Joint Representation of Spouses in Estate Planning:
The Saga of Advisory Opinion 95-4
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(The Florida Bar Journal - March 1998)

After extended proceedings commencing in 1995, the final text of Advisory Opinion 95-4 was approved by The Florida Bar Board of Governors at its May 1997 meeting. Advisory Opinion 95-4 provides guidance regarding confidentiality and conflict of interest concerns for attorneys undertaking to represent spouses as joint clients in estate planning matters. A summary of Advisory Opinion 95-4 is contained in its headnote prepared by the Ethics Department of The Florida Bar:

In a joint representation between husband and wife in estate planning, an attorney is not required to discuss issues regarding confidentiality at the outset of representation. The attorney may not reveal confidential information to the wife when the husband tells the attorney that he wishes to provide for a beneficiary that is unknown to the wife. The attorney must withdraw from the representation of both husband and wife because of the conflict presented when the attorney must maintain the husband's separate confidences regarding the joint representation.

This article examines the holdings of Advisory Opinion 95-4, with a particular focus on its procedural history and the analysis developed during deliberations prior to its final issuance.

In 1995, the Real Property, Probate and Trust Law Section approved the recommendation of its Estate Planning, Probate and Trust Professionalism Committee to request an ethics advisory opinion with respect to joint representation of spouses in estate planning. Professor Geoffrey C. Hazard, Jr. was retained as advisor and reporter for the project.

The advisory opinion was sought because of the sparse guidance on this subject under the Florida Rules of Professional Conduct (FRPC) and ethics opinions and case law in Florida. At the time the request for the opinion was made, two national organizations of trusts and estates practitioners had recently concluded major projects relating to this subject focusing on the Model Rules of Professional Conduct (MRPC). The Special Study Committee on Professional Responsibility of the American Bar Association Section of Real Property, Probate and Trust Law published three reports, one of which directly addressed multiple representation of spouses (the study committee report). Separately, the American College of Trusts and Estates Counsel (ACTEC) released its own Commentaries on the Model Rules of Professional Conduct (the ACTEC commentaries), which also devoted significant consideration to this subject. An important objective of the RPPTL Section in seeking an ethics advisory opinion was to promote the feasibility of joint representation in estate planning.

In making its request for an ethics advisory opinion, the RPPTL Section submitted a generalized situation to illustrate the ethical issues for which guidance was sought. The situation presented by the RPPTL request letter and addressed in Advisory Opinion 95-4 follows:

Lawyer has represented Husband and Wife for many years in a range of personal matters, including estate planning. Husband and Wife have substantial individual assets, and they also own substantial jointly held property. Recently, Lawyer prepared new updated Wills which Husband and Wife signed. Like their previous Wills, the new Wills primarily benefit the survivor of them for his or her life, with beneficial disposition at the death of the survivor being made equally to their children (none of whom were born by prior marriage).

Husband, Wife, and Lawyer have always shared all relevant assets and financial information. Consistent with previous practice, Lawyer met with Husband and Wife together to confer regarding the changes to be made in updating their Wills. At no point since Lawyer first started to represent them did either Husband or Wife ever ask Lawyer to keep any information secret from the other, and there was never any discussion about what Lawyer might do if either of them were to ask Lawyer to maintain such a separate confidence.

Several months after the execution of the new Wills, Husband confers separately with Lawyer. Husband reveals to Lawyer that he has just executed a Codicil (prepared by another law firm) which makes substantial beneficial disposition to a woman with whom
Husband has been having an extra-marital relationship. Husband tells Lawyer that Wife knows about neither the relationship nor the new Codicil, as to which Husband asks Lawyer to advise him regarding Wife's rights of election in the event she were to survive Husband. Lawyer tells Husband that Lawyer cannot under the circumstances advise him regarding same. Lawyer tells Husband that Lawyer will have to consider Lawyer's ethical duties under the circumstances. Lawyer tells Husband that, after consideration, Lawyer may determine to disclose to Wife the substance of Husband's revelation if Husband does not do so himself.

Ethical Dilemma Arising From a Separate Confidence

The central issue in Advisory Opinion 95-4 concerns the lawyer's duties under FRPC 4-1.411 (communication), FRPC 4-1.612 (confidentiality), and FRPC 4-1.713 (conflict of interest) with respect to the husband's communication to the lawyer of the information concerning the codicil and the extra-marital relationship, which is defined in Advisory Opinion 95-4 as the "separate confidence." Advisory Opinion 95-4 begins its analysis by characterizing the lawyer's representation of the husband and wife as a "joint representation," consistent with the RPPTL request letter,14 although Advisory Opinion 95-4 does not address the differences inherent in a "joint representation" as compared to a so-called "separate representation" of spouses in estate planning. A "joint representation" generally refers to representation of co-clients having similar goals and interests in which it is understood that information relating to the subject of representation will be shared by the co-clients.15 A "separate representation" may also involve sharing of information but would permit each client to disclose to his or her attorney certain information which is not to be shared with the other co-client.16 Absent agreement otherwise, the "default" rule is that a co-client relationship involving estate planning for married persons generally is presumed to be a joint representation.17

Advisory Opinion 95-4 devotes substantial analysis to the positions taken in the study committee report regarding separate confidences imparted in a joint representation. The study committee report focuses on the ethical dilemma which confronts the attorney under, on the one hand, the duty of confidentiality under MRPC 1.6 which the attorney owes the confiding client (husband) and, on the other hand, the duty under MRPC 1.4 to communicate to the nonconfiding client (wife) important information which naturally relates to the attorney's representation of her.18 The study committee report recommends that the attorney seek either to persuade the confiding client to disclose the separate confidence to the other spouse or to obtain express authorization for the attorney to do so. Assuming (as would be expected in the situation presented in Advisory Opinion 95-4) that the confiding client is unwilling to do so, analysis of the study committee report focuses on the insoluble nature of the ethical dilemma — whatever action the attorney takes seemingly will fail to comply with an ethical duty owed by the attorney to one or the other of the attorney's two clients. Applied to the situation presented in Advisory Opinion 95-4, compliance with the lawyer's duty to inform the wife of material information relating to the lawyer's representation of her would run contrary to the lawyer's duty of confidentiality owed to the husband — but compliance with the lawyer's duty of confidentiality relating to the husband's separate confidence would be contrary to the lawyer's duty owed to the wife to communicate important information to her.

The study committee report and the ACTEC commentaries conclude that the attorney, faced with this insoluble dilemma, must act as fiduciary toward the joint clients19 and may exercise discretion20 to determine whether to make disclosure to the nonconfiding client.21 The study committee report states that the attorney should balance the potential for material harm to the confiding client (husband) which may be caused by revealing the separate confidence against the potential for material harm to the nonconfiding client (wife) which may be expected by failure to reveal same.22

Advisory Opinion 95-4 does not follow this approach. Instead, it gives precedence to the duty of confidentiality:

[The] duties of communication and confidentiality harmoniously coexist in most situations. In the situation presented, however, Lawyer's duty of communication to Wife appears to conflict with Lawyer's duty of confidentiality to Husband. Thus, the key question for our decision is: Which duty must give way? We conclude that, under the facts presented, Lawyer's duty of confidentiality must take precedence. Consequently, if Husband fails to disclose (or give Lawyer permission to disclose) the subject information to Wife, Lawyer is not ethically required to disclose the information to Wife and does not have discretion to reveal the information. To the contrary, Lawyer's ethical obligation of confidentiality to Husband prohibits Lawyer from disclosing the information to Wife.

In analyzing the rationale underlying the discretion approach (which the opinion refers to as a "no-confidentiality"
position), Advisory Opinion 95-4 identifies and rejects two separate bases for it. The first basis advanced is that clients have an expectation that everything communicated to the attorney by one client which relates to the joint representation will be shared with the other client. Citing law journal authority as well as a passage in the study committee report itself, the opinion rejects this argument, stating that "accurately predicting the expectations of a typical client in a given situation is risky business." The second basis is grounded in the law of evidentiary privilege which specifically provides for a common interest exception to attorney-client privilege (F.S. §90.502(4)(e)). Citing the comment to FRPC 4-1.6 which explains the difference between confidentiality and privilege, Advisory Opinion 95-4 states that the privilege exception under F.S. §90.502(4)(e) becomes relevant only after legal proceedings have begun between the co-clients in which the separate confidence may be relevant.

After dismissing the two bases identified to support a discretionary approach, Advisory Opinion 95-4 concludes:

The committee rejects the concept of discretion in this important area. Florida lawyers must have an unambiguous rule governing their conduct in situations of this nature. We conclude that Lawyer owes duties of confidentiality to both Husband and Wife, regardless of whether they are being represented jointly. Accordingly, under the facts presented Lawyer is ethically precluded from disclosing the separate confidence to Wife without Husband's consent.

In support of this position, the opinion then cites the portion of the comment to FRPC 4.1-6 which provides that "whether another position of law supersedes Rule 4-1.6 is a matter of interpretation beyond the scope of these rules, but a presumption should exist against such a supersetion." The opinion also cites, as Florida supporting authority, Advisory Opinion 92-5, which addresses the extent to which privileged information may be disclosed when required by law, as well as a 1984 opinion of the New York State Bar Association involving a partnership.

The RPPTL Section supported the conclusion reached in Advisory Opinion 95-4. As additional authority for this conclusion, the RPPTL Section pointed to agency law doctrine, which is not discussed in Advisory Opinion 95-4. The rationale advanced by the RPPTL Section is that a separate confidence unilaterally terminates an agreement among two principals (co-client) and their agent (attorney) regarding sharing of information, and that, as a consequence of this unilateral termination, the separate confidence is not to be shared.

**Withdrawal**

Because of the conflict of interest which the separate confidence evidences between the co-clients, Advisory Opinion 95-4 mandates that the attorney withdraw from the representation:

An adversity of interests concerning the joint representation has arisen. This creates a conflict of interest. Many conflicts can be cured by obtaining the fully informed consent of the affected clients. Rule 4-1.7. Some conflicts, however, are of such a nature that it is not reasonable for a lawyer to request consent to continue the representation . . . In the situation presented, the conflict that has arisen is of a personal and, quite likely, emotionally-charged nature. The Lawyer's continued representation of both Husband and Wife in estate planning matters presumably would no longer be tenable. Rule 4-1.16 thus requires Lawyer's withdrawal from representation of both Husband and Wife in this matter.

The conclusion that the separate confidence may not be revealed dictates that withdrawal is required. Certainly the lawyer cannot continue to represent the wife after the lawyer learns the information imparted to him or her in the separate confidence from the husband. In the deliberations prior to issuance of Advisory Opinion 95-4, however, significant focus was directed toward the manner in which withdrawal is to be effected by the lawyer. The initial conclusion contained in Proposed Advisory Opinion 95-4 issued by the Professional Ethics Committee (PEC) provided for a "silent" withdrawal: "In withdrawing from the representation, Lawyer should take care to avoid disclosing the separate confidence to Wife. Lawyer should simply cite ‘professional obligations’ or a similar reason in providing notice of withdrawal to Wife."34

The RPPTL Section opposed this initial conclusion and sought review by The Florida Bar Board Review Committee on Professional Ethics (BRC). The basic concern expressed by the RPPTL Section was the unfair treatment which the nonconfiding client (wife) may receive as a consequence of a silent withdrawal, as well as the potential that the
The practical effect of Advisory Opinion 95-4 is that, because of the attorney's "noisy withdrawal," the noncommunicating client — the wife — should be alerted that circumstances adversely affecting her interests have developed.

The attorney should have some reasonable latitude as to the timing in which to make the notification. In some situations, the notification by the attorney may be tantamount to disclosure, as the wife may be expected to find out the substance of the separate confidence. The better practice is for the attorney to make notification only after conferring with the confiding client to explain the consequences if the client refuses to permit the separate confidence to be revealed to his or her spouse. This suggests that the attorney should have a reasonable period of time (depending on the circumstances) to seek to resolve the situation short of withdrawal, which may in some situations result in disclosure of the separate confidence to the other spouse. While Advisory Opinion 95-4 requires that the attorney state to both spouses that the withdrawal is because of conflict of interest, the opinion states that the attorney may advise them that they should each retain separate counsel. This appropriately leaves the attorney some element of discretion to tailor the withdrawal to the particular circumstances of the situation the attorney faces.

Continuing Representation

Advisory Opinion 95-4 states that the lawyer must withdraw "from representation of both Husband and Wife in this matter." As to future representation of either spouse, the opinion states only that "[f]inally, whether Lawyer ethically may represent Husband or Wife in other matters will be governed by Rule 4-1.9." This statement is obvious, as FRPC 4-1.9 sets forth conflict of interest and informed consent rules applicable to representation of a client where the client's interests are materially adverse to the interests of a former client in the same or a substantially related matter. Unfortunately, Advisory Opinion 95-4 does not provide any substantial guidance with respect to specific questions raised by the RPPTL Section request letter regarding continuing representation. Nevertheless, the RPPTL Section suggested the following basic conclusion:

In the situation presented, Lawyer may not continue to represent either Husband or Wife without obtaining informed consent. Because Husband refuses to permit disclosure of the separate confidence, Lawyer is unable to seek Wife's informed consent to waiver of conflict of interest by her (which would be required under Rule 4-1.9 in order for Lawyer going forward to be able to represent Husband alone). On the other hand, Rule 4-1.4 bars Lawyer from representing Wife alone (even if Husband were to consent thereto) as long as Lawyer is unable to advise Wife of information which seriously and adversely affects her interests but which Husband refuses to allow be disclosed.

This conclusion is consistent with applicable provisions of the Restatement. Advisory Opinion 95-4 apparently did not address this subject on account of the extensive deliberations on the other issues presented, which the RPPTL Section urged receive primary focus.

Waiver of Conflict of Interest

Apart from the ethical dilemma confronting the attorney who receives a separate confidence, Advisory Opinion 95-4 also considers the subject of waiver of conflict of interest in a joint representation. The situation presented in Advisory Opinion 95-4 was intended to
reflect a common type of joint representation, in which the spouses' interests at the outset have similar interrelated goals and interests. Advisory Opinion 95-4 concluded that this situation does not involve a conflict of interest under FRPC 4-1.7:

From the inception of the representation until Husband's communication to Lawyer of the separate confidence, there was no objective indication that the interests of Husband and Wife diverged, nor did it objectively appear to Lawyer that any such divergence of interests was reasonably likely to arise. Such situations involving joint representation of Husband and Wife do not present a conflict of interests and, therefore, do not trigger the conflict of interest disclosure-and-consent requirements of Rules 4-1.7(a) and 4-1.7(b), Rules Regulating The Florida Bar.

Accordingly, the lawyer was not required to conduct advance consultation to review relevant conflict of interest concerns and obtain client informed consent to the joint representation. Advisory Opinion 95-4 does state, however, that informed consent may be required in some joint representation situations:

It is important to recognize, however, that some spouses do not share identical goals in common matters, including estate planning. For example, one spouse may wish to make a Will providing substantial beneficial disposition for charity but the other spouse does not. Or, either or both of them may have children by a prior marriage for whom they may wish to make different beneficial provisions. Given the conflict of interest typically inherent in those types of situations, in such situations the attorney should review with the married couple the relevant conflict of interest considerations and obtain the spouses' informed consent to the joint representation.

This distinction between situations involving conflict of interest and situations in which no conflict of interest is presented is consistent with §211 of the Restatement of the Law Governing Lawyers, which contains additional examples involving estate planning matters. When a conflict of interest is presented, a joint representation may proceed only if both clients consent after consultation in which the lawyer (as required by FRPC 4-1.7(c)) explains "the implications of the common representation and the advantages and risks involved." In taking on a married client situation in which the practitioner may be uncertain at the outset whether a conflict of interest is presented, it is good practice (even though it may not be required) to obtain a waiver of conflict after consultation. Typically, the consultation should include discussion regarding the potential advantages to each spouse if he or she were to be represented by separate counsel, and also the considerations involved if the attorney receives a separate confidence from either of them. Explanation of the separate confidence concern presumably may be handled by reviewing Advisory Opinion 95-4 with the clients and perhaps in some situations furnishing the clients with the text of the opinion or a summary thereof.

If a conflict of interest does exist and the attorney fails to obtain an informed consent waiver, the potential consequences can be dire. One untoward possible consequence (regardless of whether a separate confidence may at some point be imparted) may be the invalidation of testamentary documents, which in turn could lead to possible attorney malpractice liability to disappointed beneficiaries. If a separate confidence is imparted, the attorney is confronted with an impossible situation. By failing to advise the spouses at the outset regarding separate confidences, the attorney is at risk of malpractice liability to both spouses for consequences flowing from the separate confidence. Of course, the extent of attorney malpractice liability depends on the particular circumstances presented in each individual case and may be difficult to quantify. Apart from malpractice considerations, the attorney may also be subject to disciplinary proceedings for failure to obtain conflict waiver by informed consent.

As a preventive measure, some attorneys may routinely obtain conflict waivers from estate planning clients, regardless of the potential for conflict of interest. Cautious practice is for the conflict waiver to be in writing and to include a recitation of the relevant considerations, which might be set out in a general memorandum furnished to all married clients. In some circumstances, the careful practitioner may review this memorandum with clients periodically during the course of the representation and also consider at appropriate intervals whether any specific emerging conflict may reasonably be determined to have been within the clients' contemplation when the original waiver was made.
Requirement of Advance Confidentiality Warning

The initial opinion issued by the Professional Ethics Committee contained a requirement concerning an advance confidentiality warning. Regardless of whether a conflict of interest might exist, Proposed Advisory Opinion 95-4 concluded that FRPC Rule 4-1.4(b) and Rule 4-1.7(c) imposed a duty on an attorney in every joint representation to make explanation at the outset to joint clients regarding the attorney's professional obligations in connection with the representations:

One aspect of this explanation is the lawyer's obligation of confidentiality. Clients have a right to know whether, and under what circumstances, information provided by one of them to the lawyer may be shared with other persons, including a co-client .... We conclude that Lawyer was ethically obligated to discuss with Husband and Wife Lawyer's obligations with regard to separate confidences. This required explanation is one that, of course, should be tailored to the specific circumstances involved. The explanation is not required to be in writing; however, the committee strongly believes that a written disclosure is advisable for the protection of both client and lawyer.52

Upon its review, the Board Review Committee rejected this approach. Instead, the final text of Advisory Opinion 95-4 provides:

In view of the conclusions reached in the remainder of this opinion, we conclude that, under the facts presented, Lawyer was not ethically obligated to discuss with Husband and Wife Lawyer's obligations with regard to separate confidences. While such a discussion is not ethically required, in some situations it may help prevent the type of occurrence that is the subject of this opinion.

The final text of Advisory Opinion 95-4 follows the position advanced by the RPPTL Section, which argued in connection with which its petition for review as follows:

The Professional Ethics Commission version of Proposed Advisory Opinion 95-4 would impose a per se requirement that a lawyer must give a "confidentiality warning" upon commencing every multiple representation — regardless of whether or not conflict of interest concerns (actual or potential) are presented. This per se rule is not supported by any authority, and the Professional Ethics Commission cites no case law or ethics opinion in any jurisdiction for this proposition. This per se rule clashes head-on with the basic position contained in Section 211 of the Restatement of the Law Governing Lawyers. Section 211 of the Restatement draws sharp distinction between: (i) those multiple clients who do not share substantially similar goals and interests (i.e., where waiver of conflict of interest is required; and (ii) those multiple clients who do share similar goals and interests (i.e., where no conflict of interest is reasonably foreseeable or apparent, and hence no waiver is required). To impose a "confidentiality warning" rule for the latter situation would wrongly require, in effect, that a lawyer at the outset take up conflict of interest concerns even though no conflict of interest may exist. The Professional Ethics Commission version of Proposed Advisory Opinion 95-4 would extend its iron rule to a broad range of multiple representations (i.e., largely outside estates and trust practice, and also affecting representations which may not be initiated at the same time but which may arise more gradually over a longer period in the course of practice). Bar members concerned that floodgates of attorney malpractice litigation not be opened to unwarranted claims should worry about the prospective troubling malpractice consequences if the Professional Ethics Committee version of Proposed Advisory Opinion 95-4 were to be followed.53

In presenting its position, the RPPTL Section also submitted a parallel example presented in a personal injury litigation context to illustrate its concern regarding potential general application of the advance warning requirement contained in Proposed Advisory Opinion 95-4.54

The important practical significance of Advisory Opinion 95-4 is its determination against imposing a per se rule which would require Florida lawyers to explain confidentiality considerations in every multiple representation setting. In rejecting the Professional Ethics Committee's position, however, the brief portion of Advisory Opinion 95-4 addressing this issue does not set out the rationale for its conclusion. The Board Review Committee apparently decided not to add any potential precedential discussion beyond the bare minimum to a subject where there is little authority under case law, ethics opinions, or commentary.55
Variations on the Situation Presented

The situation presented in Advisory Opinion 95-4 involved a long-term joint representation in which, after many years, a serious conflict of interest arose. The basic form of ethical dilemma which it addressed may arise in any number of comparable estate planning situations, as stated in the RPPTL request letter:

A husband may ask the attorney to prepare a Codicil (without informing his Wife) to make a substantial disposition to charity. Or, a wife may disclose to the attorney that her child (whom her husband believes is his child also) was actually born out of wedlock and is not her husband's child. A myriad of variation may arise, and each situation presents its own specific degree of seriousness and potential material adversity in respect to the spouses' goals and interests in their estate planning.\(^{56}\)

At what point is a particular separate confidence serious enough so that the attorney must withdraw if the confiding spouse does not permit its disclosure to the other spouse? The ACTEC commentaries take the position that some separate confidences concern "irrelevant (or trivial) matters" and gives the following illustration: "For example, a lawyer who represents a husband and wife in estate planning matters might conclude that information imparted by one of the spouses regarding a past act of marital infidelity need not be communicated to the other spouse."\(^{57}\)

Likewise, the Restatement contains an estate planning example involving a separate confidence by one spouse which does not present an ethical problem because of the "lack of material effect" on the other spouse.\(^{58}\)

This position is consistent with dicta in the recent Florida appellate decision in Cone v. Culverhouse, 687 So. 2d 888 (Fla. 2d DCA 1997). Culverhouse addressed the applicability of the common interest exception to attorney-client privilege in litigation brought by the wife after husband's death concerning a wide range of professional services rendered mostly to the husband but also including estate planning for both spouses. The court's decision states that in order for the common interest exception to be applicable:

[T]he clients' interests must be sufficiently compatible that a reasonable client would expect his or her communications concerning the matter to be accessible to the other client. For example, a married couple creating an estate plan with interrelated documents probably have no reasonable expectation of confidentiality concerning the matter of the joint estate plan, but might still have such expectations concerning their individual, private discussions with their lawyer about the reasons for including or excluding specific bequests to third persons in their individual wills.\(^{59}\)

This statement should be interpreted to permit a separate confidence only to the extent that it does not give rise to conflict of interest — that is, a confidential communication from one spouse which has no material effect on the other spouse should be permissible, whereas a separate confidence which does have a material effect on the other spouse is and triggers the requirement for attorney withdrawal under Advisory Opinion 95-4.

Conclusion

The conclusions of Advisory Opinion 95-4 are consistent with the RPPTL Section's goal of promoting the feasibility of joint representation of spouses in estate planning. The final text of Advisory Opinion 95-4 avoids serious difficulties inherent in the conclusions of Proposed Advisory Opinion 95-4 and provides helpful general guidance to practitioners counseling married couples together concerning estate and trust matters.

2 The emphasis which Advisory Opinion 95-4 places on the duty of confidentiality has significance beyond issues involving joint representation. See James G. Pressly, Jr., Rohan Kelley and Michael Simon, Estate Planning, Ethics and Strategies in Dealing with Potentially Incapacitated Clients, at 1-2, 14th Annual Estate and Property Seminar (Palm Beach County Bar Association, 1997), addressing the relevance of Advisory Opinion 95-4 with respect to confidentiality duties owed to clients having diminished capacity. The emphasis placed on the duty of confidentiality in Advisory Opinion 95-4 should also be considered in connection with responsibilities owed to beneficiaries by a fiduciary's attorney concerning breach of fiduciary duty. See generally, Counseling the Fiduciary, 28 REAL PROP., PROB. & TR. J. 825, 830-839, 848-855. See also FRPC Rule 4-1.7, comment relating to "Other conflicts situations" ("In Florida, the personal representative is the client rather than the estate or the beneficiaries."); Barnett Banks Trust Co., N.A. v. Compson, 629 So. 2d 849 (Fla. 2d D.C.A. 1993); Estate of Gory, 570 So. 2d 1381 (Fla. 4th D.C.A. 1990); but see Fla. Atty. Gen. Op. 96-94.
crime, as required by FRPC 4-1.6 (b)(1), making Florida one of the least protective jurisdictions of client confidentiality in this context.

In such cases the lawyer should have a reasonable degree of discretion in determining how to respond to any particular case. In fashioning a response the lawyer should consider

"(a) Representing Adverse Interests. A lawyer shall not represent a client if the representation of that client will be directly adverse to the interests of another client, unless:

(1) to prevent a client from committing a crime; or
(2) to prevent a death or substantial bodily harm to another.

(3) When Lawyer May Reveal Information. A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) to serve the client's interest unless it is information the client specifically requires not to be disclosed ....
(5) to comply with the Rules of Professional Conduct ....

(c) Limitation on Amount of Disclosure. When disclosure is mandated or permitted, the lawyer shall disclose no more information than is required to meet the requirements or accomplish the purposes of this rule."

Advisory Opinion 94-5 makes no mention of the fact that Florida is a state in which lawyers must reveal confidential client information to prevent a client from committing any crime, as required by FRPC 4-1.6 (b)(1), making Florida one of the least protective jurisdictions of client confidentiality in this context. See generally FLORIDA LEGAL ETHICS, supra note 5, at §§7.15 et seq. Unlike Florida, the majority of states permit attorney use and disclosure of client information only in the case of a criminal act that the lawyer believes is likely to result in imminent death, substantial bodily harm or substantial financial injury. See Restatement (Third) of the Law Governing Lawyers, Proposed Final Draft No. 1 (March 29, 1996, ALI) §117A, cmt. b and accompanying reporter's note (containing chart of each state's rules concerning disclosure of client crimes, fraud and perjury). Unless otherwise indicated, all references herein to "the Restatement" are to Restatement (Third) of the Law Governing Lawyers (Proposed Final Draft No. 1, March 29, 1996) (ALI), final adoption of which may occur in 1998. See ALI Approves Nearly Half of Restatement of Law Governing Lawyers, Daily Report for Executives (BNA), No. 102, at C-1 (May 28, 1996).

Relevant portions of FRPC 4-1.7 provide as follows:

(a) Duty to Explain Matters to Client. A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.
(b) Representation of Husband and Wife, Proposed Final Draft No. 1 (March 29, 1996, ALI) §117A, cmt. b and accompanying reporter's note (containing chart of each state's rules concerning disclosure of client crimes, fraud and perjury).

Id. at 787. The separate confidence addressed in Advisory Opinion 95-4 constitutes a "prejudicial confidence" as well as a "factual confidence" under the terminology of the Study Committee Report, at 785-786.

"(1) the lawyer reasonably believes the representation will not be adversely affected; and
(2) the client consents after consultation.

(c) Explanation to Clients. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved."

"See RPPTL Section Request Letter at 4-5. The facts set forth in the situation presented indicate a history in the representation in which all relevant information over many years was shared among lawyer, husband, and wife; thereby confirming a joint representation relationship."

"See ACTEC Commentaries at 65-66; Study Committee Report at 722-73.

"See ACTEC Commentaries at 66-69; Study Committee Report at 771.

"See ACTEC Commentaries at 66; Study Committee Report at 778; Theresa Stanton Collet, Disclosure, Discretion or Deception: The Estate Planner's Ethical Dilemma from a Unilateral Confidence, 28 REAL PROP., PROB. & TR. J. 683, 687 (1994).

"See Committee Report at 783-93. The separate confidence addressed in Advisory Opinion 95-4 constitutes a "prejudicial confidence" as well as a "factual confidence" under the terminology of the Study Committee Report, at 785-786.

"Id. at 787.

"The ACTEC Commentaries at 68-69 provide: "[T]he lawyer faces an extremely difficult situation with respect to which there is often no clearly proper course of action. In such cases, the lawyer should have a reasonable degree of discretion in determining how to respond to any particular case. In fashioning a response the lawyer should consider his or her duties of impartiality and loyalty to the clients; any express or implied agreement among the lawyer and the joint clients that information communicated by either
client to the lawyer regarding the subject of representation would be shared with the other client; the reasonable expectations of the clients; and the nature of the confidence and the harm that may result if the confidence is, or is not, disclosed."

This approach had been favored earlier in formal action taken by the RPPTL Section in 1994, when the RPPTL Section recommended that The Florida Bar adopt a proposed amendment to add the following new section to FRPC Rule 4-1.7: "(e) Representation of Spouses. Except as may otherwise be agreed (in a manner consistent with the Rules of Professional Conduct) among spouses and a lawyer representing both spouses in common or related matters: (1) There shall be no confidentiality pursuant to Rule 4-1.6 as between the spouses insofar as the representation in such matters is concerned; and (2) If in the course of the representation one spouse communicates to the lawyer information which the lawyer reasonably should know the lawyer must disclose to the other spouse in order for the lawyer to provide competent representation to the other spouse, the lawyer shall, at the first reasonable opportunity, either (i) make such disclosure or (ii) withdraw entirely from representation of each spouse in such matters (in which event the lawyer shall not be required to make such disclosure or state any reason for withdrawal)." Minutes of Jan. 29, 1994, Meeting of the Executive Council of the Real Property, Probate and Trust Law Section of The Florida Bar, approving motion to propose amendment to FRPC Rule 4-1.7 (on file at office of section administrator of RPPTL Section, Tallahassee).

At its meeting on June 4, 1994, the Disciplinary Procedure Committee of The Florida Bar Board of Governors rejected this proposal, as reflected in the minutes of that meeting (on file at Office of Executive Director of The Florida Bar, Tallahassee).

Study Committee Report at 787. Professors Hazard's and Hodes' treatise describes this approach as "lawyering for the situation" and sets out a succinct analysis of the relevant critical commentary. See 1 GEOFFREY C. HAZARD, JR., & WILLIAM HODES, THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT §2.102 (2d ed. 1997) (HAZARD & HODES)).

FLA. STAT. §90.502(4)(e) (1996) provides an exception to attorney-client privilege as follows: "A communication is relevant to a matter of common interest between two or more clients, or their successors in interest, if the communication was made by any of them to a lawyer retained or consulted in common when offered in a civil action between the clients or their successors in interest." ABA Comm. on Ethics and Professional Responsibility, Formal Op. 91-361; N.Y. State Bar Ass'n Op. 674; and Monroe County (N.Y.) Bar Ass'n Op. 87-2.

See May 9, 1997, RPPTL Section Memorandum to The Florida Bar Board of Governors at 1, which is available on the Internet at <http://www.flabarrpptl.org>. The RPPTL Section initially favored a discretionary approach (see RPPTL Section Request Letter at 3) but modified its position (as reflected in the memorandum of May 9, 1997) prior to the issuance of the final text of Advisory Opinion 95-4.

See July 24, 1996, RPPTL Section Memorandum to John F. Harkness, Jr., Executive Director of The Florida Bar, Attachment 1 and 2, which is available on the Internet at <http://www.flabarrpptl.org>, and which provides as follows: "An agreement regarding the sharing of information may be subsequently terminated either mutually or unilaterally. In the case of mutual termination, both clients are aware of termination (and hence are on equal footing). In the case of unilateral termination by one co-client, the attorney must inform the other co-client thereof at the first reasonable opportunity so as to avoid any prejudice to that other client. When one co-client discloses to the attorney a separate confidence which materially impacts the interests of the other co-client with instructions not to share that information, the agreement is necessarily unilaterally terminated. It is then incumbent upon the attorney to confirm same with the client imparting the unilateral confidence and also to so notify the non-confiding client. Thereafter, information shared between the co-clients before the termination remains available to both of them. However, the information which is unilaterally confided to Lawyer by the one co-client (Husband) with instructions not to share it may not under Rule 4-1.6 be disclosed by Lawyer to the non-confiding client (Wife)." For a discussion of agency law considerations, see Theresa Stanton Collett, Disclosure, Discretion, or Deception: The Estate Planner's Ethics Dilemma from a Unilateral Confidence, 28 REAL PROP., PROB. & TR. J. 683, 706-711 (1994).


See July 24, 1996 RPPTL Section Memorandum at 1, and Attachment V thereto.

The RPPTL Section argued: "Proposed Advisory Opinion 95-4 suggests that the lawyer may merely cite 'professional obligations' to the non-confiding co-client (i.e., the wife) as the basis for the lawyer's withdrawal. We believe that such a cryptic course of action may deceive the wife (who is, of course, a co-client) concerning the degree to which her interests may be threatened. Tracking §1121 of the Restatement of the Law Governing Lawyers, the lawyer should, at the first reasonable opportunity, alert the wife that a matter seriously and adversely affecting her interests has come to light, which the husband refuses to permit the lawyer to disclose. Proposed Advisory Opinion 95-4 should be revised to so state."Id. at 4.

See 1 HAZARD & HODES §1.6 (generally referring to "noisy withdrawals"); cf. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 92-366 (concluding that when a lawyer determines that his or her work product will be used by the client to perpetrate a fraud, the lawyer must withdraw and may also disaffirm documents prepared in the course of representation, "even though such a 'noisy' withdrawal may have the collateral effect of inferentially revealing client confidences").

The RPPTL Section noted: "In order to minimize the risk of harm to the clients' relationship and, possibly, to retain the lawyer's ability to represent both of them, the lawyer may properly urge the communicating client himself or herself to impart the confidential information directly to the other client. .... In doing so the lawyer may properly remind the communicating client of the explicit or implicit understanding that relevant information would be shared and of the lawyer's obligation to share the information with the other client. The lawyer may also point out the possible legal consequences of not disclosing the confidence to the other client, including the possibility that the validity of actions previously taken or planned by one or both of the clients may be jeopardized." See also RPPTL Section Request Letter at 3.

See RPPTL Section Request Letter at 10-11.

Upon reconsideration, the Professional Ethics Committee modified its opinion to mandate that the attorney be required (like the final text of Advisory Opinion 95-4) to notify both spouses that withdrawal is because of conflict of interest, and also required (unlike the opinion's final text, which is permissive) to advise the spouses that each should retain separate counsel. Proposed Advisory Opinion 95-4, as modified on January 24, 1997, on file with The Florida Bar Ethics Department, Tallahassee.

In addressing this subject, Restatement §112, comment 1 provides as follows: "In the course of withdrawal, the lawyer has discretion to warn the affected co-client that a matter seriously and adversely affecting that person's interest has come to light, which the other co-client refuses to permit the lawyer to disclose." Restatement §112, comm. 1, illus. 3, discussed at note 58 and accompanying text, further provides that the lawyer may inform the nonconfiding client that the reason for withdrawal is that the confiding client will not permit disclosure of the separate confidence. Florida practitioners must be mindful, however, that Advisory Opinion 95-4 does not address whether or not the attorney may indicate to the nonconfiding spouse that the reason for the conflict of interest is because of separate confidence. It is uncertain how the text of the opinion should be interpreted as to this issue, which remains unsettled after Advisory Opinion 95-4.

Advisory Op. 95-4 at 8.

Id.

The RPPTL Section inquired: "May Lawyer continue to represent Husband alone if Lawyer notifies Wife that Lawyer is withdrawing from the joint representation and will no longer represent Wife? If so, is disclosure to Wife necessary in order to obtain her informed consent to Lawyer's continued representation of Husband?" RPPTL Section Request Letter at 3. FRPC 4-1.9(a) provides (similar to MRPC 1.9) that "A lawyer who has formally represented a client in a matter shall not thereafter represent another person in the same or substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation." The ACTEC Commentary at 122 on MRPC 1.9 provides the following example applying the rule to the estate planning context: "A lawyer who assisted a client in establishing a revocable trust for the benefit of the client's spouse and issue may not later represent another party in an attempt to satisfy the new client's...
claims against the trust by invading the assets of the trust. Similarly, the lawyer may not without informed consent of a former client use to the detriment of the former client any confidential information that was obtained during the course of the representation. Ethics opinions outside Florida have reached different conclusions as to whether the continued representation of one spouse, in a matter related to an estate plan created during the initial joint representation of the spouses, presents an inherent conflict of interest. For example, the Committee on Ethics of the Maryland State Bar Association found no inherent conflict of interest where a law firm that represented both a husband and wife prior to their divorce wished to continue to represent the husband in redrafting his will, deleting the former spouse and provided no discussion of whether the wife must provide consent for the lawyer's continued representation of the husband. Comm. on Ethics of the Md. State Bar Ass'n, Op. 86-2. By contrast, the Rhode Island Bar Association ruled that where a lawyer prepared an estate plan for both husband and wife, including trusts and wills, the lawyer may not thereafter redesign the wife's estate to exclude her husband absent the husband's consent pursuant to MRPC 1.9 if the wife's modification of her estate becomes materially adverse to her husband's interests. R.I. Op. 96-07.

39 July 24, 1996, RPPTL Section Memorandum, Attachment 1 at 3, 4. See also FRPC 4-1.7, Comment relating to "Consultation and consent," which provides in part: "There maybe circumstances where it is impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and 1 of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent."

40 See Restatement §213, cmts. d & e. The RPPTL Section Request Letter at 4 also contained the following analysis: "Lawyer must inform Wife that, if she assents to Lawyer's continued representation of Husband, Lawyer may utilize (possibly to Wife's disadvantage) any information acquired by Lawyer during the joint representation. See ACTEC Commentaries at 122. Lawyer would not be required to obtain Wife's assent to Lawyer's representation of Husband alone in an unrelated matter (e.g., a business transaction)." But see, e.g., Standing Comm. On Legal Ethics of VA State Bar, Op. 708 (1985); see also Professional Ethics Comm. Of Allegheny County Bar Ass'n, Formal Op. 4 (Pa. 1983). See generally Restatement §211, cmt. c.

41 Advisory Op. 95-4 at n.1. This language was taken directly from the RPPTL Section Request Letter at 6. The RPPTL Section Request Letter at 2 further provides: "Where the quality of representation which either spouse may receive may be materially limited in a joint representation on account of divergent goals or interests, each of them should have the opportunity to know that he or she may be better served if each spouse were to be represented by separate attorneys. When this subject is raised, most spouses may be expected to choose the joint representation — however, it is important that they be informed that their divergent interest could, to some degree, affect the quality of representation they may receive in the estate planning process.

42 See Restatement §211, cmt. c, illus. 1-3. See also Study Committee Report at 780-781.

43 FRPC 4-1.7(c). For a general discussion of Florida decisional authorities addressing full disclosure and informed consent, see FLORIDA LEGAL ETHICS, supra note 5, at §7.12.

44 For a discussion of client informed consent, see Restatement §202, cmt. e. One noteworthy case is In re Boivin, 533 P.2d 171 (Ore. 1975) (notice of dual representation held insufficient to inform clients of potential conflict where both buyer and seller in a business transaction, as attorney must explain nature of conflict of interest in such detail that the clients understand the reasons why it might be beneficial to retain independent counsel). See also Professional Ethics Comm. Of Allegheny County Bar Ass'n, Formal Op. 4 (Pa. 1983) (finding that, in estate planning situations involving conflict of interest between spouses, counsel should be authorized to and should in fact make full disclosure to each party of all issues involved in real time and assume responsibility for the distributive scheme adopted by both, since "the failure to provide such pertinent and material information, if deliberate, may border on fraudulent conduct, or if through neglect, might well vitiate the immunization sought" by an initial waiver of conflict of interest). Cf. Colo. Bar Ass'n Op. April 20, 1985 at 196 (opining that prior to agreeing to represent both a purchaser and a seller or a residential real estate transaction, the lawyer must determine that the parties agree on all material terms, disclose the risks of multiple representation, and disclose that if a dispute develops, the lawyer would have to withdraw from representing either party absent knowing consent of the information by each party). Even where the attorney only represents one spouse, potential malpractice concerns may arise concerning the quality of the independent counsel's advice, as illustrated in Lovett v. Lovett, 593 A.2d 382 (N.J. Sup. 1991) (legal malpractice claim dismissed where new attorney prepared new will for husband containing substantially different provisions from husband's earlier estate plan, notwithstanding second wife's relatively passive participation in the estate planning services rendered for husband, who was age 73 and having memory difficulties).

45 As of the writing of this article, the Estate Planning, Probate and Trust Professionalism Committee of the RPPTL Section is undertaking a project to develop model forms for estate planning engagement letters, including matters relating to Advisory Opinion 95-4. Draft language relating to this project may be found on the Internet at http://www.flabarrpptl.org.

46 For a discussion of Florida decisional authorities addressing full disclosure and informed consent, see FLORIDA LEGAL ETHICS, supra note 52Proposed Advisory Op. 95-4. This conclusion of Proposed Advisory Opinion 95-4 is reported in Christopher H. Gadsden, "Estate Planning, Probate and Trust Professionalism Committee of the RPPTL Section is undertaking a project to develop model forms for estate planning engagement letters, including matters relating to Advisory Opinion 95-4. Draft language relating to this project may be found on the Internet at http://www.flabarrpptl.org."
For example, suppose the situation presented in Advisory Opinion 95-4 were altered such that the lawyer only became aware of the husband's extra-marital relationship from Confidentiality Issues in Representing the Elderly, would govern the lawyer's conduct. For another example involving information learned from a third party, another source. Presumably, the husband, if confronted by the lawyer, would object to disclosure to the wife, and the basic ethical duties as dictated by Advisory Opinion 95-4 this connection, the ACTEC Commentaries at 86 provide as follows: “Prospective clients and the lawyer should discuss the extent to which material information imparted by Wife, Lawyer

In contrast, an ethical problem arises under Restatement §112, cmt. 1, illus. 3, which varies the facts of Illustration 2 such that the prepared trust “would significantly deplete Husband's will, because Husband propose to use property designated in Husband's will for a personally favored charity. In view of the
distraught at learning of Husband's infidelity and of Husband's years of silence and that disclosure of this information could destroy their marriage. Husband directs Lawyer

leave most of their property to the other ... Shortly after the wills are executed, Husband (unknown to Wife) asks Lawyer to prepare an inter vivos trust for an illegitimate child whose existence Husband has kept secret from Wife for many years and about who Husband has not previously informed Lawyer. Husband states that Wife would be

misunderstanding on the part of the clients may be minimized or eliminated by means of a discussion between the lawyer and the clients at the outset of the representation.” In

should first ask for the husband's permission to disclose the information to the wife so that the lawyer may continue to represent the husband after the wife seeks the services of another lawyer and, if the request is refused and the information remains confidential, the lawyer cannot continue to represent the husband after the wife seeks the services of another lawyer.

Advisory Opinion 95-4 does indicate that, while not ethically required, an advance discussion of confidentiality may be desirable, as "in some situations it may help prevent the type of occurrence" addressed therein. In subsequent discussion regarding separate confidences, Advisory Opinion 95-4 also states that "confusion or misunderstanding on the part of the clients may be minimized or eliminated by means of a discussion between the lawyer and the clients at the outset of the representation." In

Taking into account Advisory Opinion 95-4, the foregoing quotation should be interpreted as a practice suggestion (and not as an ethical requirement) for estate planning attorneys in Florida.

RPPTL Section Request Letter at 2. Neither the ACTEC Commentaries nor the Study Committee Report specifically consider the lawyer's duties in the event that the lawyer learns from another source detrimental information of material impact which the lawyer expects one spouse would not wish the lawyer to disclose to the other spouse. For example, suppose the situation presented in Advisory Opinion 95-4 were altered such that the lawyer only became aware of the husband's extra-marital relationship from another source. Presumably, the husband, if confronted by the lawyer, would object to disclosure to the wife, and the basic ethical duties as dictated by Advisory Opinion 95-4 would govern the lawyer's conduct. For another example involving information learned from a third party, see Burnele v. Powell and Ronald C. Link, The Sense of a Client: Confidentiality Issues in Representing the Elderly, 62 FORDHAM L. REV. 1197, 1212 (1994).

ACTEC Commentaries at 67. In contrast, the ACTEC Commentaries gives two other examples of separate confidences of a more serious nature: "After she signs the trust agreement I intend to leave her" or "All of the insurance policies on my life that name her beneficiary have lapsed." Id. at 68. Other noteworthy examples are analyzed in

Restatement §112, cmt.1, illus. 2, provides: “Lawyer has been retained by Husband and Wife to prepare wills pursuant to an arrangement under which each spouse agrees to leave most of their property to the other ... Shortly after the wills are executed, Husband (unknown to Wife) asks Lawyer to prepare an inter vivos trust for an illegitimate child whose existence Husband has kept secret from Wife for many years and about who Husband has not previously informed Lawyer. Husband states that Wife would be
distraught at learning of Husband's infidelity and of Husband's years of silence and that disclosure of this information could destroy their marriage. Husband directs Lawyer not to inform Wife. The inter vivos trust that Husband proposes to create would not materially affect Wife's own estate plan or her expected receipt of property under Husband's will, because Husband has been retained by Husband and Wife to prepare wills pursuant to an arrangement under which each spouse agrees to leave most of their property to the other ... Shortly after the wills are executed, Husband (unknown to Wife) asks Lawyer to prepare an inter vivos trust for an illegitimate child whose existence Husband has kept secret from Wife for many years and about who Husband has not previously informed Lawyer. Husband states that Wife would be
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"Wife, Lawyer

In contrast, an ethical problem arises under Restatement §112, cmt. 1, illus. 3, which varies the facts of Illustration 2 such that the prepared trust "would significantly deplete Husband's estate, to Wife's material detriment and in frustration of the spouses' intended testamentary arrangements."