

# Conflicts and Ethical Issues in Farm Family Representation

Penn State Center for Agricultural and Shale Law

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September 19, 2024

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# DISCLAIMER

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This presentation is for educational purposes only. It is not intended as legal advice. Individual situations must be evaluated thoroughly before providing legal advice.



# Ethical Twists and Turns in a Family Farm Transition Scenario

## Exploring ethics in a 'real life' scenario

- Ralph and Bev are 68 and 66, respectively and have been married to each other since their early 20s. Neither were previously married.
  - Ralph has worked full time on the farm since he graduated from high school. He is a sole proprietor operating (1) a beef cattle business which sells to a popular local farm to table restaurant, (2) 3 poultry broiler barns and (3) crop farming.
  - Bev worked as a nurse her entire adult life except for a period of 10 years when their children were younger.
  - Ralph and Bev are looking forward to retiring and enjoying some time RV-ing with friends and exploring the country.
  - Ralph and Bev have 3 natural children: Collin (36), Francesca (32), and Audrey (29). Neither has other natural or step-children.
    - Collin has worked with his father on the farm his entire adult life. He earns extra income by custom cropping for other farmers in the area. Collin has been married for 10 years to his wife, Sandra. They have 2 children, a son (8) and a daughter (5).
    - Francesca is married and lives out of state working as an engineer.
    - Audrey is engaged to be married to Andrew, who grew up on a nearby dairy farm. Audrey has a knack for horticulture and has a booming business selling cut flowers and custom bouquets from her parents' property where she has built several greenhouses and grows all her flowers in the nearby fields owned by her parents.

# The Plan

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- Collin will receive the lion's share of his parents' assets as the traditional on-farm child.
  - This includes his parents' 287 acres of farm real estate and all of the farm equipment, livestock, inventories, supplies and business accounts.
    - The transfer of the farm assets will take place in 2 phases. The first phase will involve the formation of an LLC and the immediate sale/gifting of assets from Ralph and Bev to the LLC. The transfer of the real estate will not occur until both Ralph and Bev have died. They have decided to transfer the real estate to an irrevocable asset protection trust in order to shield the real estate from potential creditor claims and nursing home costs. At their deaths, the real estate will be distributed to Collin.
- Audrey's greenhouses are constructed on a parcel that her parents acquired decades ago. The parcel is separate from the acreage farmed by Collin and Ralph. Bev and Ralph have decided to offer Audrey and Andrew that parcel to construct a home together as a wedding gift.
- Francesca will receive a minimal amount from her parents, and only upon their deaths. She will receive 1/3 of her parents' residual estates.
- Ralph and Bev have approximately \$3.5 million worth of farm assets, the tract being transferred to Audrey is worth approximately \$70,000, Bev's retirement account is worth \$750,000, and Ralph and Bev have approximately \$365,000 in other miscellaneous savings and investments.

# Ralph and Bev

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- Ralph and Bev have approached you and asked that you represent them in the farm transition process.
- Identify the potential ethical issues as each new twist and turn is inserted into the scenario.

# Ralph and Bev – Representing a married couple

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## 1. Rule 1.7 Conflict of Interest: Current Client

- A lawyer is prohibited from representing two clients at the same time if the clients' interests are directly adverse to one another or the lawyer's representation will be materially limited as to the representation of one client EXCEPT
  - If the lawyer believes they can provide COMPETENT and DILIGENT representation to each client,
  - The representation is not prohibited by law
  - The clients are not asserting claims against one another in litigation or other proceeding
  - Each client provides informed consent

Practice Tip - What does your firm's engagement letter say? Have you addressed this issue up front when your married clients request that you represent them together in their planning?

- Potential for conflict
- Confidentiality
- Informed consent

# TWIST 1 – Joint Representation Issues

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- Bev approaches you following the initial meeting and voices her concern that Francesca will receive such a small portion of her parents' estate (1/3 of the residue estate left at her parents' death). Francesca has always been closest with her mother although she lives so far away. Bev states that she doesn't think that it is fair that her other two children will receive considerably more assets during her and Ralph's lifetimes and Francesca could potentially receive nothing if Ralph or Bev need to spend money for long-term care.
  - Bev requests that you draft a will for her that is different from Ralph's. She wants to provide Francesca and Audrey with 50% shares of the residue of her estate and leave Collin out of her will since he will have received so much more than his sisters by reason of the lifetime transfers and receipt of the farmland at his parents' deaths.
  - She does not want you to share this with Ralph. It has been an ongoing point of contention between them over the years.
- How do you respond?



# Confidentiality, Loyalty & Your Engagement Letter

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Comment 31 to Rule 1.7 -

As to the duty of confidentiality, **continued 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.** This is so because the lawyer has an **equal duty of loyalty** to each client, and each client has the **right to be informed of anything bearing on the representation that might affect that client's interests** and the right to expect that the lawyer will use that information to that client's benefit. See Rule 1.4.

Engagement Letter Tip - The lawyer should, **at the outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other.** In limited circumstances, it may be appropriate for the lawyer to proceed with the representation when the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential. For example, the lawyer may reasonably conclude that failure to disclose one client's trade secrets to another client will not adversely affect representation involving a joint venture between the clients and agree to keep that information confidential with the informed consent of both clients.



# TWIST 2 - The LLC – Who's the Client?

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- The LLC is formed with the ownership as follows: Ralph 45%, Bev 10% and Collin 45%. Despite his parents retaining a combined majority interest (and assume voting control), Collin is appointed as the manager so that he becomes accustomed to making most decisions in the day-to-day operation of the farm.
- Despite Collin being appointed as manager, Ralph and Bev still exercise majority voting power in decisions and, Ralph especially, is hesitant to allow Collin to make changes on the farm despite Collin's confidence that they will increase profitability.
  - TWIST → Collin approaches you one day asking about amendments to the operating agreement which would help to balance this power structure. He relays that his mother is in favor of the changes, but is hesitant to engage in a point of contention with her husband. When you hesitate and note that you will need to discuss this with Ralph, Collin gets a bit frustrated, stating “well aren't you my lawyer, too?”
  - What are your obligations?

# Identify the client – Representing an Organization

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1. Who's your client? Just Ralph/Bev?  
Ralph and the business?
2. What did your engagement letter say?  
What's the scope of your representation?
3. What are your duties to Collin?
4. Was there a conflict waiver signed?



## Rule 1.13 – Organization as a Client

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents...

(f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

# TWIST 3 - A wedding gift, with a catch

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- Ralph and Bev have offered the parcel of real estate with Audrey's greenhouses on it to Audrey and her fiancé as a wedding gift. However, Ralph and Bev have a requirement. In order to receive the real estate, Audrey and Andrew need to enter into a pre-nuptial agreement excluding the gifted land and the greenhouses as marital property.
- Audrey and Andrew, very much in love, have agreed to this term, but have never worked with a lawyer before. Ralph and Bev tell the two lovebirds to just call you.
- The wedding is just 9 weeks away, you're away on a well-deserved vacation for 2 of the next 9 weeks and have several looming deadlines when you get back.
- What issues?



# Directly Adverse Interests & Diligence

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## Rule 1.7 – Again.

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) 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, a former client or a third person or by a personal interest of the lawyer.



*Don't represent both spouses.*

## Rule 1.3 – Diligence

- A lawyer shall act with reasonable diligence and promptness in representing a client.
- Comments:
  - [2] A lawyer's workload must be controlled so that each matter can be handled competently.
  - [3] Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions...



*Consider referring this one out.*

# TWIST 4 - Lawyer as a fiduciary

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- As the discussion on the Asset Protection/Medicaid Trust continues, Bev and Ralph continually struggle to decide and agree on who should serve as the Trustee for the trust. They are hesitant to burden any one child with the duties associated with Trustee, but also don't think that appointing multiple children is best for their situation. Since most of the assets in the trust will be real estate, hiring a corporate fiduciary isn't a very viable option either.
- Finally, Ralph and Bev ask whether you or another attorney in your firm could serve as the Trustee. They've come to trust you, you're familiar with the terms of the trust and they think that appointing you is their best option.
- What are your obligations in this scenario?

# Communication, Self-Interest & Conflicts

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- Rule 1.4(b) – “A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”
- Rule 1.7(a)(2) prohibits a lawyer from representing a client if there is a significant risk that the lawyer is materially limited by his own self-interest in the matter. Informed consent by the client, in writing, is required for the representation to continue.
- Rule 1.5 prohibits a lawyer from making an agreement for, charging, or collecting an unreasonable fee. Reasonableness is based on a variety of factors. Consider how an attorney acting as a trustee and hiring his own firm to represent him in his fiduciary capacity might be reasonable/unreasonable. Reasonableness will be determined by examining compensation both to the fiduciary attorney and to the attorney’s firm.
- Rule 1.7 would ordinarily prohibit the lawyer serving as a fiduciary from representing beneficiaries of the trust and/or creditors of the trust.



# Questions?

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