Conflicts of Interest When Representing Family Business Owners

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While business succession planning is frequently non-adversarial and client-centered, there are numerous ways in which advisors can be confronted with ethical issues. Someone once said that you either have integrity or you don't, but we can all learn something more about the rules that apply to ethical dilemmas!

Too many unhappy family members are seeking ways to premise malpractice actions by citing violations of the ethics rules, particularly conflicts of interest. All family business succession planning advisors must be aware of the ethical constraints that apply to our work. To the extent that the advisors become more aware of the issues involved, there can be more effective loss prevention.

The Model Rules of Professional Conduct adopted by the American Bar Association, along with the official Comments to those Rules, provide guidance to all lawyers.[1]

Comments [19] and [20] in the Preamble provide useful guidance:

> "[19] Failure to comply with an obligation or prohibition imposed by a Rule is a basis for invoking the disciplinary process. The Rules presuppose that disciplinary assessment of a lawyer's conduct will be made on the basis of the facts and circumstances as they existed at the time of the conduct in question and in recognition of the fact that a lawyer often has to act upon uncertain or incomplete evidence of the situation. Moreover, the Rules presuppose that whether or not discipline should be imposed for a violation, and the severity of a sanction, depend on all the circumstances, such as the willfulness and seriousness of the violation, extenuating factors and whether there have been previous violations.

1 This paper addresses ethical issues in light of the Model Rules of Professional Conduct adopted by the American Bar Association and most recently amended in 2003 (the "ABA Model Rules"). These rules are not necessarily the same as the rules governing practice in any given state. Reference to applicable state rules, many of which are the same or very similar to the ABA Model Rules, is required.

> "[20] Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached. In addition, violation of a Rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability.... Nevertheless, since the Rules do establish standards of conduct by lawyers, a lawyer's violation of a Rule may be evidence of breach of the applicable standard of conduct."

In 1999, the American College of Trust and Estate Counsel adopted "commentaries" on the American Bar Association's then-Model Rules of Professional Conduct, which are published as ACTEC, Commentaries on the Model Rules of Professional Responsibility, 3d Edition (March 1999), which are hereafter referred to as the "ACTEC Commentaries." While the primary focus of the ACTEC Commentaries is on estate planning, it has application to business succession planning, as well.

The Reporter's Note included at the beginning of the ACTEC Commentaries recognizes both the prevalence of conflict situations in estate and family business succession planning and the absence of specific guidelines for these planners in the ABA Model Rules:

> "The main themes of the Commentaries are: (1) the relative freedom that lawyers and clients have to write their own charter with respect to a representation in the trusts and estates field; (2) the generally nonadversarial nature of the trusts and estates practice; (3) the utility and propriety, in this area of the law, of representing multiple parties, whose interests may differ but are not necessarily adversarial; and (4) the opportunity, with full disclosure, to moderate or eliminate entirely many problems that might otherwise arise under the MRPC. The Commentaries additionally reflect the role that the trusts and estates lawyer has traditionally played as the lawyer for members of a family. In that role a trusts and estates lawyer frequently represents the fiduciary of a trust or estate and one or more of the beneficiaries. In drafting the Commentaries we have attempted to express views that are consistent with the spirit of the MRPC as evidenced in the following passage: 'The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself.'"

(emphasis added)

Any examination of the ethical issues for succession planning lawyers must begin with the applicable Rules of Professional Conduct ("RPC").[2] While these rules expressly apply to attorneys, it is reasonable to expect that similar standards will be applied to the other professions who assist clients with this planning.

My hope in this work is not to provide an ironclad "road map" for every situation; rather, my goal is to illustrate the rules in several common situations, to give some thoughts on the resolution of the problems and to raise issues that are commonly ignored (perhaps in the mistaken belief that the problem will "go away" all by itself).

It is not particularly useful for a discussion of these issues to conclude with the observation that "this is an interesting problem," with no guidance on a solution!

Little can be obtained from reported case decisions in the ethics arena. Perhaps this is because violations of ethical requirements more frequently lead to malpractice actions.

Our obligations begin with the need to provide a client with "competent representation" (RPC 1.1) and to keep the client "reasonably informed" (RPC 1.4). The latter obligation frequently causes problems for those advisors who are less than diligent.

Beyond these basic requirements, however, a planner can be presented with ethical issues involving conflicts of interest and other matters. Starting with some thoughts on engagement letters and client communication, I will spend most of this paper on the other issues listed.

Engagement Letters

The advisor and the client must agree on the scope of the lawyer's representation according to RPC 1.2. How should that agreement be documented? Should you use an engagement letter?

2 The terms "Rules of Professional Conduct" and "RPC" in this paper refer to the ABA Model Rules.

Some advisors may find a formal engagement letter to be intrusive on the so-called "open and honest" relationship they have with their clients. Why put "the objectives of the representation" [RPC 1.2(a)] in a letter, they wonder, when both the client and the advisor know perfectly well that the client came in for business succession services? This issue was addressed in the ACTEC Commentaries:

> "Variations in the circumstances and needs of trusts and estates clients and in the approach and practice of individual lawyers naturally result in lawyers and clients adopting very different methods of working together. The agreement between a lawyer and client regarding the scope and objectives of the representation is often best expressed formally in an engagement letter or other written communication. However, most often their agreement is implicitly reflected in the manner in which they choose to work together."

RPC 1.5(b) provides as follows:

> "The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client."

(emphasis added)

Potential conflicts of interest among the owners of the business should be acknowledged in a written engagement letter. A written engagement letter can also set forth the method of your compensation, whether the fees are to be paid by the business or its owners, the procedure for billing, whether there can be confidences among the business owners, the termination of the relationship and dispute resolution.

A form of engagement letter for family business succession planning is also attached at the end of this material.

Diligence and Effective Client Communication

RPC 1.3 demands that "[a] lawyer shall act with reasonable diligence and promptness in representing a client." The appearance of procrastination, as well as its reality, can be exacerbated by ineffective client communications.

The failure to communicate regularly with a client may be one of the leading causes of ethical lapses and malpractice complaints, particularly with respect to the reasonableness of fees. The problem may be more acute in representations where much of the work is done outside of the eyes of the client.

Examples include time spent on legal research, document review and other matters not commonly requiring client participation, and planning for lifetime gifts with difficult valuation issues.

The more the work is done beyond the client's eyes, the more important is the requirement that we keep the client "reasonably informed." This may be more a matter of common sense than of malpractice.

Conflicts of Interest

The Rules of Professional Conduct present several standards addressing conflicts of interest, which are primarily found in two Rules:

1. RPC 1.7 deals with the representation of multiple clients whose interests involve a **concurrent conflict of interest**; and

2. RPC 1.9 deals with the representation of a new client whose interests are **materially adverse** to those of a former client.[3]

3 The former RPC 2.2 focused on the lawyer's involvement as an intermediary between multiple clients, so long as there was little risk of **material prejudice** to their respective interests if the intermediation was

These rules can have significant implications for the business succession planner in even the most common situation. The joint representation of multiple clients often produces a better result than would be the case had each party sought separate counsel. Economies of scale can be achieved, reducing the cost of services; the plans can be more effectively coordinated, particularly where the predominant relationship between the parties is cooperative and not adversarial.

Indeed, RPC 1.7, which provides the general rules for conflicts of interest, provides that the lawyer may not represent clients simultaneously where the representation represents a "concurrent conflict of interest" unless "(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; (2) the representation is not prohibited by law; (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and (4) each affected client gives informed consent, confirmed in writing."

A "concurrent conflict of interest" exists if "(1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer."

Rule 1.0(e) defines "informed consent" as "the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct."

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unsuccessful. This rule was deleted by the ABA in favor of addressing that role as a type of multiple representation covered by RPC 1.7. However, this rule has been retained in some jurisdictions, including Indiana.

Can the clients waive the conflict? A client may consent to representation notwithstanding a conflict. But is every conflict consentable?

Comment [2] under Rule 1.7 sets forth the steps which a lawyer should take in assessing a conflict of interest situation:

> "[2] Resolution of a conflict of interest problem under this Rule requires the lawyer to: 1) clearly identify the client or clients; 2) determine whether a conflict of interest exists; 3) decide whether the representation may be undertaken despite the existence of a conflict, i.e., whether the conflict is consentable; and 4) if so, consult with the clients affected under paragraph (a) and obtain their informed consent, confirmed in writing."

The question of whether a conflict is "consentable" is addressed in Comments [15] and [28]:

> "[15] Consentability is typically determined by considering whether the interests of the clients will be adequately protected if the clients are permitted to give their informed consent to representation burdened by a conflict of interest. Thus, under paragraph (b)(1), representation is prohibited if in the circumstances the lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation.
>
> "[28] Whether a conflict is consentable depends on the circumstances. For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference in interest among them. Thus, a lawyer may seek to establish or adjust a relationship between clients on an amicable and mutually advantageous basis; for example, in helping to organize a business in which two or more clients are entrepreneurs, working out the financial reorganization of an enterprise in which two or more clients have an interest or arranging a property distribution in settlement of an estate. The lawyer seeks to resolve potentially adverse interests by developing the parties' mutual interests. Otherwise, each party might have to obtain separate representation, with the possibility of incurring additional cost, complication or even litigation. Given these and other relevant factors, the clients may prefer that the lawyer act for all of them."

Comment [18] addresses the issue of "informed consent":

> "[18] Informed consent requires that each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client.... The information required depends on the nature of the conflict and the nature of the

> risks involved. When representation of multiple clients in a single matter is undertaken, the information must include the implications of the common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege and the advantages and risks involved."

Comment [20] addresses the need to obtain the consent in writing:

> "[20] Paragraph (b) requires the lawyer to obtain the informed consent of the client, confirmed in writing. Such a writing may consist of a document executed by the client or one that the lawyer promptly records and transmits to the client following an oral consent.... If it is not feasible to obtain or transmit the writing at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.... The requirement of a writing does not supplant the need in most cases for the lawyer to talk with the client, to explain the risks and advantages, if any, of representation burdened with a conflict of interest, as well as reasonably available alternatives, and to afford the client a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns. Rather, the writing is required in order to impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing."

Comment [31] deals with the problem of confidentiality in the event of simultaneous representation of multiple parties:

> "[31] As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect that client's interests and the right to expect that the lawyer will use that information to that client's benefit.... The lawyer should, at the outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material from the representation should be kept from the other."

How do these conflict of interest rules impact lawyers in the business succession practice?

Representing multiple owners of a business (and the business itself). While many of the issues associated with family estate planning arise in the context of family business succession planning, the opportunities for conflicts of interest compound:

1. Where the advisor meets with only one of the business owners. The advisor may have a conference with only one business owner, typically the majority owner. Suppose that the client with whom the advisor meets assures you that the other owners of the business (the owner's children, for example) are in full accord with the business succession plan? Can you simply prepare documents and have them signed on that assurance, perhaps never meeting the other owners of the business?

Do you represent the other owners? Do they think you do? If you do not represent the other owners, I recommend that you confirm that fact in writing and encourage them to seek independent counsel.

I suggest that you always meet with the other owners, to verify the statement that "they are in full agreement with my plan." Go over the options and decisions that were made in the first conference. Is there understanding? Is there agreement?

2. Where the owners of the business do not agree. While many of the owners may agree on the basic components of a business succession plan, there may easily be disagreements.

If the owners of the business cannot agree, for example, on whether all owners must also work in the business, on who will become the next manager upon the retirement or death of the majority owner or on the pricing mechanism for a buy-sell agreement, it is unlikely that you can represent all the owners of the business. Each should have his or her own separate counsel.

If there is a fundamental disagreement over an issue of this significance, you simply cannot represent everyone. But can you continue to represent the business and the majority owner who first approached you about this work? The answer to that question may depend on the extent of the work you have done so far and the extent to which your prior work had been on behalf of the now dissenting business owners.

If there is any chance that you have, in fact, provided significant representation to those owners of the business who are now in disagreement with the majority owner's wishes, you cannot continue to represent the majority owner without the written consent of all the owners.

I suppose that there may be a disagreement over "minor" issues, which are so insignificant that you may continue to represent all the owners in an effort to reach an amicable resolution; however, great caution should be exercised whenever there is **any** disagreement among the owners. Raise the conflict of interest issue and ask them whether each is willing to have you continue to advise **everyone**.

Even if you feel the issue is not significant and the owners all want you to continue, I advise you to get their consent to your continued representation in writing. If everything blows up in the future, people have too short a memory for you to rely on their assurance that it is "not necessary" for you to get this consent in writing.

3. <u>If an owner of the business were later to leave</u>. Suppose that you prepared business succession documents for a business and its owners with their consent. You did, in fact, represent everyone. Sometime later the owners have a falling out and one of them leaves the business. This departure is not pleasant and there are disagreements over issues such as the price to be paid under a buy-sell agreement or the nature and extent of any non-compete restrictions which you helped put in place.

Can you represent either side in the resolution of these issues? Not unless you fit the exception I will discuss. The departing owner was your client and you cannot take a position which is adverse to his or her interest without full disclosure and full written consent.

RPC 1.9 deals with conflicts of interest with a former client, in which a lawyer who previously represented a client cannot later represent another person "in the same or a

substantially related matter" where the former client's interests are "materially adverse" unless the former client consents to the representation.

If you helped put the buy-sell agreement or the covenant not to compete in place, it seems clear that any disagreement over the provisions of these documents is a "substantially related matter" when you previously represented the departing owner of the business. It is not sufficient for you to protest that this departing owner was not your "real" client in the prior work. You did, in fact, provide legal services to that individual, who is entitled to the protection of the conflict of interest provisions of our ethical standards.

You cannot represent either side without everyone's written consent. Even if you refer the work to another advisor, there may easily be liability to the extent that you counseled the majority owner of the business before someone else was brought in. Did you give **any** advice which might later have been used against the interest of the dissenting owner?

Recall that RPC 1.9 permits the lawyer to consult with the majority owner only with the informed consent of the former client (departing owner), confirmed in writing. The lawyer should make full disclosure to the former client before **any** advice is given to the majority owner and obtain the written consent of the dissenting owner to this new representation of the majority owner.

There is an exception to this rule IF in your written engagement letter you reserved the right to represent a particular owner in the event of a later disagreement among the owners; if all the owners sign the engagement letter, each has waived any conflict were you later to represent that one particular owner in a future dispute among the owners.

Multiple generation planning. Advisors are frequently called upon to assist in business succession planning for multiple generations. What conflicts may arise in that representation of both the parents and the children (and even grandchildren)?

Suppose that the parents own a successful company, with one child active in the business and the other child not involved. The parents counsel with the advisor about a recapitalization of their S corporation, so as to create both voting and non-voting shares. The plan is to leave voting shares to the child who is active in the business and non-voting shares to the other child.

Do you also represent the children, including the one who is not active in the business? Can you continue to represent the children, recognizing that the interests of the child not active in the business may not be well served by a plan that distributes only non-voting shares?

Is the issue any different if the parents want a plan which distributes assets outright to one child and leaves the inheritance for another child in a generation skipping trust (perhaps because the latter child is irresponsible, on drugs and so forth). If you represent the parents and the child who will receive the outright distribution, is there a potential charge of undue influence with the advisor caught in the middle?

Suppose that the parents want the lawyer to prepare a pre-marital agreement for a child, even to the extent of paying the lawyer's fee. The lawyer has provided legal services to the child before and she sees no reason for a pre-marital agreement. See RPC 1.8(f) dealing with fees paid by someone other than the client.

The problem discussed earlier of conflicts with a former client may also arise in the family representation setting. Suppose that you represent the owner of a closely-held business and the son who actively works in the business. Estate plans are prepared for each client, with

the father leaving control to the son and placing other assets in trust for the children who are not active in the business.

What is the consequence if the father later asks you to prepare a codicil to the will, in which the control shares are to be divided equally among all the children? The son learns of this change in his father's estate plan only after the death of his father.

Remember that you also prepared estate planning documents for the son. The son is your client or at least used to be your client. When the father approached you about a codicil, was not your new work for the father a "substantially related matter" to the estate planning that was done previously and will not your new work be "materially adverse" to the interests of the son?

The preparation of the codicil for the father should be prepared only with the consent of the son. To proceed otherwise gives the son an open invitation to assert an ethics violation.

Representing the elderly parent or child of an existing client. Planners are frequently asked for advice about elderly relatives of the business owner. "How can we get Dad on Medicaid?" they wonder. Parents may want you to advise children about expected inheritances. The conflicts are apparent.

The existing family business client may bring in his or her parent to do estate planning. Sometimes, the parent is not able to come to your office, but you are assured by the existing client that he or she will tell the parent all that he or she needs to know. Indeed, the child will arrange for the execution of the documents without it being necessary for you ever to meet the "client."

Suppose you represent the business owning parent of a child who is about to receive a distribution from a trust established by another relative or from a trust or custodial account established by your client. Your client wants you to advise the child to take the inheritance and

put it into an irrevocable trust for the child's benefit (perhaps revocable only with the consent of the parent, your existing family business client).

Can you represent both the existing client and the relative, giving independent advice to each? Before you take on the representation of this elderly parent of the business client or this child of an existing business client, RPC 1.7 requires you to determine that the new representation will not be "materially limited" by your responsibilities to the existing client.

The rule goes on to require you to consult with both clients (you must meet with the elderly parent and with the child) to tell them of the possibility of a conflict. You must inform each client of the implications of the common representation and the risks and advantages involved. Both clients must give informed consent, confirmed in writing.

Where applicable, RPC 2.2 may also be involved in multiple, generational representation of this sort, particularly where "the lawyer reasonably believes that the matter can be resolved on terms compatible with the clients' best interests, that each client will be able to make adequately informed decisions in the matter and that there is little risk of material prejudice to the interests of any of the clients if the contemplated resolution is unsuccessful...."

An alternative is for you to meet with the adult child of your business client and make it very, very clear that you do NOT represent the child. Advise the child to obtain independent counsel and, if that advice is declined, confirm the advice (and the child's refusal to take it) in writing to the child.

Written consents from both clients. If you do take on representation of the elderly parent or child, RPC 2.2 is applicable; therefore, you must consult with both clients, advising them of the implications of the joint representation, the advantages and risks involved, and the effect on the attorney-client privilege. Written consents must be obtained from everyone.

A client who is disabled. If one of the parties is under an incapacity, it appears that the conflict cannot be resolved. For example, if the elderly parent of your business client is incompetent, can the child (existing business client) consent on behalf of the parent on the authority of a durable power of attorney given to the child by the parent?

Perhaps, if it was an only child, there may be no other person with an interest; but what if the advisor is consulted by only one child of several and the other children are not aware of the services to be provided to the incapacitated parent? I recommend that you not accept the waiver of a conflict signed by the single child without the knowledge and consent of the other children.

In a similar fashion, the consent of a minor cannot be obtained. Even when distribution is to be made on the day the child attains the age of majority, it is difficult to imagine a scenario in which the advisor (with "consent" of the child) counsels the child -- just before his or her 18th birthday -- to put the expected inheritance into an irrevocable trust that cannot be changed by this new "client!"

How is putting the inheritance into an irrevocable trust in the best interests of the child (even though that is exactly what the parent desires)? Even if you believe that putting the inheritance in trust really is in the best interests of the child (presumably because the irresponsible child will waste the funds), the advisor should consider RPC 1.14 (Client with Diminished Capacity) before advising this new client. A court-appointed guardianship may be a more appropriate remedy.

Who pays your fee? Finally, if your fees are to be paid by the existing business client (the parents of the young child or the adult child of the elderly parent, for example), RPC 1.8(f) requires you to disclose this fee arrangement to the new client and to determine that this fee

arrangement will not interfere with your independent judgment of what is best for the new client. The new client, of course, must then provide informed consent in writing to the fee arrangement.

The advisor must exercise great care to overcome any argument that undue influence affected your advice in these circumstances. This is an obvious problem when, at the urging of an existing client, you advise a young person (as your client) to place assets in an irrevocable trust, primarily to protect the child from himself. In a similar fashion, you should be very wary when an existing client dictates the terms of his parents' wills, particularly if this new will gives to that child more than his "fair" share of the assets!

The safest avenue is to assume that full disclosure of the dual representation must be made to **both** parties and written consent must be obtained from each of them.

Multiple representation in a trust setting. All these same rules and requirements relate to the advisors who represent a trustee. The trust may hold an interest in the family business, for example, having been created by or for the benefit of your existing business client.

Suppose that a question arises concerning the proper interpretation of the will or trust agreement. May the lawyer petition the court for instructions on behalf of the trustee and then take a position with respect to the resolution of the ambiguity? May the lawyer for the trustee represent the spouse in the subsequent hearing and assert a position on the merits of the matter before the court?

The answer is "no." Both the trustee and the trustee's lawyer are under a fiduciary duty of impartiality towards the interests of **all** trust beneficiaries.

This position is a well settled matter of common law. This principal was expressed well in the dissenting opinion in Estate of Goulet v. Goulet, 10 Cal.4th 1074, 1086, 898 P.2d425, 432 (1995), as follows:

> "It has long been settled, not only in California but elsewhere, that a fiduciary (such as the trustee of a trust or the personal representative of a decedent's estate) administering property on behalf of multiple beneficiaries must act impartially towards all the beneficiaries and must not favor, or expend funds litigating, the interest of one beneficiary over another. The fiduciary may not take sides when a dispute arises as to the relative rights and interests of various beneficiaries, and may not work to advance or oppose the claim of any beneficiary."

(emphasis added)

Other cases setting forth this rule of law include In the Matter of the Trust for Duke, 305 N.J. Super. 408, 702 A.2d 1008 (1995); The Northern Trust Company v. Heuer, 202 Ill.App.3d 1066, 560 N.E.2d 961 (1990); In re Cudahy, 26 Wis.2d 153, 131 N.W.2d 882 (1965); and In re James Estate, 86 N.Y.S.2d 78 (Surr. Ct. 1948).

In The Northern Trust Company case, the trustee had advocated a construction of the trust that was unfavorable to a beneficiary. The court held that while it was proper for the trustee to seek the court's construction of the trust by filing the complaint for construction and in gathering and presenting the information necessary for the court to interpret the trust, it breached its duty of impartiality and exceeded its duty as trustee when it argued for an interpretation adverse to a beneficiary.

The court disallowed Northern Trust's petition for attorney fees and costs related to the inappropriate activity. The court stated that while

> "generally the costs of litigation to construe a trust in which there are adverse claims are paid by the trust estate,... where a trustee breaches its duty to administer the trust according to its terms and performs in a manner which favors one beneficiary over another, the trustee is not entitled to attorney fees and costs even though the breach is technical in nature, done in good faith and causes no harm."

(emphasis added)

The court stated further that "... it is preferable that we reiterate established precedent and foster every incentive for a trustee to adhere to its well-established duty of impartiality." 560 N.E.2d at 964, 965.

If the lawyer represents **most** of the trust beneficiaries, neither the trustee nor the trustee's lawyer may take a position on the merits because, to do so, must necessarily be adverse to the interests of some beneficiaries. Even if the lawyer represents **all** of the trust beneficiaries, a resolution of the ambiguity must have an negative impact on some of the lawyer's clients. That is an impermissible conflict of interest.

What if the business client is a beneficiary and is the trustee? It is difficult to tell the business client/trustee/beneficiary that he or she can take no position on the resolution of the ambiguity! I recommend under those circumstances that the business client/trustee engage an independent attorney to file a petition to resolve the ambiguity and, thereafter, take no position on behalf of the business client/trust regarding the resolution of the ambiguity. You, on the other hand, can then represent the business owner *as beneficiary* and can take a position on the resolution of the ambiguity. That is, while the business client can take no position on the resolution of the ambiguity *as the trustee*, he or she can take a position in the capacity of *beneficiary.*

What if the beneficiaries agree on the resolution? If all the beneficiaries consent to a proposed resolution, the lawyer may present that settlement to the court; however, great care must be exercised by the attorney who attempts to negotiate that consent, to be certain that each of the lawyer's clients understand the role that is being played.

If the trust beneficiaries cannot agree on a resolution, the trustee must present the problem to the court, have the court give notice to all the beneficiaries and then the trustee must

step back and let the beneficiaries make their own arguments as to the proper interpretation of the language. If the trustee were to argue in favor of one construction, it would violate the trustee's duty of impartiality because any interpretation will necessarily have a negative impact on the interests of another beneficiary (if not, why have the interpretation issue presented to the court for resolution?).

The lawyer for the trustee may not assert a position for a beneficiary. Just as the trustee cannot assert a position in this action, the trustee's lawyer may not assert a position "solely" on behalf of a beneficiary. That representation conflicts with the lawyer's simultaneous representation of the trustee on all other trust matters, when the trustee must be impartial towards the interests of all beneficiaries in **everything**.

I suppose that it is possible for the lawyer to disclose to all the parties his or her joint representation of the trustee and some of the beneficiaries and to obtain their consent; however, I believe that the trustee should obtain the consent of the **other** trust beneficiaries (who are not to be represented by the lawyer) to this joint representation. And why would those other trust beneficiaries give their consent?

It is easier for the lawyer to decide whether to represent the fiduciary **or** the beneficiary, but not both.

The Failure to Exercise Independent Judgment

Advisors can be presented with conflicts of interest, including the possible allegation that you violated your duty to exercise independent judgment, when a client asks you to serve as personal representative, to serve as trustee, to receive a gift under the will or trust agreement and so forth. Whose interest are you serving: your client's interest or you own?

1. Gifts to the advisor. While you may prepare estate planning documents for close

relatives (parents, for example) from whom you will receive benefits in the future, you cannot do so if the client is not closely related. Guidance in these situations can be found in RPC 1.8(c):

> "A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familiar relationship."

Comments [6] and [7] to RPC 1.8 provide guidance:

> "[6] A lawyer may accept a gift from a client, if the transaction meets general standards of fairness. For example, a simple gift such as a present given at a holiday or as a token of appreciation is permitted. If a client offers the lawyer a more substantial gift, paragraph (c) does not prohibit the lawyer from accepting it, although such gift may be voidable by the client under the doctrine of undue influence, which treats client gifts as presumptively fraudulent. In any event, due to concerns about overreaching and imposition on clients, a lawyer may not suggest that a substantial gift be made to the lawyer or for the lawyer's benefit, except where the lawyer is related to the client as set forth in paragraph (c).
>
> "[7] If effectuation of a substantial gift requires preparing a legal instrument such as a will or conveyance the client should have the detached advice that another lawyer can provide. The sole exception to this Rule is where the client is a relative of the donee."

The ACTEC Commentaries provide that "a closely related person is one who would receive part or all of the client's estate if the client were to die intestate; and the substantiality of a gift is determined by reference both to the size of the client's estate and to the size of the estate of the lawyer or the lawyer's spouse or children."

The prohibition against having an unrelated client make gifts to the advisor also extends, of course, to gifts that are accomplished by use of joint ownership and beneficiary designations.

Although not required by the Rule, the mere appearance of impropriety leads me to recommend that you send a non-related client who wishes to make a substantial gift to you to a

lawyer in another law firm. It is not sufficient, in my opinion, to avoid the Rule by having a partner or associate in your law firm prepare the necessary documents to effectuate the gift.

2. Selection of the advisor as fiduciary. A client can name anyone he or she chooses as a fiduciary. There is nothing in the Rules of Professional Conduct which prohibits the selection of the advisor as personal representative or trustee, so long as the client is properly advised, the appointment does not violate RPC 1.7 (Conflict of Interest: Current Clients) and 1.8 (Conflict of Interest: Current Clients: Specific Rules) and the appointment is not the result of undue influence or improper solicitation.

Care must be exercised, however, to be certain that your conduct (in preparing an estate plan in which you are named as a fiduciary) does not have even the appearance of impropriety. Comment [8] to Rule 1.8 reads as follows:

> "[8] This Rule does not prohibit a lawyer from seeking to have the lawyer or a partner or associate of the lawyer named as executor of the client's estate or to another potentially lucrative fiduciary position. Nevertheless, such appointments will be subject to the general conflict of interest provision in Rule 1.7 when there is a significant risk that the lawyer's interest in obtaining the appointment will materially limit the lawyer's independent professional judgment in advising the client concerning the choice of an executor or other fiduciary. In obtaining the client's informed consent to the conflict, the lawyer should advise the client concerning the nature and extent of the lawyer's financial interest in the appointment, as well as the availability of alternative candidates for the position."

In order to advise the client "properly," the ACTEC Commentaries suggest that (before accepting an appointment as a fiduciary) you tell the client about the duties of the fiduciary, the ability of another individual or corporate fiduciary to serve in that capacity and the comparative costs of the different alternatives (including the fees to be paid to you as the fiduciary).

If you or your firm also represent a prospective corporate fiduciary, you should disclose that representation to the client who is considering that bank as a fiduciary. Finally, you should

advise the client if it is the bank's practice to employ as its counsel the attorney who wrote the will or trust agreement.

If the client, after receiving this advice, still requests that you serve as executor or other fiduciary, the client should give informed consent, confirmed in writing. I recommend that this written confirmation also address the fees which you propose to charge as a fiduciary. Will you charge you normal hourly rate or will that compensation reflect the responsibilities of a fiduciary, rather than those of an attorney?

Can the lawyer serve both as fiduciary and as counsel to the fiduciary? While the ACTEC Commentaries note that such joint capacities may be appropriate when there has been a long standing attorney-client relationship,

> "generally, a lawyer should serve in both capacities [both as fiduciary and as counsel to the fiduciary] only if the client insists and is fully aware of the alternatives, and the lawyer is fully competent to do so. A lawyer who is asked to serve in both capacities should inform the client fully regarding the costs of such dual service and the alternatives to it. A lawyer undertaking to serve in both capacities should attempt to ameliorate any disadvantages that may come from dual service, including the potential loss of the benefits that are obtained by having a separate fiduciary and lawyer, such as the check that a separate fiduciary might provide upon the amount of fees sought by the lawyer and vice versa."

3. The document which directs the lawyer's employment as counsel. May a will or trust agreement direct the employment of a particular attorney as counsel for the fiduciary? Is that direction binding on the fiduciary or may the fiduciary employ any lawyer selected by the fiduciary?

If the direction is neither binding on the fiduciary nor a customary practice among the legal community in that marketplace, the lawyer should take steps to counter the appearance of impropriety and undue influence whenever a client mandates that provision in his or her estate planning documents.

I recommend that, if the client wants the lawyer to include such a direction in a will or trust agreement, the lawyer should advise the client that this "direction" may not be legally binding on the fiduciary, who is nevertheless free to employ as counsel any attorney of the fiduciary's selection. The lawyer should document the fact that this direction is being made at the request of the client and not at the instigation of the lawyer.

4. Clients who are referred to the advisor. Many advisors obtain new clients as a result of referrals from attorneys, trust departments, accountants, life insurance professionals and so forth. Those referral sources obviously hope (expect?) that the estate plan resulting from this relationship will result in the client's use of services or products provided by the referral sources. Is the use of those services an ethics violation?

You should advise the client of the ongoing relationship with the referral source and should affirm your primary obligation to the client.

Recall the general obligation to provide clients with advise which is solely in the client's best interests. Surely, it is frequently in the best interests of clients that the estate plan utilize the services of these outside professionals, particularly when the client has had a long-standing relationship with the referral source and the service provided is comparable in cost and quality to that provided by others.

The advisor can be presented with a dilemma, however, if he or she concludes that the best interests of the client will be served by doing business with someone other than the referral source. Suppose a bank trust officer refers a client to you and you are well aware that this trust department charges very high fees. What should the lawyer do?

Be certain that you are comparing "apples to apples" when evaluating the product or services provided by the referral source. Is the product or service provided by a competitor

really comparable? Are the higher trust fees fully justified by higher levels of service or investment results?

The first obligation is to the client. If the competing services or products are truly comparable, can the referral source meet the terms and conditions of the competing service provider? The advisor should, after discussing the matter with the client, consult with the referral source and begin the conversation by confirming the advisor's obligation to the client.

Without disclosing client confidences, it may be possible for you to obtain from the referral source better terms and conditions, such that use of the original referral source's products or services is, in fact, in the best interests of the client. Full disclosure should be made to the client.

Can you send the client to the referral source, so as to get more referrals in the future, even though you believe that alternative service providers will be more in the client's best interests? The answer must be "no," of course.

The client who later becomes incapacitated. Suppose that, after representing a client in a business planning matter, the advisor becomes aware that the client is "slipping." This growing inability to manage his or her own affairs may be the result of medical problems, alcohol or drug abuse, dependency on prescription medicines or even the undue influence of others. The advisor might learn, for example, that someone is "abusing" a durable power of attorney the lawyer drafted years ago.

Some guidance can be found in RPC 1.14, which provides that:

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

> (b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.
>
> (c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests."

Nevertheless, the advisor can be placed in a difficult decision when he or she learns (or even observes) that a long-standing client needs some help. Unfortunately, RPC 1.14 does not answer every situation.

The advisor may observe, for example, that the client needs assistance in some situations, but not in others. The client has "good days and bad days." The client may be quite capable of handling day-to-day activities, but may need help with major transactions or decisions.

The ACTEC Comment to this Rule concludes with the obvious (but not helpful) note that "the lawyer's position in such cases is an unavoidably difficult one."

What obligation does the advisor have to step forward and to take actions to protect the client? Can or should the advisor consult with the family or the physician of the client without the consent of the client? What if the client is, in the advisor's opinion, incapable of giving that consent?

Do the advisor's answers to these questions change if the reason for your concern is merely the fact that the client came to the advisor with a request for an unusual or controversial change in his or her estate plan? What if the client is brought to the advisor's office by his housekeeper and the client requests a change in the estate plan so as to leave all his assets to her?

The advisor suspects undue influence, but the client (without the housekeeper present) assures you that this is exactly what he wants to do. Does your disclosure to family or physician of the requested change in the estate plan violate your duty of confidentiality to the client?

While RPC 1.6 [Confidentiality of Information] authorizes the advisor to disclose information which is "impliedly authorized in order to carry out the representation," I doubt whether the advisor can rely on that Rule when disclosing client confidences, merely because you feel that the client wants to do something that "just isn't right."

One strategy is to suggest to the client, who wants to create a controversial change in his or her estate plan, that to do so will undoubtedly result in a will contest at death. In order to prepare for this eventuality, you advise the client, a contemporaneous evaluation by the client's physician would be helpful.

If the physician reports, after examination, that the client lacks testamentary capacity, the new will cannot be prepared, of course. But what are the advisor's obligations if the physician is not willing to make such an unequivocal statement? That is when the estate planner decides whether to be merely a scrivener (who merely writes out the client's direction) or to be a counselor in its finest sense (who strongly advises the client against a proposed course of action that, after many years representing the client, the lawyer knows is simply wrong).

Look, for example, at RPC 2.1, which provides that:

> "In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation."

Incomplete or Inadequate Representation. Both the competence of the lawyer and the adequacy of his or her representation are addressed by the Rules of Professional Conduct.

RPC 1.1 states that "[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." RPC 5.3 extends this same obligation to others in the lawyer's office.

RPC 1.2 provides that "a lawyer shall abide by a client's decisions concerning the objectives of the representation...." That is, the attorney and client can and must define the scope of the representation.

Most clients seek assistance in the preparation of a "short, simple will." No client comes in with the request that the advisors prepare "a really complicated estate plan!" Nevertheless, many clients today need more than a short, simple will. There may be short wills and there may be simple advisors, but there rarely is a short, simple will that is adequate for a client with substantial assets.

There are several problems involved:

1. What if the family business owner never gets around to a decision and then dies?

2. Does the advisor have the technical competence required by the client?

3. Does the advisor ask the "right" questions of the client, so that all the required information is disclosed? Do you have documentation of this?

4. Will the client be willing to follow through on your advice regarding the steps required to implement the estate plan? and

5. Is the estate plan that results from the representation appropriate for the client under all the circumstances which should have been known?

Unwillingness of a family business owner to make a decision. One of the hardest decisions we ask our clients to make concerns future management of the family business. Who will take over when our client retires, becomes disabled or dies?

Many clients have no intention of retiring and cannot face realistically the possibility of their ultimate death. We expect clients to make very difficult, emotional decisions, yet we are surprised when we meet resistance.

If you have a long-standing business client, for whom you have done many transactions, it is critically important that you urge this client to engage in succession planning. Most family businesses fail to make it to the second (let alone third) generation primarily due to a lack of planning.

To the extent your client is unwilling to make these hard choices, you should emphasize the risks associated with his failure to act. What will happen to the business? What will happen to the family? Why should he continue to put in 70 hour work weeks when so much of what he has and will accomplish is at risk?

Ultimately, you should document your efforts to have this work done. If no action is ever taken and severe consequences result, you do not want to face the unhappy family members who survive with no evidence of your efforts to have "the old man" take action.

Inadequate information from the client. One of an advisor's greatest challenges is to obtain accurate and complete information from clients. Some people are uncomfortable discussing estate planning matters and provide information only in response to direct, specific questions. They do not openly speak of their daughter's disability, so the advisor did not recommend a trust for her benefit in the will, for example.

It is gratifying to read in the ACTEC Commentaries that "in the ordinary case, a lawyer may reasonably rely upon a client's statement of facts." The Commentaries go on to provide, however, that the facts should be verified if the client appears to be uncertain or if there are "other circumstances" that raise doubts about the accuracy of the facts.

Questions the advisor should have asked. Occasionally, we create our own problems. The advisor did not ask how their assets are titled, for example, so you did not learn that all the property was jointly held until one spouse died and nothing went into the credit trust.

Incomplete implementation of the plan. Sometimes, the client is not willing to pay for the advisor to implement the plan. You advise the client to change beneficiary designations, to put assets into a revocable trust to avoid probate and to assign group life insurance to an irrevocable trust.

Who is responsible for the implementation of the plan? Can the advisor document that it was the client's (and not the advisor's) job to carry out these critical activities? Will the client follow through on your instructions? Can you later document the fact that the client was told what to do?

Co-counsel or other consulting arrangements. In a world of increasingly complex laws, it is difficult for the estate planner to stay "current" in every area. Inadequate estate plans may constitute not only malpractice, but also ethical violations. Jeff Pennell's 1991 paper entitled "Professional Responsibility: Reforms are Needed to Accommodate Personal Family Counseling," (25 Miami Institute on Estate Planning, 18-1) includes this statement:

> "Probably the most important act a 'general practitioner' can perform these days to protect against malpractice liability and the related ethical violation is to establish a good referral network to bring into a situation experts in areas in which the referring attorney is deficient."

The ACTEC Commentaries to RPC 1.1 call upon the lawyer's "additional research and study" as the first way to meet a client's needs. The Commentaries go on to provide that "the needs of the client may also be met by involving another lawyer or other professional who possesses the requisite degree of skill or knowledge. * * * The lawyer should be candid with the client regarding the lawyer's level of competence and need for additional research and preparation...."

Different types of consulting arrangements. The lawyer can call in another attorney on a consulting basis in at least two different ways:

1. The lawyer can employ another attorney to assist on an "as needed" basis on different estate planning matters, usually to review draft documents, to discuss planning alternatives and the like for a variety of different clients. The lawyer's clients may not even be aware that these consultations occur. The consulting attorney's fees are paid directly by the lawyer; or

2. The lawyer can employ another attorney to assist a particular client on the development, drafting and even implementation of the estate plan. The client approves of this co-counsel arrangement and usually pays all the fees directly.

Written engagement letter. When an outside attorney is involved in the representation (in either approach identified above), there should be a written engagement letter between the lawyers, in which certain issues must be addressed:

1. What may the referring lawyer disclose to the other lawyer without the consent of the client?

2. Who will communicate with the client, so as to keep the client "reasonably informed" under RPC 1.4?

3. Who will be responsible for the due diligence requirement of RPC 1.3, so as to assure that the representation is proceeding properly?

4. Who will determine the amount of fees to be paid by the client and who suffers the loss if the client does not pay?

5. Does the consulting lawyer separately bill the client for services or is the statement sent to the original lawyer or is there one combined bill sent to the client, with the resulting fee shared by the co-counsel? Note RPC 1.5(e) concerning a division of fees between lawyers who are not in the same firm.

6. Who is responsible for "mistakes," such as inaccurate or incomplete information provided to the new lawyer or malpractice by the new lawyer?

7. The scope of the representation provided by the new lawyer should be set forth, including a discussion concerning who will continue to represent the client in the future on estate planning and other matters ("don't steal my client!").

The Reasonableness of Estate Planning Fees

RPC 1.5 states that "[a] lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses." While many attorneys charge for estate planning matters on an hourly basis, RPC 1.5(a) authorizes you to consider other factors:

> "(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
>
> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
>
> (3) the fee customarily charged in the locality for similar legal services;
>
> (4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent."

The lawyer should advise the client at the beginning of the representation of the method of fee calculation, including whether the client will be charged for extra services, such as copying, postage, travel and the time of secretaries and other personnel.

Is the fee based on hourly charges? Is it a flat fee, for the preparation of papers to create a new limited liability company or a family limited partnership, for example?

Many lawyers will give to their clients an estimate of the fees to be charged, typically within a range.

What if the fees exceed the lawyer's estimate? The actual work required may cause the lawyer to exceed the estimated fee, perhaps because of later changes requested by the client, because the problems presented by the client were more complex than originally thought or for any other reason.

I recommend that the lawyer tell the client that the initial estimate must be revised before the extra time is spent on the representation.

It is far better, in my opinion, for the lawyer to have this conversation with the client before the time is put in; the alternative is to spend the time and then to explain, after the fact, why the client should pay more than the initial estimate.

What if the client asserts later that this extra work should not have been done, that there were other alternatives the client wanted to pursue (had he known that the initial estimate was

not accurate) and so forth? Have that billing conversation with the client before you put in time that may later have to be written off when confronted with an angry client.

Fees paid by the client's employer. What considerations are presented when a fee is to be paid by a business of which the client is an officer, director, employee or owner (or all of the above)?

RPC 1.8(f) provides that:

> "A lawyer shall not accept compensation for representing a client from one other than the client unless:
> (1) the client gives informed consent;
> (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
> (3) information relating to representation of a client is protected as required by Rule 1.6 [Confidentiality of Information]."

I suggest that the advisor address several issues before agreeing that the fee can be paid by the client's business:

1. If the client is not the sole owner of the business, must the other owners be advised that the entity's funds are being used to pay for one owner's personal estate planning?

2. If the business entity will benefit from your representation (business succession planning), should the engagement be with the entity and not with the individual client? Should not all the owners then be involved in the planning?

3. What conflicts might arise between your work for one client, your work for the entity and your work for the other owners of the entity?

Consideration should also be given to RPC 1.13(g), which provides that:

> "A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7 [Conflict of Interest: Current Clients]. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be

given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders."

Rebates, discounts, commissions and referral fees. A lawyer's acceptance of rebates, discounts, commissions or referral fees may involve an improper conflict of interest in violation of RPC 1.7 and may violate RPC 5.4's prohibition against sharing legal fees with non-lawyers.

Even with full disclosure to the client, such an arrangement "involves too great a risk of overreaching by the lawyer and the potential for actual or apparent abuse," according to the ACTEC Commentaries.

Conclusion

The ethical issues presented to the professionals who are engaged in estate and family business succession planning are ever present. Just being aware of the potential problems may be a step in the right direction. Ignoring these problems will not make them go away.

Eric A. Manterfield

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Sample family business succession planning engagement letter

_____, 2012

Owners of __[name of business]_____.
[address]

PERSONAL & CONFIDENTIAL

Dear _____:

You have asked _____[name of law firm]_____to perform certain services for you relating to your proposed business succession planning. This work may include the creation of a new buy-sell agreement among the owners of the business and other matters which may have an impact on all the business owners.

We are pleased to assist you with this work; however, it is in your best interests (and our own ethical obligation to each of you requires) that you fully understand the considerations involved in a "dual representation" of the business and its owners and of the owners with respect to each other.

The different owners may have differing (and sometimes conflicting) interests and objectives regarding business and personal planning matters. For example, you each may have different views on how to value the business and any ownership interest upon the death or retirement of an owner. There may be a conflict in whether the selling owner of the business should be subject to a covenant not to compete. There may be a conflict in how an installment payment is secured. These are just a few examples, of course; every situation is unique.

If you each had a separate lawyer, you would each have an "advocate" for your individual position and you would each receive totally independent advice. Information given to your own lawyer is confidential and could not be obtained by your fellow family business owners without your consent.

That may not be the case here (where we are advising all the business owners), but the opportunity for conflict does exist. We cannot be advocates for one of you against the other. Information that any of you gives us relating to your thoughts and special needs cannot be kept from the other owners of the business.

If you ask us to continue to serve you jointly and the business, as well, our effort will be to assist in developing a coordinated overall business succession plan and to encourage the resolution of differing interests in an equitable manner and in the best interests of your mutual business affairs. We will attempt to represent the business without a bias in favor of any of you.

In the event of an irreconcilable conflict in the future, we reserve the right to continue to represent the business and __[majority owner]_____, if they wish us to do so, and we will decline thereafter to represent other owners.

If at any time any one of you wishes to have the advice of separate counsel, you are completely free to do so. We hope that this information will assist you in using our services effectively.

If you each agree with our representation under these circumstances, please read the following statement and, if you are in agreement with it, sign and return the extra copy of this letter which is enclosed.

Again, we appreciate the opportunity to be of service to all of you. I look forward to a long and successful professional relationship with each of you and with [family business]_____.

Kindest personal regards,

We have each read the foregoing letter. Each of us realizes that there are areas where our interests and objectives may differ and areas of potential or actual conflict of interest between us in connection with the family business succession, buy-sell planning and related matters.

We understand that each of us may retain separate, independent counsel in connection with these matters at any time. Each of us understands and agrees that communications and information which you receive from any of us relating to these matters will be shared with the others.

We understand that, in the event of an irreconcilable conflict in the future, you reserve the right to continue to represent the business and __[majority owner]_____, if they wish you to do so, and you will decline thereafter to represent other owners.

After careful consideration, each of us requests that _____[law firm]_____represent us individually and the family business jointly in connection with our business succession, buy-sell planning and related matters.

_____ _____

Owner Owner

_____ _____

Owner Owner

_____, Inc.

By:
Its: