



Dear Ethics Lawyer™

The Legal Ethics Project. Supporting professionalism with information.

Q: Dear Ethics Lawyer,

I agreed to represent a husband and wife in putting together an estate plan. It appeared to be easy: they provided a list of assets and income, and a plan for distribution in the event that one or both passes. Then the husband called the following day and advised me that he also has a separate investment account (with a family member other than the wife currently named as a beneficiary) that contains a fairly large amount that he does not wish to advise his wife about just now. He may later decide to include it in the estate plan, but for now he wishes to keep it separate. What do I do now?

A: This simple fact pattern gives rise to very complex issues. Assuming the secret account is a material asset that the wife would have some interest in (now or in the context of the estate planning), you have an obligation to her as a client under Model Rule 1.4 to disclose the information to her and advise her about its part in the estate plan. This obligation competes with the request of your husband-client and your corresponding duty to him under Model Rule 1.6 that you not disclose it to her. In the absence of resolution, this creates a "material limitation" conflict under Model Rule 1.7(a)(2) that precludes you from proceeding with the representation (Model Rule 1.16(a)) unless you can persuade the husband to allow you to disclose the information, noting that you will have to withdraw (and perhaps make other disclosures) if he does not relent.

But what if you have provided in the engagement letter that all information provided by your joint husband and wife clients is to be shared with both of them? Does that permit or require you to make a disclosure to the wife, or may the husband revoke that consent mid-representation? There are conflicting authorities on this point, and you should look for guidance in the applicable jurisdiction. For example, in the context of an insurer/insured relationship, ABA Formal Op. 08-450 expresses "strong doubt" that a client can provide valid consent in advance for information to be revealed to a joint client when the disclosure would be damaging to the client, if there is an absence of "adequate information" to support informed consent at the time given. But see DC Ethics Op.327 (2006) (lawyer must honor information sharing agreement when one joint client shares sensitive information that it otherwise would not want shared). See also American College of Trust and Estate Counsel Commentaries on the Model Rules of Professional Conduct (ACTEC Commentaries) 1.6 (2016) ("Confidences Imparted by One Joint Client") (lawyer should have reasonable discretion in determining response in difficult situation in which there is "often no clearly proper course of action"; information sharing agreement made at the outset of engagement is one of several factors lawyer should consider in determining what should be disclosed).

Finally, if the conflict remains unresolved and you must withdraw because the information cannot be disclosed to the wife, what should you tell the wife about the circumstances of your withdrawal? ABA Formal Op. 92-366

suggests that when a lawyer must withdraw to prevent the lawyer's services to be used to perpetrate a fraud, a "noisy withdrawal," disaffirming opinions or work may be appropriate in certain circumstances. Restatement (Third) of the Law Governing Lawyers, Section 60 Cmt. I builds on this to suggest that a lawyer facing the instruction not to reveal information to a joint client may exercise discretion to advise the joint client that she should revoke any will that has been prepared, to reveal some or all of the information as necessary to protect the wife's interests, or to inform the wife that the lawyer is withdrawing because the husband will not permit disclosure of relevant information to the wife that he has provided to the lawyer.

Depending upon the circumstances (consider factors discussed in ACTEC Commentaries referenced above) and any authorities in your jurisdiction, The Ethics Lawyer recommends that the wife be informed at a minimum that you are withdrawing because based on information you have been provided, a conflict of interest has arisen between the interests of husband and wife that precludes you from representing both, and you recommend that she obtain separate counsel from the husband to advise her on any estate plan. This is more than a basic withdrawal, which may or may not be sufficient to let the wife know that there is an issue, depending upon her level of sophistication, but is an option that stops short of a full disclosure. Alternatively, if there is a provision in the engagement letter consenting to disclosure to joint clients (which the husband now purports to revoke), you might consider informing wife that you cannot continue with the representation because the husband has instructed you not to comply with that provision of the agreement between the parties.

The Ethics Lawyer

About Dear Ethics Lawyer

The twice-monthly "Dear Ethics Lawyer" column is part of a training regimen of the Legal Ethics Project, authored by [Mark Hinderks](#), former managing partner and counsel to an AmLaw 125 firm; Fellow, American College of Trial Lawyers; and speaker/author on professional responsibility for more than 25 years. Mark leads Stinson LLP's [Legal Ethics & Professional Responsibility](#) practice, offering advice and "second opinions" to lawyers and law firms, consulting and testifying expert service, training, mediation/arbitration and representation in malpractice litigation. The submission of questions for future columns is welcome: please send to mark.hinderks@stinson.com.

Discussion presented here is based on the ABA Model Rules of Professional Conduct, but the Model Rules are adopted in different and amended versions, and interpreted in different ways in various places. Always check the rules and authorities applicable in your relevant jurisdiction – the result may be completely different.