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REPORT OF WORKING GROUP ON SPOUSAL CONFLICTS*

INTRODUCTION

The group addressed the issue of how a lawyer counseling an older couple in estate and long-term care planning can address successfully the ethical issues inherent in the representation of each spouse. In other words, the group questioned whether a well-meaning lawyer can serve the potentially inconsistent client interests of each spouse.

Participants brought to the group expertise in ethics, elder law, and estate planning. To ensure a broad-based, client-centered approach, the working group began by taking note of who was not represented and who the members had to keep in mind during their discussion. The group noted the absence of clients, consumers, legal services attorneys, non-specialized lawyers and paralegals, and other helping professionals including those in health care, geriatric care management, and related fields. The group considered these interests as the discussion proceeded.

To provide a starting point, the group leader asked why lawyers have ethical rules. He also asked the group to consider what a lawyer is trying to accomplish when a client comes through his or her door. Participants listed the goals of a lawyer engaged in estate planning representation of older spouses. They include: to help each client achieve his or her objectives, to reconcile client differences, to encourage economic efficiency, to "do no harm" to the family, to avoid liability for the lawyer, to achieve client satisfaction, to build a reputation, to find professional satisfaction, to maintain lawyer integrity, to avoid an appearance of impropriety, and to enhance public confidence in lawyers.

The group then turned its attention to goals of the older client in seeking representation. The group identified the wide range of client goals which include: to plan his or her estate and financial affairs, to plan for long term care and possible incapacity, to enhance future security, to avoid surprise and thus achieve greater certainty, to receive an explanation of his or her options, to maintain privacy, to accomplish a transaction, to reasonably limit present and future costs, including tax costs, to preserve simplicity in planning, to maintain family interests, to enhance individual autonomy, to resolve conflicts and avoid future conflicts, to build a trusting relationship with the lawyer, to secure diligent representation, and to secure the lawyer's commitment and loyalty.

Group members then discussed a lawyer's duty of loyalty to a client, which underlies the Model Rules of Professional Conduct ("Model Rules"), Rule 1.7. Some members articulated this duty as an assurance

* Group Leader: Scott Severns. Staffperson: Erica Wood. Recorder: Jihane Rohrbacker. Author: Russell Pearce. Participants: Larry Fox, Louis Mezzullo, Thomas Morgan, Louis Parley, Russell Pearce, John Price, Clare Springs, and Peter Strauss.

to the client that the lawyer is "in the client's corner" or, in other words, is "behind the client." One member strongly articulated a concern that this duty of loyalty to the client not be undermined.

I. HYPOTHETICALS AND QUESTIONS RAISED

A. *Hypotheticals*

To assist in the discussion, participants focused on two hypotheticals. The group used these hypotheticals as a springboard to begin discussion of the myriad diverse issues inherent in serving older spouses.

1. Hypothetical (1)

Husband (H) and Wife (W), both 70, have been married 10 years. Each has two children by a previous marriage. They come to Lawyer (L) to discuss their estate plan and their concerns about paying for long term care. While they have some differences on each of these fronts, their marriage seems harmonious and they feel they can work things out. H is in poor health.

2. Hypothetical (2)

Husband (H) and Wife (W), both 70, have been married for 45 years. They have two grown children and 6 grandchildren. They come to Lawyer (L) for a review of their estate plan. Both agree to update their wills to reflect inclusion of the grandchildren. Later H calls L to say he has decided to give a large portion of his estate to his church, but does not wish to tell W.

B. *Questions Raised*

These hypotheticals led the group to ask itself what can best be expressed as a series of questions:

1. What should a lawyer tell the clients before he or she is retained?
2. Will the lawyer's prior representation of one or both of the clients make a difference?
3. What facts should the lawyer ascertain from the clients?
4. How should the lawyer attempt to detect any conflict?
5. Should the lawyer seek to detect undue influence of one spouse on another?
6. What disclosures should the clients make to the lawyer and to each other?
7. How should the lawyer define the scope of representation?
8. Should the lawyer seek the clients' consent to the mode of representation and, if so, how?
9. What is a conflict?
10. What documentation regarding conflict should the lawyer seek from the clients?
11. What happens when conflict arises within the course of the representation?
12. What happens if conflict arises in a subsequent representation?
13. When does the representation end?
14. What about the involvement of other family members?

15. What will be the duration of the representation?
16. What should the lawyer tell the clients about the basis for billing?
17. What happens if one spouse has diminished capacity?¹

II. DISCUSSION

A. *Modes of Representation*

Group members acknowledged that commentators have described four models for spousal representation.² These models are: (1) separate representation of each spouse by a separate lawyer; (2) separate, but simultaneous, representation of each spouse by the same lawyer; (3) joint representation; and (4) representation of the family unit.

1. Model (1)

The group readily agreed that the first model, separate representation of each spouse by a separate lawyer, is always permissible and is consistent with the Model Rules. The group noted, however, that this model may be more costly for the clients. Several members observed that spouses may have a special duty to each other—a duty of trust almost in the nature of a fiduciary duty. If so, these members queried whether the lawyer for one spouse might have some sort of derivative duty toward the other spouse. Professor Geoffrey Hazard outlines “triangular relationships” in legal representation.³ This may be an example of such a relationship. The group concluded there is a need for further legal study of spousal duties to each other and of whether a lawyer representing one spouse has a derivative duty to the other.

2. Model (2)

The group recognized the controversial nature of the second model, separate simultaneous representation of each spouse by the same lawyer. This model requires the husband and the wife each to meet with the lawyer individually and to agree that the lawyer will not disclose confidences to the other spouse. The American Bar Association Real Property, Probate and Trust Law Section (“ABA Section”) allows such representation “by agreement, but only by agreement.” The American College of Trust and Estate Counsel (“ACTEC”) also condones this model only if the clients agree “after full disclosure of the implications of

1. Although the group discussed this question during the last session, the group focused most of its limited time on issues arising where both husband and wife have full capacity.

2. See Teresa S. Collett, *The Ethics of Intergenerational Representation*, in *Ethical Issues in Representing Older Clients*, 62 *Fordham L. Rev.* 1453 (1994); Russell G. Pearce, *Family Values and Legal Ethics: Competing Approaches to Conflicts in Representing Spouses*, in *Ethical Issues in Representing Older Clients*, 62 *Fordham L. Rev.* 1253 (1994).

3. See Geoffrey C. Hazard, Jr., *Triangular Lawyer Relationships: An Exploratory Analysis* (1987).

the separate representation."⁴ Finally, Professor Jeffrey Pennell has argued extensively that separate but simultaneous representation is a viable option if a lawyer makes the clients aware of the various models, and the clients, nevertheless, select it.⁵

The majority of the working group was highly skeptical of the separate simultaneous representation model. They raised the concern that any coordination of estate plans would put the lawyer in an intolerable bind in seeking to carry out the duty of loyalty if a conflict developed. Members also expressed concern that it would be difficult to obtain sufficiently informed consent of the clients. Voicing a fear of malpractice, they observed that the lawyer could be exposed to charges that he or she failed to give complete and competent advice to both clients. They asked how a lawyer could be "in the corner" of both clients at once if a dispute emerged. After much discussion, the group concluded that separate simultaneous representation "should only be undertaken with great care and in limited circumstances. For example, such representation might be undertaken where the estate plan of each does not depend on expectations about the dispositive plan of the other."

3. Model (3)

Professor Thomas Shaffer originally proposed the third model, representation of the family unit. Professor Shaffer sees the family as an organic community rather than as a collection of individuals. One participant advocated amending Model Rule 1.13, concerning representation of an organization as client, to include families. The majority of the group, however, did not support the family representation model. They questioned how the family would make decisions, how the family would reconcile differences, and how the lawyer could serve effectively as a counselor and advocate for the family unit.

4. Model (4)

The group acknowledged that the norm for spousal representation is joint representation. Under this model, the spouses agree to share all confidences with each other. Customary practice, case law, and commentators⁶ support the use of joint representation. However, the group viewed joint representation as "fraught with perils for clients and lawyers who do not well understand [its] implications." Accordingly, the remainder of the group session focused primarily on aspects of joint representation where both spouses have full capacity—consent,

4. American College of Trust & Estate Counsel, Commentaries on the Model Rules of Professional Conduct 48 (Oct. 18, 1993) [hereinafter ACTEC Commentaries].

5. See Jeffrey N. Pennell, *Representations Involving Fiduciary Entities: Who Is the Client?*, in *Ethical Issues in Representing Older Clients*, 62 *Fordham L. Rev.* 1319 (1994).

6. See, e.g., ACTEC Commentaries, *supra* note 4; Collett, *supra* note 2; Pearce, *supra* note 2.

confidentiality, and conflict. The group also addressed problems stemming from the disability of one spouse.

B. Consent

The duty of loyalty compels a lawyer to avoid representing clients with conflicting interests. Model Rule 1.7, however, permits such representation with client consent and with the lawyer's objective determination that the representation of or relationship with the clients will not be adversely affected. The group explored questions of client consent within a joint representation context by asking:

1. When, and to what extent, is consent necessary?
2. Why is consent important?
3. What is common practice among estate planning lawyers regarding consent?
4. Should common practice be changed?
5. What form should client consent take?
6. What should client consent include?

1. Consent Generally

The ABA Section's principles provide that, unless the lawyer and client specifically modify the agreement, "under the Model Rules a representation of husband and wife is a joint representation . . . because such representation best conforms to client expectations." The ABA Section also noted that "[t]he lawyer may operate with the husband and wife by discussion or agreement (written or oral) regarding the potential for conflict, or on the basis of neither discussion or agreement as to the rules that will govern the lawyer's conduct."

This statement had drawn considerable criticism. The ACTEC Commentaries, however, specify that "[b]efore, or within a reasonable time after, commencing the representation, a lawyer who is consulted by multiple parties with related interests should discuss with them the implications of a joint representation [] or a separate representation. . . ."⁷ Professor Russell Pearce submits that established doctrine generally requires lawyers "to obtain informed consent to spousal representation."⁸ He also recommends sufficient consultation with spouses to allow them to make intelligent choices about representational mode.

The group discussed the importance of informed client consent, noting both the clients' need to understand their options, and the consequences of those options, and the lawyer's need to protect himself or herself. One group member particularly emphasized the risks of malpractice, discipline, and fee forfeiture. He explained that the legal malpractice bar is growing and that lawyers are becoming expert in suing each other. He contended that the ABA Section's principles "show a blindness to con-

7. ACTEC Commentaries, *supra* note 4, at 47.

8. Pearce, *supra* note 2, at 1259 (citing the Restatement Governing Lawyers).

cerns about malpractice" and advised that lawyers "ignore this at their peril."

Another group member pointed out the common practice among many estate planning lawyers to assume joint representation of spouses, absent evidence of conflict, without getting explicit consent. If the clients fail to indicate a preferred mode, these lawyers usually establish a joint representation by default. The group then noted that an amendment to the Model Rules, or an interpretation mandating explicit consent, would expose these lawyers to charges of unethical conduct.

The majority of participants felt that consent "is an important issue that lawyers should be struggling with" and that the working group should make a strong statement in order to stress its significance. They agreed on the pressing need for lawyer education regarding the consent requirement and felt that, with sufficient education, current practices will change. The group thus recommended that "educational programs emphasize the perils inherent in joint representation without an explicit consent."

2. Form of Consent

The group then turned to the form that consent should take and addressed the meaning of "consent after consultation." Model Rule 1.7(b)(2) specifies that client consultation "shall include explanation of the implications of the common representation and the advantages and risks involved." The group recognized that consent should not be *pro forma* and that the lawyer must uncover the real understanding of the spouses.

After much discussion about wording, the group agreed that "in order to undertake joint representation of fully competent spouses, the lawyer must reasonably believe that the husband and wife both understand the implications of joint representation. To accomplish this, the lawyer should review the terms and implications of the representation with the husband and wife, preferably in writing." The group also demanded that "the lawyer's communication with husband and wife regarding joint representation must be simple and clear."

One of the group members then handed out copies of a letter he sends to spousal clients which explains the joint representation and seeks their consent. The group concluded that a lawyer's communication should use examples to illustrate complex concepts, should plainly spell out that each spouse has the right to dispose of his or her property separately, and should indicate that each spouse has a choice of obtaining representation by separate attorneys. The group also felt that the communication "should help the clients to define the terms of their own relationship as it affects their estate planning goals." Finally, the group agreed that an oral explanation should accompany the written communication with respect to the conflict issue. Group members then focused specifically on

how the communication should address issues of confidentiality and conflict.

C. Confidentiality and Conflict

Working group participants next concentrated on the meaning and scope of the words “directly adverse” in Model Rule 1.7(a) and “materially limited” in Model Rule 1.7(b). They sought to define the parameters of the “no confidences rule” in the spousal joint representation context. Members asked the following questions:

1. What information is so “material” or shows such a potential of “adversity” as to mandate that it be shared between the spouses?
2. Must everything that one spouse tells the lawyer be shared with the other spouse?
3. What about information the lawyer gets from other sources?
4. Is confidentiality limited to anything that is relevant to or affects the estate planning process?
5. Is confidentiality limited to things that only affect property or financial matters?
6. Does confidentiality include anything a reasonable client would want to know?
7. Does confidentiality extend to information about personal relationships?

1. The “No Confidences Rule”

After considerable discussion, the group listed three concerns a lawyer must include in advising joint clients concerning the “no confidences rule.” The lawyer must establish that there will be no secrets between the spouses regarding assets, that the spouses will have conversations with the lawyer in front of each other, and that the spouses will share material facts about the estate. Further deliberation brought a specific list of information that would be “material” to the estate plan and about which there could be no secrets. This list included: assets and liabilities; health status; the people who may be affected by the estate plan; each person’s dispositive plan and related goals of the representation; no hidden agendas; and the content of the final products of the estate planning work.

2. Violations of the “No Confidences Rule”

The group next considered the consequences of a client’s violation of the “no confidences rule.” The group also asked how a lawyer best could make these consequences clear to the husband and wife in advance. The participants agreed that, if a confidence of one spouse suggests adversity or presents a material limitation on the representation, the lawyer might attempt to persuade the spouse to talk with his or her partner.

Participants debated the pros and cons of the lawyer’s options if the spouse then refuses to reveal the secret. The lawyer’s choice in the situa-

tion is either disclosure or withdrawal. Several members voiced a concern that disclosure could have disastrous effects on the marriage. Other members noted that withdrawal could be isolating and is of no help to either of the joint clients.

The group determined that the lawyer's communication with the joint clients should clarify the consequences of a violation of the agreement to hold no secrets on material matters. This communication should emphasize "(1) that the lawyer will disclose the secret to the other spouse if the first spouse is unwilling; (2) that the lawyer will treat the information as a confidence and withdraw from representation; or (3) that the lawyer will exercise discretion to either reveal or withdraw." Finally, group members supported the idea of a practice guide for lawyers, including checklists and illustrations, which would clarify the concepts of consent and confidentiality in joint representation.

D. Disability

One of the group participants had been an elder law practitioner for many years and described the tough dilemmas facing a lawyer when one spouse has diminished capacity. Two related consent problems arise in such a case. These are the need for consent to undertake joint representation and the need for consent to make specific transactions, particularly in regard to achieving Medicaid eligibility to pay for long term care. Some courts may approve a gift transaction or a retitling of assets between spouses to permit Medicaid qualification in the best interests of the client, but others will not.

If the impaired spouse has partial capacity, there may be steps the lawyer can take to enhance his or her understanding and participation in the representation. These include meeting with the client at his or her most alert times, presenting information bit by bit, reinforcing communication with repetition, and paraphrasing to check comprehension. If the lawyer has represented the client before, it may be easier to imply consent based on his or her past values and statements. The experienced group member explained that, in cases of marginal capacity, he sometimes uses another lawyer as a check, or as an informal guardian *ad litem*, to ensure there is sufficient client understanding and involvement for representation. If there is, the consulting lawyer must document adequate capacity in his or her notes.

The group next discussed Model Rule 1.14 in the context of joint spousal representation. This Rule provides that, if a client's decision-making capacity is impaired, the lawyer may seek the appointment of a guardian "or take other protective action. . . ." The ACTEC Commentaries allow the lawyer of a client under a disability to take actions "in accordance with the client's wishes that were clearly stated during his or her competency."⁹ If there were no previously stated wishes, ACTEC

9. ACTEC Commentaries, *supra* note 4, at 71.

permits the lawyer to take actions “the lawyer reasonably believes are in the client’s best interests.”¹⁰ Group members agreed that the ACTEC statement articulates the state-of-the-art perspective on this issue. They pointed out, however, that it does not provide a full answer in light of the strong current of case law that generally will not permit even court-appointed guardians to make a will, dispose of property, or rearrange an estate plan.

Several working group members expressed the concern that time had not permitted a more comprehensive discussion of problems stemming from the disability of one spouse. The group observed that ethical rules should not prevent a well-meaning lawyer from taking the best course of action under the circumstances. Thus the group members strongly advised that “further study is needed on the practices of the lawyer when one spouse is impaired and cannot adequately consider decisions as to the issues raised by Model Rules 1.7, 1.9, and 1.14.”¹¹

10. *Id.*

11. For the full text of the Recommendations of this working group, see Conference on Ethical Issues in Representing Older Clients, *Recommendations, in* Ethical Issues in Representing Older Clients, 62 Fordham L. Rev. 989 (1994).

