By **Sandra D. Glazier** & **Martin M. Shenkman**

Joint/Dual Representation

Add protections to your retainer agreements to reflect challenges involved

The practice of estate planning is evolving at a rapid pace. Practitioners should periodically review estate-planning retainer agreements to update them to reflect new ethics rules,[1] changing practices, integration of new technology into their practice and other factors. In "Drafting and Updating Your Retainer Agreements," in the July issue of *Trusts & Estates*, we examined a range of technology, ethical, legal and practical issues concerning retainer agreements. Now, we'll turn our attention to some of the challenging issues of joint or dual representation of married couples or non-married partners. Evolving demographics and societal norms have changed many aspects of how estate planners addressed these issues in the past.

Joint or Dual Representation

The client world is changing. According to a Pew Research Center analysis of Internal Revenue Service tax administration data in 1970, 69 percent of adults were married; as of 2014, the share of married adults had dropped to half of the adult population, or 50 percent.[2] In percentage terms, that's a precipitous decline and suggests that contemplating divorce and the potential for disparate estate-planning objectives can be an important consideration from the first contact with a potential client.

When potential clients contact you about preparing documents for both spouses, you should ask:

1. Is this a first marriage? While the statistics suggest a much higher divorce rate in second and later marriages, the dramatic growth of divorce in middle-aged and older clients is notable. Clients in this age group focus more on estate planning.

   Late-life divorce (also called "silver" or "gray" divorce) is becoming more common and more acceptable. In 2014, individuals age 50 and older were twice as likely to go through a divorce as in 1990, according to the National Center for Family and Marriage Research at Bowling Green State University in Ohio.[3] For those over 65, the increase was even higher.[4]
2. Do you (or your spouse) have children from other relationships?
3. Have either of you received any significant gifts or inheritances?

If the answer to any of these questions reflects that issues may exist so that the interests of the spouses could be at odds, it may be best to meet with one of the prospective clients alone, because certain duties can attach even when the initial meeting is a consultation and retention hasn't yet occurred.[5] Thereafter, you can determine if you can represent both. If you're able to determine that the parties' interests are mutually aligned, then it may still be prudent to address potential conflicts of interest in your retainer agreement or in a contemporaneous spousal waiver letter. Given the growth in silver divorce, are there situations in which you can safely ignore the risk of divorce in a client's marriage?

Spousal Confidences

When contemplating dual representation of both spouses in the creation or revision of an estate plan, consider what would happen regarding confidences if separate

Sandra D. Glazier is a partner in the firm of Lipson, Neilson, Cole, Seltzer & Garin, P.C. in its Bloomfield Hills, Mich. office, and **Martin M. Shenkman** is an attorney practicing in Fort Lee, N.J. and New York City

representation were to occur should a conflict subsequently arise. By fully disclosing to your clients what will happen, they can make informed decisions about the manner in which you'll be retained.

It's important that the prospective clients understand that if they each had a separate lawyer, they would each have an advocate for their own position, and each would receive independent advice. In that singular representation arrangement, information the client gives to his lawyer is confidential and generally can't be obtained by the other spouse without the client's actual (or implied) consent. When one firm represents both spouses jointly through a dual representation arrangement, that firm can't advocate for either spouse as against the other. Material information that one spouse gives the dual representation firm may not be kept from the other spouse. Generally, if a firm represents both spouses jointly, it must make efforts to develop a coordinated estate plan and to encourage the resolution of differing interests in an equitable manner. If either spouse disagrees on an estate-planning provision, rather than acting as an advocate for either spouse, the firm may only be permitted to act as a facilitator toward creating a plan that achieves the interests and goals of both spouses.

It's generally advisable for the retainer agreement (or another contemporaneous writing) to explain some of the potential consequences of joint representation, given the high incidence of divorce and the less than obvious nature of these rules to many clients. If the couple retains counsel to represent them jointly, their acknowledgment that communications between one spouse and counsel won't be kept confidential from the other can assist them in evaluating potential risks. If one of the spouses discloses information to counsel about his financial affairs or intentions or the existence of a material fact (such as the existence of an illegitimate child), counsel may choose to, or perhaps be obligated to, disclose that information to the other spouse. For some prospective clients, this consequence will be so uncomfortable that they may prefer hiring separate/independent counsel.

Consider including language that addresses disclosures between the two spouses, such as:

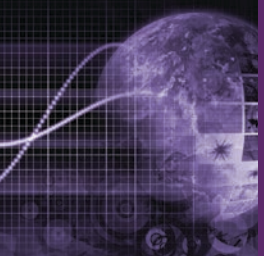
> You each agree to the complete and free disclosure and exchange of the information that we receive from either or both of you during our representation of you. You understand and agree that this information will not be kept confidential as between you and your spouse. This non-confidentiality is irrespective of how and when we obtain the information, which may be in conferences with both of you or in private conferences with only one of you—and may include conferences that took place before the date of this letter.

You should consider including language confirming that each of the spouses has the right to separate counsel.

Controversies

There may be other implications to joint representation that you may choose to address in the retainer agreement. Consider this language:

> If a legal controversy ever develops between the two of you concerning your estate planning, the law firm may be required by the attorney ethics rules to withdraw from representation, or even if not so required may determine in its sole discretion to do so. The law firm may not represent either of you individually in that controversy without the written consent of both. If litigation ensues between the two of you (e.g. a divorce), the law firm may be compelled by the court to testify about information obtained from either of you



while providing estate-planning services.

You should also consider including language confirming that each of the spouses has the right to separate counsel. For example:

> Our firm's availability to provide estate-planning legal services to the two of you is based on our belief that both of you are agreeable to retaining our firm for that purpose and that there is no actual conflict between you. It is also based on the belief that joint representation may permit better planning for the two of you, and provide important economies of scale compared to each hiring separate counsel. In these matters, you have the right to be represented by separate counsel and not to be represented by the attorney who also represents your spouse. You should immediately bring to our attention any difference that now exists, or which later arises, between you and your spouse that you believe could constitute a conflict between the two of you. You should also advise us immediately if you ever believe that our firm should not be representing both you and your spouse with respect to any matter that is under consideration. If an actual conflict later arises between you and your spouse, our firm may be required to withdraw from representing one or both of you, or may choose to do so even if not required.

It's important that you provide clients with an understanding of the possible attendant risks of the joint or dual representation.

While the American College of Trust and Estate Counsel (ACTEC) commentary to Model Rules of Professional Conduct Rule 1.7 acknowledges the possibility of separate engagements for representation in the context of multi-generational planning (or perhaps even unwed couples), it also indicates that with regard to separate representation of married couples:

> In that context, attempting to represent a husband and wife separately while simultaneously doing estate planning for each, is generally inconsistent with the lawyer's duty of loyalty to each client. Either the lawyer should represent them jointly or the lawyer should represent only one of them.[6]

Therefore, when representing unwed domestic partners, you might consider separate retainer agreements, in which each retains you to assist in the creation and implementation of his/her respective estate planning desires. This may avoid the need for disclosure—but then again, it may not. As a consequence, language similar to that reflected above (for spouses) remains advisable, because the risk of conflicting interests still exists, and a disclosure and the manner in which such conflicts may be addressed might avoid future misunderstandings. The ACTEC commentaries indicate it's advisable to only undertake such separate representation when "…the lawyer reasonably believes it will be possible to provide impartial, competent and diligent representation to each client and even then, only with the informed consent of each client, confirmed in writing."[7]

Dissolution

Given the additional risk of a dissolution in a couple's relationship, is it possible to provide truly independent representation? Taking into account this concern, you may consider a further provision that informs the prospective clients (jointly or individually) that, as clients, there will be limitations on independent representation. It may be helpful to indicate that:

> You should understand that while our firm is acting on behalf of both of you, we will not be giving either of you truly independent representation with respect to any interests that you may have that conflict with your spouse's/partner's interests.

When dealing with couples, perhaps you might also consider reflecting:

> As counsel, we generally communicate with couples together. However, one may become aware of facts that he/she might prefer to keep from the other. In addition, although in our discussions we may allude to the possibility of dissolution or differences between you, we will generally not be concerned with protecting one or both of you from the consequences of dissolution or other differences between you and will usually not be taking those possibilities into account in making recommendations to you. When it appears that you agree as to an action to be taken, we will assist in implementing that agreement. When it appears that you are not in agreement, we will assist each of you in implementing the actions that he or she has decided on. In addition, we generally will not be acting on behalf of the interests of the children of either of you and will not be concerned with protecting the children from being adversely affected by the actions of the survivor of you.

Post-mortem Representation

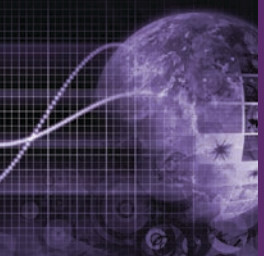
Consider the possible implications of post-mortem planning and representation in the context of dual representation. The types of disclosures and waivers that may be advisable in the retention for such services is beyond the scope of this article. Suffice it to note that some firms may generally be willing to represent the surviving spouse in both a fiduciary and beneficiary capacity, while others may not. Those that indicate an intention only to represent in one capacity or the other generally recognize the potential for conflicts, not only with regard to the parties' jointly envisioned plan but also as between the duties of the surviving spouse as a fiduciary and his interest as a beneficiary. It may nonetheless be prudent to apprise clients, during the estate-planning phase, that:

> After your death or incapacity, our firm may be retained to provide legal services that will affect the disposition of property in which you had an interest. If after your death your surviving spouse, executor, or trustee asks our firm to represent him or her, our firm may choose to accept that representation. Accordingly, if your spouse is named as executor or trustee, our firm could be representing your spouse in a fiduciary capacity. In addition, if you are then deceased or incapacitated, your spouse may also ask our firm to represent your spouse concerning your spouse's individual interest, or as fiduciary for your estate. Again, our firm may be willing to represent a surviving spouse both in his or her capacity as an executor or trustee and in his or her individual capacity as a beneficiary or other person interested in an estate or trust. We may be required to make recommendations that affect your several property interests after your death. A substantial conflict may exist in determining, for example, what constitutes community property and what is separate property. This determination may be more beneficial for one of you than for the other. If you have differing goals or different dispositive interests, e.g. children from a prior marriage, the impact of just this one example on the eventual distribution of property could be material. If you consent to dual representation, you each agree to waive all such conflicts of interest.

Waiver of Conflicts of Interest

In the context of joint or dual representation in the estate-planning arena, you're generally asking clients to waive future conflicts. An element to obtaining an effective waiver is that it be the result of informed consent resulting from adequate disclosures of possible material risks.[8] Therefore, it's important that you provide clients with an understanding of the possible attendant risks of the joint or dual representation. While you can verbally advise clients during a meeting, it's advisable to document the disclosure. Conflicts between spouses as to changing ownership of assets while both are alive could be significant. It may be essential for one or both spouses to transfer assets as between each other and/or to irrevocable trusts to accomplish tax planning, asset protection or other goals. But, these transfers could have significant implications if there's a future divorce. Therefore, also consider apprising joint clients that:

> Each of you may want to consider making lifetime transfers of assets to the other spouse, to third persons, or trusts for the other spouse and/or



third parties. Married persons sometimes achieve tax and other objectives by making outright gifts, or gifts in trust, to their children or other persons. Your respective interests concerning lifetime transfers may conflict. Changes in the form of title to your property, including life insurance, may reduce or eliminate your ownership of and right to control assets that you may now own or control either alone or jointly with each other. Any change in the form of title to assets will be particularly important if your marriage is later dissolved, and could adversely affect one or both of you. For example, if one of you is more concerned about liability risks than the other, assets might be transferred from the higher risk spouse to the lower risk spouse. If there is a later divorce, even if the law provides for equitable distribution of that asset, the dynamic for the transferor spouse may have been significantly worsened. We cannot advise either of you as to the matrimonial implications of any lifetime gifts or other transfers.

Statistics show that nearly half of families' units don't fit the historic model on which most planning constructs were based.

Give special consideration to the possible conflicts of interest that may arise if either one of a couple is incapacitated. Each spouse may want to plan for this possibility. One or both may choose to appoint an attorney-in-fact to act in the event of incapacity or to nominate a conservator of that spouse's person or property if a court-supervised conservatorship proceeding is required. One or both may have conflicting interests in planning for incapacity. One may want to plan for incapacity, and the other may not be comfortable addressing this issue. There may be disagreements as to who's to manage the affairs of an incapacitated spouse. One or both spouses may not want the other spouse to manage the affairs of an incapacitated spouse but may instead want to appoint a third person. You may want to deal with these issues upfront. While the potential for such conflicts might seem obvious to you, it's not always obvious to your clients. Consider alerting the clients that:

> Estate planning, even in simple form, can create a host of issues as between spouses or partners as to their respective dispositive schemes. It is not uncommon to use beneficiary designations that may be changed without the assistance of counsel. In planning for the disposition of property when the first of you dies, there may be conflicting interests. For example, if the marital residence is held as tenants by the entirety, which might be advisable if state law provides special protection for such property, your respective wills will not affect that or other joint tenancy property when the first of you dies. These assets will pass by right of survivorship to the surviving joint tenant. But each of you will have the power to dispose of your own separate property by will. One of you might choose to leave separately titled property to someone other than your spouse. Also, the surviving spouse might, absent a written contractual obligation to the contrary, bequeath inherited joint property other than as agreed. Some commentators have maintained that even such written contract may not be effective. Absent the use of trusts there may be inadequate control over the disposition of assets left outright to a surviving spouse or upon incapacity. However, many clients are loath to incur the cost and bear the complexity of trusts. In the context of jointly titled property, property received as the result of a beneficiary designation or inherited by will, conflict may arise under a myriad of circumstances. As counsel for both of you, we are generally prohibited from advocating one of your positions over the other.

The reality remains that most spouses want the coordination and economies of scale of joint representation. Consequently, practitioners should endeavor to educate them as to the inherit issues that representation raises.

Joint representation frequently raises conflicts regarding the provisions and planning for gifts and bequests to children and other heirs. Just as with

so many other concepts in this article, the changing demographics of the American family have had a profound impact on this issue, making it more difficult than what's historically been the case. Traditional nuclear families in 2015 only comprised 46 percent of American households, down from 73 percent in 1960.[9] That statistic has likely continued to drop. That means nearly half of families' units don't fit the historic model on which most planning constructs were based. As the family structure has diversified and become more complex, the difficulty of dealing with issues of bequests to "heirs," however the couple might choose to define that term, will grow.[10] You may, therefore, also wish to add this disclosure:

> You may have conflicting interests as to the property that will be left to your children or to other family members when you are both deceased. If you are the first to die, you may want to restrict your spouse's powers of disposition on his or her later death so that most or all your property and his or her property will be left to your children or other family members. You may want to prevent your spouse from leaving your spouse's property and your property to someone that your spouse marries after your death. On the other hand, if you survive your spouse, you may want to hold your own property and to receive your spouse's property free of any restrictions on your right of later disposition. If this is not the first marriage for either of you, and if either of you have children from a prior marriage, you may have conflicting interests in providing for children of the earlier marriage. One of you may want to make provisions for children of the earlier marriage, and the other may not.

Not only may the couple have conflicting desires with regard to the disposition of their assets, but also they may have conflicting perspectives on the selection of fiduciaries and other trust positions (see discussion above). The couple may not want to name each other in those fiduciary capacities, or one may and the other may not. These conflicts too may need to be addressed.

Endnotes

1. In 2016, the American College of Trust and Estate Counsel (ACTEC) foundation published *ACTEC Commentaries* (5th ed. 2016). Some of the recent revisions to the *ACTEC Commentaries* reflect changed attitudes and perspectives with regard to the American Bar Association's Model Rules of Professional Conduct (MRPC) in the realm of estate planning. While the *ACTEC Commentaries* are intended to provide guidance and assistance, they're not authoritative, nor do they mandate or specifically prohibit behavior. *See* prologue to *ACTEC Commentaries.*
2. Anthony Cilluffo, "Share of married Americans is falling, but they still pay most of the nation's income taxes"(April 12, 2017), *www.pewresearch.org/fact-tank/2017/04/12/share-of-married-americans-is-falling-but-they-still-pay-most-of-the-nations-income-taxes/.*
3. Abby Ellin, "After Full Lives Together, More Older Couples Are Divorcing," *The New York Times* (Oct. 30, 2015), *www.nytimes.com/2015/10/31/your-money/after-full-lives-together-more-older-couples-are-divorcing.html?_r=0.*
4. *Ibid.*
5. *See www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_18_duties_of_prospective_client.html.*
6. *ACTEC Commentaries* (5th ed. 2016), Section 1.7, at pp. 102-103, *citing generally Price on Contemporary Estate Planning*, Section 1.6.6, at p. 1059 (2014).
7. *Ibid.*, at p. 103.
8. *Ibid.*, at p. 105. It provides in pertinent part, as follows:

   Comment 22 to MRPC 1.7, as amended in 2002, states:
   [22] Whether a lawyer may properly request a client to waive conflicts that might arise in the future is subject to the test of paragraph (b). The effectiveness of such waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails. ABA Formal Ethics Opinion 05-436 (2005), interpreting MRPC 1.7(b), provides: 'A lawyer in appropriate circumstances may obtain the effective informed consent of a client to future conflicts of interest' in a 'wider range of future conflicts than would have been possible under the Model Rules prior to their amendment.'

   Comment 22 to MRPC 1.7 continues:
   The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding. ... [I]f the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, such consent is more likely to be effective, particularly if, e.g., the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation.

9. *www.pewsocialtrends.org/2015/12/17/1-the-american-family-today/.*
10. David H. Lenok, "The 50 Most Common Family Types in America" (July 20, 2016), *http://wealthmanagement.com/high-net-worth/50-most-common-family-types-america.*