

SEPARATE REPRESENTATION LETTER (BENJAMIN)

RE: Mr. & Mrs. _____—Estate Planning

Our File No. _____

Dear _____ and _____ :

When you both were in my office for our initial meeting on _____, I explained to you four alternatives for representation in your estate planning: that one of you could use me and the other could use an attorney from another firm; that each of you could go to a different other attorney from a different other firm; that I could counsel you both together as joint clients; that I could counsel you separately as separate clients if either of you so choose. You both opted to have me represent each of you *separately*, rather than *jointly*, and rather than either or both of you going to another attorney or other attorneys. However, I write this letter in order to repeat, and also to supplement, what I told you both at that meeting, so that each of you can review and further consider your initial decision.

In negotiating any *contract* between two parties, each of the parties should, except in the most extraordinary of circumstances, be represented by an attorney from a different firm. This is because a *contract*, once entered into, binds both parties and therefore cannot be changed unilaterally by either. In the estate planning field, a marriage or pre-marriage contract (or a contract to make a will in those jurisdictions, other than Louisiana, that permit this) is an example of such a *contract* requiring separate-firm representation.

By contrast, the establishment of gifts (outright or in trust) and the preparation of wills are examples of *noncontractual*, individual actions that leave each person free to make unilateral changes in his or her future plans without the knowledge or acquiescence of any other person. Since your estate planning does not involve any planned marriage contract, each of you is free to make any desired changes in your plan unilaterally, regardless of what lawyer each of you uses. Therefore, the choice of having me represent both of you jointly (on the one hand) or separately (on the other hand) is available to each of you, and I therefore am detailing the differences.

On the one hand, if I were to represent both of you *jointly*, I would have to immediately tell the other anything that one of you later told me in confidence that related to his or her estate planning, since not to reveal such information to the other would be a violation of the attorney-client joint relationship. This might inhibit each of you from telling me something in confidence that you thought I needed to know, because you would realize that I would be forced to disclose it to the other.

On the other hand, if I were to represent each of you *separately*, I would have to keep in confidence, and *conceal* from the other, anything later told me in confidence by one of you even though it *prejudiced* what the other had relied upon in making his or her own estate plan, including such differ-

ences as how each of you would like to transfer your property or your interest in community property by gift or at death, as how each of you would like to have your income, gift and estate taxes allocated and paid, and as how each of you would like your interest in community property to be managed and controlled.

However, there might be or might arise disputes between you as to which assets are separate and which are community, or whether (or how much of) any reimbursement should be made from the community to the separate estate of either of you (or vice versa), and I would not in any event be able to represent either of you in resolving any such dispute; if such a dispute were to arise, I would tell each of you to go to a different other law firm.

This written explanation is designed to make it certain that each of you fully understands the consequences of the *separate* and *individual* representation for which you previously opted. In order that the file can reflect this, and assuming that neither of you wishes to change your mind, each of you should sign the enclosed copy of this letter and return it to me for the file.

With kindest regards to each of you.

Sincerely,

Edward B. Benjamin, Jr.

P.S.: Of course, each of you is free to consult or switch to a lawyer from one or more other law firms at any time, despite your signing and returning this letter to me.

EBB, Jr.

P.P.S.: Any lawyer's ability to keep any client's affairs in strict confidence can, if an opposing party prevails in a contested matter, be overridden by a final court order that the material be revealed. Under those rather extreme circumstances, the lawyer can even be compelled by the court to testify as to the material.

EBB, Jr.

Dear Ed:

I hereby agree, and reconfirm my previous decision, to have you represent me and _____ as two *separate* clients. You are to keep in strict confidence everything I reveal to you, and I hereby direct you to keep in strict confidence everything _____ reveals to you.

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I hereby agree, and reconfirm my previous decision, to have you represent me and _____ as two *separate* clients. You are to keep in strict confidence everything I reveal to you, and I hereby direct you to keep in strict confidence everything _____ reveals to you.

, 20____

15 Probate Notes 126 (1989).

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