

What's Confidential When There is Joint Representation

by

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(Rules 1.4, 1.6, 1.7, 3.3)

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Lawyers are often faced with a dilemma of determining what is confidential as between jointly represented clients. This dilemma may arise in many areas of the law, such as business startups, estate planning, real estate, employment law, and business litigation. One classic scenario is where a husband and wife hire a lawyer to prepare estate planning documents, but the engagement agreement does not address the lawyer's duties to the jointly represented clients. During the lawyer's meeting with the husband and wife, they agreed to distribute their assets by having each leave all assets to the other and for the survivor to distribute the property equally among their children. Several days later, the wife calls the lawyer and informs the lawyer that she wants to leave a substantial share of her property to someone outside the family who was not mentioned during the first meeting with her husband. The wife also instructs the lawyer not to disclose this request to the husband. What should be done?

Fortunately, this particular scenario has been hashed out and guidance exists. A dilemma of loyalty was created once the secret material information was shared with the lawyer with instructions not to share the secret with the husband. On the one hand, the client making the disclosure expects that the lawyer will keep information obtained during the course of the representation confidential. See Mass. R. Prof. C. 1.6 (Confidentiality of Information: lawyer shall not reveal confidential information obtained during or relating to the representation of a client). On the other hand, the lawyer has a duty to disclose the wife's intentions to the husband and use this information for his benefit. See Mass. R. Prof. C. 1.4(a)(3) and (b)(Communication: "lawyer shall keep a client reasonably informed" and explain a matter to the extent needed to permit the client to make informed decisions).

How to resolve the dilemma of loyalty may be determined with reference to Mass. R. Prof. C. 1.7(a) and (b)(Conflicts of Interest: Current Clients). Rule 1.7 comments [29], [30], [31], and [32] delve into the special considerations that must be addressed when there is joint representation. The horns of the dilemma, confidentiality owed to one client and a duty to fully communicate with the other, may only be resolved by the lawyer first urging the wife to authorize the lawyer to make the disclosure to the husband. Or, in the alternative, to request that the wife communicate the secret information directly to the husband. The lawyer should also explain to the client that, unless the information is made available to the other client, it will be necessary for the lawyer to withdraw from the representation. If the client continues to refuse to authorize the disclosure or to make it directly, then the lawyer must withdraw from the representation of both of clients.¹

Proactive communication regarding the lawyer's duties to joint clients is the best way to prevent this uncomfortable dilemma. Ideally, as part of the initial discussion with the husband and wife, the lawyer should advise the joint clients that if there is litigation between them, the attorney-client privilege will not attach to any communications to the lawyer during the joint representation. See Mass. R. Prof. C. 1.7, Comment [30]. Comment [31] then addresses the broader issue of confidentiality. It recommends that the lawyer should, at the outset of the representation and as part of obtaining each client's informed consent, advise the clients that the joint representation will only work if they deal openly and honestly with each other on all matters relating to the representation, and that the lawyer's duty of loyalty to all clients means that the lawyer will have to withdraw from the representation if one client asks the lawyer to withhold material

¹ The lawyer must also withdraw pursuant to Rule 1.16(a)(1) if the client is insisting that the lawyer violate the rules of professional conduct.

information from the other client. Ideally, this discussion is done both orally and in writing. The lawyer should urge the clients to give careful consideration at the outset to whether they agree that all information can be shared openly since joint representation should not be provided if they refuse.

When the lawyer has provided this advice to all jointly-represented clients at the outset of the representation and they have agreed that the lawyer can make full disclosure, the lawyer is almost always obligated to disclose material information to all of them. Therefore, care should be taken to continue to communicate the limits of confidentiality as between the clients to prevent a disclosure which must be shared. There are limited circumstances where joint clients, after being properly informed, may agree in advance that the lawyer will not share certain types of confidential information with the other clients. See Mass. R. Prof. C. 1.7, Comment [31] (a lawyer may reasonably conclude that representing joint venturers who agree that the lawyer will not disclose the trade secrets of one joint venturer to the other does not adversely affect the representation). However, it is only in rare circumstances where such an arrangement does not create a conflict requiring separate representation.

In our estate planning scenario, even if the husband has waived his right to be told everything that the lawyer learns from the wife, a lawyer always has discretion, and sometimes an obligation, to divulge confidential information that is subject to a confidentiality exception. For instance, a lawyer is permitted or required to breach confidentiality to prevent criminal or fraudulent acts, to the extent reasonably necessary to rectify a fraud in which the lawyer's services were employed, or to correct false evidence offered to a tribunal. See Mass. R. Prof. C. 1.6(b) (1) and (3) and 3.3(a) and (b)(Candor Toward the Tribunal); S. Gilmore, S. Weisberg and R. Geller, "[Lies My Client Told Me: Ethics Issues When a Client Makes a Misrepresentation](#)" (updated, 2020, January 2001). *See also* Massachusetts Bar Association Ethics Op. 99-5 (1999) (a lawyer who represents two co-administrators of an estate and learns that beneficiary stole money and gave it to one co-administrator has a duty to reveal theft to other co-administrator).²

In our estate planning hypothetical, the lawyer did not advise the clients at the outset about the confidentiality issues. Therefore, when the wife raised the issue of making a secret bequest to a third party and could not be persuaded to disclose this secret, the lawyer must terminate the representation of both spouses without disclosure to the husband of the wife's intentions. The wife's proposed bequest to someone outside the family is not a situation that permits the lawyer to breach confidentiality under Mass. R. Prof. C. 1.6(b)(1) to prevent criminal or fraudulent acts or Mass. R. Prof. C. 1.6(b)(3) to rectify any fraud involving the lawyer's services. Since there is no tribunal involved with the representation, the lawyer's obligations to correct misrepresentations to a tribunal would not come into play. Mass. R. Prof. C. 3.3 (a) and (b). Nothing prevents the lawyer from giving notice of withdrawal, and the lawyer may also withdraw and disaffirm any opinion, document, affirmation or the like. Mass. R. Prof. C. 1.2, Comment [10](Scope of Representation).

The better course for any lawyer taking on joint representation of clients is to follow the directive of Comment [31] to Mass. R. Prof. C. 1.7 and advise the clients upfront that all information material to the joint representation will be freely and honestly available to all clients, that information provided by one client cannot be withheld from the other clients, and that all of the clients are agreeing to mutual disclosure by entering into the joint representation. Otherwise, the unhappy alternative is that the lawyer may ultimately be required not only to withdraw from representing all the clients (resulting in additional time and expense to the clients), but also — and depending upon the nature of the information — to make disclosures to one client over the objections of another.

² MBA Ethics Op. 99-5 discusses an older version of M.R.P.C. 1.7 and the comments have been renumbered, but the substance is still applicable.