

ETHICAL TRAPS IN ESTATE PLANNING AND POST-DEATH ADMINISTRATION

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The logo for Waterfall Economidis, Caldwell, Hanshaw & Villamana, PC. It features the word "Waterfall" in a large, blue, serif font. To the left of the "W" is a stylized blue graphic of a waterfall. Below "Waterfall" is the text "Economidis, Caldwell, Hanshaw & Villamana, PC" in a smaller, blue, sans-serif font.

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OVERVIEW OF MAJOR APPLICABLE STATE BAR ETHICAL RULES

- 1) ER 1.7- Duties to Current Clients
- 2) ER 1.8- Fees by 3rd Party
- 3) ER 1.9- Duties to Former Clients
- 4) E.R. 1.6- Confidentiality
- 5) ER 1.18- Duties to Prospective Clients
- 6) ER 4.3- Dealing with Unrepresented Persons
- 7) ER 1.14- Diminished Capacity

CONFLICT OF INTERESTS AND PLANNING- ER 1.7

- **Common ethical dilemma for estate planning counsel and financial/tax professionals is potential and actual conflicts of interest involving joint representation with current clients and the clients' goals and effect goal may have unequally on co-clients**

CONFLICT OF INTERESTS AND PLANNING- ER 1.7

- Joint representation is most common with spouses with joint estate plan or financial planning and ethical issues can arise with:
 - Community property/Separate property
 - Blended family situations
 - Omitting child or unequal shares
 - Unmarried partners and ownership of assets

CONFLICT OF INTERESTS AND PLANNING- ER 1.7

- Also see potential conflict of interests and ethical issues with beyond spouses or partners in current representation including:
 - Representation of multiple family members at same time but in different matters
 - Payment of fees by third-party
 - Waiver of confidentiality or release of information to others
 - Fiduciary role for client that is also a beneficiary of estate plan

CURRENT CONFLICT OF INTEREST- ER 1.7

ER 1.7-

(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 each affected client gives informed consent, confirmed in writing, and:

(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; and

(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.

ER 1.7 CONTINUED

- Representation of one client is directly adverse to another client
 - Client may waive conflict under ER with informed consent, confirmed in writing, and representation is still competent and diligent to both clients.
 - Conflict cannot be waived if involves litigation by same lawyer one client against the other.

CURRENT CONFLICTS- COMMUNITY PROPERTY

- Estate planning attorneys and financial professionals represent spouses all the time. Spouses may develop a conflict of interest if objectives are different such as distribution of assets between children, to charity, and control over assets at first death.
- Conflict is waivable in engagement letter with written confirmation by both clients.
- But engagement letter needs to disclose potential for conflict of interest to occur and explanation of what would happen to representation if actual conflict occurs including withdrawal of the representation.
- And when to send them to separate counsel?
- And what if they refuse to see separate counsel?

CONFLICT OF INTERESTS- COMMUNITY PROPERTY

- Spouses with different idea of what is community and separate property
 - Transmutation of assets into joint revocable trust or non-transmutation and property retains its character
 - Commingling of inheritance or pre-marital assets with community assets i.e. making a gift to community or expect tracing of asset nature
 - Use of mandatory bypass trust on first death or unrestricted to surviving spouse
 - And for a bypass trust, who is trustee and what are assets to fund bypass and survivor's trust (separate or community)

CONFLICTS OF INTEREST- FAMILY MATTERS

- Co-representation of spouses or partners can also have conflicts of interest arise when it is a blended family and spouses do not have the same belief of how assets should pass under estate planning or nonprobate transfers
 - Joint trust- Bypass trust or fully unrestricted on first spouse's death
 - Separate trusts for each spouse with no community assets
 - Interplay of any prenuptial agreement or postnuptial agreement
 - Nomination of agents and fiduciaries including spouse and then after both spouses cannot serve including co-agents

CONFLICTS OF INTEREST- FAMILY MATTERS

- Even in non-blended families, spouses can have differing views that can become conflicts of interest when they have a different opinion about how assets will pass on their death or by lifetime gift
- Omitted child- intentional disinheritance of a child or several
 - Very specific language is needed to confirm specific intention to disinherit (and not have them serve in any fiduciary role also) is best because it is more common typo than expected to have omitted a child on accident in drafting error or poor client communication and gives you incorrect family information
 - Distribution of nothing or something under estate in order to have a no-contest clause with effect
 - \$1 dollar not recommended
 - How specific is reason for disinheritance in estate planning documents

CONFLICTS OF INTEREST- FAMILY MATTERS

- Unequal shares to children also can create issues when representing spouses/partners
 - Clients may want to benefit one child, during lifetime by gifting, or on death more or less than other child(ren)
 - Viewpoint of client may be the one child needs money more than the other child or one child is more “deserving” or responsible
 - Again, how specific is the justification for the difference stated in the actual document
 - Lifetime gifts and loans- documentation matters immensely and if plan is to forgive a loan on death or equalize shares for lifetime advancements or keep unequal shares, needs to be stated specifically
 - Always point out to co-clients whether surviving spouse can change this after first death or only as to the Survivor’s Trust

CONFLICTS OF INTEREST- UNMARRIED PARTIES

- Unmarried parties can be represented as co-clients with the same engagement letter requirements as their married counterparts
- Titling of assets and both clients understanding lifetime and post-death implications of that titling is essential and can get very tricky
 - Example: Bob buys house with his sole assets, Mary moves in with Bob and they live together unmarried for decades. Bob and Mary both contribute to mortgage and improvements to house over those decades. Mary is never on mortgage nor is she on title at time of initial meeting. Bob and Mary want to discuss option to put Mary on title (and mortgage) now or by beneficiary deed. And if they split before doing anything?
 - Example- joint bank account v. power of attorney where assets in bank account are used for housing for both but unequal contribution to account
 - Cohabitation agreements

CONFLICTS OF INTEREST- 1.7 EXAMPLES

- Multi-generational or family representation
 - Parents have plan to pass their estate to children in trust to avoid child making gift to their community estate but you represent child and their spouse and child wants to know legal options to defeat controls parents are imposing.

CURRENT CONFLICT OF INTEREST- MULTI-GENERATIONAL

- It is not uncommon for estate planning attorneys to do documents for the entire family. For example, first for mom and dad, then their adult children and their spouses.
 - This is not prohibited outright by ethical rules since estate planning representation is generally not adverse to other family members and is finite as to clients being represented.
 - Information obtained from each client is confidential to that client and cannot be shared between other family members, without client consent.

TITLING MATTERS

- Whether decedent's estate is passing intestate, by will, or by a trust, titling and beneficiary designations are the key factor to review.
- Lots of common assets and often majority of estate pass by beneficiary designation, pay-on-death, or by right of survivorship
 - Real property, bank accounts, retirement assets
- Can inadvertently thwart estate plan because titling trumps what is stated in the will/trust and intestacy scheme

TITLING MATTERS

- How assets are titled is one of the most common issues that creates a current conflict of interest or major issues in the future
- Common area where client does not understand what they are doing (or ignores attorney advice) or someone assisting them at financial institution does not understand client's overall estate plan (nor does client) and titling is in conflict with estate plan
 - When representing spouses or partners jointly, attorney needs very good transmittal letter at end of representation with titling recommendations for assets consistent with estate plan
 - If client intentionally wants to leave IRA or bank account not following overall estate plan, best if that is documented by attorney (if known) and by financial professional to limit challenge
 - Very hard to unwind titling post-death and not often successful court challenges unless issue of community property and decedent giving more than their half of the community to non-spouse

TITLING OF ASSETS CONTINUED

- Classic scenarios
- Husband and Wife have joint wills leaving all assets equally to their 3 children. H dies and W needing some assistance with money management from her one child puts them on the bank account “for convenience”. Bank contract shows one child as joint owner with W. W dies and Bank pays full account balance to the child on the account. Other two siblings get nothing unless that sibling wants to “share”.
- Wife puts her husband on her retirement plan as primary beneficiary and their two minor children as the contingent beneficiaries. W and H die and beneficiaries of account are age 5 and 7 and account is worth \$800,000. Conservatorship needs to be established for minor children to collect the account, but conservatorship will terminate on the children’s 18th birthday and children will receive full amount outright. Same issue for life insurance plan with minor named.
- Multiparty account with Dad, Brother 1 and Brother 2 as co-owners but contribution all from Dad and Brother 1 removes money without others consent during lifetime and/or on death of Dad
- Unmarried clients with some joint assets and others held separately

CURRENT CONFLICT OF INTERESTS- FEES

- Key issue which is often obvious but needs to be asked with each new matter is:
 - Who is client?
- ER 1.8(f) does allow a third-party to pay legal fees on behalf of the client.
 - But only with client informed consent and no interference in the representation by payment of fees by non-client.
 - And payment by non-client can't violate ER 1.6.
 - Common in estate planning that parents will pay for estate plan for their adult children but again parent is not client and cannot direct attorney.

FORMER CLIENTS E.R. 1.9

ER 1.9

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client:

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by ERs 1.6 and 1.9(c) that is material to the matter; unless the former client gives informed consent, confirmed in writing

(c) A lawyer who has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

ER 1.9 CONTINUED

- Cannot represent another person in a matter that is the same or substantially related to the former client's matter where interests are materially adverse to former client without informed consent.
- This comes up less commonly when proper conflict check searches are done at start of new matter.
- But is seen with divorced spouses that were former clients.
 - Can usually do a new estate plan for the now divorced spouse because no shared attorney-client relationship and new estate plan would be confidential to former spouse.
 - But some lawyers refer past joint clients that are now divorced both to new counsel as a rule to avoid any possible conflict.
 - If should do new estate plan for former client that is divorced from your other former client may depend on dissolution decree and if any potential ambiguities and would need to advise will not take on dispute about decree or post-decree matters.
 - But could not litigate dispute against former client as you have confidential information from prior representation to be used to the detriment of the former client so can't litigate what was CP v. SP for former clients now in dispute including dissolution. Also, makes attorney a witness in the matter which violates ER 3.7.

CONFIDENTIALITY ER 1.6

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted or required by paragraphs (b), (c) or (d), or ER 3.3(a)(3).

(b) A lawyer shall reveal such information to the extent the lawyer reasonably believes necessary to prevent the client from committing a criminal act that the lawyer believes is likely to result in death or substantial bodily harm.

(c) A lawyer may reveal the intention of the lawyer's client to commit a crime and the information necessary to prevent the crime.

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

(1) 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;

(2) to 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;

(3) to secure legal advice about the lawyer's compliance with these Rules;

(4) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(5) to comply with other law or a final order of a court or tribunal of competent jurisdiction directing the lawyer to disclose such information.

(6) to prevent reasonably certain death or substantial bodily harm.

(7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

(e) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

CONFIDENTIALITY IN JOINT REPRESENTATION

ER 1.6

- Confidentiality can also be an issue when representing married spouses.
 - Lawyer needs to obtain a confidentiality waiver in writing and most practitioners adopt the approach of no secrets between spouses and that is explained at the start of the representation and confirmed in engagement letter.
 - Minority approach is that attorney can withhold information between spouses, but option is disfavored since obvious issues would result and often results in withdrawal.

CURRENT CONFLICT OF INTEREST- OTHER PERSON INVOLVED IN MATTER AND 1.6

- Estate planning clients frequently bring a friend or family member to their meetings with counsel, either for support, information sharing, or transportation. But need clear disclosure of waiver of confidentiality.
- Concept of “family meeting” is common where adult children are summoned to receive copies of estate plan and explanation of terms.
- Financial advisor/CPA at meeting
- All made more challenging by discussions about controversial issues like CP/SP.

DUTIES TO PROSPECTIVE CLIENTS- ER 1.18

ER 1.18

(a) A person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client shall not use or reveal that information, except as would be permitted by ER 1.6 or by ER 1.9 with respect to information of a former client.

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) Representation is permissible if both the affected client and the prospective client have given informed consent, confirmed in writing . . . [or screening]

ER 1.18 CONTINUED

- Cannot use information from a prospective client or reveal that information even if not officially retained.
- Need good method to screen cold calls and run conflict check before any information is obtained.
- Best practice is to send letter formally notifying them on non-representation, especially if you do speak to them in any detail and case could have statute of limitations.
- Careful where spouses contact you together and then one comes back later alone for sole representation.

UNREPRESENTED PERSONS- ER 4.3

- ER 4.3
 - In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

ER 4.3 CONTINUED

- Cannot give legal advice to unrepresented persons except to tell them to seek legal counsel and must make sure they know you are counsel and for whom.
- Common to see this with issues with unrepresented persons in “family meeting” scenario where clients ask for children to be in meeting or in probate and trust matters where meeting with beneficiaries to answer questions.
- Representing fiduciaries has special duties to provide certain information and answer certain inquires, so cannot refuse to speak to beneficiaries so position of estate planning client is harder than other areas of law that can decline to speak to unrepresented parties.

POST-DEATH ADMINISTRATION

- Common issue is when one family member takes a fiduciary role and is also a beneficiary or heir of that estate.
- Add complexity in blended family when allocation between community and separate property or aggregate determination of community estate is in hands of trustee who is also a beneficiary
 - For example, second marriage and second wife is successor trustee and funds bypass trust with no separate property of decedent because treats all as community property.
 - Or same example as above but trustee is daughter of first wife and is trustee for trust for benefit of her stepmom of which she is a remainder beneficiary.
 - Trustees (and personal representatives for probate estates) have special fiduciary duties that they owe to the beneficiaries.
 - Daughter Trustee or step-mom trustee needs to be very aware of what capacity she is acting in, personal or fiduciary, and may need to hire separate counsel to represent her individual beneficial interests so she is not acting in her fiduciary capacity while fighting for her own personal interest.
 - Co-trustees for above hypothetical often makes situation worse (and do they have same counsel or is that an unwaivable conflict of interest and if separate counsel, gets very expensive and have to manage overall costs)
 - Private fiduciary solution- but clients often are resistant to costs, but litigation is more costly than having an independent fiduciary at start.

POST-DEATH ADMINISTRATION

- Bifurcated role of trustee/PR and beneficiary heir can get complicated when:
- Tangible personal property dispute where trustee has authority to resolve any disputes (but they are the one with the dispute) or items cannot be located or lifetime “gifts” are alleged when trustee had sole access to residence
- Attorney-client privilege issues for role as trustee when litigation may arise. See *Hammerman v. Northern Trust*, 329 P.3d 1055

DIMINISHED CAPACITY- ER 1.14

ER 1.14

(a) When a client's capacity to make adequately considered decisions in connection with the representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by ER 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under ER 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

DIMINISHED CAPACITY- MANDATORY REPORTING

- 46-454. Duty to report abuse, neglect and exploitation of vulnerable adults; duty to make medical records available; violation; classification
- C. An attorney, accountant, trustee, guardian, conservator or other person who has responsibility for preparing the tax records of a vulnerable adult or a person who has responsibility for any other action concerning the use or preservation of the vulnerable adult's property and who, in the course of fulfilling that responsibility, discovers a reasonable basis to believe that abuse, neglect or exploitation of the adult has occurred shall immediately report or cause reports to be made of such reasonable basis to a peace officer or to the adult protective services central intake unit. All of the above reports shall be made immediately by telephone or online.
- D. Reports pursuant to subsections A and C of this section shall contain:
 - 1. The names and addresses of the adult and any persons having control or custody of the adult, if known.
 - 2. The adult's age and the nature and extent of the adult's vulnerability.
 - 3. The nature and extent of the abuse, neglect or exploitation.
 - 4. Any other information that the person reporting believes might be helpful in establishing the cause of the abuse, neglect or exploitation.
- E. Any person other than one required to report or cause reports to be made in subsection A or C of this section who has a reasonable basis to believe that abuse, neglect or exploitation of a vulnerable adult has occurred may report the information to a peace officer or to the adult protective services central intake unit.
- F. A person having custody or control of medical or financial records of a vulnerable adult for whom a report is required or authorized under this section shall make those records, or a copy of those records, available to a peace officer or adult protective services worker investigating the vulnerable adult's abuse, neglect or exploitation on written request for the records signed by the peace officer or adult protective services worker. Records disclosed pursuant to this subsection are confidential and may be used only in a judicial or administrative proceeding or investigation resulting from a report required or authorized under this section.
- G. If reports pursuant to this section are received by a peace officer, the peace officer shall notify the adult protective services central intake unit as soon as possible and make that information available to them.

MANDATORY REPORTING

- **C. An attorney, accountant, trustee, guardian, conservator or other person who has responsibility for preparing the tax records of a vulnerable adult or a person who has responsibility for any other action concerning the use or preservation of the vulnerable adult's property and who, in the course of fulfilling that responsibility, discovers a reasonable basis to believe that abuse, neglect or exploitation of the adult has occurred shall immediately report or cause reports to be made of such reasonable basis to a peace officer or to the adult protective services central intake unit. All of the above reports shall be made immediately by telephone or online.**

HOW TO REPORT

- **Adult Protective Services (APS)-** by phone call, Central Intake Unit at (877) 767-2385
- **APS online-** Arizona Department of Economic Security has an online form, lots of information/fields to fill out in new portal they use.
- **Or to law enforcement-** need to know whether to call Tucson Police Department or Sheriff depending on location of incident or victim. And if emergency, ok to call 911.

SIGNS OF FINANCIAL ABUSE PER AG

- Accompanied by a stranger to the bank who encourages them to withdraw large amounts of cash
- Accompanied by a family member or other person who seems to coerce them into making transactions
- Unusual banking activity such as large withdrawals during a short time period, switching from one bank to another, ATM activity by a homebound older adult
- Older adult not allowed to speak for themselves or make decisions
- Implausible explanation about what they are doing with their money
- Concerned or confused about "missing" funds from their accounts
- Neglect of needs or receiving insufficient care to meet their needs
- Isolated from others, even family members
- Unable to remember financial transactions or signing paperwork
- Frequent expensive gifts from elder to caregiver
- Older adult's personal belongings, papers and credit cards are missing
- Numerous unpaid bills
- A recently written will when person seems incapable of writing will
- Bank and credit card statements no longer come to the older adult
- Caregiver's name added to bank account
- Older adult unaware of monthly income
- Older adult signs on loan
- Frequent checks made out to 'cash' or inconsistent looking signatures on checks
- Unusual activity in bank account or on tax return

SIGNS OF PHYSICAL ABUSE OR NEGLECT

- Unexplained bruises, welts, sores, cuts or abrasions in places they would normally not be expected
- Fractures in different stages of healing
- Cigar and cigarette burns
- Rope burns on arms/wrists, legs/ankles from improperly tying or bandaging the elderly victim
- Injury that has not been cared for properly
- Injury that is inconsistent with explanation for its cause
- Pain from touching
- Dehydration or malnutrition without illness-related cause
- Poor coloration
- Sunken eyes or cheeks
- Inappropriate administration of medication
- Soiled clothing or bed
- A history of doctor or emergency room "shopping"
- Lack of personal effects, pleasant living environment, personal items
- Forced isolation
- Repeated time lags between the time of any "injury or fall" and medical treatment
- Contradictory statements, implausible stories

DIMINISHED CAPACITY IN REPRESENTATION

- As far as is possible, must maintain a normal attorney-client relationship with a client with diminished capacity
- But have to watch carefully with joint clients where one spouse is beyond the spokesperson and apparent one client has diminished capacity
- Has to be able to understand decisions being made separate from spouse saying they understand.
- Have to be aware of what spouse with capacity can do on behalf of the spouse without capacity (or agent if no surviving spouse) and what permitted under their documents and, if documents permit it, should they take action.
- Being under a guardianship/conservatorship does not mean lacks testamentary capacity to make a will/trust

DIMINISHED CAPACITY IN REPRESENTATION CONT.

- Financial professionals should inquire about powers of attorney and encourage clients to keep these current
- Financial and tax professionals may have an issue when child (especially a remainder beneficiary or heir) gains conservatorship or POA and wants drastic changes to management of assets or change in distributions taken for support perhaps to conserve estate to their benefit
- Financial and tax professionals should also read any conservatorship or guardianship documents or court orders to presented to them carefully as authority in court order is sometimes different than the fiduciary asserts.
 - For example, limited conservatorship only over certain assets or guardian trying to act on financial matters (out of state documents may use terms of guardian and conservator differently than Arizona also)

ENGAGEMENT LETTERS: COMMON PROVISIONS FOR JOINT REPRESENTATION/CP ISSUES

- **Confidentiality-**
 - Please understand that because we will represent you jointly it would be unethical for this firm to withhold information from either of you that is relevant and material to this representation. Therefore, you are consenting that this firm will disclose information provided by one of you to the other or information learned through the representation. Anything you disclose to this firm is still protected from third-parties, just not between yourselves.
 - Include any waiver to any third-party expressly in signed client engagement letter

ENGAGEMENT LETTER CLAUSES CONT.

- Joint Representation:

Our representation of clients is governed by certain legal ethics. I have the duty to exercise independent professional judgment on behalf of each client. When I am requested to represent multiple clients (such as a husband and wife) in the same matter (such as estate planning), I can do so only if I conclude that I can fulfill this duty with regard to each of you and I obtain the consent of each of you. Our representation of you will be a *joint* representation. The estate planning process for a married couple involves discussions of joint objectives. At times, the objectives of a married couple may differ and areas of potential or actual conflict of interest may arise. **For example, you may have different views on how property should pass after the death of one or both of you. You also may have differences as to whether property should be held as separate or community.** If differences develop into conflicting interests, I would not be able to represent either of you.

- Drafting note - malpractice cases consistently hold that you have to give an example of what a conflict could be and if specific situation leads to possible conflict, be more specific.

ENGAGEMENT LETTER CLAUSES CONT.

- **Joint review by spouses**
 - While it is not uncommon for one spouse to serve as the spokesperson, both spouses should be actively involved in the estate planning process. It is important that neither spouse sign documents without thoroughly reading or understanding what they have signed.

ENGAGEMENT LETTER CLAUSES CONT.

- **Withdrawal**
 - If conflicts do arise between the two of you in such a manner that it is impossible for me to perform my duties owed to both of you, it would become necessary that I withdraw as your joint counsel and to advise you both to retain independent counsel.
 - Or variation of above, we will withdraw as counsel for Jane Doe and will continue to represent John Doe.

ENGAGEMENT LETTER CLAUSES CONT.

- Fee from 3rd party
 - As we discussed, even though John Doe has offered to pay my fees in this matter, you would be my client and as such entitled to have your confidences safeguarded and your directions followed. I can accept payment from John Doe in this matter only if they agree not to interfere with my independence of judgment or with our lawyer-client relationship and acknowledge that your confidences should be maintained by me. Again, while we will be happy to include John Doe in our discussion if you so request, and may disclose information to him regarding your estate and related matters if you direct us to, we will not be representing John Doe in this matter.

QUESTIONS?

