Ethical Traps for the Estates and Trusts Attorney

Reference Outline

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Information set forth in this outline should not be considered legal advice, because every fact pattern is unique. The information set forth herein is solely for purposes of discussion and to guide practitioners in their thinking regarding the issues addressed herein.

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ETHICS

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ETHICS

I. INTRODUCTION/TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT

To be sure, a lawyer practicing in the areas of estate planning and family business planning must be well versed in the laws of taxation, property, and trusts. However, the prudent estate and family business planning lawyer cannot stop there; in addition, he must have a thorough understanding of the rules regulating lawyer conduct.

Rules regulating lawyer conduct arise from several different sources including i) common law (i.e. tort law, fiduciary law, agency law), ii) criminal law, and iii) the rules of evidence. This presentation, however, focuses on the regulation of lawyer conduct under the Texas Disciplinary Rules of Professional Conduct ("TDRPC"). In particular, this presentation discusses certain rules ("Rules") of the TDRPC that will likely affect the estate and family business planning lawyer. This presentation does not discuss all of the Rules contained in the TDRPC, nor does it address every provision of a particular Rule. Accordingly, a lawyer should refer to the actual text of the TDRPC, including the comments, for more comprehensive guidance. [**Note**: Occasional references are made to parallel rules contained in the American Bar Association Model Rules of Professional Conduct. The ABA Model Rules are the blueprint for the TDRPC; however there are some important differences between them.]

The TDRPC are found at Title 2, Subtitle G, Appendix A, Article X, Section 9 of the Government Code and became effective as of January 1, 1990.

The violation of a Rule may subject a lawyer to disciplinary action. In addition, although the Preamble to the TDRPC expressly states that the violation of a Rule does not give rise to a private cause of action against a lawyer or create a presumption that a lawyer has breached a legal duty to a client, a court may look to the TDRPC for guidance in determining whether a lawyer has committed malpractice or otherwise breached a legal duty to a client.

II. DUTY OF COMMUNICATION/RULE 1.03

Rule 1.03 imposes a duty of communication on a lawyer. The purpose of the Rule is to ensure that a client has sufficient information to make intelligent decisions regarding the representation. A lawyer's duty of communication under Rule 1.03 has three basic elements: i) to keep the client <u>reasonably informed</u> about the status of the representation; ii) to <u>promptly comply</u> with reasonable client <u>requests</u> for information regarding the representation; and iii) to reasonably <u>explain</u> the legal matter so that the client can make informed decisions regarding the representation.

1. The standard of compliance with all three duties is reasonableness; the lawyer must make a reasonable effort to communicate with the client so that the client may be able to actively participate in the representation and make informed decisions. The question of whether a lawyer has acted reasonably is ordinarily a question of fact. ROBERT P. SCHUWERK & JOHN F. SUTTON, JR., A GUIDE TO THE TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT 54 (1990).

2. A lawyer should keep in mind four basic principles underlying the communication requirements of Rule 1.03. SCHUWERK at 57-59.

a. The communication must be truthful.

b. Explanations given by the lawyer should be in terms that the client can understand. Further, Comment 5 encourages lawyers to make a reasonable attempt to communicate directly with clients who are minors or mentally disabled, in addition to consulting with the client's representative.

c. The lawyer must give comprehensive advice concerning all possible options - including the potential risks associated with each option.

d. In the litigation context, the lawyer's duty to communicate does not end with a judgment, but also includes informing a client about appeal matters, including the client's right to appeal and the relative advantages and disadvantages of an appeal.

3. Additional communication duties include advising clients of the risks and benefits of all possible courses of action, informing clients of their rights, advising as to the legal and practical points of a matter, and promptly notifying clients as to why the lawyer cannot provide diligent representation (if applicable), as well as notifying clients of any changes in the lawyer's address, phone number, etc. ABA/BNA LAWYER'S MANUAL ON PROFESSIONAL CONDUCT 31:501 (1984).

4. ABA Model Rule 1.4 is the ABA counterpart to Rule 1.03 of the TDRPC.

III. DUTY OF CONFIDENTIALITY/RULE 1.05

Rule 1.05 imposes a duty of confidentiality on a lawyer. Subject to certain exceptions and limitations, this Rule generally prohibits a lawyer from knowingly disclosing or using "<u>confidential information</u>" of a client or former client. The purposes of the Rule are i) to encourage people to seek professional legal counsel for their legal problems and questions by providing assurance that communications with their legal counsel will be kept in strict confidence and ii) to promote the free exchange of information between the client and the lawyer so that the lawyer is equipped with all of the information necessary to provide effective representation.

1. <u>Confidential information</u> is broadly defined to include: i) "<u>privileged information</u>" - client information protected by the lawyer-client privilege under Rule 503 of the Texas Rules of Evidence, Rule 503 of the Texas Rules of Evidence, and Rule 501 of the Federal Rules of Evidence and ii) "<u>unprivileged information</u>" - all other client information (other than privileged information) acquired by the lawyer during the course of, or by reason of, the representation.

2. Rule 1.05 contains several exceptions whereby a lawyer <u>may</u> (discretionary disclosures) or even <u>must</u> (mandatory disclosures) disclose confidential client information. In particular, a lawyer <u>may</u> disclose confidential information: i) if the client (or former client) consents after consultation; ii) if the lawyer <u>reasonably believes</u> that disclosure is necessary to comply with the law or a court order; iii) to enforce a claim by the lawyer against the client (i.e. claim for attorney's fees for legal services rendered); iv) to establish a defense to a malpractice claim asserted by the client; and v) to prevent the client from committing a crime or fraud. Furthermore, a lawyer <u>must</u> disclose confidential information if such confidential information <u>clearly establishes</u> that a client is <u>likely</u> to engage in

criminal/fraudulent conduct that will likely kill or inflict substantial bodily harm on another. [**NOTE:** See Rule 1.05 and the accompanying Comment for additional discretionary and mandatory disclosures]. In the event a lawyer decides to disclose confidential information adverse to the client, the lawyer should only disclose such information as is necessary to accomplish the purpose of the disclosure.

3. ABA Model Rule 1.6 is the ABA counterpart to Texas Rule 1.05.

IV. DUTY OF LOYALTY

The TDRPC impose a duty of loyalty on a lawyer in that it generally prohibits a lawyer from representing conflicting interests. Rules 1.06-1.13 of the TDRPC address various situations involving conflicting interests.

A. Rule 1.06 Conflict Of Interest: General Rule

Rule 1.06 is the general conflict of interest rule. It establishes three (3) basic types of conflict situations. First, a conflict exists if the lawyer undertakes to represent opposing parties to the same litigation. Second, a conflict exists if the representation of a client (or prospective client) involves a substantially related matter in which that client's (or prospective client's) interests are materially and directly adverse to the interests of another client of the lawyer. Third, a conflict exists if the representation of a client (or prospective client) reasonably appears to be or become adversely limited by the lawyer's responsibilities to another client or to a third party, or by the lawyer's own interests. A representation involving the first type of conflict described above is never permissible. However a representation involving either the second or third type of conflict described above is permissible but only if 1) the lawyer reasonably believes that the representation of each client (or prospective client) will not be materially affected AND 2) each affected or potentially affected client (or prospective client) consents to such representation after full disclosure of the existence, nature, implications, and possible adverse consequences of the common representation and the advantages involved.

1. Though adverse interests are often defined as any interest not identical to that of a particular client, in evaluating interests in estate planning, the general consensus has been to recognize that interests may be dissimilar without being adverse. "Conflicts in estate planning goals between husband and wife do not per se create either a material potential for conflict or true adversity between them. Conflicts in rights or obligations will create a material potential for conflict or true adversity." *Report of the Special Study Committee on Professional Responsibility: Comments and Recommendations on the Lawyer's Duties in Representing Husband and Wife*, 28 REAL PROP., PROB., & TR. J. 765, 772 (1994).

2. Comment 15 to Rule 1.06 contemplates conflicts occurring in estate planning and estate administration:

> "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. In estate administration it

may be unclear whether the client is the fiduciary or is the estate or trust, including its beneficiaries. The lawyer should make clear the relationship to the parties involved."

3. Comment 13 recognizes that conflicts of interest in the non-litigation context (i.e. estate planning and family business planning) may be difficult to assess. Relevant factors to consider include: a) the length and intimacy of the lawyer-client relationships involved, b) the functions being performed by the lawyer, c) the likelihood that a conflict will actually arise, and d) the probable harm to the client or clients involved if the conflict actually arises. The question is often one of proximity and degree.

4. Comment 6 states that the representation of one client is "directly adverse" to the representation of another client if the lawyer's independent judgment on behalf of a client or the lawyer's ability or willingness to consider, recommend or carry out a course of action will be or is reasonably likely to be adversely affected by the lawyer's representation of, or responsibilities to, the other client. The dual representation also is directly adverse if the lawyer reasonably appears to be called upon to espouse adverse positions in the same matter or a related matter. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only generally adverse, such as competing economic enterprises, does not constitute the representation of directly adverse interests. However, common sense may deem such dual representation inadvisable depending upon the extent of competition between the clients.

5. Although not required by Rule 1.06, a prudent lawyer will make sure that a <u>conflict disclosure</u> and a <u>client's consent to the representation</u> are reduced to writing and signed by each of the clients (or prospective clients). *See Rule 1.06/Comment 8.*

6. A conflict that prevents a lawyer from representing a person also prevents every other lawyer at the firm from doing so.

7. ABA Model Rule 1.7 is the ABA counterpart to Rule 1.06 of the TDRPC. Also, ABA Model Rule 1.8 sets forth certain specific rules relating to current client conflicts, and ABA Model Rule 1.18 addresses a lawyer's duties to <u>prospective clients</u>, including avoiding conflicts with prospective clients.

B. Rule 1.07 Conflict Of Interest: Intermediary

1. <u>Generally</u>
Rule 1.07 governs a situation in which the lawyer acts as an intermediary by jointly representing multiple clients in the same matter. The intermediary form of representation (or joint representation) is possible where the joint clients have common goals and interests that outweigh potential conflicting interests. The role of the lawyer is to develop these common goals and interests on a mutually advantageous basis—with the end result being that everybody "wins". Examples of this type of joint representation include: assisting multiple persons in the

formation of a business enterprise, or performing estate planning for a husband and wife with potentially conflicting interests.

2. Role of the Lawyer-Intermediary

In acting as an intermediary, the lawyer assumes a special role. Rather than acting in partisan manner, advocating for the interests of a particular person to the detriment of others, the role of the lawyer-intermediary is to promote the interests of all of the clients—with the goal of achieving a resolution that benefits everyone. At the beginning of the intermediation (joint representation), each client should be advised of the lawyer's special role in the intermediation.

3. Intermediation Requirements

A lawyer may not undertake an intermediary representation/joint representation unless all of the following conditions are satisfied:

(1) the lawyer consults with each client concerning the implications of the joint representation, including the advantages and risks involved, and the effect on the attorney-client privileges;

(2) the lawyer obtains each client's written consent to the joint representation; and

(3) the lawyer reasonably believes that:

(a) the matter can be resolved without the necessity of contested litigation on terms compatible with the clients' best interests,

(b) each client will be able to make adequately informed decisions in the matter,

(c) there is little risk of material prejudice to the interests of any of the clients if the contemplated resolution is unsuccessful, and

(d) the joint representation can be undertaken impartially and without improper effect on other responsibilities the lawyer has to any of the clients. *Rule 1.07(a).*

4. Evaluating the Propriety of Intermediation

In evaluating whether a particular legal matter is appropriate for a joint representation, a lawyer should remember the following: A lawyer may never represent opposing parties to the same litigation. *Rule 1.06(a).* In addition, a lawyer cannot undertake a joint representation if contested litigation between the parties is reasonably expected or if contentious negotiations are contemplated. *See Rule 1.07/Comment 4.* If definite antagonism already exists between parties, the lawyer should strongly consider declining intermediation because the possibility that the parties' interests can be adjusted by the joint representation is not very good. *See Rule 1.07/Comment 4*. Finally, as discussed below in more detail, the lawyer needs to consider the impact the joint representation will have on confidentiality of information and the attorney client privilege. *See Rule*

1.07/Comment 5. If the lawyer concludes that Rule 1.07 prohibits him from acting as an intermediary in a legal matter, then all of the lawyers in the same firm would also be disqualified. *Rule 1.07(e)*.

5. Confidentiality/Attorney-Client Privilege
In a joint representation, there are no secrets. All information obtained by the lawyer from whatever source (third parties, one of the clients, the lawyer's own investigations, etc.) that would help the clients make informed decisions regarding the common legal matter should be disclosed to each of the clients. Moreover, in the event litigation subsequently arises between the clients concerning the common legal matter, the attorney-client privilege will likely not protect any of the communications between the lawyer and any of the clients concerning such legal matter. Before undertaking the joint representation, each of the clients should be advised of the effect that the joint representation will have concerning confidentiality and the attorney-privilege.

6. Ongoing Consultation
In carrying-out the joint representation, the lawyer must regularly consult with each of the clients regarding the decisions to be made and the considerations relevant in making them so that each client can make adequately informed decisions. *Rule 1.07(b).* However, because the lawyer is not advocating for a particular client, each of the clients will have to assume a more active role in the decision making process.

7. Termination of Intermediation
A lawyer must withdraw as an intermediary if any of the clients requests or if any of the requirements for serving as an intermediary cease to exist. The withdrawal must be a complete withdrawal, meaning that the lawyer cannot represent any of the clients in the legal matter subject to the joint representation. *Rule 1.07(c).* Furthermore, arguably the lawyer's continued representation of some of the clients would be improper even with the consent of all of the clients involved in the joint representation. The break-down of the joint representation can be disastrous for everyone (i.e. the lawyer and the clients) because the situation has probably deteriorated to the point where each of the clients will need to obtain separate legal counsel and the lawyer who served as the intermediary may face complaints from one or more of the joint clients.

8. ABA Model Rule 1.7 is the ABA Counterpart to Rule 1.07 of the TDRPC.

C. Rule 1.09 Conflict Of Interest: Former Client

1. Generally
Rule 1.09 of the TDRPC sets forth certain circumstances in which a lawyer is prohibited from undertaking a representation against a former client. Rule 1.09 recognizes that even after the attorney-client relationship is terminated, the lawyer still owes certain duties to the former client. Thus, under Rule 1.09, a lawyer may not undertake a representation adverse to a former client without the prior consent of the former client if:

A. such representation questions the validity of the lawyer's services or work product for the former client;

B. such representation in reasonable probability will involve a violation of Rule 1.05 of the TDRPC (i.e. Confidentiality of Information); or

C. such representation is the same or a substantially related matter. *Rule 1.09(a)*

Each of these situations is described in more detail below.

2. Questioning Validity of Work for Former Client

The first limitation prohibits a lawyer from challenging the work which the lawyer previously performed on behalf of a former client. The classic example involves a lawyer seeking to overturn a will which the lawyer previously prepared for the former client.

3. Violation of Confidentiality Obligations

The second limitation prohibits a lawyer from undertaking a representation adverse to a former client if, in carrying-out such representation, there is reasonable probability that the lawyer would make an unauthorized disclosure of, or an improper use of, confidential information of the former client to the disadvantage of the former client—such confidential information having been obtained by the lawyer in the course of the representation of the former client.

4. Same Matter and Substantially Related Matters

The third limitation has two aspects—"same matter" and "substantially related matters". The "same matter" aspect prohibits a lawyer from switching sides in the middle of battle (i.e. lawyer initially representing the plaintiff in a legal dispute and then subsequently representing the defendant in the same legal dispute). **Note:** This limitation, to some extent, overlaps the first two limitations—Questioning Validity of Work for Former Client and Violation of Confidentiality Obligations.

Although Rule 1.09 does not specifically define "substantially related" matter, Comment 4A to Rule 1.09 states that it involves a situation where a lawyer could have acquired confidential information concerning the former client that could be used by the lawyer to the disadvantage of the former client or the advantage of the current client or another person.

5. Waiver of Conflict by Former Client

Rule 1.09 is intended to protect the former client. The former client can always consent to the adverse representation. However, such consent will be effective only if the lawyer discloses all of the relevant circumstances to the former client, including the lawyer's past or intended role on behalf of each client. *See Rule 1.09/Comment 10.*

6. Disqualification Imputed to other Attorneys At Firm

If a lawyer is prohibited from undertaking a representation against a former client under Rule 1.09, then all of the other lawyers at that firm are also disqualified from undertaking such representation. *Rule 1.09(b)*

7. When Does Client Become A "Former Client"
   In conducting a conflicts analysis, it is important for a lawyer to assess whether a person is a current client or a former client because such assessment will ultimately determine which professional ethics rules govern the lawyer's conduct--the current client rules or the former client rules. Unfortunately, sometimes it is not easy to determine when a current client becomes a former client. Factors to consider include: the scope of the contemplated representation (ongoing and involving various legal matters or limited and involving a single legal matter), the length of the lawyer-client relationship, the period of time that has elapsed since the lawyer last performed work for the client, the existence of a termination letter from either the client or the lawyer, and the client's subsequent retention of another law firm for legal work.

8. Rule 1.9 of the ABA Model Rules is the ABA counterpart to Rule 1.09 of the TDRPC.

D. Rule 1.12 Organization As Client

Rule 1.12 deals with the representation of an organizational client (i.e. corporations, limited liability companies, limited partnerships, etc.). According to Rule 1.12, a lawyer employed by an organization represents "the entity" and not its constituents (i.e. shareholders, officers, employees, etc.). In the event the interests of the organization are adverse to the interests of a constituent, the lawyer for the organization may need to explain to the constituent that 1) an adversity of interests exists between the organization and the constituent, 2) the lawyer represents the organization, not the constituent, 3) the constituent should seek independent representation, and 4) the matters discussed between the constituent and lawyer will not be confidential and may not be privileged insofar as the constituent is concerned.

1. Comment 3 to Rule 1.12 states that any communication between the lawyer for the organization and the constituents of the organization, while acting within their "organizational capacity," is protected by the confidentiality rule *(Rule 1.05).*

2. ABA Model Rule 1.13 is the ABA counterpart to Rule 1.12 of the TDRPC.

E. Rule 1.15 Declining or Terminating Representation

1. Overview.
   Rule 1.15 of the TDRPC is the primary rule governing the termination of the attorney-client relationship. In particular, this Rule sets forth situations under which the attorney must withdraw from the representation of a client (mandatory withdrawal) and situations under which the attorney may withdraw from the representation of a client (permissive withdrawal). Furthermore, Rule 1.15 sets forth the obligations of the attorney in connection with any termination of the attorney-client relationship. In addition to Rule 1.15, other Rules of the TDRPC either require or permit termination of the attorney-client relationship under specific circumstances. *(See Rule 1.01: Competent and Diligent Representation and Rule 1.07: Conflict of Interest/Intermediary.)*

2. Mandatory Withdrawal

Under Rule 1.15(a), a lawyer must withdraw from the representation of a client if any of the following conditions exist:

(a) the representation will result in the violation of Rule 3.08 of the TDRPC (i.e. Lawyer as a Witness), other Rules of the TDRPC, or other applicable law;

(b) the lawyer's physical, mental, or psychological condition materially impairs the lawyer's fitness to represent the client; or

(c) the lawyer is discharged by the client, with or without good cause.[1]

3. Permissive Withdrawal

Under Rule 1.15(b), a lawyer may withdraw from the representation of a client if any of the following conditions exist:

(a) withdrawal can be accomplished without material adverse effect on the interests of the client;

(b) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes may be criminal or fraudulent;

(c) the client has used the lawyer's services to perpetrate a crime or fraud;

(d) a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent or with which the lawyer has fundamental disagreement;

(e) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services, including an obligation to pay the lawyer's fee as agreed, and has been given reasonable warning that the lawyer will withdraw unless the obligations is fulfilled;

(f) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(g) other good cause for withdrawal exists.

Note: The lawyer may withdraw from the representation under any of the situations described in subsections 3(b)-(g) above, even if such withdrawal may have a material adverse effect upon the interests of the client (*See Rule 1.15 Comment 7*).

[1] A client has the right to discharge a lawyer at any time, for any reason or no reason at all; the client will remain obligated to pay any legal fees earned prior to discharge (*see Rule 1.15 Comment 4*).

4. Prohibition on Withdrawal Even if Good Cause Exists
If a court orders a lawyer to continue the representation of a client, the lawyer must continue the representation even if the lawyer would otherwise be required or permitted to withdraw from the representation under the TDRPC. *Rule 1.15(c).* For example, if a lawyer has been appointed to represent a client, ordinarily the lawyer would have to obtain the approval of the appointing authority or presiding judge in order to withdraw.

5. Obligations of Lawyer In Connection With Withdrawal
In connection with the termination of the attorney-client relationship, the lawyer must take all reasonable steps to protect the interests of the client *Rule 1.15(d).* Such steps include, but are not limited to: giving reasonable notice to the client of the withdrawal, allowing the client time for employment of other counsel, providing the client with all papers and property to which the client is entitled, and refunding the client any advance fee payments which have not been earned by the lawyer. In addition, after the termination of the representation, the lawyer must abide by the confidentiality standards imposed by Rule 1.05 with respect to information obtained during the course of the representation of the former client. *Rule 1.05, Comment 21.*

6. Declining Representation
A lawyer must decline a new representation for the same reasons that a lawyer would be required to withdraw from an existing representation. *See Rule 1.15(a).*

7. ABA Counterpart. Rule 1.16 of the ABA Model Rules is the ABA counterpart to Rule 1.15 of the TDRPC.

V. FAMILY REPRESENTATION MATTERS AND ATTORNEY-CLIENT PRIVILEGE

The TDRPC apply to all types of representations (i.e. litigation work, transactional work, etc.). However, the Rules are more easily applied in some types of representations than others. Estate and family business planning is one area where a practitioner is likely to struggle with the TDRPC. The notion of a "family lawyer" permeates the fields of estate and family business planning. Oftentimes, the "family lawyer" is called upon to represent multiple family members with varying plans, goals and interests. The multiplicity of individuals and goals inherent in family representation gives rise to ethical problems and legal problems in two main areas—confidentiality and conflicting interests.

For many practitioners, the most common type of family representation is the representation of a husband and wife for estate planning. In the context of estate planning for a husband and wife, three basic models of representation have been proposed by commentators and practitioners for addressing confidentiality and conflicting interests concerns -- 1) joint representation (i.e. the open relationship), 2) separate representation (i.e. the closed relationship), and 3) independent representation.

In a joint representation or open relationship, the same lawyer represents the husband and wife jointly. The husband, wife, and lawyer work together as a team to implement a coordinated estate plan. There are no secrets in a joint representation, and any information and communications relevant to the joint representation disclosed to the lawyer by one spouse should be disclosed by the lawyer to the other spouse. Furthermore, in the event litigation subsequently arises between the

husband and wife involving estate planning matters, the attorney-client evidentiary privilege would not apply. See Rule 503(d) of the Texas Rules of Evidence for exceptions to the attorney-client privilege including fraud, claimants through the same deceased client, documents attested to by the lawyer, and joint clients. (**NOTE:** The attorney-client evidentiary privilege would continue to apply, however, to litigation between the husband/wife, on the one hand, and outside third parties on the other hand). A joint representation may discourage both the husband and wife from fully confiding in the lawyer because they know that anything disclosed that is relevant to the joint representation may be disclosed to the other spouse. Nevertheless, the joint representation model is probably the most common form of representation of husband and wife for estate planning purposes.

Like the joint representation model, in a separate representation or closed relationship, the same lawyer represents both the husband and the wife in the estate planning process. However, in a separate representation, the husband and wife are each regarded as separate and distinct clients of the lawyer. Because the lawyer regards the husband and wife as separate clients, the lawyer must not disclose the confidences of one spouse to the other spouse. This puts the lawyer at risk of being caught in the unenviable position of learning information from one spouse that would be important to the other spouse in formulating his or her estate plan. However, the lawyer would not be permitted to disclose such information to the other spouse because of the duty of confidentiality owing to the disclosing spouse and consequently the attorney-client privilege should apply to such information. It is important to note that there is disagreement among commentators about the propriety of the separate representation model. The practitioner should carefully review applicable rules and regulations before undertaking such representation.

In an independent representation, the husband and wife are each represented by different legal counsel. This form of representation ensures that each spouse has his or her own counsel "looking-out" solely for the interests of that spouse. It further protects the confidentiality and attorney-client privilege of communications between a spouse and his or her lawyer. From the lawyer's perspective, independent representation is the safest form of representation in terms of avoiding conflict and confidentiality issues. A major drawback of this form of representation, however, is that it is more costly and less efficient than the other forms of representation in which only one lawyer is retained. If a lawyer does not believe that adequate representation can be provided to a husband and wife through either joint or separate representation, the lawyer should have one or both of the spouses retain separate legal counsel.

It is very important that the lawyer discuss each of the forms of representation described above with the husband and wife at the very beginning, along with the advantages and disadvantages of each form, and let the husband and wife select the form of representation that will best suit their needs. In the event the husband and wife select either the joint representation (i.e. open relationship) or separate representation (i.e. closed relationship), the lawyer should obtain their agreement to such representation in writing.

VI. MALPRACTICE CONCERNS

Adverse client interests can arise any time the attorney represents more than one person. Each person has an opinion as to how a matter should be resolved and each is looking out for his or her own interests. For example, if a family business is represented by a lawyer who has also done legal work for the president or principal shareholders, conflicts may arise. When the stockholders are all members of the same family and the lawyer is considered the "family attorney," each party often considers the lawyer his personal attorney. In disputes arising within the business framework and

between family members, the lawyer may feel an allegiance to all sides if he has not determined the confines of his relationship with each party from the start. Also, an attorney should be especially wary of representing the president in a divorce suit as increasingly closely held corporations (through their officers, directors and attorney) are being joined in these suits as material witnesses, especially when stocks and benefits are included in a dispute over the allocation of community property.

A lawyer can minimize malpractice risk arising from family representation by carefully analyzing, defining, and documenting the lawyer's advisory relationship.

A. Identifying Client(s)

The very first question a lawyer should ask himself or herself at the very beginning of a representation is, Who am I representing? The answer to this question is critical because it will establish the persons/organizations to whom the lawyer's fiduciary duties will run.

B. Defining the Scope of the Representation

After determining who the client(s) will be, the lawyer must then define the scope of the representation (i.e. What am I being hired to do?/What services will I be performing on behalf of my client(s)?).

C. Recognizing Conflicts

After identifying the client(s) and establishing the scope of the representation, the lawyer must then analyze the representation for any conflicts under the TDRPC.

D. Analyzing and Resolving Conflicts

In the event the lawyer determines that the contemplated representation will give rise to a conflict under the TDRPC, the lawyer must determine whether he or she can undertake such representation through full disclosure of the conflict to the affected client(s) and obtaining the consent of each to the representation. If the lawyer determines that the conflict is such that he or she cannot possibly represent the client(s) even with full disclosure and consent, the lawyer should immediately decline the representation or limit the representation to the extent permissible under the TDRPC. (i.e. This may mean agreeing to represent only one of two prospective clients with conflicting interests and having the other prospective client obtain separate legal representation.)

E. Documentation and Records

Another key to minimizing malpractice risk is to maintain good records concerning each representation. The prudent lawyer will begin documenting the attorney-client relationship from the outset and continue documenting the relationship until the conclusion of the representation. For example, a written engagement letter should be sent to each client at the beginning of the representation. This engagement letter should specifically address the matters discussed in Items A-D above by: (i) identifying the client(s) the lawyer is representing, (ii) defining the scope of the representation, (iii) fully disclosing any conflicts, including the risks involved, and (iv) obtaining the client(s) consent to the representation (if the lawyer believes he or she can properly undertake the representation despite the conflict). This engagement letter should also specify the manner in which the lawyer's fees will be determined, and, if more than one (1) client is involved in the representation the person or persons who will be responsible for paying the legal fees. In addition to preparing written engagement letters to persons the lawyer <u>intends to represent</u>, the lawyer may need to

affirmatively advise persons whom the lawyer does not intend to represent that the lawyer is not representing that person and such person should obtain separate counsel. The failure to so advise that person could give rise to a negligence cause of action against the lawyer if the circumstances are such that it was reasonable for such person to believe the lawyer was representing the person. Parker v. Caunahan, 772 S.W. 2d 151, 157 (Tex. App. – Texarkana 1989, writ denied) (in overturning summary judgment in favor of defendant's law firm, the court held that even though the evidence rejected the showing of an attorney-client relationship between the plaintiff and defendant a fact issue was raised as to whether defendant was negligent in failing to advise plaintiff that they would not represent her); Burnap v. Linnantz, 914 S.W. 2d 142, 150 (Tex. App. – San Antonio 1995, writ denied) (in overturning summary judgment in favor of defendant law firm, the court held that fact issues were raised to as to: (i) whether attorney-client relationship existed between defendant and plaintiff, and (ii) if no attorney-client relationship existed, whether defendant was negligent in failing to advise plaintiff that defendant did not represent him). If the lawyer feels a need to advise a person that the lawyer is not representing the person, the lawyer should make sure this is accomplished in writing, preferably with a signed acknowledgment by that person returned to the lawyer.

F. Estate Planning Quality Control Procedure

1. Presupposes good form book;

2. Presupposes good document assembly program;

3. Presupposes effective training and use of paralegal and/or legal secretary; and

4. Presupposes working knowledge of applicable TDRPC.

G. Professional Malpractice And The Privity Requirement

Due to recent cases, most notably Barcelo v. Elliot, 923 S.W.2d 575 (Tex. 1996), and Belt v. Oppenheimer, Blend, Harrison and Tate, 192 S.W.3d 780 (Tex. 2006), the Texas Supreme Court has stated that it strikes the appropriate balance by drawing a bright line so that a claim for malpractice against an estate planning lawyer for negligent estate planning cannot be brought by the beneficiaries of an estate, but may be brought by an estate's personal representative.

An estate planning lawyer does not owe a legal duty to the beneficiaries of estate planning documents (i.e. will or trust) drafted by the lawyer when the lawyer has an attorney-client relationship only with the testator or grantor and not the beneficiaries. Barcelo v. Elliot, 923 S.W.2d 575 (Tex. 1996). As a result, such non-client beneficiaries cannot assert a malpractice action against an estate planning lawyer who negligently prepares estate planning documents to their detriment. The opinion of the Texas Supreme Court in Barcelo affirms previous Texas court of appeals' decisions holding that a lawyer does not owe a duty to intended beneficiaries of a will who are not in privity of contract with the lawyer. Dickey v. Jansen, 731 S.W.2d 581, 582 (Tex. App.-Houston [1st Dist.] 1987, writ ref'd n.r.e.) (lawyer who allegedly was negligent in drafting a testamentary trust owes no duty to intended beneficiaries); Berry v. Dodson, Nunley & Taylor, 717 S.W.2d 716, 718 (Tex. App.-San Antonio 1986) (lawyer who allegedly was negligent in failing to diligently

prepare a will for execution before testator's death owed no duty to intended beneficiaries), *judgm't vacated by agr.,* 729 S.W.2d 690 (Tex. 1987).

In Barcelo, a lawyer prepared a pourover will and an inter vivos trust for a client as part of an estate plan for the client. After the death of the client, the probate court declared the trust to be invalid and unenforceable. As a result, the deceased client's residuary estate passed by intestacy to persons other than the intended beneficiaries of the inter vivos trust. The beneficiaries of the trust brought a malpractice action against the lawyer who prepared the estate planning documents. At the trial court level, the lawyer moved for summary judgment on the sole ground that he did not owe a duty to the beneficiaries of the trust because he never represented them. The trial court granted the lawyer's summary judgment motion and the court of appeals affirmed. On appeal to the Texas Supreme Court, the sole question presented was:

"Whether an attorney who negligently drafts a will or trust agreement owes a duty of care to persons intended to benefit under the will or trust, even though the attorney never represented the intended beneficiaries."

The Texas Supreme Court answered this question **"NO"** (in a 5 to 3 decision) adhering to the common law privity rule that a lawyer owes a duty of care only to his or her client, not to third parties who may have been harmed by the lawyer's negligent representation of the client. In addition, the Texas Supreme Court rejected a cause of action based on a third-party-beneficiary contract theory on the ground that a legal malpractice action in Texas is an action in tort, not in contract, and is therefore governed by negligence principles.

Three justices dissented from the majority opinion—declaring that it was time for Texas to join the majority of states which have relaxed the privity barrier in the estate planning context in order to provide intended beneficiaries a cause of action against a lawyer who negligently prepares estate planning documents. The dissent complained that the majority, by denying a cause of action in favor of the intended beneficiaries, has created a situation where a lawyer who is negligent in the preparation of estate planning documents is accountable to no one because the client (testator/grantor) is dead—and although the personal representative would succeed to the cause of action of the deceased client, the estate itself may not suffer any harm or diminution of funds as a result of the lawyer's negligence (except perhaps attorney's fees paid). Although all three dissenting justices generally agreed that intended beneficiaries of an estate plan should have a right of action against a negligent lawyer, they differed as to the class of persons who could qualify as intended beneficiaries and therefore maintain an action. Two dissenting justices favored a broad class of beneficiaries composed of any person claiming to be an intended beneficiary of the deceased client's estate. The third dissenting justice, on the other hand, advocated limiting the class of intended beneficiaries only to those persons specifically named or identified on the face of the estate planning documents.

As mentioned above, the decision by the Texas Supreme Court in Barcelo places Texas among the minority of states holding on to the privity requirement and denying beneficiaries a cause of action against a lawyer who negligently prepares estate planning documents. The overwhelming majority of states have provided beneficiaries with a cause of action against a lawyer who negligently prepares estate planning documents despite the lack of privity between the lawyer and beneficiaries. The "majority states" have afforded

beneficiaries this right of action on one of two theories. Some states hold that the cause of action of an intended beneficiary against the negligent estate planning lawyer sounds in tort/negligence in that the lawyer owes a duty of care directly to the beneficiary. Needham v. Hamilton, 459 A.2d 1060, 1061 (D.C. Ct. App. 1983). Other states hold that the cause of action of the intended beneficiary sounds in contract in that the beneficiary is a third-party-beneficiary of the estate planning contract between the lawyer and the deceased client. Guy v. Liederbach, 459 A.2d 744, 752-753 (Pa. 1983). Whether the cause of action is based on tort or contract may be important because the statute of limitations for a tort action and a contract action may be different.

Although a beneficiary is precluded from asserting a claim against an estate planner under Barcelo, there is no legal bar, i.e., Barcelo, preventing an estate's personal representative from maintaining a legal malpractice claim on behalf of the estate against the decedent's estate planners. Belt v. Oppenheimer, Blend, Harrison and Tate, 192 S.W.3d 780 (Tex. 2006).

As a result, an estate's personal representative, on behalf of the estate of a decedent, may assert a malpractice claim against the decedent's estate planners for negligent tax planning that results in depletion of the estate. The opinion of the Texas Supreme Court in Belt is one of first impression.

In Belt, a law firm prepared a will for a client as part of an engagement for estate planning. After the death of the client, the client's estate incurred over $1,500,000 in tax liability. The Co-Executors of the estate brought a malpractice action against the law firm and its attorneys claiming (i) negligent drafting of the will, and (ii) negligent advice in asset management, which both were claimed to result in tax liability that could have been avoided by competent estate planning. At the trial court level, relying on the Barcelo decision, the law firm moved for summary judgment on the ground that estate planners owe no duty to the personal representatives of a deceased client's estate. The trial court granted such motion and the court of appeals affirmed. On appeal to the Texas Supreme Court, the sole question presented was:

"Whether the Barcelo rule bars suits brought *on behalf* of the decedent client by his estate's personal representatives."

The Texas Supreme Court answered this question "**NO**" adhering to the long-standing, common-law principle that actions for damage to property survive the death of the injured party. The Texas Supreme Court drew a distinction between (i) claims for injury to property, which pass to the estate and the damages are limited to that property loss, and (ii) other claims, i.e., personal injuries and mental anguish, which do not pass to the estate.

In a related issue, the Texas Supreme Court held that a claim for legal malpractice accrues before the decedent's death. Id. at 785. While the primary damages at issue, i.e., increased tax liability, do not occur until after the decedent's death, the lawyer's alleged negligence occurred while the decedent was alive and, thus, the injury accrues during the client's lifetime and the claim survives the client's death. Additionally, in footnote five, the Texas Supreme Court notes that the discovery rule applies.

In reaching this conclusion, the Texas Supreme Court discussed many policy considerations. The most notable included a reference to the dissent in Barcelo.

> Precluding both beneficiaries and personal representatives from bringing suit for estate-planning malpractice would essentially immunize estate-planning attorneys from liability for breaching their duty to their clients. As the Barcelo dissent noted, however, allowing estate-planning malpractice suits may help provide accountability and thus an incentive for lawyers to use greater care in estate planning. Limiting estate-planning malpractice suits to those brought by either the client or the client's personal representative strikes the appropriate balance between providing accountability for attorney negligence and protecting the sanctity of the attorney-client relationship. Id. at 789.

In summary:

1. The Barcelo case is a favorable decision for Texas estate planners (and their malpractice insurance carriers).

2. The Belt case is not a favorable decision to Texas estate planners (or their malpractice insurance carriers). It is arguable whether this strikes the appropriate balance for estate planner accountability. As data is compiled in the upcoming years regarding malpractice claims against estate planners under Belt, and as plaintiff attorneys add Belt to their arsenal, the line may need to be restricken or further refined by Texas courts.

3. Assume a lawyer is coordinating the estate plans of persons A, B, and C. Assume further that B and C are beneficiaries of A's estate plan (i.e. will) and the success of the estate plans of B and C is dependent to some extent on the validity of A's estate plan. If A's estate plan (i.e. will) is determined to be invalid or unenforceable for some reason such that B and C do not receive certain property that they expected in establishing their estate plans, would B and C have a claim against the lawyer for malpractice? Barcelo may not provide protection to a lawyer in these circumstances.

4. Negligent Misrepresentation – The Texas Supreme Court has recognized a negligent representation cause of action in favor of third-party/non-clients against an attorney in special circumstances based upon RESTATEMENT (SECOND) OF TORTS § 552(1977). McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests, 991 SW2d 787 (Tex. 1999). This negligent misrepresentation cause of action is separate and distinct from professional malpractice and does not depend on the existence of traditional attorney-client relationship between the claimant and the attorney. Id. at 408-409. Generally speaking, in order to establish a cause of action for negligent misrepresentation, the claimant must show: (a) the attorney made a representation to the claimant specifically, (b) such representation was made by the attorney to induce some action on the part of the claimant, (c) the claimant relied on such representation, (d) such reliance by the claimant was justifiable, (e) the representation relied upon was false, and (f) the claimant suffered damages as a result.

5. Failure to Advise Persons/Non-clients of Non Representation – Even in the absence of conduct sufficient to support a finding of an attorney-client relationship, a lawyer may be liable to a person/non-client if the circumstances were such that it was reasonable for such person to believe that he or she was represented by the lawyer and the lawyer fails to advise the person/non-client that the lawyer was not representing him or her. (See discussion in VI(E) above.)