

NEW HAMPSHIRE BAR ASSOCIATION

Joint Representation of Clients in Estate Planning

Ethics Committee Advisory Opinion #2014-15/10

ABSTRACT: Joint representation of clients in estate planning requires informed consent and that the lawyer be from those clients and that the lawyer be on guard for impermissible conflicts arising during the course of the representation which require withdrawal.

ANNOTATIONS:

Joint representation of client requires informed consent.

A lawyer must keep both clients reasonably informed about the representation.

A lawyer must be vigilant to detect if a concurrent conflict of interest arises between the clients which requires the lawyer's withdrawal.

RULE REFERENCES:

Rule 1.0(e)

Rule 1.4

Rule 1.6

Rule 1.7

Rule 1.16

Issues Presented:

What ethical guidelines apply when an attorney is asked to represent two clients jointly in the preparation of estate planning documents? What type of informed consent, if any, must the lawyer obtain before proceeding?

Factual Background:

Lawyer is asked to meet with Mr. and Mrs. Smith, a married couple, to discuss preparing estate planning documents designed to manage the couple's healthcare and financial decisions. The couple has been married for thirty years and wants to create a joint revocable trust that benefits each other during life, followed by their mutual children after the second spouse's death. Mrs. Smith discloses during the initial meeting that, in addition to planning for shared marital assets, she wants to direct that a modest financial asset owned by her individually be made payable on her death to a charity. Nothing during the initial fact-gathering raises a concern for the lawyer that the interests of either spouse might limit the lawyer's ability to prepare a joint estate plan for the couple. At the end of the meeting, the couple wants to engage the lawyer to draft their documents.

Analysis:

One of the most challenging aspects of an estate planning practice involves the joint representation of clients. Before entering into joint representation, a lawyer must identify any

potential conflicts of interest between the clients, and clearly communicate the nature of the client relationship and the lawyer's ethical obligations. Evaluating potential conflicts of interests requires the lawyer to assess the type of representation, the confidentiality protection afforded to information received by the lawyer, the duty of loyalty owed to each client, and either the existence or risk of adversity between the clients or a material limitation on the lawyer's ability to represent all clients involved. The lawyer must ensure the clients understand the confidentiality considerations and the fact that potential conflicts may arise which could change the lawyer-client relationship. Furthermore, the lawyer should obtain the clients' informed consent to share information at the outset of the representation.

Joint Representation Requires Informed Consent. The New Hampshire Rules of Professional Conduct (referred to collectively as the "Rules" and individually as a "Rule") are written as pertaining to a single client and the only discussion of "common representation" is contained in the ABA comments to Rule 1.7 [see comments 29 – 33]. Embarking on the joint representation of two clients in connection with the same subject matter, especially in an estate planning context, requires a careful analysis of the lawyer's obligations to each client.

The majority of estate planning cases that involve document preparation for new clients with common objectives are free of conflicts of interest. In this factual scenario, there is nothing present that creates a direct adversity between the clients, nor any significant risk that the lawyer's representation of a client will be materially limited by the other client's objectives. Accordingly, at least at the outset, there is no Rule 1.7(a) concurrent conflict of interest of which the lawyer must be concerned, and no informed consent is required under Rule 1.7(b). However, informed consent should be obtained under Rule 1.6(a) before proceeding with the joint representation.

Preserving the confidentiality of client information is a cornerstone of the lawyer-client relationship. It is critical that clients involved in joint representation, such as spouses engaging one lawyer for estate planning, understand the lawyer's duties with respect to disclosure and non-disclosure of client-related information.

Since the lawyer must preserve the confidentiality of two clients involved in common representation, it is paramount that the lawyer's duties be communicated clearly to both clients. While neither the New Hampshire Supreme Court, nor this Committee, has opined on the issue of implied consent to share confidential information in a joint representation context, authority exists in other jurisdictions for the proposition that jointly represented clients do not impliedly relinquish the protections afforded under Rule 1.6 merely by agreeing to engage one lawyer to provide joint representation in the same matter. See Georgia Bar Assoc. Formal Advisory Op. 03-2 (Sept. 11, 2003); and Professional Ethics of the Florida Bar, Op. 95-4 (May 20, 1997). Accordingly, we conclude that until the New Hampshire Supreme Court opines on the issue, a lawyer should obtain the "informed consent" of both clients to allow all information protected under Rule 1.6(a) to be shared between the clients in order to continue with the joint representation of clients in estate planning matters.¹ While this Rule does not require the clients' informed consent to be "confirmed in writing," as does Rule 1.7(b), it certainly is recommended that written confirmation be obtained.

Given the importance of having all requisite information available to effectuate the clients' goals when preparing estate planning documents for a couple, a free flow of information among the lawyer and the clients is essential to ensure the clients' objectives are accomplished and the lawyer complies with the Rules throughout the course of the representation. The best practice for estate planning practitioners is to require clients to acknowledge, in writing, that information will be shared freely between the clients and lawyer during the joint representation. Such written acknowledgement establishes an unambiguous understanding, at the outset, as to whom disclosure of information is permitted and when.

Compliance with Rule 1.4. The lawyer must keep both clients reasonably informed about the representation under Rule 1.4(a)(3). A client's failure to authorize a free exchange of information with a joint client could place the lawyer in the difficult position of being in possession of information that cannot be used to further the other joint client's interests. In fact, the interplay between the need to obtain informed consent under Rule 1.6(a) and compliance with Rule 1.4 is emphasized in the ABA Comment [31] to Rule 1.7:

- As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect that client's interests and the right to expect that the lawyer will use that information to that client's benefit. See Rule 1.4.

Rule 1.7 Concerns. It is not a per se conflict to represent two clients in connection with a joint estate plan. Concurrent representation of spouses in estate planning generally is non-adversarial and it often is more efficient and economical for spouses to engage one lawyer to assist with all aspects of a common plan. An alignment of interests may not always be the case. Sometimes joint clients involved in estate planning have common, but not identical goals, and it is important for the lawyer to determine at the outset of the representation whether (1) any such divergent goals exist and, if so (2) does the divergence rise to the level of a conflict of interest under Rule 1.7(a) that may or may not be waived through written informed consent under Rule 1.7(b).

A concurrent conflict of interest exists under Rule 1.7(a) 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." When evaluating at the outset whether joint representation of spouses in estate planning triggers a conflict under Rule 1.7(a), the lawyer must gauge the likelihood that the clients' interests currently differ or reasonably may diverge during the course of joint representation. If so, the lawyer must decide whether such difference or divergence materially would interfere with the lawyer's independent judgment and evaluation of estate planning alternatives that otherwise could be pursued for any one spouse. See Rule 1.7(a)(2) and ABA Model Rule Cmt. 8; see also generally N.H. Bar Assoc. Ethics Comm. Advisory Op. No. 1988-89/6 (Nov. 10, 1988) (advising a lawyer to weigh all factors carefully in order to determine whether a lawyer's independent professional judgment

would be compromised by the dual representation of a husband and wife who plan to live separately but not divorce).

When assessing joint representation of clients, the lawyer should keep in mind that the failure to identify a concurrent conflict of interest under Rule 1.7 or obtaining informed consent to what later is determined to be a non-waivable conflict, is evaluated under New Hampshire's "harsh reality" test. The harsh reality test is based on an objective standard under which the lawyer should inquire "whether, if a disinterested lawyer were to look back at the inception of the representation once something goes wrong, would that lawyer seriously question the wisdom of the first attorney's requesting the client's consent to this representation or question whether there had been full disclosure to the client prior to obtaining the consent." *See generally* N.H. Bar Assoc. Ethics Comm. Formal Op. No. 1988-89/24 (Aug. 10, 1989).

Additionally, the existence of a conflict of interest must be evaluated throughout the entire course of any joint representation. For example, informed consent would be needed if (1) the interests of the clients diverge, and they now want to benefit different people with different plans, (2) each client disagrees as to the other's choices of people to act in various fiduciary capacities, (3) the clients no longer wish to use a joint revocable trust or (4) one party asks for information to be withheld from the other party. When new facts develop, the lawyer must assess whether a conflict exists under Rule 1.7(a), whether lawyer may continue to represent both and, if so, whether a consent is required and able to be provided under Rule 1.7(b). Under the facts described in this opinion, there are no conflict of interest concerns that would trigger the need for a detailed analysis under Rule 1.7. The fact that Mrs. Smith wishes to make a separate, modest charitable bequest, which was disclosed to the other spouse raises no adversity of interests and does not constitute a planning nuance that would materially limit the lawyer's ability to represent Mr. Smith.

Potential Withdrawal from Joint Representation. If the jointly represented clients later develop significantly divergent goals or become estranged during the joint representation, then the lawyer may need to terminate the representation of both clients if effective informed consent is not feasible under Rule 1.7(b). Notwithstanding the clients' clear agreement to share all client-related information at the outset of the representation, if one spouse communicates information to the lawyer that is relevant to the overall estate plan, but refuses to allow the lawyer to disclose the information to the co-client, withdrawal will be mandated if the inability to disclose information would impair the lawyer's duties under Rule 1.4(a)(3) to the co-client (See ABA Comment [31] to Rule 1.7). If withdrawal from joint representation is deemed necessary, the withdrawal must be accomplished in a manner that protects both clients' interests, and the lawyer must continue to protect client-related information even after termination of the representation. Rule 1.16. Additionally, if one joint client asks that material information be withheld from the other client, the lawyer who reached an agreement with the clients, and obtained informed consent in conformance with Rule 1.6(a) to share information, has a duty to disclose the information to the fellow client.

Alternatively, if a lawyer fails to obtain the requisite informed consent under Rule 1.6(a) at the outset of the joint representation, the lawyer is prohibited from sharing any information that a

client has requested be kept secret. In this latter scenario, the lawyer should attempt to obtain permission from the disclosing client to share information and explain the ramification of any resulting denial, specifically that a withdrawal from representation of both clients would be necessary. If disclosure was not authorized at the outset of the joint representation, the lawyer also should consider whether a “noisy withdrawal” will be warranted, after evaluating the nature of the confidence and the harm that could result if the confidence is not disclosed.²

Best Practices for Obtaining Consent. It is essential that the lawyer develop procedures to ensure clear and unequivocal client expectations as to how the lawyer will handle joint representation of clients. Best practices dictate that, at minimum, several issues must be discussed at the initial meeting before the lawyer prepares documents for a joint estate plan, including the following: (1) there will be full disclosure of all client-related information between the lawyer and the joint clients; (2) no secrets shall be kept by the lawyer from either client; (3) throughout the course of the joint representation, both clients must concur with the overall planning goals, despite the fact that each could, with consent of the other and consistent with the Rules, deviate from original objectives; (4) should differences arise between the clients’ objectives that reasonably cannot be resolved, the lawyer may be forced to withdraw from representing both clients; and (5) each client has the right to request a copy of the client file following termination of the joint representation. Although not mandated by the Rules, from a risk management standpoint and to ensure client expectations are clear, the best practice is to obtain the clients’ informed written consent to the disclosure of all information to both clients involved in the joint estate plan and what will be communicated by the lawyer between the joint clients.

ENDNOTES:

[1] To obtain “informed consent,” the lawyer must share “adequate information and explanation” with both clients of the “material risks of and reasonably available alternatives to the proposed course of conduct.” *See* Rule 1.0(e).

[2] For example, a “noisy withdrawal” might involve the attorney disclosing to the wife that information was disclosed by the husband with specific instructions not to share it with the wife, and the attorney is thereby forced to withdraw from representing either husband or wife. *See* for example *A v. B*, 726 A.2d 924, 158 N.J. 51 (1999).

SUBJECTS:

Joint Representation

Estate Planning

Concurrent conflicts of interest.

- **By the NHBA Ethics Committee**

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