

ETHICS AND THE ESTATE PLANNER

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Introduction

*"This thorn in my side is from the tree I've planted."*¹

All it takes is one careless act to place you in the hot seat for months or years where you might watch your personal, professional, and financial life crumble around you.

This article focuses the reader's attention on ethical issues that may arise while preparing or executing an estate plan. I hope that by pointing out potentially troublesome areas, the reader will avoid the ramifications of having a lapse of ethical good judgment, which may lead to the frustration of the client's intent, financial loss to the client or the beneficiaries, personal embarrassment, and possible disciplinary action.

Estate Planning for Both Spouses²

Today you are meeting with a new estate planning client. During the initial telephone contact, the client indicated a need for a simple plan, "nothing too complex" were the exact words. As you enter your reception area to greet the client, you are surprised to see *two* people waiting — the client and the client's spouse. The client explains that the client wants you to prepare estate plans for both of them. Your mind immediately becomes flooded with thoughts of the potential horrors of representing both husband and wife. You remember stories from colleagues about their married clients who placed them in an awkward position when one spouse confided sensitive information that would be relevant to the estate plan with the admonition to "not tell my spouse." You also recall the professional ethics rules which prohibit representing clients with conflicting interests. What do you do? What is the best way to protect the

¹ METALLICA, *Bleeding Me, on LOAD* (Blackened Recordings 1996).

² Portions of this section are adapted from GERRY W. BEYER, TEXAS LAW OF WILLS §§ 53.4–53.7 (9 Tex. Prac. 3d ed. 2002).

interests and desires of the client and the client's spouse and still avoid ethical questions as well as potential liability?

This scenario is replayed many times each day in law offices across Texas and the United States. The joint representation of a husband and wife in drafting wills and establishing a coordinated estate plan can have considerable benefits for all of the participants involved. However, depending on the circumstances, joint representation may result in substantial disadvantages to either or both spouses and may subject the drafting attorney to liability. The attorney's duties of loyalty and confidentiality in joint representations, as well as how conflict situations should be handled, whether the conflict is apparent initially or arises during the representation, can be gleaned from the Texas Disciplinary Rules of Professional Conduct.

A. Models of Representation for Married Couples

When a married couple comes to an attorney's office for estate planning advice, it is likely they are unaware of the different forms of representation that are available, in addition to the specific factors they must consider to determine which form of representation is appropriate. The attorney has the burden to use his or her skills of observation and information gathering and apply the relevant professional conduct rules to help the couple to make a choice that best fits their situation.

1. Family Representation

Under the concept of family representation, the attorney represents the family as an entity rather than its individual members. This approach attempts to achieve a common good for all of the participants, and thus the attorney's duty is to the family interest, rather than the desires of one or both of the spouses. However, representation of the family does not end the potential for conflict between the spouses; instead, it broadens the potential basis of conflict by adding other family members to the equation. Further, even where there is no conflict of purposes between the spouses, the attorney may feel an obligation to the family to discourage or even prevent the spouses from effectuating their common desires where those desires do not benefit the family as a whole (e.g., where the spouses choose not to take advantage of tax-saving tools, such as annual exclusion gifts, in favor of retaining the assets to benefit themselves). This type of representation, at least for spousal estate planning purposes, is unnecessarily complicated and may even

frustrate the common desires of the spouses. The courts have not recognized this model of representation.

2. Joint Representation

Joint representation is probably the most common form of representation estate planners use to develop a coordinated estate plan for spouses. Joint representation is based on the presumption that the husband, wife, and attorney will work together to achieve a coordinated estate plan. In situations where the attorney does not discuss the specific representative capacity in which he or she will serve, joint representation serves as the “default” categorization. Despite its widespread acceptance, however, joint representation has its pitfalls.

A critical issue faced by an attorney who represents multiple parties is the attorney’s obligation to make sure that the representation complies with the Texas Rules of Professional Conduct. Most relevant in the joint representation of husband and wife is Rule 1.06 which prohibits representation where it “involves a substantially related matter in which that person’s interests are materially and directly adverse to the interests of another client of the lawyer”³ Additionally, the Rule provides that if in the course of multiple representation such a conflict becomes evident, the lawyer must withdraw from representing one or both of the parties.

The rule does, however, contain a savings clause which permits the attorney to accept or continue a representation where a conflict of interest exists if: (1) the attorney believes that the representation will not be materially affected, and (2) both of the parties consent to the representation after full disclosure of all of the potential disadvantages and advantages involved. Many attorneys, regardless of whether potential conflicts are apparent, take advantage of this part of the rule and routinely disclose all advantages and disadvantages and then obtain oral and/or written consent to the representation. This approach exceeds the minimum requirements of the rule and helps protect all participants from unanticipated results. Of course, there are still situations which cannot be overcome by disclosure and consent, such as where the attorney gained relevant, but confidential, information during the course of a previous

³ TEX. DISCIPLINARY RULES PROF’L CONDUCT R. 106(b)(1), *reprinted in* TEX. GOV’T CODE ANN., tit. 2, subtit. G, app. A (West 2013) (Tex. State Bar R. art. X §9).

representation of one of the parties. In this type of situation, the attorney has no choice but to withdraw from the joint representation and recommend separate counsel for each spouse.

The dangers of joint representation are discussed in greater detail below.

3. Separate Concurrent Representation of Both Spouses

The theory of separate concurrent representation in a spousal estate planning context is that a single attorney will undertake the representation of both the husband and the wife, but as separate clients. All information revealed by either of the parties to the attorney is fully protected by confidentiality and evidentiary privileges, regardless of the information's pertinence to establishing a workable estate plan. Thus, one spouse may provide the attorney with confidential information that undoubtedly would be important for the other spouse to have in establishing the estate plan, but the attorney would not be able to share the information because the duty of confidentiality would be superior to the duty to act in the other spouse's best interest. Proponents of this approach claim that informed consent given by the parties legitimizes this form of representation. However, due to the confusion it creates for the attorney regarding to whom the duty of loyalty is owed and whose best interest is to be served, it is hard to understand why any truly informed person would consent. The dual personality that this form of representation requires of the attorney has resulted in it being dubbed a "legal and ethical oxymoron."⁴

4. Separate Representation

A final option for the attorney and the married clients is for each of the spouses to seek his or her own separate counsel. This approach is embraced by many estate planning attorneys as the best way to protect a client's confidences and ensure that the client's interests are not being compromised or influenced by another. By seeking independent representation, spouses forego the efficiency, in terms of money and time spent, that joint representation offers, but they gain confidence that their counsel will protect their individual priorities rather than be diluted by the priorities of the spouse. Additionally,

⁴ Geoffrey C. Hazard, Jr., *Conflict of Interest in Estate Planning for Husband and Wife*, 20 PROB. L. 1, 11 (1994).

separate representation substantially decreases the potential that the attorney will be trapped in an ethical morass because of unanticipated conflicts or unwanted confidences.

B. Dangers of Joint Representation

1. Creates Conflicts of Interest

A conflict of interest between the spouses or between the spouses and their attorney can arise for many reasons. These conflicts often do not become apparent until well into the representation. If the attorney is skillful (or lucky), the conflict can be resolved and the joint representation continued. In other cases, however, the conflict may force the attorney to withdraw from representing one or both of the spouses.

a. Accommodating the Modern Family

With the frequency of remarriage and blended families in today's society, it is not surprising that non-traditional families are a ripe source of conflict. A step-parent spouse may not feel the need or desire to provide for children that biologically are not his or her own. This fact can come into direct conflict with the expectations of the parent spouse who may feel that the children are entitled to such support and that the step-parent spouse is just being selfish. Alternatively, the spouses may be in conflict over how the estate plan should provide for "our" children, "your" children, and "my" children, and whether any of these classifications should receive preferential treatment.

b. Bias Toward Spouse if Past Relationship With Attorney Exists

Where one of the spouses has a prior relationship with the drafting attorney, regardless of whether that relationship is personal or professional, there is a potential for conflict. The longer, closer, and more financially rewarding the relationship between one of the spouses and the attorney, the less likely the attorney will be free from that spouse's influence.⁵ Because the spouses rely on the attorney's independent judgment to assist them in effectuating their

⁵ See James R. Wade, *When Can A Lawyer Represent Both Husband and Wife in Estate Planning?*, PROB. & PROP., Mar.-Apr. 1987, at 13.

testamentary wishes, it is important that neither of the parties has any actual or perceived disproportionate influence over the attorney.

c. Opposing Objectives Between Spouses

Spouses may also have different ideas and expectations regarding the forms and limitations of support provided by their estate plan to the survivor of them, their children, grandchildren, and so forth. By including need-based or other restrictions on property, one spouse may believe that the other spouse will be “protected” while that spouse may view the limitations as unjustifiable, punitive, or manipulative. If one spouse has children from a prior relationship, that spouse may wish to restrict the interest of the non-parent spouse via a QTIP trust or other arrangement to the great dismay of the other spouse who would prefer to be the recipient of an outright bequest. No one distribution plan may be able to satisfy the desires of both spouses.

d. Power Struggle Between Spouses

One spouse may dominate the client side of the attorney-client relationship. If one spouse is unfamiliar or uncomfortable with the prospect of working with an attorney or if one spouse is unable, for whatever reason, to make his or her desires known to the drafting attorney and instead simply defers to the other spouse, it will be difficult for the attorney to fairly represent both parties.

e. A Faltering Marriage

If the attorney seriously questions the stability of the marriage, it will be practically impossible to create an estate plan which contemplates the couple being separated only by death. As one commentator explained:

[N]o court would permit a lawyer to go forward when such a situation involves partners in a partnership or the principals in a close corporation, or a trustee and beneficiary of a trust, or a corporation and its officers. The courts will not take a different view

when the clients are husband and wife.⁶

The case of *In re Taylor*, is instructive.⁷ A law firm represented both the husband and wife in the preparation of their estate plans, including wills and powers of attorney, as well as some business matters.⁸ Later, the law firm undertook to represent the husband in divorce proceedings against the wife.⁹ The wife sought to have the law firm disqualified from representing the husband.¹⁰ The trial court denied her motion and she appealed.¹¹

The appellate court conditionally granted the wife's request for a writ of mandamus directing the trial court to vacate the order denying her motion to disqualify the law firm.¹² The record was clear that the law firm represented both the husband and wife with regard to the business and estate matters and thus there would be a conflict of interest for the law firm to represent the husband in the divorce action.¹³ The wife did not consent to the law firm's representation of the husband in the divorce, and the law firm was disqualified.¹⁴ The trial court's failure to grant the wife's motion was a clear abuse of discretion.¹⁵

f. Unbalanced Estate Assets Between Spouses

Significant conflict may arise if one spouse has a separate estate that is of substantially greater value than that of the other spouse,

⁶ Hazard, *supra* note 4, at 1.

⁷ *In re Taylor*, 67 S.W.3d 530 (Tex. App. – Waco 2002, no pet.).

⁸ *Id.* at 531.

⁹ *Id.* at 532.

¹⁰ *Id.*

¹¹ *Id.* at 533.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at 534.

¹⁵ *Id.*

especially if the wealthier spouse wants to make a distribution which differs from the traditional plan where each spouse leaves everything to the survivor and upon the survivor's death to their descendants. The attorney may generate a great deal of conflict among all of the parties if, to act in the best interest of the not-so-wealthy spouse, the attorney provides information regarding that spouse's financial standing under the contemplated distribution, if the wealthy spouse were to die first.

Conflict may also exist in situations where one spouse wants to make a gift of property which the other spouse believes is that spouse's separate property and therefore not an item which the first spouse is entitled to give. The potential for this type of conflict is especially great where the spouses have extensively commingled their separate and community property.

2. Forces Release of Confidentiality and Evidentiary Privileges

Joint representation may force spouses to forego their normal confidentiality and evidentiary privileges. Disclosure of all relevant information is the only way to work toward the common goal of developing an effective estate plan. In subsequent litigation between the spouses regarding the estate plan, none of the material provided to the attorney may be protected. However, release of these privileges protects the attorney by eliminating the potential conflict between the attorney's duty to inform and the duty to keep confidences.

3. Discourages Revelation of Pertinent Information

The fact that there is no confidentiality between the spouses in joint representation situations may not be a problem if the spouses have nothing to hide and have common estate planning goals. On the other hand, joint representation can place one or both of the spouses in the compromising position of having to reveal long held secrets in the presence of his or her spouse, e.g., the existence of a child born out-of-wedlock. Even worse is the scenario where the spouse withholds the information leaving the other spouse vulnerable and unprotected from the undisclosed information which, if known, may have resulted in a significantly different estate plan.

4. Increases Potential of Attorney Withdrawal

A potential conflict which becomes an actual conflict during the course of representation may not prevent the attorney from continuing the representation if the spouses previously gave their informed consent. However, if the conflict materially and substantially affects the interests of one or both of the spouses, the attorney must carefully consider the negative impact that the conflict will have on the results of the representation and on the attorney's independent judgment. The prudent action may be withdrawal. A midstream withdrawal can be very disruptive to the estate planning process and result in a substantial loss of time (and even money) to both the spouses and the attorney.

5. Creates Conflicts Determining When Representation Completed

There is some question as to whether a spouse who sought joint representation in the creation of his or her estate plan can, at a later date, return to the same attorney for representation as an individual. The determination as to when the joint representation ends is quite settled with respect to subsequent attempts to unilaterally revise the estate plan—it does not end. Any subsequent representation of either spouse which relates to estate planning matters would constitute information that the attorney would be obligated to share with the other spouse/client. Regarding other legal matters, representation “should be undertaken by separate agreement, maintaining a clear line between those matters that are joint and those matters that are individual to each client.”¹⁶

C. Recommendations

Decisions regarding the form of representation most appropriate for a husband and wife seeking estate planning assistance could be made by the attorney alone, based on his or her past experiences, independent judgment, and skills of observation regarding the potential for conflict between the spouses. The better course of action is for the attorney to explain the choices available to the spouses along with the related advantages and disadvantages and then permit the spouses to decide how they would like to proceed. The

¹⁶ Teresa Stanton Collett, *And the Two Shall Become One . . . Until the Lawyers Are Done*, 7 NOTRE DAME J.L. ETHICS & PUB. POL'Y 101, 141 (1993).

only two viable options are joint representation and representation of only one spouse.¹⁷ As previously mentioned, representation of the family as an entity and separate concurrent representation by one attorney are appropriate forms of representation for a husband and wife only in extremely rare cases.

1. Representation of Only One Spouse

This form of representation allows each of the spouses to be fully autonomous in dealing with their attorney. Only the information the client spouse is comfortable with sharing is revealed to the other spouse. As one commentator explained, “it [separate representation for each spouse] is consistent with the present dominant cultural view of marriage as a consensual arrangement, and is most consistent with the assumptions about the attorney-client relationship”¹⁸ Where it is obvious to the attorney that the couple would be best served by this style of representation, it is the attorney’s responsibility to convince the couple of this fact. Examples of facts that alert the attorney that separate representation is probably the best choice include situations where the marriage was not the first for either or both of the parties, where there are children from previous relationships, where one party has substantially more assets than the other, and where one spouse is a former client or friend of the consulted attorney.

When recommending separate representation, the attorney should take care to point out that this suggestion is not an inference that their relationship is unstable or that one or both parties may have something to hide. Instead, it is merely a reflection that each spouse has his or her own responsibilities, concerns, and priorities which may or may not be exactly aligned with those of the other spouse. Accordingly, and the best way to achieve a win-win result and reduce present and future family conflict is for each spouse to retain separate counsel.

¹⁷ See Malcolm A. Moore, *Representing Both Husband and Wife Ethically*, A.L.I.-A.B.A. EST. PLAN. COURSE MATERIALS J., Apr. 1996, at 5, 7.

¹⁸ Collet, *supra* note 16, at 128–29.

2. Joint Representation of Both Spouses

Despite the potential dangers to clients and attorneys alike, joint representation is the most common form of representation of husband and wife for estate planning matters. With appropriate and routine use of waiver and consent agreements, the attorney may undertake this type of representation with a minimum of risk to the attorney and a maximum of efficiency for the clients. Unfortunately, however, use of disclosure and consent agreements is far from a standard procedure. One survey revealed that over forty percent of the estate planning attorneys questioned do not, as a matter of practice, explain to the couple the potential for conflict that exists in such a representation, much less put such an explanation in writing. One attorney stated that he only felt it was necessary to discuss potential conflicts where the representation involved a second or more marriage, and that he only put it in writing if he felt a real problem was indicated in the first meeting. Another respondent failed to disclose the potential for conflict because he was afraid it would appear as if he were issuing a disclaimer for any mistakes he might make. Finally, it seems that denial of the existence of potential conflicts occurs on the part of the attorney as well as the spouses, as evidenced by one practitioner's statement, "I have a hard time believing that I should tell clients who have been married for a long time and who come in together to see me that there may be problems if they get a divorce."¹⁹ The A.B.A. Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 05-434 that addresses conflicts which may arise when an attorney represents several members of the same family in estate planning matters.²⁰

The Opinion validates the common practice of one lawyer representing several members of the same family.²¹ The basis of this authorization is that the interests of the parties may not be directly adverse and that more than conflicting economic interests are needed before the attorney may not represent both.

¹⁹ Francis J. Collin, Jr., et al., *A Report on the Results of a Survey About Everyday Ethical Concerns in the Trust and Estate Practice*, 20 ACTEC NOTES 201, 219 (1994).

²⁰ ABA Comm'n on Ethics & Prof'l Responsibility, Formal Op. 05-434 (2004).

²¹ *Id.*

The Opinion recognizes, however, that current conflict of interest may result even without direct adversity if there is a significant risk that representation of one client will materially limit the representation of another.²²

Despite the “permission” granted by this Opinion, I continue to think the representation of more than one family member in estate planning matters is problematic. A potential conflict may turn into a real conflict at a later time leaving the attorney in an untenable position. It is simply not worth the risk. I believe it is better for a lawyer to owe 100% of his or her duties to one and only one family member. This way, there will never be doubt whom the attorney represents or what actions the attorney should take if something “gets sticky.” True, practitioners may lose some business and some clients may have higher legal fees but I believe this is preferable to the alternative.

Many attorneys, nonetheless, will continue to represent spouses jointly. Attorneys who do so are strongly recommended to (1) provide the spouses with full disclosure and (2) obtain the spouses’ written informed consent, regardless of the perceived potential for conflict.

Informed consent is not possible without full disclosure. Because estate planning attorneys often meet one or both of the spouses for the first time the day of the initial appointment, it is not possible for the attorney to know more about the couple than what he or she sees and hears during the interview. Because there is no way to be sure which specific issues are relevant to the spouses, it is extremely important for the attorney to discuss as many different potential conflicts as are reasonably possible. Even if the attorney has some familiarity with the couple, it is better to cover too many possibilities than too few.

The amount of disclosure that must be provided for the consent given to be considered “informed” is different for each client. The attorney has the responsibility to seek information from the parties to be sure that all relevant potential conflicts are addressed as well as the effects of certain other incidents, such as divorce or death of one of the spouses. It is also a good idea to include a discussion of the basic ground rules of the representation detailing exactly what is and is not

²² *Id.*

confidential, rights of all parties to withdraw, and other procedural matters such as attendance at meetings and responsibility for payment of fees.

An oral discussion of potential conflicts that exist or that may arise between the couple will allow the attorney to gather information about the clients while disseminating information for them to use in making their decisions. Oral disclosure also permits a dialogue to begin that may encourage the clients to ask questions and thereby create a more expansive description of the advantages and disadvantages of joint representation as they apply to the couple.²³

Representation of Non-Spousal Relatives

Representation of more than one family member raises a number of ethical concerns such as avoiding conflicts of interest, maintaining confidences, and preserving independent professional judgment. These issues are analogous to those discussed with regard to the representation of both spouses. The safest course of action would be to decline to represent two individuals from the same family, especially a parent and his or her child.

Naming Drafting Attorney, Attorney's Relative, or Attorney's Employee as a Beneficiary

Attorneys are often asked by family members, friends, and employees to prepare wills, trusts, and other documents involved with the gratuitous transfer of property. These same individuals may also want the attorney to name him- or herself as one of the beneficiaries of the gift. This common occurrence is fraught with legal and ethical problems, since the attorney may not be able to claim the gift and may be subject to professional discipline.

²³ Though there is no rule or standard which requires that disclosure or the clients' consent be evidenced by a written document, the seriousness and legitimacy that go along with a signed agreement serve as additional protection for all participants. By documenting the disclosure statement and each client's individual consent to the joint representation, the couple may be forced to reconsider the advantages and disadvantages of joint representation and may feel more committed to the agreement. Additionally, if there are any issues which they do not feel were addressed in the document, they may be more likely to express them so that the issue can also be included in the agreement. Finally, reducing the agreement to written form helps protect the attorney should any future dispute arise regarding the propriety or parameters of the representation. (Excellent forms are available on the website of the American College of Trust and Estate Counsel:

<http://www.actec.org/publications/engagement-letters/> (last visited Jan. 26, 2018).

D. Effect on Validity of Gift

Under Roman law, the drafter of a will could take no benefit under the will.²⁴ Under modern law, the general rule still prohibits the drafter of a will from taking a benefit under the will. However, forty-six states and the District of Columbia have adopted the Model Rules of Professional Conduct (MRPC), including Rule 1.8(c), which prohibits an attorney from preparing a will giving the attorney or a person related to the attorney a substantial gift, unless the recipient is related to the client.²⁵ The MRPC prohibits the drafter of the will from benefiting under the will, but with an exception, if the attorney or person related to the attorney is related to the client. Although forty-six states and the District of Columbia have adopted the MRPC, there are various exceptions to the rule of the drafter being a beneficiary under the will, which varies from state to state. This also brings up the question concerning the validity of such gifts.

If the drafter of the will is a beneficiary under the will, many states provide that this benefit raises a presumption of undue influence, while some states automatically void the gift.²⁶ Generally, a violation of the MRPC Rule 1.8(c) will not automatically void the gift, but instead the appropriate authority can impose a penalty ranging from a private reprimand to disbarment (determined on a case-by-case basis).²⁷

E. Effect on Ethical Duties

The MRPC Rule 1.8(c) states, “[a] lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild,

²⁴ See Elmo Schwab, *The Lawyer as Beneficiary*, 45 TEX. B.J. 1422 (1982) (discussing ancient doctrine of “qui se scrip sit heredem”).

²⁵ ACTEC Commentaries on the Model Rules of Professional Conduct, ATEC.ORG, <http://www.actec.org/publications/commentaries/> (last visited Jan. 24, 2018).

²⁶ Gerry W. Beyer, *Wills, Trusts, & Estates*, § 10.3.3.1 (Aspen Publishers, 6th ed. 2015).

²⁷ *Id.*

parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.”²⁸

The MRPC Rule 1.8(c) does not apply if the gift is not a *substantial* gift.²⁹ While it is unclear whether a non-substantial gift is acceptable, the comment to Rule 1.8(c) indicates that it is, “a simple gift such as a present given at a holiday or as a token of appreciation is permitted.”³⁰ However, the standard for what constitutes a substantial gift and should not be relied on by a drafter of the will who is also the beneficiary.

The MRPC provides an exception for attorneys (or someone related to the attorney) to receive gifts from clients. The exception applies when the recipient is related to the client. However, a prudent attorney should look to see how “related” is defined, as it may vary from state to state. Additionally, the rule does not prohibit the attorney from appointing another lawyer to draft the will, but the appointment would be subject to the general conflict rules.³¹

Naming Drafting Attorney as a Fiduciary

The former Ethical Considerations provided that “[a] lawyer should not consciously influence a client to name him as executor [in a will]. In these cases where a client wishes to name his lawyer as such, care should be taken by the lawyer to avoid even the appearance of impropriety.”³² This rule was interpreted to mean that a lawyer may be named as the executor for an estate “provided there is no pressure brought to bear on the client, and such appointments represent the true desire of the client.”³³

²⁸ MODEL RULES OF PROF’L CONDUCT r. 1.8(c) (AM. BAR ASS’N 2017).

²⁹ N. Gregory Smith, *Beware of Clients Bearing Gifts*, 54 LA. B.J. 250, 251 (Dec. 2006/Jan. 2007).

³⁰ MODEL RULES OF PROF’L CONDUCT r. 1.8(c) cmt.6 (AM. BAR ASS’N 2017).

³¹ *Id.*

³² TEX. STATE BAR R., EC 5–6 (Tex. Code of Prof’l Resp.), *reprinted in* 23 BAYLOR L. REV. 697, 763 (1971).

³³ Comm’n on Interpretation of the Canons of Ethics, State Bar of Tex., Op. 71 (1953), *reprinted in* 18 BAYLOR L. REV. 195, 226–27 (1966).

Despite the authority to do so, the attorney must exercise great care to avoid potential claims of overreaching or conflict of interest.³⁴ It is wise to have the client sign a plain language disclosure statement that explains the ramifications of the attorney serving as the executor.³⁵ It is not uncommon for a will to have a provision exonerating the executor from liability for acts of ordinary negligence. A standard such clause is: “No executor shall be liable for its acts or omissions, except for willful misconduct or gross negligence.” These exculpatory clauses are generally upheld by Texas courts.³⁶ However, if the executor doubled as the attorney who drafted the will, it is not clear whether such a clause would be upheld in light of Rule 1.08(g) of the Texas Disciplinary Rules of Professional Conduct which states:

A lawyer shall not make an agreement prospectively limiting the lawyer’s liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement, or settle a claim for such liability with an unrepresented client or former client without first advising that person in writing that independent representation is appropriate in connection therewith.³⁷

³⁴ See Howard M. McCue III, *Flat-Out of the Will Business – A Recent Malpractice Case Results in an Expensive Settlement for Both Lawyer and Executor*, TR. & EST., Sept. 1988, at 66 (discussing San Antonio lawsuit which was settled when law firm agreed to pay over \$4 million to plaintiff; the attorney who drafted the will had named attorneys employed by the firm as executors).

³⁵ See Larry W. Gibbs, *The Lawyer’s Professional Responsibility in Estate Planning and Probate – Common Solutions and Practical Problems*, in STATE BAR OF TEXAS, PRACTICAL WILL DRAFTING AND REPRESENTING THE ESTATE AND BENEFICIARIES IN HARD TIMES, ch. F, 2-6, 24-26 (1987) (includes sample disclosure form).

³⁶ See *Corpus Christi Nat’l Bank v. Gerdes*, 551 S.W.2d 521 (Tex. Civ. App. – Corpus Christi 1977, writ ref’d n.r.e.).

³⁷ TEX. DISCIPLINARY RULES PROF’L CONDUCT R. 1.08(g), *reprinted in* TEX. GOV’T CODE ANN., tit. 2 subtit. G, app. A (West 2013) (Tex. State Bar R. art. X §9).

Naming Drafting Attorney as Fiduciary's Attorney

The Model Rules do not prohibit an attorney from including a provision directing a fiduciary to retain a particular lawyer's services.³⁸ Most wills and trusts, however, do not contain these types of provisions; hence, the inclusion of such a clause may raise suspicions that the attorney improperly influenced his or her client. In addition, many courts will treat this type of provision as merely precatory and thus not binding on the fiduciary.

Fiduciary Hiring Self As Attorney

A fiduciary with special skills may be tempted to employ him- or herself to provide those services to the estate or trust. For example, the trustee may be an attorney, accountant, stockbroker, or real estate agent. If the trustee succumbs to the temptation, the trustee will create a conflict of interest situation. As a fiduciary, the trustee should seek the best specialist possible within the trust's budget. However, as a specialist, the trustee wants to get the job and secure favorable compensation. Dual roles permit the trustee to engage in schizophrenic conversations such as, "This is too complicated for my trustee mind, so I need to consult myself using my attorney brain."

Courts typically presume that self-employment is a conflict of interest and will not permit trustees to recover extra compensation for the special services. However, the court may permit the trustee to receive compensation in dual capacities if the trustee can prove that the trustee acted in good faith for the benefit of the trust and charged a reasonable fee for the special services.

Attorney as Document Custodian

It is important for estate planning documents to be stored in appropriate locations. If documents are unavailable to the appropriate person when needed, the client may lose the benefits of executing the documents. The disposition of an executed document is simple in some cases. For example, a medical power of attorney should be delivered to the agent. In other cases, however, the proper receptacle for the document is less easily ascertained.

The proper disposition of a will is often a controversial issue. The original will should normally be stored in a secure location where it may be readily found after the testator's death. Thus, some testators

³⁸ See MODEL RULES OF PROF'L CONDUCT r. 1.8 (AM. BAR ASS'N 2006).

keep the will at home or in a safe deposit box, while others prefer for the drafting attorney to retain the will. The attorney should not suggest retaining the original will because the original becomes less accessible to the testator. When the drafting attorney retains a will, the testator may feel pressured to hire the attorney to update the will, and the executor or beneficiaries may feel compelled to hire that attorney to probate the will. In other jurisdictions, some courts hold that an attorney may retain the original will only “upon specific unsolicited request of the client.”³⁹

If a will contest is likely, the client must be informed of the dangers associated with retaining the will (i.e., it increases the opportunity for unhappy heirs to locate and then alter or destroy the will). The attorney may need to urge the testator to find a safe storage place that will not be accessible to the heirs, either now or after death, but rather a location where the will is likely to be found and probated. Simultaneously, make certain not to suggest that the attorney retain the will.

Capacity of Representation

Generally, when an attorney represents a client, it is clear as to whom the attorney owes a duty. However, it is not as clear as to whom the client is when the attorney represents a fiduciary, such as custodian or guardian for a minor, an executor, trustee, or personal representative.⁴⁰ Most jurisdictions have no laws regarding this issue, and those that have tried to provide some guidance adopts one of three major approaches: (1) the traditional theory, (2) the joint-client theory, or (3) the entity theory.⁴¹

The traditional theory dictates that the fiduciary is the client. The American Bar Association has adopted this approach and those jurisdictions that have provided a clear ruling regarding who the client is, the traditional theory also seems to be the most prevalent theory.⁴² Some states that have indicated following the traditional

³⁹ State v. Gulbankian, 196 N.W.2d 733, 736 (Wis. 1972).

⁴⁰ Kennedy Lee, *Representing the Fiduciary: To Whom Does the Attorney Owe Duties?*, 37 ACTEC L.J. 469 (2011).

⁴¹ *Id.*

⁴² *Id.* at 471.

approach are South Carolina, Michigan, and California (although California has not enacted specific legislation, California's case law indicates the adoption of the traditional theory).⁴³ Indiana recently enacted legislation adopting the traditional theory.⁴⁴ Additionally, the Texas Supreme Court also adopted the traditional theory in *Huie v. DeShazo*.⁴⁵

The joint-client theory finds that a "beneficiary is entitled to essentially the same duties as the fiduciary is entitled" and therefore is a joint-client with the fiduciary.⁴⁶ Professor Hazard illustrates the joint-client theory with a triangle metaphor: the first leg is the attorney-fiduciary relationship, the second leg is the fiduciary-beneficiary relationship, and the third leg is the attorney-beneficiary relationship. Although courts that follow the joint-client theory recognizes that the beneficiary and the fiduciary are both clients of the attorney, there is disagreement as to whether the two clients are equal in relation to the attorney.⁴⁷ Jurisdictions that seem to follow the joint-client theory include Nevada, Washington, Delaware, New Jersey, and Arizona.⁴⁸

Under the third approach, the entity theory, "the estate is considered a separate legal entity and the estate, not the fiduciary or the beneficiary, will be considered the client."⁴⁹ The estate is treated as if the client was a business entity.⁵⁰ Similar to how a corporation would act through an agent, the estate "would act through the fiduciary as its agent."⁵¹ Under the entity theory, the attorney for the fiduciary would become a co-agent of the estate and therefore, responsible to

⁴³ *Id.*

⁴⁴ 2013 Ind. Acts 99.

⁴⁵ *Huie v. DeShazo*, 922 S.W.2d 920 (Tex. 1996).

⁴⁶ Lee, *supra* note 40, at 477.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* at 485.

⁵⁰ *Id.*

⁵¹ *Id.*

the estate instead of the fiduciary agent.⁵² As a co-agent of the estate, the attorney would owe not only a duty to the estate, but also to all interested parties, including beneficiaries.⁵³ Michigan used to follow the entity approach, however, an amendment to the Michigan Probate Code clarified to whom an attorney owes a duty to and adopted the traditional theory.⁵⁴

Conclusion

*"Sleep with one eye open. Grippin' your pillow tight."*⁵⁵

Now that doesn't sound like any fun, does it? However, if you are careful and follow the advice in this article, you can endeavor to make your estate planning practice free from ethical issues. And then, you can get the good night's sleep you deserve.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ METALLICA, *Enter Sandman*, on METALLICA (Blackened Recordings 1991).