American Heart Association

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The Two of You Came to Me for Estate Planning – But Let's Talk About What Happens When You Get Divorced!

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Bruce Stone is a shareholder of Goldman Felcoski & Stone P.A., in Naples, Florida. His practice consists primarily of trust and estate planning. A significant part of his practice involves disputed or complex situations in which he is retained to find creative planning solutions or to serve as expert witness, mediator or arbitrator.

Bruce is a lifelong Florida resident, but he was born in Atmore, Alabama (one of the towns mentioned in the song "I've Been Everywhere" covered by Hank Snow and Johnny Cash) because the closest hospital to his parents' home was just across the Alabama state line. While in high school, he was the Northwest Florida district tractor driving champion for the Future Farmers of America. He was awarded an agricultural scholarship to attend the University of Florida. He was the sole U.S. exchange delegate with the Scottish Young Farmers Organisation in the summer of 1968.

During the summers of his college years at the University of Florida, Bruce played several instruments in a rock band (his band was the featured band for the televised Miss Alabama pageant). He was a member of the University of Florida marching band and symphonic orchestra, and he also served as a church organist during the summer. He was elected to Phi Beta Kappa, graduated in 1971 with high honors, and upon graduation was commissioned as a second lieutenant in the United States Army Reserve.

He was granted a deferral from entering active Army duty so he could attend law school at the Florida State University in the fall of 1971. He graduated from law school in December 1973 with highest honors, was first in his class, and was the editor-in-chief of the law review. During law school and following graduation he remained a member of the U.S. Army Reserves until he was honorably discharged in 1979 with the rank of captain.

Bruce is a Fellow and Past President of the American College of Trust and Estate Counsel. He is a past chair of the Real Property, Probate and Trust Law Section of The Florida Bar. For eight years he served as the chair of the Uniform Law Commission Joint Editorial Board for Uniform Trust and Estate Acts, which monitors and recommends updates to the Uniform Trust Code and all other trust and estate related uniform laws on a nationwide basis. He is a member of the Advisory Committee of the Heckerling Institute on Estate Planning, and an Academician in the International Academy of Estate and Trust Law. In 2001 he received the first-ever Friend of the Trust Industry award from the Florida Bankers Association. He is a member of the National Association of Estate Planners and Councils Hall of Fame. He is an adjunct professor in the University of Miami LLM Masters Program in Estate Planning.

Estate Planning for the (Happily?) Married Couple: Do We Have To Bring Up the Possibility of Divorce?

Bruce Stone

A married couple retains your firm to do their estate planning. They are new clients, and you don't have any background information about them other than what you glean from your firm's estate planning questionnaire which they have filled out in advance of your first meeting with them. Both spouses are in their mid-40's, and they have two children who are in their early teens. They have been married for nearly 20 years, and this is the first marriage for each of them. Both spouses come from middle class families without significant wealth, and there are no prospects for any significant inheritance.

In your first meeting with the couple, you learn that the husband is a partner in a fairly new cryptocurrency venture with two of his close friends from college. Prior to joining with his friends in the formation of their new venture, the husband was a salaried employee of a financial services firm. The wife is a public-school teacher. In the very early years of their marriage, her salary was an important component of their income. When their children were born, she took a leave of absence from teaching to stay home with their children, but as they are now in middle and high school, she has resumed teaching, more from the desire to stay active in her profession than from a financial need for a second income for the marriage. However, her income from teaching did once again become an important component of the couple's finances when the husband decided to leave salaried employment with the financial services firm and join his friends in the formation of their new cryptocurrency venture.

Recently the cryptocurrency venture has had some notable financial success, with some significant income and distributions to the venture's partners, greatly reducing the relative financial need for the wife's teaching salary. As a result, the couple has been able to enjoy much higher levels of income and to accumulate enough savings to make them focus on their estate planning.

The couple have no estate planning documents, not even basic wills. Outside of the husband's interest in his cryptocurrency venture (which he holds in his sole individual name), most (but not all) of the assets the couple own are held in joint and survivorship ownership, so that if one spouse dies, the surviving spouse will become the immediate sole and outright owner of nearly all assets and benefits the couple has been able to accumulate. The wife did inherit several hundred thousand dollars in brokerage accounts when her parents died, and those accounts were never retitled into joint ownership with her husband,

so she individually owns those accounts. Those brokerage accounts have remained passive under the management of the brokerage firm, and no funds have ever been withdrawn from the accounts. Each spouse has relatively modest amounts in basic qualified retirement plans (all of which designate the other spouse as the sole beneficiary in the event of death of the participant spouse), In addition, there are a couple of whole life insurance policies on the husband's life, which he owns individually, and his wife is the designated beneficiary.

The husband advises you that his cryptocurrency venture may have a series of liquidity events over the next several years, which could result in extraordinarily large amounts of income and gains for himself and his two partners. At the suggestion of financial counsel and advisers for the cryptocurrency venture, each partner is now thinking about doing sophisticated estate planning with those likely liquidity events in mind.

General Estate Planning Discussion

In your first meeting with the couple, you note that the husband tends to dominate the conversation, and the wife rarely speaks. Sometimes when she does speak, the husband speaks up and overrides her, for example, by completing her sentences for her. But there doesn't seem to be any obvious tension between them, not even when he speaks over her, and you assume this is simply a part of their normal relationship.

You lead the couple through the normal discussion of educating them how assets are transferred at death, and normal ways to avoid the probate system (joint ownership, pay on death arrangements, beneficiary designations, and revocable trusts). You explain that ever since portability of the estate tax exemption equivalent was enacted, the major estate planning disadvantage of joint and survivor ownership (loss of the benefit of the estate tax exemption of the first spouse to die) was eliminated, and thus joint ownership is an effective way of transferring wealth between spouses and avoiding probate. During that discussion the husband asks whether his wife's brokerage accounts which she inherited from her parents should be transferred into their joint names.

Custodial and Guardianship Provisions

You also discuss the need to address custodial and guardianship arrangements for the couple's two minor children if the couple should die before their children have reached the age of legal majority. There is some disagreement between the couple on which of their family members should take on that responsibility. The husband wants to name his parents as custodians and guardians. The wife disagrees and says the husband's parents are too old

to take on the responsibility. She instead wants her sister to serve as custodian and guardian if the need arises, and alternatively her brother. The husband doesn't agree.

After some back and forth discussion in which they can't arrive at an agreement, you tell the couple that they don't absolutely have to name the same persons – that it won't matter anyway unless both spouses have died, that they can each name different custodians and guardians in their respective wills, and that the surviving spouse's will likely would govern this question. You also explain that a court would make the final determination in any event, as the decision would depend on what was in the best interests of the minor children at the time. After some uncomfortable discussion, the wife finally says to name the husband's parents, but to name her sister and then her brother as alternate custodians and guardians. The husband agrees to that.

The custodian and guardianship provisions of the wife's will which you later draft and send to the clients are as follows.

> If my husband predeceases me and if any of my children are minors, I direct that my husband's parents (or the survivor of them if only one of them is then living) be given custody of my minor children, and if it is necessary to appoint a guardian of the person, I direct that they (or the survivor of them) be appointed as guardian of the person. If my husband's parents do not survive me, or if one or both of them survive me but they both fail or cease to serve as custodian and guardian of the person of my minor children, I appoint my sister to have custody and to serve as guardian of the person of my minor children. If both of my husband's parents and my sister all fail or cease to serve as custodian and guardian of the person of my minor children, I appoint my brother to serve in those capacities. I direct that the guardians not be required to post bond or other security.

The custodian and guardianship provisions of the husband's will are complementary mirror provisions of the provisions of the wife's will.

Life Insurance Planning

The discussion turns to ways to make current transfers of assets to save estate taxes in the event of death of one or both spouses. After discussion the husband agrees that it would be appropriate to transfer ownership of the whole life insurance policies on his life policies to an irrevocable life insurance trust (an ILIT) for the benefit of the wife and their children, with the wife to serve as trustee of the ILIT. The annual premiums are relatively modest, and it is agreed that the husband will continue to pay the policy premiums by gifts

to the trust each year, with standard Crummey demand provisions to shelter the premiums through use of the husband's annual gift tax exclusion. The beneficial provisions of the ILIT which you later draft and send to the clients are as follows.

> During my life and after my death, the Trustee may distribute any amounts it thinks are necessary for the health, support, and maintenance of my wife and my descendants who are living from time to time. My primary concern is for my wife. Before distributing amounts to or for the benefit of my descendants, the Trustee should be satisfied that there will be enough resources to provide for my wife's reasonably foreseeable needs during her lifetime (including her own separate resources). If an Independent Trustee is serving, additional amounts may be spent for the best interests of my wife and my descendants living from time to time as determined solely by the Independent Trustee. The amounts spent for their benefit may be unequal among them, based on their separate needs and resources. Any undistributed income is to be added to principal periodically.

Spousal Lifetime Access Trusts

You then discuss with the couple the possibility of creating spousal lifetime access trusts (SLATs). One key advantage of SLATs for these clients is the ability of the spouses to make irrevocable gifts at lower values of assets likely to appreciate in value (and thereby remove them from their gross estates at death), and to use up the unified credit before future changes in the law might reduce the amount of the unified credit or eliminate it altogether. Coordinated spousal SLATs can allow each settlor spouse to "have his or her cake and eat it too" – by giving the spouse who is the beneficiary of that particular SLAT a limited power to appoint assets of that SLAT in further trust for the benefit of the spouse who is the settlor (and not a beneficiary) of that SLAT. You discuss with the clients that if each spouse creates a SLAT for the benefit of the other spouse and their descendants, the two SLATs must differ enough from each other in their terms so that the IRS cannot "uncross" the two SLATs under the reciprocal trust doctrine and thus cause estate tax inclusion of the respective SLATs in each spouse's gross estate at death.

After thorough review of the couple's assets and making some projections through financial modeling with the assistance of a financial consulting firm, you recommend that the husband transfer a significant amount of jointly owned assets and also of some interests in his cryptocurrency venture (which he is permitted to do under the venture's governing documents) to the wife, to enable her to create and fund a SLAT for the benefit of the

husband and their descendants. The beneficial provisions of the wife's SLAT which you later draft and send to the clients are as follows.

> The Trustee will hold and administer the trust estate as follows.
>
> The Trustee may spend any amounts from income or principal it thinks are needed for my husband's health, support, and maintenance, and if there is an Independent Trustee then serving, for my husband's best interests as determined solely by the Independent Trustee.
>
> If the Trustee is satisfied that there will be enough resources to provide for my husband's reasonably foreseeable needs during his lifetime (taking into account my husband's own separate resources), the Trustee may also spend amounts from income or principal during my husband's lifetime that it determines to be needed for the basic and necessary support and health needs of our children and grandchildren living from time to time. Before spending any amounts for our children and grandchildren during my husband's lifetime, the Trustee must take into account all other resources known by the Trustee to be reasonably available to them for those purposes (including the ability of our children to support their own children). Distributions (if any) among our children and grandchildren may be unequal among them, based on their differing needs and separate resources.
>
> Any income that is not distributed under the preceding clauses is to be added to principal periodically.

The husband also creates and funds a SLAT for the benefit of the wife and their descendants. The beneficial provisions of the husband's SLAT are as follows.

> The Trustee will hold and administer the trust estate as follows.
>
> The Trustee may spend any amounts from income or principal it thinks are needed for my wife's health, support, and maintenance, and if there is an Independent Trustee then serving, for my wife's best interests as determined solely by the Independent Trustee.
>
> If the Trustee is satisfied that there will be enough resources to provide for my wife's reasonably foreseeable needs during her lifetime (taking into account my wife's own separate resources), the Trustee may also spend amounts from income or principal during my wife's lifetime that it determines to be needed for the basic and necessary support and health needs

> of our children and grandchildren living from time to time. Before spending any amounts for our children and grandchildren during my wife's lifetime, the Trustee must take into account all other resources known by the Trustee to be reasonably available to them for those purposes (including the ability of our children to support their own children). Distributions (if any) among our children and grandchildren may be unequal among them, based on their differing needs and separate resources.
>
> Any income that is not distributed under the preceding clauses is to be added to principal periodically.

But the beneficial provisions of the husband's SLAT for the wife and descendants also include one additional provision not included in the wife's SLAT for the husband and their descendants: a broad inter vivos and testamentary power of appointment given to the wife in her nonfiduciary capacity as a beneficiary which she can exercise to appoint assets of the SLAT back to the husband or for his benefit if there is ever a need to return wealth to him (for example, because of severe future financial reversals). That additional provision is:

> During her life and upon her death, my wife can make gifts from the assets of the trust to or for the benefit of any one or more persons (including Charitable Organizations) other than her estate, her creditors, or the creditors of her estate.

You explain to the clients that there is no corresponding power of appointment given to the husband in the wife's SLAT because it is important that the two SLATs differ in some material respects, again to avoid application of the reciprocal trust doctrine.

Each SLAT names the beneficiary spouse as a trustee of that SLAT, together with the same corporate fiduciary to serve as the successor trustee if that spouse ceases to serve as trustee. The beneficiary spouse of each SLAT has the power to remove and replace the corporate fiduciary with another corporate fiduciary.

<u>Health Care Surrogate and Living Will Documents</u>

The husband and wife each execute documents naming the other one of them as surrogate to make decisions about health care matters and the termination of life-prolonging decisions. There are no alternate surrogates named.

Pourover Wills and Revocable Trusts

The husband and wife each execute separate pourover wills and revocable trust agreements. The wills devise all tangible personal property to the surviving spouse, and the residuary probate assets to that spouse's revocable trust. Each will names the surviving spouse as the sole personal representative of the deceased spouse's estate. But following the discussion and decision about custodians and guardians of their minor children, both the husband's will and the wife's will name the husband's parents (or the survivor of them) to serve as personal representatives of both estates if there is no surviving spouse, and then the wife's sister and brother as further alternative personal representatives.

The revocable trusts are mirror images of each other. They contain credit shelter trust and marital deduction trust provisions to maximize use of the federal estate tax unified credit and to postpone for as long as possible whatever estate tax liability may be owed on the deaths of the spouses. On the death of the surviving spouse, all assets in each spouse's revocable trust will pour over and be held in trust under the provisions of the husband's ILIT. The two spouses are co-trustees of each spouse's revocable trust. Upon the death or disability of one spouse, the other spouse continues on as sole trustee under both revocable trust agreements. Each trust agreement names the same corporate fiduciary to serve as sole trustee if both spouses cease to serve as trustee.

The Rest of the Story

Two years later, the wife calls you and tells you that she and her husband are in the process of getting divorced. She has discovered that her husband has been carrying on an extramarital affair which began before the two of them consulted with you about their estate planning. To make matters worse, the husband has fathered a child from that extramarital arrangement. The wife asks you to send her divorce attorney copies of all the estate planning documents that you prepared and that she and her husband signed. She tells you that she wants you to give her and her divorce attorney a written summary and analysis of those documents, and what effect their impending divorce will have on the documents you prepared.

What do you do?

Relevant Authority

A. Model Rules of Professional Conduct

Model Rule of Professional Conduct 1.7: Conflict of Interest: Current Clients

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists 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.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

B. American College of Trust and Estate Counsel Commentary on Model Rule of Professional Conduct 1.7

General Nonadversary Character of Estates and Trusts Practice; Representation of Multiple Clients. It is often appropriate for a lawyer to represent more than one member of the same family in connection with their estate plans, more than one beneficiary with common interests in an estate or trust administration matter, co-fiduciaries of an estate or trust, or more than one of the investors in a closely held business. See ACTEC Commentary on MRPC 1.6 (Confidentiality of Information). In some instances the clients may actually be better served by such a representation, which can result in more economical and better coordinated estate plans prepared by counsel

who has a better overall understanding of all of the relevant family and property considerations. The fact that the estate planning goals of the clients are not entirely consistent does not necessarily preclude the lawyer from representing them. Advising related clients who have somewhat differing goals may be consistent with their interests and the lawyer's traditional role as the lawyer for the "family." Multiple representation is also generally appropriate because the interests of the clients in cooperation, including obtaining cost-effective representation and achieving common objectives, often clearly predominate over their limited inconsistent interests. Recognition should be given to the fact that estate planning is fundamentally nonadversarial in nature and estate administration is usually nonadversarial.

Disclosures to Multiple Clients. Before, 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, if the lawyer believes that mode of representation to be more appropriate and separate representation is permissible under the applicable local rules). See ACTEC Commentary on MRPC 1.6 (Confidentiality of Information). In particular, the prospective clients and the lawyer should discuss the extent to which material information imparted by either client would be shared with the other and the possibility that the lawyer would be required to withdraw if a conflict in their interests developed to the degree that the lawyer could not effectively represent each of them. The information may be best understood by the clients if it is discussed with them in person and also provided to them in written form, as in an engagement letter or brochure. As noted in the ACTEC Commentary on MRPC 1.2 (Scope of Representation and Allocation of Authority Between Client and Lawyer), a lawyer may represent co-fiduciaries whose interests do not conflict to an impermissible degree. A lawyer who represents co-fiduciaries may also represent one or both of them as beneficiaries so long as no nonwaivable conflict arises and the lawyer maintains a proper separation of files and services as required by law between the client as fiduciary and the client as beneficiary. (See Examples 1.7-2 and 1.7-4).

Before accepting a representation involving multiple parties, a lawyer should consider meeting with the prospective clients separately, which may allow each of them to be more candid and, perhaps, reveal conflicts of interest. Failure initially to meet with the prospective clients separately risks the possibility that information will be revealed by one of them in a joint meeting that would disqualify the lawyer from representing any of them because of the duties owed to a prospective client under MRPC 1.18 (Duties to Prospective Client).

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Client Joint or Separate Representation. As indicated in the ACTEC Commentary on MRPC 1.6 (Confidentiality of Information), a lawyer usually represents multiple clients jointly. Representing both spouses is the most common situation. In that context, attempting to represent each spouse separately while simultaneously doing estate planning for each, is generally inconsistent with the lawyer's duty of loyalty to each client. Either the lawyer should represent them jointly or the lawyer should represent only one of them. See generally PRICE ON CONTEMPORARY ESTATE PLANNING, section 1.6.6 at page 1059 (2014 ed). In other contexts, however, some experienced estate planners undertake to represent related clients separately with respect to related matters Such representations should only be undertaken if the lawyer reasonably believes it will be possible to provide impartial, competent and diligent representation to each client and even then, only with the informed consent of each client, confirmed in writing. See ACTEC Commentaries on MRPC 1.0(e) (Terminology) (defining informed consent) and MRPC 1.0(b) (Terminology) (defining confirmed in writing). The writing may be contained in an engagement letter that covers other subjects as well.

Example 1.7-1. Lawyer (L) was asked to represent married couple Pat and Dana in connection with estate planning matters. L had previously not represented either Pat or Dana. At the outset L should discuss with Pat and Dana their estate planning goals and the terms upon which L would represent them, including the extent to which confidentiality would be maintained with respect to communications made by each. Assuming that the lawyer reasonably concludes that there is no actual or potential conflict between the spouses, it is permissible to represent both spouses as joint clients. Before undertaking such a representation, the lawyer should elicit from the spouses an informed agreement in writing that the lawyer may share any information disclosed by one of them with the other. See ACTEC Commentary on MRPC 1.6 (Confidentiality of Information).

Example 1.7-1a. Lawyer (L) was asked to represent Father (F) and Son (S) in connection with estate planning matters. L had previously not represented either F or S. At the outset L should discuss with F and S their estate planning goals and the terms upon which L would represent them, including the extent to which confidentiality would be maintained with respect to communications made by each. If the prospective clients have common estate planning objectives and coordination is important to them, and there do not appear to be any prohibitive conflicts, the lawyer could undertake the representation of the two clients jointly with an agreement that information can be shared. Depending on the circumstances, however, a lawyer may be able to represent the father and son as

separate clients between whom information communicated by one client will not be shared with the other. Even then, the circumstances may be such that the lawyer knows or should know that their estate plans are interconnected. In that situation, separate representation may be appropriate, provided that there is no obvious conflict of interest between the clients. But even so the lawyer will need to make a conflict determination and may need to obtain the informed consent of each client if there is a "significant risk" that the representation of one might be materially limited by the representation of the other. In such a case, each client must give his or her informed consent confirmed in writing. The same requirements apply to the representation of others as joint or separate multiple clients, such as the representation of other family members, business associates, etc.

Consider Possible Presence and Impact of Any Conflicts of Interest. A lawyer who is asked to represent multiple clients regarding related matters must consider at the outset whether the representation involves or may involve nonwaivable conflicts, including ones that affect the interests of third parties or the lawyer's own interests. The lawyer must also bear this concern in mind as the representation progresses: What was a tolerable conflict at the outset may develop into one that precludes the lawyer from continuing to represent one or more of the clients.

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.

Example 1.7-3. Lawyer (L) represented spouses Pat and Dana jointly with respect to estate planning matters. Pat died leaving a will that appointed Bank (B) as executor and as trustee of a trust for the benefit of Dana that meets the QTIP requirements under I.R.C. 2056(b)(7). L has agreed to represent B and knows that Dana looks to L as her lawyer. L may represent both B and Dana if the requirements of MRPC 1.7 are met. If a serious conflict arises between B and Dana, L may be required to withdraw as counsel for B or Dana or both. L may be able to continue representing one of them, depending on the circumstances and the provisions of the engagement letters. L may inform Dana of her elective share, support, homestead or other rights under the local law without violating MRPC 1.9 (Duties to Former Clients). However, without the informed consent of all affected parties confirmed in writing, L should not represent Dana in connection with an attempt to set aside Pats will or to assert an elective share. See ACTEC Commentaries on

MRPC 1.0(e) (Terminology) (defining informed consent) and MRPC 1.0(b) (Terminology) (defining confirmed in writing).

Conflicts of Interest May Preclude Multiple Representation. Some conflicts of interest are so serious that the informed consent of the parties is insufficient to allow the lawyer to undertake or continue the representation (a "non-waivable" conflict). Thus, a lawyer may not represent clients whose interests actually conflict to such a degree that the lawyer cannot adequately represent their individual interests. A lawyer may never represent opposing parties in the same litigation. A lawyer is almost always precluded from representing both parties to a prenuptial agreement or other matter (such as a postnuptial agreement) with respect to which their interests directly conflict to a substantial degree. Thus, a lawyer who represents the personal representative of a decedent's estate (or the trustee of a trust) should not also represent a creditor in connection with a claim against the estate (or trust). This prohibition applies whether the creditor is the fiduciary individually or another party. On the other hand, if the actual or potential conflicts between competent, independent parties are not substantial, their common interests predominate, and it otherwise appears appropriate to do so, the lawyer and the parties may agree that the lawyer will represent them jointly subject to MRPC 1.7 (Conflict of Interest: Current Clients).

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Prospective Waivers. A client who is adequately informed may waive some conflicts that might otherwise prevent the lawyer from representing another person in connection with the same or a related matter. These conflicts are said to be "waivable." Thus, a surviving spouse who serves as the personal representative of the deceased spouse's estate may give her informed consent, confirmed in writing, to permit the lawyer who represents her as personal representative also to represent a child who is a beneficiary of the estate. The lawyer also would need an informed consent from the child that is confirmed in writing before undertaking such a dual representation. However, a conflict might arise between the personal representative and the beneficiary that would preclude the lawyer from continuing to represent both, or either, of them.

Comment 22 to MRPC 1.7, as amended in 2002, states:

[22] Whether a lawyer may properly request a client to waive conflicts that might arise in the future is subject to the test of paragraph (b). The effectiveness of such waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails.

ABA Formal Ethics Opinion 05-436 (2005), interpreting MRPC 1.7(b), provides: "A lawyer in appropriate circumstances may obtain the effective informed consent of a client to future conflicts of interest" in a "wider range of future conflicts than would have been possible under the Model Rules prior to their amendment."

Comment 22 to MRPC Rule 1.7 continues: The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding. ... [I]f the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, such consent is more likely to be effective, particularly if, e.g., the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation.

As used in Comment 22 and ABA Formal Ethics Opinion 05-436 (2005), the term "waiver" means "informed consent," as defined in MRPC 1.0 (Terminology).

Several additional limitations and requirements apply to prospective waivers: 1) Some conflicts, of course, are not waivable [see MRPC 1.7(b)(2) and (3)]; 2) the client's informed consent must be confirmed in writing [see MRPC 1.7(b)(4)]; 3) a client's informed consent to a future conflict, "without more, does not constitute the client's informed consent to the disclosure or use of the client's confidential information against the client [see MRPC 1.6 (Confidentiality of Information)]"; and 4) in any event, the lawyer considering taking on a later matter arguably covered by an informed prospective consent must nevertheless determine whether accepting the later engagement is prohibited for any other reason under either MRPC 1.7(b) or MRPC 1.9 (Duties to Former Clients). ABA Formal Opinion 05-436 at 4-5. Finally, the lawyer in any event would need the consent of the other client whose interests are affected by the representation. MRPC 1.7(a).

Lawyers should also note that neither Comment 22 nor ABA Formal Opinion 05-436 will be binding on the jurisdiction in which a lawyer practices. This is important because MRPC 1.7 limits the circumstances to which it applies under both paragraph (a) and (b) to situations where "a concurrent conflict of interest [exists] under paragraph (a)." Accordingly, a state disciplinary authority could argue that since Rule 1.7 applies only to a concurrent conflict of interest, neither Comment 22 nor ABA Formal Ethics Opinion 05-436 (2005) accurately reflects the text of MRPC 1.7, so MRPC 1.7(b) would not control a future conflict of interest.

In addition, the lawyer should consider the impact, if any, that MRPC 1.8 (h) could have on a state disciplinary authority. It provides: "A lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement." A claim that a lawyer asserted the interests of another party in conflict with a client's interest normally constitutes a breach of fiduciary duty, rather than malpractice. Even so, both as a matter of substantive law and pursuant to the Rules of Professional Conduct of a particular state, the disciplinary authority or court may believe that of the two types of misconduct, a client's right to bring a claim in the future for breach of the lawyer's fiduciary duty to the client deserves greater protection than a client's right to bring a future claim for malpractice. Thus, a state disciplinary authority or court could apply MRPC 1.8(h) to a future conflict of interest on the basis that "malpractice" includes a "breach of fiduciary duty" to the client. (See Day v. Rosenthal (1985) 217 Cal. Rptr. 89, cert. denied, 106 Sup. Ct. 1267 (1986) where the court upheld a multi-million dollar judgment against an attorney for legal malpractice, breach of fiduciary duty, and fraud by finding that "it is an attorney's duty to protect his client in every possible way and it is a violation of that duty for the attorney to 'assume a position adverse or antagonistic to his client without the latter's free and intelligent consent given after full knowledge of all the facts and circumstances. . . . An attorney's duty, the breach of which amounts to negligence, is not limited to his failure to use the skill required of lawyers. Rather, it is a wider obligation to exercise due care to protect a client's best interests in all ethical ways and in all circumstances. The standards governing an attorney's ethical duties are conclusively established by the Rules of Professional Conduct. They cannot be changed by expert testimony. . ." (Ibid. at 102); See also Mirabito v. Liccardo (1992) 5 Cal.Rptr. 2d 571, holding that where the applicable Rule of Professional Conduct provides the standard by which an attorney's breach of his fiduciary duty is measured, consideration of the Rule by the trier of fact in determining the breach is entirely proper.

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Significant Risks Arising From a Lawyer's Own Interests. Estate planners are often asked questions about techniques for avoiding taxes and/or creditors. Some of these techniques involve sophisticated instruments which are expensive for the client and may not be appropriate for the client's situation. MRPC 1.7(a)(2) notes that "[a] concurrent conflict of interest exists if …there is a significant risk that the representation of [a client] will be materially limited by …a personal interest of the lawyer." It is a conflict of interest and also a violation of the duty of competence for a lawyer to recommend to a client work that 112 the client does not need, but which will increase fees for the lawyer.

See MRPC 1.1 (Competence). If the lawyer is recommending investment vehicles or products in which the lawyer has a financial stake apart from the time required to prepare the instrument, the situation may be considered a business transaction with the client. In that case, the requirements of MRPC 1.8(a) (Conflict of Interest: Current Clients: Specific Rules) will need to be satisfied.

Example 1.7.6 Pat dies leaving a will that passes his entire estate to spouse Dana outright and free of trust. The law of the state in which Pat resides provides for a summary administrative procedure allowing for a simplified and relatively inexpensive transfer of title to Dana without the need for a formal probate administration. Any lawyer retained by Dana should not initiate a formal probate administration in order to generate a higher legal fee unless compelling legal reasons exist for utilizing a formal probate administration, the lawyer informs Dana of those compelling reasons, and Dana consents to the use of such a formal administration and the correspondingly greater legal fee.

Confidentiality Agreements. A lawyer generally should not sign a confidentiality agreement that bars the lawyer from disclosing to the lawyer's other current and future clients the details of an estate planning strategy developed by a third party for the benefit of the lawyer's client. As stated in Ill. Op. 00-01, a lawyer who signs such a confidentiality agreement creates an impermissible conflict with the lawyer's other clients who might benefit from the information learned in the course of representing this client. "In the case at hand, the Lawyer's own interests in honoring the Confidentiality Agreement would 'materially limit' [the Lawyer's] responsibilities to Clients B, C and D because Lawyer would be prohibited from providing beneficial tax information to Clients B, C and D." See MRPC 5.6 (Restrictions on Right to Practice) and Restatement of the Law Governing Lawyers §59, cmt. e ("Confidential client information does not include what a lawyer learns about the law, legal institutions such as courts and administrative agencies, and similar public matters in the course of representing clients."). See also ACTEC Commentary on MRPC 1.6 (Confidentiality of Information).

C. New York Rules of Professional Conduct

Rule 1.7 Conflict of Interest: Current Clients

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if a reasonable lawyer would conclude that either:

(1) the representation will involve the lawyer in representing differing interests; or

(2) there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

D. Florida Rules of Professional Conduct

Rule 4-1.7 Conflict of Interest; Current Clients

(a) Representing Adverse Interests. Except as provided in subdivision (b), a lawyer must not represent a client if:

(1) the representation of 1 client will be directly adverse to another client; or

(2) there is a substantial risk that the representation of 1 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.

(b) Informed Consent. Notwithstanding the existence of a conflict of interest under subdivision (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a position adverse to another client when the lawyer represents both clients in the same proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing or clearly stated on the record at a hearing.

(c) Explanation to Clients. When representation of multiple clients in a single matter is undertaken, the consultation must include an explanation of the implications of the common representation and the advantages and risks involved.

E. Excerpts from Official Comment to the Florida Rules of Professional Conduct

Loyalty to a client is also impaired when a lawyer cannot consider, recommend, or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests. The conflict in effect forecloses alternatives that would otherwise be available to the client. Subdivision (a)(2) addresses such situations. A possible conflict does not itself preclude the representation. The critical questions are the likelihood that a conflict will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.

A client may consent to representation notwithstanding a conflict. However, as indicated in subdivision (a)(1) with respect to representation directly adverse to a client and subdivision (a)(2) with respect to material limitations on representation of a client, when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When more than 1 client is involved, the question of conflict must be resolved as to each client.

"Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

F. Florida Statutes

732.703 Effect of divorce, dissolution, or invalidity of marriage on disposition of certain assets at death.—

(1) As used in this section, unless the context requires otherwise, the term:

(a) "Asset," when not modified by other words or phrases, means an asset described in subsection (3), except as provided in paragraph (4)(j).

(b) "Beneficiary" means any person designated in a governing instrument to receive an interest in an asset upon the death of the decedent.

(c) "Death certificate" means a certified copy of a death certificate issued by an official or agency for the place where the decedent's death occurred.

(d) "Employee benefit plan" means any funded or unfunded plan, program, or fund established by an employer to provide an employee's beneficiaries with benefits that may be payable on the employee's death.

(e) "Governing instrument" means any writing or contract governing the disposition of all or any part of an asset upon the death of the decedent.

(f) "Payor" means any person obligated to make payment of the decedent's interest in an asset upon the death of the decedent, and any other person who is in control or possession of an asset.

(g) "Primary beneficiary" means a beneficiary designated under the governing instrument to receive an interest in an asset upon the death of the decedent who is not a secondary beneficiary. A person who receives an interest in the asset upon the death of the decedent due to the death of another beneficiary prior to the decedent's death is also a primary beneficiary.

(h) "Secondary beneficiary" means a beneficiary designated under the governing instrument who will receive an interest in an asset if the designation of the primary beneficiary is revoked or otherwise cannot be given effect.

(2) A designation made by or on behalf of the decedent providing for the payment or transfer at death of an interest in an asset to or for the benefit of the decedent's former spouse is void as of the time the decedent's marriage was judicially dissolved or declared invalid by court order prior to the decedent's death, if the designation was made prior to the dissolution or court order. The decedent's interest in the asset shall pass as if the decedent's former spouse predeceased the decedent. An individual retirement account described in s. 408 or s. 408A of the Internal Revenue Code of 1986, or an employee benefit plan, may not be treated as a trust for purposes of this section.

(3) Subsection (2) applies to the following assets in which a resident of this state has an interest at the time of the resident's death:

(a) A life insurance policy, qualified annuity, or other similar tax-deferred contract held within an employee benefit plan.

(b) An employee benefit plan.

(c) An individual retirement account described in s. 408 or s. 408A of the Internal Revenue Code of 1986, including an individual retirement annuity described in s. 408(b) of the Internal Revenue Code of 1986.

(d) A payable-on-death account.

(e) A security or other account registered in a transfer-on-death form.

(f) A life insurance policy, annuity, or other similar contract that is not held within an employee benefit plan or a tax-qualified retirement account.

(4) Subsection (2) does not apply:

(a) To the extent that controlling federal law provides otherwise;

(b) If the governing instrument is signed by the decedent, or on behalf of the decedent, after the order of dissolution or order declaring the marriage invalid and such governing instrument expressly provides that benefits will be payable to the decedent's former spouse;

(c) To the extent a will or trust governs the disposition of the assets and s. 732.507(2) or s. 736.1105 applies;

(d) If the order of dissolution or order declaring the marriage invalid requires that the decedent acquire or maintain the asset for the benefit of a former spouse or children of the marriage, payable upon the death of the decedent either outright or in trust, only if other assets of the decedent fulfilling such a requirement for the benefit of the former spouse or children of the marriage do not exist upon the death of the decedent;

(e) If, under the terms of the order of dissolution or order declaring the marriage invalid, the decedent could not have unilaterally terminated or modified the ownership of the asset, or its disposition upon the death of the decedent;

(f) If the designation of the decedent's former spouse as a beneficiary is irrevocable under applicable law;

(g) If the governing instrument is governed by the laws of a state other than this state;

(h) To an asset held in two or more names as to which the death of one co-owner vests ownership of the asset in the surviving co-owner or co-owners;

(i) If the decedent remarries the person whose interest would otherwise have been revoked under this section and the decedent and that person are married to one another at the time of the decedent's death; or

(j) To state-administered retirement plans under chapter 121.

. . . .

(8) This section does not affect the ownership of an interest in an asset as between the former spouse and any other person entitled to such interest by operation of this section, the rights of any purchaser for value of any such interest, the rights of any creditor of the former spouse or any other person entitled to such interest, or the rights and duties of any insurance company, financial institution, trustee, administrator, or other third party.

(9) This section applies to all designations made by or on behalf of decedents dying on or after July 1, 2012, regardless of when the designation was made.

732.507 Effect of subsequent marriage, birth, adoption, or dissolution of marriage.—

(1) Neither subsequent marriage, birth, nor adoption of descendants shall revoke the prior will of any person, but the pretermitted child or spouse shall inherit as set forth in ss. 732.301 and 732.302, regardless of the prior will.

(2) Any provision of a will that affects the testator's spouse is void upon dissolution of the marriage of the testator and the spouse, whether the marriage occurred before or after the execution of such will. Upon dissolution of marriage, the will shall be construed as if the spouse died at the time of the dissolution of marriage.

(a) Dissolution of marriage occurs at the time the decedent's marriage is judicially dissolved or declared invalid by court order.

(b) This subsection does not invalidate a provision of a will:

1. Executed by the testator after the dissolution of the marriage;

2. If there is a specific intention to the contrary stated in the will; or

3. If the dissolution of marriage judgment expressly provides otherwise.

(3) This section applies to wills of decedents who die on or after June 29, 2021.

736.1105 Effect of subsequent marriage, birth, adoption, or dissolution of marriage.—

(1) Neither subsequent marriage, birth, nor adoption of descendants shall revoke the revocable trust of any person.

(2) Any provision of a revocable trust that affects the settlor's spouse is void upon dissolution of the marriage of the settlor and the spouse, whether the marriage occurred before or after the execution of such revocable trust. Upon dissolution of marriage, the revocable trust shall be construed as if the spouse had died at the time of the dissolution of marriage.

(a) Dissolution of marriage occurs at the time the decedent's marriage is judicially dissolved or declared invalid by court order.

(b) This subsection does not invalidate a provision of a revocable trust:

1. Executed by the settlor after the dissolution of the marriage;

2. If there is a specific intention to the contrary stated in the revocable trust; or

3. If the dissolution of marriage judgment expressly provides otherwise.

(3) This section applies to revocable trusts of decedents who die on or after June 29, 2021.

61.075 Equitable distribution of marital assets and liabilities.—

(1) In a proceeding for dissolution of marriage, in addition to all other remedies available to a court to do equity between the parties, or in a proceeding for disposition of assets following a dissolution of marriage by a court which lacked jurisdiction over the absent spouse or lacked jurisdiction to dispose of the assets, the court shall set apart to each spouse that spouse's nonmarital assets and liabilities, and in distributing the marital assets and liabilities between the parties, the court must begin with the premise that the distribution should be equal, unless there is a justification for an unequal distribution based on all relevant factors, including:

(a) The contribution to the marriage by each spouse, including contributions to the care and education of the children and services as homemaker.

(b) The economic circumstances of the parties.

(c) The duration of the marriage.

(d) Any interruption of personal careers or educational opportunities of either party.

(e) The contribution of one spouse to the personal career or educational opportunity of the other spouse.

(f) The desirability of retaining any asset, including an interest in a business, corporation, or professional practice, intact and free from any claim or interference by the other party.

(g) The contribution of each spouse to the acquisition, enhancement, and production of income or the improvement of, or the incurring of liabilities to, both the marital assets and the nonmarital assets of the parties.

(h) The desirability of retaining the marital home as a residence for any dependent child of the marriage, or any other party, when it would be equitable to do so, it is in the best interest of the child or that party, and it is financially feasible for the parties to maintain the residence until the child is emancipated or until exclusive possession is otherwise terminated by a court of competent jurisdiction. In making this determination, the court shall first determine if it would be in the best interest of the dependent child to remain in the marital home; and, if not, whether other equities would be served by giving any other party exclusive use and possession of the marital home.

(i) The intentional dissipation, waste, depletion, or destruction of marital assets after the filing of the petition or within 2 years prior to the filing of the petition.

(j) Any other factors necessary to do equity and justice between the parties.

(2) If the court awards a cash payment for the purpose of equitable distribution of marital assets, to be paid in full or in installments, the full amount ordered shall vest when the judgment is awarded and the award shall not terminate upon remarriage or death of either party, unless otherwise agreed to by the parties, but shall be treated as a debt owed from the obligor or the obligor's estate to the obligee or the obligee's estate, unless otherwise agreed to by the parties.

(3) In any contested dissolution action wherein a stipulation and agreement has not been entered and filed, any distribution of marital assets or marital liabilities shall be supported by factual findings in the judgment or order based on competent substantial

evidence with reference to the factors enumerated in subsection (1). The distribution of all marital assets and marital liabilities, whether equal or unequal, shall include specific written findings of fact as to the following:

(a) Clear identification of nonmarital assets and ownership interests;

(b) Identification of marital assets, including the individual valuation of significant assets, and designation of which spouse shall be entitled to each asset;

(c) Identification of the marital liabilities and designation of which spouse shall be responsible for each liability;

(d) Any other findings necessary to advise the parties or the reviewing court of the trial court's rationale for the distribution of marital assets and allocation of liabilities.

(4) The judgment distributing assets shall have the effect of a duly executed instrument of conveyance, transfer, release, or acquisition which is recorded in the county where the property is located when the judgment, or a certified copy of the judgment, is recorded in the official records of the county in which the property is located.

(5) If the court finds good cause that there should be an interim partial distribution during the pendency of a dissolution action, the court may enter an interim order that shall identify and value the marital and nonmarital assets and liabilities made the subject of the sworn motion, set apart those nonmarital assets and liabilities, and provide for a partial distribution of those marital assets and liabilities. An interim order may be entered at any time after the date the dissolution of marriage is filed and served and before the final distribution of marital and nonmarital assets and marital and nonmarital liabilities.

(a) Such an interim order shall be entered only upon good cause shown and upon sworn motion establishing specific factual basis for the motion. The motion may be filed by either party and shall demonstrate good cause why the matter should not be deferred until the final hearing.

(b) The court shall specifically take into account and give appropriate credit for any partial distribution of marital assets or liabilities in its final allocation of marital assets or liabilities. Further, the court shall make specific findings in any interim order under this section that any partial distribution will not cause inequity or prejudice to either party as to either party's claims for support or attorney's fees.

(c) Any interim order partially distributing marital assets or liabilities as provided in this subsection shall be pursuant to and comport with the factors in

subsections (1) and (3) as such factors pertain to the assets or liabilities made the subject of the sworn motion.

(d) As used in this subsection, the term "good cause" means extraordinary circumstances that justify an interim partial distribution. In determining if extraordinary circumstances exist for purposes of this subsection, the court must consider the following:

1. Whether there is a need for funds in order to avoid or prevent the loss of an asset through repossession or foreclosure, the loss of housing, the default by either party of a marital debt, or the levy of a tax lien.

2. Whether there is a need for funds to pay an expense for a dependent child if nonpayment of the expense would be detrimental to the child.

3. Whether one or both parties have a need to access funds in order to pay a reasonable amount of the attorney fees, court costs, or other suit money for maintaining or defending a proceeding under this chapter.

4. Any other circumstances that justify the entry of an order granting an interim partial equitable distribution.

(6) As used in this section:

(a)1. "Marital assets and liabilities" include all of the following:

a. Assets acquired and liabilities incurred during the marriage, individually by either spouse or jointly by them.

b. The enhancement in value and appreciation of nonmarital assets resulting from the efforts of either party during the marriage or from the contribution to or expenditure thereon of marital funds or other forms of marital assets, or both.

c. The paydown of principal of a note and mortgage secured by nonmarital real property and a portion of any passive appreciation in the property, if the note and mortgage secured by the property are paid down from marital funds during the marriage. The portion of passive appreciation in the property characterized as marital and subject to equitable distribution is determined by multiplying a coverture fraction by the passive appreciation in the property during the marriage.

(I) The passive appreciation is determined by subtracting the value of the property on the date of the marriage or the date of acquisition of the property, whichever is later, from the value of the property on the valuation date in the dissolution action, less

any active appreciation of the property during the marriage as described in sub-subparagraph b., and less any additional encumbrances secured by the property during the marriage in excess of the first note and mortgage on which principal is paid from marital funds.

(II) The coverture fraction must consist of a numerator, defined as the total payment of principal from marital funds of all notes and mortgages secured by the property during the marriage, and a denominator, defined as the value of the subject real property on the date of the marriage, the date of acquisition of the property, or the date the property was encumbered by the first note and mortgage on which principal was paid from marital funds, whichever is later.

(III) The passive appreciation must be multiplied by the coverture fraction to determine the marital portion of the passive appreciation of the property.

(IV) The total marital portion of the property consists of the marital portion of the passive appreciation, the mortgage principal paid during the marriage from marital funds, and any active appreciation of the property during the marriage as described in sub-subparagraph b., not to exceed the total net equity in the property at the date of valuation.

(V) The court shall apply the formula specified in this subparagraph unless a party shows circumstances sufficient to establish that application of the formula would be inequitable under the facts presented.

d. Interspousal gifts during the marriage. An interspousal gift of real property may not be made in the absence of a writing that complies with the requirements of s. 689.01. The joinder of a spouse in the execution of a deed with the sole purpose of the conveyance of homestead real property to any person or entity other than the other spouse or both spouses jointly does not change the character of the real property being conveyed, or any proceeds from the sale thereof, to marital property.

e. All vested and nonvested benefits, rights, and funds accrued during the marriage in retirement, pension, profit-sharing, annuity, deferred compensation, and insurance plans and programs.

f. The marital interests in a closely held business. The court shall determine the value of the marital interests in a closely held business as follows:

(I) The standard of value of a closely held business is fair market value. For purposes of this sub-subparagraph, the term “fair market value” means the price at which

property would change hands between a willing and able buyer and a willing and able seller, with neither party under compulsion to buy or sell, and when both parties have reasonable knowledge of the relevant facts.

(II) If there is goodwill separate and distinct from the continued presence and reputation of the owner spouse, it is considered enterprise goodwill, which is a marital asset that must be valued by the court.

(III) The court must consider evidence that a covenant not to compete or a similar restrictive covenant may be required upon the sale of the closely held business, but such evidence alone does not preclude the court from finding enterprise goodwill.

2. All real property held by the parties as tenants by the entireties, whether acquired before or during the marriage, is presumed to be a marital asset. If, in any case, a party makes a claim to the contrary, the burden of proof is on the party asserting the claim that the subject property, or some portion thereof, is nonmarital.

3. All personal property titled jointly by the parties as tenants by the entireties, whether acquired before or during the marriage, is presumed to be a marital asset. In the event a party makes a claim to the contrary, the burden of proof is on the party asserting the claim that the subject property, or some portion thereof, is nonmarital.

4. The burden of proof to overcome the gift presumption is by clear and convincing evidence.

(b) "Nonmarital assets and liabilities" include all of the following:

1. Assets acquired and liabilities incurred by either party prior to the marriage, and assets acquired and liabilities incurred in exchange for such assets and liabilities.

2. Assets acquired separately by either party by noninterspousal gift, bequest, devise, or descent, and assets acquired in exchange for such assets.

3. All income derived from nonmarital assets during the marriage unless the income was treated, used, or relied upon by the parties as a marital asset.

4. Assets and liabilities excluded from marital assets and liabilities by valid written agreement of the parties, and assets acquired and liabilities incurred in exchange for such assets and liabilities.

5. Any liability incurred by forgery or unauthorized signature of one spouse signing the name of the other spouse. Any such liability is a nonmarital liability only of the party having committed the forgery or having affixed the unauthorized signature. In

determining an award of attorney fees and costs pursuant to s. 61.16, the court may consider forgery or an unauthorized signature by a party and may make a separate award for attorney fees and costs occasioned by the forgery or unauthorized signature. This subparagraph does not apply to any forged or unauthorized signature that was subsequently ratified by the other spouse.

6. Real property acquired separately by either party by noninterspousal gift, bequest, devise, or descent for which legal title has not been transferred to the parties as tenants by the entireties in accordance with this section.

(7) The cut-off date for determining assets and liabilities to be identified or classified as marital assets and liabilities is the earliest of the date the parties enter into a valid separation agreement, such other date as may be expressly established by such agreement, or the date of the filing of a petition for dissolution of marriage. The date for determining value of assets and the amount of liabilities identified or classified as marital is the date or dates as the judge determines is just and equitable under the circumstances. Different assets may be valued as of different dates, as, in the judge's discretion, the circumstances require.

(8) All assets acquired and liabilities incurred by either spouse subsequent to the date of the marriage and not specifically established as nonmarital assets or liabilities are presumed to be marital assets and liabilities. Such presumption is overcome by a showing that the assets and liabilities are nonmarital assets and liabilities. The presumption is only for evidentiary purposes in the dissolution proceeding and does not vest title. Title to disputed assets shall vest only by the judgment of a court. This section does not require the joinder of spouses in the conveyance, transfer, or hypothecation of a spouse's individual property; affect the laws of descent and distribution; or establish community property in this state.

(9) The court may provide for equitable distribution of the marital assets and liabilities without regard to alimony for either party. After the determination of an equitable distribution of the marital assets and liabilities, the court shall consider whether a judgment for alimony shall be made.

(10)(a) To do equity between the parties, the court may, in lieu of or to supplement, facilitate, or effectuate the equitable division of marital assets and liabilities, order a monetary payment in a lump sum or in installments paid over a fixed period of time.

(b) If installment payments are ordered, the court may require security and a reasonable rate of interest or may otherwise recognize the time value of the money to be paid in the judgment or order.

(c) This subsection does not preclude the application of chapter 55 to any subsequent default.

(11) Special equity is abolished. All claims formerly identified as special equity, and all special equity calculations, are abolished and shall be asserted either as a claim for unequal distribution of marital property and resolved by the factors set forth in subsection (1) or as a claim of enhancement in value or appreciation of nonmarital property.

G. Internal Revenue Code section 672(e)

(e) Grantor treated as holding any power or interest of grantor's spouse

(1) IN GENERAL

For purposes of this subpart, a grantor shall be treated as holding any power or interest held by—

(A) any individual who was the spouse of the grantor at the time of the creation of such power or interest, or

(B) any individual who became the spouse of the grantor after the creation of such power or interest, but only with respect to periods after such individual became the spouse of the grantor.

(2) MARITAL STATUS

For purposes of paragraph (1)(A), an individual legally separated from his spouse under a decree of divorce or of separate maintenance shall not be considered as married.

H. Florida Bar Ethics Opinion 95-4

FLORIDA BAR ETHICS OPINION

OPINION 95-4

May 30, 1997

Advisory ethics opinions are not binding.

In a joint representation between husband and wife in estate planning, an attorney is not required to discuss issues regarding confidentiality at the outset of representation. The attorney may not reveal confidential information to the wife when the husband tells the attorney that he wishes to provide for a beneficiary that is unknown to the wife. The attorney must withdraw from the representation of both husband and wife because of the conflict presented when the attorney must maintain the husband's separate confidences regarding the joint representation.

Note: This opinion was approved by the Board of Governors at its May 1997 meeting.

RPC: 4-1.4, 4-1.4(b), 4-1.6, 4-1.7(a), 4-1.7(b), 4-1.9, 4-1.16
Opinions: 92-5, American Bar Association Formal Opinion 91-361; New York State Bar Opinions 555 and 674; Monroe County (N.Y.) Bar Opinion 87-2
Cases: *Alexander v. Superior Court*, 684 P.2d 1309 (Ariz. 1984); *Brennan's, Inc. v. Brennan's Restaurants, Inc.*, 590 F.2d 168 (5th Cir. 1979); *Buntrock v. Buntrock*, 419 So.2d 402 (Fla. 4th DCA 1982); *Campbell v. Pioneer Savings Bank,* 565 So.2d 417 (Fla. 4th DCA 1990); *Gerlach v. Donnelly*, 98 So.2d 493 (Fla. 1957); *Lawyer Disciplinary Board v. McGraw*, 461 S.E.2d 850 (W.Va. 1995); *Luthy v. Seaburn*, 46 N.W.2d (Iowa 1951); *X Corp. v. Doe*, 805 F.Supp. 1298 (E.D.Va. 1992);
Statute: F.S. § 90.502(4)(e)
Misc: American College of Trusts and Estates, *Commentaries on the Model Rules of Professional Conduct* (2d ed. 1995); *Restatement of the Law Governing Lawyers,* sec. 112, comment l. (Proposed Final Draft); *Report of the Special Study Committee on Professional Responsibility*, 28 Real Prop., Prob. & Tr. L.J. 765 (1994); Collett, *Disclosure, Discretion, or Deception: The Estate Planner's Ethics Dilemma from a Unilateral Confidence*, 28 Real Prop., Prob. & Tr. L.J. 683 (1994); Zacharias, *Rethinking Confidentiality*, 74 Iowa L. Rev. 351 (1989).

The Estate Planning, Probate, and Trust Law Professionalism Committee (the "RPPTL Professionalism Committee") of the Florida Bar's Real Property, Probate, and Trust Law Section has requested a formal advisory opinion regarding some ethical issues that trusts and estates practitioners face in day-to-day practice. The RPPTL Professionalism Committee has presented the following generalized situation, reflecting a common type of estate planning representation. The RPPTL Professionalism Committee states that it has found little guidance in the Florida Rules of Professional Conduct, ethics opinions, or case law in Florida and requests that the Professional Ethics Committee address the ethical issues presented.

SITUATION PRESENTED

Lawyer has represented Husband and Wife for many years in a range of personal matters, including estate planning. Husband and Wife have substantial individual assets, and they also own substantial jointly-held property. Recently, Lawyer prepared new updated wills that Husband and Wife signed. Like their previous wills, the new wills primarily benefit the survivor of them for his or her life, with beneficial disposition at the death of the survivor being made

equally to their children (none of whom were born by prior marriage).

Husband, Wife, and Lawyer have always shared all relevant asset and financial information. Consistent with previous practice, Lawyer met with Husband and Wife together to confer regarding the changes to be made in updating their wills. At no point since Lawyer first started to represent them did either Husband or Wife ever ask Lawyer to keep any information secret from the other, and there was never any discussion about what Lawyer might do if either of them were to ask Lawyer to maintain such a separate confidence.

Several months after the execution of the new wills, Husband confers separately with Lawyer. Husband reveals to Lawyer that he has just executed a codicil (prepared by another law firm) that makes substantial beneficial disposition to a woman with whom Husband has been having an extra-marital relationship. Husband tells Lawyer that Wife knows about neither the relationship nor the new codicil, as to which Husband asks Lawyer to advise him regarding Wife's rights of election in the event she were to survive Husband. Lawyer tells Husband that Lawyer cannot under the circumstances advise him regarding same. Lawyer tells Husband that Lawyer will have to consider Lawyer's ethical duties under the circumstances. Lawyer tells Husband that, after consideration, Lawyer may determine to withdraw from representing Husband and Wife. Lawyer further tells Husband that, after consideration, Lawyer may determine to disclose to Wife the substance of Husband's revelation if Husband does not do so himself.

ISSUES PRESENTED

The following ethical questions have been asked by the RPPTL Professionalism Committee:

1. Prior to Husband's recent disclosure, did Lawyer owe any ethical duty to counsel Husband and Wife concerning any separate confidence which either Husband or Wife might wish for Lawyer to withhold from the other?

2. Assuming that Husband does not make disclosure of the information [referred to in Issue 1.] to Wife:

a) Is Lawyer required to reveal voluntarily the information to Wife?

b) May Lawyer in Lawyer's discretion determine whether or not to reveal the information to the Wife? If so, what are the relevant factors which Lawyer may or should consider?

c) If Lawyer does not reveal the information to Wife, is Lawyer required to withdraw from the representation? If so, what explanation, if any, should Lawyer give to Wife?

3. May Lawyer continue to represent Husband alone if Lawyer notifies Wife that Lawyer is withdrawing from the joint representation and will no longer represent Wife? If so, is disclosure to Wife necessary in order to obtain her informed consent to Lawyer's continued representation of Husband?

4. Assuming that adequate disclosure is made to Wife, may Lawyer continue to represent both Husband and Wife if they both wish for Lawyer to do so?

The RPPTL Professionalism Committee views Lawyer's representation of Husband and Wife as a "joint representation." The committee concurs in this view in reaching the opinion expressed below.

DISCUSSION

From the inception of the representation until Husband's communication to Lawyer of the information concerning the codicil and the extra-marital relationship (hereinafter the "separate confidence"), there was no objective indication that the interests of Husband and Wife diverged, nor did it objectively appear to Lawyer that any such divergence of interests was reasonably likely to arise. Such situations involving joint representation of Husband and Wife do not present a conflict of interests and, therefore, do not trigger the conflict of interest disclosure-and-consent requirements of Rules 4-1.7(a) and 4-1.7(b), Rules Regulating The Florida Bar.[1]

In view of the conclusions reached in the remainder of this opinion, we conclude that, under the facts presented, Lawyer was not ethically obligated to discuss with Husband and Wife Lawyer's obligations with regard to separate confidences. While such a discussion is not ethically required, in some situations it may help prevent the type of occurrence that is the subject of this opinion.

We now turn to the central issue presented, which is the application of the confidentiality rule in a situation where confidentiality was not discussed at the outset of the joint representation. A lawyer is ethically obligated to maintain in confidence all information relating to the representation of a client. Rule 4-1.6. A lawyer, however, also has a duty to communicate to a client information that is relevant to the representation. Rule 4-1.4. These duties of communication and confidentiality harmoniously coexist in most situations. In the situation presented, however, Lawyer's duty of communication to Wife appears to conflict with Lawyer's

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[1] It is important to recognize, however, that some spouses do not share identical goals in common matters, including estate planning. For example, one spouse may wish to make a Will providing substantial beneficial disposition for charity but the other spouse does not. Or, either or both of them may have children by a prior marriage for whom they may wish to make different beneficial provisions. Given the conflict of interest typically inherent in those types of situations, in such situations the attorney should review with the married couple the relevant conflict of interest considerations and obtain the spouses informed consent to the joint representation.

duty of confidentiality to Husband. Thus, the key question for our decision is: Which duty must give way? We conclude that, under the facts presented, Lawyer's duty of confidentiality must take precedence. Consequently, if Husband fails to disclose (or give Lawyer permission to

disclose) the subject information to Wife, Lawyer is not ethically required to disclose the information to Wife and does not have discretion to reveal the information. To the contrary, Lawyer's ethical obligation of confidentiality to Husband *prohibits* Lawyer from disclosing the information to Wife.

The lawyer-client relationship is one of trust and confidence. *Gerlach v. Donnelly*, 98 So.2d 493 (Fla. 1957). Rule 4-1.6 recognizes a very broad duty of confidentiality on the part of a lawyer. Save for a few narrow exceptions set forth in the rule, a lawyer is prohibited from voluntarily revealing any "information relating to the representation" of a client without the client's consent. Rule 4-1.6. The duty of confidentiality "applies not merely to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source" and "continues after the client-lawyer relationship has terminated." Comment, Rule 4-1.6.

It has been suggested that, in a joint representation, a lawyer who receives information from the "communicating client" that is relevant to the interests of the non-communicating client may disclose the information to the latter, even over the communicating client's objections and even where disclosure would be damaging to the communicating client. The committee is of the opinion that disclosure is not permissible and therefore rejects this "no-confidentiality" position. The argument for a "no-confidentiality" approach -- which is a departure from the usual rule of lawyer-client confidentiality -- is premised on two bases: (1) that joint clients have an expectation that everything relating to the joint representation that is communicated by one client to the joint lawyer will be shared by the lawyer with the other client (i.e., that joint clients have no expectation of confidentiality within the joint representation); and (2) that the law governing the evidentiary attorney-client privilege sets (or should set) the standard for the lawyer's ethical duties in the joint representation setting. Both of these foundations, in the committee's opinion, are flawed.

Significantly, existing Rule 4-1.6(c)(1) allows the joint clients' lawyer to share information received from one client with the other client, without the need to obtain consent from the communicating client, when such disclosure is reasonably necessary to further the interests of the joint representation. Thus, a presumption of "no confidentiality" is not needed to facilitate representation of joint clients with a mutual goal. Rather, such a presumption would serve only to permit the lawyer to reveal an adverse separate confidence, against the communicating client's wishes and outside the parameters of Rule 4-1.6. At that point in time, it is clear that a conflict of interests has arisen and any "community of interests" has been damaged or destroyed. See *Report of the Special Study Committee on Professional Responsibility* prepared by the American Bar Association Section of Real Property, Probate and Trust Law, 28 Real Prop., Prob. & Tr. L.J. 765, 776-77 (1994) (hereinafter the "Study Committee Report") ("Because these expectations [of joint clients] may change, the lawyer must reassess these expectations as the representation progresses.").

Furthermore, accurately predicting the expectations of a typical client in a given situation is risky business. See, e.g., Zacharias, *Rethinking Confidentiality*, 74 Iowa L. Rev. 351 (1989). This would seem to be especially true concerning separate confidences imparted by one joint client to the lawyer that are in some way adverse to the other joint client. Even commentators who oppose maintaining the usual confidentiality rule in the joint client setting acknowledge that

client expectations concerning confidentiality may be different in the case of separate confidences that are adverse to the non-communicating client than they are when the communication clearly furthers the objectives of the joint representation. See, e.g., *Study Committee Report*, at 788 ("Most [separate] confidences would not be imparted if the client were mindful of the lawyer's competing duty [of communication] to the other spouse."); Collett, *Disclosure, Discretion, or Deception: The Estate Planner's Ethics Dilemma from a Unilateral Confidence*, 28 Real Prop., Prob. & Tr. L.J. 683 (1994) (hereinafter, Collett), at 684 ("Absent agreement concerning the nature of the relationship, clients may have different expectations concerning the lawyer's obligation to maintain individual confidences."). Moreover, a leading case in the area of attorney-client privilege in joint representations states, "As between joint clients, there can be no 'confidences' or 'secrets' *unless one client manifests a contrary intent*." *Brennan's, Inc. v. Brennan's Restaurants, Inc.*, 590 F.2d 168, 173 (5th Cir. 1979) (emphasis added). The committee is of the opinion that it would be inadvisable to rely on such a speculative basis as "joint client expectations" to justify altering the usual lawyer-client confidentiality rule when applied to joint representation situations. This is especially true where confusion or misunderstanding on the part of the clients may be minimized or eliminated by means of a discussion between the lawyer and the clients at the outset of the representation. See Collett, at 738-39.

The second basis advanced for a no-confidentiality rule is the law governing the evidentiary attorney-client privilege. See *Restatement of the Lawyer Governing Lawyers* (Proposed Final Draft) (hereinafter the "*Restatement*"), sec. 112, comment *l*. Communications relevant to a matter of common interest between joint clients generally are not privileged as a matter of law. See, e.g., F.S. sec. 90.502(4)(e). Case law cited in support of a no-confidentiality rule invariably is grounded in the law of attorney-client privilege. See, e.g., *Alexander v. Superior Court*, 685 P.2d 1309 (Ariz. 1984); *Luthy v. Seaburn*, 46 N.W.2d 44 (Iowa 1951).

It is important to note that the ethical duty of confidentiality is broader than the evidentiary attorney-client privilege. *Campbell v. Pioneer Savings Bank*, 565 So. 2d 417 (Fla. 4th DCA 1990); *Buntrock v. Buntrock*, 419 So.2d 402 (Fla. 4th DCA 1982); Opinion 92-5. This distinction holds true even in a joint client setting. *Lawyer Disciplinary Board v. McGraw*, 461 S.E.2d 850 (W.Va. 1995). The Comment to Rule 4-1.6 clearly explains the difference between confidentiality and privilege:

> The principle of confidentiality is given effect in 2 related bodies of law, the attorney-client privilege (which includes the work product doctrine) in the law of evidence and the rule of confidentiality established in professional ethics. The attorney-client privilege applies in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule applies not merely to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or by law.

The ethical duty of confidentiality assures a client that, throughout the course of the representation and beyond, the lawyer ordinarily may not voluntarily reveal information relating to the representation to anyone else without the client's consent. In contrast, the evidentiary privilege becomes relevant only after legal proceedings have begun. The privilege is a limited exception to the general principle that, in formal legal proceedings, the legal system and society should have all relevant information available as part of the search for truth. Thus, there are different purposes underlying the concepts of confidentiality and privilege. See, e.g., *Brennan's, Inc. v. Brennan's Restaurants, Inc.*, 590 F.2d 168 (5th Cir. 1979); *X Corp. v. Doe*, 805 F.Supp. 1298 (E.D.Va. 1992); *Study Committee Report*, at 774. The committee is of the opinion that the law of privilege does not, and should not, set the ethical standard of lawyer-client confidentiality.

It has been argued in some commentaries that the usual rule of lawyer-client confidentiality does not apply in a joint representation and that the lawyer should have the *discretion* to determine whether the lawyer should disclose the separate confidence to the noncommunicating client. This discretionary approach is advanced in the *Restatement*, sec. 112, comment *l*. This result is also favored by the American College of Trusts and Estates in its *Commentaries on the Model Rules of Professional Conduct* (2d ed. 1995) (hereinafter the "ACTEC Commentaries"). The *Restatement* itself acknowledges that no case law supports the discretionary approach. Nor do the *ACTEC Commentaries* cite any supporting authority for this proposition.

The committee rejects the concept of discretion in this important area. Florida lawyers must have an unambiguous rule governing their conduct in situations of this nature. We conclude that Lawyer owes duties of confidentiality to both Husband and Wife, regardless of whether they are being represented jointly. Accordingly, under the facts presented Lawyer is ethically precluded from disclosing the separate confidence to Wife without Husband's consent.

The conclusion we reach is consistent with the Rules of Professional Conduct and with prior committee decisions. For example, the Comment to Rule 4-1.6 notes:

> The Rules of Professional Conduct in various circumstances permit or require a lawyer to disclose information relating to the representation. See rules 4-2.2, 4-2.3, 4-3.3, and 4-4.1. In addition to these provisions, a lawyer may be obligated or permitted by other provisions of law to give information about a client. *Whether another provision of law supersedes rule 4-1.6 is a matter of interpretation beyond the scope of these rules, but a presumption should exist against such a supersession.* [Emphasis added.]

Additionally, in Opinion 92-5 we concluded that a lawyer who was faced with a federal law purporting to require the lawyer to disclose client information that was confidential under Rule 4-1.6, but not protected by the attorney-client privilege, could not disclose the information without client consent until compelled to do so by legal process.

Our conclusion is also supported by out-of-state authorities. Facing an issue quite similar to that presented by the instant inquiry, the Committee on Professional Ethics of the New York State Bar Association in its Opinion 555 concluded that the lawyer's duty of confidentiality to

the communicating joint client (a partner in a two-partner partnership) must take precedence over the lawyer's duty to provide relevant information to the non-communicating joint client (the other partner). That committee reasoned that the mere joint employment of a lawyer does not imply consent on the part of the joint clients to reveal a communication to the noncommunicating joint client where disclosure would be adverse to the communicating client. See American Bar Association Formal Opinion 91-361; New York State Bar Association Opinion 674; Monroe County (N.Y.) Bar Association Opinion 87-2. See also *Study Committee Report*, at 788.

The committee further concludes that Lawyer must withdraw from the joint representation under the facts presented. An adversity of interests concerning the joint representation has arisen. This creates a conflict of interest. Many conflicts can be cured by obtaining the fully informed consent of the affected clients. Rule 4-1.7. Some conflicts, however, are of such a nature that it is not reasonable for a lawyer to request consent to continue the representation. The Comment to Rule 4-1.7 provides in pertinent part:

> A client may consent to representation notwithstanding a conflict. However, as indicated in subdivision (a)(1) with respect to representation directly adverse to a client and subdivision (b)(1) with respect to material limitations on representation of a client, when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent.

In the situation presented, the conflict that has arisen is of a personal and, quite likely, emotionally-charged nature. Lawyer's continued representation of both Husband and Wife in estate planning matters presumably would no longer be tenable. Rule 4-1.16 thus requires Lawyer's withdrawal from representation of both Husband and Wife in this matter.
In withdrawing from the representation, Lawyer should inform Wife and Husband that a conflict of interest has arisen that precludes Lawyer's continued representation of Wife and Husband in these matters. Lawyer may also advise both Wife and Husband that each should retain separate counsel. As discussed above, however, Lawyer may not disclose the separate confidence to Wife. The 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.

Finally, whether Lawyer ethically may represent Husband or Wife in other matters will be governed by Rule 4-1.9.

I. Sample state planning engagement letter for married couple

Terms of Engagement
For Estate Planning Services

We appreciate your decision to retain our firm for your estate planning. This document contains important information about the relationship between you and our firm. Our work will be limited strictly to legal services, unless otherwise described in the letter that accompanies this document. You are not relying on us for business, investment, accounting, or valuation decisions, or to investigate the character or credit of other persons or firms (such as insurance companies or investment advisers), unless otherwise specified in the letter.

Our Duty to Preserve Your Confidential Information

Estate planning is a personal matter that requires you to disclose sensitive information about your family relationships and financial matters, and it may involve difficult questions. You agree to provide us with all information needed to perform our services. You will be responsible for making decisions on matters not involving legal determinations. We urge you to make a complete disclosure of your financial matters and your wishes concerning your estate. Failure to do so could make it impossible for us to give proper advice to you. We will not be responsible for consequences caused by your failure to disclose essential information to us.

The ethics rules require us to keep information that you disclose to us confidential and not to disclose it to persons outside our firm without your permission. The lawyer primarily responsible for your work may disclose information to other persons in our firm as needed to do your work, on a "need to know" basis, but we will not make unnecessary disclosures. At least two of our lawyers will be aware of the provisions of your estate planning documents, because of our policy to have documents reviewed by a second attorney for quality control purposes.

Unless you direct us otherwise in writing, you consent to our sending written communications, including confidential information, to you at any physical location or electronic mail address that you provide to us. You agree that except as indicated otherwise communications sent to each such physical location or electronic mail address are being sent only to you and not to any other person who may have access to such communications.

If persons outside our firm work with us with your permission (such as your accountant, a bank trust officer, a financial planner, an insurance agent, or another law

firm), you agree that we can disclose information to them that they need to fulfill their role in your estate planning. Unless you instruct otherwise, you agree that we can disclose information to them that in our judgment we think is necessary for your best interests.

Our Duty To Share Information With Each of You

We will represent both of you jointly in your estate planning. We owe duties to each of you, and each of you has an obligation to disclose to us all information that is relevant to both spouses' estate planning. You agree that among us (the two of you and our firm), there will be no confidentiality of communications or information, unless and until one of you instructs us otherwise. If one of you discloses information to us that is relevant to the other spouse's estate planning, we can disclose that information to the other spouse if we think it is necessary to fulfill our duties to the other spouse in your estate planning.

Either of you can terminate your permission for us to disclose information to the other spouse at any time, if you give us clear directions not to disclose. However, if you do terminate that permission, we must then decide if a conflict of interest has arisen that prevents us from adequately representing the other spouse. We will make that decision in our sole professional judgment. If we believe that we cannot adequately represent the other spouse without the disclosure, we will notify each of you separately in writing that a conflict of interest has arisen that prevents us from representing either one of you in your estate planning. We could not represent either one of you in your estate planning after that without the consent of both of you. Even if you revoke our permission to disclose information, you should be aware that if there is ever litigation between the two of you, we could be compelled to testify about information we obtained from you or about advice that we gave to you in your estate planning.

If this agreement concerning confidentiality is not acceptable to you, you must advise us immediately so that other arrangements can be made.

If You Become Disabled

The ethics rules that govern us state that if you become unable to make adequately considered decisions, whether because of mental disability or other reasons, we may attempt to continue a normal attorney-client relationship with you as much as is possible. Those rules also state that we are authorized to seek the appointment of a guardian or to take other actions to protect your interests if we reasonably believe that to be necessary.

You can designate other persons to act on your behalf under a durable power of attorney and to make decisions for you concerning your estate planning, such as making gifts of your assets and signing trust agreements on your behalf. If you authorize someone

to act on your behalf, and if we believe their authority is broad enough to allow them to instruct us on your estate planning, you agree that we can continue to do estate planning work for you by dealing with them, and that we can rely on instructions from them. You agree that we can communicate with them and disclose information they need to make informed decisions on your behalf, including information that is protected by the attorney-client privilege. However, if we believe that they do not have the authority to act on your behalf, or if we believe they are not acting in your best interests, we reserve the right to refuse to act on their instructions and instead to take whatever action that we reasonably believe is necessary to protect your interests.

After Your Death

We cannot disclose confidential information about your estate planning after your death, but there are some important exceptions. For example, your personal representative can permit us to disclose information, or we can be required to disclose information to parties in litigation (including the contents of our files such as correspondence and records of conversations with you) if there is a will or trust contest. Even if we are not required to disclose information, you consent and authorize us to make limited disclosures about your estate planning after your death (if there is no personal representative for your estate), if we believe in our professional judgment that such limited disclosures will help to prevent or resolve disputes over your estate planning. You waive the attorney-client privilege to this limited extent.

How We Charge for Our Services

We will bill you for our time at our standard hourly rates, unless you and we agree on a fixed amount.

Fixed Fee Arrangements

If we agree on a fixed amount, our fees will not be limited to that amount if you do not accurately disclose information that we request and need for your work, or if you materially change the terms, conditions, scope, or nature of the work after we agreed on the fixed amount. If this happens, you agree to pay us for our time billed at our standard hourly rates, unless we agree on a revised fixed amount.

Hourly Basis Fee Arrangements

We adjust our hourly rates periodically. We consider the ability, experience, and reputation of our lawyers and paralegals when we set hourly rates. Changes are usually made each January 1, but sometimes they are made at other times. If your bill is based on

hourly rates, increases in rates will apply to all time beginning with the month when the rates are changed. Work done before that month will be billed at the hourly rate that was previously in effect.

Our law firm will represent you, not any one particular lawyer. Different lawyers in our firm may be involved in your work if that will result in lower fees, provide a specialized legal talent, or help us do your work more quickly. If we determine that the services of other lawyers are required, their time will be billed at their standard hourly rates, unless we have agreed on a fixed amount for our fee.

We will try to assign lawyers having the lowest hourly rates consistent with the skills, time demands, and other factors required for your work. We might not assign a lawyer with the lowest hourly rate. For example, in our judgment it may be in your best interests to assign a lawyer with a higher hourly rate, because of that lawyer's skill and experience.

We record and bill our time in one tenth hour (six minute) units.

Costs and Expenses

We will bill you for out of pocket expenses that we pay on your behalf and for our internal costs. Out-of-pocket expenses generally include items such as travel expenses, filing, recording, and registration fees charged by government agencies. Our internal costs include things like photocopying, long-distance telephone calls, fax transmissions, courier services, terminal time for computer research, and complex document production. Rather than tracking precise and exact costs for every single internal charge (which would ultimately result in higher hourly rates for our clients), we charge fixed costs on a reasonable basis for these types of expenses. Our charges for these internal costs may exceed the actual direct costs that we pay to outsiders (such as the telephone company or photocopying contractors).

Sometimes it is necessary to hire other persons to provide services for you, such as accounting or appraisal firms. Their work may have more confidentiality if we (rather than you) request their services, and so we may hire them. However, you will be responsible for paying their fees and expenses, whether paid directly to them or to us in reimbursement.

How We Will Bill You

Our bills generally will be prepared and mailed during the month following the month in which services were rendered and costs incurred. Our bills are due upon receipt. You agree to pay each bill no later than 15 days from the date it was mailed to you. The

failure to pay any bill for fees and costs rendered in accordance with this agreement will constitute a default.

If a default occurs, you agree we may elect to cease all legal services on your behalf at any time after the default, and that we can withdraw as counsel from all pending litigation. If a default occurs, at our sole option we may elect to continue our services pending payment of our bills, for a period of time to be determined solely by us. Even if we continue to represent you pending payment, that will not prevent us from exercising our right to cease representing you immediately upon giving you written notice of our decision. We will notify you in writing if we elect to cease our services. You will nevertheless be liable to the firm for payment of any fees earned and costs incurred prior to our withdrawal as your counsel.

As soon as possible after signing this agreement, we ask that you mail to us a retainer in the amount of $_____. That amount will be nonrefundable, and it will be deemed earned in full by us when we receive it. However, we will apply the retainer toward our bills until it is exhausted. You agree that we can apply the retainer toward each bill before mailing the bill to you. The amount of the retainer that is applied will be shown on the bill. If the retainer is exhausted before our representation of you has ended, we reserve the right to require payment of an additional retainer in an amount reasonably determined by us based on the progress of the engagement and our good faith estimate of the remaining services that will be required of us. If the retainer has not been exhausted before our representation of you has ended, we will retain the full remaining balance.

If the retainer amount has been fully applied, and if a bill is not paid within 15 days after it is mailed to you, interest will accrue on the unpaid balance of that bill beginning on the 15th day and accruing thereafter at the rate of one percent per month. Interest charges will apply to specific monthly bills. Payments made on past due accounts will be applied first to the oldest outstanding bill.

If we have to bring collection efforts for payment, you agree that you will be obligated to pay the costs of collection procedures, including reasonable attorneys fees incurred by us (whether paid to our firm or another firm retained by us).

Each of you agrees that you will be jointly and severally responsible for the payment of all amounts owed to us, and that we can seek payment in full from either one of you at our election. An agreement between the two of you to limit your responsibility for payment of amounts owed to us will not be binding upon us unless we also agree in writing to those limits.

Conflicts with Other Clients

Sometimes we are asked to represent a client who has interests that are adverse to another client who we represent in other unrelated matters. Just as you may wish to hire other law firms that compete with us, we want to be able to consider representing other persons who may be competitors in your business or occupation or who may have interests that are potentially adverse to yours – but only in matters that are unrelated to the work that we do for you. The ethics rules that govern us permit us to accept multiple representations if certain requirements are met.

While we represent you, we will not represent another client in matters that are directly adverse to your interests unless and until we have made full disclosure to you of all relevant facts, circumstances and implications. You agree that we can represent other clients whose interests are adverse to yours if we confirm to you in good faith that the following conditions are met: (i) there is no substantial relationship between the other client's matter and our work for you, both now and in the past; (ii) our representation of the other client will not involve or disclose any confidential information we have received from you (with the use of screening measures, if appropriate); and (iii) the other client also consents to our representation of you. You will have the right to contest (but only if done in good faith) our statement to you that these conditions have been met. If you make a good faith objection to our statement, we will have the burden of proving that these conditions have been met.

Relationships with Financial Institutions

Our firm works with a number of banks, trust companies, and other financial institutions. Sometimes we may represent those institutions as clients, either in a fiduciary capacity such as when they serve as personal representatives or trustees, or directly such as when defending them in litigation matters. Those institutions may refer potential clients to our firm, and we may recommend their services to our clients. If you ask us to recommend a financial institution for your estate planning arrangements, it is possible that we may have separate attorney-client relationships with the institution or institutions we recommend. If you name a corporate fiduciary to serve as your personal representative or trustee, it is possible that the corporate fiduciary might retain our law firm in the future to represent it in performing its duties (assuming that there are no conflicts of interest). You acknowledge that the decision whether to use a corporate fiduciary and the selection of a particular institution is your responsibility, even if you ask us for advice and recommendations.

Florida law does not fix compensation for personal representatives or trustees, although statutory guidelines are given for fees for personal representatives. You are free to negotiate the amounts that will be paid as compensation to your personal representative or trustee, and do not have to agree that fees (including termination fees) will be paid to a corporate fiduciary based on its standard fee schedule.

In addition, some corporate fiduciaries may wish to have provisions included in wills and trust agreements that have the effect of holding them to a lesser standard of responsibility or liability than Florida law would otherwise impose on them. For example, a corporate trustee might wish to be liable only for gross negligence or fraud, and not liable for acts or omissions that are negligent but not grossly negligent. The corporate trustee might want provisions allowing it to invest trust assets in investment products sold by its affiliates, which can result in increased revenues to the financial institution's overall group of affiliated companies. Florida law generally would not permit these types of results in the absence of a specific waiver or authorization by you in your will or trust agreement. If a particular corporate fiduciary asks for these types of provisions to be included in your estate planning documents, we will discuss them with you so that you can make an informed decision whether you wish to use the services of that corporate fiduciary if it won't agree to modify or waive those provisions, even if you were referred to us by that corporate fiduciary or if we separately represent that corporate fiduciary in other matters.

Completion of Our Engagement

When you have executed the estate planning documents that we will prepare for you (such as a will, trust agreement, or related documents such as living will and health care surrogate designations), the attorney-client relationship between us will end unless both you and we have separately and expressly agreed in writing that it will continue.

It may be necessary for you to take additional steps to implement and make best use of your estate planning documents after they have been signed. Failure to take those steps could result in your estate planning being incomplete or in some cases ineffective. The following are some examples of things that you may need to do after you have signed documents that we prepare for you.

Revocable trusts: If you execute a revocable trust agreement with the intention of avoiding probate of your assets when you die, but you fail to take additional steps to fund the trust during your lifetime by transferring legal ownership of your assets to the trustee, it will still be necessary to probate those assets when you die.

Irrevocable trusts: If you create an irrevocable trust, someone must send a notice (commonly referred to as a "Crummey notice") to the beneficiaries each time you make a gift to the trust in order to avoid possible unnecessary use of your gift and estate tax "exemptions." It might also be necessary for you to obtain a taxpayer identification number and to file gift tax and income tax returns, and it might be advisable for you to allocate generation-skipping tax exemption (or instead deliberately elect not to allocate generation-skipping tax exemption) each year on gift tax returns. For some types of trusts such as "GRATs" and charitable remainder trusts, there are important deadlines for making distributions each year, and failure to meet those deadlines could have serious adverse tax consequences.

Family limited partnerships and LLCs: If you create a partnership or limited liability company with the objective of reducing the amount of estate taxes upon your death, but you fail to create proper operating procedures for the entity during your lifetime (or you create them but then fail to follow them), your estate might have to pay estate tax just as if the partnership or limited liability company had never been created.

These types of matters involve actions on your part in the future, or by others acting on your behalf, after we have finished your estate planning documents and you have signed them. Those types of services are not included in this engagement agreement, and we will not be responsible to assist or advise you in those ongoing matters after execution of your documents unless you and we have entered into a written engagement agreement for those additional services.

After we have finished our work for you, we recommend that you review your estate planning periodically, especially if there are important changes in your life (such as marriage, divorce, birth of new family members, death of a beneficiary, or significant changes in your financial net worth), or if there are changes in the law. After you have executed your estate planning documents, we will not have any responsibility to notify you of changes in the law or in your own circumstances that may affect your estate planning. On occasion we may send out general mailings or communications to our existing and past clients informing them of a change in the law for general informational purposes, but you understand and agree that we have no obligation to notify you of any such changes. You understand and agree that if we do send you such a communication, our attorney-client relationship with you will not resume unless and until you and we enter into a separate and new client engagement agreement.

We believe that it is in your best interests to lay out these rules that govern the termination of our attorney-client relationship in a clear and straightforward manner so that

you will not mistakenly assume that we are monitoring such things as changes in the law on your behalf. Even though our attorney-client relationship will end when you have executed the estate planning documents we will prepare for you, we are always happy to continue to be of future service to our past clients. If you would like to engage us to provide additional services for you after the execution of your estate planning documents, or to revise your estate planning documents in the future, please discuss this with us so that you and we can have a clear agreement on the services we are to provide for you and so that a new client engagement agreement can be prepared.

When we finish your work, the attorney client relationship between us will end unless you and we have expressly agreed to a continuation for other matters. Either you or we can terminate the attorney-client relationship before our work is finished, subject to ethical restraints.

Your Agreement With Us

Your agreement to our representation constitutes your acceptance of these terms and conditions. If any of them is unacceptable to you, please tell us now so that we can resolve any differences and proceed with a clear understanding of our relationship.

We accept the terms of this agreement.

Date:_____ _____

Date:_____ _____