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EST. 1959

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ETHICS OF REPRESENTING A HUSBAND AND WIFE IN THEIR JOINT ESTATE PLAN By Randy Spiro

Each state has its own laws regulating ethical practices for attorneys. These rules come into play when one attorney undertakes to represent both the husband and the wife in the preparation of their joint estate plan, in many cases a joint revocable living trust.

One spouse may call the lawyer and ask to meet with the lawyer alone initially. Even if that spouse claims that the other spouse is too busy and that the other spouse agrees to this arrangement, it is a risky practice to meet with only one of the attorney's two co-clients. The other spouse may later claim that the lawyer did not properly explain the plan, or that the lawyer favored the spouse who attended the meeting. Either way, the non-attendance of one spouse should be avoided.

The attorney may get a call from one spouse asking the attorney to keep the call private from the other spouse. If the attorney will represent both spouses in preparing the estate plan, the attorney cannot do this. The client is placing the attorney in a position of conflict.

Even when both spouses are attending the meeting, one spouse may propose that the documents be drafted in a way that is unfair to the other spouse. One example would be that if spouse A dies first the trust remains revocable by spouse B, but if spouse B dies first, all or part of the trust becomes irrevocable. Such requests may be a clue for the attorney that the husband and wife should be represented by separate counsel.

The character of assets, separate property and community property, can be clarified by spouses in a pre-marital agreement or in a post-marital agreement. In many cases, it is safer for the lawyers to have each spouse represented by separate attorneys, safer because if one attorney represents both spouses and if one spouse is later unhappy about the agreement, the attorney could be alleged to have had a conflict of interest and/or to have been negligent.

If one or both spouses ask the attorney preparing the estate plan to transfer assets from the name of both spouses to one spouse's name, or from one spouse's name to both spouses, the same problem of conflict of interest presents itself. The spouse whose ownership is decreased may later claim that he or she would not have signed the document had he or she been represented by a separate attorney.

Another warning sign for an attorney is a spouse whose capacity is in question, particularly where the other spouse stands to benefit from the transaction. If the ill spouse has property in his name and the proposal is to transfer it to a joint revocable trust of both spouses where the well spouse's is the sole trustee, it would be prudent for the ill spouse to be represented by a separate attorney.

Finally, each state's ethics laws for attorneys may prescribe or suggest conflict waiver language that the spouses can sign as part of authorizing one attorney to represent both of them. The possibility of having the clients sign a conflict waiver does not mean that the attorney should take on joint representation when prudence dictates otherwise.