By **Kim Kamin** & **James Grubman**

How to Be a Wealth 3.0 Attorney

Practical approaches that foster integrated services

The 2023 book, *Wealth 3.0: The Future of Family Wealth Advising*,[1] and several related articles[2] outline a fresh perspective on advising families about wealth. The perspective is grounded in a historical context in which, prior to approximately 1985 and still dominant in many areas of wealth management, the era of "Wealth 1.0" focused mainly on a family's financial assets without much concern for the family's emotional, psychological, governance or long-term developmental needs.

The next almost four decades of "Wealth 2.0" then introduced profound new thinking and interest in the nonfinancial capitals of the family, leading to the modern ecosystem of wealth management. However, Wealth 2.0 also spawned a variety of negative stereotypes, biases and oft-cited "proofs" about the allegedly high failure rate of wealth longevity in families. Recent debunking of these myths[3] has challenged the pessimism and fear-based strategies that influence what wealth creators believe and what wealth advisors offer *to protect the family from the money* and *the money from the family*.

The proposed new paradigm of Wealth 3.0 incorporates four building blocks for a robust new profession of family wealth advising: (1) improved and integrated practice across relevant professional services; (2) enhanced multidisciplinary training and credentialing of those who advise families; (3) organization of a unified field to support education and professionalism; and (4) enhanced rigorous research to support effective practice and reliable understanding of wealth in families. These interrelated elements are designed to move the field of family wealth advising forward with greater rigor, accountability, efficiency and cost-effectiveness.

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Serving Families Responsibly

Wealth 3.0: The Future of Family Wealth Advising notes the legal profession has unique challenges in fitting into a more collaborative cross-disciplinary environment.[4] Understandably, some attorneys have responded to the concepts described in Wealth 3.0 with questions, given challenges such as sharing the "family as the client" stance often taken by family governance specialists, philanthropic advisors and family educators. In the growing shift toward developing integrated strategies among multiple providers, the attorney may feel uncomfortable when asked to share information on behalf of the client and their family.

Can responsible attorneys participate in a Wealth 3.0 service environment, or must they be absent from the table where other advisors collaborate?

Professional Ethics

Members of the family advisory team need to understand an attorney's distinctive responsibilities to clients. Attorneys[5] are bound by the rules of professional ethics, and they're fiduciaries with corresponding fiduciary duties. Moreover, they must consider the potential benefits of protecting attorney-client privilege and attorney work product in litigation. The potential consequences of being reported and reprimanded for not faithfully following ethical rules require attorneys to carefully consider the ethics of each family engagement and all interactions with other advisors.

The American Bar Association (ABA) publishes Model Rules of Professional Conduct (Model Rules),[6] with each state adopting its own version. Because the Model Rules are designed primarily for litigators and transactional attorneys, they don't always clearly apply to estate-planning attorneys. The American College of Trust and Estate Counsel (ACTEC) further publishes its own commentaries for attorneys practicing in the trusts and estates area.

The primary ethical rules implicated in family representations are: (1) competence,[7] (2) avoiding conflicts of interest with concurrent or former clients, and (3) confidentiality and privilege.[8] Other factors relate to attorneys' fiduciary roles and the perceived risks of family conflict versus the benefits of helping to prevent or ameliorate those conflicts through integrated services. Specifically:

Competence. Attorneys need to remain cognizant of the extent of their own experience and expertise and avoid giving advice beyond the scope of what they can competently cover. With increased specialization, one lawyer can rarely opine and advise on the plethora of legal issues faced by a family, their trusts and their entities. This means an attorney must naturally collaborate with other attorneys and specialists while respecting their own boundaries of competence and expertise.

Simultaneous representation of current clients. The Model Rules create the presumption that an attorney can't provide concurrent common representation if: (1) the representation of one client will be directly adverse to another client; or (2) there's a significant risk that the attorney's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer will materially limit the representation of one or more clients.[9] However, this presumption can be overcome if: (1) the attorney reasonably believes that they'll be able to provide competent and diligent representation to each affected client; (2) the representation isn't prohibited by law; (3) the representation doesn't involve the assertion of a claim by one client against another client represented in the same litigation or other proceeding before a tribunal; and (4) each affected client gives informed consent, confirmed in writing.[10] Attorneys must also remain cognizant of their duties to former clients to avoid harming their interests in the same or substantially related matters.[11]

An additional complexity is that attorneys must carefully review the specific rules of the jurisdiction where they practice, as local law can differ significantly from the Model Rules. This gets complicated with wealthy families and family enterprises that commonly have residences, businesses and family members across multiple domestic and international jurisdictions.

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Confidentiality and privilege. Except in extreme circumstances, an attorney may not reveal client information without informed consent.[12] This obligation isn't so different than that of other professional advisors such as accountants or therapists. Similarly, consultants who have signed confidentiality agreements and nondisclosure agreements may have obligated themselves legally to maintain client confidentiality.

The attorney-client privilege is an evidentiary rule that protects information from being disclosed in discovery or at trial. In general, the privilege applies to communications in confidence between an attorney and client to seek or provide legal advice. It extends to documents or testimony reflecting the substance of the communications, not just the communications themselves.[13] Because one element of privilege is that the communication must be confidential, generally, privilege can't attach to a communication made in the presence of a third party or without regard for who might hear or read it. The privilege is also deemed to have been waived with respect to communications later disclosed to a third party. Accordingly, certain communications made to clients in the presence of or later shared with other advisors can destroy the privilege.

As a practical matter when working with families, however, the circumstances in which privilege must be protected can be rather limited, might extend to the client's agents and are often waived. Therefore, concerns about protecting it are often overstated or can otherwise be addressed more precisely within the team environment serving the family.

Attorneys as fiduciaries. The attorney-client relationship is also a fiduciary one, meaning attorneys owe their clients the fiduciary duties of loyalty and prudence. This includes maintaining client confidences and avoiding conflicts of interest with clients.[14] Attorneys can be found to have committed malpractice for breaching their fiduciary duties to clients.[15]

Conflicts within families. Inherent potential conflicts among family members are pervasive. Each family member will likely have their own interests, desires and objectives. There's the potential for conflicting interests between spouses, between or within generations and among branches of a family. In particularly egregious situations in which attorneys were cavalier about ignoring potential conflicts, those attorneys subsequently were sued for favoring one client over another in the actual conflict.[16]

However, there's a big difference between the *potential for* conflict and *actual* conflict. We would posit that, more often than not, such conflicts are merely potential conflicts that needn't be reified. Joint or concurrent representations within a family and collaboration with an expanded advisory team generally behoove the family to operate as a unit. This also enables attorneys to be much more effective in the design, implementation and administration of the legal work itself.

As we'll outline below with concrete recommendations, many disputes can be averted with proper advance planning and communications respectful of each family member and their potential interests. The rewards of attorney involvement in the full engagement and affairs of the family vastly outweigh the potential risks, which can be addressed with careful structural planning.

Structural Representations

There can be considerable efficiencies and cost savings when the same attorney or law firm appropriately represents a successful family and its enterprises, building relationships with multiple family members and understanding its byzantine web of trusts and operating businesses. Ultra-high-net-worth (UHNW) families with family offices will also significantly benefit from having consistency across what are often multiple complex governing instruments.

Wealth 3.0 lawyering begins with carefully structuring family representations to comply with the ethical rules, fully disclosing potential risks and conflicts and obtaining informed consent from all parties. Optimizing benefits to each family member, many attorneys and firms secure appropriate conflict waivers and promptly excuse themselves from advocating for one side over another if an actual conflict emerges. In UHNW situations, the attorneys are often engaged by the family office itself as the client; the work done for family members is derivative of that primary relationship.[17]

"Sample Engagement Letter Inserts," p. 70, provides examples of specific language that can be used in engagement letters to address common family representation scenarios. Well-constructed and well-communicated engagement letters and conflict waivers should clarify who the client is, if any clients have priority over others in the event of a conflict and when information will or won't be shared within the family and with outside advisors.

It's also incumbent on an attorney working across family members, trusts and entities as clients to ensure all parties clearly understand the engagement with each client. These conversations require good communication skills to avoid excessive jargon and handle the common questions that arise so explanations are clear. These skills are part of the communication and collaboration skills outlined for a Wealth 3.0 integrated environment. Attorneys can generally play a role in encouraging clients to embrace more transparency and better communication, which can also avoid future conflicts.

Sample Engagement Letter Inserts

Language to address common family representation scenarios

Joint Representation: You have asked us to represent both of you in this matter. Although joint representation of spouses is common and generally results in coordinated and cost-effective planning, some spouses choose to have separate counsel for a variety of reasons, and you are, of course, free to do so. In some situations, separate counsel is necessary because of conflicts between the spouses. Differences of opinion alone do not prevent us from representing both of you, but if they rise to such a high level that they interfere with our ability to provide proper representation, or if other significant conflicts appear, we would have to withdraw from representing one or both of you. We are unaware of any such conflicts and are not expecting any to occur. If we become aware of a conflict, we will promptly advise you of that fact, although it may not be possible to disclose to both of you precisely why we have concluded that we must withdraw. You also should advise us if you become aware of any conflict. Of course, either of you may retain separate counsel at any time. If one of you does so, you agree that we will be free to continue to represent the other of you.

Information Sharing With Joint Representation: One important aspect of our joint representation is that all information relating to the representation that we receive or have already received, including from [either/any] of you, is available to [both/all] of you. We cannot keep any relevant information secret from one of you. By choosing the joint representation described in this letter, each of you authorizes us to disclose to the other[s] all information that may come to our attention at any time, including any requests by one of you that we change only your estate plan.

Information Sharing With Concurrent Representation: Other members of your family or businesses in which you or they have an interest may ask us to represent them in estate planning or other matters. Those other individuals or businesses would be our only clients in such matters. We would not be representing you or protecting any interest you might have with respect to those matters. In such other representations, we may obtain confidential information that could be significant to you in making your estate planning or other personal decisions. Because we will have a duty to the other clients to preserve the confidentiality of their information, however, we will not be able to disclose the information to you without the informed consent of the other clients. Similarly, we would not disclose confidential information about your legal matters to other clients without your informed consent.

Existing Representation of Other Family Members: You have requested our representation, recognizing that we will simultaneously represent [insert relationships and names of all other family members] on other matters. It is important at this juncture to confirm that you understand that they would be our only clients with respect to their estate-planning matters and that we are not representing you in connection with, or otherwise protecting whatever interest you may have in, their assets. You also recognize that, during the course of our representation of your parents and your siblings, we might receive information from them that you would be interested in having, but that we are not permitted to share with you any information from or about them and their estate plan without their consent. Similarly, we will share your personal information with them only to the extent that you have given us your consent to do so. [You have requested that our firm copy [Name of Family Member] on all of our various correspondence.]

Authorization to Speak With Other Advisor(s): In addition, you have authorized us to communicate openly about your matters with [Name or Names (and their colleagues)] of [Firm] until we receive written notice from you to the contrary.

Authorization to Speak With Agent (to Signal Privilege Inclusion): In addition, you have authorized us to communicate openly about your matters with _____ of _____, as your agent, until we receive written notice from you to the contrary.

Representation if Primary Relationship is With One Spouse or Family Member: [Party Name], in light of the existing relationship we have with [Other Party], by signing this letter, you will be agreeing that, in the event of such a dispute, we would cease to represent you and continue to represent [Other Party] (subject to our inability to represent either of you because of the nature of the information we acquired during the course of our joint representation).

— Kim Kamin & James Grubman

Thornier Scenarios

There will naturally be some circumstances in which one attorney won't be able to serve as sole counsel representing multiple parties on the same project. For example, prospective spouses negotiating a pre-nuptial agreement or couples suing for divorce will each need separate counsel. Similarly, when there's a ripe intra-family dispute, members of the family whose interests aren't aligned should each have separate counsel (although similarly situated or aligned parties can still share counsel in a joint representation scenario).

Numerous scenarios might initially seem ineligible for a collaborative approach. Yet, they could still be compatible with multi-party representation and broader collaboration. These include creating post-nuptial agreements or marital property agreements, intra-family sales and even certain intra-family negotiations or disputes that can involve a common attorney and separate counsel.

For example, married clients who are on the same page about what they want with a post-nuptial agreement can have their common attorney draft an agreement that documents their wishes, as long as each spouse then hires separate counsel to review with them the agreement and their rights before they execute it. For a transmutation agreement or a marital property agreement clarifying the couple's current understanding of titling and character, depending on the potential for future conflict, the common attorney may be comfortable drafting the document and just having each spouse acknowledge they were advised they could or should consult separate counsel, even if the clients determine they don't want to do so.

Similarly, a family office suggesting a transaction can design the transaction, draft template documents and then hire separate counsel to represent the different interests of the family members. Consider the scenario in which the family office recommends that a younger generation take an outright distribution or exercise a power of appointment over trust assets that aren't generation-skipping transfer tax-exempt and then use their own exemptions to set up new trusts. The family office can hire counsel to meet individually with each member of that generation to explain the benefits and any disadvantages of the proposed transaction so that each family member can determine whether to participate.

Final Thoughts

The reality is that astute attorneys can and should be open to a modern collaborative approach to advising families, consistent with a Wealth 3.0 paradigm. Using the skills and knowledge we've outlined, attorneys have a valued seat at the table alongside the many other professionals a family needs to manage the complexity of wealth. The legal profession has always adapted to rapidly changing environments of regulation, professional practice and innovative strategies. Wealth 3.0 is simply the next step in the long history of the legal profession as a dynamic, thriving field.

Endnotes

1. James Grubman, Dennis T. Jaffe and Kristin Keffeler, *Wealth 3.0: The Future of Family Wealth Advising*, Family Wealth Consulting (2023).
2. James Grubman, Dennis T. Jaffe and Kristin Keffeler, "Wealth 3.0: From Fear to Engagement for Family Wealth Advisors," *Trusts & Estates* (February 2022), at pp. 18-22; James Grubman, Dennis T. Jaffe and Kristin Keffeler, "Wealth 3.0 in Practice," *Trusts & Estates* (February 2023), at pp. 16-20; Sharilyn Hale, "Philanthropy and Wealth 3.0," *Trusts & Estates* (April 2024), at pp. 44-47.
3. James Grubman, "There is no 70% rule—improving outcome research in family wealth advising," *International Family Offices Journal* (June 2022), at pp. 33-38.
4. *Supra* note 1, at p. 98.
5. Note that a "lawyer" is an individual who has only graduated from law school, while an "attorney" has additionally passed a bar exam and professional responsibility exam and has been granted a license to practice law, that is, they can give legal advice and appear in court. In most states, all attorneys are lawyers but not all lawyers become attorneys. *See, e.g, www.indeed.com/careeradvice/career-development/can-you-take-the-bar-exam-without-going-to-law-school.*
6. The American Bar Association's (ABA) Model Rules of Professional Conduct (Model Rules) were adopted by the ABA House of Delegates in 1983. They serve as models for the ethics rules of most states. California was the final state to bring its rules into quasi-conformity with the format of the ABA Model Rules, which it did in 2018.
7. Model Rule 1.1: Competence. "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." *See also* Model Rule 5.5: Unauthorized Practice of Law; Multijurisdictional Practice of Law. Model Rule 5.5(a) provides that: "A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so."

8. *See* Kim Kamin, "Fiduciary Duties and Ethical Challenges for Trustees: The Evolving Landscape," Andersen Tax Family Office Roundtable (June 2017) originally prepared for the 40th Annual Notre Dame Tax & Estate Planning Institute (November 2014).
9. Model Rule 1.7(a).
10. Model Rule 1.7(b).
11. Model Rule 1.9: Duties to Former Clients.
12. Model Rule 1.6 provides that an attorney may reveal information under certain circumstances such as to prevent crime or fraud, comply with another law or court order and to disclose to the Internal Revenue Service.
13. *See* David C. Blickenstaff and Kim Kamin, "Attorney-Client Privilege in a Team Environment, National Association of Estate Planning Council" Webinar (July 10, 2019); David C. Blickenstaff and Kim Kamin, "Estate Planning as a Team Sport: Attorneys, Accountants and Other Advisors Working Together—Are Your Communications Privileged?" IICLE 61st Annual Estate Planning Short Course (May 2018).
14. Hofstra Law School Class #5 The Lawyer's Fiduciary Duties, *https://legalmalpractice.com/cle-law-school-course/lawyer-malpractice-class-5-the-lawyers-fiduciary-duties/*. *See* Cornell Law School, Fiduciary Duty, *https://www.law.cornell.edu/wex/fiduciary_duty. See also* Berkeley Law Legal Profession Course, Duties Lawyers Owe Clients Casebook Chapter 1, *www.law.berkeley.edu/php-programs/courses/fileDL.php?fID=578.*
15. *See, e.g.*, Hofstra Law School Class #5 The Lawyer's Fiduciary Duties, *ibid*. This is global, not just in the United States (any legal system based on English system), including Canada. *See, e.g.,* Alice Woolley, "The Lawyer As Fiduciary: Defining Private Law Duties in Public Law Relations," 65 *UTLJ* 4, at pp. 285-334 (Fall 2015), *www.jstor.org/stable/24855487*. For Western Europe, *see, e.g.*, Martin Gelter and Genevieve Helleringer, "Fiduciary Principles in European Civil Law Systems," *Oxford Handbook of Fiduciary Law* (March 2018), *www.ecgi.global/sites/default/files/working_papers/documents/finalgelterhelleringer_0.pdf.*
16. *See, e.g.,* Liesel Pritzker and Mary Scanlan's separate law suits against their family attorneys described in Zach Lowe, "Shopping Mall Heiress Sues Neal Gerber, Alleging Massive Misconduct," *AM LAW Daily* (August 2009), *https://amlawdaily.typepad.com/amlawdaily/2009/08/mall-heiress-sues-neal-gerber-alleging-massive-misconduct.html.*
17. Martin E. Lybecker, Domingo P. Such III and Stephen A. Keen, "Avoid Ethical Pitfalls When Representing Family Offices," *Trusts & Estates* (February 2017), at pp. 2-5.

AD INDEX

Advertiser Name	Page No.
AMERICAN SOCIETY OF APPRAISERS	29
LEAP LEGAL SOFTWARE	47
LITCO	33
M FINANCIAL GROUP	C2
NAEPC	69
NFP INSURANCE SOLUTIONS	35
NOTRE DAME TAX AND ESTATE PLANNING INSTITUTE	C3
PLI, LLC	C4
TRIDENT TRUST	25
WEALTHCOUNSEL, LLC	9, 59

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