



**FEATURE:**  
HIGH-NET-WORTH FAMILIES  
& FAMILY OFFICES

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# TRUSTS & ESTATES

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## Avoid Ethical Pitfalls When Representing Family Offices

Engagement letters may help

**F**amily offices continue to multiply, and the number of industry professionals who provide services to them continues to grow. The genesis of family offices dates back hundreds of years; wealth management and the deployment of capital in its various forms have evolved with family offices to recognize financial, human, intellectual and spiritual capital management. Today, in addition to a president, a chief financial and investment officer and other executive family-centric officers, many offices employ administrative and support staff, including in-house attorneys. Based on our experience in counseling in-house attorneys for family offices, we believe that such attorneys and the family office executive team should carefully consider ethical issues that may be inherent in their work to successfully serve important family relationships and manage various forms of capital.

### Conflicts of Interest

A case from 2007, *Preovolos v. Preovolos*,<sup>1</sup> illustrates some potential ethical pitfalls of representing a family office. The Preovolos Family Limited Partnership held and managed Fofu Preovolos' home. In a familiar structure, Fofu and her son, Peter, were the general partners; her other son, Theodore, was a limited partner, along with Peter and the Preovolos Family Children's Trust.

One of Peter's sons, Thanasi, was a principal in

the law firm of Preovolos & Associates, ALC (P & A). Thanasi and his firm had represented, at various times, the partnership, the general partners and Peter in his personal capacity. Thanasi also prepared Theodore's estate plan and provided Theodore a letter explaining his rights and interest in the partnership. Thanasi's letter didn't indicate whom he represented when responding to Theodore's questions.

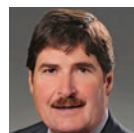
Theodore and Peter had a dispute over a tax-free, like-kind exchange of the house for a storage facility, which led Theodore to sue the other partners. P & A represented the defendants, but Theodore moved to disqualify the firm. The trial court granted the motion, which was affirmed on appeal. The appellate court found that Theodore was a current client of the firm because Thanasi had sent Theodore and his wife a letter reminding them to update the Schedule of Assets for their estate plan. The court also found Thanasi's letter explaining Theodore's rights and interests in the partnership prima facie evidence of a former representation. This former representation provided an independent ground for disqualification, insofar as it related to the same subject matter as the lawsuit.

The appellate court concluded:

Disqualification should be no surprise to Thanasi. By performing legal work for both the partnership and at least two of its limited partners, Thanasi knowingly assumed representation of clients with potentially adverse interests. As soon as Theodore began questioning the management of the partnership and urging the sale of the house over Peter's objections, Thanasi was on notice that he represented clients with actual adverse interests. Yet Thanasi responded to Theodore's ... inquiry about his rights and interests in the partnership

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without qualification, and he continued to represent Theodore as to his estate plan.<sup>2</sup>

### A Difficult Question

“Who’s your client?” can be a difficult question for family office attorneys. Although Thanasi wasn’t an employee of his family’s partnership, his situation should be familiar to an in-house attorney to a family office. Everyone in the Prevolos family felt free to ask P & A for legal advice for both personal and business purposes, without giving thought to potential conflicts. Likewise, members of a family office may regard an in-house attorney as their first stop for legal advice. Specifically, an in-house attorney at a family office may be asked to represent:

- the family office itself as a legal organization;
- related family operating entities;
- members of the family in their personal capacity (for example, as donors, beneficiaries or testators);
- members of the family acting as the trustees of trusts;
- investment entities created by the family, that is, investment vehicles and foundations; and/or
- members of the family acting as members of the boards of trustees or directors for those investment vehicles and foundations.

If an outside law firm were engaged to represent the individuals or entities involved in any of those six situations, the law firm would probably treat each situation as a different “client” for purposes of its evaluating potential conflicts of interest, maintaining confidentiality and other ethical issues. The firm would, or should, document each representation with an engagement letter and seek waivers from the other clients when appropriate. The rigor and robustness of that ethical approach is worth examining in the context of an in-house attorney for a family office.

### Potential Sources of Conflicts

*Prevolos* illustrates how family conflicts can translate into ethical conflicts for a family office attorney. Regrettably for these types of attorneys, conflicts among family members are common. Frequently, the patriarch and matriarch of the single-family office, as well as their descendants, have different financial interests,

investment objectives, philosophies of life and a variety of different medical, educational and support needs. It’s common knowledge that differences of opinion span the generational family members, and those differences can spawn conflict. It’s possible to foresee sincerely held differences of opinion based on different personal circumstances and desires, and not just different views regarding the best use of the family’s resources. This may create conflicts of interest when, for example:

- Members of the family have different views on how the family office, as an entity, should be run, perhaps

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involving greater or lesser representation on the board of directors for different generations of the family;

- Family involvement with an operating company, policies and family culture evolve over time and typically change with or without conflict, depending on the strength of the family succession plan and its implementation across generations;
- One member of the family is willing to serve as trustee of trusts that exist for the benefit of a different generation of family members, and the trustee and one or more of those beneficiaries disagree on how the trustee should exercise his discretion over the trust; or
- Some members of the family are willing to serve on the board of directors of a family-operated company, family investment vehicle or the family foundation, and members of the family disagree on whether the members of the family acting in a fiduciary capacity are making decisions that are consistent with their fiduciary duties.



An attorney employed by the family office may be asked to give legal advice in each of these situations. An in-house attorney who provides such advice without considering whom she represents, or without making sure that the family members understand the scope of her representation, can find herself in an ethical quagmire.

### Engagement Letters

Thanasi's letter regarding Theodore's rights and interests in the family partnership illustrates the difficulty of identifying a family office client. Theodore just wanted answers to some legal questions. He probably didn't consider whether he was posing his questions to the partnership's attorney or to his own attorney. If a family member seeking legal advice is unaware of the distinction, how can an in-house family office attorney tell whom she's supposed to represent?

Difficult though it may be, the court's unsympathetic treatment of Thanasi reminds us that the in-house attorney is responsible for making sure that family members understand whose interest the attorney represents in any matter. Although not currently a common practice, we suggest that an in-house attorney consider the approach taken by outside law firms and request that the family office execute an engagement letter with the in-house attorney.<sup>3</sup> An engagement letter would not only document the family's understanding of the scope of the lawyer's engagement, but also would encourage the attorney to consider whom she's being asked to represent before responding to a request.

Unlike a typical engagement letter, a family office letter should also address the extent to which the attorney may represent members of the family and whether such representation would be limited to an official capacity (such as board member or trustee) or extended to personal representation (such as estate planning). If the engagement letter permits the representation of individual family members in any capacity, then it's recommended that all of the potential clients should sign it. Moreover, the letter should address: (1) the terms of joint representations; (2) what would happen if the attorney couldn't properly represent different "clients" under certain circumstances; and (3) when the attorney may seek ethical advice from a third party without necessarily breaching the attorney-client privilege with any client. A standard law firm engagement letter could be

used as a model.

Ideally, every family member would execute the engagement letter to document their understanding of whether they are or aren't represented by the attorney, the limitations of any representation and their waiver of certain potential conflicts. If the attorney finds that the scope of the representation is expanding, it would be important to supplement the engagement letter accordingly.

### Identifying Your Non-Clients

Working through the engagement letter process may also expose situations in which the attorney should consider documenting a family member's understanding that he's not the attorney's client. This would be a second approach to addressing potential conflicts of interest for the in-house attorney.

A "non-client" letter would identify the specific matter that affects the addressee and ask the addressee to acknowledge that the in-house attorney represents the interest of the family office or another family member exclusively, even though the addressee is also a party to the identified matter. If this isn't practical, it would still be helpful to refer to the engagement letter in the transmittal letter for the transaction documents and remind the addressee of the limits of the attorney's representation. The court's reference to Thanasi's failure to "qualify" his letter to Theodore suggests that if the letter had stated that Thanasi was acting as the partnership's attorney, this might have been sufficient proof that Theodore wasn't Thanasi's client.

### Benefits to Family

As shown by *Prevolos*, without a prior understanding among the family members, a family conflict may prevent an in-house attorney from representing anyone in a matter, including the family office. An engagement letter may thus protect the interests of the family, as well as the attorney employed by the family office. Specifically, an engagement letter may:

- Preserve the in-house attorney's ability to perform her primary job of representing the family office and its officers (in their official capacity), thus avoiding the expense and difficulty of retaining outside counsel to represent the family office in the conflicted matter;




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- Prevent family members from using a potential conflict of interest as a bargaining chip in negotiations with other members; or
- Document a “material common interest” that would protect the attorney/client privilege when confidential information is shared with family members not represented by the attorney.<sup>4</sup>

Our proposed approach may be at odds with the informal nature of many family offices. However, informal arrangements can be a source of intra-familial conflicts, and those operating a family office may want to consider the general benefits of documenting any services that the office will provide to the family. An additional benefit to the family office as a whole, and not just to the in-house attorney, is the intrinsic value of documenting those service arrangements. We’ve regularly prepared service agreements between the family office and the family members with respect to accounting, investment, tax, insurance and succession planning purposes as part of our “best practices” recommendations. The legal services engagement letter we recommend for the in-house attorney could easily be subsumed into a master service agreement. Indeed, when a family member engages a multi-family office entity for services, the standard practice is for the multi-family office to document each engagement to avoid the informal and unclear understanding that might lead to conflicts and lawsuits.

### Document Representation

An in-house attorney’s ethical situation working for a family office is similar in many ways to an attorney

employed by a small, closely held company. However, an in-house counsel for a closely held company may have the theoretical advantage of only representing the business, rather than personal, interests of the owners. Such a demarcation isn’t available to an in-house attorney for a family office, insofar as the business of the family office is to pursue the personal interests of the family members, individually as well as collectively. This confluence of interests is more apparent as the family office industry further researches and documents wealth management concerning financial, as well as human, intellectual and spiritual capital. It’s not a stretch to see that the family office attorney is involved with family operating companies, family investment companies, private trust companies and other family entities, being managed side-by-side with the family office. This makes it even more important for an attorney at a family office to determine and document whom she represents. At the very least, it would be prudent for the in-house attorney at a family office to have a frank discussion with the family principals so that appropriate sensitivity can be instilled in all concerned and interested parties. 

### Endnotes

1. *Prevolos v. Prevolos*, 2007 WL 521362 (Cal. Ct. App. 2007) (unpublished).
2. *Ibid.*, at p. 6.
3. Even if the parties decide not to execute a written engagement letter, it would still be prudent to discuss conflicts of interest, ethical obligations including privilege and joint representations with all family members with whom the lawyer expects to interact, so that there are no unfounded expectations.
4. See *In re Lululemon Athletica Inc.*, 2015 WL 1957196 (Del. Ch. Ct. 2015) (inclusion of chief financial officer of family office on emails didn’t waive attorney-client privilege).