

Representing Husband and Wife in Estate Planning

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When a husband and wife seek estate planning advice, they probably expect the lawyer to represent both of them in developing the estate plan. But Oregon Disciplinary Rule DR 5-105(E) prohibits a lawyer from representing multiple current clients when such representation will result in an actual or likely conflict. Should this prevent the lawyer from representing them? Normally it does not.

Lawyers usually find that the husband and wife share major goals, such as a desire to reduce estate taxes, and an intent to benefit the same persons or charities on the death of the second of them. Where the goals are the same, the disciplinary rules governing lawyer ethics are clear: there is neither a conflict, nor even a “likely conflict” as that term is used in DR 5-105, and representing the couple is not a problem.

Often the husband and wife, especially when it is neither’s first marriage, wish to benefit different individuals. In that context, advising the couple about their planning has more of a potential to put the lawyer into a conflict of interest situation. Worse, either the husband or wife may disclose information to the lawyer which he or she wishes to keep confidential from the other spouse. Can the lawyer represent both individuals under either of these situations?

Assistance in resolving these issues comes from the Oregon Disciplinary Rules (Oregon Rules) and some insightful commentaries published by the American College of Trust and Estate Counsel (the ACTEC Commentaries) to the American Bar Association’s Model Rules of Professional Conduct (Model Rules). Although the Oregon Rules differ in significant ways from the Model Rules, it is not the purpose of this article to focus on those distinctions. For the purposes of most estate planners, the ACTEC Commentaries are a useful guide to issues governed by the Oregon Rules. The ACTEC Commentaries are available from the ACTEC Foundation, at its web site, www.actec.org, or at 3415 South Sepulveda Boulevard, Suite 330, Los Angeles CA, 90034. References in this article are to the second edition of the ACTEC Commentaries (1995).

Estate planning is generally nonadversarial in nature. The common interests of husband and wife in getting cost effective representation, achieving common objectives with a well coordinated plan -- based on a full understanding of both members’ assets and goals -- usually are more significant than any different interests they may have. For these reasons, spouses are often best served by one lawyer representing both.

The ACTEC Commentaries recognize two modes of representation for the lawyer representing husband and wife. The first mode, and the one most frequently used, is joint representation, treating both spouses as essentially one client. Joint representation is based on the assumption that, on most issues, the two spouses are in agreement, or to the extent they do not agree, that they are sufficiently independent, so agreement is not required. Absent an agreement to the contrary, joint representation is assumed. ACTEC Commentaries at 66.

The second mode of representation recognized in the ACTEC Commentaries is separate representation. In this mode, the lawyer treats each spouse as a separate client. The lawyer does not share information between the two clients, except to the extent that it fosters the purposes of each. Consistent with the view that joint representation is assumed absent an agreement to the contrary, the ACTEC commentaries require advance approval of the clients for the lawyer to engage in separate representation. ACTEC Commentaries at 87.

Because it is assumed to most closely match the expectations of the clients, joint representation does not require special disclosures. However, the ACTEC Commentaries recommend that lawyers discuss the mode of representation with the clients at the outset. This can help prevent one spouse from revealing a confidence to the lawyer which will have to be shared with the other spouse under the general rules of joint representation.

The separate representation approach, at least in theory, avoids the risk of sharing confidences. The lawyer in a separate representation context is required to keep the confidences of each spouse secret from the other. However, this might put the lawyer in a situation where the lawyer will learn a confidence from one spouse that creates an actual conflict with the other spouse, and thus requires that the lawyer discontinue representation, as described in DR 5-105 (A)(1). For this reason, many observers doubt that separate representation is a practical alternative to joint representation. *See*, for instance, Professor John R. Price, *Contemporary Estate Planning*, § 1.14.2 (1992 and Supp. 1998), contending that separate representation is inconsistent with the lawyer's primary duty of loyalty.

Joint representation means the lawyer will share information between the clients to the extent that the information is relevant to the purpose of the representation, or withdraw. Joint representation does not require that information be shared where the information is not related to the purpose of the representation.

A lawyer in a joint representation context who receives confidential information from one spouse will determine whether his or her duty of loyalty to the other spouse creates a conflict, keeping in mind the nondisclosure rules of DR4-104. The first part of the analysis is to determine whether the confidential communication concerns the subject of the representation of the other spouse. Consider a husband and wife with a several year marriage who consult with a lawyer for estate planning. During the preparation of the plan, the husband informs the lawyer of a past marital infidelity. Since it is doubtful that the husband's disclosure is relevant to the estate planning, the duty of loyalty to the other spouse does not create a conflict.

At the other extreme, assume that with respect to the same couple the lawyer recommends that the wife transfer some of her substantial assets to husband, so that each has sufficient assets to

fund a credit shelter trust. During the planning, husband tells the lawyer that he is having an affair, and plans to leave his wife after the assets are transferred. Here, the information is highly relevant to the representation of wife. But DR 4-104 requires preservation of the confidence. Under these circumstances the ACTEC Commentaries recommend the lawyer encourage husband to disclose the information to his wife, or allow the lawyer to do so. If husband will do neither, the lawyer should withdraw from representing either. ACTEC Commentaries at 67. The withdrawal itself may raise the wife's suspicions to the point that she ultimately discovers the confidence. But withdrawal under these facts may be inadequate to protect the wife and her interests.

Consider whether full discussion of joint representation or an appropriate engagement letter, advising both spouses that the lawyer cannot keep any such confidences, and continue the representation, might have prevented the problem. If the ground rules are well understood, the husband is put on notice of the impact of disclosing confidential information.

If the husband and wife do not agree on goals in estate planning, it is less likely that a lawyer will encounter a likely or actual conflict. Here, the issue does not involve keeping information secret. Many spouses in second or later marriages wish to leave their assets to different beneficiaries, and the use of marital trusts may affect the spouses differently. However, different choices by each spouse with respect to his or her own assets should not create a conflict.

A likely or actual conflict may well arise when the spouses disagree on issues in which only one spouse can prevail, such as disputes over ownership rights, or the characterization of property as separate, joint or community, or where the potential exists for one spouse to defeat the other's estate plan, as by using the elective share. If such disputes do come up, the lawyer can withdraw without triggering adverse consequences, since the nature of the dispute is known to both parties.

No single step can prevent the estate planning lawyer from running into potentially difficult situations in representing husband and wife. However, it seems obvious that the frequency with which those situations arise will decrease, and the satisfaction of the clients with the lawyer's handling of these issues will increase, if the lawyer includes in the first meeting a frank discussion of his or her responsibilities in representing both.

Former Client Issues

In OSB Legal Ethics Op. No. 1997-148, the Oregon State Bar Board of Governors answered the question of whether a lawyer who had previously represented husband and wife in family estate planning matters can now represent wife in the dissolution of the marriage. The opinion discusses the issue from the assumption that the husband is a "former client," as that term is used is used in DR 5-105. The opinion does not state how the Board of Governors reached that conclusion.

In actual practice, estate planning lawyers may find it difficult to know when an estate planning client has become a former client. However, OSB Legal Ethics Op. No. 1997-148 should not be taken as an endorsement of a position that estate planning clients automatically become former clients after the documents are signed. Of course, a lawyer can terminate the relationship after

the wills or trusts are signed by sending a termination letter to the client, but such a practice would be contrary to the lawyer's self interest and, I would like to believe, to the clients' best interest as well.

The relationship of the lawyer and client may go into a dormant phase after the documents are signed. It is likely that the clients still think of the lawyer as their lawyer, but have no immediate need for services.

The existence of the lawyer client relationship is generally viewed from the perspective of the reasonable expectations of the clients. *The Ethical Oregon Lawyer*, § 6.3 (Oregon CLE 1991 and Supp. 1998). The belief of the clients in a continuing relationship may be enough to establish that they are current clients, even though no current work is being done.

Although not directly related to estate planning, OSB Legal Ethics Op. No. 1996-146 is instructive on the subject of whether an estate planning client remains a current client after the documents are signed. In that opinion, the Board of Governors pointed out that periodic reminder letters from an attorney after work is completed can create a current client relationship under the reasonable expectation of the client test.

If the lawyer sends periodic reminders to review estate plans, or retains the client's wills or other documents, the client may well have the subjective belief that representation continues, and that belief is supported by the objective facts. In order to avoid the conclusion that the client is still a current client, OSB Legal Ethics Op. No. 1996-146 suggests that the lawyer would have to send a written notice of termination. Further, if the lawyer continues to send long term docket notices, the opinion suggests he or she should add to them an advisory that the notice is not for the purpose of providing legal advice, but merely to serve as a reminder.

Lawyers who represented husband and wife in estate planning, and whose clients are divorcing, should consider the implications of OSB Legal Ethics Op. No. 1996-146 before assuming that OSB Legal Ethics Op. No. 1997-148 allows them to represent one of the parties in the dissolution.

If you have questions, please contact any member of [The Estate and Business Planning Practice Group](#):

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