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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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# **Do we have a duty to take the possibility of divorce into account when making our estate planning recommendations?**

- The current divorce rate for first marriages per the CDC is about 42%.
- According to the US Census Bureau, the average length of first marriages which end in divorce is 8.2 years.
- Around 60-67% of second marriages end in divorce.
- Third marriages end in divorce 73% of the time.
- A study conducted by the American Sociological Association in 2015 reported that a 70% of divorces are filed by women, and the rate goes up to 90% for college-educated women getting divorced.

# Estate Planning Facts

- Couple married for 20 years, first marriage, no marital agreement. Fairly typical married clients, most assets are owned jointly or will pass by beneficiary designation to the surviving spouse. No wills or trusts are in place.
- Unresolved disagreement over custody arrangements for their minor children.
- Husband recently entered into a startup venture which has the potential to generate enormous amounts of wealth. Wife is a salaried school teacher.

# **Estate Planner's Advice**

- Execute wills, revocable trusts, and health care documents
- Create life insurance trusts
- Possibly sever joint ownership arrangements
- Create spousal lifetime access trusts (SLATs)

## Uh oh!

Several months after the execution of the new wills, the husband asks to meet separately with the lawyer. The husband tells the lawyer that he has just executed a codicil to his will. The codicil was prepared by another law firm without the knowledge of the lawyer.

The husband says his codicil makes a significant gift for the benefit of a woman with whom he has been having an extra-marital relationship. He tells the lawyer that his wife doesn't know about the relationship with the other woman or about the new codicil. The husband asks what will happen after his death if his wife survives him? Does she have rights that will affect will the gift to the other woman under the new codicil?

The lawyer tells the husband that the lawyer cannot advise the husband about his questions, and that the lawyer will have to consider what the lawyer's ethical duties are under these circumstances. The lawyer warns the husband that the lawyer might withdraw from representing both the husband and his wife. The lawyer goes further and tells the husband that the lawyer might decide to disclose to the wife what the husband has told the lawyer if the husband won't tell his wife himself.

The lawyer calls the husband and say the lawyer won't represent either the husband or the wife any longer. The lawyer does nothing to inform the wife about what the husband disclosed, and the lawyer doesn't even send a letter to the couple telling them that the lawyer has ended the representation.

The lawyer never hears from the couple again. However, one year after the husband died, the lawyer receives a demand letter from a law firm representing the wife, demanding a copy of the lawyer's estate planning file. The lawyer complies with the demand.

Another year passes and the lawyer is served with a complaint in a civil lawsuit naming the lawyer and the lawyer's firm as defendants in a lawsuit brought by the wife, suing them for professional negligence, breach of fiduciary duty, fraud, conspiracy, and tortious interference with her marital property and inheritance rights.

What should the lawyer and the law firm do? Should they hire the same law firm to represent them in the suit? If not, should their separate lawyers coordinate their defenses? Do the lawyer and the law firm have the same interests and same level of exposure?

# ABA Model Rule 1.6

A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

...

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

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

# **New York Rule 1.6)(b) (excerpts)**

**(b) A lawyer may reveal or use confidential information to the extent that the lawyer reasonably believes necessary:**

1. to prevent reasonably certain death or substantial bodily harm;
2. to prevent the client from committing a crime;
3. to withdraw a written or oral opinion or representation previously given by the lawyer and reasonably believed by the lawyer still to be relied upon by a third person, where the lawyer has discovered that the opinion or representation was based on materially inaccurate information or is being used to further a crime or fraud;
4. to secure legal advice about compliance with these Rules or other law by the lawyer, another lawyer associated with the lawyer's firm or the law firm.

# Florida Bar Ethics Opinion 95-4

- The formal ethics opinion was issued at the request of the RPPTL Section of the Florida Bar in 1995. Hollis Russell and I worked with renowned Professor Geoffrey Hazard of Hastings, Yale and the University of Pennsylvania in requesting a formal ethics opinion from the Florida Bar Ethics Committee on what would happen based on the facts of the hypothetical situation I just described. The formal advisory opinion was approved by the Florida Bar Board of Governors in 1997.

## Questions presented in 95-4:

Is the lawyer required to reveal the information to the wife?

May the lawyer in the 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?

If the lawyer does not reveal the information to wife, is the lawyer required to withdraw from the representation? If so, what explanation, if any, should the lawyer give to the wife?

## Answer to the first question:

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.

## **Answer to the second question:**

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.

## **Answer to the third question: yes, the lawyer must withdraw.**

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. 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.

**Bonus question number four:** did the Lawyer owe an ethical duty to counsel the Husband and Wife at the beginning of the representation about what the Lawyer could or could not do if and when the Lawyer might receive a communication from either the Husband or Wife which that particular spouse might wish for the Lawyer to withhold from the other spouse?

## **Answer to the bonus question:**

From the inception of the representation until Husband's communication to Lawyer of the information concerning the codicil and the extra-marital relationship, 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)

## **(Answer to bonus question continued)**

We conclude that, under the facts presented, Lawyer was not ethically obligated to discuss with Husband and Wife the 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.



# **Internal Revenue Code section 672**

## **(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.