

# Joint Representation of Spouses in Estate Planning

## *The Saga of Advisory Opinion 95-4*

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After extended proceedings commencing in 1995, the final text of Advisory Opinion 95-4<sup>1</sup> was approved by The Florida Bar Board of Governors at its May 1997 meeting. Advisory Opinion 95-4 provides guidance regarding confidentiality and conflict of interest concerns for attorneys undertaking to represent spouses as joint clients in estate planning matters.<sup>2</sup> A summary of Advisory Opinion 95-4 is contained in its headnote prepared by the Ethics Department of The Florida Bar:

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.

This article examines the holdings of Advisory Opinion 95-4, with a particular focus on its procedural history and the analysis developed during deliberations prior to its final issuance.

In 1995, the Real Property, Probate and Trust Law Section approved the recommendation of its Estate Planning, Probate and Trust Professionalism Committee to request an ethics advisory opinion with respect to joint representation of spouses in estate planning.<sup>3</sup> Professor Geoffrey C. Hazard, Jr. was retained as advisor and reporter for the project.<sup>4</sup>

The advisory opinion was sought because of the sparse guidance on this subject under the Florida Rules of Professional Conduct (FRPC) and ethics opinions and case law in Florida.<sup>5</sup> At the time

the request for the opinion was made, two national organizations of trusts and estates practitioners had recently concluded major projects relating to this subject focusing on the Model Rules of Professional Conduct (MRPC). The Special Study Committee on Professional Responsibility of the American Bar Association Section of Real Property, Probate and Trust Law published three reports, one of which directly addressed multiple representation of spouses (the study committee report).<sup>6</sup> Separately, the American College of Trusts and Estates Counsel (ACTEC) released its own *Commentaries on the Model Rules of Professional Conduct* (the ACTEC commentaries), which also devoted significant consideration to this subject.<sup>7</sup> An important objective of the RPPTL Section in seeking an ethics advisory opinion was to promote the feasibility of joint representation in estate planning.<sup>8</sup>

In making its request for an ethics advisory opinion, the RPPTL Section submitted a generalized situation to illustrate the ethical issues for which guidance was sought.<sup>9</sup> The situation presented by the RPPTL request letter<sup>10</sup> and addressed in Advisory Opinion 95-4 follows:

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 which 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 assets 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

A sequel to this article addressing planning for variations in engagement arrangements in light of Advisory Opinion 95-4 and intergenerational multiple representation concerns will be published in the April *Bar Journal*.

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) which 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 disclose to Wife the substance of Husband's revelation if Husband does not do so himself.

### **Ethical Dilemma Arising From a Separate Confidence**

The central issue in Advisory Opinion 95-4 concerns the lawyer's duties under FRPC 4-1.4<sup>11</sup> (communication), FRPC 4-1.6<sup>12</sup> (confidentiality), and FRPC 4-1.7<sup>13</sup> (conflict of interest) with respect to the husband's communication to the lawyer of the information concerning the codicil and the extra-marital relationship, which is defined in Advisory Opinion 95-4 as the "separate confidence." Advisory Opinion 95-4 begins its analysis by characterizing the lawyer's representation of the husband and wife as a "joint representation," consistent with the RPPTL request letter,<sup>14</sup> although Advisory Opinion 95-4 does not address the differences inherent in a "joint representation" as compared to a so-called "separate representation" of spouses in estate planning. A "joint representation" generally refers to representation of co-clients having similar goals and interests in which it is understood that information relating to the subject of representation will be shared by the co-clients.<sup>15</sup> A "separate representation" may also involve sharing of information but would permit each client to disclose to his or her attorney certain information which is not to be shared with the other co-client.<sup>16</sup> Absent agreement otherwise,

## **The attorney must act as fiduciary toward the joint clients and may exercise discretion to determine whether to disclose to the nonconfiding client.**

the "default" rule is that a co-client relationship involving estate planning for married persons generally is presumed to be a joint representation.<sup>17</sup>

Advisory Opinion 95-4 devotes substantial analysis to the positions taken in the study committee report regarding separate confidences imparted in a joint representation. The study committee report focuses on the ethical dilemma which confronts the attorney under, on the one hand, the duty of confidentiality under MRPC 1.6 which the attorney owes the confiding client (husband) and, on the other hand, the duty under MRPC 1.4 to communicate to the nonconfiding client (wife) important information which naturally relates to the attorney's representation of her.<sup>18</sup> The study committee report recommends that the attorney seek either to persuade the confiding client to disclose the separate confidence to the other spouse or to obtain express authorization for the attorney to do so. Assuming (as would be expected in the situation presented in Advisory Opinion 95-4) that the confiding client is unwilling to do so, analysis of the study committee report focuses on the insoluble nature of the ethical dilemma — whatever action the attorney takes seemingly will fail to comply with an ethical duty owed by the attorney to one or the other of the attorney's two clients. Applied to the situation presented in Advisory Opinion 95-4,

compliance with the lawyer's duty to inform the wife of material information relating to the lawyer's representation of her would run contrary to the lawyer's duty of confidentiality owed to the husband — but compliance with the lawyer's duty of confidentiality relating to the husband's separate confidence would be contrary to the lawyer's duty owed to the wife to communicate important information to her.

The study committee report and the ACTEC commentaries conclude that the attorney, faced with this insoluble dilemma, must act as fiduciary toward the joint clients<sup>19</sup> and may exercise discretion<sup>20</sup> to determine whether to make disclosure to the nonconfiding client.<sup>21</sup> The study committee report states that the attorney should balance the potential for material harm to the confiding client (husband) which may be caused by revealing the separate confidence against the potential for material harm to the nonconfiding client (wife) which may be expected by failure to reveal same.<sup>22</sup>

Advisory Opinion 95-4 does not follow this approach. Instead, it gives precedence to the duty of confidentiality: [The] 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 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.

In analyzing the rationale underlying the discretion approach (which the opinion refers to as a "no-confidentiality" position), Advisory Opinion 95-4 identifies and rejects two separate bases for it. The first basis advanced is that clients have an expectation that everything communicated to the attorney by one client which relates to the joint representation will be shared with the other

client. Citing law journal authority as well as a passage in the study committee report itself, the opinion rejects this argument, stating that "accurately predicting the expectations of a typical client in a given situation is risky business." The second basis is grounded in the law of evidentiary privilege which specifically provides for a common interest exception to attorney-client privilege (ES. §90.502(4)(e)).<sup>21</sup> Citing the comment to FRPC 4-1.6 which explains the difference between confidentiality and privilege, Advisory Opinion 95-4 states that the privilege exception under F.S. §90.502(4)(e) becomes relevant only after legal proceedings have begun between the co-clients in which the separate confidence may be relevant.

After dismissing the two bases identified to support a discretionary approach, Advisory Opinion 95-4 concludes: 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.

In support of this position, the opinion then cites the portion of the comment to FRPC 4.1-6 which provides that "whether another position 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." The opinion also cites, as Florida supporting authority, Advisory Opinion 92-5,<sup>24</sup> which addresses the extent to which privileged information may be disclosed when required by law, as well as a 1984 opinion of the New York State Bar Association involving a partnership.<sup>25</sup>

The RPPTL Section supported the conclusion reached in Advisory Opinion 95-4.<sup>26</sup> As additional authority for this conclusion, the RPPTL Section pointed to agency law doctrine, which is not discussed in Advisory Opinion 95-4. The rationale advanced by the RPPTL Section is that a separate

confidence unilaterally terminates an agreement among two principals (co-client) and their agent (attorney) regarding sharing of information, and that, as a consequence of this unilateral termination, the separate confidence is not to be shared.<sup>27</sup>

## Withdrawal

Because of the conflict of interest which the separate confidence evidences between the co-clients, Advisory Opinion 95-4 mandates that the attorney withdraw from the representation: 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 ... In the situation presented, the conflict that has arisen is of a personal and, quite likely, emotionally-charged nature. The 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.

The conclusion that the separate confidence may not be revealed dictates that withdrawal is required. Certainly the lawyer cannot continue to represent the wife after the lawyer learns the information imparted to him or her in the separate confidence from the husband. In the deliberations prior to issuance of Advisory Opinion 95-4, however, significant focus was directed toward the manner in which withdrawal is to be effected by the lawyer. The initial conclusion contained in Proposed Advisory Opinion 95-4 issued by the Professional Ethics Committee (PEC) provided for a "silent" withdrawal: "In withdrawing from the representation, Lawyer should take care to avoid disclosing the separate confidence to Wife. Lawyer should simply cite 'professional obligations' or a similar reason in providing notice of withdrawal to Wife."<sup>28</sup>

The RPPTL Section opposed this initial conclusion and sought review by The Florida Bar Board Review Committee on Professional Ethics (BRC).<sup>29</sup> The basic concern expressed by the RPPTL Section was the unfair treatment which the

nonconfiding client (wife) may receive as a consequence of a silent withdrawal, as well as the potential that the nonconfiding client might be deceived regarding the significance of the withdrawal.<sup>30</sup>

The foregoing language was removed from the final text of Advisory Opinion 95-4, which instead provides as follows:

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.

The practical effect of Advisory Opinion 95-4 is that, because of the attorney's "noisy withdrawal,"<sup>31</sup> the noncommunicating client — the wife — should be alerted that circumstances adversely affecting her interests have developed.

The attorney should have some reasonable latitude as to the timing in which to make the notification. In some situations, the notification by the attorney may be tantamount to disclosure, as the wife may be expected to find out the substance of the separate confidence. The better practice is for the attorney to make notification only after conferring with the confiding client to explain the consequences if the client refuses to permit the separate confidence to be revealed to his or her spouse.<sup>32</sup> This suggests that the attorney should have a reasonable period of time (depending on the circumstances) to seek to resolve the situation short of withdrawal, which may in some situations result in disclosure of the separate confidence to the other spouse.<sup>33</sup> While Advisory Opinion 95-4 requires that the attorney state to both spouses that the withdrawal is because of conflict of inter-

est, the opinion states that the attorney may advise them that they should each retain separate counsel<sup>34</sup> This appropriately leaves the attorney some element of discretion to tailor the withdrawal to the particular circumstances of the situation the attorney faces.<sup>35</sup>

### Continuing Representation

Advisory Opinion 95-4 states that the lawyer must withdraw "from representation of both Husband and Wife in this matter."<sup>36</sup>As to future representation of either spouse, the opinion states only that "[f]inally, whether Lawyer ethically may represent Husband or Wife in other matters will be governed by Rule 4-1.9."<sup>37</sup> This statement is obvious, as FRPC 4-1.9 sets forth conflict of interest and informed consent rules applicable to representation of a client where the client's interests are materially adverse to the interests of a former client in the same or a substantially related matter. Unfortunately, Advisory Opinion 95-4 does not provide any substantial guidance with respect to specific questions raised by the RPPTL Section request letter regarding continuing representation.<sup>38</sup> Nevertheless, the RPPTL Section suggested the following basic conclusion:

In the situation presented, Lawyer may not continue to represent either Husband or Wife without obtaining informed consent. Because Husband refuses to permit disclosure of the separate confidence, Lawyer is unable to seek Wife's informed consent to waiver of conflict of interest by her (which would be required under Rule 4-1.9 in order for Lawyer going forward to be able to represent Husband alone). On the other hand, Rule 4-1.4 bars Lawyer from representing Wife alone (even if Husband were to consent thereto) as long as Lawyer is unable to advise Wife of information which seriously and adversely affects her interests but which Husband refuses to allow be disclosed.<sup>39</sup>

This conclusion is consistent with applicable provisions of the Restatement.<sup>40</sup>Advisory Opinion 95-4 apparently did not address this subject on account of the extensive deliberations on the other issues presented, which the RPPTL Section urged receive primary focus.<sup>41</sup>

### Waiver of Conflict of Interest

Apart from the ethical dilemma confronting the attorney who re-

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ceives a separate confidence, Advisory Opinion 95-4 also considers the subject of waiver of conflict of interest in a joint representation. The situation presented in Advisory Opinion 95-4 was intended to reflect a common type of joint representation, in which the spouses' interests at the outset have similar interrelated goals and interests.<sup>42</sup> Advisory Opinion 95-4 concluded that this situation does not involve a conflict of interest under FRPC 4-1.7:

From the inception of the representation until Husband's communication to Lawyer of 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.

Accordingly, the lawyer was not required to conduct advance consultation to review relevant conflict of interest concerns and obtain client informed consent to the joint representation.<sup>43</sup>

Advisory Opinion 95-4 does state, however, that informed consent may be required in some joint representation situations:

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.<sup>44</sup>

This distinction between situations involving conflict of interest and situations in which no conflict of interest is presented is consistent with §211 of the Restatement of the Law Governing Lawyers, which contains additional examples involving estate planning matters.<sup>45</sup> When a conflict of interest is presented, a joint representation may proceed only if both clients consent after consultation in which the lawyer (as required by FRPC 4-1.7(c)) explains "the implications of the common representation and the advantages and risks involved."<sup>46</sup>

In taking on a married client situation in which the practitioner may be uncertain at the outset whether a conflict of interest is presented, it is good practice (even though it may not be required) to obtain a waiver of conflict after consultation. Typically, the consultation should include discussion regarding the potential advantages to each spouse if he or she were to be represented by separate counsel, and also the considerations involved if the attorney receives a separate confidence from either of them.<sup>47</sup> Explanation of the separate confidence concern presumably may be handled by reviewing Advisory Opinion 95-4 with the clients and perhaps in some situations furnishing the clients with the text of the opinion or a summary thereof"

If a conflict of interest does exist and the attorney fails to obtain an informed consent waiver, the potential consequences can be dire. One untoward possible consequence (regardless of whether a separate confidence may at some point be imparted) may be the invalidation of testamentary documents, which in turn could lead to possible attorney malpractice liability to disappointed beneficiaries.<sup>49</sup> If a separate confidence is imparted, the attorney is

confronted with an impossible situation. By failing to advise the spouses at the outset regarding separate confidences, the attorney is at risk of malpractice liability to both spouses for consequences flowing from the separate confidence." Of course, the extent of attorney malpractice liability depends on the particular circumstances presented in each individual case and may be difficult to quantify. Apart from malpractice considerations, the attorney may also be subject to disciplinary proceedings for failure to obtain conflict waiver by informed consent.

As a preventive measure, some attorneys may routinely obtain conflict waivers from estate planning clients, regardless of the potential for conflict of interest. Cautious practice is for the conflict waiver to be in writing and to include a recitation of the relevant considerations, which might be set out in a general memorandum furnished to all married clients. In some circumstances, the careful practitioner may review this memorandum with clients periodically during the course of the representation and also consider at appropriate intervals whether any specific emerging conflict may reasonably be determined to have been within the clients' contemplation when the original waiver was made.<sup>51</sup>

### Requirement of Advance Confidentiality Warning

The initial opinion issued by the Professional Ethics Committee contained a requirement concerning an advance confidentiality warning. Regardless of whether a conflict of interest might exist, Proposed Advisory Opinion 95-4 concluded that FRPC Rule 4-1.4(b) and Rule 4-1.7(c) imposed a duty on an attorney in every joint representation to make explanation at the outset to joint clients regarding the attorney's professional obligations in connection with the representations:

One aspect of this explanation is the lawyer's obligation of confidentiality. Clients have a right to know whether, and under what circumstances, information provided by one of them to the lawyer may be shared with other persons, including a co-client .... We conclude that Lawyer was ethically obligated to discuss with

Husband and Wife Lawyer's obligations with regard to separate confidences. This required explanation is one that, of course, should be tailored to the specific circumstances involved. The explanation is not required to be in writing; however, the committee strongly believes that a written disclosure is advisable for the protection of both client and lawyer.<sup>52</sup>

Upon its review, the Board Review Committee rejected this approach. Instead, the final text of Advisory Opinion 95-4 provides:

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.

The final text of Advisory Opinion 95-4 follows the position advanced by the RPPTL Section, which argued in connection with which its petition for review as follows:

The Professional Ethics Commission version of Proposed Advisory Opinion 95-4 would impose a *per se* requirement that a lawyer must give a "confidentiality warning" upon commencing every multiple representation — regardless of whether or not conflict of interest concerns (actual or potential) are presented. This *per se* rule is not supported by any authority, and the Professional Ethics Commission cites no case law or ethics opinion in any jurisdiction for this proposition. This *per se* rule clashes head-on with the basic position contained in Section 211 of the Restatement of the Law Governing Lawyers. Section 211 of the Restatement draws sharp distinction between: (i) those multiple clients who do not share substantially similar goals and interests (i.e., where waiver of conflict of interest is required; and (ii) those multiple clients who do share similar goals and interests (i.e., where no conflict of interest is reasonably foreseeable or apparent, and hence no waiver is required). To impose a "confidentiality warning" rule for the latter situation would wrongly require, in effect, that a lawyer at the outset take up conflict of interest concerns even though no conflict of interest may exist. The Professional Ethics Commission version of Proposed Advisory Opinion 95-4 would extend its iron rule to a broad range of multiple representations (i.e., largely outside estates and trust practice, and also affecting representations which may not be initiated at the same time but which may arise more gradually over a longer period in the course of practice). Bar members concerned that floodgates of attorney malpractice litigation not be opened to un-

warranted claims should worry about the prospective troubling malpractice consequences if the Professional Ethics Committee version of Proposed Advisory Opinion 95-4 were to be followed."

In presenting its position, the RPPTL Section also submitted a parallel example presented in a personal injury litigation context to illustrate its concern regarding potential general application of the advance warning requirement contained in Pro-posed Advisory Opinion 95-4.<sup>54</sup>

The important practical significance of Advisory Opinion 95-4 is its determination against impressing a *per se* rule which would require Florida lawyers to explain confidentiality considerations in every multiple representation setting. In rejecting the Professional Ethics Committee's position, however, the brief portion of Advisory Opinion 95-4 addressing this issue does not set out the rationale for its conclusion. The Board Review Committee apparently decided not to add any potential precedential discussion beyond the bare minimum to a subject where there is little authority under case law, ethics opinions, or commentary.<sup>55</sup>

### Variations on the Situation Presented

The situation presented in Advisory Opinion 95-4 involved a long-term joint representation in which, after many years, a serious conflict of interest arose. The basic form of ethical dilemma which it addressed may arise in any number of comparable estate planning situations, as stated in the RPPTL request letter:

A husband may ask the attorney to prepare a Codicil (without informing his Wife) to make a substantial disposition to charity. Or, a wife may disclose to the attorney that her child (whom her husband believes is his child also) was actually born out of wedlock and is not her husband's child. A myriad of variation may arise, and each situation presents its own specific degree of seriousness and potential material adversity in respect to the spouses' goals and interests in their estate planning."

At what point is a particular separate confidence serious enough so that the attorney must withdraw if the confiding spouse does not permit

its disclosure to the other spouse? The ACTEC commentaries take the position that some separate confidences concern "irrelevant (or trivial) matters" and gives the following illustration: "For example, a lawyer who represents a husband and wife in estate planning matters might conclude that information imparted by one of the spouses regarding a past act of marital infidelity need not be communicated to the other spouse."<sup>57</sup>

Likewise, the Restatement contains an estate planning example involving a separate confidence by one spouse which does not present an ethical problem because of the "lack of material effect" on the other spouse.<sup>56</sup>

This position is consistent with dicta in the recent Florida appellate decision in *Cone v. Culverhouse*, 687 So. 2d 888 (Fla. 2d DCA 1997). *Culverhouse* addressed the applicability of the common interest exception to attorney-client privilege in litigation brought by the wife after husband's death concerning a wide range of professional services rendered mostly to the husband but also including estate planning for both spouses. The court's decision states that in order for the common interest exception to be applicable: [T]he clients' interests must be sufficiently compatible that a reasonable client would expect his or her communications concerning the matter to be accessible to the other client. For example, a married couple creating an estate plan with interrelated documents probably have no reasonable expectation of confidentiality concerning the matter of the joint estate plan, but might still have such expectations concerning their individual, private discussions with their lawyer about the reasons for including or excluding specific bequests to third persons in their individual wills.<sup>59</sup>

This statement should be interpreted to permit a separate confidence only to the extent that it does not give rise to conflict of interest — that is, a confidential communication from one spouse which has no material effect on the other spouse should be permissible, whereas a separate confidence which does have a material effect on the other spouse is and triggers the requirement for attorney withdrawal under Advisory Opinion 95-4.

## Conclusion

The conclusions of Advisory Opinion 95-4 are consistent with the RPPTL

Section's goal of promoting the feasibility of joint representation of spouses in estate planning. The final text of Advisory Opinion 95-4 avoids serious difficulties inherent in the conclusions of Proposed Advisory Opinion 95-4 and provides helpful general guidance to practitioners counselling married couples together concerning estate and trust matters. □

<sup>1</sup> The final text of Advisory Opinion 95-4 (May 30, 1997) is published in *The Florida Bar News*, July 1, 1997, at 6.

<sup>2</sup> The emphasis which Advisory Opinion 95-4 places on the duty of confidentiality has significance beyond issues involving joint representation. See James G. Pressly, Jr., Rohan Kelley and Michael Simon, *Estate Planning, Ethics and Strategies in Dealing with Potentially Incapacitated Clients*, at 1-2, 14th Annual Estate and Property Seminar (Palm Beach County Bar Association, 1997), addressing the relevance of Advisory Opinion 95-4 with respect to confidentiality duties owed to clients having diminished capacity. The emphasis placed on the duty of confidentiality in Advisory Opinion 95-4 should also be considered in connection with responsibilities owed to beneficiaries by a fiduciary's attorney concerning breach of fiduciary duty. See generally, *Counseling the Fiduciary*, 28 REAL PROP., PROB. & TR. J. 825, 830-839, 848-855. See also FRPC Rule 4-1.7, comment relating to "Other conflicts situations" ("In Florida, the personal representative is the client rather than the estate or the beneficiaries."); *Barnett Banks Trust Co., N.A. o. Compson*, 629 So. 2d 849 (Fla. 2d D.C.A. 1993); *Estate of Gory*, 570 So. 2d 1381 (Fla. 4th D.C.A. 1990); but see Fla. Atty. Gen. Op. 96-94.

<sup>3</sup> Minutes of Oct. 20, 1995, Meeting of the Executive Council of the Real Property, Probate, and Trust Law Section of The Florida Bar (on file in the Office of the RPPTL Section Administrator, Tallahassee).

<sup>4</sup> *Id.*

<sup>5</sup> Prior to Advisory Opinion 95-4, estate planning attorneys had little guidance in Florida beyond the following very limited analysis contained in FRPC 4-1.7, which provides: "Conflict questions may also arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may arise."

Discussion of Florida decisional authorities generally addressing confidentiality concerns involved in multiple representation are summarized in FLORIDA LEGAL

Florida Bar).

<sup>6</sup> *Comments and Recommendations on Lawyer's Duties in Representing Husband and Wife*, 28 REAL PROP., PROB. & TR. J. 765 (1994).

<sup>7</sup> *Commentaries on the Model Rules of Professional Conduct* (2d ed. March 1995, ACTEC), updating its first edition published in October 1993.

<sup>8</sup> The RPPTL Section's request for an advisory opinion states: "The Florida Rules of Professional Conduct are intended to facilitate the delivery of legal services in an efficient and economically feasible manner. Accordingly, their interpretation should encourage joint representation of spouses in non-adversarial representations, such as estate planning." November 30, 1995, letter submitted by Hollis F. Russell on behalf of the RPPTL Section to Don Beverly, chair of the Professional Ethics Committee of The Florida Bar (the "RPPTL Section Request Letter") at 4. This letter is available on the Internet at

<<http://www.flabarppptl.org>> in the materials relating to the Estate Planning, Probate and Trust Professionalism Committee. In this connection, the ACTEC Commentaries at 85 provide: "It is often appropriate for a lawyer to represent more than one member of the same family in connection with their estate plans . . . . 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."

<sup>9</sup> In this connection, the RPPTL Section Request Letter stated: "The focus of this inquiry is directed not toward the litigation context but rather toward the non-adversarial context in which estate planning services typically are rendered, involving long-term planning for appropriate ultimate disposition of family assets. The situation presented is intended to reflect a common type of estate plan-

ning representation — an attorney represents spouses whose interrelated interests and goals are similar over an extended period of time, but then diverge. The situation presented is adapted from Fox, *Liability Squared* (PROB. & PROP., Sept./Oct. 1995), and is intended to provide an illustrative factual background as an aid to analysis of the issues presented." RPPTL Section Request Letter at 1-2.

<sup>10</sup> RPPTL Section Request Letter at 3. "FRPC 4-1.4 is identical to MRPC 1.4 and provides as follows:

"(a) Informing Client of Status of Representation. A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

"(b) Duty to Explain Matters to Client. A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."

<sup>12</sup> Relevant portions of FRPC 4-1.6 pro-void as follows:

"(a) Consent Required to Reveal Information. A lawyer shall not reveal information relating to representation of a client except as stated in subdivisions (b), (c), and (d), unless the client consents after disclosure to the client.

"(b) When Lawyer Must Reveal Information. A lawyer shall reveal such information to the extent the lawyer reasonably believes necessary:

"(1) to prevent a client from committing a crime; or

"(2) to prevent a death or substantial bodily harm to another.

"(c) When Lawyer May Reveal Information. A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

"(1) to serve the client's interest unless it is information the client specifically requires not to be disclosed ...

"(5) to comply with the Rules of Professional Conduct ...

"(e) Limitation on Amount of Disclosure. When disclosure is mandated or permitted, the lawyer shall disclose no more information than is required to meet the requirements or accomplish the purposes of this rule."

Advisory Opinion 94-5 makes no mention of the fact that Florida is a state in which lawyers must reveal confidential client information to prevent a client from committing any crime, as required by FRPC 4-1.6 (b)(1), making Florida one of the least protective jurisdictions of client confidentiality in this context. See generally FLORIDA LEGAL ETHICS, *supra* note 5, at §§7.15 *et seq.* Unlike Florida, the majority of states permit attorney use and disclosure of confidential client information only in the case of a criminal act that the lawyer believes is likely to result in imminent death, substantial bodily harm or substantial financial injury. See Restatement (Third) of the Law Governing Lawyers, Proposed Final Draft No. 1 (March 29, 1996, ALI) §117A, ant. b and accompanying reporter's note (containing chart of each state's rules concerning disclosure of client crimes, fraud and perjury). Unless otherwise indicated, all references herein to "the Restatement" are to Restatement (Third) of the Law Governing Lawyers (Proposed Final Draft No. 1, March 29, 1996) (ALI), final adoption of which may occur in 1998. See *ALI Approves Nearly Half of Restatement of Law Governing Lawyers*, Daily Report for Executives (BNA), No. 102, at C-1 (May 28, 1996).

<sup>13</sup> Relevant portions of FRPC 4-1.7 provide as follows:

"(a) Representing Adverse Interests. A lawyer shall not represent a client if the representation of that client will be directly adverse to the interests of another client, unless:

"(1) the lawyer reasonably believes the representation will not adversely affect the lawyer's responsibilities to and relationship with the other client; and

"(2) each client consents after consul-

tation.

"(b) Duty to Avoid Limitation on Independent Professional Judgment. A lawyer shall not represent a client if the lawyer's exercise of independent professional judgment in the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person or by the lawyer's own interest, unless:

"(1) the lawyer reasonably believes the representation will not be adversely affected; and

"(2) the client consents after consultation.

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

<sup>14</sup> See RPPTL Section Request Letter at 4-5. The facts set forth in the situation presented indicate a history in the representation in which all relevant information over many years was shared among lawyer, husband, and wife, thereby confirming a joint representation relationship.

<sup>15</sup> See ACTEC Commentaries at 65-66; Study Committee Report at 772-73.

<sup>16</sup> See ACTEC Commentaries at 66-69; Study Committee Report at 771.

<sup>17</sup> See ACTEC Commentaries at 66; Study Committee Report at 778; Theresa Stanton Collett, *Disclosure, Discretion or Deception: The Estate Planner's Ethical Dilemma from a Unilateral Confidence*, 28 REAL PROP., PROB. & TR. J. 683, 687 (1994).

<sup>18</sup> Study Committee Report at 783-93. The separate confidence addressed in *Advisory Opinion\_ 95-4* constitutes a "prejudicial confidence" as well as a "factual confidence" under the terminology of the Study Committee Report, at 785-786.

<sup>19</sup> *Id.* at 787.

<sup>20</sup> The ACTEC Commentaries at 68-69 provide: "[T]he lawyer faces an extremely difficult situation with respect to which there is often no clearly proper course of action. In such cases the lawyer should have a reasonable degree of discretion in determining how to respond to any particular case. In fashioning a response the lawyer should consider his or her duties of impartiality and loyalty to the clients; any express or implied agreement among the lawyer and the joint clients that information communicated by either client to the lawyer regarding the subject of representation would be shared with the other client; the reasonable expectations of the clients; and the nature of the confidence and the harm that may result if the confidence is, or is not, disclosed."

<sup>21</sup> This approach had been favored earlier in formal action taken by the RPPTL Section in 1994, when the RPPTL Section recommended that The Florida Bar adopt a proposed amendment to add the following new section to FRPC Rule 4-1.7: "(e) Representation of Spouses. Except as may otherwise be agreed (in a manner consistent with the Rules of Pro-

fessional Conduct) among spouses and a lawyer representing both spouses in common or related matters: (1) There shall be no confidentiality pursuant to Rule 4-1.6 as between the spouses insofar as the representation in such matters is concerned; and (2) If in the course of the representation one spouse communicates to the lawyer information which the lawyer reasonably should know the lawyer must disclose to the other spouse in order for the lawyer to provide competent representation to the other spouse, the lawyer shall, at the first reasonable opportunity, either (i) make such disclosure or (ii) withdraw entirely from representation of each spouse in such matters (in which event the lawyer shall not be required to make such disclosure or state any reason for withdrawal)."

Minutes of Jan. 29, 1994, Meeting of the Executive Council of the Real Property, Probate and Trust Law Section of The Florida Bar, approving motion to propose amendment to FRPC Rule 4-1.7 (on file at office of section administrator of RPPTL Section, Tallahassee). At its meeting on June 4, 1994, the Disciplinary Procedure Committee of The Florida Bar Board of Governors rejected this proposal, as reflected in the minutes of that meeting (on file at Office of Executive Director of The Florida Bar, Tallahassee).

<sup>22</sup> Study Committee Report at 787. Professors Hazard's and Hodes' treatise describes this approach as "lawyering for the situation" and sets out a succinct analysis of the relevant critical commentary. See 1 GEOFFREY C. HAZARD, JR., & WILLIAM HODES, *THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT* §2.2:102 (2d ed. 1997) (HAZARD & HODES).....

<sup>23</sup> FLA. STAT. §90.502(4)(e) (1996) provides an exception to attorney-client privilege as follows: "A communication is relevant to a matter of common interest between two or more clients, or their successors in interest, if the communication was made by any of them to a lawyer retained or consulted in common when offered in a civil action between the clients or their successors in interest."

<sup>24</sup> Florida Advisory Opinion 92-5 holds that an attorney faced with federal law requiring disclosure of confidential client information which is not protected by attorney-client privilege may not make disclosure without client consent until compelled by legal process.

<sup>25</sup> N. Y. State Bar Ass'n Op. 555 (1984) (A and B to form a partnership, lawyer who received communication from B indicating that B was violating the partnership agreement may not disclose the information to A although it would not be within the lawyer-client evidentiary privilege and the lawyer must withdraw from representing the partners with respect to partnership affairs). Also cited are ABA Comm. on Ethics and Professional Responsibility, Formal Op. 91-361; N.Y. State Bar Ass'n Op. 674; and Monroe County (N.Y.) Bar Ass'n Op. 87-2.

<sup>26</sup> See May 9, 1997, RPPTL Section Memo-



random to The Florida Bar Board of Governors at 1, which is available on the Internet at <<http://www.flabarrpptl.org>>. The RPPTL Section initially favored a discretionary approach (see RPPTL Section Request Letter at 3) but modified its position (as reflected in the memorandum of May 9, 1997) prior to the issuance of the final text of Advisory Opinion 95-4.

<sup>27</sup> See July 24, 1996, RPPTL Section Memorandum to John F. Harkness, Jr., Executive Director of The Florida Bar, Attachment I at 2-3, which is available on the Internet at <<http://www.flabarrpptl.org>>, and which provides as follows: "An agreement regarding the sharing of information may be subsequently terminated either mutually or unilaterally. In the case of mutual termination, both clients are aware of termination (and hence are on equal footing). In the case of unilateral termination by one co-client, the attorney must inform the other co-client thereof at the first reasonable opportunity so as to avoid any prejudice to that other client. When one co-client discloses to the attorney a separate confidence which materially impacts the interests of the other co-client with instructions not to share that information, the agreement is necessarily unilaterally terminated. It is then incumbent upon the attorney to confirm same with the client imparting the unilateral confidence and also to so notify the non-confiding client. Thereafter, information shared between the co-clients before the termination re-mains available to both of them. However, the information which is unilaterally confided to Lawyer by the one co-client (Husband) with instructions not to share it may not under Rule 4-1.6 be disclosed by Lawyer to the non-confiding client (Wife)."

For a discussion of agency law considerations, see Theresa Stanton Collett, *Disclosure, Discretion, or Deception: The Estate Planner's Ethics Dilemma from a Unilateral Confidence*, 28 REAL PROP., PROB. & TR. J. 683, 706-711 (1994).

<sup>28</sup> Proposed Advisory Op. 95-4 (March 22, 1996), published in *The Florida BarNEWS*, April 15, 1996, at 8.

<sup>29</sup> See July 24, 1996 RPPTL Section Memorandum at 1, and Attachment V thereto.

<sup>30</sup> The RPPTL Section argued: "Proposed Advisory Opinion 95-4 suggests that the lawyer may merely cite 'professional obligations' to the non-confiding co-client (i.e., the wife) as the reason for the lawyer's withdrawal. We believe that such a cryptic course of action may deceive the wife (who is, of course, a co-client) concerning the degree to which her interests may be threatened. Tracking §112(1) of the Restatement of the Law Governing Lawyers, the lawyer should, at the first reasonable opportunity, alert the wife that a matter seriously and adversely affecting her interests has come to light, which the husband refuses to permit the lawyer to disclose. Proposed Advisory Opinion 95-4 should be revised to so state." *Id.* at 4.

<sup>31</sup> See 1 HAZARD & HODES §1.6 (generally

referring to "noisy withdrawals"); *cf.* ABA

Comm. on Ethics and Professional Responsibility, Formal Op. 92-366 (concluding that when a lawyer determines that his or her work product will be used by the client to perpetrate a fraud, the lawyer must withdraw and may also disaffirm documents prepared in the course of representation, "even though such a 'noisy' withdrawal may have the collateral effect of inferentially revealing client confidences").

<sup>32</sup> The ACTEC Commentaries at 68 provide: "In order to minimize the risk of harm to the clients' relationship and, possibly to retain the lawyer's ability to represent both of them, the lawyer may properly urge the communicating client himself or herself to impart the confidential information directly to the other client....In doing so the lawyer may properly remind the communicating client of the explicit or implicit understanding that relevant information would be shared and of the lawyer's obligation to share the information with the other client. The lawyer may also point out the possible legal consequences of not disclosing the confidence to the other client, including the possibility that the validity of actions previously taken or planned by one or both of the clients may be jeopardized." See also RPPTL Section Request Letter at 3.

<sup>33</sup> See RPPTL Section Request Letter at 10-11.

<sup>34</sup> Upon reconsideration, the Professional Ethics Committee modified its opinion to mandate that the attorney be required (like the final text of Advisory Opinion 95-4) to notify both spouses that withdrawal is because of conflict of interest, and also required (unlike the opinion's final text, which is permissive) to advise the spouses that each should retain separate counsel. Proposed Advisory Opinion 95-4, as modified on January 24, 1997, on file with The Florida Bar Ethics Department, Tallahassee.

<sup>35</sup> In addressing this subject, Restatement §112, comment 1 provides as follows: "In the course of withdrawal, the lawyer has discretion to warn the affected co-client that a matter seriously and adversely affecting that person's interest has come to light, which the other co-client refuses to permit the lawyer to disclose."

Restatement §112, cmt. 1, illus. 3, discussed at note 58 and accompanying text, further provides that the lawyer may inform the nonconfiding client that the reason for withdrawal is that the confiding client will not permit disclosure of the separate confidence. Florida practitioners must be mindful, however, that Advisory Opinion 95-4 does not address whether or not the attorney may indicate to the nonconfiding spouse that the reason for the conflict of interest is because of separate confidence. It is uncertain how the text of the opinion should be interpreted as to this issue, which remains unsettled after Advisory Opinion 95-4.

<sup>36</sup> Advisory Op. 95-4 at 8.

<sup>37</sup> *Id.*

<sup>33</sup> The RPPTL Section inquired: "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?" RPPTL Section Request Letter at 3.

FRPC 4-1.9(a) provides (similar to MRPC 1.9) that "A lawyer who has formally represented a client in a matter shall not thereafter represent another person in the same or substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation." The ACTEC Commentary at 122 on MRPC 1.9 provides the following example applying the rule to the estate planning context: "A lawyer who assisted a client in establishing a revocable trust for the benefit of the client's spouse and issue may not later represent another party in an attempt to satisfy the new client's claims against the trust by invading the assets of the trust. Similarly, the lawyer may not without informed consent of a former client use to the detriment of the former client any confidential information that was obtained during the course of the representation." Ethics opinions outside Florida have reached different conclusions as to whether the continued representation of one spouse, in a matter related to an estate plan created during the initial joint representation of the spouses, presents an inherent conflict of interest. For example, the Committee on Ethics of the Maryland State Bar Association found no inherent conflict of interest where a law firm that represented both a husband and wife prior to their divorce wished to continue to represent the husband in redrafting his will, deleting the former spouse and provided no discussion of whether the wife must provide consent for the lawyer's continued representation of the husband. Comm. on Ethics of the Md. State Bar Ass'n, Op. 86-2. By contrast, the Rhode Island Bar Association ruled that where a lawyer prepared an estate plan for both husband and wife, including trusts and wills, the lawyer may not thereafter redesign the wife's estate to exclude her husband absent the husband's consent pursuant to MRPC 1.9 if the wife's modification of her estate becomes materially adverse to her husband's interests. R.I. Op. 96-07.

<sup>39</sup> July 24, 1996, RPPTL Section Memorandum, Attachment I at 3, 4. *See also* FRPC 4-1.7, Comment relating to "Consultation and consent," which provides in part: "There may be circumstances where it is impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and 1 of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent."

<sup>40</sup> See Restatement §213, cmts. d & e. The RPPTL Section Request Letter at 4 also contained the following analysis: "Lawyer must inform Wife that, if she assents to Lawyer's continued representation of Husband, Lawyer may utilize (possibly to Wife's disadvantage) any information acquired by Lawyer during the joint representation. See ACTEC Commentaries at 122. Lawyer would not be required to obtain Wife's assent to Lawyer's representation of Husband alone in an unrelated matter (e.g., a business transaction) in which the spouses' interests were not materially adverse, assuming Wife will not suffer any material harm on account thereof. In the event of the spouses' subsequent divorce, Lawyer might be able to represent Husband alone (without obtaining Wife's assent) in estate planning upon the proceeding's conclusion, as long as there were to be no relevant material adversity between the spouses' interests (insofar as concerns Husband's estate planning) at that time."

<sup>41</sup> See May 15, 1996 RPPTL Section Memorandum to the Florida Bar Professional Ethics Committee at 4; this Memorandum is available on the Internet at <<http://www.flabarrpntl.org>>.

<sup>42</sup> See note 1, *supra*.

<sup>43</sup> This conclusion is consistent with the Study Committee Report, which determined that no conflict is presented "if there is a mere possibility of conflict between the spouses in the estate planning process" and that a conflict only arises where there exists "a substantial potential for a material limitation on the lawyer's representations of either spouse — the equivalent of a material potential for conflict." Study Committee Report, at 779, 780. See also Standing Comm. On Legal Ethics of VA State Bar, Op. 708 (1985); *but see* Professional Ethics Comm. Of Allegheny County Bar Ass'n, Formal Op. 4 (Pa. 1983). See generally Restatement §211, cmt. c.

<sup>44</sup> Advisory Op. 95-4 at n.1. This language was taken directly from the RPPTL Section Request Letter at 6. The RPPTL Section Request Letter at 2 further provides: "Where the quality of representation which either spouse may receive may be materially limited in a joint representation on account of divergent goals or interests, each of them should have the opportunity to know that he or she may be better served if each spouse were to be represented by separate attorneys. When this subject is raised, most spouses may be expected to choose the joint representation — however, it is important that they be informed that their divergent interest could, to some degree, affect the quality of representation they may receive in the estate planning process."

<sup>45</sup> See Restatement §211, cmt. c, illus. 1-3. See also Study Committee Report at 780-781.

<sup>46</sup> FRPC 4-1.7(c). For a general discussion of Florida decisional authorities addressing full disclosure and informed consent, see FLORIDA LEGAL ETHICS, *supra* note 5, at §7.12.

<sup>47</sup> For a discussion of client informed consent, see Restatement §202, cmt. c. One noteworthy case is *In re Boivin*, 533 P.2d 171 (Ore. 1975) (notice of dual representation held insufficient to inform clients of potential conflict where attorney represented both buyer and seller in a business transaction, as attorney must explain nature of conflict of interest in such detail that the clients understand the reasons why it might be beneficial to retain independent counsel). See also Professional Ethics Comm. of Allegheny County Bar Ass'n, Formal Op. 4 (Pa. 1983) (finding that, in estate planning situations involving conflict of interest between spouses, counsel should be authorized to and should in fact make full disclosure to each party of all assets involved and the terms and significance of the distributive scheme adopted by both, since "the failure to provide such pertinent information, if deliberate, may border on fraudulent conduct, or if through neglect, might well vitiate the immunization sought" by an initial waiver of conflict of interest). Cf. Colo. Bar Ass'n Op. April 20, 1985 at 196 (opining that prior to agreeing to represent both a purchaser and a seller or a residential real estate transaction, the lawyer must determine that the parties agree on all material terms, disclose the risks of multiple representation, and disclose that if a dispute develops, the lawyer would have to withdraw from representing either party absent knowing consent of the information by each party). Even where the attorney only represents one spouse, potential malpractice concerns may arise concerning the quality of the attorney's independent advice, as illustrated in *Lovett v. Lovett*, 593 A.2d 382 (N.J. Sup. 1991) (legal malpractice claim dismissed where new attorney prepared new will for husband containing substantially different provisions from husband's earlier estate plan, notwithstanding second wife's relatively passive participation in the estate planning services rendered for husband, who was age 73 and having memory difficulties).

<sup>48</sup> As of the writing of this article, the Estate Planning, Probate and Trust Professionalism Committee of the RPPTL Section is undertaking a project to develop model forms for estate planning engagement letters, including matters relating to Advisory Opinion 95-4. Draft language relating to this project may be found on the Internet at <<http://www.flabarrpntl.org>>.

<sup>49</sup> See, e.g., *Hotz v. Minyard*, 403 S.E.2d 634 (S.C. 1991) (where one client made two wills, second of which would adversely affect his daughter's interests and where both were clients of same attorney, finding no duty to disclose existence of second will against wishes of testator but finding duty to deal with other client (daughter) in good faith and not actively misrepresent first will); *Haynes v. First Nat'l State Bank of New Jersey*, 432 A.2d 890 (N.J. 1981) (finding mere possibility of conflict of interest due to possibility of

undue influence at outset of attorney-client

ent relationship sufficient to establish ethical breach by attorney; further finding that even where representation of two clients has become routine practice, when latent conflict becomes real, attorney must fully disclose all material information and, if need be, extricate himself from conflict by terminating his relationship with at least one party).

<sup>50</sup> In Florida, an ethics rule violation may be introduced as "some evidence" of malpractice. *Pressley v. Farley*, 579 So. 2d 160,161 (Fla. 1st D.C.A. 1991), *cause dismissed*, 583 So. 2d 1036. Malpractice liability for estate planning under Florida law is addressed in BASIC ESTATE PLANNING IN FLORIDA §§13.24 *et seq.* (2d 1993, 1996, The Florida Bar) and in Professional Liability of Lawyers in Florida, §§3.11 *et seq.* (1989, 1993 The Florida Bar), which summarize the modified privity requirements under Florida case law. *See also Kinney v. Shinholser*, 663 So. 2d 643 (Fla. 5th D.C.A. 1995). No reported Florida case has addressed the application of malpractice privity requirements with respect to challenge to estate planning documents grounded on a conflict of interest ethics violation. For a general discussion of the significance of ethical violations with respect to attorney civil liability in estates and trust practice, *see* Bruce S. Ross, *How To Do Right By Not Doing Wrong: Legal Malpractice and **Ethical Considerations in Estate Planning and Administration***, 28 U. MIAMI HECKERLING INST. T 800, at Q 806.2 (1994). *See generally* Restatement (Third) of the Law Governing Lawyers (Tentative Draft No. 8, March 21, 1997) (ALI) §§71 *et seq.*;

<sup>1</sup> HAZARD & HODES §1.7:306 and 2 HAZARD & HODES §8.4:201.

<sup>51</sup> 1 HAZARD & HODES §1.7:305.

Proposed Advisory Op. 95-4. This conclusion of Proposed Advisory Opinion 95-4 is reported in Christopher H. Gadsden, *Familiar Ethics Themes Receive Additional Attention*, TR. & EST., May 1997 (vol. 136, no. 6), at 39, 40, although the Gadsden article does not report that this conclusion has been rejected and reversed in the final text of Advisory Opinion 95-4.

<sup>53</sup> May 9, 1997, RPPTL Section Memorandum, at 2-3. This position follows *In re Samuels*, 674 P.2d 1166 (Ore. 1983), which held that no advance confidentiality warning was required prior to representation of multiple clients in the formation of a partnership where no conflict of interest was presented. In an earlier submission, the RPPTL Section had also set out its analysis that, from purely an interpretation viewpoint, FRPC Rules 4-1.4(b) and 4-1.7(c) were not intended to be read to require an advance confidentiality warning in the absence of a conflict of interest. May 15, 1996 RPPTL Section Memorandum at 8-10. In recent action consistent with this position, the New York State Bar Association approved a proposed amendment to DR 5-105 (C) that incorporates language similar to FRPC 4-1.7(c) and the last sentence of MRPC 1.7 (b). In explaining the change,

the comment to the proposed amendment indicates that it is to be applicable in situations where lawyers are seeking waiver of conflict of interest. N.Y. State Bar Ass'n, Proposed Amendments to the N.Y. Lawyers' Code of Professional Responsibility, DR 5-105 (C) (January 24, 1997).

<sup>54</sup> This example is as follows: "Lawyer Represents Husband and Wife as plaintiffs jointly in a substantial personal injury matter. Husband's claims are based upon serious injuries received in an automobile accident, and Wife's claims are based on loss of consortium. At the outset of the litigation and throughout its prosecution Lawyer does not learn any information which might reasonably indicate that the interests of his co-clients were divergent. At no point does Lawyer discuss with them conflict of interest or separate confidence concerns. After substantial discovery, settlement negotiation discussions reach tentative agreement on a settlement amount. However, Husband separately confides to Lawyer that he is having an extra-marital relationship and insists that the settlement agreement be structured to provide that Husband alone is to be entitled to the entire settlement proceeds." May 9, 1997 RPPTL Section Memorandum at 4.

The RPPTL Section opposed the per se rule favored by the Professional Ethics Committee because it would "add a severe requirement on Florida lawyers which would essentially censure ethical conduct currently practiced by a large segment of Florida's lawyers." *Id.* See also Monroe County Bar Ass'n Ethics Comm., Op. 87-2 (N.Y. 1988), which presented facts similar to the above personal injury example. Although that opinion did not address the issue whether the joint representation of a husband and wife as plaintiffs in a personal injury litigation (arising from injuries sustained by the husband) created a conflict at the outset or a need for an advance confidentiality warning, it concluded that where a lawyer learns during the course of the trial that the husband intends to divorce the wife after the lawsuit has concluded and a settlement has been paid to both, there is no implied consent on the part of the husband to the disclosure to the wife simply by virtue of the fact that the spouses have jointly employed the lawyer. Pre-

sented with this dilemma, the opinion concludes that the lawyer should first ask for the husband's permission to disclose the information to the wife so that the lawyer may continue to represent the husband after the wife seeks the services of another lawyer and, if the request is refused and the information remains confidential, the lawyer cannot continue to represent the husband after the wife seeks the services of another lawyer.

<sup>55</sup> Advisory Opinion 95-4 does indicate that, while not ethically required, an advance discussion of confidentiality may be desirable, as "in some situations it may help prevent the type of occurrence" addressed therein. In subsequent discussion regarding separate confidences, Advisory Opinion 95-4 also states that "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." In this connection, the ACTEC Commentaries at 86 provide as follows: "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."

Taking into account Advisory Opinion 95-4, the foregoing quotation should be interpreted as a practice suggestion (and not as an ethical requirement) for estate planning attorneys in Florida.

<sup>56</sup> RPPTL Section Request Letter at 2. Neither the ACTEC Commentaries nor the Study Committee Report specifically consider the lawyer's duties in the event that the lawyer learns from another source detrimental information of material impact which the lawyer expects one spouse would not wish the lawyer to disclose to the other spouse. For example, suppose the situation presented in Advisory Opinion 95-4 were altered such that the lawyer only became aware of the husband's extra-marital relationship from another source. Presumably, the husband, if confronted by the lawyer, would object to disclosure to the wife, and the basic ethical duties as dictated by Advisory Opinion 95-4 would govern the lawyer's conduct. For another example involving information learned from a third party, see *Burnele v. Powell and Ronald C. Link, The Sense of a Client: Confidentiality Issues in Representing the Elderly*, 62 *FORDHAM L. REV.* 1197, 1212 (1994).

<sup>67</sup> ACTEC Commentaries at 67. In contrast, the ACTEC Commentaries gives two other examples of separate confidences of a more serious nature: "After she signs the trust agreement I intend to leave her" or "All of the insurance policies on my life

that name her beneficiary

have lapsed." *Id.* at 68. Other noteworthy examples are analyzed in Powell and Link, *supra* note 56, at 1205-1216. See also Jeffrey N. Powell, *Professional Responsibility: Reforms are Needed to Accommodate Estate Planning and Family Counselling*, 25 U. MIAMI HECKERLING INST. 111803.2, 1805.1 (1991).

<sup>58</sup> Restatement §112, cmt.1, illus. 2, provides: "Lawyer has been retained by Husband and Wife to prepare wills pursuant to an arrangement under which each spouse agrees to leave most of their property to the other ... Shortly after the wills are executed, Husband (unknown to Wife) asks Lawyer to prepare an inter vivos trust for an illegitimate child whose existence Husband has kept secret from Wife for many years and about who Husband has not previously informed Lawyer. Husband states that Wife would be distraught at learning of Husband's infidelity and of Husband's years of silence and that disclosure of this information could destroy their marriage. Husband directs Lawyer not to inform Wife. The inter vivos trust that Husband proposes to create would not materially affect Wife's own estate plan or her expected receipt of property under Husband's will, because Husband propose to use property designated in Husband's will for a personally favored charity. In view of the *lack of material effect* on Wife, Lawyer may assist Husband to establish and fund the inter vivos trust and refrain from disclosing Husband's information to Wife." (Emphasis added.)

In contrast, an ethical problem arises under Restatement §112, cmt. 1, illus. 3, which varies the facts of Illustration 2 such that the prepared trust "would significantly deplete Husband's estate, to Wife's material detriment and in frustration of the spouses' intended testamentary arrangements."

<sup>59</sup> *Cone v. Culverhouse*, 687 So. 2d at 893.

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