

Real Property, Probate and Trust Law

Multiple Representation in Estate Planning: Beyond Advisory Opinion 95-4, Part 2

by Hollis F. Russell

The holdings and procedural history of Advisory Opinion 95-4¹ are examined in detail in an earlier article: *Joint Representation of Spouses in Estate Planning: The Saga of Advisory Opinion 95-4*, 72 FLA. B.J. 39 (Mar. 1998). This article addresses the impact of the holdings of Advisory Opinion 95-4 on engagement arrangements for joint representations of spouses in estate planning and also considers how its holdings affect intergenerational representations in trust and estate matters.

Engagement Arrangement Variation

In general, attorneys and clients may fashion the terms of a particular engagement to define the precise responsibilities of the attorney differently than the responsibilities might otherwise be defined.² Following the Study Committee Report³ and the ACTEC Commentaries,⁴ some attorneys may wish to structure estate planning engagements so as to have discretion to reveal a separate confidence.⁵ Other estate planners instead may prefer for there to be agreement that all information received during the representation, including any information received by separate conference, is required to be shared with both spouses (notwithstanding any later objection by the confiding spouse).⁶ Any agreement along these lines presumably would be structured to take into account different attorneys' standards of practice and individual clients' objectives and preferences.

Practitioners should be careful in undertaking such arrangements,

While supplemental ethics guidance may be needed, its conclusions in general provide a useful framework for multiple representations.

however, since Advisory Opinion 95-4 does not address the extent to which the fundamental ethical rule enunciated therein may be modified by agreement. Cautious practice would call for sufficient preliminary discussion to ensure client comprehension of the import of the arrangement⁷ and for it to be memorialized in a writing⁸ indicating that the terms of the engagement differ from the default confidentiality rules which would otherwise govern under Advisory Opinion 95-4. But even when this is done, can an attorney rely on such an agreement when, at some later date, a separate confidence may be imparted?

Separate confidences often are suddenly made — sometimes "blurted"⁹ — by the client in the confidential setting of the attorney-client relationship before the attorney has had any mean-

ingful opportunity, at the time the confidence is uttered, to alert the client to the consequences of making a separate confidence. Often, the separate confidence would not have been imparted if the client, when so doing, expected that the attorney would reveal it to the co-client. It may be difficult to argue that the client should have remembered the engagement agreement provision, particularly if it was made years earlier at the outset of the representation and was never addressed thereafter. If the agreement mandates disclosure, the attorney may be trapped unwittingly in an unsolvable dilemma of the attorney's own making. On the one hand, disclosure may result in an ethics violation and potential malpractice liability,¹⁰ while on the other hand, nondisclosure may result in contractual liability for failure to abide by the agreement.¹¹

When a modified agreement is reviewed with clients at reasonable intervals during the course of representation, Advisory Opinion 95-4 should not be interpreted to raise the spectre of ethical violation stemming from a separate confidence imparted during an on-going estate planning project. Generally, it should be sufficient to review the subject with the clients at the commencement of each "active" phase of a long-term estate planning relationship.¹² With the discussion relatively fresh in mind, clients should be less likely to impart a separate confidence. Separate confidences may be forthcoming nonetheless, but the significance of the relatively contemporaneous discussion should be that the confiding client may not be warranted in having an expectation of confidentiality.

Each client situation is unique,¹³ however, and there is no authority in Florida to support the foregoing proposition. Moreover, the practitioner should be mindful that a separate confidence may arise during a "dormant"¹⁴ period in an estate planning representation — for example, by telephone discussion several years after the last active period in which estate planning work was done. In such a situation, it may be difficult to argue that there may be no reasonable basis for the confiding client to expect confidentiality.

This concern may be avoided when the practitioner structures the attorney-client relationship to terminate at the conclusion of each estate planning project undertaken for the clients. The consequence of termination is that the attorney is dealing with former clients and, given appropriate provision in an engagement letter or an "exit" letter, "owes more limited duties to them." The attorney presumably should not be required to take any action if a separate confidence is received from one of them after the most recent estate planning project is completed and the attorney-client relationship has been terminated. Accordingly, it may be advisable for a practitioner who wishes to undertake a joint representation under a modified arrangement authorizing disclosure of a separate confidence to structure the arrangement to provide for termination of the attorney-client relationship at the completion of each active period.¹⁷

Another difficult issue is whether an engagement may be structured to permit the attorney to receive separate confidences of material import under a "separate representation" arrangement. The Study Committee Report and the ACTEC Commentaries argue that it is permissible for an estate planner to undertake such a separate representation.¹⁸ Whether or not the clients' situation may otherwise present a conflict of interest at the outset, both clients' informed consent is necessary because a separate confidence of material significance may not trigger a requirement for attorney withdrawal.¹⁹ However,

the Study Committee Report states that there are limits to circumstances in which a separate representation may be maintained:

For the lawyer engaging in a separate representation, the prohibition on the use of confidences from either spouse requires careful handling. The decision of one spouse to change his or her will to reduce or defeat the interests of the other after the preparation of mirror wills is one important example. In a separate representation, the lawyer has no duty or power to advise the other spouse of the change. Adverse confidences not disclosed to the other spouse do not require the lawyer to consider withdrawal. At what point will the lawyer's independent judgment, in recommending changes to that other spouse, be affected? MRPC Rule 1.7(b) requires the lawyer to make this assessment by forcing consideration of the lawyer's duty to other clients. The lawyer who chooses this mode of representation must be prepared to define this boundary and to withdraw at that point.²⁰

The separate confidence in the situation presented in Advisory Opinion 95-4 is presumably an example of such extreme direct adversity as to require attorney withdrawal even if a separate representation had been structured in the engagement agreement"

One leading commentator,²² however, maintains that separate representation by a single attorney is fraught with serious difficulty and may be ethically impermissible.²⁶

Professor Hazard has taken the position that a separate representation by the same attorney may be conceptually flawed because it presumes absence of informed consent by each client with respect to material information (present and/or future) received from one client which must be disclosed to the other in order for each client to give informed consent to the material limits placed on the lawyer's independent judgment in representing each client.²⁴ An attorney undertaking a separate representation may be faced with potentially overwhelming practical problems²⁵ as he or she attempts to compartmentalize information separately received from each spouse, including separate confidences as well as the substance of each spouse's estate plan (which may or may not be disclosed to the other, possibly at differing points in time).²⁶

As enumerated in the Study Committee Report, the potential ethical concerns inherent in a separate representation are broader than the receipt of separate confidences — the attorney may be asked in confidence by one spouse to draft an estate planning instrument which adversely impacts a beneficial interest of the other spouse.²⁷

Typically, each spouse has certain expectations regarding essential elements of the dispositive plan of the other spouse — the level of beneficial disposition to be made for any one or more of the surviving spouse, children (and, in a second marriage, separately taking into account each spouse's separate children by prior marriage), or a favored charitable organization. If one spouse wishes to change an essential element of his or her estate plan in a manner detrimental to the expectations of the other spouse and does not wish to inform the other spouse, it may be impossible for the attorney to exercise independent judgment in advising the other spouse regarding modifications to his or her own estate planning, so that the attorney may be required to withdraw even if the engagement may have been structured as a separate representation.²⁸ Of course, there may be some situations in which spouses have no expectations regarding each other's estate plan. For example, each spouse may be independently wealthy and may establish an estate plan for the primary benefit of separate children by prior marriage. As long as it is understood by each spouse that he or she should not expect any beneficial disposition under the other's estate plan, a separate representation should be ethically permissible for an attorney who is prepared to attempt to compartmentalize each spouse's estate planning situation.

Intergenerational Representation

Beyond representation of married couples, Advisory Opinion 95-4 has significance with respect to situations in which a lawyer or law firm may also represent other family members in estate planning and

other personal matters. It is commonplace for estate planning attorneys to represent entire families — parents as well as adult children (and sometimes their spouses). Advisory Opinion 95-4 does not disturb the estate planning attorney's ability to take on such an expanded representation role in harmonious family situations. The estate planning attorney must be careful, however, to address conflicts of interest and confidentiality concerns among the different individuals within, larger family groups. Some situations will present conflicts of interest and require the clients' informed consent. For example, a closely held family business in which both parents and children participate as shareholders, directors, officers, and employees may be expected to present various difficult long-term estate planning issues concerning matters in which several family members have materially different interests.²⁹ The attorney should be careful to make clear his or her responsibilities to different family members concerning sharing of confidential information. Some families may wish all material information to be shared among the several family units. Other families may wish for estate planning within each family unit to remain confidential and be handled as separate representations.³⁰ When a law firm also is handling other legal work for a family, such as corporate representation of a family business, the estate planning attorney's ethical responsibilities may be further complicated by interrelated corporate matters.³¹ Similar to the difficulties encountered with a separate representation of husband and wife, an attorney engaged in separate representations of different family units may be faced with serious practical difficulties associated with compartmentalizing the information pertaining to each separate representation.³²

Conflict of interest should not be presumed per se to be inherent in every family representation, as is illustrated in two noteworthy cases outside Florida: *Matter of Koch*,³³ 849 P.2d 977 (Kan. App. 1993), and *Blissard v. White*, 515 So. 2d 1196

The attorney's ethical responsibilities can only be determined with reference to the particular circumstances of the individual family setting.

(Miss. 1987). In *Koch*, a Kansas appellate court was presented with malpractice and probate dispute issues involving a will prepared for an elderly widow by the law firm which also represented two of her four sons. The will contained a penalty provision which eventually led to the other two sons being disinherited after her death on account of continuing litigation between the sons. None of the sons was aware of the terms of her will until her death. In dismissing the malpractice claim and upholding her will, the court held that there was no conflict of interest³⁴ presented by the lawyer's multiple representation under the facts of the case, which demonstrated that the will was prepared "without any evidence of extraneous considerations."³⁵

In *Blissard*, the Mississippi Supreme Court affirmed dismissal of a will contest brought by nephews and nieces of the decedent challenging a will in favor of decedent's younger brother, for whom the attorney had also done estate planning work. The brother was not involved in the preparation of the will for the decedent, who was an independent, strong-willed and capable woman. The court ruled that the attorney had not acted improperly in preparing the decedent's will, and expressed concern that a contrary ruling "would create a trap which would void bona

fide gifts and bequests among family members in small towns and rural areas all over this state."³⁶

A significant element of both *Koch* and *Blissard* is apparent recognition by the court that, absent a disqualifying conflict of interest, the substance of estate planning work done for one family member need not be disclosed to other family members whom the attorney also represents. This decision suggests that the "default" rule governing the mode of representation for married couples — joint representation³⁷ — may not be generally applicable for multigenerational representations involving larger family groups. Given the similar rationales found in the *Koch* and *Blissard* decisions, and also in the recent Florida authorities in Advisory Opinion 95-4 and *Cone v. Culverhouse*, 687 So. 2d 888 (Fla. 2d D.C.A. 1987), it should be expected that, if *Koch* or *Blissard* had arisen in Florida, a similar result would have been reached by a Florida court. However, each family representation situation is unique,³⁸ and the attorney's ethical responsibilities can only be determined with precise reference to the particular circumstances of the individual family setting and the specific roles undertaken by the attorney. Although it may not be required in some situations, it is good practice for an estate planning attorney engaging in a multigenerational representation to clarify confidentiality and conflict of interest considerations and obtain each family member's informed consent to the multiple representation.

Conclusion

Advisory Opinion 95-4, along with relevant portions of the Restatement, the ACTEC Commentaries, the Study Committee Report, and other authorities, should enable Florida estate planning attorneys to more effectively counsel spouses and other family members together in estate planning matters. While supplemental ethics guidance may be needed on certain issues not considered in Advisory Opinion 95-4, its conclusions in general provide a useful framework for multiple representations

undertaken by Florida practitioners in estate planning. □

¹ The final text of Advisory Opinion 95-4 is published in *The Florida Bar NEWS*, July 1, 1997, at p.6.

² See **FLORIDA RULES OF PROFESSIONAL CONDUCT** Rule 4-1.2(c) and its comments relating to "Scope of Representation" and "Services Limited in Objectives or Means." Similar provisions are contained in **MODEL RULES OF PROFESSIONAL CONDUCT** Rule 1.2(c). See also **RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §30 (Proposed Final Draft No. 1, March 29, 1996, ALI)** ("RESTATEMENT").

³ *Comments and Recommendations on Lawyer's Duties in Representing Husband and Wife*, 28 **REAL PROP., PROB. & TR. J.** 765, 787-792 (1994) (the "Study Committee Report").

^a **COMMENTARIES ON THE MODEL RULES OF PROFESSIONAL CONDUCT**, at 68-69 (2d ed. March 1995, American College of Trusts and Estates Counsel) (the "ACTEC Commentaries").

¹ See Anne K. Hilker, *Everyday Ethics Problems for Estate Planners*, 1993 ALI-ABA Conference: Estate Planning in Depth, vol. I, 159, at D-1; Charles M. Bennett, *Don't Tell My Husband, But ... "Ethics in Spousal Representation*, **TR. & ES.T.**, May 1996 (vol. 135, no. 6), at 46-47; Bruce S. Ross, *I Do, I Don't and I Won't: The Ethics of Engagement Letters*, 31 **U.**

MIAMI HECKERLING INST., 1801, at 1801.8-9 (1997).

See Hilker, *supra* note 5, at D-1. This approach has been suggested by the Attorney's Liability Assurance Society. Note, *Florida Bar Ethics Advisory Opinion 95-4: Estate Planning—Lawyer's Obligation When Conflict Develops Between Husband and Wife*, **LOSS PREVENTION J.** 20, at 22 (Sept. 1997). See also Theresa Stanton Collett, *Disclosure, Discretion or Deception: The Estate Planner's Ethical Dilemma from a Unilateral Confidence*, 28 **REAL PROP., PROB. & TR. J.** 683, 741 (1994), concluding that disclosure to the nonconfiding spouse should be required unless there is advance client agreement to the contrary. This approach was initially taken in earlier drafts of the Restatement but in 1995 was changed to adopt a discretionary approach. See **RESTATEMENT §112** (Reporter's Note to cmt. 1).

¹ Even if the client situation does not present a conflict of interest (i.e., the spouses have similar goals and interests), careful practice suggests that the explanation should be sufficient for there to be client informed consent to a confidentiality arrangement which would depart from Advisory Opinion 95-4. Also, the attorney who structures a modified agreement which permits disclosure in the attorney's discretion should be mindful that the discretionary approach initially advocated by the Section of Real Property Probate and Trust Law was rejected in

Advisory Opinion 95-4 because of the stated need for Florida attorneys to have

an "unambiguous rule governing their conduct in situations of this nature." See Hollis F. Russell and Peter A. Bicks, *Joint Representation of Spouses in Estate Planning: The Saga of Advisory Opinion 95-4*, 72 **FLA. B.J.** 39 ("The Saga of Advisory Opinion 95-4").

⁸ **RESTATEMENT §29A**, cmt. c, and **§30(1)**, cmt. a.

¹ Malcolm A. Moore & Anne K. Hilker, *Representing Both Spouses: The New Section Recommendations*, 7 **PROB. & PROP.** 26 (July/Aug. 1993).

¹⁰ See *Saga of Advisory Opinion 95-4, supra* note 7.

¹¹ Under agency law, disclosure may be required pursuant to the terms of such an agreement on which the nonconfiding coclient may be entitled to rely. See **RESTATEMENT (SECOND) OF THE LAW OF AGENCY §381**, cmt. a (ALI 1957); *but see* **RESTATEMENT (SECOND) OF THE LAW OF AGENCY §381**, cmt. 3, and **§394**. Under the ethical rule enunciated under Advisory Opinion 95-4, however, disclosure is not permitted. It might conceivably be argued that such an agreement is invalid on account of the ethical rule set out in Advisory Opinion 95-4, and, therefore, no contractual liability arises. This argument is troublesome because it might establish a basis for holding that the attorney committed an ethical violation (and hence is exposed to malpractice liability) by undertaking the agreement at the outset and failing to address its subject matter periodically during the course of the representation.

¹² See **ACTEC Commentaries** at 121-122. In the context of substantial transactional matters other than estate planning, flexibility to modify the confidentiality rules set out in **Advisory Opinion 95-4** may be important to the clients' interests, as withdrawal would typically cause increased costs in seeking new and separate representation. In a commercial joint venture, for example, sophisticated corporate parties might at the outset insist that a single law firm be retained and be able to continue to

work on the project regardless of whether a separate confidence may be imparted, and accordingly may wish for the engagement letter to require disclosure and provide waiver regarding conflict of interest in order to allow continued representation should a conflict arise.

¹³ This consideration is articulated in the RPPTL Section Request Letter, at 10, as follows: "No two factual settings where a dilemma arises akin to the situation presented herein are the same. Each relationship between an attorney and two such clients is unique as to duration, scope, intimacy and informal personal commitments which may have developed."

¹⁸ See ACTEC Commentaries at 121-122; John R. Price, *Ethics in Action Not Ethics Inaction: The ACTEC Commentaries on the Model Rules of Professional Conduct*, 29 U MIAMI HECKERLING INST., 1712, 1712.1 (1995). See generally RESTATEMENT §45.

¹⁵ For discussion of the practical disadvantage in use of an exit letter, see Price, *supra* note 14, at 1712.3.

¹⁶ See FLORIDA RULES OF PROFESSIONAL CONDUCT Rule 4-1.9. See generally JOHN R. PRICE, PRICE ON CONTEMPORARY ESTATE PLANNING §1.34.4 (1996 Supp.); RESTATEMENT §45. Another possible variation in the engagement arrangement is for there to be provision by which one spouse assents to the attorney's continued representation of the other spouse in the event a conflict of interest arises. See Ross, *supra* note 5, at 1801.8 (form of engagement letter providing for waiver of continued representation of one spouse as long as any breach by that spouse of any understanding between the spouses, such as a material estate plan change, is fully disclosed to the other spouse). In the event of a separate confidence, however, the effectiveness of such an advance consent arrangement may be questioned on account of the absence of informed consent at the time the attorney begins to represent only one spouse (i.e., because the

other spouse is unaware of the separate confidence), as discussed at note 7 and accompanying text.

¹⁷ For general guidance on implementation of such a modified arrangement, it may be appropriate to consider the rules applicable to a lawyer acting as an intermediary between clients under MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.2 and FLORIDA RULES OF PROFESSIONAL CONDUCT RULE 4-2.2. See ACTEC Commentaries at 143-46 (discussing how use of a - lawyer in the role of intermediary allows parties significant latitude to shape the nature of their representation with respect to potential conflicts of interest as long as the lawyer consults with the clients on a continuing basis in order to allow them to make informed decisions); see also JOHN R. PRICE, PRICE ON CONTEMPORARY ESTATE PLANNING §1.14.3 (1992) (suggesting that the representation of husband and wife, consistent with an estate planner's role as a family counselor, is **appropriately** subject to the intermediary rule but noting that other commentators have **disagreed**).

¹⁸ Study Committee Report at 772. For sample forms of engagement for separate representation, see Hilker, *supra* note 5, at D-2; Ross, *I Do, I Don't and I Won't*, *supra* note 5, at 1801.9 *et seq.*

¹⁹ Study Committee Report at 794-795.

²⁰ Study Committee Report, at 779-800.

²¹ **Although Advisory Opinion 95-4 does not address this** subject, the RPPTL Section Request Letter takes the position that, even with disclosure, continued representation of both spouses (either joint or separate) by the same attorney in the situation presented in Advisory Opinion 95-4 is not tenable after the separate confidence is imparted: "A true adversity of interests between Husband and Wife would appear to have arisen, so that counsel to each spouse by a separate attorney would seem necessary for each spouse to receive competent representation." RPPTL Section Request Letter at 4. See also Florida Rules of Professional Conduct Rule 4-1.7, comment relating to "Consultation and Consent," which provides in part: "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." For a general discussion of authorities regarding fundamentally antagonistic representations outside of the estate and trust practice, see Florida Advisory Opinion 97-2 (determining that it would be unethical for a Florida attorney to act as a "closing agent" representing both buyer and seller in the negotiation and closing of a sale of a business in Florida, since such transactions are "fraught with adversity and conflict, even for the most scrupulous attorney in the friendliest of deals . . . [and thus] repre-

sents a nonwaivable conflict under Rule 4-1.7(a) and (b)").

²² Geoffrey C. Hazard, Jr., *Conflict of Interest in Estate Planning for Husband and Wife*, 20 THE PROBATE LAWYER 1 (Joseph Trachtman Lecture) (1994) at 5-6, 11-15. Professor Hazard has expressed his skepticism regarding advance written waivers as follows: "My skepticism ultimately derives from my perception that the testimony in an actual subsequent dispute will be to the effect that, whatever the writing might say, the relevant client did not fully understand, so that the predicate 'adequate disclosure' was not adequate. Transaction lawyers, particularly estate planners, are engaged in the very process of establishing 'facts' (e.g., the Will and trust documents) that will be incontrovertible. It therefore goes against their grain (indeed their professional religion) to address the possibility that they cannot control future testimony in a legal malpractice case, which of course is the relevant context." Letter dated August 25, 1997, from Geoffrey C. Hazard, Jr. (on file with authors).

²³ The comment to Florida Rules of Professional Conduct Rule 4-1.7, relating to "Consultation and Consent," provides in part: "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." While the ACTEC Commentaries do state that "it may be possible" to provide separate representation to fully informed clients who give their consent, the ACTEC Commentaries suggest that a lawyer only do so "with great care because of the stress it necessarily places on the lawyer's duties of impartiality and loyalty and the extent to which it may limit the lawyer's inability to advise each of the clients adequately." ACTEC Commentaries, at 66-67. Professor Price has stated his general concern regarding separate representation as follows: "It is difficult to imagine how a husband and wife or other multiple clients could be adequately served by a lawyer who undertook to represent them as separate clients in the same or a closely related matter." Price, *supra* note 14, at 1704.2.

²⁴ See Hazard, *supra* note 22, at 8-15. This position is in general supported by RESTATEMENT §202, cmt. d. More specifically, the REPORTER'S NOTE TO RESTATEMENT §211, cmt. c, provides: "Occasionally, some estate planning lawyers have urged or contemplated 'co-representation' of multiple clients in non-litigation representations, such as husband and wife. The concept is that the lawyer would represent the two or more clients on a matter of common interest on which they otherwise have a conflict of interest only after obtaining informed consent of all affected clients. Its distinguishing feature is that the arrangement would entail, as a matter of specific agreement between the clients and

lawyer involved that the lawyer would provide separate services to

each client and would not share confidential information among the clients, except as otherwise agreed or directed by the client providing the information. . . . The concept of simultaneous, separate representation apparently has not yet been the specific subject of litigation, statute, or professional rule. The risks of conflict and subsequent claims for malpractice are obviously substantial, and any lawyer considering this novel form of representation presumably would fully inform clients of its risks. At least at this point, the advice should include informing the clients that the structure is untried and might have adverse consequences unintended by the lawyer or clients." See *also* ACTEC Commentaries at 90 ("Uninformed or overly broad waivers are of little, if any, value."); ABA Formal Op. 93-372 (taking a "guarded view" of prospective waivers, stating that no lawyer should rely with ethical certainty on a prospective waiver of objection to further adverse representations, particularly since the original client executing the waiver cannot know what confidences will be disclosed in the future or what issues may be raised in a future representation).

²⁵ See Hazard, *supra* note 22, at 16-18.

²⁶ Within a firm of attorneys, a more acceptable arrangement may be for a separate representation to be undertaken by maintaining a screening arrangement, with different attorneys within the law firm separately representing each spouse. See RESTATEMENT § 203, cmt. h, and §204, cmt. d; *but see* Hazard, *Conflict of Interest*, *supra* note ___, at n. 25. The clients' informed consent to such an arrangement should be obtained and would appear to be required under *Birdsall v. Crowngap, Ltd.*, 575 So. 2d 231 (Fla. 4th D.C.A. 1991) (emphasizing that application of Florida Rules of Professional Conduct Rule 4-1.10 must be based on "functional analysis" involving issues of confidentiality and adverse positions, court granted motion to disqualify and rejected theory that, absent waiver of conflict of interest, "Chinese wall" employed by law firm in isolating attorney from lawsuit was adequate to prevent disqualification), which is discussed in Adele I. Stone, *Professional Ethics: Leading Cases and Significant Developments in Florida Law*, 18 NovA L. REv. 597, 609-610 (1993).

²⁷ Study Committee Report at 785 (categorizing such a separate confidence as an "action-related confidence").

²⁸ In a recent case dealing with problems arising from such a confidence, a Tennessee appellate court dismissed a malpractice suit brought by the husband against an attorney who prepared individual, nonreciprocal wills for a married couple even though the husband was under the impression that the wills were to be reciprocal. *Smith v. Goodson*, 1996 Tenfi. App. LEXIS 675. The court ruled in favor of the attorney (who was also the wife's brother) even though he neither informed the husband that the wife's will was not reciprocal nor corrected the husband's

misimpression on this point when the husband later asked the attorney to transfer title of the marital home from his name into his wife's name for the stated purpose of equalizing their estates, apparently in keeping with the husband's impression that their testamentary plans were reciprocal. The court concluded that the attorney had not neglected his duties in regard to either of his clients because, regardless of what the spouses might have told each other or agreed to privately and despite the fact that they had approached the attorney as a couple, they had each communicated to the attorney their respective testamentary estate plans (the wife communicated her wishes to the attorney privately, after her husband had signed his will, paid the fee for both wills and left the attorney's office), which the attorney properly embodied in their respective wills. The court also rejected the husband's argument that the attorney should have withdrawn because he knew that the wife was considering divorcing the husband.

Taking into account the significant conflict of interest which **developed** between the spouses, the *Smith v. Goodson* decision is insupportable under the authorities discussed in *Saga of Advisory Opinion 95-4*, *supra* note 7. The finding that the attorney was not required to withdraw appears difficult to justify given that the wife's actions were materially adverse to the husband's interests, the husband had acted and continued to act in reliance upon the wife's execution of a reciprocal testamentary plan, and that

husband's later actions were made without realizing the degree to which they were materially adverse to his own interests. The court's decision is also questionable because the court's opinion does not address the ethical problems presented by the fact that the attorney's children were primary beneficiaries under the will of the wife (their aunt). See generally ACTEC Commentaries at 111-12;

RESTATEMENT §208.

²⁹ See Price, *supra* note 16, at §1.14.1.

³⁰ See Ross, *supra* note 5, at 1802.1 *et seq.* for alternate forms with respect to the mode of representation (i.e., separate or joint) in estate planning for multiple generations of the same family.

³¹ The extent of potential complexity may be illustrated by the multiple roles undertaken by the single law firm in *Cone v. Culverhouse*, 687 So. 2d 888, 890 (Fla. 2d D.C.A. 1997) (law firm acting as counsel for each of the following: Mrs. Culverhouse; the personal representatives of Mr. Culverhouse's estate; the trustees of the two trusts created by Mr. Culverhouse's will; and the Culverhouse Family Foundation). See also *Symmons v. O'Keefe*, 644 N.E. 2d 631 (Mass. 1995) (law firm acting as counsel to Symmons Industries (a family partnership); counsel to O'Keefe as CEO and Chairman of the Board of Directors of Symmons Industries and as trustee of the Symmons Family Partnership Trust; and estate planner to company **founder/family** patriarch Symmons).

³² See notes 29-31, *supra* and accompanying text. For an in-depth examination of intergenerational representation issues, see Teresa Stanton Collett, *The Ethics of Intergenerational Representation*, 62 FORDHAM L. REV. 1453 (1994). See also *Report of Working Group on Intergenerational Conflicts*, 62 FOANXAM L. REV. 1037 (1994).

³³ *Koch* is particularly significant on account of its extensive and careful analysis of the issues presented and the circumstances of the case, in which Professors Hazard and Wolfram testified as expert witnesses on behalf of their respective clients, who were engaged in protracted litigations involving substantial amounts in controversy. *Koch*, 849 P.2d at 994, 998.

³⁴ "The scrivener's representation of clients who may become beneficiaries of a Will does not by itself result in a conflict of interest in the preparation of the Will. Legal services must be available to the public in an economical, practical way, and looking for conflicts where none exist is not of benefit to the public or the bar." *Koch*, 849 P.2d at 998.

³⁵ *Koch*, 849 P.2d at 997. The *Koch* court distinguished *Haynes v. First Nat'l. State Bank of New Jersey*, 432 A.2d 890 (N.J. 1981), stating that "[i]n our case, the scrivener had no contact with [testatrix's] children in connection with the formulation of her estate plan ... [T]he material difference in the facts limits the persua-

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sive effect of *Haynes*.... [T]he scrivener in *Haynes* may or may not have been able

to exercise independent professional judgment but we do not see where [testatrix's] scrivener was limited by responsibilities to another client." *Koch*, 849 P.2d at 996.

³³ *Blissard v. White*, 515 So. 2d 1196, 1200 (Miss. 1987). Two other noteworthy cases are: *Walton v. Davy*, 86 Md. App. 275, 286-289, 586 A.2d 760, 765-767 (Md. App., 1991) (attorney's status as the attorney of record for husband's estate did not create a conflict of interest with respect to his advice to the widow regarding her statutory right to elect her intestate share of the husband's estate. Although she ultimately decided against it, the widow's election would not have affected the attorney's duty to the estate because the election would not have altered the estate, only its distribution and attorney had no pecuniary or proprietary interest in the outcome of the case); and *Matter of Trust Created by Hill*, 499 N.W.2d 475, 491-492 (Minn. App., 1993) (law firm's former representation of a trust beneficiary did not require disqualification of the law firm as counsel for the trust where the law firm drafted the trust instrument and represented the trustee extensively while its former representation of the beneficiary was on personal matters unrelated to the pending issue concerning the trust).

⁹⁷ See *Saga of Advisory Opinion* 95-4, **supra note 2**.

³³ See note 2, *supra* and accompanying text.