W H E R E T H E R E ' S A W I L L

How the new ethics rules affect estate planners

By Dan W. Holbrook

As of March 1, 2003, Tennessee joined the overwhelming majority of states in adopting a version of the Model Rules of Professional Conduct, and all of us lawyers have had to learn them. Kudos to Carl Pierce and Lucian Pera for their excellent overview of the new rules last December.[1]

The rules are, for the most part, by litigators for litigators, greatly sensitive to the professional duties of loyalty, confidentiality, and conflict avoidance. Estate planning lawyers regularly face an ethical dilemma - they are entrusted with the most personal of confidences yet are enmeshed in more potential conflicts of interest than perhaps any other legal specialty. They routinely engage in joint representations - spouses, multiple generations, multiple fiduciaries, multiple beneficiaries of trusts and estates, and multiple investors in closely held businesses. They believe clients are better served by the attendant comprehensive understanding and overall cost effectiveness, at least where the interests are merely different, and not necessarily adversarial. How do the new rules deal with this?

First, Rule 1.7 contains the general rule on conflicts of interest: they can be waived[2] by consent "in writing"[3] after consultation, and only if the lawyer "reasonably believes" the representation will not be adversely affected. Comment [17] to Rule 1.7[4] explicitly acknowledges the potential benefits of joint representation in estate planning, where the interests of individual family members are subordinated to the interests of the family as a whole. Attorneys must represent individuals, not "the family," but we can behave as if the family comes first, provided the clients consent.

Second, Rule 2.2 creates a new category of representation, "Lawyer as Intermediary." This means rendering impartial legal advice to multiple clients engaged in a candid and non-adversarial effort to accomplish a common objective with respect to creating or modifying a "consensual legal relation" between them. When Rule 2.2 applies, the ethical bar is raised: consents must be preceded by more extensive analysis and disclosure by the attorney. There must also be cautious monitoring during the intermediation, and withdrawal if the predicates for such representation cease to exist.

Comment [24] to Rule 1.7 and Comment [4] to Rule 2.2 make it clear that planning for purely gratuitous transfers falls within the usual conflict of interest rules of Rule 1.7, not 2.2; that as soon as the lawyer undertakes any action involving a "consensual legal relation" between clients, Rule 2.2 applies; and that Rule 2.2 always trumps 1.7. The concern to estate planners is that many routine tools whose primary purpose is a gratuitous transfer may nevertheless involve legal relations between clients, and be governed by Rule 2.2 rather than 1.7. Examples include family limited partnerships, trusts with spouse or other family member as trustee, stock or partnership transfer restriction agreements, sale of assets to children, or interest-free loans to children. The distinction may not always be so clear. Defensive lawyering suggests complying with Rule 2.2 when there is any concern it may govern, and perhaps even when the situation clearly suggests it will not.

The result may be that estate planning attorneys find themselves consulting Rule 2.2 regularly, and spending far more time on engagement letters and conflict waivers. Fortunately, the American College of Trust and Estate Counsel (ACTEC) has published a fully annotated set of commentaries on the Model Rules,[5] along with a formbook of engagement letters under the Rules.[6] Both publications offer a wealth of guidance to estate attorneys and may well be the estate planner's ethical manual. The Joint Representation Checklist, at right, may also help in identifying the necessary concerns.

The good news is that as we walk this minefield between the clients' desires and needs for multiple representation on the one side, and the attorneys' preservation of the duties of loyalty and confidentiality on the other, the new Rules give us more specific guidance, especially as amplified by the ACTEC materials. Are the risks worth it? We believe so. As Professor John Langbein has said:

The trust-and-estate field is the one branch of the legal profession that specializes in love. You help people build, maintain, and protect families. Yours is the branch of the law that deals with families that work, and yours is the business of helping them work. You help clients provide for spouses, children, parents, friends, servants, charity. The most resonant phrases from the Bible and the Book of Common Prayer describe the purposes: it is more blessed to give than to receive; honor thy father and thy mother; marriage is an estate founded for the having of children; in sickness and in health, until death do us part. The trust-and-estate lawyer has the signal privilege of helping people channel the noblest human aspirations into workable means. You help your fellow man to achieve the highest purposes of life, to fulfill the human condition.[7]

Notes

1. Carl A. Pierce and Lucian T. Pera, "Your Ethics Roadmap," 38 Tennessee Bar Journal, December 2002.
2. Rule 1.7 implies that no waiver of consent is needed where there is neither a directly adverse interest nor any material limitation on the representation. But in reality almost all joint representation in estate planning carries potential material limitation to one or more parties, despite the parties' strong concurrence and agreement of mutual disclosure. Comment [4] to Rule 1.7 adds: "The critical questions are the likelihood that a conflict will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or otherwise foreclose courses of action that reasonably should be pursued on behalf of the client. Consideration should be given to whether the client wishes to accommodate the other interest involved." Cautious counselors should always get consent.
3. Under Rule 1.0(b), written consent includes either (i) an actual written consent executed by a client, or (ii) oral consent, which the lawyer promptly confirms in writing.
4. Comment [17] to Rule 1.7 reads, in relevant part, as follows:
Members of a family may reasonably seek joint representation by a single lawyer in a matter affecting the family. Conflict questions may arise in such circumstances. For example, in estate planning, a lawyer may be called upon to prepare wills for family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may arise. Resolution of conflicts of interest between family members pursuant to this Rule must be consistent with the lawyer's duty of undivided loyalty to each client, but the lawyer may take into account the willingness of each individual client to accommodate the interests of the family as a whole or the individual interests of other family members.
5. Commentaries on the Model Rules of Professional Conduct, 3rd Edition (1999). A new edition is pending. Copies may be obtained from the ACTEC Foundation, 3415 South Sepulveda Blvd., Suite 330, Los Angeles, CA 90034-6060; by contacting info@actec.org; or by ordering from the web page, www.actec.org. These are, of course, based on the Model Rules, and do not take into account the Tennessee variations on Rules 1.7 and 2.2.
6. Engagement Letters: A Guide for Practitioners, for use with the ACTEC Commentaries on the Model Rules of Professional Conduct (June 1999). See the prior footnote for ordering information from ACTEC.
7. John H. Langbein, "The 20th Century Revolution in Family Wealth Transmission and the Future of the Probate Bar," 1988 Joseph Trachtman Lecture, reprinted in The Probate Lawyer, Summer 1988, also available from ACTEC.

Joint Representation Checklist

No 'consensual legal relation' (Rule 1.7)

(1) If representation is directly adverse to another client, attorney must reasonably believe that the representation will not adversely affect the relationship with such other client.
(2) If representation is materially limited by responsibilities to another client, a third party, or the attorney's own interests, attorney must reasonably believe that the representation will not be adversely affected.
(3) If representation is either "directly adverse" or "materially limited," each client must consent in writing after consultation, including, if multiple clients in a single matter:

Implications of the common representation.

Advantages and risks involved.

(4) If representation is neither "directly adverse" nor "materially limited," consent in writing is not required (but advisable).

'Consensual legal relation' (Rule 2.2) - Lawyer becomes intermediary

(1) Representation impermissible unless attorney's representation of, or relationship with, each client will not be adversely affected by attorney's responsibilities to other clients, third parties, or attorney's own interests.
(2) Representation impermissible unless attorney reasonably believes:

Matter can be resolved on terms compatible with the best interests of the clients.

Each client will be able to make adequately informed decisions in the matter.

Little risk of material prejudice to interest of any client if matter unsuccessful.

Intermediation can be undertaken impartially.

(3) Each client must consent in writing after consultation, including:

Lawyer's responsibilities as intermediary.

Implications of intermediation, including:

Advantages and risks involved.

Effect of intermediation on attorney-client privilege.

Effect of intermediation on any other obligation of confidentiality of attorney.

Any circumstances that will materially affect the attorney's impartiality between the clients.

Any representation in another matter of a client whose interests are directly adverse to the interests of any one of the clients.

Any interests of the attorney, the attorney's other clients, or third parties that will materially limit the attorney's representation of one of the clients.

Authorization from each client to disclose to each of the other clients being represented in the matter any information relating to the representation to the extent reasonably necessary to comply with the communication requirements of Rule 1.4.

Dan W. Holbrook practices estate law with Holbrook & Peterson PLLC, in Knoxville. He is certified as an Estate Planning Specialist by the Tennessee Commission on Continuing Legal Education and Specialization, is a Fellow of the American College of Trust and Estate Counsel, and serves on the TBA Probate Study Group reviewing and recommending legislation involving trusts and estates in Tennessee. He can be reached at dholbrook@hpestatelaw.com.

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