<sup>63</sup> This may mean that in a later arising dispute between the parent and the child, the lawyer will consider the parent to be the client and information obtained from the child may be used in representing the mother or father.

When a lawyer who represents the buyer in a real estate closing pursuant to a contract that requires the seller to convey the deed, the lawyer may prepare the deed as an accommodation to her client without becoming the lawyer for the seller as well.<sup>64</sup> However, the lawyer must first explain to the seller that the lawyer represents the buyer and not the seller, that she cannot give the seller legal advice other than the advice to secure counsel, and that she will prepare the deed in accordance with the specifications stated in the contract.<sup>65</sup> In this case a distinguishable element is that the deed does not exclusively represent the interests of the seller as the buyer is the specific and intended beneficiary of it.<sup>66</sup>

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<sup>59</sup> *Id.*

<sup>60</sup> *Togstad v. Vesley*, 291 N.W.2d 686, 693 (1980). Whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact. MODEL RULES OF PROFESSIONAL CONDUCT SCOPE 17 (2004).

<sup>61</sup> Opinion 2003-7 (January 2004) Ethics Committee of the North Carolina State Bar, [http://www.ncbar.com/eth\\_op/ethics\\_o.asp](http://www.ncbar.com/eth_op/ethics_o.asp).

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> Opinion 2004-10 (July 2005) Ethics Committee of the North Carolina Bar, [http://www.ncbar.com/eth\\_op/ethics\\_o.asp](http://www.ncbar.com/eth_op/ethics_o.asp).

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

A lawyer who represents a married person is not also the representative of the client's spouse in the absence of direct consent by the spouse and a waiver of any potential conflict that might arise in a joint representation situation.<sup>67</sup> To fulfill a professional's obligation, clients should have sufficient information to participate intelligently in decisions concerning the objectives of the representation, and the means by which they are to be pursued depends in part on the kind of advice or assistance that is involved. A lawyer who is retained to form a new business entity may limit the representation to the entity, and not its individual constituents, provided the constituents of the yet to be formed entity consent following appropriate disclosures by the lawyer.<sup>68</sup> The engagement letter from the lawyer to the principals of the entity should specify whom the lawyer does and does not represent and also explain that once the entity is formed, the principals agree that to ratify the lawyer's engagement terms on behalf of the entity.<sup>69</sup> The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation.

### C. Confidentiality

Under professional responsibility rules a lawyer is prohibited from revealing any information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by Professional Conduct rules.<sup>70</sup> Clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct.<sup>71</sup>

A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation.<sup>72</sup> This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing, sensitive or legally

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<sup>67</sup> Opinion 05-07 (July 2005) Committee on Rules of Professional Conduct of the State Bar of Arizona, <http://www.myazbar.org/Ethics/>.

<sup>68</sup> Opinion 2002-06 (September 2002) <http://myazbar.org/Ethics/>.

<sup>69</sup> *Id.*

<sup>70</sup> MODEL RULES OF PROF'L CONDUCT R 1.6 (2002).

<sup>71</sup> R. 1.6. cmt. (2002).

<sup>72</sup> Informed consent for these purposes includes providing a client with enough information to enable a client to make a knowing and intelligent decision about a question presented.



damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Family members involved in negotiating the transfer of a family business may look to the role of the family legal counsel as the advisor for all family members without appreciating the limited role the advisor can play with non-clients.

The principle of client-lawyer confidentiality is given effect by three related concepts: the attorney-client privilege, the work product doctrine and the rule of confidentiality established in professional ethics.<sup>73</sup> The attorney-client privilege and work-product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer.<sup>74</sup> The confidentiality rule, for example, applies not only to matters communicated in confidence by the client, but also to all information relating to the representation, whatever its source.<sup>75</sup>

#### *D. Conflicts of Interest with Current Clients*

As a result of recent high profile insolvency situations at Enron Corporation, WorldCom and other businesses, conflicts of interest and the implications of recognizing a conflict exists are topics of current discussion. In the legal profession, the Rules of Professional Conduct have addressed these matters in great detail. It is to the profession's credit that detailed rules and an emerging body of law addresses this topic to which some people have given little or no thought. The complexity of these rules and the implications to the lawyer and client from paying them little heed will be readily apparent in the following discussion from the Comments to Rule 1.7.

A lawyer is prohibited from representing a client if the representation involves a concurrent conflict of interest.<sup>76</sup> In typical family business succession planning situations, these differences can be sharp. A concurrent conflict of interest exists if representation of one client will be directly adverse to another client, or there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to other clients.<sup>77</sup> As explained below, in this case

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<sup>73</sup> MODEL RULES OF PROF'L CONDUCT R 1.6 cmt. (2002).

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> MODEL RULES OF PROF'L CONDUCT R 1.7 (2002).

<sup>77</sup> *Id.*

the lawyer risks a considerable economic interest by ignoring a conflict of interest situation.

If a conflict of interest exists, a lawyer may represent a client if the lawyer reasonably believes that he or she will be able to provide competent and diligent representation to each affected client, the representation is not prohibited by law, and each affected client gives informed consent, confirmed in writing.<sup>78</sup> Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. Concurrent conflicts of interest can arise from the lawyer's responsibilities to another client, a former client or a third person or from the lawyer's own interests.<sup>79</sup> Resolution of a conflict of interest problem under this Rule requires the lawyer to: 1) clearly identify the client or clients; 2) determine whether a conflict of interest exists; 3) decide whether the representation may be undertaken despite the existence of a conflict, for instance, whether the conflict is one on which a client can grant consent; and 4) if so, consult with the clients affected to obtain their informed consent, confirmed in writing.<sup>80</sup>

Conflicts of interest may exist before representation is undertaken, in which event the representation must be declined, unless the lawyer obtains the informed consent of each client. If a conflict arises after representation has been undertaken, the lawyer ordinarily must withdraw from the representation, unless the lawyer has obtained the informed consent of the client.<sup>81</sup> Where more than one client is involved, whether the lawyer may continue to represent any of the clients is determined both by the lawyer's ability to comply with duties owed to the former client and by the lawyer's ability to represent adequately the remaining client or clients, given the lawyer's duties to the former client as explained below.

#### *E. Identifying Conflicts of Interest: Directly Adverse*

Loyalty to a current client prohibits undertaking representation directly adverse to that client without that client's informed consent. Absent consent, a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated.<sup>82</sup> The client to whom the representation is directly adverse is likely to feel betrayed, and the resulting damage to the client-lawyer relationship may impair the lawyer's ability to represent the client

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<sup>78</sup> *Id.*

<sup>79</sup> R 1.7 cmt.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> MODEL RULES OF PROF.'L CONDUCT R 1.7 (2002).

effectively. In addition, the client on whose behalf the adverse representation is undertaken reasonably may fear that the lawyer will pursue that client's case less effectively out of deference to the other client.<sup>83</sup>

#### *F. Identifying Conflicts of Interest: Material Limitation*

Even where there is no direct adverse interest, a conflict can exist if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests.<sup>84</sup> For example, a lawyer asked to represent several individuals seeking to form a joint venture is likely to be materially limited in the lawyer's ability to recommend or advocate all possible interests that each might have because of the lawyer's duty of loyalty to the others. The conflict in effect forecloses alternatives that would otherwise be available to the client. The mere possibility of subsequent harm does not itself require disclosure and consent. The critical questions are the likelihood that a difference in interests will occur and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.<sup>85</sup>

#### *G. Personal Interest Conflicts*

The lawyer's own interests are not allowed to have an adverse effect on representation of a client.<sup>86</sup> For example, if a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. Similarly, when a lawyer has discussions concerning possible employment with a law firm representing the opponent, such discussions could materially limit the lawyer's representation of the client. A lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed financial interest.<sup>87</sup>

When lawyers representing different clients in the same matter, or in substantially related matters, are closely related by blood or marriage, there may be a significant risk that client confidences will be revealed and that the lawyer's family relationship will interfere with both loyalty

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<sup>83</sup> Rule 1.7 cmt. (2002).

<sup>84</sup> MODEL RULES OF PROF'L CONDUCT R 1.7 (2002).

<sup>85</sup> *Id.* Rule 1.7 cmt. (2002).

<sup>86</sup> MODEL RULES OF PROF'L CONDUCT R 1.7 (2002).

<sup>87</sup> R.1.7 cmt (2002).

and independent professional judgment.<sup>88</sup> As a result, each client is entitled to know of the existence and implications of the relationship between the lawyers before the lawyer agrees to undertake the representation.

Conflict questions arising from estate planning and estate administration are well known. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may be present. In estate administration, the identity of the client may be unclear under the law of a particular jurisdiction. Under one view, the client is the fiduciary that has a defined role to play in the situation and a defined relationship with the beneficiaries. Under another view the client is the estate or trust, including its beneficiaries. In this latter case, the attorney's obligation is to a broader list of people with potentially differing interests.

Whether a conflict is eligible for informed consent depends on the circumstances. For example, a lawyer may not represent multiple parties to a negotiation where interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference in interest among them.<sup>89</sup> Thus, a lawyer may seek to establish or adjust a relationship between clients on an amicable and mutually advantageous basis; for example, in helping to organize a business in which two or more clients are entrepreneurs, working out the financial reorganization of an enterprise in which two or more clients have an interest or arranging a property distribution in settlement of an estate. The lawyer seeks to resolve potentially adverse interests by developing the parties' mutual interests. Otherwise, each party might have to obtain separate representation, with the possibility of incurring additional cost, complication or even litigation. Given these and other relevant factors, the clients may prefer that the lawyer act for all of them.

#### *H. Special Considerations in Common Representation*

In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the common representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost to the clients, and embarrassment and recrimination to the lawyer.<sup>90</sup> Other impacts to the lawyer's goodwill include loss of standing within the community and possible civil action by the af-

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<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

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

fects clients. Ordinarily, a lawyer will be forced to withdraw from representing all of the clients if the common representation fails. In some situations, the risk of failure is so great that multiple representations are plainly impossible. For example, a lawyer cannot undertake common representation of clients where contentious litigation or negotiations between them are imminent or contemplated. Moreover, because the lawyer is required to be impartial between commonly represented clients, representation of multiple clients is improper when it is unlikely that impartiality can be maintained. Generally, if the relationship between the parties has already assumed antagonism, the possibility that the clients' interests can be adequately served by common representation is not very good. Other relevant factors are whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating or terminating a relationship between the parties.<sup>91</sup>

A particularly important factor in determining the appropriateness of common representation is the effect on client-lawyer confidentiality and the attorney-client privilege. With regard to the attorney-client privilege, the prevailing rule is that, as between commonly represented clients, the privilege does not attach.<sup>92</sup> Therefore, it must be assumed that if litigation occurs between the clients, the privilege will not protect any such communications, and the clients should be so advised.

As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. This result occurs because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect that client's interests and the right to expect that the lawyer will use that information to that client's benefit. The lawyer should, at the outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other. In limited circumstances, it may be appropriate for the lawyer to proceed with the representation when the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential.

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<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

*I. Former Clients*

A lawyer's obligation to clients continues after the representation has ended. In regard to former clients, a lawyer is prohibited from representing another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client, unless the former client gives informed consent, confirmed in writing.<sup>93</sup> In addition, a lawyer is prohibited from using information relating to the representation to the disadvantage of the former client, or revealing information relating to the representation, except as these Rules would permit or require with respect to a client.<sup>94</sup>

After a client-lawyer relationship ends, a lawyer has certain continuing duties with respect to confidentiality and conflicts of interest and may not represent another client in certain cases.<sup>95</sup> For example, a lawyer could not properly seek to rescind on behalf of a new client a contract drafted on behalf of the former client. Nor could a lawyer who has represented multiple clients in a matter represent one of the clients against the others in the same or a substantially related matter after a dispute arose among the clients in that matter, unless all affected clients give informed consent.<sup>96</sup>

Matters are considered to be "substantially related" if they involve the same transaction or legal dispute, or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter.<sup>97</sup> If the new representation will work some injury to the former client in connection with the same matter, a "matter-specific" conflict arises.<sup>98</sup> If there is a new risk that confidential factual information learned in the former representation could be used to advance the new client's position, then an "information-specific" conflict arises.<sup>99</sup> For example, a lawyer who has represented a businessperson and learned extensive private financial information about that person may not then represent that person's spouse in seeking a divorce.

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<sup>93</sup> MODEL RULES OF PROF'L CONDUCT R 1.9 (2002).

<sup>94</sup> *Id.*

<sup>95</sup> R 1.9 cmt.

<sup>96</sup> R 1.9 cmt. (2002).

<sup>97</sup> *Id.*

<sup>98</sup> Opinion 2005-11 (August 2005) <http://www.osbar.org/ethics/ethicsops.html> (the Legal Ethics Committee of the Oregon State Bar after being approved by the bar's Board of Governors).

<sup>99</sup> *Id.*

### *J. Representing an Organization*

A lawyer employed or retained by an organization, such as a corporation, limited liability company, or limited or general partnership, represents the organization acting through its duly authorized constituents.<sup>100</sup> A lawyer who represents a corporation or partnership with two stockholders or owners who are not related does not automatically represent the stockholders or owners as individuals.<sup>101</sup> Likewise, a lawyer who represents two unrelated stockholders or owners does not automatically represent their corporation or partnership.<sup>102</sup> In the course of representing an organization there may be times when the organization's interest is adverse to those of one or more of its constituents. In such circumstances the lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation.<sup>103</sup> Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged. A lawyer who represents two clients in forming a partnership or a corporation may not represent either of them against the other after they have a falling-out and are negotiating about dissolution.<sup>104</sup>

### *K. Dealing with Unrepresented Parties*

Several situations described above address unrepresented parties who may have the mistaken impression that a lawyer retained by one party in a transaction also represents their interests in the transaction. With that situation in mind, what obligation does a professional have to the unrepresented person? When dealing on behalf of a client with a person who is not represented by counsel, a lawyer should not state or imply that the lawyer is disinterested.<sup>105</sup> If the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer must make reasonable efforts to correct the misun-

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<sup>100</sup> MODEL RULES OF PROF'L CONDUCT R 1.13 (2002).

<sup>101</sup> Opinion 2005-85 (August 2005) <http://www.osbar.org/ethics/ethicsops.html> (the Legal Ethics Committee of the Oregon State Bar after being approved by the bar's Board of Governors).

<sup>102</sup> *Id.*

<sup>103</sup> MODEL RULES OF PROF'L CONDUCT R 1.13 cmt. (2002).

<sup>104</sup> *Id.*

<sup>105</sup> MODEL RULES OF PROF'L CONDUCT R 4.3 (2002).

derstanding.<sup>106</sup> The lawyer must not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.<sup>107</sup>

An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is an authority on the law without considering whether the lawyer represents another client or the impact that representation has on the lawyer's professional obligations to clients. To avoid a misunderstanding, a lawyer should identify the lawyer's client and, where necessary, explain that the client has interests opposed to those of the unrepresented person.<sup>108</sup>

The Rules of Professional Responsibility distinguish between situations involving unrepresented persons whose interests may be adverse to those of the lawyer's client, and those in which the person's interests are not in conflict with the client's.<sup>109</sup> Where the unrepresented person's interest may be adverse, the possibility that the lawyer will compromise the unrepresented person's interests is great, then the Rule prohibits giving any advice, apart from the advice to obtain counsel.<sup>110</sup> This Rule would not prohibit a lawyer from negotiating a transaction or settling a dispute with an unrepresented person. If the lawyer explained that the lawyer represents an adverse party and is not representing the person, the lawyer may inform the person of the terms on which the lawyer's client will act or reach an agreement in the matter.

#### *L. Minors as Clients*

When a client's capacity to make decisions is diminished for any reason, such as age, disease or mental impairment, a lawyer must, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.<sup>111</sup> When the client, is at risk of physical or financial harm unless action is taken a lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of an authorized representative for the person.<sup>112</sup>

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<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

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

<sup>110</sup> R. 4.3 cmt. (2002).

<sup>111</sup> MODEL RULES OF PROF'L CONDUCT R 1.14 (2002).

<sup>112</sup> *Id.*



Disclosure of the client's diminished capacity could adversely affect the client's interests. For example, raising the question of diminished capacity could, in some circumstances, lead to proceedings for involuntary commitment. Information relating to the representation is protected by the Rules of Professional Conduct.<sup>113</sup> Therefore, unless authorized to do so, a lawyer may not disclose such information. When taking reasonably protective action the lawyer is impliedly authorized to make the necessary disclosures, even when the client directs the lawyer to the contrary.<sup>114</sup> Nevertheless, given the risks of disclosure, the Rule limits what the lawyer may disclose in consulting with other individuals or entities or seeking the appointment of a legal representative. At the very least, the lawyer should determine whether it is likely that the person or entity consulted with will act adversely to the client's interests before discussing matters related to the client.<sup>115</sup> The lawyer's position in such cases is an unavoidably difficult one.<sup>116</sup>

#### *M. Lawyers Acting as Neutral Third Parties*

Recognizing that family dynamics may call for someone to serve as a facilitator in the decision making process, can a lawyer serve as a "neutral third party" in these types of family decision making cases? A lawyer serves as a third-party neutral when the lawyer assists two or more persons who are not clients to reach a resolution of a dispute or other matter that has arisen between them. Service as a third-party neutral may include service as an arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.<sup>117</sup> Aside from representing clients in dispute-resolution processes, lawyers often serve as third-party neutrals. A third-party neutral is a person, such as a mediator, arbitrator, conciliator or evaluator, who assists the parties, represented or unrepresented, in the resolution of a dispute or in the arrangement of a transaction.<sup>118</sup> Professional Conduct Rules require a lawyer serving as a third-party neutral to inform unrepresented parties that the lawyer is not representing them. When a lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer must explain the difference between the lawyer's role

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<sup>113</sup> See R. 1.6, *infra* and accompanying discussion.

<sup>114</sup> MODEL RULES OF PROF'L CONDUCT R. 1.14 cmt 8.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> MODEL RULES OF PROF'L CONDUCT R. 2.4 (2002).

<sup>118</sup> R 2.4 cmt.

as a third-party neutral and a lawyer's role as one who represents a client.<sup>119</sup>

The role of a third-party neutral is not unique to lawyers, although, in some court-connected contexts, only lawyers are allowed to serve in this role or to handle certain types of cases. In performing this role, the lawyer may be subject to court rules or other law that apply either to third-party neutrals generally or to lawyers serving as third-party neutrals.<sup>120</sup> Lawyer-neutrals may also be subject to various codes of ethics.<sup>121</sup> Lawyers serving in this role may experience unique problems as a result of differences between the role of a third-party neutral and a lawyer's service as a client representative. The potential for confusion is significant when the parties are unrepresented in the process. Thus, a lawyer-neutral is obligated to inform unrepresented parties that the lawyer is not representing them and explain some of the differences between each of these situations, including the inapplicability of the attorney-client evidentiary privilege.<sup>122</sup>

## VI. CONCLUSION

In summary, the professional advisor in family succession planning situations must be prepared to navigate a set of potentially complex problems to achieve an outcome that will be viewed as a professional success. The technical challenges that applicable law provides may be problems that are best addressed with preparation. The family dilemma issues, however, call for skills that are obtained through experience. To aid the professional in choosing the skills to obtain the following recommendations are offered.

### *A. Recommendations for Professionals who Assist with Farm Succession Planning*

Succession planning professionals can and are needed to do more than provide advice and accurate information about farm transfer laws, regulations, and procedures. As found in this study and noted elsewhere in the literature some families also need help in communicating effectively

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<sup>119</sup> R 2.4

<sup>120</sup> *Id.*

<sup>121</sup> Such as the Code of Ethics for Arbitration in Commercial Disputes prepared by a joint committee of the American Bar Association and the American Arbitration Association or the Model Standards of Conduct for Mediators jointly prepared by the American Bar Association, the American Arbitration Association and the Society of Professionals in Dispute Resolution.

<sup>122</sup> MODEL RULES OF PROF'L CONDUCT R 2.4 (2002).

and cooperating on important decisions. Succession planning professionals can help in the following ways:

- 1) Identify your client and clearly and firmly establish the role you will play for your client. Client or family pressure to be everyone's lawyer is a temptation that must be resisted. This is even more troublesome where a misunderstanding can lead family members to believe they are represented by someone who does not consider them to be their professional advisor. The rules of professional responsibility are built upon the attorney-client relationship. In that relationship all aspects should be clearly stated in writing. While the professional relationship between the attorney and client should be clear, those who are not in that relationship should also be aware of how the existence of the relationship affects those who are outside of it.
- 2) Work with other professionals to help facilitate dialogue within the family. Although it is readily understood that family communication issues can present a formidable impediment to farm succession planning efforts, estate planning professionals typically do not have the training in how to improve family communication dynamics. One strategy is to partner with professionals who have skills in promoting and facilitating family communication and cooperation; this includes mental health professionals who do family counseling work and community educators who specialize in family relations issues such as those involved in parenting and care giving. Professionals with family strengthening skills are likely to be better equipped to help family members recognize how communication problems threaten the transfer process, learn problem-solving and conflict-resolution skills, and practice these communication techniques.
- 3) Be flexible in working with farm families. As noted in the study results, there are many ways in which families seek to address the farm succession planning process. For example, some families are more committed to participatory decision-making and open communication than others. Families also have distinct needs in terms of the timing of their succession plans. It is likely there are certain crucial times for families to engage in effective communication about farm transfer planning, such as when a family member begins asking questions, when youth start contemplating career path possibilities, and when retirement options are being explored. Professionals who work with families in the farm succession planning process should take this variability into account.

- 4) Be patient and understanding of the problems that families are confronting in this planning process.

### *B. Final Thoughts*

One might say there is a paradox between (a) how legal practice is traditionally defined as a lawyer-client relationship, and (b) how a lawyer would operate if the goals of succession planning representation included encouraging family members to communicate more frequently and more effectively, supporting family collaborative decision-making processes, strengthening family relationships and promoting trust within the family. Which objective should be more important—fulfilling the obligations to one's profession, or effectively solving the problem for which the client first approached the attorney? For most professionals the answer would likely be that the professional obligation receives greater attention, for these rules govern the delivery of the professional service and set it apart from other types of service providers. That may be true, but the statement reflects an inward rather than outward looking professional focus. When professional rules take greater precedence than achieving a workable solution for a client, who will feel disadvantaged if greater attention is paid to non-client concerns? Is the problem clients do not understand the nature of a professional's role in these matters, or is the problem professionals do not take the time to explain what these rules are? Professionals who spend more time with patients and clients are likely to have more satisfied patients and clients. If professional responsibility rules recognize the importance of client satisfaction and raise its importance to a level on par with professional obligations that maintain the profession's image, this will lead to more positive relationships between professionals and their clients.