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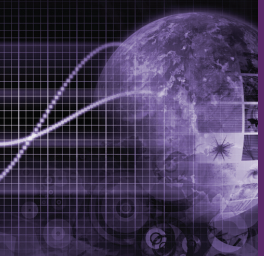


By **Charles Douglas, Judi Cunningham** & **Jennifer Odom**

Balancing Collaboration With the Attorney-Client Privilege

Beware of confidentiality limitations

Collaboration is increasingly becoming the footpath for advisors to proceed within the context of family wealth and estate planning. Whether face-to-face or cloud-based, authentic collaboration is often a highly suggested best practice today. The National Association of Estate Planners & Councils, for example, recommends that all Accredited Estate Planners designees continue sharpening their skillsets to engage more fully in a collaborative process, in which their multidisciplinary teams commit more fully to mutual communication, cooperation and coordination for a client-centric and synergistic outcome.

The clarion call for collaboration, however, doesn't mean that the collaborative footpath is downhill and effortless. Rather, advisors should anticipate and embrace some teaming dysfunction and uphill struggles along the way. One potential stumbling block involves balancing the need for increased collaboration with that of maintaining confidentiality and the attorney-client privilege.

Increased Collaboration

Whether the death tax is repealed in coming months, there are, nevertheless, consequential changes afoot in our industry. Our world and workplace are increasingly becoming interdependent. And, those advisors who cling too tightly to an independent planning approach run the risk of being left behind.

If you look closely, you can see the coming paradigm shift needed to successfully meet the complex and varied financial challenges of clients today. More than ever, workplace intricacies within our own areas of specialization and multifaceted client issues require practitioners to take part in a cohesive team, comprised of professionals from various planning disciplines.

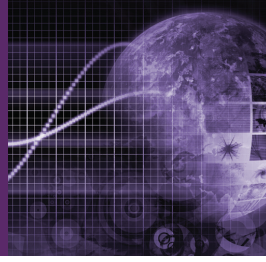
Technological advancements surrounding the Internet and mobility are helping to pave the way for greater interdependence in a global marketplace. Consider that in the past, workplace teams were often enduring, fixed and confined to a geographical location. Today, however, workplace teams need to become provisional, adaptable and virtual to stay competitive.

Independent advising isn't well suited for an interdependent world and workplace. Many advisors who use their own expertise to accomplish individual client goals are frequently failing to engage in actual teamwork, when team members seek to build on each other's expertise to achieve collective client goals. High performing advisors, on the other hand, often seek to collaborate, offer integrated planning advice and challenge the multidisciplinary teams they're on to act in more interdisciplinary ways. Importantly, high performing advisors have a foundational understanding of the differences between multidisciplinary teams and interdisciplinary teams.

In a multidisciplinary team, for example, the accountant, attorney, insurance specialist, trust officer, philanthropic advisor or family dynamics counselor will often act for the benefit of the client through the lens of their own specialty. Advisor counsel may be punctuated with individual consultation and occasional reporting back to team members about those discussions. If they're

From left: **Charles Douglas** is a partner and director of wealth planning at Cedar Rowe Partners in Atlanta, **Judi Cunningham** is a visiting scholar at the Cox Family Enterprise Center of Kennesaw State University, Coles College of Business in Kennesaw, Ga. and **Jennifer D. Odom** is a partner at Bryan Cave LLP in Atlanta





collaborating at all, members of multidisciplinary teams tend to more loosely collaborate at a technical and practical level.

By contrast, interdisciplinary teams are more fully collaborating, whether apart or in tandem with the client. "Interdisciplinary" indicates that the team is interdependent, so team members who impact and rely on each other typically determine the success of the team and the ultimate client experience. Collective consultations are encouraged, when prudent and practical, so that all or most all practitioners can be present at meetings with the client. In this manner, each advisor has the ability to hear the thoughts and perspectives of the client firsthand, so that team members can discuss the meeting from each member's vantage point.

As multidisciplinary teams are encouraged to stretch themselves to act in more interdisciplinary ways, the need to clarify who's actually being represented and to appropriately contract thereafter becomes paramount.

Determining the Client

As an advisor, determining who's the client is straightforward when the client is one individual. However, when we're working with large multigenerational families, determining who we're working for can be complex. If we're designing an estate plan for an individual with a large family, then the plan is bound to have an impact on multiple family members in multiple generations.

Who then are we serving? Is it the individual or the family? If we decide that the individual is the primary client because he signs our checks, then we may likely be biased toward that individual. Nevertheless, will the plan be sustainable if it only represents the needs and desires of that individual? In any engagement, practitioners must be clear about who's the client because this drives every decision, affects the biases advisors hold and the actions they take. Plans that are designed and implemented with the input of one individual that will have an impact on future generations may not stand the test of time and could tear a family apart.

Need for Contract

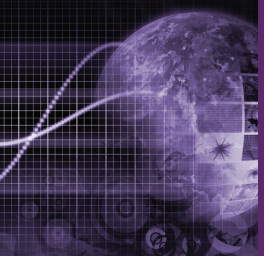
In the advisory world, there's an adage that says, "How it goes in the beginning determines the entire engagement." This saying speaks to the need for strong, clear contracting with the client at the beginning. A written contract is part of the contracting process, but contracting, at its core, is the ongoing process of negotiating and renegotiating between the client and advisor(s) around their needs and wants. In a multigenerational family, contracting includes how the advisor will work with the family and how information will flow through the family for a successful outcome.

Contracting is particularly important when relationships are changing. For instance, if you've represented the interests and affairs of an individual client for many years, and the client later asks you to assist him with an additional project in a multigenerational setting, it's critical at this juncture to re-contract with the client. Setting expectations around how you see your role, how you plan to move forward, who'll be privy to what information and whom you now represent will assist with redefining the relationship, especially around attorney-client privilege. Re-contracting needs to occur throughout an engagement to ensure that the advisor is meeting the expectations of the client and to continue to seek clarity in the client/advisor system.

> Whether they're bound legally or not, it isn't good practice for any professional to reveal confidences from another member of a client family.

Contracting is something that needs to happen not only between advisor(s) and client(s), but also among advisors. In an interdisciplinary team, without clear contracting among advisors, the client engagement can quickly go awry. At minimum, some guiding protocols can help govern the actions of the individuals on the team as they move forward. Clear protocols are particularly helpful in complex client systems with many family members. They can help guide communication practices and promote better decision making on the advisor team.

Possible protocols include clarity around roles and



responsibilities of the team members, how confidential information will be handled on the team and how fees will be structured and arranged by the team. These elements can be complex to sort out, given the varied disciplines and industries of each advisor on the team. Even so, as with families, a greater level of transparency among advisor team members often yields a better result for both advisors and families.

An Ethical Imperative?

Almost all advisors would agree that there's an explicit ethical duty for each advisor to put the client's best interests first. By extension then, teams comprised of individual advisors should also have an implicit ethical duty to put the client's best interests first. But, is there an ethical duty to always collaborate?

> Although challenging, keep in mind that collaboration and confidentiality aren't mutually exclusive.

Unlike individual advisors, codes of conduct governing advisor teams are scarce. In most instances, collaboration among the advisors tends to be in the best interest of the client. One may even ask whether collaboration is a necessity to act in the best interest of the client. After all, true collaboration necessitates putting the client's interests ahead of the team's or any individual team member's interest. Yet, managing information flow and transparency, particularly within the family system, can be complex in an open and collaborative environment.

On the one hand, when families move in a direction of greater transparency, it often benefits the entire family system. With transparency, families often more easily experience cohesion, strengthen trust and make more informed decisions. As such, advisors should be sure to communicate the benefits of transparency within the family system.

On the other hand, what if the patriarch or matriarch asks you during the planning process to keep things confidential from the spouse or other family members? This request can place you in an untenable position, and it can be the beginning of significant conflicts within the family. Should you honor what was asked of you and preserve the relationship with the patriarch or matriarch, or do you risk that relationship and encourage transparency, believing that's what's best for the family? And, who exactly is the client that you and the team represent and need to keep contracting with?

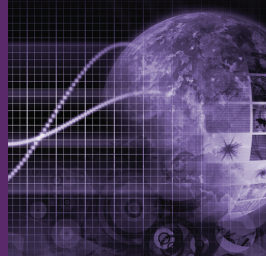
Encouraging transparency among family members is likely a best practice in most cases, and there are many incontestable benefits to the client and the team of having an open and collaborative environment. Still, a fully transparent collaborative environment may not be an ethical imperative. Clients, at times, must decide between having transparency and collaboration versus keeping information and discussions completely confidential and privileged. Because of this decision, advisors must discuss these delicate issues upfront and often with their clients as part of the contracting process. Failure to do so could impact important client safeguards like the attorney-client privilege.

Confidentiality and Privilege

All professionals, attorneys or otherwise, must manage confidential information coming from clients. Whether they're bound legally or not, it isn't good practice for any professional to reveal confidences from another member of a client family. Managing confidential information can be a delicate matter regardless of one's profession or background. Creating clarity with clients around our role with them, and what kind of information they can and should be telling us, is an important part of managing the client relationship. Attorneys, in particular, have additional duties to pay attention to under the attorney-client privilege.

"The purpose of attorney-client privilege is to encourage full and frank communication between attorneys and their clients, which thereby promotes greater transparency and aids in the overall judicial process."[1] Privilege helps create an atmosphere of confidentiality, where the client may be more willing to communicate to legal counsel things that might otherwise be suppressed.

Similarly, collaboration calls for a full and frank environment, where there can be a free flowing exchange of information among team and family members. But, the two can easily come into conflict in the midst of collaboration and interdisciplinary teaming. Open communications and dialogue put at risk the confidentiality of the



information being shared and could possibly waive the attorney/client privilege.

Understanding that professionals have a duty of confidentiality unless and until the clients specifically waive those privileges, attorneys will need to specifically discuss these issues with their clients and obtain their informed consent before participating in team discussions and communications. The client may need to decide, situation by situation, which is more important: (1) obtaining the benefit of open dialogue and collaboration, or (2) keeping the planning and discussions privileged.

The attorney needs to consider ethical implications, especially when he seeks to represent "the family" as the client. In such a setting, multiple representation is decidedly challenging, and keeping confidentialities and privileged communication among family members is next to impossible, even with informed consent. Attorneys need to be honest with themselves and their clients about their effectiveness in conducting multiple representations. Are the attorneys trying to wear too many hats? Some attorneys have chosen to withdraw from the practice of law altogether to concentrate on the business of working with families as counselors when there are multiple representations.

Be that as it may, contracting and re-contracting, both verbally and through the use of well-crafted engagement letters with the client, is critical to avoid misunderstandings and malpractice. Many good and capable attorneys find themselves in compromising situations, not because of legal inadequacy, but because of their failure to openly and regularly contract around these matters with the client and the team.

Should an attorney choose to engage in joint representation between spouses or among multiple family members, it's a best practice to have an engagement letter address the issues involved in joint representation. Customarily, engagement letters provide that attorneys can't keep confidential or privileged the communications that the attorney is having with spouses or among family members in joint representation. Further, these letters often contain language that if an actual conflict arises, when the interests of one diverge from the interests of another or others, it might be necessary for the attorney to withdraw from the joint representation, so that the attorney may continue to represent one party or may have to withdraw from the engagement altogether.

In "Creed or Code: The Calling of the Counselor in Advising Families," published in the *ACTEC Law Journal*,[2] estate-planning lawyer Ronald D. Aucutt mentions another best practice. ACTEC's Engagement Letters include a recommended addition when there's a "conflict of interest" or "difference of opinion," when the attorney "can point out the pros and cons of [the] respective positions or differing opinions," without "advocating one of [the] positions over the other."

Although challenging, keep in mind that collaboration and confidentiality aren't mutually exclusive. There may be ways to do both, but it often requires some compromise and careful planning. For example, the client, as the privilege holder, can give informed consent to his attorney to reveal particular confidential information or information otherwise protected by the privilege. The client needn't give a blanket waiver, but perhaps could give a carved-out waiver, which says to the attorney, "You're free to collaborate—except for disclosing communications around x, y and z."

Importantly, the extent of confidentiality and collaboration is a matter for the client alone to decide. Advisors can appropriately advise on risks regarding certain options, but most options involve some degree of risk. There's risk to having an effective and comprehensive plan without collaboration; there's risk to preserving attorney-client privilege when collaborating with the full advisory team; and there's risk to the family members, whether they're included in or excluded from the planning process. In any case, an attorney shouldn't use attorney-client privilege as a shield to control the planning process to the exclusion of advisors on the team when the client foremost desires collaboration.

In the end, estate planning, within the context of family wealth, is about protecting, preserving and enhancing the family through the accumulation, conservation and distribution of one's assets and values. Without question, estate planning has both quantitative and qualitative aspects that need to be addressed by the advisory team. Each advisor on the team has an obligation to contract, to seek clarity with both their client and the advisor team, to freely point out potential conflicts and compromises and to pursue best practices that allow for greater transparency and deeper collaboration as guided by the client.

Endnotes

1. *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).
2. Ronald D. Aucutt, "Creed or Code: The Calling of the Counselor in Advising Families," 36 *ACTEC L.J.* 669 (Spring 2011).