

# Back to the School of Hard Knocks: Thoughts on the Initial Estate Planning Interview-Revisited

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The author wrote and published this article many years ago.<sup>1</sup> Since he originally published the article, he has sent out hundreds of copies to people who have requested it over these many years, and the passing years have not reduced the demand for it. After 12 years, the author decided to give the subject further consideration; hence, this article. The author will retain much of the original article, but he will supplement it with further thoughts and citations that were not available when the article was originally published.

You know *how* to design and implement a tax-wise estate plan. Then a new client calls and schedules an initial interview. Your estate planning fact-finder is ready. But *are* you ready?

The purpose of this article is to discuss the initial client interview in the estate planning process. Given the amount of estate planning that goes on in this country, the paucity of writing about the estate planning interview *process* is both scary and disconcerting. Since 2002, not much has changed on the writing front. The topic still is neglected, wrongfully so.

An exhaustive analysis of the human processes at work behind estate planning would fill a volume (or two).<sup>2</sup> This article will discuss selected aspects of the initial estate planning client interview, primarily focusing upon the primary “players” in the interview: the client and the estate planner. Although he has not yet gotten around to it, at some point, the author intends to write a follow-up article that will delve into specific process aspects of the estate planning interview, as well as interviews involving entire families, the latter being more frequently encountered in today’s increasingly common practice of inter-generational estate planning.

**Before proceeding further, a disclaimer is appropriate. The author does not claim to have all of the answers. Or even all of the questions! If the author seems absolutely certain of his positions in this article, please remember that the author**

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<sup>1</sup>“The Initial Estate Planning Interview,” 27 *ACTEC Journal* 297 (2002).

<sup>2</sup>James, Russell N. III, J.D., Ph.D., *Inside the Mind of the Bequest Donor* (self-published 2013); Shaffer, Thomas L. (1970), *Death, Property, and Lawyers*, New York: Dunellen (hereafter, *Death, Property, and Lawyers*.)

**is not as certain as he seems.** The author is not an expert on estate planning interviews, nor does he have any formal training in interviewing. The author sanguinely admits that he has made more mistakes in client interviews than he cares to admit. The truth is that each client is so different that nothing is always true. If anyone is offended or feels that the author is pontificating or coming on a little strong, the author sincerely apologizes in advance for his only intention is to trumpet a Baconian call for further analysis by estate planners of the human processes of estate planning.

### **Why “Soft” Knowledge Is “the Mortar” of Estate Planning**

All estate planners and clients are (or should be) united in the search for and implementation of a “good estate planning result”, whatever that may be in a given situation. The path to a “good estate planning result” can be a treacherous and tricky one, with numerous potential obstacles, as demonstrated by the graphic at the end of this article. A “good estate planning result” is a very difficult thing to achieve, and estate planners and their clients should celebrate **each and every time** that it occurs. A “good estate planning result” is much more than minimizing or even eliminating estate taxes. In fact, the author posits that the tax and property transmission issues are the easiest pieces of the puzzle.<sup>3</sup>

As the graphic illustrates, there are several “players” in the estate planning “play.” The matters above the green line that flows in both directions represent views and common experiences in the past with estate matters among all of the “players,” and the items below the green line are witnessed in each of the various players in the “play.” What the graphic is intended to show is that there is a lot that has to happen for a good estate planning result to occur. Stated another way, there are a lot of moving parts, and there are lots of opportunities for the estate planning process to go awry. The graphic also illustrates that the planning process can go backwards too if the wrong events occur at the wrong time.

The author posits that estate and financial planning decisions and techniques have psychological and/or societal ramifications and can significantly impact a family system. Estate and financial planners must be aware that their planning recommendations can have significant psychological and societal implications and impacts on a family system. In fact, estate and financial planners may well be held responsible in the future for failure reasonably to know the psychological and societal side effects of recommended planning and techniques, much like the professional liability that physicians face for failing reasonably to know the contraindications of prescribed medicines or therapies. There are many people for whom certain widely prescribed estate planning techniques

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<sup>3</sup>This is especially true if Congress ever really repeals the federal estate and gift tax, although, by “permanently” raising the applicable exclusion amount to \$5,000,000, indexed for inflation, in 2013 (through the act incorrectly named the Taxpayer Relief Act of 2012), one could reasonably conclude that Congress actually *did* repeal the transfer tax for over 99% of the U.S. population.

and strategies are ill-advised, even without the benefit of 20/20 hindsight. Some creative member of the plaintiff bar is sure to bring such a claim at some point.

The estate planning community collectively holds technical knowledge of available estate planning techniques that far exceeds the estate planning knowledge of clients as well as society's collective experience with estate planning techniques, which have and continue to proliferate. This collective technical knowledge also outstrips the current knowledge base, or at least the applied knowledge base, of the sociological, anthropological, and psychological implications of estate planning techniques. This is particularly true with respect to lifetime planning techniques, the overwhelming majority of which have been around for less than a generation, which is a frighteningly brief period of time.

Estate and financial planning advisors, and the clients whom they attempt to serve, may not have enough experience with the effects that flow from the long-term use of some of the techniques, many of which are tax or fear driven. For example, what will be the long-term social and psychological impacts of the use of dynasty trusts?<sup>4</sup>

Without any study or research, one would have to conclude initially that the real public policy under-girding the classical rule against perpetuities ("RAP") had a non-tax genesis since it pre-dated the federal transfer tax. Query whether the current trend of states repealing or effectively repealing the RAP (which is being primarily driven by the urge to beat the federal transfer tax) and in enhancing asset protection laws through anti-creditor provisions (in an attempt to attract capital and investment in the state), is grounded in solid social policy, or is it merely a race to the bottom by competitive states?<sup>5</sup> Philosophical questions abound.

Should the law be paternalistic? Should it cater specially to those who have wealth? Is it moral or proper public policy for states to enact laws that assist in the avoidance or reduction of a federal tax? Like Nietzsche would argue, are we beyond good and evil, and should people be allowed to do whatever they want to do without worrying about whether what they propose to do fits within rational ethics?

It perhaps is unfortunate that the very first generation to experience a virtually unrestricted right to direct property (unburdened by primogeniture and, in some cases, RAP) is burdened by the pressure of the largest inter-generational transfer of property in the history of mankind. That the property available for transfer is more diverse in form than it ever has been (much more in the way of intangible, derivative assets) further must be considered as adding to the difficulty. The dramatic rise in life expectancy here in the United States over the past hundred years further adds to the complexity both of

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<sup>4</sup>Madoff, Ray D., "America Builds an Aristocracy," *The New York Times*, July 11, 2010 and *Immortality and the Law: The Rising Power of the American Dead* (2010), New Haven, Yale University Press. See also Marsh, Lucy A., "The Demise Of Dynasty Trusts: Returning The Wealth to the Family," 5 *Estate Planning and Community Property Law Journal* 23 (2012).

<sup>5</sup>Sterk, Stewart E., "Asset Protection Trusts: Trust Law's Race to the Bottom?" 85 *Cornell Law Review* 1035 (2000).

advising relative to lifetime giving as well as trust structure. With as much in motion as we have, one could say that a “practice” or “scrimmage” generation would have been desirable. Are our clients paralyzed by their options? The author posits that this is the case.

The stakes indeed are high. However, perhaps it is best to go through this baptism of fire, as we do tend to rise to the occasion when our backs are against the wall. Most people either play up to or down to the level of competition that they face. Nevertheless, the largest transmission of wealth in the history of mankind could end up as a psychological and societal disaster in the form of increased litigation and family enmity if poor or mal-focused estate and financial planning, much of which pays disproportionate attention to tax savings, is implemented.

As was stated earlier, there has been little writing about the actual estate planning client interview process, save the development of extensive “fact-finders.” Indeed, most of the fact-finders in current usage are heavy on “facts” and very light on “feelings” other than fishing for the usual conclusory “objectives” that really are characteristics of a good estate plan.<sup>6</sup> However, other “helping professions,” *i.e.*, psychiatry, psychology, and social work, have focused significant effort over a very long period of time in breaking down and analyzing the human processes of client interaction and interviewing.<sup>7</sup>

This article is divided into three parts. In Part I, the author analyzes the initial client interview. Part II discusses the concept of triangles in estate planning. Finally, Part III introduces the concept of the expert’s paradox, where the practitioner’s status as an expert is used against him or her.

## **Part I**

### **Initial Client Interviews: Methodology of this Part**

This part of the article will employ whole quotes from various textbooks on interviewing from other helping professions in an attempt to make a case for the proposition that there are significant similarities between issues pertaining to the “client” or patient interview process in those other helping professions and the interview process issues faced by estate and financial planners. If the estate planning advisory community accepts this argument of significant similarity in human process, it would take estate planners a long way toward jump-starting analysis of estate planning as a human process.

For ease of distinguishing between the quotations taken from the textbooks and guidebooks from other helping professions and the author’s own commentary, the

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<sup>6</sup>Often found examples of so-called “objectives” include deferral of taxes, flexibility, and maintenance of control.

<sup>7</sup>Several textbooks on interviewing hearken back to the work done during the 1940’s and 1950’s of Harry Stack Sullivan, which have been summarized in several posthumously edited books based upon his lectures and writings on the interview process in the field of psychiatry, including *The Psychiatric Interview* (1954) (edited by Helen Swick Perry and Mary Ladd Gawel W.W. Norton & Co.).

quotations are set off and italicized. The purpose of employing works from the fields of psychiatry, psychology and social work is not to assert that the initial estate planning interview is *exactly* like an initial interview of a patient/client by a psychiatrist, psychologist or social worker. It is not.<sup>8</sup> Nor does the use of these quotes infer that knowledge or formal education in psychiatry; psychology or social work is or should be required for estate planners.<sup>9</sup> The author merely offers the quotes contained herein for the purpose of asking the reader to consider their possible application in the estate planning interview process.

### **Similarities Between Estate Planners and those in the Physical/Mental Helping Professions**

Even the most opposed skeptics cannot deny that there are some parallels between what estate planners do in the initial interview and follow-up counseling and what those in the other helping professions do. Many clients and patients have difficulty coming to grips with the issues involved in each scenario. Similarly to mental and physical assessments, estate planning assessments and recommendations must be based upon accurate and complete information.

Like psychologists, psychiatrists and social workers, we must often simultaneously obtain accurate information from new clients while, at the same time, convince them that we possess the requisite levels of trust, empathy, and expertise to be given the very information that we require in order to do our jobs correctly. And both estate planners and helpers share the challenge of having to overcome barriers constructed by the client/patient, third parties and estate/financial planning advisers, and sometimes all of the above.

*The processes of engagement, data gathering, understanding, and assessment are in actuality parallel processes.*<sup>10</sup>

That we as estate planners have to do all of this at once, most of us without the benefit of formal training or education in these matters, gives me (and many of our clients) great anxiety. In fact, all aspects of estate planning are impacted by human processes. Therefore, why isn't there more focus on or study, or formal education about, estate planning as a human process?

### **Why Is There so Little Focus on Estate Planning Human Processes?**

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<sup>8</sup>On the one hand, estate planners do not have to deal very often with people who are a physical threat to themselves or others. On the other hand, however, there often are big money and life decisions that clients punt to the estate planner for resolution.

<sup>9</sup>It should be noted that the author does not possess any of that formal education. However, numerous articles and books have made the point that estate planners should have some knowledge of psychology. See, e.g., *Death, Property, and Lawyers, supra.*; Sprott, James A. (1973), "Psychological Aspects of Estate Planning," 5 *Journal of Forensic Psychology*, No. 2, pp. 25-33. See also Shaffer, Thomas L. and Elkins, James R., (2004) *Legal Interviewing and Counseling in a Nutshell*, St. Paul MN, West.

<sup>10</sup>Shea, Shawn C., M.D. (1998), *Psychiatric Interviewing: The Art of Understanding* (2<sup>nd</sup> Ed.), Philadelphia: W.B. Saunders Co. (hereafter, "*Psychiatric Interviewing*"), p. 9.

There are numerous, possible explanations for this unfortunate truth. First, there is little or no formal instruction given to estate planners about the human processes involved in estate planning. Second, but just as important, estate planners have little experience or opportunity to use real live clients for research and teaching purposes, a process that is done routinely in other helping professions.

Other reasons include ethical issues pertaining to confidentiality and privilege, client relations (including a desire on the part of an estate planner to keep some distance between his or her “client” and other planning professionals, whether or not the estate planners are affiliated professionally), office/practice economics (clients usually do not like to effectively pay someone else’s “tuition,” and thus may not like someone to tag along just to learn, even at a reduced rate), and long-time practice norms also work against formal gathering of knowledge on estate planning interviews and processes.<sup>11</sup>

It also appears to be much more common place in helping professions other than law or other estate planning disciplines to refer patients and clients to others engaged in the same helping profession. It also is much more acceptable both to clients and patients as well as other helping professionals to permit real-time research and learning to be conducted during the course of sessions with those professionals. The estate planning professions and the clients whom they serve certainly could benefit from some significant research on estate planning processes.<sup>12</sup> The same could be said of teaching the human process of estate planning to those who are toiling in the estate planning trenches.

Whatever an estate planner feels about “touchy-feely” or “soft” estate planning processes, there are some real bottom line financial reasons why estate planners should be familiar with the human processes of estate planning. Two of the most common complaints (other than not having enough fast-paying clients) made by estate planners about clients are procrastination and inaction. Yet the estate planning community seems resigned to continue clogging their file drawers with unexecuted documents and follow-up (and in some cases accounts receivable) rather than spending any time or money to study the estate planning process for clues as to the epistemology of procrastination and inaction in estate planning.

Having studied this issue in some depth, I discovered 11 different fears that clients can have regarding estate planning, which we published in a 2012 book.<sup>13</sup> Those fears are:

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<sup>11</sup> Professor Thomas Shaffer has done some actual analysis of estate planning interviews in some of his law school courses. See, e.g., *Death, Property, and Lawyers*, Chapter 5.

<sup>12</sup>On this point, several people who have studied the processes have agreed. See, e.g., Davis, Margaret Triplett, Ph.D. (1990), *Psychological Aspects of Will-Making and Estate Planning* (Ph.D. Dissertation, University of Kentucky). See also, Glover, Mark, “A Therapeutic Jurisprudential Framework of Estate Planning,” 35 *Seattle Law Review* 427 (2012).

<sup>13</sup> Hood, L. Paul, Jr. and Bouchard, Emily, *Estate Planning for the Blended Family* (2012) Bellingham WA, Self-Counsel Press, pp. 4-9. Subsequent to the publication of that book, I added the fear of probate as a separate and distinct fear that some clients also can have.



1. Fear of contemplating death
2. Fear of not doing the right thing
3. Fear of the unknown
4. Fear of hurting someone's feelings
5. Fear of estate planners
6. Fear of the estate-planning process
7. Fear of running out of money or losing security or control
8. Fear of law changes
9. Fear of facing reality
10. Fear of loss of flexibility
11. Fear of loss of privacy
12. Fear of probate

In the book, we conclude that many of those fears are irrational and unfounded, but fears are real things to real people and must be considered. These fears create what we called "planning paralysis."

### **Why the Initial Interview Is So Critical in Estate Planning**

There does not seem to be much disagreement amongst estate planners that obtaining accurate and complete information is critical to fashion a proper estate plan and to keep the estate planner away from malpractice. Yet estate planners do not focus much attention to the formal knowledge of interviewing skills. Other helping professions see it a lot differently.

*In a survey of practicing and teaching clinicians, comprehensive interviewing was ranked the highest of 32 skills by mental health practitioners.<sup>14</sup>*

What makes a good interviewer?

*Good interviewers share three features. They*

- 1. Obtain the greatest amount of accurate information relevant to diagnosis and management,*
- 2. In the shortest period of time,*
- 3. Consistent with creating and maintaining a good working relationship (rapport) with the patient.<sup>15</sup>*

Based upon the dearth of writing on the subject of interviewing and human processes as applied to estate planning, it is arguable that estate planners do not classify interviewing skills as very important. The author argues that the skill of client

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<sup>14</sup>Morrison, James R., M.D. (2008), *The First Interview* (3<sup>rd</sup> Ed.), New York: The Guilford Press (hereafter, "*The First Interview*"), p. 1.

<sup>15</sup>*Ibid*, p. 2.

interviewing is just as important in estate planning as it is in the other helping professions.

Is there really more to the initial estate planning client interview than having some basic social skills and a good fact-finder? Can estate planning interview skills be identified, taught and learned? Consider the following quote and accompanying commentary.

*If interviewing only involved getting patients to answer questions, clinicians could assign the task to computers and spend more time drinking coffee. But computers and paper questionnaires cannot begin to perceive the nuance of feeling, or assess the hesitation or the moist eye, that alerts the clinician to yet another fruitful inquiry. A good interviewer must know how to work with a range of different personalities and problems: to give free rein to the informative patient, to guide the rambling one, to encourage the silent one and to mollify the hostile one. Nearly anyone can learn these skills.<sup>16</sup>*

The good news indeed is that, like technical estate planning knowledge, nearly every estate planner can learn and improve interviewing skills. If psychologists, psychiatrists and social workers can organize, study, teach and learn interviewing skills tailored to their respective helping professions, then the author posits that estate planners can do so too. Estate planners must focus on the interview aspects of the estate planning process as well as the estate planning process itself. It is asserted that estate planners can only do this by examining the client interview both from the respective human standpoints as refracted through the lens of the interviewer and interviewee.

Most of the efforts of estate planners in obtaining information tend to be focused solely on the cognitive aspects of getting the facts correct via a fact-finder. In fact, some fastidious (even anal) estate planners constantly update their fact-finders in an attempt to keep up with the evolution of all possibly relevant information with recent additions for digital property and the like. In practice, rarely seen is a fact-finder that strays very far from the sub-specialty of the particular estate planner who utilizes that form.

Unfortunately, the information that must be obtained in an estate planning interview includes information, which is both verbal and nonverbal, fact and feeling. Too often, some of the most critical information that a client (or someone else) sends to an estate planner is off of the estate planner's pre-set radar screen because the estate planner is too distracted by filling in their fact-finder to pay sufficient attention.

Have you ever had initial client interviews start out well, and then something was said or done, quite often unrelated or even only tangentially related to the issues at hand, that either negatively or positively impacted the interview and ultimately the relationship? The author recalls several such personal experiences with clients. In the worst case, a client who has a negative experience in an estate planning initial interview may postpone doing the estate planning that he or she needs to do, with potentially severe

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<sup>16</sup> *Ibid*, pp. 1-2.



negative implications for his or her family. The estate planner may lose the client as well. Thus, how the initial interview goes can inform or shape the remainder of the client/estate planner relationship.

### **What Goes Through the Minds of the Participants During an Initial Interview?**

What goes through the minds of an estate planning advisor and a new client during that initial encounter? As the quote below correctly observes, the relationship between interviewer and interviewee changes with each verbal and nonverbal exchange.

*The initial psychiatric interview is a creative act. It is a study of movement and change. It is unique. The circumstances, the environment, and the people involved can never be duplicated. Even if the interviewer and interviewee wanted to replicate their own interaction, they could not; for with each sentence their interaction has subtly changed. This creativity is harnessed by two pivotal principles: (1) the patient must be powerfully engaged, and (2) a thorough and valid data base must be gathered in a limited amount of time. These two principles form the basis of the initial therapeutic encounter. They represent a complementary pair. When performed with sensitivity, thorough data gathering mirrors effective engagement.<sup>17</sup>*

The same could be said about the initial estate planning interview. The potential thoughts of all participants in an initial estate planning interview vary greatly. At the end of this article, there are two charts intended to cover the reasonable possibilities of thoughts that occur to the estate planner and client during an initial interview, which is based on interviews with clients, other laymen and other estate planners. The range of these possible thoughts covers the waterfront for each, certainly a wider range than most of us may realize.<sup>18</sup> There is a high potential for anxiety on the part of all participants in an initial estate planning interview, estate planner and client alike. Note that both the client and the estate planner have many common thoughts. But if these thoughts are not discussed in the proper manner and at the proper time, the estate planning process can be retarded, if not derailed.

### **The Role and Importance of Listening Generally**

Listening is an act that many of us take for granted, and most, if not all, of us blithely assume that we are pretty good at it, certainly better at it than “your average bear.”<sup>19</sup> For most, being accused of not being a good listener (other than by a spouse—which is expected) is either an attack upon our intelligence or our character. Yet listening, in its

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<sup>17</sup>*Psychiatric Interviewing*, page xi (preface to first edition).

<sup>18</sup>Readers who have any additional feelings not set forth there or any clients have any feelings not listed there are asked to pass those feelings to the author by phone 504.452.7574 or by e-mail to [paul@paulhoodservices.com](mailto:paul@paulhoodservices.com).

<sup>19</sup>A tip of the duffer to old Yogi Bear—great to be able to work him into this article, even in a footnote.

fullest and most complete sense, is necessary in order to truly understand what a client desires to accomplish in the estate planning process.

*Concerned and empathic listening is the greatest gift you can give to help the other person soothe her feelings.<sup>20</sup>*

It is common knowledge that the act of estate planning itself causes many clients great anxiety. For other clients, estate planning is not their favorite activity.<sup>21</sup> One of the conundrums of estate planning is that estate planners almost always assume that every client who comes into our offices to “get started” on estate planning is in fact really ready to get started or even really intending to do some estate planning. Sometimes clients just want to talk some things out, and just be listened to, first without taking or being forced into any action. A client may have an entirely different agenda than that initially and superficially represented or implied to the estate planner by the client.

*To understand listening and the dynamics of relationship, it's necessary to consider not only what goes on between people but also what goes on inside them.<sup>22</sup>*

The reasons why clients do not commence or complete their estate planning often lie resident within them. If estate planners had more knowledge of these possible internal conflicts and the signs of each, estate planners could assist the client with resolving or addressing the conflict, or, at least, understand why the client is not moving forward.

*Experience has taught me to listen not only to what people say but also for what they're not saying and to wonder why.<sup>23</sup>*

It is important that estate planners maintain a very healthy independence and objectivity in the initial client interview, and to look particularly hard for items conspicuous by their absence, or for things that just do not “add up.” However, this is easier said than done, but it definitely cannot be done if the estate planner is not watching for it.

*Sympathy is available in a lot of places, but it eventually wears thin. Emotional objectivity, which is grounded in a consistent theoretical orientation, is less common and families never grow tired of it.<sup>24</sup>*

Clients look to professional advisors ultimately for listening, counseling, and solutions, not sympathy.

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<sup>20</sup>Nichols, Michael P., Ph.D., (1995), *The Lost Art of Listening*, New York: The Guilford Press (hereafter, “*The Lost Art of Listening*”), p. 158.

<sup>21</sup>Charles Osgood, of rhyming radio commentary fame, has said on the air that for him, estate planning “ranks right up there with root canals.”

<sup>22</sup>*The Lost Art of Listening*, p. 80.

<sup>23</sup>*Ibid*, p. 90.

<sup>24</sup>Kerr, Michael E., M.D. and Bowen, Murray, M.D. (1988), *Family Evaluation*, New York: W. W. Norton & Co. (hereafter, “*Family Evaluation*”), p. 284.

*It isn't the content that makes people deaf, it's the emotionality behind it.*<sup>25</sup>

*The ability to listen rests on how successfully we resist the impulse to react emotionally to the position of the other.*<sup>26</sup>

### **Listening for Estate Planners is Not Always Easy**

Estate planners must recognize that, on a subconscious level, sometimes estate planners talk during sensitive times in a client meeting not to impart advice or information, but to reduce the estate planner's own anxiety. Subjects such as death or contemplating one's mortality are known to bother some estate planners.<sup>27</sup>

*Genuine listening involves a brief suspension of self. You won't always notice this because it's reflexive and taken for granted and because in most conversations we take turns. But you might catch yourself rehearsing what you're going to say next when the other person is talking. Simply holding your tongue while the other person speaks isn't the same as listening. To really listen you have to suspend your own agenda, forget about what you might say next, and concentrate on being a receptive vehicle for the other person.*<sup>28</sup>

*Suspending the self does not of course mean losing the self—though that seems to be precisely what some people are afraid of.*<sup>29</sup>

In fact, Professor Thomas Shaffer actually states this fact.<sup>30</sup>

Estate planners, through experience, and trial and error, constantly develop and improve ways of explaining complex concepts to clients, including “pat answers” to “routine” questions or situations that the estate planner can recite from memory. Sometimes, estate planners “plug in the tape” of the answer when the estate planner has heard what he or she assumes the question to be, and the estate planner quits real listening and just starts talking. Besides being embarrassing when the estate planner has “plugged in” the wrong tape, this action has the danger of signaling to the client that the estate planner really may not be listening and may not really understand or care about the client. The author has made this mistake more times than he cares to admit.

Although there are many other topics worthy of discussion, this part of the article concludes with one more item that the interviewing texts discuss: interview setting. Some psychological and psychiatric interviewing texts go into great detail about the setting for the therapy room in general. Even though the estate planner's office or

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<sup>25</sup>*The Lost Art of Listening*, p. 97.

<sup>26</sup>*Ibid*, p. 95.

<sup>27</sup>*Death, Property, and Lawyers*, p. 109.

<sup>28</sup>*The Lost Art of Listening*, p. 63.

<sup>29</sup>*Ibid*.

<sup>30</sup>*Death, Property, and Lawyers*, p. 109.

interview place may not require such careful attention, points such as attention during the interview, office/telephone (including cellular phone) and e-mail or text messages interruptions, office entry points (for reasons of confidentiality, etc.) can be very important to many clients.

### **What Do Clients Really Want From Us Initially? You May Be Surprised**

Let's face it. Put aside for the moment that persons other than the potential client, who may have selfish motives and agendas, have been the protagonists for the initial meeting. Estate planners too often suppose that the fact that the client is in their offices to do some estate planning signifies that the client is ready to get right into it. Estate planners also often assume that the client selected the estate planner because of the estate planner's expertise and that, therefore, the estate planner should waste no more time before dazzling the client with his or her brilliance. Give them their money's worth right now because the meter is running! Isn't this right? Before leaping into the Amen corner on that belief, carefully consider the following quotes:

*When the people I know talk about feelings--what's really on their minds, what they're excited about, what's troubling them--they want to be listened to and acknowledged, not interrupted with advice or told that someone else had a similar experience. They want listeners who will take the time to listen and acknowledge what they're saying, not immediately turn the focus to themselves.<sup>31</sup>*

Back to the estate planning conundrum: estate planners operate under the assumption that clients want advice and recommendations immediately. This doesn't appear to be true.

*One of the most common consequences of failing to be sensitive to other people's motivating expectations is giving them unwanted advice.<sup>32</sup>*

This quote slapped the author in the face with a wet rag of reality. It sometimes is simple for estate planners to launch into sharing war stories, past successes, anecdotes, recommendations and advice without first considering whether that is what the client either wanted, needed, or was ready for.

*Listening, as we've seen, takes effort. But sometimes that effort is prejudiced: our own internal sensitivities filter what we hear and what we say. Those sensitivities take the form of preconceived expectations and defensive emotional reactions.<sup>33</sup>*

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<sup>31</sup> *The Lost Art of Listening*, p. 74.

<sup>32</sup> *Ibid*, p. 137.

<sup>33</sup> *Ibid*, p. 75.

*A lot of us have difficulty listening when it means having to sit still and share someone's uneasiness or uncertainty. We have to say something quick to make the anxiety go away.<sup>34</sup>*

It can be quite difficult to temper the impulsive desire to “help” with the need first to listen. These texts generally remind estate planners that quite often estate planners are unconsciously attempting to fix or minimize their own anxiety instead of focusing on that of the person talking.

*It isn't that we're bad listeners; it's our hidden emotional agenda that crowds out our understanding and concern.<sup>35</sup>*

*Too much showin'; way too much tellin'; not enough listenin'; not enough counseling.<sup>36</sup>*

Many times professional advice is unwanted at the time that the giver chooses to impart it (which is too often at the outset of the interview), because most professionals are far more comfortable giving advice than they are with really listening (which can be painful).

*The next logical question is, “How does one convey expertise effectively during an initial interview?” The answer lies primarily not in what we tell the patient but in what we ask the patient. It is the quality of our questions, not the quantity of our words, that generally convinces a patient that the clinician knows something that might help.<sup>37</sup>*

And this quote fits exactly right into the mix (there could not have been a better straight man). It is important that the client be made to feel comfortable with estate planner and the recommendations that the estate planner makes. Estate planners too often believe that the best way to make the client feel comfortable is to demonstrate their estate planning knowledge and experience. However, while the opportunity to expound on that which the estate planner knows may make the estate planner feel better and more comfortable (and while the estate planner is talking, the estate planner does not have to delve into the client's emotions or those of the estate planner), the estate planner may not be making the client feel any better or any more comfortable with the estate planner.

### **Does Technology in Estate Planning Have a Downside? Are We Shutting Out Part of the Communication?**

Through technology, the ability of estate planners to make projections and to illustrate those projections graphically to clients in an understandable way has improved dramatically over the past few years. However, reliance upon the “teaching tool bag” has a seductive downside. It too often focuses the conversation on the proposed

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<sup>34</sup> *Ibid*, p. 66.

<sup>35</sup> *Ibid*, p. 87.

<sup>36</sup> Estate Planning R Us (© 1997-2002 L. Paul Hood, Jr.), which is a “rap song” about estate planning.

<sup>37</sup> *Psychiatric Interviewing*, p. 35.

techniques and the accompanying implementation, way too frequently to the detriment of the feeling side of the equation. Estate planners get taken with the process of creating and using “pictures” and projections to explain the proposed estate plan to the client.

*Objectivity and neutrality are communicated to a family non-verbally as well as verbally. Tone of voice, facial expression, and other nonverbal clues (as well as what a therapist says) convey his attitude and level of reactivity.<sup>38</sup>*

Clients, like patients, communicate both verbally and non-verbally. Additionally, clients communicate both facts and feelings. If estate planners are only “listening” for verbal (including those communications made in writing) communications, or only for facts, then the “listening” is incomplete. Some writers have indicated that as much as 90% of communication is nonverbal.<sup>39</sup>

*To listen well, and be listened to in return, we have to develop some sensitivity to other people’s conversational styles.<sup>40</sup>*

*Being sensitive to other people’s conversational ways doesn’t mean you have to have them all figured out. It means you should be attentive and tolerant.<sup>41</sup>*

Estate planners and clients alike should endeavor to learn something about the basics of communication and personality styles, if for no other reason than to understand that clients and estate planners may have different conversational and personality styles.<sup>42</sup> The estate planner should possess knowledge of his or her own communication and personality style so as to be able to relate to others, even family and non-clients, so that he or she is aware of the type that the client is, even if the client is not educated in personality and communication styles.

There are a few theories about personality and communication styles.<sup>43</sup>

*People who try to communicate indirectly feel that someone close to them should know what they like and dislike without having to say so.<sup>44</sup>*

*As a general rule, basic empathic statements, which tend to possess a “sounds-like” quality, can be used effectively to enhance blending with both a trusting and a guarded patient.<sup>45</sup>*

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<sup>38</sup> *Family Evaluation*, pp. 284-285.

<sup>39</sup> See, e.g., *Psychiatric Interviewing*, ch. 3; Julius Fast (1970), *Body Language*, New York, MJF Books.

<sup>40</sup> *The Lost Art of Listening*, p. 133.

<sup>41</sup> *Ibid*, p. 133.

<sup>42</sup> The author’s Myers-Briggs personality type is INFP.

<sup>43</sup> See, e.g., Isabel Briggs Myers with Peter B. Myers, *Gifts Differing: Understanding Personality Type* (1980 and 1995), Palo Alto, Davies-Black Publishing.

<sup>44</sup> *The Lost Art of Listening*, p. 133.



It is important that a counselor establish rapport with a client, which the helping professions often describe as “blending” and “engagement”, the latter of which is used in the above quote. However, blending must occur not just from patient/client to advisor, but also from advisor to patient/client. These texts seem to agree that empathic statements made by the interviewer to the interviewee in response to the statements made by the interviewee go a long way toward “engagement”, which, hopefully, gives blending a better chance to occur.

### **The Advisor and the Initial Interview Generally**

It is undeniable that as a fellow human being participating in an interview, the humanity of the interviewer significantly impacts upon the interview process. As dispassionate and objective as we fancy ourselves, the fact is that we all seem to work better, or to enjoy working more, with certain types of people.

The first thing that estate planners should know about their role in an initial client interview is that they are not able to check their own humanity at the door. Estate planners are human, bringing their collective life experiences, and biases into an interview.

*Our parents may be the most important unfinished business of our lives.*<sup>46</sup>

*The past is alive in memory—and it runs our lives more than we know.*<sup>47</sup>

*More than we like to realize, we continue to live in the shadow of the families we grew up in.*<sup>48</sup>

Our families of origin are lifetime influences upon us as estate planners, whether we like it or not. These influences, together with lifetime experiences, impact advice and counsel to clients, and can bias estate planners either toward or against certain persons or certain estate planning techniques or practices.

*If you find yourself feeling bored, angry, or disgusted, ask yourself, “Why?” Is there someone this patient reminds you of, such as a supervisor, parent, or spouse? (When therapist’s feelings toward patients are carried over from previous relationships of their own it is called counter-transference.) Perhaps there are features of this patient’s personality that remind you of some of your own less admirable traits. Do you have anxiety about your own health, marriage, or family? These feelings are ubiquitous, so even experienced therapists must take care that they do not intrude unto their relationships with patients.*

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<sup>45</sup> *Psychiatric Interviewing*, pp. 19-20.

<sup>46</sup> *The Lost Art of Listening*, p. 83.

<sup>47</sup> *Ibid*, p. 79.

<sup>48</sup> *Ibid*, p. 80.

*If you find yourself feeling uncomfortable during an interview, ask yourself:*

*Why should I be feeling so upset?*

*What message am I missing?*

*Whom does this patient remind me of?<sup>49</sup>*

When a client projects feelings toward an estate planner, psychologists often call that “transference.” When listeners project feelings toward the client in response to the client’s words or actions, it often is called “counter-transference.” It would be naive to believe that estate planners like all of their clients the same. The author certainly didn’t; he far preferred the company of some clients and actually loathed the company of other clients, some of whom he fired later on.

It is helpful to keep an open mind about, and to be alert to, anxiety on the part of an estate planner about a client or the situation in which the client is enmeshed. There is a somewhat fine line between, on the one hand, rationalizing the estate planner’s anxiety as an attempt to maintain professional integrity as well as to reasonably protect oneself from malpractice, and taking out past or present events or feelings on this client (or someone to be affected by the planning).

The estate planner not only has to manage his or her own humanity, but estate planners also must obtain accurate and complete information while simultaneously building rapport and relationship with the client.

*The challenge of the interview currently revolves around the manner in which the initial interviewer collects critical data, while constantly attending to rapport.<sup>50</sup>*

The interview process is deceptively complex, as it requires multi-tasking, which can tax an estate planner’s physical and emotional resources to the brink, especially when there are other interruptions such as telephones, computers, and office personnel coming into the interview room.

### **Perils of Poor or Incomplete Data Gathering or Poor Initial Interview**

During an initial interview, estate planners often are lulled to sleep by the imbalance between the knowledge of estate planning techniques that they possess in comparison to that possessed by the client. This disparity causes estate planners to carelessly split their attention between listening to the client and assessing what estate planning techniques are appropriate for that client.

Sometimes estate planners even start mentally drafting for a particular result while the interview is still taking place. It should be kept in mind that while estate planners are

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<sup>49</sup>*The First Interview*, p. 198-199.

<sup>50</sup>*Psychiatric Interviewing*, pp. xii (preface).

constantly learning new estate planning techniques as well as twists on old ones, estate planners rarely if ever study how well they are actually relating to their clients, or how much of their personal or business life is impacting client interaction. Very few estate planners utilize any sort of exit interview process or survey about ourselves and the effectiveness of our services for a particular client. Perhaps estate planners should do that, because it could shed some light that could be of future use to the estate planner.

*More specifically, poor engagement raises significant doubts about the validity of the data base, for patients generally do not freely share with people they do not like. ... Hence the clinician leaves with only a superficial understanding of the patient's pain. Furthermore, without valid data falling into place, the clinician's assessment and diagnosis are frequently in significant jeopardy. Finally, if the engagement process proceeds poorly, the patient may never return for a second appointment, casting the shadow of irrelevance over the work of the first interview.<sup>51</sup>*

The above quote underscores the importance of establishing a real relationship with the client. Every estate planner probably can recall at least one past experience where the planner thought that he or she got on well with a particular client, only to have that client either never come back after the initial interview or opt to go to another estate planner. Psychiatrists have used the term “unipolar blending” to describe the situation where one of the parties to the interview established what that party perceived as good blending, but the other party did not.<sup>52</sup> The author definitely experienced unipolar blending a time or two, but he didn't understand it at the time.

*Most failures of understanding are not due to self-absorption or bad faith, but to defensive reactions that crowd out understanding and concern.<sup>53</sup>*

The above quote acknowledges that many failures of understanding in the interview process are internal to the interviewer. Nevertheless, many estate planners never really consider the underlying reason why an estate planner either failed to comprehend accurately or to make note of a particular fact or feeling, usually in the context of either reviewing the work of another estate planner or a malpractice case, too often characterizing the error as simple professional negligence or oversight, rarely if ever digging deeper for a possible psychological explanation.

### **The Estate Planner and the Data Gathering Process**

Like it or not, the estate planner brings his or her human fallibility and biases into the data gathering process. Therefore, we can make mistakes in the data gathering process, which can be conscious and unconscious errors or omissions, as well as errors in analyzing the data.

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<sup>51</sup> *Ibid*, pp. 11, 733-734.

<sup>52</sup> *Ibid*, p. 13.

<sup>53</sup> *The Lost Art of Listening*, p. 3.

*Thus, it is not only a matter of gathering data, it is a question of realizing that one alters the data base by the very act of gathering the data.*<sup>54</sup>

Estate planners must understand that they play a role in the potential contamination of the data collection process. Fact-finder forms and listening can contaminate the data. Have you ever examined your fact-finder, or your document explanations, or your usual interview discussions, not for the purpose of accuracy or completeness, but for bias? Bias can take several different forms, including gender bias, estate planning technique bias, and “boilerplate” bias, as well as a few others. As the following quote indicates, bias can crop up in our questioning to keep us steered clear of issues with which we do not wish to deal.

*Interviewers may not want to hear positive responses to questions concerning sensitive topics such as suicidal ideation, homicidal ideation, child abuse, or even the emergence of certain target symptoms such as depression. The hesitancy to uncover positive replies to such questions probably results from the fact that such responses may demand increased time from the clinician or legal action or even generate fear or a sense of failure in the clinician. Consequently, clinicians may unconsciously develop methods of decreasing the risk of a positive reply by beginning their questions with a negative (e.g., not), as follows: a. You don't really feel more depressed, do you?*<sup>55</sup>

*Many of the questions therapists ask are really opinions disguised as questions.*<sup>56</sup>

Questions that are phrased so as to telegraph the answer that the estate planner may be seeking, even only subconsciously, can be a problem. It is important to remember that not only can the question itself be phrased as to telegraph the desired answer the body language of the estate planner (such as a head or finger shake in the direction of the desired answer) when delivering the infected question can as well. What are some examples of these types of questions in an estate planning context? “You really don't want a living trust, do you?” “You're not going to leave that much of your estate to charity, are you?” “You don't really want anything *expensive or complicated*, do you?” “You don't really want to make any lifetime gifts, do you?”

And there are loads more. “You don't really want to not treat your children equally, do you?” The mind just runs wild with the possibilities. If estate planners begin showing bias, whether subconsciously or consciously, the clients usually can figure that out, and it can impact the validity of the information that the client provides to the estate planner.

Although the subject of question phraseology may be dealt with in greater detail in a subsequent article, people in the other helping professions generally believe that it is

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<sup>54</sup> *Psychiatric Interviewing*, p. 40.

<sup>55</sup> *Ibid*, p. 45.

<sup>56</sup> *Family Evaluation*, p. 292.

wise to avoid “why” questions because research has unearthed a tendency of “why” questions to contaminate the data because they often require the client to defend an indefensible position, an example being: “Why haven’t you gotten around to making a will until now?”).<sup>57</sup>

Estate planners are wise to remember that how their questions and comments are *phrased* potentially contaminates the data, but how the questions are *asked* also impacts the answers and the validity thereof. It is not unusual for an estate planner with a bias against a particular technique to pepper one of the questions set forth above with a head nod in the direction of the desired answer. If clients discern our disapproval, or a bias from us, they may answer a certain, false way or we may not be given additional, related information that might have been obtained through a follow up question.

*Patients are very quick to perceive defensiveness in an interviewer. Defensive posturing by the clinician may create in the interviewee the feeling that “I’ve got to watch what I say here.”*<sup>58</sup>

*This issue of interviewer reliability can be framed within two problem areas, although many other areas also exist: (1) the interviewer changes his or her style of asking a question and is not aware of the impact of this change and (2) the interviewer has good reliability but unfortunately reliably evokes invalid information.*<sup>59</sup>

It is tough to really consider that we might make a mistake in the data collection process, but it can and does happen. The author finds the realization that he might make this mistake to be comforting, in an Augustinian way, as it reminds him of his fallible humanity. Other helping professions have studied causes of interviewing unreliability, not solely for purposes of malpractice, but for greater insight as to the interview process. Perhaps estate planners ought to consider some way to do this for purposes of studying and quantifying the interviewing process.

*When a therapist gets anxious about “fixing” a problem in a family, he usually stops learning about a family. He is so preoccupied with what he is “supposed” to be doing that he is unable to inquire carefully into what actually happens in the family.*<sup>60</sup>

In light of their past experiences, estate planners know that clients should be doing something constructive in the estate planning process. All estate planners have had estate planning situations that have blown up or gone bad, and estate planners try to avoid this at all costs. Whenever estate planners believe that a client is heading down one of these paths, even the path of inaction, sometimes estate planners attempt to seize the moment by imposing, either consciously or unconsciously, the estate

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<sup>57</sup> *Ibid*, p. 89; *The First Interview*, p. 55.

<sup>58</sup> *Psychiatric Interviewing*, p. 30.

<sup>59</sup> *Ibid*, p. 44.

<sup>60</sup> *Family Evaluation*, pp. 292-293.

planner's desire for "peace in the valley" on the client to "let estate planners do what they do best." As is indicated by the quote above, this effort comes at the risk of not listening.

*Perhaps this challenge reaches its most formidable peak when an interviewer or consultant is placed in the unenviable role of performing an intake assessment.<sup>61</sup>*

The author was a solo practitioner for ten years, with no assistant for well over half of that time. Therefore, whenever the author makes a mistake in data intake or data interpretation, the author has no one to blame but himself. However, early in his career, he learned to prepare drafts of documents not from being able to see the client, but from a memo prepared by a partner, often the one who would ultimately review the author's work product. Later in his career, the author did the memo work, and an associate did first drafts. The author recognized on review of the work product that his memos occasionally led the draftsman down the wrong road, either because he was unclear as to what the author was seeking or because the author either misstated or failed to include a key fact in that memo.

### **Indirect Data Gathering/Interpretation Problems**

When another person is trying to work based upon indirect fact gathering and without any direct observation of the subjects, one should remember that there are two persons whose biases and personal listening issues must be factored into the mix. The author confesses that, as an eldest child, he frequently and unconsciously filled in the name of the client's oldest child as a successor fiduciary without actually discussing it with the client.

The author posits that all would agree that the prospects for malpractice grow in the areas of misinterpretation of data when the estate planner introduces another professional in the office into the mix. However, it is important to recognize that the possibility of misinterpretation of "feeling data" also grows. Whether we like it or not, there is the real prospect for triangulation because three people are involved. And sometimes this misinterpretation may bring about sinister results because the junior person in the triangle, who may possess the clearest perception of a bias or misinterpretation of a supervisor, may feel powerless to say or do anything about it.

### **Importance of Honest Objective Self-Evaluation by Estate Planners**

Have you ever considered at what time of day you are at your best in the way of listening, e.g., mornings or afternoons, as well as what days you are more attentive? If so, do you use this data in your actual scheduling? Personally, the author preferred not to schedule meetings on Mondays and Fridays, particularly with new clients. Additionally, the author believes that he is more suitable for client interviews in the mornings. Do you consider your client's best days and times as well? You probably

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<sup>61</sup> *Psychiatric Interviewing*, p. 7.



consider your client's interests in this regard more than your own, but estate planners must consider their own interests and circumstances as well, because if estate planners are not at their best, they may not be listening sufficiently well.

Self-examination and knowledge of self are both of critical importance to estate planners. Professionals in other helping professions are required, during training and education, as well as during work in some situations, to undergo analysis in order to uncover and deal with personal issues. Query how many estate planners have never gone through the internal machinations of planning their own estates.<sup>62</sup>

*Listening to yourself means not only respecting your own feelings but also getting to know something about your own ways of communicating. This isn't always easy, and it isn't always pleasant.*<sup>63</sup>

Most human beings prefer to travel through territory with which they are familiar, and, likewise, they generally avoid new ground. Estate planners, either consciously or unconsciously, slot (or even shove) new clients into templates previously developed. Many estate planners rationalize that this paternalistic action translates into both lower cost to the client and also decreased risk of malpractice and the anxiety that accompanies venturing into uncharted waters. Sometimes, however, estate planners have the tendency to make swift judgments about what "form" of estate plan a client should have, and, subconsciously, estate planners stop listening on one or more levels to the client. In other words, estate planners may still be listening for the facts needed to implement the plan, e.g., identification and description of assets, proper name spellings, etc.

*But the real problem in that first interview didn't have to do with technique. I wasn't truly interested in that woman; I was more interested in being a therapist.*<sup>64</sup>

Now, the above quote is one with which all can identify at some point. In a moment of self-confidence based upon a presumption that we know a particular subject "cold", estate planners are susceptible to thinking ahead about cutting edge applications or variations on the techniques in which we are "expert", leaving behind the client's situation.

That last quote really gave the author reason to pause. We spend so much time learning the latest and greatest techniques that sometimes we become too enamored with the idea of showing off our knowledge. The author confesses that there have been times that he was too concerned about drafting and implementing an estate plan or being seduced by a potentially unique issue of fact or law, and too concerned about demonstrating empathy, knowledge and expertise to be a true estate planner.

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<sup>62</sup> What is the old adage about the cobbler's children having no shoes of their own?

<sup>63</sup> *The Lost Art of Listening*, p. 146.

<sup>64</sup> *Ibid*, p. 62.

## The Estate Planner's Subconscious Agenda?

We are forced to consider the possibility that, similar to what philosopher Alvin W. Gouldner argued concerning the intellectual class, often have our own paternalistic agendas.<sup>65</sup> Estate planners, being the “intellectual elite” in wealth, may have our own agendas, that they impose, consciously and unconsciously, on clients.

*The act of listening requires a submersion of the self and immersion in the other. This isn't always easy. We may be interested but too concerned with controlling of instructing or reforming the other person to be truly open to his point of view.*<sup>66</sup>

Too many of us have learned how to take charge of the estate planning process, whether it is for reasons of closing sales or just our own personal desires for peace, safety and tranquility, or at the least, nothing uncertain or new. Sometimes we “take charge” of a client’s estate planning on maternalistic/paternalistic grounds in order to “move them along” (and some clients invite us to do just that, *i.e.*, to “make them” do what they need to do). When estate planners are certain in their minds what they think a client needs, many stop considering alternatives, sometimes to avoid the discussion going in a direction in which the planner may not feel comfortable.

*That failures of understanding occur in psychotherapy, just as everywhere else, is a fact often missed as long as therapists remain too wrapped up in their own theories and techniques and intentions to give themselves over to sustained immersion in the other person.*<sup>67</sup>

Unfortunately, the fixations and absolutisms in which many of us traffic cause biases in the interview process, which can stymie the flow of truthful discussion as well as factual information.

*Thus as clinicians we need to consider carefully the impact of our probings, recognizing that certain patients may not be ready to discuss certain issues while others might actually benefit from our exploration.*<sup>68</sup>

*In the final analysis, the mark of a true professional seems to be his or her lack of a need to feign professionalism.*<sup>69</sup>

*In this regard, the myth of “professional blandness” may have evolved from a misinterpretation of the psychoanalytic concept of a neutral screen,*

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<sup>65</sup> Alvin W. Gouldner (1979), *The Future of Intellectuals and the Rise of the New Class*, London, Macmillan.

<sup>66</sup> *The Lost Art of Listening*, p. 62.

<sup>67</sup> *Ibid*, p. 63.

<sup>68</sup> *Ibid*, p. 50.

<sup>69</sup> *Ibid*, p. 32.

*upon which the patient could project his or her transference. ... This supposed “neutral stance” is, in actuality, potentially very disengaging. Moreover, rather than providing a blank screen, it seems to bias the patient towards negative transference.*<sup>70</sup>

The two previous quotes highlight a problem that is common both to estate planners and to those in the other helping professions: the question of how much of the personal sides of the estate planner should be shown to clients. We are all familiar with the oft-depicted scene of the expressionless Freudian-style psychiatrist, with the patient on the “couch”. As the above quote indicates, many of the professionals in other helping professions have stopped using this “expressionless” method of interviewing. Nevertheless, some estate planners use this method, which sometimes is justified on “ethical” grounds. Sharing personal experiences at the right time and in the right manner can be very therapeutic to a client and can go a long way toward demonstrating true empathy with the client’s situation. For example, the author used to freely share his own estate planning with clients who stood in similar shoes.

It is important that estate planners develop a self-assessment system on their respective client interactions, looking at areas such as honesty, openness, need for control, patience with clients who are slow to respond or who act contrary to advice, discomfort with something that some clients want to do (e.g., Medicaid eligibility planning or disinheriting children, etc.), reactivity/proactivity and negativity.<sup>71</sup> Even if it is only in the form of “Cheers” therapy, exercise or coffee house/office debriefings, it is important that estate planners understand that they can be affected by the twists and turns of the work.

### **The Client (and others) in the Interview Process**

Thus far, this article has only focused the lens of analysis on our own lines. However, the client and others who participate in the interview also play important roles and are not without problems of their own.

*In order to explain the concept of clinician experience most effectively, it may be best temporarily to view the interviewing process solely from the patient’s perspective. To the patient, certain questions are of paramount importance. The answer to one of these questions in particular holds unusually powerful significance, perhaps even determining the degree of final compliance. It is a logical question. It is a natural question. And it can be paraphrased simply as follows: Can this person help me?”<sup>72</sup>*

This is a tough issue for a professional to ponder. On a cognitive level, the question seems illogical, as the estate planner reasons: Why would these people be here if they

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<sup>70</sup>*Ibid*, p. 33.

<sup>71</sup>Okun, Barbara, F., *Effective Helping: Interviewing and Counseling Techniques* (Sixth Edition 2001), Wadsworth Publishing, Boston, pp. 44-46.

<sup>72</sup>*Ibid*, p. 35.

did not think that I could help them? Even where the clients are there pursuant to a strong referral or even because of prior professional relationship, many estate planners overlook this fundamental question to the peril of the client relationship. However, the estate planner should be searching for clues to the following question, which is just as logical, natural and profound as the client's question stated above.

*More specifically, one can categorize patients, with some degree of caution, into two types, those who are trusting and those who feel guarded. It is with the latter patient, the so-called guarded patient, that empathic statements most frequently display the nasty habit of disrupting the engagement process. The guarded quality of those patients may arise from a variety of sources, including a fear of the clinician, a long-standing character trait of suspiciousness, or frankly prepsychotic or psychotic paranoia.<sup>73</sup>*

All estate planners have some level of anxiety in an initial client interview, as do clients. Sometimes, estate planners tend to attempt to demonstrate empathy very early on. As the quote above demonstrates, this can be a problem for some clients. Although it would be a rash generalization in the estate planning context to break down clients as in the above quote, new clients often break down this way.

*Clearly, because of psychological defenses, pre-dispositions for deceit, fading memories, and actual cognitive deficits (as seen in dementia), patients may not provide accurate histories.<sup>74</sup>*

Although the following data was not scientifically collected, in the author's informal inquiry of lay audiences about whether they have ever misstated or omitted material information to an estate or financial planning professional, approximately 2/3 to 3/4 of the audience reluctantly raise their hands in the affirmative. This is an enormously important question that goes to the heart of trust and engagement.

Even if the actual percentage of clients who actually misstate financial information is half of the above, that constitutes significant distortion of the facts on which an estate plan may be based or proposed, which could lead to problems down the road. What many estate planners fail to ever consider is whether the facts were sabotaged at the outset such that the client had a reason from the get go not to execute the documents: because the documents were based upon faulty or incomplete information, which the client uses to discard or disregard the advice.

*Whenever someone asks your advice or shrinks from you or gets impatient with you, it's worthwhile to think about what parts of the person might be at war with each other.<sup>75</sup>*

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<sup>73</sup> *Ibid*, p. 18.

<sup>74</sup> *Ibid*, p. 40.

<sup>75</sup> *The Lost Art of Listening*, p. 85.

As has been discussed elsewhere in this article, it may strike an estate planner as counterintuitive that a person who seeks our advice, the very *raison d'être* for the estate planner's existence, may be in internal conflict and not really be ready for that advice. Clients also may not believe that the estate planner knows enough about their situation to render advice. Sometimes, new clients just want a sounding board.

*While you are gathering biographical information, maintain a healthy skepticism about its validity. Human memory is fallible, especially when the human has an intense personal interest in what is being remembered.*<sup>76</sup>

In estate planning, this type of often sub-conscious misstatement often is used to denigrate some potential recipients of either wealth or authority.

*Health care professionals don't treat illnesses; they treat people. You therefore need to know the context in which your patient's complaints have occurred. This requires learning all you can about family background and other biological data. This knowledge will not only help you get to know your patient, but also may reveal additional information about the present illness. Your patient has spent a lifetime accumulating these experiences, so there is almost no limit to the amount and variety of the information that you may find available.*<sup>77</sup>

Some estate planners believe that their substantive work involves assisting in the transfer of wealth, avoidance of taxes and the establishment of property management mechanisms, but not the "sticky" personal issues that often are inexorably intertwined.

## **Part II: Triangles in Estate Planning**

Too often, estate planners focus only on the client to the exclusion of the reality that the client exists in a world with others who may influence, positively or negatively, the estate planning process. Estate planners often are driven toward client-focused approaches due to loyalty to the client and so-called "ethical" requirements of the estate planner's specialty-of-origin. The helping professions have been focusing more organized study these days on so-called "triangles," which can adversely impact, even truncate, the estate planning process.

*The concepts of transference and countertransference describe the emotional interplay between patient and therapist in individual therapy. The concepts of triangles and interlocking triangles describe the emotional interplay in a system of two or more persons.*<sup>78</sup>

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<sup>76</sup> *The First Interview*, p. 65.

<sup>77</sup> *Ibid*, p. 65.

<sup>78</sup> *Ibid*, p. 283.

*At the very beginning—of your life, as soon as your conception became known, either your father, your mother, or both may have experienced you as an intruder. The fact of your existence may have overjoyed your father and presented a threat to your mother’s career, making your father too eager for your arrival and your mother not so anxious. Even before your conception, not-so-subtle pressure from your maternal grandmother may have led the campaign for your existence. At your birth, whatever genetic map was on your face was probably the stimulus for all kinds of loyalty-driven distinctions by well-meaning relatives. “He looks just like George’s mother,” says George’s mother’s sister.<sup>79</sup>*

Even the armchair psychologist can go on with examples here, including family names given to children, bedrooms or other items given to children, schools selected, sports, etc. Triangles are reality in relationships. Consequently, estate planners must be aware of their existence, particularly when doing estate planning with the involvement of the entire family, particularly in family business succession planning.<sup>80</sup> Although the above quote does not expressly state this, triangles can include living as well as dead people. In fact, all sides of the triangle really do not have to be people at all.

A triangle can include tangible and intangible items, including a business or piece of property or a name or even the persons inhabiting a particular bedroom of a home that has been in a family for more than one generation. Anecdotally, the author has discovered triangles existing between certain persons based upon the name of one of the triangle participants, e.g., with a certain family surname as a middle name, etc. It is even possible for triangles to develop within the client’s professional advisors, and these can be particularly bad for the estate planning progress.

As noted above, triangles are important to be aware of in estate planning because triangles can impede or prevent progress toward implementation of the estate plan. In estate planning, triangles seem to almost always manifest themselves in the form of delay. Whether in the form of “getting around to review documents” to still trying to get that information” to whatever excuses that the estate planner hears either directly from the client or from a family member (or a family employee who is in a loyalty triangle with a particular person perceived to be in trouble when the plan is implemented).

*Triangles can create or support the therapeutic impasse. An unaddressed triangle is a vehicle for voluntary noncompliance with treatment or is a reason for involuntary noncompliance.<sup>81</sup>*

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<sup>79</sup>Guerin, Philip J., Jr., M.D., Fogarty, Thomas F., Jr., M.D., Fay, Leo F., Ph. D. and Kautto, Judith Gilbert, A.C.S.W. (1996), *Working with Relationship Triangles: The One-Two-Three of Psychotherapy*, New York: The Guilford Press (“hereafter, “Relationship Triangles”), p. 1.

<sup>80</sup>Charles W. Collier, “A Family Systems Approach to the Estate Planning Process,” 20 *ACTEC Journal* 146 (2005).

<sup>81</sup>*Relationship Triangles*, p. 34.



Not only can a triangle impede or retard the estate planning engagement, but the estate planner with no knowledge of the existence of triangles can find himself or herself caught up in, or blindsided by, a triangle, with potential negative consequences to the estate planner.

*A therapist without knowledge of triangles will get caught into the therapy triangle of being judgmental about the affair or into justifying it based on the betrayed partner's behavior.<sup>82</sup>*

*It's taking sides that keeps triangles going. Staying out of triangles sounds simple, but it can't be accomplished just by stating "I'm not going to take sides with either one of you," or "I'm not going to get into a triangle with you two." Emotional neutrality can be a trap if the therapist walks on eggs so as to not give the appearance of being stymied by the partners' conflict. In fact, anxiety about remaining neutral paradoxically catches therapists in a triangular trap because they lose the ability to move freely between the partners and are paralyzed.<sup>83</sup>*

The estate planner who is working with an entire family can have a tough time with a family because:

*Each family member either wants the therapist to be his ally or fears that the therapist will be someone else's ally. As a consequence, each family member has verbal and non-verbal ways of triangulating the therapist into his or her point of view. Some family members are more forceful about this than others.<sup>84</sup>*

*At the outset, in subtle and not so subtle ways, a family automatically attempts to incorporate a therapist into its problems.<sup>85</sup>*

Walking into a room alone to face an entire family in an initial estate planning interview or conference can be a daunting, intimidating experience for an estate planner, even one who is seasoned and confident. In estate planning, it is not unusual for an anxious family member to dangle a carrot in the form of additional work toward an estate planner with a view toward currying favor and alliance with the estate planner.

### **Part III: The Expert's Paradox**

Many estate planners are certified as "specialists," a designation with which those estate planners so designated positively identify ourselves. All human beings are too often flattered as being referred to as "experts".

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<sup>82</sup> *Ibid*, p. 33.

<sup>83</sup> *Ibid*, p. 11.

<sup>84</sup> *Family Evaluation*, p. 283.

<sup>85</sup> *Ibid*, p. 282.

*People who insist the doctor or therapist is the expert and should be telling them what creates the problem must be addressed at the outset. If a therapist falls into the trap of being set up as an expert who can tell the family what its problem is and what is needed to fix it, he may be forever prescribing techniques for change.<sup>86</sup>*

But, as the quote above accurately points out, being held up as an expert can foreshadow a rocky relationship in which the “expert” estate planner may be set up for the blame for the failure to complete the estate planning, usually because the client will not do what the estate planner recommended, and this the client knew going to happen from the start. Has any client or family ever set you up like this, which is often a trap? There is quite a difference between technical knowledge of estate planning and its complex application to the set of facts and circumstances that uniquely represent your client’s situation.

Closely related to the “expert” issue discussed above, family anxiety about estate planning where the family is “stuck” or in conflict may be passed on to the estate planner in the form of a request for “answers” or quick action.

*In addition to wanting to influence the thinking of a therapist, an anxious family may also try to get a therapist to take the problem off its shoulders by pressuring him to provide “answers.” This pressure may emanate from the family’s apparent helplessness, or it may come from overt demands that the therapist fix the problem. These covert and overt maneuvers by a family to involve a therapist emotionally can occur when a therapist is seeing one person, a couple, or an entire family.<sup>87</sup>*

The truth is that even seasoned estate planners who have been working with a family for a long time can be caught in these traps.

*The processes by which a family’s anxiety and subjectivity can brainwash a therapist and by which the therapist’s anxiety and subjectivity can “brainwash” a family are sufficiently subtle that most therapists require years of clinical experience to recognize them fully. Experience alone, however, guarantees nothing. A therapist can be in practice for years and never realize that he is often a pawn of the families he treats or that the families he treats are often pawns of what is needed to make him feel comfortable. Psychoanalytic training addresses this problem by requiring analysts to have a personal analysis.<sup>88</sup>*

This in no way suggests that estate planners should submit themselves to either peer review or psychoanalysis. It merely points out the issue for the estate planner’s

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<sup>86</sup>Ibid, p. 291.

<sup>87</sup>Ibid, pp. 282-383.

<sup>88</sup>Ibid, pp. 285-286.

consideration. Have you ever asked by a client, directly or indirectly, to convey a message to a member of the client's family? Have you ever have a client justify an action that he or she took on the basis of reliance upon you, even when that wasn't exactly the case? Has your work ever been used for cover for another desired action, such as termination of a child employee or a disproportionate gift? If the answers to any of these questions is "yes," then it may have happened to you. It certainly happened to the author a couple of times over the years.

### **Conclusion**

As one can hopefully easily see, there is a whole lot to the art of interviewing that can impact both the validity of the data received as well as whether the participants have a real relationship. The author hopes that this piece can, if only through the fine words of the authors quoted here, convince estate planners of the applicability of most of their words to all of us.

Let's be careful out there! And stick together!

## **The Minds of the Estate Planner and the Client During the Initial Interview: A Meeting of the Minds or Two Ships Passing in the Night?**

### **THE ESTATE PLANNER**

- Am I physically safe with this client?
- Will this person make me uncomfortable?
- If meeting with more than one person, either scheduled or unscheduled, is this too many people to be meeting with?
- Am I being used or part of an agenda of this person other than estate planning?
- Can this client pay reasonable fees to do the estate planning work that I feel he or she needs?
- Will this client pay the reasonable fees for the work that I perform?
- How likely is it that this client or his or her family will sue me or attempt to drag me into a fight after the client's death or during a divorce on an involuntary, non-paying basis as a witness?
- Will this client be pleased with my work or with the work of any advisor?
- Can I expand my services with this client into other needs, including those of companies owned by the client?
- How likely is it that this client will refer me to other friends or relatives?
- Will I run into a snag or complication that will cause the final cost of my services to be significantly higher than the quoted fee (or fee range)?
- Can I rely on this client's representations of the facts and figures? How much "due diligence" will I have to do?
- Does the client "have all of his or her marbles?" (Or at least enough to execute legally valid documents or enter into legally binding documents)?
- Can I fit this client into one of the "standard forms or plans" that I have developed with a minimum of "original thought of drafting" (translated, without additional risk-taking or cost)? Will this client understand this reality, or should I go over that now and possibly alarm the client needlessly?
- Will I enjoy working with this client?
- Will I rue the day that I ever agreed to take on this client at the quoted rates?
- What are this client's expectations regarding turnaround time and my personal availability?
- Will this client permit me to allow his or her work (or at least original draft(s) to be prepared by the person in my office with the lowest rate scale who is competent to perform the work?
- With whom may I speak in the course of doing this work? With whom should I absolutely not speak?
- What confidentiality issues are present with this client? Should I send mail, faxes or electronic correspondence to a particular place? Should I call prior to sending? May I leave voice mail messages, even to say that I called?
- Will I encounter problems with the client's spouse, children or significant others? How clear must I be that I do not represent or work for them?

- How much “TLC” or “hand-holding” will this client expect or require? Does this client understand that this can have a bearing on fees or desirability to have them as a client?
- Will this client ask or pressure me to do anything that would compromise my personal integrity or even my professional license or designation, *e.g.*, backdating documents, misleading others about effect of documents, forging signatures, not following formal execution procedures, lying or omitting material health information on a life insurance application, *etc.*?
- How many other advisors before me has the client gone through? Why?
- Will this client present problems that I lack the confidence or competence to handle? Would they allow me to bring in help? Should I discuss this candidly up front, or will this needlessly alert the client that they perhaps should choose another advisor?

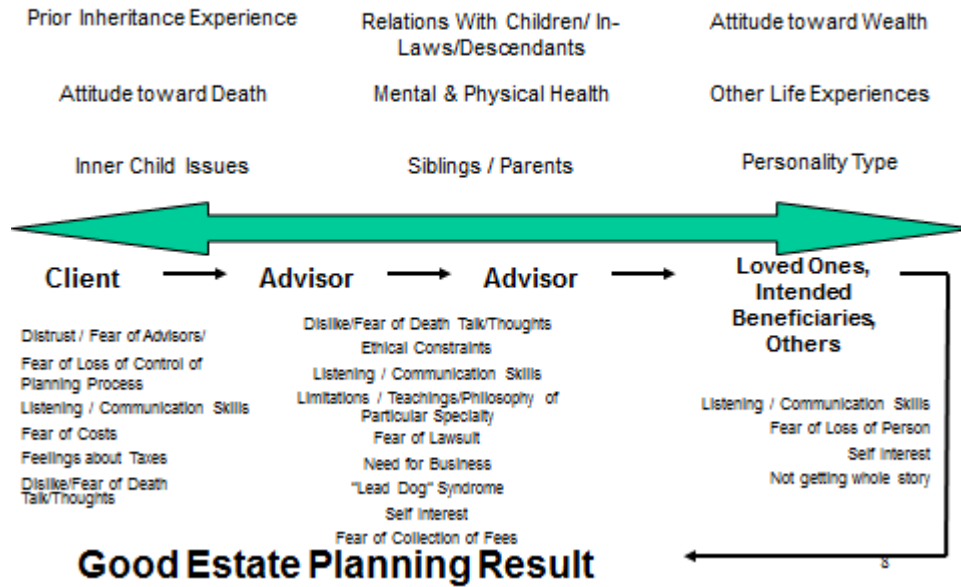
## The Minds of the Estate Planner and the Client During the Initial Interview: A Meeting of the Minds or Two Ships Passing in the Night?

### THE CLIENT

- Can this person help me (or us)?
- Will I be able to work with this person?
- Am I physically safe with this person?
- Will this person make me feel uncomfortable?
- Is this person going to be loyal to me?
- Will this person take the time to talk to me, not down to me?
- Can this person explain the issues and considerations to me and to my family?
- Is this going to offend any of my loved ones or hurt any feelings?
- Does this person understand that for me some of these decisions are going to be very trying?
- Will this person be perceptive enough to pick up what I do not or cannot express clearly or directly? Will this person even make an effort in that regard?
- If this person going to take advantage of me either on a fee or work basis?
- What is really in it for this person?
- What is this going to cost me?
- How long will this take?
- Will this person respect my feelings and desires, not try to take over to save me taxes?
- Can I call this person whenever I want? If not, when may I call this person?
- May I call this person at home? On weekends? After hours?
- Will this person return my calls in timely fashion? Are our definitions of “timely” the same?
- Will this person keep my affairs confidential?
- Will this person give me his or her undivided attention during our meetings? Will this person take phone calls or office interruptions while we are meeting?
- Where will my matter fall into this person’s work priorities?
- Will this person meet me at my home or other location, or will he or she meet only at his or her office?
- Will this person be timely and prompt?
- If we are eating a meal together, will this person charge me during the time we are eating?
- How will this person handle “soft office costs”, e.g. copies, faxes, long distance charges, *etc.*
- Will I talk to this person or will I have to deal with others in the firm? If so, who else may I have to deal with?
- Does this person have a gatekeeper, i.e., someone I have to go through to get to talk to them?



## Why is a Good Estate Planning Result so Hard to Achieve?



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