THE GOLDILOCKS PRINCIPLE AND INFORMED CONSENT IN JOINT-SPOUSE REPRESENTATION

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INTRODUCTION

Herbert and his wife Wilma retain a lawyer to prepare reciprocal wills,[1] each choosing to leave the estate to the surviving spouse.[2] Unbeknownst to Wilma, Herbert asks the lawyer privately to draw up a trust for a child from a prior relationship.[3] Wilma has no knowledge of the existence of the child.[4] Herbert asks the lawyer to keep the information secret from Wilma, whom he has never told, because it will hurt her feelings and damage their marriage.[5]

This scenario creates a relatively common problem for lawyers. If the information Herbert disclosed is considered to be "material" to Wilma, then failing to communicate that information to Wilma constitutes a breach of the lawyer's duties of diligence, communication, and loyalty.[6] But, if the lawyer discloses the information to Wilma, the lawyer is breaching his or her duty of confidentiality owed to Herbert.[7] The attorney has to decide what—if any—information should be revealed to the wife, whether to withdraw from representing one or both of the

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[1] Based on RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 60 illus. 2-3 (2000). The names were added for this Note only and are not in the original illustration.

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 60 cmt. l (2000). Diligence, communication and loyalty are required in the Model Rules. *See generally* MODEL RULES OF PROF'L CONDUCT (2011). "A lawyer shall act with reasonable diligence and promptness in representing a client." *Id.* R. 1.3. The rule regarding communication requires that a lawyer "promptly inform the client of any decision or circumstance with respect to a client's informed consent . . . reasonably consult with the client," and "keep the client reasonably informed." *Id.* R. 1.4. Loyalty is addressed throughout the Model Rules in the rules of conflicts. *Id.* R. 1.7-1.12.

[7] *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 60 cmt. L (2000). Generally, "information relating to the representation of a client" is confidential information that a lawyer may not share with outside parties. MODEL RULES OF PROF'L CONDUCT R. 1.6 (2011). But the Model Rules identify certain circumstances where a lawyer may reveal confidential information to outside parties. *See id.* R. 1.6(b).

joint-client spouses, or whether to continue the representation as if nothing had occurred.[8]

Throughout the course of a joint-spouse representation, the client spouses will communicate confidences, or information relating to the representation, with their attorney. [9] These communications will sometimes occur while one spouse-client is speaking privately with their attorney and sometimes while both spouses are present.[10] If one client shares information with their attorney outside the presence of the other co-client, the attorney must decide what information is significant enough to have consequences in the representation of the other joint client-spouse—*i.e.*, whether it is "material."[11] An attorney may have to decide whether informed consent means revealing a spouse's infidelity or the existence of an illegitimate child to the other spouse because the information could have consequences in decisions the client makes in the representation.[12]

In a joint representation, a lawyer has "an equal duty of loyalty to each client,"[13] yet authorities—such as the Model Rules of Professional Conduct, Restatement (Third) of the Law Governing Lawyers, and the American College of Trust and Estate Counsel ("ACETC")[14]—conflict on how confidentiality can be resolved in the context of a joint representation, especially where the joint clients are married.[15] All of these authorities[16] put supreme importance on the concept of informed consent as an initial hurdle in any kind of joint representation without giving much guidance as to what constitutes informed consent.[17] Lawyers choosing to represent spouses as co-clients are faced with conflicting sources that do not give clear guidance on how to put informed consent into practice. These sources often conflict or are unclear with regard to how lawyers should handle information sharing agreements for jointly represented spouses.[18]

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[8] *See* MODEL RULES OF PROF'L CONDUCT R. 1.3, 1.4, 1.6, 1.7 (2011).

[9] A confidence is information relating to a representation. *See generally* MODEL RULES OF PROF'L CONDUCT R. 1.6 (2011). A confidence should not be confused with the attorney client privilege. FED. R. EVID. 502. Though there are times where a confidence is also protected by the attorney client privilege. MODEL RULES OF PROF'L CONDUCT R. 1.6 (b)(6) (2011).

[10] *See e.g.*, *supra* note 1.

[11] See *infra* Part II.A for more on the conflicting duties of communication and confidentiality. Failure to follow ethics rules could have professional consequences for lawyers, up to and including disbarment. MODEL RULES OF PROF'L CONDUCT R. 8.5. Law is generally a self-regulating profession. *Id.* R. 8.3.

[12] *E.g.*, *supra* note 1.

[13] MODEL RULES OF PROF'L CONDUCT R.1.7 cmt. 31 (2011).

[14] Sources include the MODEL RULES OF PROF'L CONDUCT (2011), RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS (2000), and THE AM. COLL. OF TRUST & ESTATE COUNSEL COMMENTARIES ON THE MODEL RULES OF PROFESSIONAL CONDUCT (4th ed. 2006), among others.

[15] For a discussion of spouses *see infra* Part I.C.

[16] *Supra* note 14.

[17] For the purposes of this Note, 'informed consent' and 'waiver' will be interchangeable.

[18] *See infra* Part II.A. For more on the Model Rules, *see infra* Part II.B.

Although commonly referred to as a waiver,[19] informed consent is complicated, particularly when it involves spouses. Before establishing the attorney-client relationship, an attorney must explain to the prospective clients the significance of being jointly represented by a single attorney. In this explanation, the attorney must make a judgment call as to how much information is necessary so that the clients understand their decision to be jointly represented. If the lawyer gives the clients too much information, the clients could feel overwhelmed and get lost in the details. If the lawyer explains too little, the explanation will not provide the clients with information necessary to make an informed decision about being jointly represented.[20] The lawyer should use the Goldilocks Principle to draft a Joint Representation Agreement that gives the co-clients just the right amount of information to feel confident in their informed consent.

This Note examines informed consent in the context of joint representation of spouses. Part I provides general background on the Informed Consent, The Model Rules of Professional Conduct, and the definition of spouses. Part II examines the nature of joint representation and how it differs from the standard model of one attorney representing one client. For example, representing spouses is different from the typical representation of two unmarried individuals because of the deeply personal, dependent, and interconnected relationship of the two clients. While the joint representation of spouses presents serious difficulties and the potential for future conflicts, it is possible to have effective joint representation with informed consent. Part III suggests a Joint Representation Agreement ("JRA") as a means to secure a conflict waiver for the joint representation of spouses and includes a sample JRA. A JRA must include an agreement about confidential information and enough specific information for the clients to understand the ramifications of their waiver. Ultimately, this Note concludes that the Goldilocks Principle should be applied to JRAs for spouses to ensure that the information available to spouses in understanding the ramifications of joint representation is "just right."[21]

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[19] *E.g.*, Michael J. DiLernia, *Advance Waivers of Conflicts of Interest in Large Law Firm Practice*, 22 GEO. J. LEGAL ETHICS 97, 98 (2009) ("Advance waivers are a kind of conflict of interest waiver.").

[20] *See* MODEL RULES OF PROF'L CONDUCT R. 1.4(b) (2011).

[21] The tale of Goldilocks tells the story of a woman who goes into the home of the three bears while they are in the woods waiting for their porridge to cool. *See* ROBERT SOUTHEY, SELECT PROSE OF ROBERT SOUTHEY 306 (Jacob Zeitlin ed. 1916). As the woman goes through the bears' home, she tastes their porridge, sits in their chairs and lies on their beds. *Id.* at 306-07. Each time two of the choices present extremes and the third option is "just right":

> [F]irst she tasted the porridge of the Great, Huge Bear, and that was too hot for her . . . [a]nd then she tasted the porridge of the Middle Bear, and that was too cold for her . . . [a]nd then she went to the porridge of the Little, Small, Wee Bear, and tasted that; and that was neither too hot, nor too cold, but just right; and she liked it so well, that she ate it all up.

Id. at 306. According to some scholars, the tale can be viewed as examining binary opposition and "perfection over time." *See* Alan C. Elms, *"The Three Bears": Four Interpretations*, 90 J. OF AM. FOLKLORE 257, 259-61 (1977). Though its folkloric and oral origins are uncertain, the story of "The Three Bears" was originally published by the poet Robert Southey in 1837. *Id.* at 258. Though the original protagonist was an old woman with silver hair, the tale developed over time to be about a young

I. BACKGROUND

A. Informed Consent

The New York Rules of Professional Conduct define "Informed Consent" as:

> denot[ing] the agreement by a person to a proposed course of conduct after the lawyer has communicated information adequate for the person to make an informed decision, and after the lawyer has adequately explained to the person the material risks of the proposed course of conduct and reasonably available alternatives.[22]

Whether the informed consent is in writing or takes another form depends on the rule and the circumstances for which consent is being given.[23] For example, the Model Rules require lawyers to obtain the informed consent from a current client if there is a conflict, including the potential conflict presented when two spouses are jointly represented.[24]

A lawyer may not reveal confidential information of one client to another without obtaining the informed consent of the first client.[25] Accordingly, joint representations are challenging because the lawyer is prevented from freely sharing information between the two co-clients. If a lawyer cannot share information relevant to the representation of a client, then there is a conflict and the lawyer cannot represent the clients.[26] If the clients waive the conflict at the beginning of the representation and agree on how confidential information will be handled in the representation, then the joint representation may proceed. Agreement to the conflict waiver and information sharing constitute informed consent.

Informed consent is an important element of a lawyer's representation of joint clients.[27] Informed consent is a term easily spoken but difficult to implement,

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girl named Goldilocks and has become a popular children's story. *Id.* at 260, 268. The Goldilocks Principle has been used in various academic disciplines. *See e.g.*, Ravi Kanbur, *Goldilocks Development Economics: Not Too Theoretical, Not Too Empirical, but Watch out for the Bears!*, 40 ECON. & POL.WKLY. 4344 (2005) (economics); Milan M. Cirkovic, *Evolutionary Catastrophes and the Goldilocks Problem*, 6 INT'L J. OF ASTROBIOLOGY 325 (2007) (science); Dan L. Burk & Brett H. McDonnell, *The Goldilocks Hypothesis: Balancing Intellectual Property Rights at the Boundary of the Firm*, 2007 U. ILL. L. REV. 575 (2007) (law).

22 *See* MODEL RULES OF PROF'L CONDUCT R. 1.0(e) (2011).

23 *Compare* MODEL RULES OF PROF'L CONDUCT R. 1.6 (2011) (requiring informed consent) *with* R. 1.7(b)(4) (requiring that the informed consent be confirmed in writing).

24 *Id.* R. 1.7 (b). A current conflict is one where the "the representation of one client will be directly adverse to another client" or "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client." *Id.* R. 1.7 (a)(1), (2). For a discussion about why jointly represented spouses are a current conflict, *see infra* note 44 and accompanying text. For a discussion of the MODEL RULES OF PROF'L CONDUCT, *see infra* note 30 and accompanying text.

25 *Id.* R. 1.6.

26 *Id.* R. 1.4 (b), 1.7 (a)(2).

27 Informed consent is so significant that it appears in the Model Rules eight separate times. MODEL RULES OF PROF'L CONDUCT R. 1.0 (b), 1.4 (a)(1), 1.6 (a), 1.8 (a)(3), 1.8 (b), 1.8 (g), 1.9 (b)(2), 1.12 (a), 1.18 (d) (1) (2011).

as demonstrated above.[28] If both clients do not understand the full ramifications of their consent, then consent is not informed and the joint representation is improper.[29]

B. The Model Rules Professional Conduct

The Model Rules of Professional Conduct ("Model Rules") were developed by the American Bar Association ("ABA") and adopted by the ABA House of Delegates in 1983.[30] The Model Rules followed are the latest effort by the ABA to attempt to address professional responsibility issues in the legal field.[31] The Model Rules replaced the Model Code of Professional Responsibility of 1969 and the Canons of Professional Ethics of 1908.[32] Before the Model Rules, the Model Code of Professional Responsibility reflected very few changes in legal ethics since the beginning of the twentieth century.[33] The Model Rules offered a modern approach to professional responsibility, recognizing "the vast changes that have occurred in law and the legal profession since the turn of the century."[34] Included in the Model Rules was an effort "to enlarge substantially the protection of the client. The rules strengthen[ed] the duties of competence, communication, diligence, and promptness. The rules enlarge the scope of the general rule of confidentiality. The rules narrow the range of both obligatory and discretionary disclosure."[35] Since the inception of the Model Rules, most states have implemented professional conduct rules based on the Model Rules.[36] Despite evolving over time, the Model Rules do not give sufficient guidance to lawyers choosing to represent spouses.[37]

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[28] *See supra* Part I.A.

[29] *See infra* note 170 and accompanying text .

[30] *Model Rules of Professional Conduct*, AMERICAN BAR ASSOCIATION, http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct.html (last visited Mar. 10, 2012).

[31] *See* Robert J. Kutak, *A Commitment to Clients and the Law*, 68 A.B.A. J. 804 (1982).

[32] *Id.*

[33] *See generally* A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982 – 2005 (American Bar Association 2006).

[34] Kutak, *supra* note 31. The rules succeeded the 1969 Model Code of Professional Responsibility and the 1908 Canons of Professional Ethics. These two predecessors were based on the 1887 Alabama Code of Ethics inspired from lectures by Philadelphia judge George Sharswood in the 1850s. *Id.* The 1982 Model Rules thus represented a major change in professional responsibility that had changed little in over a century.

[35] *Id.*

[36] *See Chronological List of States Adopting Model Rules*, AMERICAN BAR ASSOCIATION, http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/chrono_list_state_adopting_model_rules.html (last visited Feb. 4, 2013) (listing states—including the District of Columbia—that have adopted the Model Rules). California is the only state whose rules do not follow the format of the Model Rules. *Id.*

[37] *See generally infra* Part II.

C. The Definition of "Spouse"

In order to discuss the significance of a joint representation of spouses, it is important to clarify the modern definition of "spouse."[38] *Webster*'s dictionary defines a "spouse" as a noun, meaning "a husband or wife; either member of a married couple spoken of in relation to the other."[39] While accommodated for in *Webster*'s, the term "spouse" does not necessarily refer to one man and one woman.[40]

This Note uses the term "spouse" to refer to "a married person"[41] and also couples in domestic partnerships and civil unions. The considerations of spouses in a joint representation closely parallel those of same-sex couples in committed relationships that are not legally recognized on the state and local level because of the intimacy of the relationship.[42] Joint representation of same-sex couples, even in jurisdictions that do not recognize legal marriages between same-sex couples, has the same potential for conflict and requires the same diligence and forethought as that of couples of the opposite gender.[43]

II. JOINT REPRESENTATION AND JOINT-SPOUSE REPRESENTATION AS A CONFLICT

All attorneys owe their clients a duty of loyalty above all others, which means a lawyer should strive to "zealously assert[] the client's position under the rules of the adversary system."[44] It would be a gross understatement to say that joint-representation can greatly complicate many duties lawyers owe to clients. Instead of one, there are two or more clients entitled to confidentiality; entitled to reasonable communication from the lawyer; and as to whom the lawyer owes an undivided duty of loyalty. Though the joint representation does not alter the duties

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[38] "Spouse" has different meanings in different jurisdictions. *See infra* note 40.

[39] WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 1758 (2d ed. 1976).

[40] Currently, Connecticut, Delaware, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New York, Rhode Island, Vermont, Washington and the District of Columbia permit same-sex couples to marry under state law. *See Defining Marriage: Defense of Marriage Acts and Same-Sex Marriage Laws*, NAT'L CONF. OF STATE LEGISLATURES, http://www.ncsl.org/issues-research/human-services/same-sex-marriage-overview.aspx (last visited April 9, 2013).

[41] *See* BLACK'S LAW DICTIONARY (9th ed. 2009).

[42] *See* Naomi Cahn & Robert Tuttle, *Dependency and Delegation: The Ethics of Marital Representation*, 22 SEATTLE U. L. REV. 97 (1998).

[43] *Id.* at 134. Cahn theorizes it is not the sex but dependency that defines the relationship: "Historically, although it has been women who have given up their jobs and stayed home with children, we are concerned about the dependency associated with this role, not with the sex of its occupant." *Id.*

[44] *See* MODEL RULES OF PROF'L CONDUCT pmbl. 2 (2011). Some states have chosen to adopt different language. *See e.g.* MASS. RULES OF PROF'L CONDUCT R. 1.3 (2013) ("The lawyer should represent a client zealously within the bounds of the law."). By contrast, the Preamble to the New York Rules say: "The touchstone of the client-lawyer relationship is the lawyer's obligation to assert the client's position under the rules of the adversary system, to maintain the client's confidential information except in limited circumstances, and to act with loyalty during the period of the representation." NY RULES OF PROF'L CONDUCT pmbl. 2 (2012). This language comes from the ABA Canons that state a lawyer should exercise their professional judgment "within the bounds of the law" for the sole benefit of his or her client. ABA CANON EC 5-1 (1980).

that an attorney owes his or her clients, it can create conflicts that the attorney needs to resolve ethically.[45]

A. The Lawyer's Conflicting Duties of Communication and Confidence

It is important to note the scope and interrelation of confidentiality and communication in the attorney-client relationship. To advance a client's interests with diligence and competence,[46] attorneys need to speak freely to clients and clients need to feel free to share their most intimate information with their lawyers.[47] Paramount to the attorney-client relationship is the notion of privileged communication and confidentiality.[48] The Model Rules demand: "A lawyer shall not reveal information relating to the representation of a client."[49] Lawyers are empowered to get information from clients, but as fiduciaries to their clients, attorneys must not share information regarding a client's representation.[50] The policy behind the rule is that if attorneys are allowed tell third parties about the information told to them by their clients, clients would worry about the harm or embarrassment disclosure would cause, thereby limiting what information clients would report to their attorneys.[51]

In addition to the obligation of confidentiality, an attorney has certain obligations concerning proper communication with the client.[52] Significantly, clients must be kept "reasonably informed about the status of the matter."[53] Furthermore, while lawyers are required to keep clients' information confidential, there are exceptions to this rule;[54] for example, an attorney may share information when he or she is authorized to do so.[55] This could be because the disclosure is necessary for effective representation or because the client gives informed consent.[56]

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[45] *See* MODEL RULES OF PROF'L CONDUCT R. 1.7, 1.8 (2011).

[46] *See id.* R. 1.1, 1.3.

[47] *See id.* R. 1.4, 1.6 (protecting the need for open communication between clients and attorneys).

[48] *Id.* R. 1.6(a).

[49] *Id.*

[50] *Id.* R. 1.6.

[51] *E.g.*, People v. Belge, 372 N.Y.S.2d 798 (N.Y. Co. Ct. 1975), *aff'd*, 50 A.2d 1088 (N.Y. App. Div. 4th Dep't 1975). In this famous case, the lawyers representing Robert Garrow for murder were charged with violating a public health law requiring authorities to be notified upon the discovery of a dead body. The defendant learned of other murders that their client had committed and while investigating the truth of his client's statements, and discovered the body of one of his client's victims. The lawyer did not disclose the location of the body or the fact that the body of a missing person was found. *Id.* at 799. Despite public outrage, the court held that this information was protected by attorney client privilege. *Id.* at 803.

[52] *See* MODEL RULES OF PROF'L CONDUCT R. 1.4 (2011).

[53] *Id.* R. 1.4 (a)(3).

[54] Exceptions such as the crime fraud exception or the client's intent to commit a crime will not be discussed in this Note.

[55] MODEL RULES OF PROF'L CONDUCT R. 1.6 (2011).

[56] *Id.* R. 1.6(a).

A tension may arise between the two duties of confidentiality and communication. Under the Model Rules, a lawyer must "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."[57] Although an attorney is ethically bound by Model Rule 1.6(a) not to disclose a client's confidential communications, the rule permits an attorney to disclose confidential information when "the disclosure is impliedly authorized to advance the best interests of the client."[58] Therefore, there may be times that a lawyer's obligation to communicate information conflicts with his or her duty to keep information confidential.[59] For instance, in the scenario discussed in the Introduction to this Note, the attorney owes different obligations to Herbert—the client disclosing the confidence—and Wilma—the client affected by the disclosure.[60] To the client disclosing the confidence—Herbert—the lawyer owes a duty of confidentiality and loyalty,[61] and to the client affected by the disclosure—Wilma—the lawyer owes a duty to communicate information necessary for "the client to make informed decisions regarding the representation."[62] "The Model Rules offer conflicting obligations with little assistance in prioritizing them. The lawyer, as advisor to the non-confiding client, must provide adequate information so that the client can make informed decisions. Simultaneously, the lawyer must maintain the confidences entrusted to the lawyer by the confiding client."[63]

In a joint representation scenario, confidentiality and privilege continue, but their mutual co-existence is complicated, since the lawyer owes a duty of loyalty to *both* jointly represented clients. The joint representation could become complicated or untenable because the attorney cannot reveal information about one client's representation to the other client without informed consent.[64] Representing clients jointly would be cumbersome if the attorney were not permitted to speak to both clients about the matter. Therefore, it can be argued that revealing the information is impliedly authorized pursuant to Rule 1.6, because it is necessary and appropriate to carry out the joint-representation.[65] Furthermore, information provided by one client concerning the joint representation matter may be information necessary to stay "reasonably informed about the status of the matter."[66] Comment 30 of the Model Rules addresses this dilemma: the comment

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[57] *Id.* R. 1.4(b).

[58] *Id.* R. 1.4(a).

[59] *Id.* R. 1.4, 1.6. *See, e.g., infra* note 85 and accompanying text.

[60] *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 60 illus. 2-3 (2000).

[61] *See* MODEL RULES OF PROF'L CONDUCT R. 1.6 (2011).

[62] *Id.* R. 1.4(b).

[63] *See* Teresa Stanton Collett, *Disclosure, Discretion, or Deception: The Estate Planner's Ethical Dilemma from a Unilateral Confidence*, 28 REAL PROP. PROB. & TR. J. 683, 760-61 (1994).

[64] *See* MODEL RULES OF PROF'L CONDUCT R. 1.6 (2011).

[65] *Id.* R. 1.6 cmt. 5 (communicating information between the two clients may be "appropriate in carrying out the representation.").

[66] *Id.* R. 1.4(a)(3).

suggests, "the prevailing rule is that, as between commonly represented clients, the [attorney-client] privilege does not attach."[67] According this comment, there are no secrets between jointly represented clients.

However, the Model Rules complicate the issue further in Comment 31. "[C]ontinued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation."[68] This statement conflicts with Comment 30. On the one hand, the comments suggest that the clients have no secrets between each other, but the very next comment seems to impose a duty of nondisclosure on the lawyer when one client requests a secret not be disclosed to the co-client. Furthermore, if the attorney withdraws from representation because a conflict arises, then they have only kept their duty of loyalty to one client by keeping information confidential while violating their duty of communication to the other client.[69] This tension between communication and confidentiality can be reconciled through an advance waiver or informed consent.[70] This Note will refer to such an agreement as a Joint Representation Agreement ("JRA").

B. The Conflict of Spouses as Co-Clients

A JRA is needed to reconcile the conflict of two spouses in a joint representation scenario. Though two spouses sharing a lawyer may seem logical, this kind of joint representation poses a potential conflict under the Model Rules.[71] Under the rules, a lawyer may not represent a client with interests adverse to the interests of another current client[72] or when there is a risk that the representation of one client will be materially limited by the lawyer's responsibilities to another client.[73] In our example, the lawyer's representation of Wilma, the wife, is materially limited by Herbert's, the husband's, disclosure of an illegitimate child and his request to withhold the information from her.[74] When spouses are represented jointly, there is always a possibility that the interests of one spouse will not be aligned with the interests of the other spouse, even if the possibility is not initially clear.[75]

Moreover, if an attorney is required to withdraw from a joint representation, he or she cannot continue to represent only one of the co-clients.[76] When an

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[67] *Id.* R. 1.7 cmt. 30.

[68] *Id.* R. 1.7 cmt. 31.

[69] *Compare* R. 1.7 cmt. 30, *with* R. 1.7 cmt. 31.

[70] *See* Thomas E. Spahn, *Keeping Secrets or Telling Tales in Joint Representations: Part I*, 27 LAW. MAN. PROF. CONDUCT NEWSL. (ABA/BNA) 303 (2011).

[71] MODEL RULES OF PROF'L CONDUCT R. 1.7 (2011).

[72] *Id.* R. 1.7(a)(1).

[73] *Id.* R. 1.7(a)(2).

[74] *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 60 illus. 2-3 (2000).

[75] *See, e.g.*, Hill Wallack, *infra* note 85.

[76] "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

attorney represents a client in a matter where the client's interests are adverse to those of a former client whom the attorney represented in a substantially related matter, the presumption is that the attorney should be disqualified.[77] Therefore, the attorney representing both Wilma and Herbert could not withdraw from representing Wilma and then continue to represent Herbert individually after a conflict arises. 'This rule protects attorneys by "[avoiding] any suggestion of impropriety on the part of the attorney."[78] Yet, the rule also protects the clients by ensuring that the lawyer's duty of loyalty is undivided and untainted.

In *O'Rourke v. O'Rourke*, a New York court ordered the disqualification of an attorney where the attorney, Ms. LoPresti, represented a wife in a divorce action against her husband after having previously represented the spouses jointly in a foreclosure proceeding.[79] Ms. LoPresti argued that her representation of the husband was "superficial" because he did not share confidences with her or meet with her privately.[80] The court found the attorney's arguments unpersuasive, noting that she was aware of the conflict and never obtained informed consent from her former client, the husband.[81] The *O'Rourke* decision emphasizes the rule's inflexible nature and the theory that a servant cannot serve more than one master.[82]

Attorneys have a duty to advise clients of information necessary "to make informed decisions regarding the representation."[83] In the case of spouses, as compared to other kinds of joint representations, this information could include the existence of illegitimate children of which the other spouse is not aware or a spouse's extramarital affair or hidden assets. "Adverse confidences require the lawyer to assess both the need for disclosure to the other spouse and the need to withdraw from the representation[.] . . . [T]he communication of confidences themselves do not per se require this assessment; it is the *substance* of such secrets that does do so."[84]

C. The Case of A. v. B. v. Hill Wallack

A. v. B. v. Hill Wallack demonstrates the tension between "two fundamental obligations of lawyers: the duty of confidentiality . . . and the duty to inform clients

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adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing." MODEL RULES OF PROF'L CONDUCT R. 1.9 (2011).

[77] *See* O'Rourke v. O'Rourke, 2011 N.Y. Slip Op. 51619U, at 5 (N.Y. Sup. Ct. 2011).

[78] *See* Tekni-Plex, Inc. v. Meyner & Landis, 674 N.E.2d 663, 667 (N.Y. 1996).

[79] *O'Rourke*, 2011 N.Y. Slip Op. 51619U at 2-3, 5.

[80] *Id.* at 2-4.

[81] *Id.* at 4. The court refers to informed consent as a "waiver" though clearly refers to rule 1.9 requiring "informed consent confirmed in writing." MODEL RULES OF PROF'L CONDUCT R. 1.9(a) (2011).

[82] *See generally O'Rourke*, 2011 N.Y. Slip Op. 51619U, at 5.

[83] MODEL RULES OF PROF'L CONDUCT R. 1.4 (b) (2011). New York's rule is the same. NY RULES OF PROF'L CONDUCT R. 1.4(b)(2012).

[84] *See Report of the Special Study Committee on Professional Responsibility: Comments and Recommendations on the Lawyer's Duties in Representing Husband and Wife*, 28 REAL PROP. PROB. & TR. J. 765, 787 (1994) [hereinafter *Report of the Special Study Committee*].

of material facts"[85] when one spouse wants confidential information withheld from the other spouse and co-client.[86] In *Wallack*, the defendant law firm represented husband, B, and wife, W, jointly to draft both of their wills.[87] In their wills, both transferred all their property to the survivor, creating the possibility that the other spouse's children—legitimate or illegitimate—would ultimately receive the descendant's property.[88] The wife was not aware that her husband had fathered an illegitimate child.[89] Prior to the execution of the wills, the child's mother, A, had retained the same law firm in order to file a paternity suit.[90] Due to an internal error, the firm initially did not notice the conflict.[91] When the firm discovered the conflict, the firm withdrew from representing A in the paternity action.[92] The firm sought to disclose the existence of the husband's illegitimate child to his wife, but the husband sought to enjoin the firm from such a disclosure.[93]

While disclosing the husband's secret child would violate the lawyer's duty of confidentiality toward the husband, failure to disclose the fact would violate the lawyer's duty to the wife requiring him to give her information material to the representation.[94] The existence of an illegitimate child had significant implications for the wife in her estate planning decisions.[95] In the event that the wife died, her estate could potentially be left to her husband's illegitimate child, even though she had no knowledge of the child's existence.[96] The wife then did not have information necessary to make informed decisions in planning her estate.[97] The court held that the law firm could disclose the existence of the husband's illegitimate child to his wife because it was information that would materially affect the wife's estate planning interests.[98] *Wallack.* demonstrates "the

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[85] A. v. B. v. Hill Wallack, 726 A.2d 924, 926 (N.J. 1999).

[86] *Id.* at 924.

[87] *Id.* at 925.

[88] *Id.* at 924-25.

[89] *Id.* at 925.

[90] *Id.*

[91] *See Hill Wallack*, 726 A.2d at 925. The representation of both A and B was a conflict under NJ RULES OF PROF'L CONDUCT 1.7 (2004) (the representation of one client will be directly adverse to another client).

[92] *See Hill Wallack*, 726 A.2d at 925.

[93] *See id.* "The husband's expectation of nondisclosure of the information may be less than if he had communicated the information to the firm in confidence." *Id.* at 928.

[94] *Id.* at 926. *See also* NJ RULES OF PROF'L CONDUCT R. 1.4(c), 1.6(a) (2004).

[95] *See Hill Wallack*, 726 A.2d at 926; *see also* NJ RULES OF PROF'L CONDUCT R. 1.4(c) (2004).

[96] *Hill Wallack*, 726 A.2d at 925-26.

[97] *Id.* at 926. *See* NJ RULES OF PROF'L CONDUCT R. 1.4(c) (2004).

[98] *Hill Wallack*, 726 A.2d at 932. The court did not however address the issue of whether disclosure was discretionary or mandatory. *Id.*; *see also* Aimee Danielson, *A. v. B. v. Hill Wallack: Disclosure of Illegitimate Children in Estate Planning*, 15 QUINNIPIAC. PROB. L. J. 335 (2001) (opining that by not requiring disclosure the court did not follow the Rules of Professional Ethics in their decision). But NJ RULES OF PROF'L CONDUCT R. 1.6(c)(1) (2004) permits disclosure to prevent fraud, which neither the Model Rules nor New York permits. *Compare* NJ RULES OF PROF'L CONDUCT R. 1.6 (2004) *with* MODEL RULES OF PROF'L CONDUCT R. 1.6 (2011) *and* NY RULES OF PROF'L CONDUCT R. 1.6 (2012).

importance of carefully expressing the extent to which multiple clients agree that confidential information will, or may be, shared among them."[99]

D. Despite Potential Conflicts, the Joint Representation of Spouses Should Be Allowed

The potential for conflicts concerning confidential information is prevalent when spouses are co-clients. However, one way to eliminate conflicts from the joint-representation of spouses would be to make the joint-representation of spouses a per se unwaivable conflict of interest and not allow spouses to be jointly represented. As the ACTEC Commentaries to the Model Rules point out, "[s]ome conflicts of interest are so serious that the informed consent of the parties is insufficient to allow the lawyer to undertake or continue the representation."[100] This is the only way to effectively ensure that no spouse's interests are violated and that the attorney is able to maintain his or her duty of loyalty to his or her client.[101]

Although this simplistic approach clearly avoids conflict, there are strong policy reasons why the joint representation of spouses should be allowed. First, there is a public interest in clients choosing their own counsel. Clients have the right to be represented by the counsel of their choice.[102] This extends to the choice of a married couple to be represented by the same attorney.[103] In court, agreements between spouses will not be set aside solely because the spouses were jointly represented.[104]

Second, there is a strong economic argument in favor of allowing joint representation of spouses. If joint representation is not allowed, then spouses will have to seek separate representation, even when executing a transaction or document, such as reciprocal wills or the purchase of a home together. This will require the spouses to retain two separate lawyers, the payment of two sets of legal

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[99] *See* John R. Price, *In Honor of Professor John Gaubatz: The Fundamentals of Ethically Representing Multiple Clients in Estate Planning*, 62 U. MIAMI L. REV. 735, 746 (2008).

[100] AM. COLL. OF TRUST & ESTATE COUNSEL FOUND., COMMENTARIES ON THE MODEL RULES OF PROFESSIONAL CONDUCT 93 (4th ed. 2006) [hereinafter ACTEC COMMENTARIES]. Some examples of these "non-waivable conflicts" include opposing parties in the same litigation, and both parties to a pre-nuptial agreement. *Id.*

[101] *See* O'Rourke v. O'Rourke, 2011 N.Y. Slip Op. 51619U, at 4-5 (N.Y. Sup. Ct. 2011). "This not only preserves the client's expectation of loyalty but also promotes public confidence in the integrity of the Bar." *Id.* at 4.

[102] *See* Cerqueira v. Clivilles, 213 A.D.2d 202 (N.Y. App. Div. 1st Dep't 1995). The court notes that motions to disqualify counsel are often used as a litigation tactic, so "absent a violation of an ethical precept, plaintiffs' right to the lawyer of their choice should not be abridged." *Id.* "Disqualification of a law firm during litigation implicates not only the ethics of the profession but also the substantive rights of the litigants. Disqualification denies a party's right to representation by the attorney of its choice." S & S Hotel Ventures Ltd. P'ship v. 777 S. H. Corp., 69 N.Y.2d 437, 443 (N.Y. 1987). *See also* Talvy v. Am. Red Cross, 205 A.D.2d 143, 149 (N.Y. App. Div. 1st Dep't 1994).

[103] *See* Levine v. Levine, 436 N.E.2d 476, 479 (N.Y. 1982).

[104] *See, e.g., id.* at 476 (refusing to set aside a separation agreement because the husband and wife were jointly represented).

fees, and the possible extension, complication, and elongation of the transaction.[105] Two sets of legal fees could impose an economic burden on couples. A joint representation may thus be more efficient and economical for spouses.

Third, joint representation seems like a logical arrangement for many spouses: "Joint and entity representation respond to the realities of most marriages, such as cooperative and collaborative estate planning."[106] Spouses have a joint identity and shared interests as a family.[107] "In . . . contexts, such as a married couple's purchase of a home, joint representation seems perfectly normal. Indeed, one would hardly think of suggesting a different form of representation where the spouses' interests are so closely aligned."[108] Professor Thomas Shaffer, author of "The Legal Ethics of Radical Individualism," argues separate representation could be counterproductive or damaging to a family:

> [T]he most *irresponsible* thing a lawyer could do is to send either of these people to another lawyer, or both of them to two other lawyers. If that is the command of our professional ethics, or even the easiest available "solution" to the case from our regulatory rules, then our ethics and our rules are corrupting. They corrupt the family in general, and this family in particular. A lawyer following the rules is irresponsible because in fact, the family is the lawyer's client. The lawyer who sends the family away is not able to respond to his client. He is disabled by a false ethic[], and in trying to protect himself, he harms his client.[109]

Ethics rules should not prelude representation of spousal units, as this prevents lawyers from responding to their clients as a family and practicing holistic lawyering.[110]

Notably, conflicts are not stagnant, but can develop and change as the representation progresses. "What was a tolerable conflict at the outset may develop into one that precludes the lawyer from continuing to represent one or more of the clients."[111] This is significant when spouses are co-clients because it is the

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[105] *See Report of the Special Study Committee*, *supra* note 84, at 776-77. "Ethical rules should be interpreted by the lawyer to provide appropriate delivery of legal services without excessive cost or duplication of services, and fulfillment of client expectations about the lawyer's role." *Id.*

[106] *See* Cahn & Tuttle, *supra* note 42, at 105.

[107] *Id.* at 104.

[108] *Id.* at 101. Spouse's interests may be more aligned in purchasing of rather than writing wills by contrast. *Id.*; *see, e.g.*, *supra* note 1.

[109] Thomas L. Shaffer, *The Legal Ethics of Radical Individualism*, 65 TEX. L. REV. 963, 982 (1987) (emphasis in original).

[110] *See infra* note 119 and accompanying text for a discussion of the 'entity' model of joint representation.

[111] ACTEC COMMENTARIES, *supra* note 100, at 92; *see also* MODEL RULES OF PROF'L CONDUCT cmt. 4 (2011). If a conflict arises after representation has been undertaken, the lawyer must withdraw from the representation, unless the lawyer has obtained the informed consent of the client under the conditions of paragraph (b).

unknown future disclosures of one of the spouses that will trigger a conflict for the lawyer representing the clients jointly.[112]

Weighing the potential for conflict against the public policy interests and the economic and social realities of marriage, it is clear that "[j]oint representations will remain a fact of life for . . . lawyers as long as marriage continues as an institution in our society."[113]

E. Theories of Joint Representation of Spouses

There are several theories concerning how joint representation of spouses should be viewed: joint clients; separate representation by one lawyer; or an entity model where the family is the client as a unit.[114] Representing both clients as joint clients in one representation is the standard model. This standard model would be modified as necessary to account for the married couple. Simultaneous, separate representation is a formulation where one attorney represents two clients separately on one matter. The Restatement (Third) of the Law Governing Lawyers lays out how a simultaneous separate representation model would function:

> The concept is that the lawyer would represent the two or more clients on a matter of common interest on which they otherwise have a conflict of interest only after obtaining informed consent of all affected clients. Its distinguishing feature is that the arrangement would entail, as a matter of specific agreement between the clients and lawyer involved, that the lawyer would provide separate services to each clients and would not share confidential information among the clients, except as otherwise agreed or directed by the client providing the information.[115]

In this scenario, the separate clients have distinct rights to the attorney-client privilege and the lawyer's duty of confidentiality.[116] This is a risk-laden model because of "the stress it necessarily places on the lawyer's duties of impartiality and loyalty and the extent to which it may limit the lawyer's ability to advise each of the clients adequately."[117] Though this model has not been tested through litigation, the danger of conflict and subsequent malpractice claims are substantial.[118]

Another option is the entity model. It has been suggested that jointly represented spouses should be treated like an entity or unit, similar to the way a

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[112] MODEL RULES OF PROF'L CONDUCT R. 1.7(b) (2011).

[113] *See* Collett, *supra* note 63, at 762.

[114] RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 130 Reporter's Note cmt. C (2000); Schaffer, *supra* note 109.

[115] RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 130 Reporter's Note cmt. C (2000) (noting the substantial malpractice risks inherent in this kind of representation and the need for informed consent about the possible adverse consequences).

[116] *Id.*

[117] Price, *supra* note 99, at 750.

[118] RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 130 Reporter's Note Cmt. C (2000).

corporation is represented.[119] In this model, the client is the "unit" or family and the individuals have roles within the entity similar to shareholders or partners in a corporation or partnership.[120] The needs of the family then would be prioritized over the concerns of the individual members.[121] Professor Schafer argues this is the most appropriate way to represent a family unit: "[T]he client is the family. Any other description is incomplete and, thus, untruthful and corrupting."[122]

There are, however, serious challenges to this model. First, there are distinctions between a family and a corporation that make this model untenable. A corporate entity focuses on the separation of ownership and management and the interests of a corporation as a legal person are generally identifiable by an attorney.[123] The roles of spouses are less defined in modern society. Further, power balances between spouses could be exploited through a family unit representation model, making it possible that one spouse controls the representation.[124] Because of the characteristics of the marital relationship, "we must treat the family differently from commercial entities because of the nature of interfamilial obligations and because of the inequalities that currently exist within the structure of the family."[125] The entity model is unrealistic because "each family member is entitled to recognition, respect and autonomy—a family is not a legally recognized entity."[126] Though the idea of spouses as an entity in representation is provocative, it is unrealistic in the context of Model Rules that refer to a lawyer's legal duties to a single client and not clients in the plural.[127] Furthermore, the conflicts rules use the language of "a client" and do not refer to clients as a class or group.[128]

F. Joint-Spouse Representations Are Unique from Other Joint-Representations

Though the representation of two spouses is a joint representation, it is different from other joint representations. In business or commercial relationships, one party could potentially harm another through a poor business decision, but this would not extend to the party's personal life.[129] Even in partnerships where one partner may be liable for another partner's debts, a partner could not dictate what

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[119] Cahn & Tuttle, *supra* note 42, at 103. *See also* Schaffer, *supra* note 135; Patricia M. Batt, Note, *The Family Unit as Client: A Means to Address the Ethical Dilemmas Confronting Elder Law Attorneys*, 6 GEO. J. LEGAL ETHICS 319, 338-41. *See also* MODEL RULES OF PROF'L CONDUCT R. 1.13 (2011) for the ethical rules regarding representation of an organization.

[120] Cahn & Tuttle, *supra* note 42, at 104.

[121] *Id.* at 103.

[122] Schaffer, *supra* note 114, at 976.

[123] *See* Cahn & Tuttle, *supra* note 42, at 104.

[124] *Id.*

[125] *Id.* at 121.

[126] Price, *supra* note 99, at 750.

[127] *E.g.*, MODEL RULES OF PROF'L CONDUCT R. 1.4 (a)(1) (2011) (referring to "the client" and not clients).

[128] *See generally id.* R. 1.7. The exception is when an organization is the client. *See id.* R. 1.13.

[129] Cahn & Tuttle, *supra* note 42, at 107-08.

another does with his or her personal life. "[P]artners' authority is limited: partners' apparent authority to bind the partnership extends only to acts in the ordinary course of the partnership's business."[130]

A married couple is a unique form of joint representation because their relationship is not limited in scope like a professional relationship.[131] The relationship is not centered only on a business enterprise, but extends to every aspect of the spouses' lives.[132] For instance, a "broker exercises authority over a small part of [a client's] life. She does not have the power to decide where [a client's] children will go to school, how [a client's] salary will be spent, or where [the client's] family will vacation."[133] The all-encompassing nature of marriage makes spouses particularly vulnerable as jointly represented clients.[134] "In a marital relationship . . . the vulnerability comes from the spouses' intimacy and mutual dependence. As such, vulnerability is intrinsic to the relationship[.] [S]pouses' vulnerability to one another is not bound by any preordained scope of the relationship: it extends to the full breadth of their shared lives."[135]

In addition to the vulnerability and mutual dependence, each marital relationship is distinct, characterized by unique power relations. Inequality in a relationship could create situations in which one spouse is more vulnerable than the other.[136] This is amplified in an attorney-client situation in which one spouse may be footing the bill on behalf of both individuals. "[B]ecause of the inequality that is almost inherent in contemporary marriage . . . , it is appropriate to require special scrutiny of marital representation."[137]

III: THE JOINT REPRESENTATION AGREEMENT

The representation of a married couple should begin with a Joint Representation Agreement ("JRA"). Despite the difficulties of joint-representation and conflicts, the Model Rules, the Restatement, and the ACTEC Commentaries agree that those difficulties can be overcome by informed consent.[138] Proper informed consent will protect both the attorney and the jointly represented clients.[139] As discussed in Part I above, informed consent is "the agreement by a person to a proposed course of conduct after the lawyer has communicated information adequate for the person to make an informed decision, and after the

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130 *Id.* at 108.

131 *Id.* at 107.

132 *Id.*

133 *Id.* at 107-08.

134 *Id.* at 107.

135 Cahn & Tuttle, *supra* note 42, at 107.

136 Schaffer, *supra* note 109, at 979 ("[T]he objection that my way of describing the family, as the client, is patriarchal and therefore untruthful or unfair to married women").

137 Cahn & Tuttle, *supra* note 42, at 122.

138 *See* MODEL RULES OF PROF'L CONDUCT; RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 60 (2000).

139 This Note will not address default provisions for when the attorney fails to obtain a waiver.

lawyer has adequately explained to the person the material risks of the proposed course of conduct and reasonably available alternatives."[140]

"Few cases articulate the basis for finding a duty to provide an opportunity for informed consent in a legal context. Today, however, the legal profession clearly recognizes such a duty [in] Model Rule 1.4."[141] Without a requirement for lawyers to explain their duty of confidentiality to clients, "a substantial majority of clients have no express understanding with their attorneys concerning the nature of the representation or the extent of the duty of confidentiality."[142] This is particularly relevant when spouses are jointly represented. They need to have an understanding of the nature of the tripartite attorney-co-client relationship. "Absent agreement concerning the nature of the relationship, clients may have different expectations concerning the lawyer's obligation to maintain individual confidences."[143] To overcome the challenges of a joint representation of spouses, the attorney and the clients should agree to a JRA at the commencement of the representation and the lawyer should decline the engagement if the clients will not enter into an acceptable JRA.[144]

The dilemma presented in *Wallack* is avoidable.[145] One important issue that must be discussed in a JRA is the issue of confidentiality in a joint representation and how information, including secrets, will flow between the jointly represented clients. The court in *Wallack* noted:

> An attorney, on commencing joint representation of co-clients, should agree explicitly with the clients on the sharing of confidential information. In such a "disclosure agreement," the co-clients can agree that any confidential information concerning one co-client, whether obtained from a co-client himself or herself or from another source, will be shared with the other co-client. Similarly, the co-clients can agree that unilateral confidences or other confidential information will be kept confidential by the attorney. Such a prior agreement will clarify the expectations of the clients and the lawyer and diminish the need for future litigation.[146]

A JRA that is silent about confidentiality in a joint representation is inadequate and unacceptable. Failure to inform clients about the consequences of confidentiality and failure of the clients to agree on how information will be shared "reflects a

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[140] *Supra* note 22 and accompanying text.

[141] Lee A. Pizzimenti, *The Lawyer's Duty to Warn Clients about Limits on Confidentiality*, 39 CATH. U. L. REV. 441, 472 (1990); MODEL RULES OF PROF'L CONDUCT R. 1.4 (2011) ("A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."). *See also* NY RULES OF PROF'L CONDUCT R. 1.4(b) (2012).

[142] Collett, *supra* note 63, at 687. *See also* Fred C. Zacharias, *Rethinking Confidentiality*, 74 IOWA L. REV. 351, 383 (1989) (for a survey concluding that attorneys "seldom or never fail" to consult with clients).

[143] Collett, *supra* note 63, at 685-86.

[144] A JRA seeks to satisfy informed consent of the current and future conflict of the joint representation. MODEL RULES OF PROF'L CONDUCT R. 1.6 (2011).

[145] *See* A. v. B. v. Hill Wallack, 726 A.2d 924, 929 (N.J. 1999).

[146] *Id.*

lawyer's failure to think about the issue" and should not be considered a valid option for the ethical attorney.[147]

One solution is to have an informed consent requirement for disclosures of confidentiality when a lawyer represents spouses as co-clients.[148] The Model Rules suggest this in the comments, but they do not make this a requirement: "With regard to the attorney-client privilege, the prevailing rule is that, as between commonly represented clients, the privilege does not attach."[149] This has serious consequences for the clients: "[I]f litigation eventuates between the clients, the privilege will not protect any such communications, and *the clients should be so advised.*"[150] By failing to advise clients about the limits on confidentiality, a lawyer is violating his or her duty to communicate facts material to the representation.[151] "Given that substantive client rights may be affected, the possibility of disclosure is material."[152] Lee Pizzimenti argues in his provocative article that failure to explain limits of confidentiality can be viewed as a form of deception towards the co-clients:

> An attorney practices deception upon a trusting client when she misstates or refuses to disclose those circumstances that constitute exceptions to the attorney-client privilege. Deception has the immediate impact of reducing client autonomy and impairing the trust relationship, while the rights that deception might vindicate are varied and speculative. Thus, an attorney is morally required, and should be legally required, to be forthright with a client and allow the client to choose whether the risks of disclosure outweigh its benefits.[153]

Though Pizzimenti's view is perhaps extreme, it stresses the necessity for clients to fully understand the consequences of confidentiality in a representation.[154]

One reason to make JRAs mandatory in joint representation of spouses is that the likelihood of a conflict is high and the consequences of that conflict are material to both the lawyer and the clients.[155] As discussed in Part II.B above, the

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147 *See* Spahn, *supra* note 70.

148 Pizzimenti, *supra* note 141, at 476 ("An informed consent requirement regarding conflicts serves the critical purpose of reducing the ability of a lawyer to overstep her authority and take unfair advantage of the client.").

149 MODEL RULES OF PROF'L CONDUCT R. 1.7 (2011).

150 *Id.* R. 1.7 cmt. 30 (emphasis added).

151 *Id.* R. 1.4 (b). Pizzimenti, *supra* note 141, at 461-62 ("The Supreme Court has been reluctant to create a requirement of a 'meaningful relationship' with one's lawyer. Thus, the Court may draw the line at an attempt to constitutionalize informed consent and may determine that breach of an ethics rule does not automatically result in ineffective assistance of counsel)." Arguably, failing to advise clients about the limits of confidentiality could even be a form of ineffective assistance. *Id.* Though this argument is in a criminal context, I believe it still is valid in a civil context with joint representation of spouses, as the close relationship of spouses makes this representation unique and therefore the keeping of secrets between spouses would be especially relevant to the representation.

152 Pizzimenti, *supra* note 141, at 476.

153 *Id.* at 489-90.

154 *Id.*

155 *Id.* at 486. Likelihood of conflict can be used as justification for informed consent of

consequences of a disclosure of confidence when spouses are co-clients has ramifications that go beyond an individual's business or fiduciary interests and affect their personal lives.[156]

Two related arguments against a special rule for spouses is that by detailing these risks with specificity, the lawyer is encouraging the couple to keep secrets from each other and from the attorney.[157] While this may or may not be true, the attorney cannot operate based on how the clients may or may not react:

> [T]he Model Rules do not operate independently of other ethical responsibilities. The Model Rules do not ignore that husbands and wives, by virtue of their marriage commitment, have certain rights and obligations between themselves. Nor is it appropriate for the lawyer to put the marriage at risk by assuming the spouses' behavior will fail to honor that commitment. Rather the lawyer must do no harm to the marriage relationship.[158]

Furthermore, many attorneys may be afraid to share the consequences of joint representation with their clients for fear that this information will discourage their clients from retaining them.[159] These concerns, however, are subordinate to the lawyer's duty to inform clients of information material to the representation.[160] The attorney has an obligation to make sure the clients understand the confidentiality scenario to which they are agreeing.

A. Informed Consent Should Not Be Illusory

A JRA should provide meaningful, informed consent that is not illusory.[161] Confirming informed consent in writing protects attorneys and clients. The purpose of requiring a JRA to be in writing, as the Model Rules suggest, is "in order to impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the

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confidentiality in the corporate context as well:

> The likelihood of conflict renders it mandatory that lawyers should advise an officer of a corporation that counsel for the entity does not represent officers' interests; it has been suggested that a warning should include a statement that the attorney may disclose harmful information to the company if an officer shares it with her. The same rationale might be used to support a contention that lawyers should warn criminal clients about exceptions to confidentiality for future crimes or fraud.

Id.

156 *See* Cahn & Tuttle, *supra* note 42.

157 Zacharias, *supra* note 142, at 365.

158 *Report of the Special Study Committee*, *supra* note 84, at 776-77 (1994). Some states have codified fiduciary duties between spouses, though New York has not. *See, e.g.*, CAL. CIVIL CODE §5103 (West 1983).

159 Zacharias, *supra* note 142, at 364.

160 MODEL RULES OF PROF'L CONDUCT R. 1.4 (b) (2011).

161 An attorney may represent two clients if "each affected client gives informed consent, confirmed in writing." MODEL RULES OF PROF'L CONDUCT R. 1.7 (b)(4) (2011).

absence of a writing."[162] Beyond the formality and seriousness that a writing and signature add to a joint representation, a JRA should be more than a signature on a page. Having a JRA means the *content* of the information should be confirmed in writing, not just the fact that a conversation about the risks of joint representation took place.[163]

Not all jurisdictions require that the content of informed consent be memorialized in writing. For example, in New York, "confirmed in writing" does not mean that the *content* of the waiver must be in writing.[164] As one of the last states to adopt the Model Rules, New York had a unique opportunity to clarify the writing requirement for informed consent.[165] The New York definition of "confirmed in writing" specifies that the writing confirms "that the person has given consent."[166] The writing then certifies that informed consent took place, but the writing itself does not constitute informed consent, and the writing also does not memorialize the meaning of informed consent.[167] The New York State Bar Association's Committee on Standards of Attorney Conduct has specifically stated in its comments to the New York Rules that the content of the informed consent does not need to be in writing: "The confirming writing need not recite the information that the lawyer communicated to the person in order to obtain the

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[162] MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 20 (2011).

[163] *See infra* note 149.

[164] *Compare* MODEL RULES OF PROF'L CONDUCT R. 1.0 (b) (2011) ("'Confirmed in writing,' when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or that a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (e) for the definition of 'informed consent.' If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.") *with* NEW YORK R. OF PROF'L CONDUCT ANN. R. 1.0(e) (2012) ("'Confirmed in writing' denotes (i) a writing from the person to the lawyer confirming that the person has given consent, (ii) a writing that the lawyer promptly transmits to the person confirming the person's oral consent, or (iii) a statement by the person made on the record of any proceeding before a tribunal. If it is not feasible to obtain or transmit the writing at the time the person gives oral consent, then the lawyer must obtain or transmit it within a reasonable time thereafter").

[165] *See Chronological List of States Adopting Model Rules, supra* note 36. While the New York Rules of Professional Conduct are based on the Model Rules, they do vary in some ways. *American Bar Association CPR Policy Implementation Committee: State Adoption of the ABA Model Rules of Professional Conduct and Comments*, AMERICAN BAR ASSOCIATION (May 23, 2011), http://www.americanbar.org/content/dam/aba/migrated/cpr/pic/comments.authcheckdam.pdf. New York is among six states, including New Jersey, that adopted the Model Rules with no comments. *Id.* The New York State Bar Association's Committee on Standards of Attorney Conduct introduced the accompanying Preamble, Scope and Comments to the new York Rules. *See* NEW YORK R. OF PROF'L CONDUCT ANN. (2012). However, the New York Appellate Division did not adopt the preamble, Scope, or Comments. *See* New York State Bar Association, *available at* http://www.nysba.org/Content/NavigationMenu/ForAttorneys/ProfessionalStandardsforAttorneys/ Professional_Standard.htm. For a comparison of the current New York rules and New York's previous rules, *see* Roy Simon, *Comparing the New NY Rules of Professional Conduct to the NY Code of Professional Responsibility*, NYPRR: ETHICS AND PROFESSIONALISM FOR NEW YORK LAWYERS, http://www.nysba.org/Content/NavigationMenu/ForAttorneys/ProfessionalStandardsforAttorneys/CorrelationtableofnewNYrules.pdf.

[166] NEW YORK R. OF PROF'L CONDUCT ANN. R. 1.0 (e) (2012) ("'Confirmed in writing' denotes (i) a writing from the person to the lawyer confirming that the person has given consent, or (ii) a writing that the lawyer promptly transmits to the person confirming the person's oral consent.").

[167] *Id.*

person's consent."[168] Therefore, according to the New York Rules, only a writing stating that informed consent took place is necessary.

But, the presence of a writing with a client's signature will not be dispositive of whether or not proper informed consent exists. In a 2008 decision,[169] the U.S. District Court for the District of New Jersey addressed whether informed consent existed in *Celgene v. KV Pharmaceuticals*.[170] In *Celgene*, the plaintiff, a holder of a pharmaceutical patent, sued a pharmaceutical company for patent infringement.[171] Both clients were current clients of the same law firm and Celgene moved to disqualify the law firm from representing KV Pharmaceuticals for conflict of interest.[172] The law firm claimed it had informed consent from the parties and cited two different waivers that Celgene had signed.[173] The court did not consider the existence of the waivers as dispositive of informed consent, stating that "courts must look beyond the words in a waiver provision to determine whether the client gave truly informed consent."[174]

While extrinsic evidence would be precluded in a contract dispute,[175] the court made it clear that whether informed consent exists is not a matter of contract interpretation.[176] The court's supervision of professional ethics does not fall under contract law,[177] and courts may look beyond the four corners of the agreement to determine if the client truly consented.[178]

Even though the existence of a writing does not prove informed consent exists, a writing is still a vital part of informed consent. The practice of not requiring the content of informed consent in the waiver, condoned by the New York comment, puts attorneys at risk. In a disqualification motion, such as the one in *Celgene*, the court will look to the document to determine whether informed consent exists. A more detailed and fact-specific waiver is more likely to demonstrate informed consent than a general waiver. [179]

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168 NEW YORK R. OF PROF'L CONDUCT ANN. 1.0(e) cmt. 1.

169 The New Jersey Code of Professional Conduct, like New York, is adopted from the Model Rules of Professional Conduct. *See Chronological List of States Adopting Model Rules, supra* note 36.

170 Celgene Corp. v. KV Pharm. Co., No. 07-4819, 2008 U.S. Dist. LEXIS 58735, at *1 (D.N.J. July 28, 2008).

171 *Id.* at *1-2.

172 *Id.* at *8.

173 *Id.* at *8-9.

174 *Id.* at *13.

175 *See* RESTATEMENT (SECOND) OF CONTRACTS § 214 (1981).

176 Celgene Corp. v. KV Pharm. Co., No. 07-4819, 2008 U.S. Dist. LEXIS 58735, at*35 (D.N.J. July 28, 2008) ("The motion to disqualify is not fundamentally a matter of contract interpretation. Rather, it is primarily a matter of interpretation of the New Jersey Rules of Professional Responsibility, as well as application of those rules to the facts of this case.").

177 *Id.* at *36 ("[The] [c]ourt is not now adjudicating a breach of contract case. Rather, this Court is 'supervis[ing] the professional conduct of attorneys appearing before it.' Miller, 624 F.2d at 1201").

178 *Id.*

179 Price, *supra* note 99, at 753 ("Those matters should be memorialized in an engagement letter to the clients.").

However, the existence of a writing is not dispositive of whether actual informed consent exists. Informed consent should consist of a consultation between an attorney and his or her client. The content of informed consent should include an agreement about confidential information, and the information in the agreement should be sufficient so the client actually understands the risks and alternatives involved in the decision to accept joint representation.

Since informed consent is made "after the lawyer has communicated information adequate for the person to make an informed decision,"[180] the content of the information communicated should be considered. Clients should be given enough information so that they understand the consequences of disclosure during representation, but they should not be overloaded with technical legalese: "Providing the client with an equivalent of a law school education by explaining all of the nuances of confidentiality rules seems unnecessary and would, in fact, be counterproductive."[181] Yet, clients need a basic understanding of the lawyer's duty of confidentiality and the reasons why disclosure might occur.[182] With this information, clients can ask questions and gain a level of autonomy in the attorney-client relationship.[183]

B. A No Secrets Approach Must Be Adopted in the JRA

A JRA must address the subject of confidences in the joint representation. There are three different approaches to an information flow agreement in a joint representation.[184] The first option is for the parties to agree to keep secrets in the joint representation.[185] This can be called a "keep secrets" approach to information flow.[186] This means that "the lawyer will keep secret from a jointly represented client what the lawyer learns from another jointly represented client, unless the disclosing client agrees at the time [of the disclosure] that the lawyer can share the information."[187] Second, in a "no secrets" approach, the clients can agree that there will be no secrets between the jointly represented clients.[188] This approach matches the assertion in Comment 30 of the Model Rules that the privilege does not attach as between jointly represented clients.[189] A third option is that "a joint representation can be silent on the lawyer's information flow duty or

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180 NEW YORK R. OF PROF'L CONDUCT R. 1.0(j) (2012).

181 Pizzimenti, *supra* note 141, at 485.

182 *Id.* at 485.

183 *Id.* at 479 ("An attorney's misstatements or failure to share material facts may have an immediate and substantial impact upon the client's right to autonomy."). For more information about autonomy and the attorney-client relationship, *see id.* at 477-79.

184 Spahn, *supra* note 70.

185 *Id.*

186 *Id.*

187 *Id.*

188 *Id.*

189 MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt 30 (2011).

discretion."[190] Failure to inform clients about the consequences of confidentiality and agree on how information will be shared "reflects a lawyer's failure to think about the issue" and should not be considered a valid option for the ethical attorney. [191]

A "keep secrets" approach is a "recipe for professional liability."[192] As the Restatement points out, a scenario where the clients have not agreed to share confidential information creates tension between an attorney's ethical obligations of communication and confidentiality:

> If the information is material to the other co-client, failures to communicate it would compromise the lawyer's duties of loyalty, diligence, and communication to that client. On the other hand, sharing the communication with the affected co-client would compromise the communicating client's hope of confidentiality and risks impairing that client's trust in the lawyer.[193]

There is a clear conflict in a lawyer's professional duties. In such a scenario, the Restatement suggests that the attorney has the discretion to either "warn the affected co-client that a matter seriously and adversely affecting that person's interests has come to light, which the other co-client refuses to permit the lawyer to disclose"[194] or "inform the affected co-client of the specific communication, if, in the lawyer's reasonable judgment, the immediacy and magnitude of the risk to the affected co-client outweigh the interest of the communicating client in continued secrecy."[195] This scenario requires the lawyer to apply a subjective balancing test as to which client's interests are more significant.[196] Practically, both options suggested by the Restatement require an attorney to breach a duty owed to one of the co-clients.[197] If the attorney alerts the affected client that a disclosure was made but does not express the content of the disclosure, he or she has revealed information relating to the representation of a client and given the affected client enough information to be suspicious of his or her spouse.[198] The failure of the attorney to disclose the confidence to the affected client is a violation of his or her duty of communication to the client.[199] In both scenarios there is a disclosure

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190 Spahn, *supra* note 7070.

191 *Id.* "There is little case authority on the responsibilities of a lawyer when, in the absence of an agreement among the co-clients to restrict sharing of information, one co-client provides to the lawyer material information with the direction that it not be communicated to another co-client." RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §60 cmt. l (2000).

192 Teresa Stanton Collett, *The Promise and Peril of Multiple Representation*, 16 REV. LITIG. 567, 578 (1997).

193 RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 60 cmt l (2000).

194 *Id.*

195 *Id.*

196 *Id.*

197 *Id.*

198 MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (2011).

199 *Id.* R. 1.4(b)

without informed consent.[200]

In light of the potential conflicts and risks in adopting a "keep secrets" approach, the only way to adequately protect the interests of both spouses in joint representation is to maintain a "no secrets" policy.[201] This way, the attorney can uphold his or her duties to both spouses without either withdrawing from the representation or disadvantaging one of the spouses.

C. Consequences of Disclosure of Confidential Information

Informed consent confirmed in writing is not simply a writing, but requires that the attorney meet with his clients to explain the consequences of consent. The lawyer must "communicate information."[202] As discussed previously, a writing is not a sufficient method of communication for informed consent.[203]

In *Celgene*, the court held that "'truly informed consent' requires the attorney to provide meaningful consultation to the client about potential conflicts. Thus, in determining whether Celgene gave 'truly informed consent,' the inquiry focuses in part on how [the attorney] actually consulted with its client, Celgene, and informed Celgene about the potential conflict when consent was obtained."[204]

Accordingly, consultation must mean communication with the attorney that allows for interaction and questions, most likely through a face-to-face meeting. In the first meeting between clients and their attorney, the attorney should "thoroughly explain to them the key aspects of the representation."[205] Consultation with spouses may be tricky because of the unique relationship and the information that must be divulged. Some sources suggest that consultation should happen with each spouse separately so that they individually understand the provisions of the waiver.[206]

D. The Goldilocks Principle

For clients who are not familiar with the Model Rules or the New York Rules, an attorney needs to explain a waiver and conflict provisions with specificity.[207] This means that the waiver is not an illusory document with a

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[200] *Id.* R. 1.6(a).

[201] RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 60 cmt l (2000).

[202] NEW YORK R. OF PROF'L CONDUCT R. 1.0 (j) (2012).

[203] Celgene Corp. v. KV Pharm. Co., No. 07-4819, 2008 U.S. Dist. LEXIS 58735, at *13 (D.N.J. July 28, 2008).

[204] *Id.* at *14.

[205] Price, *supra* note 99, at 752.

[206] ACTEC COMMENTARIES, *supra* note 100, at 32 ("A lawyer may wish to consider meeting with prospective clients separately, which would give each of them an opportunity to be more candid and, perhaps, reveal potentially serious conflicts of interest or objectives that would not otherwise be disclosed.").

[207] Sophisticated clients may be treated differently and may not need the same level of specificity or information as the average client. MODEL RULES OF PROF'L. CONDUCT R. 1.0(e) cmt. 6 (2011). The familiarity of a client with legal matters is a factor in determining whether a client is giving informed

signature, but it discloses "facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client's or other person's options and alternatives."[208] In a JRA, an attorney should apply the Goldilocks Principle.[209] An attorney needs to strike a balance between giving too much information or too little information and giving information that is "just right."[210]

Too much information is unhelpful and may even be harmful to clients in their understanding of the JRA.[211] Ethics rules and the Model Rules are confusing and a client need not take a professional responsibility class in order to give informed consent.[212] Similarly, too little information will not give the clients enough knowledge to constitute truly informed consent under the Model Rules. For instance, in *Celgene*, the court focused on whether the waiver was specific enough for the client to understand the risks, consequences, and alternatives of the agreement.[213] The consent failed the Goldilocks Principle because it did not provide enough specific information to explain the consequences of the waiver.[214] The wording was "so general that a reader has no clear idea what course of conduct [the law firm] anticipated."[215] To demonstrate this point, the court asked the following: "[W]hat kinds of cases are substantially related? Did the parties anticipate that [a competitor company] would be adverse to Celgene in other patent cases?"[216] The risks of the conflict waiver were not appropriately explained to the client. Celgene did not clearly understand the risk that their retained law firm might represent a pharmaceutical company that manufactured generics.[217] The explanation of alternatives is a necessary part of informed consent according to the Model Rules, and likewise requires factual specificity.[218] In *Celgene*, the law firm did not explain to their client alternatives available to them, such as the possibility that the firm "would not represent any generic drug companies."[219] Though the risks in marital joint representations are unique from conflict issues like that in

consent. *Id. See also* New York Committee on Prof'l Ethics Formal Op. No. 724 ("[A] 'blanket' waiver of future conflicts involving adverse parties may be informed and enforceable depending on the client's sophistication, its familiarity with the law firm's practice, and the reasonable expectations of the parties at the time consent is obtained.").

208 MODEL RULES OF PROF'L CONDUCT R. 1.0 cmt. 6 (2011). *See also Celgene*, No. 07-4819, 2008 U.S. Dist. LEXIS 58735, at *1 (D.N.J. July 28, 2008).

209 SOUTHEY, *supra* note 21.

210 *Id.*

211 Pizzimenti, *supra* note 141, at 485.

212 *Id.*

213 *Celgene*, No. 07-4819, 2008 U.S. Dist. LEXIS 58735, at *23-24 (D.N.J. July 28, 2008).

214 *Id.* at *29-34.

215 *Id.* at *23.

216 *Id.*

217 *Id.* at *31-32.

218 MODEL RULES OF PROF'L CONDUCT R. 1.0(e) (2011).

219 Celgene Corp. v. KV Pharm. Co., No. 07-4819, 2008 U.S. Dist. LEXIS 58735, at *23 (D.N.J. July 28, 2008).

Celgene, the case explains the level of specificity that is required in a waiver.

Striking the balance required by the Goldilocks Principle is difficult. Regarding confidentiality in a joint representation, an attorney should strive to anticipate their co-clients' concerns:

> The crux of a client's complaint against a lawyer for divulging his secrets is that the client never would have entrusted the lawyer with private information had the client known the lawyer would share it with others. The client would claim that his decision to share information was not an informed one, because he was not told of the material fact that the lawyer might not hold all confidences inviolate.[220]

The information supplied must be sufficiently clear that the clients can reasonably know what kinds of statements will remain secret, and which statements will not remain secret.[221] The nature of the confidential information to be shared should be considered.[222] "The client might want to know that highly private or harmful information may be the subject of disclosure, but may not care about less sensitive information."[223] In a no secrets scenario, the JRA must advise the clients that anything that one client tells the attorney will be shared with the other spouse, regardless of how private or harmful the information may be.[224]

E. Sample JRA

Before beginning representation, a lawyer should enter into a JRA with his or her clients that explains the consequences of joint representation. The JRA should be executed at a meeting with the clients so that they have the opportunity to ask questions.[225] Language regarding confidentiality in a JRA for spouses could look like the following:[226]

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220 Pizzimenti, *supra* note 141, at 471.

221 Zacharias, *supra* note 142, at 365.

222 *Id. See also* Pizzimenti, *supra* note 141, at 487. For example, "clients do not need to know that fee information may be shared as it is usually quite general and not harmful to the client if disclosed. Of course, use of this factor would lead to the conclusion that the client would want to know that information about crimes or frauds might be disclosed, or that the lawyer may disclose information inculpatory to the client to exculpate herself." *Id.*

223 Pizzimenti, *supra* note 141, at 487. *See also* Nancy J. Moore, *Limits to Attorney-Client Confidentiality: A "Philosophically Informed" and Comparative Approach to Legal and Medical Ethics*, 36 CASE W. RES. 177 (1986). (suggesting that different levels of privacy exist depending on how close the information is to the individual's "core" self).

224 RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 60 cmt. l (2000).

225 ACTEC COMMENTARIES, *supra* note 100, at 32 ("A lawyer may wish to consider meeting with prospective clients separately, which would give each of them an opportunity to be more candid and, perhaps, reveal potentially serious conflicts of interest or objectives that would not otherwise be disclosed.").

226 Though not every state requires engagement letters, it is a highly recommended practice. *See* John R. Price, *Conflicts, Confidentiality, and Other Ethical Considerations in Estate Planning*, 801-2d Tax Mgmt. Est., Gifts & Tr. Portfolios (BNA), at A-14 (2007). States have unique requirements for engagement letters. *See, e.g.*, N.Y. COMP. CODES R. & REGS. tit. 22, § 1215.1-2 (2003) ("[A]n attorney who undertakes to represent a client . . . shall provide to the client a written letter of engagement before commencing the representation, or within a reasonable time thereafter."). Issues such as scope and fees

Joint Representation. You have chosen to retain me as your attorney in a joint representation. This means that I represent both of you jointly and have an equal duty of loyalty to both of you.

Confidentiality. Anything that either of you tell me, or any information that I learn in the course of representing you, is confidential. I will not share this information without your consent, except to the extent I believe reasonably necessary to conduct the representation. This means I may share information with my staff or other individuals if I believe disclosure will advance your interests.

Conflicts. As joint clients, there is no confidentiality as between the two of you. This means any information that one of you tells me I can and will share with the other client. If you accidentally tell me something that you do not want your spouse to know, this is a conflict. By engaging me in this joint representation, you agree that if there is an accidental disclosure of personal information that I think would be material for your spouse to know in this representation, I will disclose this information to the other client/spouse. If you ask me not to share certain information with your spouse, I will not be able to follow this request, but will be required to tell your spouse. For example, if one of you tells me of assets that you would not like your spouse to know about, I must disclose this information to your spouse.

By signing this Joint Representation Agreement you agree to the confidentiality arrangement specified herein. You should not sign this Joint Representation Agreement if you do not understand it or if you are in any way uncomfortable with this agreement. Please ask any questions about what anything means in this document before signing it. I encourage you to seek independent counsel in deciding whether to sign this agreement.[227]

JRAs should be tailored to the individual client and the kind of the legal work involved.[228]

CONCLUSION

When spouses are co-clients in a joint representation, their intimate relationship makes the representation unique, and therefore, they should be treated as such by preparing a JRA at the start of the representation. The JRA represents the co-clients' informed consent to the consequences of confidentiality in a joint representation. The consequences of disclosure of confidential information should

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which must be laid out in writing are not addressed in this Note. *See also* MODEL RULES OF PROF'L CONDUCT R. 1.2, 1.5 (2011).

[227] This is a sample JRA written by the Author intended to fulfill the duties of the Model Rules of Professional Conduct, particularly rules 1.4, 1.6 and 1.7. *See* MODEL RULES OF PROF'L CONDUCT R. 1.4, 1.6, 1.7 (2011). A JRA may represent only a piece of a larger engagement letter. For a variety of engagement letters and forms, see AM. COLL. OF TRUSTS & ESTATE COUNSEL, ENGAGEMENT LETTERS: A GUIDE FOR PRACTITIONERS (2nd ed. 2007), *available at* http://www.actec.org/public/EngagementLettersPublic.asp#1.

[228] *See* Price, *supra* note 99, at 753-55 for a sample engagement letter for estate planning.

be explained to the co-clients and a JRA should be a mandatory requirement in this kind of representation. The content of informed consent of information agreements, and not just the fact that informed consent was given, should be memorialized in writing—as a requirement—to clarify the client's expectations and serve as a record for informed consent if a conflict arises. When spouses are jointly represented, disclosure of confidential information to one of the co-clients can have drastic and personal consequences. A JRA protects both the interests of the co-client spouses and the attorney representing them.