THE PROFESSIONAL ETHICS COMMITTEE
FOR THE STATE BAR OF TEXAS

Proposed Opinion PO 2026-4

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QUESTIONS PRESENTED

1. May a Texas lawyer who represented one spouse in preparation of a premarital agreement later represent the married spouses jointly in estate planning?

2. May a Texas lawyer who represented one spouse in an uncompleted divorce later represent the reconciled spouses jointly in estate planning?

3. May a Texas lawyer who represented one spouse in a divorce proceeding later represent each ex-spouse in individual estate planning matters?

STATEMENT OF FACTS

Scenario 1: Attorney represented A in preparation of a premarital (or prenuptial) agreement adverse to B. Attorney's representation of A ended after A and B signed the agreement. A and B then married. A and B have asked Attorney to represent them jointly in estate planning as a married couple.

Scenario 2: Attorney represented C in a divorce proceeding against D. C and D reconciled, the divorce proceeding was dismissed, and Attorney's representation of C ended. C and D have asked Attorney to represent them jointly in estate planning as a married couple.

Scenario 3: Attorney represented E in a divorce matter adverse to F. The divorce was finalized and the Attorney's representation of E ended. E and F have separately asked Attorney to represent them in their individual estate planning.

DISCUSSION

Each scenario discussed in this opinion involves the concurrent or successive representation of spouses and raises potential issues of conflicts of interest and the protection of client confidences under the Texas Disciplinary Rules of Professional Conduct. Before turning to the specific questions presented, the opinion addresses general considerations regarding the joint representation of spouses in estate planning.

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1. Joint representation of spouses in estate planning—generally

Rule 1.06(b) prohibits a lawyer from representing a person if the representation of that person either:

> (1) involves a substantially related matter in which that person's interests are materially and directly adverse to the interests of another client of the lawyer or the lawyer's firm; or
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> (2) reasonably appears to be or become adversely limited by the lawyer's or law firm's responsibilities to another client or to a third person or by the lawyer's or law firm's own interests.

When considering joint representation, a lawyer should determine whether the clients' shared interests are such that any risk of adverse effect is minimal. For example, Comment 3 to Rule 1.06 notes that "common representation of persons having similar interests is proper if the risk of adverse effect is minimal and the requirements of paragraph (b) are met."

An estate planning lawyer may represent spouses jointly provided that after reasonable inquiry there is no reason to suspect a material conflict in their interests. *See generally* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 130, illustrations 1-3 (2000) (mere theoretical possibility that spouses might make different distributions does not present a conflict when lawyer knows or comes to know that the spouses are knowledgeable about their respective rights and interests, competent to make independent decisions if called for, and in accord on their common and individual objectives). Indeed, spouses are often better served by joint estate planning representation, despite the potential for conflicts of interest.

In determining whether a disqualifying conflict exists, the primary question is whether the spouses' interests are aligned with respect to the division of property or inheritance. General considerations include "the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that actual conflict will arise and the likely prejudice to the client from the conflict if it does arise." Comment 13 to Rule 1.06. "The question is often one of proximity and degree." *Id*. Specific considerations in the joint estate planning context include, but are not limited to:

- Whether the spouses have a premarital agreement,
- Whether one or both spouses have children from previous marriages,
- Whether one spouse has acquired significant wealth through gift or inheritance, or

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- Whether the spouses have expressed materially different estate planning goals.

None of these circumstances necessarily precludes joint estate planning representation, but each should be considered closely in evaluating whether a conflict of interest exists.

If it reasonably appears that the lawyer's representation of one spouse will be adverse to the other spouse or adversely limited by the lawyer's responsibilities to the other spouse, the lawyer may not represent both spouses jointly without obtaining informed consent under Rule 1.06(c). Rule 1.06(c) allows a lawyer to represent multiple clients despite an apparent conflict of interest if two conditions are met:

> (1) the lawyer reasonably believes the representation of each client will not be materially affected; and
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> (2) each affected or potentially affected client consents to such representation after full disclosure of the existence, nature, implications, and possible adverse consequences of the common representation and the advantages involved, if any.

With regard to the first requirement of Rule 1.06(c), if a disinterested lawyer would conclude the client should not consent to the joint representation under the circumstances, the lawyer must decline the engagement notwithstanding the parties' willingness to consent. *See* Rule 1.06(c)(1) and Comment 7. But if the lawyer is satisfied that the representation of each spouse will not be materially affected, the lawyer may then seek the clients' consent to the joint representation after making necessary disclosures. *See* Rule 1.06(c)(2). Effective consent requires "full disclosure of the existence, nature, implications, and possible adverse consequences of the common representation and the advantages involved, if any." *Id.*

If a lawyer properly accepts joint representation in compliance with Rule 1.06, but the conditions that permitted the representation later cease to exist, Rule 1.06(e) requires the lawyer to withdraw from representing one or both clients to the extent necessary to prevent a violation of the Rules.

Even if there is no reason to suspect a conflict of interest, a prudent estate planning lawyer will include provisions in a joint engagement letter informing the spouses of the inherent differences between separate and joint representation, including the potential for conflicts in joint representation and how material confidential information obtained from one spouse during the representation will be shared with the other. *See generally* ENGAGEMENT LETTERS, A GUIDE FOR

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PRACTITIONERS, published by the American College of Trust and Estate Counsel (ACTEC) (2017) (available at https://perma.cc/4VT7-8LBS).

2. Conflicts of interest in joint estate planning representation due to previous representation of one spouse – Scenarios 1 and 2

In Scenarios 1 and 2, a lawyer is asked to represent both spouses jointly in estate planning after representing one spouse in a matter that was adverse to the other spouse. In such a situation, the lawyer must consider carefully whether the circumstances of the prior representation will prevent the lawyer from fulfilling the lawyer's obligations to both spouses in a joint estate planning representation. This includes consideration of (1) whether the lawyer obtained confidential client information in the previous representation that would be material to the formerly adverse spouse in the proposed joint representation, and (2) whether the nature and scope of the previous representation overlaps with the proposed estate planning.

In general, a lawyer may not disclose information obtained during a former representation of a client or use that information to the disadvantage of the client without the client's informed consent after consultation. *See* Rules 1.05(b), (c), 1.09(c). Accordingly, a lawyer who previously represented one spouse in a matter should determine whether confidential information related to the former representation may be material to the other spouse in the proposed joint estate planning representation. If so, the lawyer should determine whether the former client spouse will consent to the revelation of that information to the other spouse. If the former client spouse is unwilling to consent, the lawyer should ordinarily decline the proposed joint representation. Likewise, a lawyer should decline a proposed joint representation if the lawyer's work product or advice in the prior representation is likely to be at issue in the joint representation. *See* Rule 1.06(b)(2) (prohibiting a representation that is adversely limited by the lawyer's own interests) and Rule 1.06, Comment 5 (noting it may be difficult for a lawyer to give detached advice if the probity of the lawyer's own conduct in a transaction is in question).

Scenario 1 (former representation regarding premarital agreement). In Scenario 1, a premarital agreement exists and the spouses seek joint representation from the same lawyer who represented one of the spouses regarding the premarital agreement.

As noted above, the mere existence of a premarital agreement creates a potential for adversity that should be considered before undertaking joint estate planning representation. Although the existence of a premarital agreement does not necessarily preclude joint representation of spouses in estate planning, the inherent adversity between parties to a premarital agreement creates a possible conflict that

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should be considered and discussed at the outset of the joint representation. An estate planning lawyer considering joint representation of spouses with a premarital agreement should alert the spouses to the potential for conflict and make clear that the lawyer's representation will not include disputes or issues regarding the premarital agreement.

In Scenario 1, not only do the spouses have a premarital agreement, but the estate planning lawyer previously represented one of the spouses in negotiating and drafting that premarital agreement adverse to the other. This prior representation increases the risk of a conflict of interest because the premarital agreement is the lawyer's own work product and its interpretation, implementation, or potential challenges may materially affect the spouses' interests in ways that place the lawyer's prior advice or drafting at issue. For example, the lawyer may be required to interpret provisions of the premarital agreement or apply provisions affecting ownership or inheritance in a manner that benefits one spouse at the other's expense. In the opinion of the Committee, a lawyer who formerly represented one spouse adverse to the other regarding a premarital agreement should agree to a joint representation of the spouses in estate planning only after reaching a firm, reasonable conclusion that no disputes exist or are likely to arise relating to the premarital agreement, explaining the conflicts inherent in the proposed representation, and securing the spouses' informed consent in light of the advantages and disadvantages of the joint representation.

Scenario 2 (former representation in divorce). In Scenario 2, a lawyer previously represented one spouse against the other in a divorce case. The spouses reconciled before the divorce was granted and have now asked the lawyer to represent them jointly in estate planning.

The permissibility of this representation depends on the facts and circumstances of the divorce, including the nature of any confidential information disclosed to the lawyer during the divorce representation. For example, if during the divorce representation the former client spouse confided that he had hidden assets from his spouse, or that he had a child unknown to his spouse, the lawyer should not accept the joint representation unless the former client spouse is willing to reveal that confidential information to the other spouse. *See* Rules 1.05(b), (c), 1.09(c). On the other hand, the mere fact that the lawyer represented one spouse in a divorce from the other, without more, should not prevent joint representation of reconciled spouses.

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3. Separate estate planning representations of divorced spouses when attorney represented one of the spouses in the divorce – Scenario 3.

In Scenario 3, a lawyer previously represented one spouse against the other in a divorce. Now that the parties are divorced, each of the ex-spouses has asked the lawyer to provide separate estate planning representation. The proposed representations are concurrent, but not joint.

Rule 1.06(b) governs conflicts of interest in concurrent representations. Under Rule 1.06(b)(1), the lawyer must determine whether the concurrent estate planning representations will involve substantially related matters in which the ex-spouses' interests are materially and directly adverse. The existence of such adversity may depend on several factors, including the length of time since the divorce, the terms and division of assets in the divorce decree, whether there are children of the marriage who may be the subject of later estate plans, and whether the divorce was agreed or contested. The fact that the former spouses have different goals for the disposition of their now-separated assets, however, does not present a conflict under Rule 1.06.

The lawyer in Scenario 3 should also consider whether his former representation of one of the spouses in the divorce prevents his representation of the other spouse in post-divorce estate planning. Rule 1.09 governs conflicts of interest arising from former representations, and provides in relevant part:

> (a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.
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> (c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
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> > (1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

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(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

Ordinarily, the representation of a client's ex-spouse in estate planning is not substantially related to the former representation of the client in the divorce, or materially adverse to the interests of that client. Without facts to the contrary, Scenario 3 does not present a conflict of interest under Rule 1.09(a).

Rules 1.09(c) and 1.05 prohibit the use or revelation of information relating to the representation of a former or current client, except as otherwise allowed or required by the Rules. Accordingly, a lawyer must not use or reveal a client's confidential information from a prior divorce representation when providing estate planning representation to the client's ex-spouse. If the lawyer represents both ex-spouses in concurrent but separate estate planning, the lawyer may not, without informed consent, use or reveal either client's confidential information in connection with the estate planning representation of the other.

CONCLUSION

In general, a Texas lawyer may represent spouses jointly in estate planning provided that after reasonable inquiry there is no reason to suspect a conflict in their interests. If a conflict exists, the lawyer may represent the spouses jointly only if the lawyer reasonably believes the representation of each client will not be materially affected and each affected or potentially affected client consents to such representation after full disclosure of the existence, nature, implications, and possible adverse consequences of the common representation and the advantages involved, if any. A prudent estate planning lawyer will include such disclosures in an engagement agreement for every joint representation.

A Texas lawyer may represent spouses jointly in estate planning after previously representing one spouse individually, provided the lawyer reasonably believes each person's interests are not materially and directly adverse, the lawyer's duties to each spouse will not be adversely limited, and the representation can be conducted impartially with respect to each client, despite the former representation. This is a context-specific analysis that depends on the nature of the prior engagement and of the spouses' potentially adverse interests.

A lawyer who formerly represented one spouse adverse to the other regarding a premarital agreement should agree to a joint representation of the spouses in estate planning only after reaching a firm, reasonable conclusion that no disputes exist or are likely to arise relating to the premarital agreement, explaining the conflicts inherent in the proposed representation, and securing the spouses' informed consent in light of the advantages and disadvantages of the joint representation.

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Whether a lawyer who previously represented one spouse against the other regarding a potential divorce may represent the now-reconciled spouses jointly in estate planning depends on the circumstances.

Ordinarily a lawyer may provide separate estate planning representation to divorced spouses after representing one spouse in the divorce, provided the concurrent and former representations are not substantially related and the interests of the ex-spouses regarding the estate planning are not materially adverse. As with all separate representations, a lawyer may not use or reveal one client's confidential information in the separate representation of a second client, without the first client's consent.

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