

Understanding the Conflicts of Interest in Estate Planning



By Kira S. Masteller

ESTATE PLANNING ATTORNEYS OFTEN work with entire families. Many times these clients are better served by a single attorney representing their multiple interests, resulting in more economical and better coordinated estate plans because the attorney has a greater overall understanding of the pertinent family and asset considerations. Most married couples or registered domestic partners are jointly represented. Multiple generations of families including parents, siblings, children, grandchildren, cousins, partners and co-habitants who have common interests can also be jointly represented.

A sophisticated tax plan may involve the coordination of several generations of assets, gifts, trusts, business entities, and more. Very often, post-death trust administration requires an attorney to work with a surviving spouse, the children and grandchildren of the parents for whom the attorney originally prepared an estate plan. While many cases are completed without any conflicts, others barely get started without a conflict.

What does the estate planning attorney have to address when considering whether or not to represent a couple, domestic partners, business partners, multiple generations of a family or all of the above? The attorney must determine whether or not such representation involves a concurrent conflict.

Rule 1.7 of the American Bar Association's Model Rules of Professional Conduct (MRPC) calls for an

attorney to ensure that the representation of a client does not involve a concurrent conflict of interest. Per the Rule, "a concurrent conflict of interest exists if the representation of one client will be directly adverse to another client or if 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, a third person, or by a personal interest of the lawyer."

What Is Materially Limited?

The drafters of the current conflict rule attempt to clearly state that a conflict exists if there is significant risk that the representation of one or more clients will be materially limited by the attorney's other responsibilities. Materially limited conflict includes judgment that is affected by an attorney's interests, duties, connections or responsibilities to another client or a third party.

If a materially limited conflict exists, the attorney may proceed to represent the client if the attorney reasonably believes that he or she will be able to provide competent and diligent representation; the representation is not prohibited by law; the representation does not involve representing opposing parties in the same matter; and each affected client gives informed consent, confirmed in writing. An attorney owes the client services independent of outside influences, to the extent possible. The attorney can work to resolve this issue by communicating with the client and limiting the scope of representation so as to keep out potential material limitations.



Kira S. Masteller is a Shareholder at Lewitt, Hackman, Shapiro, Marshall & Harlan where her practice focuses on estate planning, estate and gift tax planning, and trust and estate administration. Masteller works with individuals, families, businesses and organizations with respect to their personal estate planning, business estate planning, charitable planning and tax planning. She can be reached at kmasteller@lewitthackman.com.

What Is a Significant Risk?

The risk analysis requires the evaluation of the positions and options that the attorney should recommend and advocate for the affected client and then the evaluation of whether an appreciable risk exists that the attorney's ability to pursue those positions and options will be materially restricted. The attorney must evaluate both the likelihood of the conflict ever materializing and the extent to which it will interfere with the attorney's representation. The MPRC defines a "substantial risk" as one that is "significant and plausible," which means more than "a mere possibility of adverse effect." The standard that is intended to apply is an objective "reasonable lawyer" standard, which is based on the facts and circumstances that the attorney knew or should have known at the time of undertaking or continuing the representation.

Applying the Standard in Practice

While spouses are happily planning for the arrival of children or raising the children they already have together, it is very unlikely that the two clients will become adverse to one another with respect to their estate planning because they have similar goals. They may not always agree on who should be guardian for the children (certainly not their in-laws), a subject upon which they can agree to disagree; however, they usually agree on not distributing funds to children until both spouses have passed, holding funds in trust for children until specified ages, and even on who should manage such funds for the children and the criteria for doing so.

Problems arise when a couple is divorcing or if they are married a second or third time with children from a prior marriage, or similar circumstances. Often a conflict between siblings will rear its ugly head when the surviving parent passes and a trust is to be administered for adult children.

An estate planning attorney who prepared an estate plan for both spouses generally should not represent one spouse during or after a divorce, unless both spouses have consented in writing to such representation after having received full disclosure of the potential conflicts from the attorney. To advise one spouse prior to a divorce in anticipation of filing for divorce would be a concurrent conflict (without full disclosure and the written consent of both spouses).

It is prudent to advise a client couple at the time they are not in conflict that in the event of a divorce, the attorney representing both of them cannot represent one or the other and that each of them would require separate counsel. Even after the divorce is final, the attorney should obtain written consent from both parties in order for the attorney to continue to represent one or the other. Some experienced estate planners regularly represent husbands and wives as separate clients. Such representations should only be undertaken with the informed consent of each client.

A second marriage can be fraught with conflicts between the spouses the moment they enter the attorney's office. Often a prenuptial agreement exists that one spouse may wish to continue to enforce and the other wishes to ignore. One spouse may have four minor children and one spouse may only have one adult child. The combinations of differences and the needs for different planning goals are endless. One spouse may have brought assets to the marriage and desires to continue to keep

her property separate; one spouse may have brought nothing to the marriage, but wants to have all of the spouse's assets divided equally among both sets of children.

In representing parties married more than once, the attorney must, on a case by case basis, evaluate the parties, the assets, the children and the initial apparent challenges and determine whether or not the couple should be represented by only one attorney. Are the desires of this couple more often in disagreement? Could the estate plan later fail when one spouse dies and the other claims he or she was not fairly represented? Will the children of the decedent treat the surviving spouse badly because of the conflict? Or will children be taken advantage of by a surviving spouse? Did tax planning goals of one party and the joint attorney lead to bad planning for the lesser advantaged spouse?

These issues do not exist in every second marriage but must be addressed in advance by the attorney asked to represent such a couple. After determining in advance any existing conflicts, some cases may require that each spouse should have separate representation so that no one is disadvantaged.

Keep in mind that an estate planning attorney working with both spouses can provide an excellent plan addressing these challenging issues. For example, the attorney can advise clients to keep individual property separate and preserve some assets for children and others for a spouse. The attorney can also utilize tax planning techniques such as providing income only for a surviving spouse or utilizing life insurance and retirement assets specifically for a surviving spouse or for children while keeping a family home available for a spouse or children, etc.

Working with the children of married clients after both parents have died can be quite fulfilling for the attorney because he or she is able to communicate and follow through on the parent's wishes and goals for the children while guiding them through the practical legal advice to properly administer an estate. But this will not be the case when one child is a trustee and another child is resentful of such appointment, or if there are unequal shares or rewards for some children and not for others, or the many other ways children will become upset by the choices their parents made. In cases such as these, it is clearly a conflict to represent more than one party.

The attorney who represented the now deceased parents may choose not to represent any of the children, but instead remain available as a witness in the event of litigation between the children. A child may complain that the parent's drafting attorney should not represent the child Trustee who is also a beneficiary because it is a conflict of interest.

In applying the requirements of the MPRC while there may be a decision made by the child Trustee that may be detrimental to that same child as a beneficiary, it is not a conflict of interest to have that one child as the client in the two roles. Both roles must be discussed by the attorney when advising the client so that he or she understands the ramifications as they apply to the Trustee and as they apply to a beneficiary.

When working with multiple generations of clients, there are several ways to prepare for such cases by limiting the scope of the representation and providing clients with specific examples of conflicts that may arise. If forming an entity where parents are gifting assets to children and grandchildren, informed written consent of potential conflicts may not be necessary. However, if an attorney is going to prepare the estate plan for the parents, as well as for each child and his or her spouse, and for each grandchild and his or her spouse, then many potential conflicts could arise including confidentiality issues and varying goals.

An attorney who is consulted by multiple parties with related interests should discuss the implications of a joint representation (or separate representation if the attorney believes separate representation to be appropriate) during the initial consultation. The prospective clients and the attorney should discuss the extent to which material information imparted by either client would be shared with the other and the possibility that the attorney would be required to withdraw if a conflict in their interests developed to the degree that the attorney could not effectively represent each of them. The information may be best understood by the clients if it is discussed with them in person. Examples of potential conflicts provided to them in written form, such as in an engagement letter, may further help a client understand the potential for a conflict.

An attorney must be particularly careful if a client asks the attorney to prepare a will or a trust for someone else that benefits that client, especially if that client is going to pay the cost of the attorney preparing that will or trust. As an example, if George asks attorney to prepare his mother's will that leaves everything to George and George pays for that will, there is a material risk that the representation of both the existing client and the new client will be significantly limited. In this case the attorney must comply with the Model Rules of Professional Conduct and should caution both clients of the possibility that George may be presumed to have exerted undue influence on his mother because George was involved in the procurement of the document.

Terminating representation at the close of the preparation of the initial estate plan and requiring the clients to enter into a new agreement for future work or post death trust administration may assist the attorney with potential representation problems.

When one spouse dies and the surviving spouse returns to the estate planning attorney with a desire to remove the deceased spouse's children as the beneficiaries, or in some manner keep the deceased spouse's wishes from being followed, is there a conflict of interest? Does the estate planning attorney have a duty to the children of the deceased spouse or a duty to the deceased spouse? Or is the duty solely to the surviving spouse who remains a client?

The "client" in this situation is the surviving spouse, but what about the deceased client's planning? The attorney must consider the potential conflict between the deceased spouse and the surviving spouse, even though the deceased spouse is dead. If there was a termination of the attorney/client relationship at the close of the completion of the estate plan and the prior representation was limited solely to the

preparation of the estate plan, there could now be a renewed representation of the surviving spouse with respect to the post death trust administration that did not conflict with the prior client representation.

If there were not a termination of the relationship, or the scope of representation was not limited to the preparation of the estate plan only, the attorney must consider whether there is a significant risk that the representation of the surviving spouse will be materially limited by the attorney's responsibility to the deceased spouse. The attorney could be a future witness in a matter such as this and potentially adverse to the surviving spouse or to the deceased spouse (both of whom are attorney's clients).

An estate planning attorney can represent families effectively even though the possibility of a conflict always lurks in the background. Communicating examples of potential problems using specific detail relevant to each family will aid in properly disclosing the possibilities of conflict to clients, allowing them to give informed consent and to waive the potential conflicts, or ultimately choose to have separate representation.

It is important to remember that the scope of representation can be narrowed and limited by agreement and if, during the course of representation, potential or actual conflicts surface, immediate communication with the clients can help the attorney discern whether or not a materially limited conflict exists and the risks associated with it. 🐾