

# Lawyer Ethics in Wills, Trusts, and Estate Matters



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# Today's Topics



- ▶ Joint Representation
- ▶ Self dealing, business transactions with clients
- ▶ Conflicts of Interest
- ▶ Gifts to lawyers in Wills, Trusts, and other documents prepared by lawyer
- ▶ Demands for confidential documents/information after client dies
- ▶ Bar Rules and Issues in WTE
- ▶ Bar Ethics Opinions
- ▶ Case law
- ▶ Other Important Bar Rules

# Bar Rules and Issues

- ▶ Risks inherent in multiple client representation
- ▶ Disagreement on goals and objectives
- ▶ Preserving assets vs. institutional or in home care
- ▶ Maximizing income vs. maximizing assets
- ▶ Life prolonging care vs. minimal medical intervention
- ▶ Confidentiality issues (Rule 4-1.6)
- ▶ Many times families have secrets from each other
- ▶ Duties of confidentiality and loyalty are owed to each client

# Confidentiality and Deceased Client's File and Information

- ▶ Ethical considerations when there is a will/trust contest and there is a demand for the deceased client's information and/or file
- ▶ Confidentiality is forever (i.e. it continues even after the client is deceased).
- ▶ Subpoena for file related to deceased client and/or deposition. Is this a court order? No. Consider whether to require a court order before providing confidential file/information.
- ▶ Would providing the confidential information/information be “serve the client's interest (unless it is information the client specifically requires not to be disclosed).” (Rule 4-1.6(c)(1). If so, the information/file could arguably be provided without a court order; however, according to Ethics Opinion 10-3, “doubt should be resolved in favor of nondisclosure.”
- ▶ If the lawyer's representation is being questioned, the lawyer can consider revealing the information “to respond to allegations in any proceeding concerning the lawyer's representation of the client.” (Rule 4-1.6(c)(4).

# Florida Bar Ethics Opinion 10-3

## Confidentiality and Deceased Clients

- ▶ **Ethics Opinion 10-3 (February 1, 2011)**
- ▶ Ethical obligations regarding request for confidential information of deceased client by PR, beneficiaries or heirs of decedent's estate or their counsel will vary depending on circumstances
- ▶ Lawyer may disclose confidential information to serve deceased client's interests, unless client previously instructed lawyer not to disclose information. Whether and what information may be disclosed will depend on who is making request, information sought, and other factors. Doubt should be resolved in favor of nondisclosure
- ▶ When compelled to disclose information via subpoena or court order, lawyer must disclose all information sought that is not privileged, and raise privilege as to any information for which there is good faith basis to do so
- ▶ May exhaust appellate remedies before disclosing confidential information

# Bar Rule 4-1.6 Confidentiality

## ▶ RULE 4-1.6 CONFIDENTIALITY OF INFORMATION

(a) Consent Required to Reveal Information. A lawyer shall not reveal information relating to representation of a client except as stated in subdivisions (b), (c), and (d), unless the client gives informed consent.

(b) When Lawyer Must Reveal Information. A lawyer shall reveal such information to the extent the lawyer reasonably believes necessary:

- ▶ (1) to prevent a client from committing a crime; or
- ▶ (2) to prevent a death or substantial bodily harm to another.

# Bar Rule 4-1.6 Confidentiality

## ▶ RULE 4-1.6 CONFIDENTIALITY OF INFORMATION

- ▶ (c) When Lawyer May Reveal Information. A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:
  - ▶ **(1) to serve the client's interest unless it is information the client specifically requires not to be disclosed;**
  - ▶ (2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and client;
  - ▶ (3) to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved;
  - ▶ **(4) to respond to allegations in any proceeding concerning the lawyer's representation of the client; or**
  - ▶ (5) to comply with the Rules of Professional Conduct.
- ▶ (d) Exhaustion of Appellate Remedies. When required by a tribunal to reveal such information, a lawyer may first exhaust all appellate remedies.
- ▶ **(e) Limitation on Amount of Disclosure. When disclosure is mandated or permitted, the lawyer shall disclose no more information than is required to meet the requirements or accomplish the purposes of this rule.**

# Bar Rules and Conflicts of Interest

- ▶ Who is the client and multiple clients
- ▶ Joint representation is relatively common
- ▶ Rule 4-1.7 Conflict of Interest; current clients
  - (a) Representing Adverse Interests. Except as provided in subdivision (b), a lawyer shall not represent a client if:
    - (1) the representation of 1 client will be directly adverse to another client; or
    - (2) there is a substantial risk that the representation of 1 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.



# Bar Rule 4-1.7 Conflict of Interest

- ▶ Rule 4-1.7 Conflict of Interest; current clients
- ▶ (b) Notwithstanding the existence of a conflict of interest under subdivision (a), a lawyer may represent a client if:
  - (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
  - (2) the representation is not prohibited by law;
- ▶ (3) the representation does not involve the assertion of a position adverse to another client when the lawyer represents both clients in the same proceeding before a tribunal; and
- ▶ (4) each affected client gives informed consent, confirmed in writing or clearly stated on the record at a hearing.

# Bar Rule 4-1.7 Conflict of Interest

- ▶ Rule 4-1.7 Conflict of Interest; current clients
- ▶ (c) Explanation to Clients. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

# Bar Rule 4-1.7 Conflict of Interest

- ▶ Comment to Rule 4-1.7
- ▶ Conflict questions may also arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may arise.
- ▶ In estate administration the identity of the client may be unclear under the law of some jurisdictions. **In Florida, the personal representative is the client** rather than the estate or the beneficiaries. The lawyer should make clear the relationship to the parties involved.

# Bar Rule 4-1.7 Conflict of Interest

- ▶ Rule 4-1.7 (c) Explanation to Clients
- ▶ When representation of multiple clients in a single matter is undertaken, the **consultation shall include explanation of the implications of the common representation and the advantages and risks involved.**
- ▶ Lawyer should have clients review and execute written disclosure and informed consent waiver of potential conflict.

# Bar Rule 4-4.3 Unrepresented Persons

- ▶ Rule 4-4.3 Dealing with Unrepresented Persons
- ▶ Lawyer (or lawyer's agent) cannot imply that the attorney is disinterested if the person misunderstands the lawyer's role and must correct any misunderstanding if it exists.
- ▶ Again, who is the client?

# Bar Rule 4-1.8 Prohibited and Other Transactions

- ▶ Rule 4-1.8 Conflict of Interest; Prohibited and Other Transactions
- ▶ (c) Gifts to Lawyer or Lawyer's Family. A lawyer is prohibited from soliciting any gift from a client, including a testamentary gift, or preparing on behalf of a client an instrument giving the lawyer or a person related to the lawyer any gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this subdivision, related persons include a spouse, child, grandchild, parent, grandparent, or other relative with whom the lawyer or the client maintains a close, familial relationship.
- ▶ No longer a requirement that the gift be "substantial".

# Bar Rule 4-1.8 Prohibited and Other Transactions

- ▶ Rule 4-1.8 Conflict of Interest; Prohibited and Other Transactions
- ▶ Comment: Gifts to lawyers
- ▶ A lawyer may accept a gift from a client, if the transaction meets general standards of fairness and if the lawyer does not prepare the instrument bestowing the gift. **For example, a simple gift such as a present given at a holiday or as a token of appreciation is permitted. If a client offers the lawyer a more substantial gift, subdivision (c) does not prohibit the lawyer from accepting it, although the gift may be voidable by the client under the doctrine of undue influence, which treats client gifts as presumptively fraudulent.**
- ▶ Caveat/tip: If your client wants to give you testamentary or trust gift, make sure that client goes to a completely independent lawyer, do not allow your office prepare the documents, and do not participate in the review of same by the client.

# Bar Rule 4-1.8 Prohibited and Other Transactions

- ▶ Rule 4-1.8 Conflict of Interest; Prohibited and Other Transactions
- ▶ Comment: Gifts to Lawyers (Personal Representative/Fiduciary Office)
- ▶ This rule does not prohibit a lawyer or a partner or associate of the lawyer from serving as personal representative of the client's estate or in another potentially lucrative fiduciary position in connection with a client's estate planning. **A lawyer may prepare a document that appoints the lawyer or a person related to the lawyer to a fiduciary office if the client is properly informed, the appointment does not violate rule 4-1.7, the appointment is not the product of undue influence or improper solicitation by the lawyer, and the client gives informed consent, confirmed in writing. In obtaining the client's informed consent to the conflict, the lawyer should advise the client in writing concerning who is eligible to serve as a fiduciary, that a person who serves as a fiduciary is entitled to compensation, and that the lawyer may be eligible to receive compensation for serving as a fiduciary in addition to any attorney's fees that the lawyer or the lawyer's firm may earn for serving as a lawyer for the fiduciary.**



# Lawyer/Fiduciary Privilege

- ▶ Lawyer/fiduciary privilege
- ▶ F.S. 90.5021 (2011) states that a communication between a lawyer and a client acting as a fiduciary is privileged and protected from disclosure under F.S. 90.502 (unless crime/fraud exception to the privilege under F.S. 90.502(a)(4) applies)
- ▶ 1/25/18 Florida Supreme Court opinion adopted and incorporated the lawyer/fiduciary privilege into Florida Evidence Code, F.S. §90.5021.
- ▶ The opinion provides that the attorney-client privilege applies even when the client is a fiduciary to the extent that it is procedural. The opinion stated that the provision “is effective retroactively to June 21, 2011, the date it became law.”
- ▶ The opinion is *In Re: Amendments to the Florida Evidence Code – 2017 Out of Cycle Report*, Case No. SC17-1005 (January 25, 2018)

# Identifying and Addressing Ethics Issues

- ▶ Issues in Probate/Estates/Trusts:
- ▶ Undue Influence between and among family members/beneficiaries
- ▶ Influence of a third party that may overpower choice
- ▶ Potential solutions:
- ▶ Interview the client in private
- ▶ Understand motives
- ▶ The beneficiary may or may not be the influencer
- ▶ If issues cannot be resolved consider declining or terminating representation

# Bar Rule 4-1.14 Client Under a Disability

- ▶ Bar Rule 4-1.14 Client Under a Disability
- ▶ (a) Maintenance of Normal Relationship. When a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability, or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.
- ▶ (b) Appointment of Guardian. A lawyer may seek the appointment of a guardian or take other protective action with respect to a client only when the lawyer reasonably believes that the client cannot adequately act in the client's own interest.

# Ethical Considerations

- ▶ What is nature of the capacity/incapacity?
- ▶ Risk of decline in capacity increases with age
- ▶ Mental capacity – not age or physical ability
- ▶ Legal capacity is presumed of adults
- ▶ Mental capacity is a spectrum, not black and white

# Ethical Considerations

- ▶ Legal Capacity
- ▶ Every individual is presumed to be **legally** competent, but
- ▶ Does the client have the actual capacity to engage a lawyer?
- ▶ Does the client have the capacity to complete the legal transaction?
- ▶ Lawyers assess the capacity of clients all of the time; however, the risks/issues are higher with clients of advanced age

# Ethical Considerations



- ▶ Considerations related to Comment to Rule 4-1.14
- ▶ Client should be able to articulate reasons for decisions
- ▶ Variability of state of mind (good days/bad days)
- ▶ Client should be able to appreciate consequences of decision
- ▶ Consider substantive fairness and reasonableness of client's decision
- ▶ Consider consistency of client's decisions with known long term commitments and values

# Ethical Considerations

- ▶ Look for:
- ▶ Decisional ability
- ▶ Memory (short and long term)
- ▶ Communication
- ▶ Comprehension
- ▶ Mental flexibility
- ▶ Calculation
- ▶ Disorientation

# Ethical Considerations



- ▶ Different types of legal capacity
- ▶ Task or transaction specific capacity
- ▶ Testimonial capacity
- ▶ Contractual capacity
- ▶ Capacity to convey real estate
- ▶ Capacity to make health care decisions



# Bar Ethics Opinion 95-4 Joint Representation of Spouses and Confidentiality/Conflicts

- ▶ **Ethics Opinion 95-4 (May 30, 1997)**
- ▶ **Joint representation of spouses- secret codicil to pay mistress**
- ▶ In a joint representation between husband and wife in estate planning, an attorney is not required to discuss issues regarding confidentiality at the outset of representation
- ▶ The attorney may not reveal confidential information to the wife when the husband tells the attorney that he wishes to provide for a beneficiary that is unknown to the wife (mistress)
- ▶ **If this occurs, attorney must withdraw from the representation of both husband and wife** because of the conflict presented and the attorney must maintain the husband's separate confidences regarding the joint representation (prohibited from telling wife).
- ▶ Real world perils of joint/multiple client representation such as multiple beneficiaries

# Bar Ethics Opinion 76-16

## Duties of Personal Representative

- ▶ **Ethics Opinion 76-16 (April 4, 1977)**
- ▶ A surviving spouse who claims an elective share or statutory entitlements does not, without more, have a conflict of interest with the personal representative of an estate or other beneficiaries under a will.
- ▶ The attorney for the personal representative has the right and in some circumstances a duty, to inform the surviving spouse of the existence of those statutory rights.

# Bar Ethics Opinion 12-2

## Delegating E-filing Authority

- ▶ **Ethics Opinion 12-2 (June 22, 2012)**
- ▶ It is ethically permissible for a lawyer to provide his or her access credentials to the E-Portal to trusted, properly supervised, non-lawyer employees so that they may electronically file court documents on the lawyer's behalf
- ▶ The lawyer is ultimately responsible for the filing and its contents. The opinion also states that the lawyer should immediately change the lawyer's password if the non-lawyer leaves the lawyer's employment or shows untrustworthiness in the use of the E-Portal

# Breach of Confidentiality in E-filing

- ▶ *In the Matter of: John A. Goudge*, No. 1024426, Commission No. 2012PR00085. Illinois lawyer reprimanded for e-filing confidentiality violations.
- ▶ Lawyer was associate at Chicago law firm and responsible for cases from contract firm had with USDOJ to represent U.S. in debt collection cases involving student loans.
- ▶ Under lawyer's supervision and at his direction, non-lawyer assistant prepared complaints and exhibits and several non-lawyer assistants filed the complaints and exhibits with the Ill. N. U.S. District Court for the Northern District of Illinois' CM/ECF (e-filing) system.
- ▶ CM/ECF requires that box be checked stating that filings are in compliance Fed. Civil Proc. Rules and personal identifying information was redacted; however, the information was not redacted and confidential information became available to the public and viewable on court's website.
- ▶ The lawyer admitted failure to make reasonable efforts to supervise non-lawyer and expressed remorse for his conduct.

# Bar Rule 4-1.9 Confidentiality and Former Clients

- ▶ Amendment to Bar Rule 4-1.9 Confidential Information/Former Clients
- ▶ Previous rule prohibited use of former client's information to that former client's disadvantage except when “these rules would permit or require” its use or when information has become generally known.
- ▶ Amended Rule 4-1.9(c) prohibits lawyer from revealing former client's information except as the rules permit or require; however, **there is no longer an exception in rule for information that has become generally known.**

# Bar Rule 4-1.5 Nonrefundable Fees

- ▶ Nonrefundable fees must be confirmed in writing
- ▶ Rule 4-1.5(e) was recently amended and two sentences were added:
- ▶ “A fee for legal services that is nonrefundable in any part shall be confirmed in writing and shall explain the intent of the parties as to the nature and amount. The test of reasonableness found in subdivision (b), above, applies to all fees for legal services without regard to their characterization by the parties.”

# Bar Trust Accounting Rules

- ▶ Chapter 5, Rules Regulating The Florida Bar Trust Account Records and Procedures was recently amended
- ▶ Rule 5-1.2 was amended to permit lawyers to keep trust account records “in their original format or stored in digital media as long as the copies include all data contained in the original documents and may be produced when required.”
- ▶ May also keep “clearly legible” copies of deposit slips instead of the originals if the copies include all data on the originals and clearly legible copies of original canceled checks, instead of originals, “if the copies include all endorsements and all other data and tracking information.”

# Lawyer Professionalism and Sanctions in Litigation

- ▶ *Robinson v. Robinson*, 88 So.3d 973 (Fla. 5th DCA 2012)
- ▶ In appeal of dissolution order, the 5th DCA criticized professionalism of one of the parties' lawyers.
- ▶ The opinion stated, in a footnote: "The former husband's counsel strongly disagreed with this court's entry of the stay order. Although it was not improper for counsel to express his disagreement with our decision, his disparaging comments regarding this court, made at a subsequent hearing below, fell far below the standards of professionalism expected of members of The Florida Bar. See, e.g., Preamble, Rules of Professional Conduct, R. Regulating Fla. Bar Ch. 4 ('A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers, and public officials.');
- ▶ Oath of Admission, *In re The Fla. Bar*, 73 So.3d 149 (Fla. 2011) ('I will maintain the respect due to courts of justice and judicial officers.')."



# Lawyer Professionalism and Sanctions in Litigation

- ▶ *Jones v. Publix Super Markets, Inc.*, \_\_ So.3d \_\_\_, 37 Fla.L.Weekly D1787 (Fla. 5th DCA, No. 5D09-4120, 7/27/2012), 2012 WL 3044250.
- ▶ Plaintiffs sued Publix in a slip and fall case. Despite a proper discovery request, defense counsel did not disclose the known address of a key witness.
- ▶ Opinion: “As we have already said about the willful non-disclosure of truthful facts in discovery: ‘A system that depends on an adversary’s ability to uncover falsehoods is doomed to failure, which is why this kind of conduct must be discouraged in the strongest possible way.’ [Citation omitted.] If trial counsel cannot be relied on to comply with their ethical obligations for something as basic as the address of a witness, we will either have to do a better job of punishing misconduct or devise an entirely new system. On remand to the trial court, the trial court shall award to the Joneses their expenses associated with the failure of Publix to disclose the [witness’s] address. **We further instruct the Clerk of this Court to forward this opinion to the Florida Bar for its examination of the conduct of counsel.**”

# The End!

- ▶ Thanks for your attention and...
- ▶ Be careful out there!

