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# **In Honor of Professor John Gaubatz: The Fundamentals of Ethically Representing Multiple Clients in Estate Planning**

JOHN R. PRICE\*

As law professors, John Gaubatz and I shared many things, including a love of teaching, an appreciation of the broad pedagogic value of the basic law-school course on wills and trusts, and a fascination with the ethical problems that confront estate planners.<sup>1</sup> The opportunity to talk about these things with John, and to socialize with John and his wife Kathy,<sup>2</sup> were among the main reasons I looked forward to participating in the programs of the University of Miami's Institute on Estate Planning<sup>3</sup> and teaching ethics in the Graduate Program in Estate Plan-

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\* Professor of Law Emeritus and Dean Emeritus, University of Washington School of Law.

1. Professor Gaubatz graduated from the University of Chicago Law School in 1964 and began his teaching career in 1971 at Case Western Reserve University Law School, where he also served a stint as an Associate Dean. In 1976 he taught at the University of Miami School of Law as a visiting professor and Associate Director of the Institute on Estate Planning. In 1977 he accepted a permanent position on the University of Miami law faculty, where he served as Associate Dean from 1977 through 1980. Being an accommodating sort, over his career Professor Gaubatz taught a wide range of courses, including Employee Benefit Plans, Introduction to Law, Legal Method, Federal Taxation, Patents, and Wills and Trusts. He was also the author or co-author of a number of books, including ones on wills and trusts, taxation, and moot court. Perhaps most important to the practicing bar, Professor Gaubatz directed the University of Miami's Graduate Program in Estate Planning from 1983 through 1992, and he directed the Philip E. Heckerling Institute on Estate Planning from 1983 until 1994.

2. Kathy Gaubatz has always been an active contributor to the intellectual, social, and political life of the Gaubatz household. Kathy helped plan, and participated in, events sponsored by the Institute on Estate Planning during the period John served as Director. She was, in addition, fully engaged in the life of the Institute, the law school, and the broader community. The breadth of Kathy's interests is indicated by her long service as a volunteer at the Fairchild Botanical Gardens and her candidacy for election to the City Council of Coral Gables.

3. The idea that the University of Miami School of Law should sponsor an extensive annual educational program on estate planning was perhaps the most creative contribution that Professor Philip E. Heckerling made to legal education. "Phil," as Professor Heckerling was known to almost everyone, was the founding Director of the Institute on Estate Planning, a position he held from the first Institute in 1967 until his untimely death in November 1982. In recognition of Professor Heckerling's vision and many contributions to the Institute, beginning with the eighteenth Institute in 1984, it was renamed the Philip E. Heckerling Institute on Estate Planning. The Institute, now in its forty-second year as of January 2008, regularly attracts 2500 or more attendees from the United States and several foreign countries. As the late Willard Pedrick wrote in his tribute to Phil in the dedication of the eighteenth Institute, "[t]he Institute is beyond doubt the finest, the most effective continuing education program for estate planners in the world." Willard H. Pedrick, *To Philip E. Heckerling We Dedicate the 18th Annual Institute of the University of Miami Institute on Estate Planning*, 18 PHILIP E. HECKERLING INST. ON EST. PLAN. ix (1984). If anything, the size, importance, and value of the Institute continued to grow during

ning.<sup>4</sup> Because we were both interested in how legal ethics affect estate planning, I am pleased, in John's memory, to contribute this primer on the joint representation of multiple clients, particularly husbands and wives, in the same estate-planning matter.

Joint representation in estate planning can occur in a variety of contexts other than the representation of husbands and wives, including the multigenerational representation of family members, the representation of multiple beneficiaries of a trust or estate, and the representation of multiple fiduciaries of a trust or estate. This article first gives consideration to the propriety of representing multiple clients in estate planning and to the various ways in which they might be represented. It also includes a discussion about the practicalities of representing multiple clients in estate planning and the impact of the recent changes in the form of the ABA Model Rules of Professional Responsibility ("Model Rules") regarding confidentiality of client information and conflicts of interest.<sup>5</sup> Emphasis is given to the importance of adequately informing clients about the consequences of a multiple representation and to the use of engagement letters. Although the article will generally focus on the Model Rules, a lawyer's ethical duties are, of course, governed by

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the period it was directed by Professor Gaubatz between 1983 and 1994 and since Tina Portuondo became the Director in 1995.

4. The first paper I presented at the Institute was for the fourteenth Institute in 1980. See John R. Price, *The Uses and Abuses of Irrevocable Life Insurance Trusts*, 14 INST. ON EST. PLAN. ¶ 1100 (1980). From 1981 through 2004, I served on the advisory committee of the Institute, and I currently remain an emeritus member. In 1994, 2003, and 2004, I taught ethics in the Graduate Program in Estate Planning.

5. MODEL RULES OF PROF'L CONDUCT R. 1.6 (2007) (confidentiality of information); *id.* R. 1.7 (conflicts of interest between current clients). References in this paper to the "Model Rules" are to the 2007 edition of the ABA Model Rules of Professional Conduct. In 2002 Rule 1.7 was restructured and revised, and modest changes were made to Rule 1.6. See ABA, ETHICS 2000 COMM'N: REPORT ON THE MODEL RULES OF PROFESSIONAL CONDUCT 20-36 (2002), <http://www.abanet.org/cpr/e2k/10-85rem.pdf> [hereinafter ETHICS 2000 COMM'N REPORT]. Among other things, the changes in Rule 1.7 and the accompanying comments appear to relax somewhat the rules regarding waivers of future conflicts of interest. See ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 05-436 (2005), *withdrawing* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 93-372 (1993). More important changes in Rule 1.6 were adopted in August 2003 with the addition of subparagraphs (b)(2) and (b)(3). Compare MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(1)-(4) (2002), with MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(1)-(6) (2003). These subparagraphs had been rejected when they were proposed for adoption as part of the Model Rules in 1983 by the ABA's Ethics 2000 Commission and on several other occasions. See Pamela Atkins & Joan C. Rogers, *ABA Task Force Revised Recommendations on Model Rule Changes Generally Welcomed*, 19 ABA/BNA LAW. MANUAL ON PROF'L CONDUCT 263 (2003). They were finally adopted in 2003 as recommended by the ABA's Task Force on Corporate Responsibility. ABA PRESIDENTIAL TASK FORCE ON CORPORATE RESPONSIBILITY, REPORT OF THE AMERICAN BAR ASSOCIATION TASK FORCE ON CORPORATE RESPONSIBILITY 52 (2003). The recommendations of the Task Force were made in response to the collapse of Enron and numerous other public companies. See *id.* at 2.

the rules of the jurisdiction in which the lawyer practices, which often differ from the Model Rules.

### I. SOME BACKGROUND REGARDING THE MODEL RULES (SPECIFICALLY RULES 1.6 AND 1.7)

Before considering the ethical aspects of jointly representing multiple clients, it may be helpful to provide a bit of background regarding some aspects of the Model Rules. First, as indicated above, what is said about a Model Rule doesn't necessarily apply to the corresponding rule in any particular jurisdiction. The Model Rules are just that—a relatively comprehensive set of ethical rules that can be used by a local jurisdiction as the starting point from which to formulate ethical rules that best meet its needs.<sup>6</sup> Although some forms of the confidentiality and conflict rules, Model Rules 1.6 and 1.7, are in effect in most states, they usually differ from the ABA version to some extent.<sup>7</sup> Second, the duty of confidentiality imposed by the ethical rules governing lawyers is broader in scope than the evidentiary privilege that shields communications between a lawyer and client from involuntary disclosure.<sup>8</sup> Unlike the evidentiary privilege, which only applies to confidential communications between a lawyer and client, the ethical rule applies “to all information relating to the representation, whatever its source.”<sup>9</sup> Third, the form of Model Rule 1.6 originally adopted by the ABA House of Delegates in 1983 was more restrictive than its predecessors under the ABA

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6. As stated in the Chair's Introduction to the promulgation of the Model Rules in 1983,

[t]he Model Rules of Professional Conduct are intended to serve as a national framework for implementation of standards of professional conduct. . . . And the Model Rules, like all model legislation, will be subject to modification at the level of local implementation. Viewed as a whole, however, the Model Rules represent a responsible approach to the ethical practice of law and are consistent with professional obligations imposed by other law, such as constitutional, corporate, tort, fiduciary, and agency law.

MODEL RULES OF PROF'L CONDUCT Chairman's Introduction (1983).

7. For example, according to former ABA President Alfred P. Carlton, Jr., as of 2003 forty-one states had adopted forms of the confidentiality rule that differ from Model Rule 1.6 as to whether a lawyer may disclose client information to prevent a crime or fraud. *See Atkins & Rogers, supra* note 5.

8. The distinction between the ethical rule and the evidentiary privilege is described as follows:

The attorney-client privilege is more limited than the ethical obligation of a lawyer to guard the confidences and secrets of his client. This ethical precept, unlike the evidentiary privilege, exists without regard to the nature or source of information or the fact that others share the knowledge. . . . A lawyer owes an obligation to advise the client of the attorney-client privilege and timely to assert the privilege unless it is waived by the client.

MODEL CODE OF PROF'L RESPONSIBILITY EC 4-4 (1983).

9. MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 3 (2007).

Canons of Professional Ethics and the Model Code of Professional Responsibility. In particular, the original form of Rule 1.6 prohibited disclosures of a client's crime or fraud, whereas the prior versions of the ABA confidentiality rule either permitted or required a lawyer to make such disclosures. Specifically, the Canons of Professional Ethics, adopted in 1908, permitted, and the Model Code of Professional Responsibility, which replaced the Canons in 1969, required a lawyer to disclose confidential information regarding frauds perpetrated by a client on either a third party or a tribunal.<sup>10</sup>

With two very narrow exceptions, Rule 1.6(a), as adopted in 1983, prohibited a lawyer from disclosing information relating to the representation of a client without the client's consent or the implied authorization of the client.<sup>11</sup> In most cases, a lawyer is impliedly authorized to consult

10. The ABA Canons of Professional Ethics provided that

[w]hen a lawyer discovers that some fraud or deception has been practiced, which has unjustly imposed upon the court or a party, he should endeavor to rectify it; at first by advising his client, and if his client refuses to forego the advantage thus unjustly gained, he should promptly inform the injured person or his counsel, so that they may take appropriate steps.

ABA CANONS OF PROF'L ETHICS Canon 41 (1928). Model Code provision DR 7-102(B) required a lawyer to disclose client fraud in some cases:

(B) A lawyer who receives information clearly establishing that:

(1) His client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the affected person or tribunal . . . .

(2) A person other than his client has perpetrated a fraud upon a tribunal shall promptly reveal the fraud to the tribunal.

MODEL CODE OF PROF'L RESPONSIBILITY DR 7-102(B) (1969). In 1974, DR 7-102(B)(1) was weakened by adding at its end the words "except when the information is protected as a privileged communication." R.W. Nahstoll, *The Lawyer's Allegiance: Priorities Regarding Confidentiality*, 41 WASH. & LEE L. REV. 421, 431-33 (1984) (internal quotation marks omitted). However, as pointed out by Nahstoll, "[t]he 1974 amendment was adopted by only seventeen states and one of these, Pennsylvania, is about to repeal it." *Id.* at 433. According to an opinion issued by the ABA,

the duty imposed by DR 7-102(B) [as amended in 1974] would remain in force if the information clearly establishing a fraud on a person or tribunal and committed by a client in the course of representation were obtained by the lawyer from a third party (but not in connection with his professional relationship with the client), because it would not be a confidence or secret of a client entitled to confidentiality.

ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 341 (1975).

11. In its original form, Model Rule 1.6(a) provided as follows: "A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b)." MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (1983). As noted *supra* note 5, in August 2002 the ABA House of Delegates adopted relatively minor changes to Rule 1.6, and in August 2003 the house of delegates adopted subparagraphs (b)(2) and (b)(3), which added two major exceptions to Rule 1.6. The exceptions were included in the form of the Model Rules proposed by the commission charged with fashioning a set of rules to replace the Model Code. The exceptions were deleted from Rule 1.6 in 1983 when it was originally

with a client's financial advisors and, in some cases, the client's physicians. However, the limits of what a lawyer is impliedly authorized to disclose are unclear—which may be helpful in some cases. Note also that a change that is beneficial to the adequate representation of elderly clients was made to Rule 1.14 in 2002.<sup>12</sup> This welcome change permits a lawyer to disclose information regarding a client with diminished capacity to the extent necessary to protect the client's interests.<sup>13</sup>

The first exception to Rule 1.6's general ban on the disclosure of client information, subparagraph (b)(1), permitted a lawyer to disclose client information "to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm."<sup>14</sup> In 2002 the exception of subparagraph (b)(1) was liberalized by eliminating the predicate of client criminality and the requirement of immediacy.<sup>15</sup> The amendment replaced the requirement that conditioned a lawyer's right to disclose client information on a belief that the client's act "is likely to result in *imminent* death or substantial bodily harm"<sup>16</sup> with language that allows disclosure to the extent the lawyer reasonably believes necessary "to prevent *reasonably certain* death or substantial bodily harm."<sup>17</sup> The second original exception, subparagraph (b)(2), allowed a lawyer to disclose client information in a controversy between the lawyer and client to establish a defense in a criminal or civil claim based upon conduct in which the client was involved, or to respond to allegations concerning the representation of the client.<sup>18</sup> Neither of the original exceptions had much relevance in

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considered by the house of delegates. According to former ABA President Alfred P. Carlton, Jr., the changes adopted in 2003 had been rejected five times since 1983. See Atkins & Rogers, *supra* note 5.

12. See MODEL RULES OF PROF'L CONDUCT R. 1.14(c) & cmt. 1 (2007); see also ETHICS 2000 COMM'N REPORT, *supra* note 5, at 59 (2002) (indicating the addition of subsection (c) to Model Rule 1.14 by the Ethics 2000 Commission in 2002).

13. See MODEL RULES OF PROF'L CONDUCT R. 1.14(c) (2007).

14. MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(1) (1983). The version adopted in some states permits a lawyer to disclose client information to prevent the client from committing "a crime." E.g., WASH. RULES OF PROF'L CONDUCT R. 1.6(b)(2) (2006).

15. Compare MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(1) (1983) ("[T]o prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm . . ."), with MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(1) (2007) ("[T]o prevent reasonably certain death or substantial bodily harm . . .").

16. MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(1) (1983) (emphasis added).

17. MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(1) (2007) (emphasis added).

18. MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(2) (1983). The specific language of subparagraph (b)(2) allows disclosures "to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client." This exception is established in subparagraph (b)(5) in the current version of the Rule 1.6. See MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(5) (2007).

the estate-planning context.

The primacy of the duty of confidentiality under Model Rule 1.6 is emphasized in some ABA ethics opinions, which in effect hold that the requirement of confidentiality trumps the other duties of a lawyer.<sup>19</sup> Although disclosure is not permitted by Rule 1.6, a lawyer who is aware of a client's crime or fraud may or may not be required to withdraw from the representation.<sup>20</sup> Some authorities recognize that the lawyer may do so in a manner that may, depending on the degree of their sophistication, alert others to the client's misconduct.<sup>21</sup> As illustrated by the following example, which is based on Florida Ethics Opinion 95-4, if a co-client directs a lawyer not to disclose information to the other client that would allow the other client to protect his or her interests, the lawyer may not disclose the information directly, but may withdraw in a manner calculated to alert the other client to the problem:

Lawyer ("L") recently helped long-time clients, Husband ("H") and Wife ("W"), update their estate plans, including the preparation of wills under which each is the principal beneficiary of the other's will. H later met alone with L to discuss the effect of a codicil to his will, which another law firm prepared, that gives a significant portion of his estate to a woman with whom he has been having an extramarital relationship. In particular, H asked L to advise him regarding the extent of W's right of election if she were to survive him. L should ask H to disclose his plan to W because of the substantial adverse effect it will have on her. If H refuses to tell W and directs L not to inform W of H's plan, the pre-2003 version of Rule 1.6 bars L from informing W about the codicil.<sup>22</sup> L may no longer represent H or W. L must also inform them of his or her withdrawal. Note that, depending on the certainty and substantiality of the prospective economic injury to W, disclosure may be permitted by Rule 1.6(b)(2), which was added in 2003.<sup>23</sup>

According to Florida Ethics Opinion 95-4, in withdrawing from the representation, the lawyer (L in the foregoing example) may inform W that

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19. *E.g.*, ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 94-380 (1994). This ruling concludes that the lawyer for a fiduciary may not disclose crimes or frauds committed by the fiduciary. *Id.* As noted in the opinion, the version of Rule 1.6 in effect in some states would allow or require the lawyer for a fiduciary to make limited disclosures of misconduct by the fiduciary. *See id.* The opinion states that "if the fiduciary insists on continuing a course of fraudulent or criminal conduct, the lawyer may be required to terminate the representation because the lawyer's services will be involved in that conduct, so as to invoke Rule 1.16(a)(1), or may have the option of a voluntary withdrawal under Rule 1.16(b)(1)." *Id.* (citation omitted).

20. MODEL RULES OF PROF'L CONDUCT R. 1.16 (2007) sets forth the rules regarding the termination of a representation.

21. *See, e.g.*, Fla. Bar Prof'l Ethics Comm., Op. 95-4 (1997).

22. *See id.*

23. *See* MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(2) (2007).

“a conflict of interest has arisen that precludes Lawyer’s continued representation of Wife and Husband in these matters.”<sup>24</sup> Such disclosure may or may not arouse W’s suspicions sufficiently for her to take some protective action.<sup>25</sup> The Florida opinion concludes by saying that

[t]he committee recognizes that a sudden withdrawal by Lawyer almost certainly will raise suspicions on the part of Wife. This may even alert Wife to the substance of the separate confidence. Regardless of whether such surmising by Wife occurs when Lawyer gives notice of withdrawal, Lawyer nevertheless has complied with the Rules of Professional Conduct and has not violated Lawyer’s duties to Husband.<sup>26</sup>

If the obligation to maintain confidentiality is absolute, as recited in some ethics opinions, how is it that L is permitted to do by indirection (i.e., alert W to misconduct by H) that which L is forbidden to do directly?

The form of Rule 1.6 in effect in New Jersey and a few other jurisdictions allows a lawyer to disclose a client’s crime or fraud to the extent reasonably necessary to rectify the effect of the crime or fraud on another person, regardless of the substantiality of the economic effect on the other person.<sup>27</sup> Under the facts of the foregoing example, in such a jurisdiction L would be permitted to inform W directly about H’s codicil.<sup>28</sup>

## II. LIBERALIZATION OF RULE 1.6

In August 2003 the ABA House of Delegates narrowly adopted two significant changes in the confidentiality rule, Rule 1.6.<sup>29</sup> The amendments changed Rule 1.6(b) to allow a lawyer to disclose client information to the extent the lawyer reasonably believes necessary to prevent, mitigate, or rectify crimes or frauds by a client that are reasonably certain to result, or have resulted, in substantial financial harm to a third person in furtherance of which the lawyer’s services were used.<sup>30</sup> Although the changed rule continues significantly to restrict a lawyer’s right to disclose a crime or fraud committed by a client, the modest

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24. Fla. Bar Prof’l Ethics Comm., Op. 95-4 (1997).

25. *See id.*

26. *Id.*

27. N.J. RULES OF PROF’L CONDUCT R. 1.6(c)–(d) (2007); *see infra* note 40.

28. The outcome would depend on whether L’s services were implicated in the fraud because H consulted L regarding the effect of the codicil.

29. *See ABA Amends Ethics Rules on Confidentiality, Corporate Clients, To Allow More Disclosures*, 19 ABA/BNA LAW. MANUAL ON PROF’L CONDUCT 467 (2003).

30. The amendments were passed by a small margin, 218–201, after several hours of debate. *Id.*



liberalization achieved by the changes is welcome.<sup>31</sup>

As amended, subparagraphs (b)(2) and (b)(3) permit, but do not require, a lawyer to disclose client information:

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services . . . .<sup>32</sup>

According to Rule 1.6, Comment 15, a lawyer's decision not to disclose information is not subject to review: "A lawyer's decision not to disclose as permitted by paragraph (b) does not violate this Rule."<sup>33</sup>

The Restatement (Third) of the Law Governing Lawyers ("Restatement") adopts a similar approach.<sup>34</sup> Under it, a lawyer's decision whether to disclose client information to prevent reasonably certain death or serious bodily harm<sup>35</sup> or to prevent or mitigate a crime or fraud that threatens substantial financial loss<sup>36</sup> is not in itself subject to discipline or imposition of damages.<sup>37</sup> Despite those statements, a person who is injured by a crime or fraud may decide to pursue an action against a lawyer who did not disclose information that might have allowed the injured party to have avoided the injury or to rectify its commission. Specifically, an injured party may seek to recover damages from a lawyer who fails to make a disclosure permitted by subparagraph (b)(2) or (b)(3).

Unfortunately, both subparagraphs condition the discretionary right to make disclosures on imponderables—the certainty that an injury will occur and its substantiality. Neither Rule 1.6 nor the comments to it provide any insight as to how the substantiality of a financial injury should be determined.<sup>38</sup> Assuming that *substantiality* is a relative term, a lawyer may need to know the economic circumstances of an injured

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31. Query whether a client who uses a lawyer's services to any extent in committing a crime or fraud has forfeited any right to be protected by the duty of confidentiality.

32. MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(2)–(3) (2007).

33. *Id.* R. 1.6 cmt. 15.

34. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 66–67 (2000).

35. *See id.* § 66.

36. *See id.* § 67.

37. *See id.* § 66 cmt. g; *id.* § 67 cmt. h.

38. Consistently, the Model Rules do not provide any guidance with respect to the determination of whether a gift to a lawyer is substantial for the purpose of Rule 1.8(c), which prohibits a lawyer from soliciting a "substantial gift" from an unrelated client. *See* MODEL RULES OF PROF'L CONDUCT R. 1.8(c) (2007).

party. For example, a loss of \$25,000 might be insubstantial to the lawyer or an affluent person, but very substantial to a person of modest means. The requirement that an economic injury be substantial should be satisfied if the injury is substantial from the perspective of either the miscreant (the client) or the victim (or victims). Insofar as economic injuries are concerned, it would be preferable for the right to disclose to depend on whether a lawyer reasonably believes that a client would commit, or had committed, a crime or fraud that would cause another party to suffer a financial injury—which is the rule in some states.

Variations of the exceptions, which differ widely in their details, are in effect in most states.<sup>39</sup> For example, some states allow a lawyer to disclose client information to the extent necessary to prevent a client or another person from committing a crime.<sup>40</sup> This might be invoked, for example, to prevent one co-client from embezzling from another. Other states *require* a lawyer to disclose information that clearly establishes a criminal or fraudulent act of a client in which the lawyer's services were involved to the extent necessary to rectify the consequences of the act where the act resulted in substantial injury to the financial interests or property of another person.<sup>41</sup> For example, in such a jurisdiction, the lawyer for a fiduciary might be required to disclose a fraud by the fiduciary that caused substantial economic losses and involved the services of the lawyer. As indicated above, still other states permit disclosures of client information to rectify the consequences of a client's criminal, illegal, or fraudulent act in which the lawyer's services were used regardless of the substantiality of injuries that resulted from it.<sup>42</sup> Consistent with the current text of Rule 1.6(b), a large number of states allow disclosures of client information to be made to the extent reasonably necessary to prevent a client from committing a crime or fraud that is likely to result in death, substantial bodily harm, or substantial injury to the finan-

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39. As stated in the ABA/BNA Lawyers' Manual on Professional Conduct, "[t]he ethics rules in most jurisdictions contain some similar exception to the confidentiality rule permitting or even requiring a lawyer to disclose information in order to prevent and/or rectify the consequences of a crime or fraud that injures the financial or property interests of another. The details vary greatly from state to state, with almost as many versions as there are jurisdictions." ABA/BNA LAWYERS' MANUAL ON PROF'L CONDUCT: PRACTICE GUIDE, DISCLOSURE: CRIMES AND FRAUDS § 55:901 (2008).

40. *E.g.*, OHIO RULES OF PROF'L CONDUCT R. 1.6(b)(2) (2006); WASH. RULES OF PROF'L CONDUCT R. 1.6(b)(2) (2006). This rule is consistent with MODEL RULES OF PROF'L RESPONSIBILITY DR 4-101(C)(3) (1980).

41. *E.g.*, HAW. RULES OF PROF'L CONDUCT R. 1.6(b) (2005).

42. *E.g.*, N.J. RULES OF PROF'L CONDUCT 1.6(c) (2003). The New Jersey version of Rule 1.6 was involved in *A v. B. v. Hill Wallack*, 726 A.2d 924 (N.J. 1999). In *Hill Wallack*, the New Jersey Supreme Court gave a broad construction to "the term 'fraudulent act' within the meaning of RPC 1.6(c)." *Id.* at 927.

cial interests or property of another.<sup>43</sup>

The following example, based upon *A. v. B. v. Hill Wallack*,<sup>44</sup> illustrates the limited circumstances in which disclosures are permitted under subparagraphs (b)(2) and (b)(3):

Law Firm ("LF") represented Husband ("H") and Wife ("W") in estate-planning in connection with which H and W signed letters, captioned "Waiver of Conflict of Interest," which stated that "information provided by one spouse could become available to the other." LF prepared wills for H and W, under which the residuary estate of a deceased spouse would pass to the survivor of them. If there were no survivor, the residuary estate of the deceased spouse would pass to the testator's issue, which would include a testator's illegitimate children. LF was later retained to represent a single woman ("M") to pursue a paternity action against H. Because of a clerical error LF was initially unaware of the conflict in agreeing to represent M against H. When LF learned of the conflict, it withdrew from representing M and informed H that it believed it was ethically obligated to inform W that under her current estate plan, her estate might pass to H's illegitimate child. H sought a court order prohibiting LF from making the disclosure.

In *Hill Wallack*, the court allowed the firm to inform the wife of H's illegitimate child.<sup>45</sup> Although the conflict letters signed by H and W appeared to allow disclosure, the court did not rely on them.<sup>46</sup> Instead, the court relied on a specific exception in the New Jersey version of Rule 1.6.<sup>47</sup> Relevant to the way in which subparagraphs (b)(2) and (b)(3) will be applied, the court concluded that disclosure was not permitted by New Jersey Rule of Professional Conduct ("RPC") 1.6(b)(3), which allows disclosures in order to rectify crimes or frauds that may cause substantial injury to the financial interests of another.<sup>48</sup> The court reasonably concluded that "[t]he possible inheritance of the wife's estate by the husband's illegitimate child is too remote to constitute 'substantial injury to the financial interest or property of another' within the meaning of RPC 1.6(b)."<sup>49</sup> Assuming the correctness of that conclusion, disclosure of the facts would have been improper under Model Rule 1.6.<sup>50</sup> The opinion upheld disclosure under New Jersey RPC 1.6(c), which permits disclosures "to rectify the consequences of a client's

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43. *E.g.*, MINN. RULES OF PROF'L CONDUCT R. 1.6(b)(4) (2005).

44. 726 A.2d 924.

45. *See id.* at 932.

46. *See id.* at 928.

47. *See id.* at 927-28.

48. *See id.* at 927.

49. *Id.*

50. *See id.* at 928.

criminal, illegal or fraudulent act in furtherance of which the lawyer's services had been used."<sup>51</sup> In addition to illustrating the importance of the exact phraseology of the exceptions to Rule 1.6, the *Hill Wallack* case demonstrates the necessity that firms maintain an accurate conflicts database and the importance of carefully expressing the extent to which multiple clients agree that confidential information will, or may be, shared among them.

### III. JOINT REPRESENTATION OF MULTIPLE CLIENTS IN ESTATE PLANNING

In a joint representation (which is also referred to as *common representation*), one lawyer represents multiple clients in the same matter and is, expressly or impliedly, authorized to share all material information regarding the representation. That is, in a joint representation, there is no confidentiality as between clients with regard to information that is material to the representation.<sup>52</sup> Also, importantly, the lawyer owes each client identical duties of loyalty and impartiality.<sup>53</sup> Before undertaking a joint representation, a lawyer should explain the lack of confidentiality between the parties and other implications of a joint representation, which should be confirmed in an engagement letter. Most authorities and commentators agree that the joint representation of multiple clients, such as a husband and wife, is ethically proper if there

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51. *Id.* (internal quotation marks omitted); see also N.J. RULES OF PROF'L CONDUCT R. 1.6(c) (2003).

52. MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 31 (2007).

53. *Id.* (stating that in a joint representation, the lawyer "has an equal duty of loyalty to each clients"). A lawyer is also "required to be impartial between commonly represented clients." *Id.* cmt. 29. The duty to share information may exist by reason of an express agreement of the parties or by default. According to Restatement § 130, Comment b, "multiple representation not involving litigation requires a lawyer to remain loyal to clients and protect their confidential information." RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 130 cmt. b (2000). Section 75, Comment d provides that "[r]ules governing the co-client privilege are premised on an assumption that co-clients usually understand that all information is to be disclosed to all of them. Courts sometimes refer to this as a presumed intent that there should be no confidentiality between co-clients." *Id.* § 75 cmt. d. As stated in the *ACTEC Commentaries on the Model Rules of Professional Conduct*,

"[i]n the absence of any agreement to the contrary (usually in writing), a lawyer is presumed to represent multiple clients with regard to related legal matters jointly with resulting full sharing of information between the clients. The better practice in all cases is to memorialize the clients' instructions in writing and give a copy of the writing to the client."

AM. COLL. OF TRUST & ESTATE COUNSEL FOUND., COMMENTARIES ON THE MODEL RULES OF PROFESSIONAL CONDUCT 75 (4th ed. 2006) [hereinafter *ACTEC COMMENTARIES*]. The *ACTEC Commentaries* were first adopted by the Regents of the American College of Trust and Estate Counsel in 1993. Your author was the Reporter for, and the principal author of, the first and second editions of the *ACTEC Commentaries*, which were adopted in 1993 and 1995 respectively.

are no disabling conflicts and none is likely to arise.<sup>54</sup> A joint representation may, of course, be terminated by one or more of the clients or by subsequent changes in the circumstances (e.g., a nonwaivable conflict intervenes). Following the termination of a joint representation a lawyer may continue to represent one of the clients if doing so is permissible under Rule 1.9 and Comment 21 to Rule 1.7.<sup>55</sup>

Apart from ethical considerations, a joint representation is generally more efficient and economical. This conclusion is supported by an ABA opinion, which observed that "[c]onsiderable efficiency is gained through having one lawyer or firm manage the legal affairs of all family members. The firm learns about family businesses, assets, documents, and personalities and thus is able to provide quality representation requiring less time."<sup>56</sup> Additional advantages were pointed out by Professor Teresa Collett: "The advantages of joint representation include pooled information, pooled resources, cost savings, coclient support, commitment to the collective good, presentation of a united front, and reducing the drain on judicial resources."<sup>57</sup> A joint representation does involve some risks, including the possibility that the representation of both parties will have to be abandoned if a serious conflict arises during the course of the representation.<sup>58</sup> However, in my experience, if a lawyer exercises reasonable care in screening for conflicts and other possibly troublesome issues, it is unlikely that a joint representation will encounter any serious problems.

At the initial meeting, a lawyer who is asked to represent multiple clients in the same matter should also attempt to determine whether, and to what extent, the interests of the parties conflict. While it is prudent for a lawyer to discuss potential conflicts of interest and confidentiality concerns at the initial meeting with a husband and wife, as stated in a 1997 Florida ethics opinion, the lawyer is not required to do so if there is no objective evidence that their interests conflict.<sup>59</sup> As noted in Com-

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54. E.g., RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 60 cmt. 1 ("A lawyer may represent two or more clients in the same matter as co-clients either when there is no conflict of interest between them (see § 121) or when a conflict exists but the co-clients have adequately consented (see § 122)."); Geoffrey C. Hazard, Jr., *Conflict of Interest in Estate Planning for Husband and Wife*, 20 PROB. LAW. 1, 5 (1994) ("Continuing concurrent representation in such circumstances would constitute inadequate representation of the spouse who is inadequately informed and, as such, would be a violation of the rules of ethics.").

55. See MODEL RULES OF PROF'L CONDUCT R. 1.9 (2007); *Id.* R. 1.7 cmt 21.

56. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 02-428 n.2 (2002) (citing ACTEC COMMENTARIES).

57. Teresa Stanton Collett, *The Promise and Peril of Multiple Representation*, 16 REV. LITIG. 567, 578 (1997).

58. See MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 29 (2007).

59. Fla. Bar Prof'l Ethics Comm., Op. 95-4 (1997). If a husband and wife appear to be knowledgeable and there do not appear to be any conflicts, a lawyer may represent them without

ment 27 to Model Rule 1.7, “conflict questions may arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may be present.”<sup>60</sup> Even if the interests of prospective multiple clients conflict, many nonlitigation conflicts may be waived by the clients.<sup>61</sup> Clients can give an effective waiver only if the requirements of Rule 1.7(b) are met, which requires that “each affected client gives informed consent, confirmed in writing.”<sup>62</sup>

In some instances, an existing or prospective conflict of interest among multiple parties may be so serious as to preclude a lawyer from representing them.<sup>63</sup> For example, a lawyer is generally unable to represent multiple parties “where contentious litigation or negotiations between them are imminent or contemplated.”<sup>64</sup> Thus, the same lawyer should generally not represent both parties to a prenuptial agreement or other matter in which their interests directly conflict to a substantial degree.<sup>65</sup> Similarly, the same lawyer should not represent the personal representative of a decedent’s estate and a creditor or other person who is pursuing a claim against the estate.<sup>66</sup>

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obtaining any consent from them. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 130 cmt. c (2000).

60. MODEL RULES OF PROF’L CONDUCT R. 1.7 cmt. 27 (2007).

61. See *id.* cmt. 28.

62. *Id.* R. 1.7(b)(4). Comment 18 to Rule 1.7 explains the requirements of informed consent in the context of conflicts. It reads, in part: “Informed consent requires that each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client.” *Id.* R. 1.7 cmt. 18.

63. *Id.* R. 1.7(a).

64. *Id.* R. 1.7 cmt. 29.

65. ACTEC COMMENTARIES, *supra* note 53, at 93. It is sometimes possible for a lawyer to represent both parties to a prenuptial agreement or other agreement. For example, a lawyer might draft a prenuptial agreement with the informed consent of the parties if both parties are lawyers, they have already agreed to all material terms, and they only ask the lawyer to prepare the agreement for them or to advise them regarding the federal-tax aspects of the agreement.

66. *Id.* The same is, of course, true with respect to the representation of a trustee and a person with a claim against the trust. Some ethics opinions would permit the lawyer to represent a fiduciary in the fiduciary’s representative capacity and personally in taking a position adverse to the interests of the beneficiaries of the fiduciary estate. *E.g.*, Or. State Bar, Formal Op. 2005-119 (2005); Va. State Bar’s Standing Comm. on Legal Ethics, Informal Op. 1778 (2003). The Virginia opinion erroneously cites *In re Birnbaum*, 460 N.Y.S.2d 706 (Sur. Ct. 1983) as supporting its conclusion—which it does not. In fact, the *Birnbaum* court opined that “where the attorney represents his client in both capacities, he may not act to advance the *personal* interests of a fiduciary in such a way as to harm his other client, the estate.” *Id.* at 707. The Oregon and Virginia opinions reason that the lawyer only represents a single client—the person who is acting as a fiduciary, which completely ignores that the person is acting in two different, adverse capacities. Or. State Bar, Formal Op. 2005-119 (2005); Va. State Bar’s Standing Comm. on Legal Ethics, Informal Op. 1778.

#### IV. AVOIDING CONFLICTS BY LIMITING THE SCOPE OF THE REPRESENTATION

Importantly, the same lawyer may represent multiple clients if the representation is limited to matters as to which the clients' interests do not conflict. Under Model Rule 1.2(c), a lawyer may limit the scope of the representation "if the limitation is reasonable . . . and the client gives informed consent."<sup>67</sup> This rule allows a lawyer to represent a client, or clients, with respect to some matters, but not others. The concept is illustrated by the following example:

Lawyer ("L") is asked to represent Client ("C") as executor of the will of Decedent ("D") and to enforce a claim C has against D's estate. If payment of C's claim is required, the payment would reduce the residuary estate of which there are several beneficiaries other than C. L may properly represent C as executor, but L cannot also represent C in enforcing C's claim against D's estate. The conflict, which might result in litigation between C individually and C as executor, may not be waivable by the beneficiaries of D's residuary estate.

The existence of a marital or other familial relationship does not itself involve a conflict of interest that would preclude a lawyer from jointly representing a husband and wife or other multiple family members.<sup>68</sup> In estate planning, the joint representation of parties whose interests do not seriously conflict is the norm. The joint representation of clients whose interests did not seriously conflict was encouraged by former Rule 2.2, which was deleted from the Model Rules in 2002.<sup>69</sup> Unanticipated serious conflicts among multiple clients may, of course, arise during the course of the representation.<sup>70</sup>

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67. MODEL RULES OF PROF'L CONDUCT R. 1.2(c) (2007).

68. For example, a 1996 Montana ethics opinion concluded that

[t]he marital relationship itself is not in most cases adversarial in nature and no conflict inherently exists in representing both parties. Generally speaking, the fact that the clients are married does not materially limit the responsibilities to either client. Therefore, it is not necessary to advise a couple of the possibility of a potential conflict unless there is evidence suggesting such advisement is appropriate.

State Bar of Mont., Ethics Op. 960731 (1996).

69. See ETHICS 2000 COMM'N REPORT, *supra* note 5, at 73–75 (indicating the deletion of Rule 2.2 from the Model Rules of Professional Conduct). Rule 2.2, which discussed the lawyer's role as an intermediary, was deleted on the theory that the representation of multiple parties was more appropriately subject to the provisions of Rule 1.7. ABA, ETHICS 2000 COMM'N, RULE 2.2: REPORTER'S EXPLANATION OF CHANGES (2002), available at <http://www.abanet.org/cpr/e2k/e2k-rule22rem.html>. Making the shift was also encouraged by the relative relaxation of the rigor of the conflict rules of Rule 1.7. See *id.*

70. As stated in Comment 29 to Rule 1.7, "[o]rdinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails." MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 29 (2007). However, if such a conflict arises the lawyer may continue to

As illustrated by the following example from the *ACTEC Commentaries on the Model Rules of Professional Responsibility*,<sup>71</sup> a lawyer may properly represent a personal representative both with respect to the administration of a decedent's estate and regarding a personal matter so long as the two representations do not conflict:

Example 1.7-2. Lawyer (*L*) represents Trustee (*T*) as trustee of a trust created by *X*. *L* may properly represent *T* in connection with other matters that do not involve a conflict of interest, such as the preparation of a will or other personal matters not related to the trust. *L* should not charge the trust for any personal services that are performed for *T*. Moreover, in order to avoid misunderstandings, *L* should charge *T* for any substantial personal services that *L* performs for *T*.<sup>72</sup>

The same lawyer may ethically represent the multiple fiduciaries of a trust or estate so long as their interests do not conflict. Similarly, the same lawyer may represent multiple beneficiaries of a fiduciary estate, such as the residuary beneficiaries of an estate. Consistent with the provisions of former Rule 2.2, a lawyer for multiple fiduciaries or beneficiaries may be required to withdraw from the representation if any of the multiple clients object to the lawyer continuing to represent them.

## V. OTHER MODELS FOR THE REPRESENTATION OF MULTIPLE PARTIES

There is one other appropriate way in which multiple clients can be represented regarding the same estate-planning matter—a completely separate representation, the main feature of which is that each client is represented by a separate lawyer. A representation of multiple clients by separate lawyers does not ordinarily involve any unusual ethical problems.<sup>73</sup> Although a separate representation is almost always more expensive than if the clients were jointly represented by the same law-

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represent one of the clients if the clients gave their advance informed consent. See *id.* R. 1.7(b)(4).

71. See ACTEC COMMENTARIES, *supra* note 53.

72. *Id.* at 93.

73. Ethical issues can, of course, arise in connection with the separate representation of clients in an estate-planning matter, including issues involving the duty of confidentiality. For example, Rules 1.6(b)(2) and (b)(3) allow a lawyer to reveal client information to the extent necessary to prevent a client from committing a crime or fraud in which the lawyer's services were implicated and were reasonably certain to cause substantial injury to the financial interests or property of another party. MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(2)–(3) (2007). For example, after a lawyer has assisted a husband in planning a transaction that would result in the wife transferring substantial wealth to the husband, the husband informs the lawyer that as soon as the transaction is completed he intends to leave his wife and file a dissolution action. In such a case, if the husband refuses to inform the wife of his intentions, Rule 1.6(b)(2) allows the lawyer to disclose the husband's intentions to counsel for the wife. See MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 7.



yer, it is appropriate where each client wishes to preserve autonomy, freedom of action, and confidentiality. Thus, multiple clients might prefer to have separate lawyers if their interests are not entirely congruent (e.g., they are negotiating the formation of a business entity or the terms of a prenuptial agreement). Likewise, a husband and wife, both of whom had been married previously and have differing wishes regarding the disposition of their property, might prefer to have separate counsel.

Two other ways that multiple clients might be represented by a single lawyer have been suggested, but they are not widely used. One is the so-called family model in which one lawyer represents "the family" as if it were an entity, rather than the individual members of the family.<sup>74</sup> Professors Thomas Shaffer and Russell Pearce are the principal proponents of this model.<sup>75</sup> Despite having some attractive features, including the recognition of duties that inhere in a family relationship,<sup>76</sup> family representation is neither sanctioned by existing ethical rules nor is it widely accepted or used.<sup>77</sup> The reason is simple: Each family member is entitled to recognition, respect, and autonomy—a family is not a legally recognized entity.<sup>78</sup> A lawyer may, of course, represent multiple members of a family so long as doing so is not barred by the conflicts rules. It is, for example, common for the same lawyer to advise several family members regarding their closely held business, their estate planning, or both.

In the final model, commonly called "separate representation," a lawyer represents multiple clients pursuant to an agreement that the lawyer will not disclose any information regarding one client to the other client without the former client's express consent. Professor Jeffrey Pennell is the primary advocate for this type of representation.<sup>79</sup> While

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74. See Russell G. Pearce, *Reexamining the Family Values of Legal Ethics*, 22 SEATTLE U. L. REV. 1, 2 (1998); Thomas L. Shaffer, *The Legal Ethics of Radical Individualism*, 65 TEX. L. REV. 963, 964–68 (1987); see also Teresa Stanton Collett, *And the Two Shall Become as One . . . Until the Lawyers Are Done*, 7 NOTRE DAME J.L. ETHICS & PUB. POL'Y 101, 119–24 (1993) (discussing Professor Shaffer's "lawyers of the family" theory of representation); Russell G. Pearce, *Family Values and Legal Ethics: Competing Approaches to Conflicts in Representing Spouses*, 62 FORDHAM L. REV. 1253 (1994) [hereinafter Pearce, *Family Values and Legal Ethics*] (generally discussing entity versus individual representation within families).

75. See sources cited *supra* note 74.

76. See Shaffer, *supra* note 74, at 967.

77. See Pearce, *Family Values and Legal Ethics*, *supra* note 74, at 1274 ("[E]stablished legal ethics doctrine favors the individual over the family unit.").

78. Hazard, *supra* note 54, at 22 ("Under the law as it stands husband and wife, and other adult family members as well, are legally autonomous jural persons and must be treated as such in lawyer-client relationships.").

79. Professor Jeffrey Pennell calls this method the "priestly" approach, which is intended to protect all disclosures by one client from disclosure to the other. Jeffery N. Pennell, *Professional Responsibility: Reforms Are Needed To Accommodate Estate Planning and Family Counselling* [sic], 25 PHILIP E. HECKERLING INST. ON EST. PLAN. ¶¶ 1801–05.1 (1991).

the concept is tangentially supported by dicta in at least one case,<sup>80</sup> a comment in the Restatement,<sup>81</sup> and a New York ethics opinion,<sup>82</sup> separate representation is not generally considered to be feasible or consistent with the Model Rules. Professor Geoffrey Hazard has condemned the concept in the strongest terms.<sup>83</sup>

Although some experienced estate planners separately represent multiple clients according to this regime, the *ACTEC Commentaries* caution that

[a] lawyer who is asked to provide separate representation to multiple clients should do so with great care because of the stress it necessarily places on the lawyer's duties of impartiality and loyalty and the extent to which it may limit the lawyer's ability to advise each of the clients adequately.<sup>84</sup>

My views regarding the separate representation of clients are expressed in the following excerpt from the book that I wrote with Samuel A. Donaldson, entitled *Price on Contemporary Estate Planning*:

A so-called separate representation is fraught with risk for the clients and the lawyer. In such a case, how could the lawyer possibly fulfill his or her duties of competency and loyalty to each client? . . . How could a lawyer adequately represent both spouses if he or she has agreed that the confidences of each would not be disclosed to the other?<sup>85</sup>

As noted by Professor Theresa Collett, "Such 'don't ask, don't tell' policies appear to be a recipe for professional liability."<sup>86</sup>

Despite the widespread criticism of the separate-representation model, a 2003 opinion of the New York State Bar Association indicates that the separate representation of co-clients is permissible in New York.<sup>87</sup> According to the opinion, "[o]n establishing the attorney-client relationship, the co-clients may consent to an alternative arrangement.

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80. See *A v. B. v. Hill Wallack*, 726 A.2d 924, 929 (N.J. 1999) ("Similarly, the co-clients can agree that unilateral confidences or other confidential information will be kept confidential by the attorney.").

81. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 60 cmt. 1 (2000) ("Co-clients can also explicitly agree that the lawyer is not to share certain information, such as described categories of proprietary, financial, or similar information with one or more other co-clients (see § 75, Comment d). A lawyer must honor such agreements.").

82. N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 761 (2003).

83. Hazard, *supra* note 54, at 13 ("Let me put the point bluntly. The concept of 'separate representation' is a legal and ethical oxymoron.").

84. ACTEC COMMENTARIES, *supra* note 53, at 76.

85. JOHN R. PRICE & SAMUEL A. DONALDSON, PRICE ON CONTEMPORARY ESTATE PLANNING 1-58 (2008 ed. CCH 2007). For a discussion of the risks inherent in such a representation, see RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 130 reporter's note (2000).

86. Collett, *The Promise and Peril*, *supra* note 57, at 578.

87. N.Y. State Bar Ass'n. Comm. on Prof'l Ethics, Op. 761 (2003).

The co-clients may specifically agree that the lawyer will not share confidential information if requested by the client providing the information.”<sup>88</sup>

## VI. CLARIFYING THE NATURE OF A REPRESENTATION, ENGAGEMENT LETTERS

The Model Rules, the Restatement, and the *ACTEC Commentaries* all agree that a lawyer who is asked to represent multiple clients should inform them fully at the outset regarding the ramifications of a joint representation—particularly regarding confidentiality and conflicts.<sup>89</sup> In some cases, a lawyer should consider meeting separately with the prospective clients, or at least offering each of them the opportunity to do so.<sup>90</sup>

To reduce the risk of misunderstanding, at the initial meeting with prospective clients, the lawyer should thoroughly explain to them the key aspects of the representation, including the scope and terms of the representation; the timetable for completing each phase of the representation; the basis upon which the lawyer’s fee will be determined;<sup>91</sup> that confidentiality will be maintained with respect to others, but not as between the clients; and what will be done if a conflict develops during

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88. *Id.* (citing RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 75 cmt. d. (2000) (“Co-clients may agree that the lawyer will not disclose certain confidential communications of one co-client to other co-clients.”)).

89. MODEL RULES OF PROF’L CONDUCT R. 1.7 cmt. 31 (2007) (“The lawyer should, at the outset of the common representation and as part of the process of obtaining each client’s informed consent, advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other.”); *id.* cmt. 32 (“Any limitations on the scope of the representation made necessary as a result of the common representation should be fully explained to the clients at the outset of the representation. See Rule 1.2(c).”); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 60 (2000) (“When a conflict of interest exists, as part of the process of obtaining consent, the lawyer is required to inform each co-client of the effect of joint representation upon disclosure of confidential information . . . .”); ACTEC COMMENTARIES, *supra* note 53, at 32 (explaining that under the general principles of Rule 1.2, “[i]f multiple clients are involved, the lawyer should discuss with them the scope of the representation and any actual or potential conflicts and determine the basis upon which the lawyer will undertake the representation.”).

90. ACTEC COMMENTARIES, *supra* note 53, at 32 (“A lawyer may wish to consider meeting with prospective clients separately, which would give each of them an opportunity to be more candid and, perhaps, reveal potentially serious conflicts of interest or objectives that would not otherwise be disclosed.”); Hazard, *supra* note 54, at 23 (“[I]f a multiple representation is being considered separate interviews should be held with each client, more than once if necessary. Separate interviews can reveal divergences in the clients’ respective assumptions and purposes that otherwise would be masked by polite conversation.”).

91. MODEL RULES OF PROF’L CONDUCT R. 1.5(b) (2007) requires that the scope of the representation and the basis upon which the fee will be determined “be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.”

the course of the administration. Those matters should be memorialized in an engagement letter to the clients.<sup>92</sup> Any existing conflicts must also be fully discussed and should be described and appropriately waived in the engagement letter. Under the liberalized version of Rule 1.7, clients are more broadly able to waive some future conflicts, although such a waiver may not be upheld if a completely unanticipated conflict develops.<sup>93</sup> The efficacy of a waiver depends largely upon the sophistication of the client and “the extent to which the client reasonably understands the material risks that the waiver entails.”<sup>94</sup> Note that some jurisdictions require the basis of a lawyer’s fee to be communicated in writing to clients or that there be a written agreement between the lawyer and client regarding the lawyer’s fee.<sup>95</sup>

An engagement letter for a husband and wife in an estate-planning matter might look something like the following example:<sup>96</sup>

Dear Husband and Wife:

Thank you for asking me to assist you with your estate planning, which I will be pleased to do. The following paragraphs summarize the agreements we reached at our initial conference regarding our relationship.

*Scope of the representation.* We will review relevant information, including your existing estate-planning documents; help you identify your estate-planning goals; explain the various estate-planning techniques that you might consider using; prepare estimates of the tax consequences of the plans under consideration; prepare drafts

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92. Although most states do not require a lawyer to send a client an engagement letter, it is good practice to do so. “Engagement letters help clients have more accurate and realistic expectations regarding the scope of the representation, the time within which the services will be performed and their cost.” John R. Price, 801-2d *Conflicts, Confidentiality, and Other Ethical Considerations in Estate Planning*, 801-2d Tax Mgmt. Est., Gifts & Tr. Portfolios (BNA), at A-14 (2007). For a broad sample of forms of engagement letters, see AM. COLL. OF TRUST & ESTATE COUNSEL, *ENGAGEMENT LETTERS: A GUIDE FOR PRACTITIONERS* (1999), available at <http://www.actec.org/pubInfoArk/comm/engltrtoc.html>. For a form of engagement letter that might be used in connection with a husband and wife representation, see also PRICE & DONALDSON, *supra* note 85, at 1-34 to -36.

93. See MODEL RULES OF PROF’L CONDUCT R. 1.7 cmt. 22 (2007).

94. *Id.*

95. *E.g.*, D.C. RULES OF PROF’L CONDUCT R. 1.5(b) (2007) (requiring the basis or rate of a lawyer’s fee to be communicated in writing to the client if the lawyer has not regularly represented the client); CAL. BUS. & PROFESSIONS CODE § 6148(a) (1996) (requiring a written contract for services if the lawyer’s fee will exceed \$1,000); see also MODEL RULES OF PROF’L CONDUCT R. 1.5(b) (requiring a lawyer to communicate the basis or rate of the lawyer’s fee to be communicated to a client “preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate”).

96. The text of the letter is loosely based on the form presented in PRICE & DONALDSON, *supra* note 85, at 1-34 to -36.

and final versions of estate-planning documents; supervise execution of the final form of the documents; arrange any transfers of property that are appropriate; and prepare any tax returns that may be required. Based on my experience, the final version of your estate-planning documents should be available within 30–45 days, assuming the process is not significantly delayed at any point.

*Fees and costs.* You will be billed for our estate-planning services when the work is completed [monthly, quarterly]. As I explained when we met, the fee for our services will be based upon the time actually required to prepare and implement your plans. In order to carry out the work economically and efficiently, I may be assisted by other lawyers and legal assistants in our firm. My time is currently billed at \$\_\_\_ per hour; the time of my associates at between \$\_\_\_ and \$\_\_\_ per hour; and the time of legal assistants at \$\_\_\_ per hour. Our rates are usually adjusted in December of each year, with the new rates taking effect on January 1. While the total amount of our fee will depend on the number and length of our meetings, the complexity of the plans you adopt, and the number of drafts we prepare of various documents, based upon the information I now have, I estimate that the total cost of formulating and implementing your estate plans will be between \$\_\_\_\_\_ and \$\_\_\_\_\_. Any photocopying, communications, or delivery services will be billed to you at cost.

*Confidentiality.* Any information we receive from either or both of you may be shared with others in our office in order to carry out our engagement. The information will not be communicated to others, particularly persons outside our office, except to the extent we believe is reasonably appropriate to share with your other advisors. As between yourselves, you have agreed that there will be full and complete disclosure of all information that is relevant and material to our engagement, including information that one or both of you might characterize as confidential. Accordingly, we may provide information to one of you that we receive from the other regardless of the time or manner in which it is communicated to us.

*Conflicts.* Each of you is free to develop an independent plan for the disposition of your property. Some couples adopt plans that are mirror images of each other, but others do not. We may represent you both although you may differ regarding the manner in which you each choose to dispose of your property. As between the two of you, we will not advocate the interests of one of you over the other. We may not be able to assist with matters in which your interests are directly adverse, such as negotiating and defining your respective interests in a property-status agreement. Should a serious conflict in your interests develop, we may be required to withdraw from representing both of you.

If the foregoing accurately expresses our agreement, please sign and return the enclosed copy of this letter.

Sincerely,

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We confirm the engagement of your firm on the foregoing terms:

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Husband

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Wife

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Date

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Date

An actual engagement letter might contain significantly different terms regarding various matters, such as fees. For example, the lawyer and clients might agree that the lawyer's compensation would be based on a fixed fee rather than on hourly rates.<sup>97</sup> The letter might also include more detailed language regarding confidentiality, conflicts, or other appropriate subjects.

#### CONCLUSION

The joint representation of multiple clients in estate planning is generally appropriate and beneficial to clients. With the broader recognition given to conflict waivers under Rule 1.7, joint representations are somewhat more feasible. A lawyer should always exercise care in considering whether to accept multiple clients. Among other things, the lawyer must explore fully with the prospective clients the ramifications of a joint representation. In some instances they may rationally and reasonably choose each to be represented by separate counsel. Most estate planners would not agree to represent multiple clients in the same matter pursuant to the separate regime. At the least, a lawyer should be extremely wary of attempting to represent multiple clients separately if the clients insist that each of them reserves the right to direct that some information regarding the representation would not be shared with the other client or clients.

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97. For a fixed-fee sample form, see PRICE & DONALDSON, *supra* note 85, at 1-35.