

THE MODERN PRACTICE

How to Handle Conflicts of Interest

Make sure to comply with the Rules of Professional Conduct

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When spouses seek advice from their attorney in implementing an estate plan, they likely expect that their attorney will represent each of their interests. The Model Rules of Professional Conduct (the Rules) prohibit an attorney from representing two clients if their interests are directly adverse.¹ As the Bible proclaims (in a different context): No man can serve two masters.²

But, things don't always work out as planned. Take the example of a married couple, who travels to their attorney's office to sign their wills. The husband reads his will, signs it and leaves without reading his wife's will but assumes they're reciprocal. The attorney then prepares a deed transferring the husband's residence to his wife to equalize their estates. Subsequently, the wife dies leaving most of her estate, including the house and her "husband's" Jaguar, to her nieces. The surviving husband sues the attorney, who happened to be the wife's brother, for negligence, breach of contract and breach of fiduciary duty. Not plausible? In *Smith v. Goodson*,³ those allegations were litigated, and the appellate court affirmed the dismissal of the complaint. However, that result shouldn't give an attorney comfort. Like the 1856 *Dred Scott* decision (no descendant of a slave can be a U.S. citizen), courts make mistakes.

Subhed: Rules of Professional Conduct

When a client seeks estate planning advice, the client expects – implicitly, if not explicitly – that the attorney must and will adhere to those directives the Rules require: zealous representation, competence, loyalty from their attorney and confidentiality.⁴ An attorney who doesn't follow the Rules is subject to discipline by a state's governing body. Additionally, because the Rules establish standards of care, an attorney's violation of a Rule may be evidence of breach of the applicable standard and thus give rise to civil liability.⁵ One appellate court has stated plainly that the Rules define the minimum level of professional conduct required of an attorney, such that a violation creates a rebuttable presumption of a breach of the attorney's common law fiduciary obligations.⁶

In a situation in which a couple intends to benefit identical people (their children, for example) or identical charities, there's no actual conflict. Nor is there a significant risk that the representation of one will be materially limited by the lawyer's responsibilities to the other.⁷ If there's such a risk, the Rules prohibit the attorney from representing both spouses unless the attorney believes he'll be able to provide competent and diligent representation to each client and both clients consent to the dual representation.⁸ Thus, should each spouse want to create trusts to benefit the other spouse during the survivor's life, with the remainder to different individuals, an attorney could ethically represent both spouses and create such a plan. The attorney should, consistent with the particular state's rules of professional conduct, obtain written consent after disclosure.⁹ Attorneys shouldn't use a passive engagement letter that assumes the client has

given consent. Rather, the attorney should require clients to sign and return the engagement letter.

The overriding view of many commentators, including the American College of Trust and Estate Counsel (ACTEC) is that, because estate planning is generally non-adversarial in nature, clients are often well-served by one attorney representing both spouses.¹⁰ After all, each spouse often has comparable objectives that are in harmony with one another. They want a synchronized estate plan. They likely have an interest in cost-effective representation. They want counsel to proceed based on a full understanding of both party's assets and goals. These common interests, as ACTEC makes clear, often predominate over their potentially very limited *inconsistent* interests.¹¹

Subhed: Confidentiality

An attorney's duty of confidentiality is a major factor when considering the representation of two members of one family.¹² For example, one spouse may provide confidential information that's not intended for the other spouse. While Rule 1.6 provides (absent certain circumstances) that the attorney shall not reveal confidential information, there's a preliminary question about joint representation. Does the attorney represent the spouses jointly, or does the attorney represent each spouse *separately*, albeit concurrently? The attorney in *Smith* was hired pursuant to an oral engagement, and there was ambiguity about the nature of the services he would provide.¹³

An attorney may be counsel for both spouses and treat the couple as one client. Such joint representation is based on the assumption that, on all issues of importance, the two spouses agree. Absent an agreement to the contrary, joint representation is assumed.¹⁴

When there's joint representation and the attorney learns information from one client relevant to the matter, the attorney must disclose that confidential information.¹⁵ In a situation in which the attorney is representing each spouse separately, she can't ethically disclose confidential information to the other spouse.¹⁶ When the husband in *Smith* asked the Tennessee attorney to prepare a deed transferring his house to his wife, that attorney knew that at the wife's death, the house would pass to her nieces – not to her husband. In short, the attorney's duty of loyalty – and his duty to keep the client reasonably informed - required disclosure of the relevant information to the husband or to withdraw as counsel.

The determination to represent each spouse *separately* and adhere to the Rules might appear to preclude any possibility of sharing confidences. As noted, the attorney in a separate representation is required to keep the confidences of each spouse secret from the other. However, the lack of transparency could create an actual conflict. If an actual conflict develops, the attorney must discontinue the representation of both clients.¹⁷ Once the attorney in *Smith* was asked to prepare the deed transferring the house to the wife, the attorney had an actual conflict. Rule 1.7(a)(2) prohibits an attorney from representing a client if, among other things, there's a significant risk that the representation will be materially limited by the attorney's responsibilities to another client. Thus, in a separate representation, assume that one spouse's plan will substantially eliminate the interests of the other spouse, as in *Smith*. Rule 1.7(a)(2) may,

depending upon the circumstances, require the attorney to then withdraw notwithstanding the predicate – separate representation and the expectation that the attorney wouldn't share confidences. (Of course, if the confidential information doesn't touch on the estate planning matter, the conundrum is avoided.)

An attorney in a joint representation context who receives confidential information from one spouse will determine whether her duty of loyalty to the other spouse and duty to keep the client informed¹⁸ creates a conflict, keeping in mind the nondisclosure rules. The first part of the analysis is to determine whether the confidential communication concerns the subject of the representation. For example, say the husband discloses his infidelity. Since infidelity may not be relevant to the estate planning, the duty of loyalty to the other spouse may not create a conflict.

An element of *Smith* is more common: a spouse transfers some assets to the other spouse, so that each has sufficient assets to fund a credit shelter trust. Consider though that the receiving spouse discloses to an attorney that he's currently being unfaithful and is planning to leave his wife immediately after the assets are transferred. In the separate representation context, the Rules require the attorney to keep this information confidential.¹⁹ While the ACTEC Commentaries recommend that the attorney encourage the husband to disclose the information to his wife or allow the attorney to do so, human experience tell us that it's likely the client will do neither. In that case, the attorney must withdraw from representing both clients.²⁰ Interestingly, the withdrawal will almost certainly be insufficient to protect the wife's interest.

A full discussion of the joint representation is appropriate as well as a very frank and explicit engagement letter, advising both spouses that the attorney can't keep any confidences related to the estate planning. The engagement letter must indicate that if one spouse provides confidential information that may affect the estate plan with the expectation that it not be communicated to the other spouse, the attorney can't continue the representation of either spouse.²¹ Such a discussion, coupled with an explicit engagement letter that must be signed by the clients, might prevent some of the problems discussed. (See "Sample Engagement Letter," p. x.) [I think the sample engagement letter would make a good sidebar, instead of an endnote] If the ground rules are well understood, and the spouses are put on notice of the impact of disclosing confidential information, an appropriate framework for a joint engagement can be established.

SIDEBAR

HED: Sample Engagement Letter

DECK: Include language regarding confidentiality

SOURCE: John R. Price, "In Honor of Professor John Gaubatz: The Fundamentals of Ethically Representing Multiple Clients in Estate Planning" 62 *U. Miami L. Rev.* 735, 754-55 (2008)

A portion of a sample engagement letter, drafted by John R. Price, contains the following language:

Confidentiality. Any information we receive from either or both of you may be shared with others in our office in order to carry out our engagement. The information will not be communicated to others, particularly persons outside our office, except to the extent we believe is reasonably appropriate to share with your other advisors. As between yourselves, you have agreed that there will be full and complete disclosure of all information that is relevant and material to our engagement, including information that one or both of you might characterize as confidential. Accordingly, we may provide information to one of you that we receive from the other regardless of the time or manner in which it is communicated to us.

Conflicts. Each of you is free to develop an independent plan for the disposition of your property. Some couples adopt plans that are mirror images of each other, but others do not. We may represent you both although you may differ regarding the manner in which you each choose to dispose of your property. As between the two of you, we will not advocate the interests of one of you over the other. We may not be able to assist with matters in which your interests are directly adverse, such as negotiating and defining your respective interests in a property-status agreement. Should a serious conflict in your interests develop, we may be required to **withdraw** from representing

both of you. If the foregoing accurately expresses our agreement, please sign and return the enclosed copy of this letter.

Endnotes

1. *See* Rule 1.7(a)(1) of the Model Rules of Professional Conduct: “(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: (1) the representation of one client will be directly adverse to another client; or . . .”

2. Matthew 6:24.

3. *Smith v. Goodson*, 1996 WL 599697 (Tenn. Ct. App. 1996).

4. ABA Model Rules, Preamble.

5. *See e.g., In re Disciplinary Proceeding Against Botimer*, 166 Wash. 2d 759 (2009) and

Smith v. Haynsworth, Marion, McKay & Geurard, 322 S.C. 433 (1996).

6. *Avianca, Inc. v. Harrison*, 70 F.3d 637 (D.C. Cir. 1995).

7. *See* Rule 1.7(a)(2). “Rule 1.7 Conflict Of Interest: Current Clients

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.”

8. *See ibid.*, Rule 1.7(b).

9. *See supra* note 7, Rule 1.7(b)(4).

10. American College of Trust and Estate Counsel Commentary (ACTEC) on MRPC 1.7.

11. *Ibid.*

12. *See* Rule 1.6: “A lawyer shall not reveal 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 paragraph (b).”

13. *Smith v. Goodson*, 1996 WL 599697 (Tenn. Ct. App. 1996).

14. ACTEC Commentary on MRPC 1.6: Confidentiality of Information.

15. Rule 1.4 is potentially in conflict with Rule 1.6 (Confidentiality of Information). Rule 1.4 should trump 1.6 in this circumstance. A lawyer shall: “. . . keep the client reasonably informed about the status of the matter.” The comments to the Model Rules of Professional Conduct, Rule 1.7, comment 31, address the requirement to disclose. The conflicting duties of an attorney – confidentiality to one client and disclosure to a joint client – are discussed extensively in *A. v. B.*, 158 N.J. 51 (1999) (law firm entitled to disclose existence, but not name, of husband's

illegitimate child.) *See also*, John R. Price, “In Honor of Professor John Gaubatz: The Fundamentals of Ethically Representing Multiple Clients in Estate Planning,” 62 *U. Miami L. Rev.* 735 (2008) for an extensive discussion of this area.

16. Rule 1.6. “A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent . . .”

17. Rule 1.7, cmt 29. “Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails.”

18. Rule 1.4(b): “A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”

19. *See* Rule 1.6.

20. The attorney 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 attorney will have to withdraw if one client decides that some matter material to the representation should be kept from the other. Model Rules of Professional Conduct, Rule 1.7, Comment 31. *Ibid.*