I SEE DEAD PEOPLE!

ATTORNEY LIABILITY AND CONFLICT OF INTEREST CONSIDERATIONS IN ESTATE PLANNING… FROM A LITIGATOR'S PERSPECTIVE

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I. Introduction

Estate planning lawyers often seem to be oblivious to the dangers of potential conflicts. They cling to statements like "Model Rules of Professional Conduct were drafted for litigators!" and "This is the way we've always done it!" They would rather avert their eyes and choose to ignore the harsh realities.

The fact of the matter is that the Model Rules *do* apply to planning lawyers. In the estate planning context, lawyers face a myriad of legal and ethical issues which can create the potential for conflicts of interest and professional liability. Because of the dollars involved, the risks can be significant. Most attorneys are diligent, conscientious, and carry out their duties with good intentions. The liability visited upon good lawyers is rarely the result of intentional bad acts. Rather, it is often due to unclear communications, lack of documentation, or a failure to recognize that the situation presents a potential for conflict of interest.

These materials will focus on a number of areas in which potential for conflicts of interest arise in the estate planning practice. I do not suggest, nor do I contend, that these materials, or the authorities cited herein, are minimum standards of care or required standards of practice.

II. Who Is Your Client?

This question may sound obvious or even ridiculous, but for attorneys, answering this question correctly is critical. In almost all instances, the duties lawyers owe to clients are far more expansive than the duties they owe to anyone else. In the real world, this seemingly innocuous question can prove to be quite tricky. It is important that a lawyer have a clear understanding of the identity of the client and in what capacity the lawyer represents that client. This is true from the first informal communications outside the office, to the initial interview with a prospective client (including a so-called "beauty contest"), to the formal retention of the lawyer, to the ongoing work for the client and all the way to the termination of the attorney/client relationship. A lawyer needs to be clear about the legal status of his professional relationships, whether they are collateral contacts with a client's children, spouse or significant other, or communications with heirs or creditors of an estate or trust.

A. Establishing the Attorney Client Relationship- Blurred Lines

The following scenarios will highlight some issues that arise frequently in everyday practice.

1. Example – The Bad Son

Assume you have an 82 year old estate-planning client who has been coming to see you for more than 10 years. During the last 5 years, the client has declined. He has good and bad days. On good days, he seems to have full capacity. On the bad days, you are not so sure. The client's son accompanies him to all his meetings. The son assists his father with all of his business decisions and investments. The son has called your firm on various occasions to get advice and information, presumably for his father. You have worked closely with the son to carry out the father's legal needs and desires. It is now discovered that the son may have been embezzling from his father. The father would like you to represent him in connection with a claim against the son. Can you do so ethically?

2. Example – The Dutiful Son

You represent the personal representative of the Estate of I.C. Trouble. The beneficiaries of the Estate are the decedent's wife and his three children. Trouble's wife is the personal representative. You frequently field calls from their son, I.M., who claims to be a spokesman for the other two children. You quickly build a good rapport with I.M., who calls you asking for information about the Estate and his rights. You talk to him about his rights under the will, accounting procedures, and the timing for filing objections. You do these things with the understanding that you are simply providing him with "information," and never with the expectation that he would ever claim to be a client of the firm. In the event there is an accounting dispute later, can you defend the personal representative in the accounting dispute?

3. Example – The Good Son

You meet Sonny at a cocktail party. You get to talking and he asks you to draft testamentary documents for his father. Sonny also asks you to assist in transferring assets to Sonny and his siblings to assist his father in becoming Medicaid eligible. Sonny is one of the beneficiaries of the transfers. Who do you represent?

B. Key Considerations

The answer to these hypothetical questions is "it depends." Pursuant to Rule 4-1.7(a) of the Rules Regulating the Fla. Bar, 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.

Notwithstanding the existence of a conflict of interest under these circumstances, Rule 4-1.7(b) states that 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.

1. Subjective Belief of the Client

In determining whether the child in these examples is a client of your firm, it makes little difference what you believe. Under Florida law, the test for determining the existence of an attorney client relationship is a subjective one and hinges on the client's belief that he is consulting a lawyer in that capacity and that his manifested intention is to seek legal advice. Mansur v. Podhurst Orseck, P.A., 994 So. 2d 435 (Fla. 3d DCA 2008); Bartholomew v. Bartholomew, 611 So. 2d 85 (Fla. 2d DCA 1992); The Florida Bar v. Beach, 675 So. 2d 106 (Fla. 1996). A court may find that you reasonably believed that the son was not your client, but nonetheless hold that you are disqualified from representing the father or the personal representative because it is the son's belief that matters. That said, the son's belief must be a reasonable belief.

2. No Formal Act Is Required

It takes very little overt action to establish an attorney-client relationship. For example, an individual does not actually have to hire the lawyer in order for an attorney-client relationship to exist. Garner v. Somberg, 672 So. 2d 852 (Fla. 3d DCA 1996); Dean v. Dean, 607 So. 2d 494 (Fla. 4th DCA 1992); Metcalf v. Metcalf, 785 So. 2d 747 (Fla. 5th DCA 2001). Likewise, the relationship or contact with the lawyer does not need to be long or complicated. Id.

3. A Fee Is Not Required

In dealing with potential clients, you should also keep in mind that a fee is not necessary to form an attorney-client relationship. The Florida Bar v. King, 664 So. 2d 925 (Fla. 1995); Dean v. Dean, 607 So. 2d 494 (Fla. 4th DCA 1992); Metcalf v. Metcalf, 785 So. 2d 747 (Fla. 5th DCA 2001).

4. A Writing Is Not Required

Florida law is clear that a writing is not necessary to form an attorney-client relationship. Eggers v. Eggers, 776 So. 2d 1096 (Fla. 5th DCA 2001). There is, however, an important exception to this rule. Rule Regulating the Fla. Bar 4-1.5(f) provides that contingent fee agreements must be in writing and shall state the method by which the fee is to be determined.

5. Dealing With Children, Third Parties & Beneficiaries

It is not unusual for lawyers and corporate fiduciaries in the trusts and estate field to deal with unrepresented parties. These individuals may be children of estate planning clients, beneficiaries of a trust or an estate under administration or creditors of a deceased client. It is important to avoid the appearance of simultaneously representing adverse interests, especially where an opposing part may be unfairly induced to rely on the attorney's advice and skill in preparing legal documents. In The Florida Bar v. Belleville, 591 So. 2d 170 (Fla. 1991), an attorney was suspended 30 days for failing to explain to an unrepresented party the fact that the attorney is representing an adverse interest and failing to explain the material terms of the documents that the attorney has drafted for the client so that the opposing party fully understands their actual effect. The Court held that in a one-sided transaction counsel preparing the documents "is under an ethical duty to make sure that an unrepresented party understands the possible detrimental effect of the transaction and the fact that the attorney's loyalty lies with the client alone." Id. at 172.

It is important to keep the identity of the client clear when you deal with third parties, such as the children of your estate planning clients or beneficiaries of an estate. In The Florida Bar v. Maurice, 955 So. 2d 535 (Fla. 2007), an attorney was disciplined, in part, for letting these lines blur. The Court approved the Florida Bar referee's conclusions, finding that the attorney's judgment in representing a decedent's children was "clouded" by her expressed concern for the decedent's caretakers. Id. at 537. The Court found that the attorney's conduct violated Rule Regulating the Fla. Bar 4-1.7(b). Id. at 540.

Although a lawyer for the personal representative of an estate owes fiduciary duties to the personal representative and the beneficiaries of the estate, this does not necessarily mean that the lawyer and the beneficiaries have an attorney-client relationship. In re Estate of Gory, 570 So. 2d 1381 (Fla. 4th DCA 1996).

However, practitioners should be aware that in Jacob v. Barton, 877 So. 2d 935, 937 (Fla. 2d DCA 2004), the court, in addressing the application of the attorney-client privilege where the attorney represented a trustee, noted that in some circumstances, "the beneficiary may be the person who will ultimately benefit from the legal work the trustee has instructed to attorney to perform." Under these circumstances, the beneficiary may be considered the attorney's "real client" and would hold the attorney-client privilege. Id.; *See also* Riggs Nat'l Bank of Washington, D.C. v. Zimmer, 355 A.2d 709 (Del.Ch. Ct. 1976)(stating that legal memorandum regarding tax issues, prepared before beneficiaries' litigation against trustee began, was prepared for the benefit of the trust beneficiaries); Tripp v. Salkovitz, 919 So. 2d 716, 718-19 (Fla. 2d DCA 2006)(discussing the holding in Jacob).

C. Reviewing Estate Planning Documents for Out of State Lawyers

1. Hypothetical Fact Pattern

Willy Willdrafter is a New York lawyer who represents a number of very wealthy New York clients. One of his clients, Donny Deepocketz, has a residence in Palm Beach and a penthouse apartment in New York City. Donny has declared his domicile to be in Florida and spends most of the year in Florida. Willy has prepared new estate planning documents, including a will, revocable trust, Florida durable power of attorney, and designation of health care surrogate for Donny. Willy has sent you business in past and asks whether you can review the documents for "Florida compliance" and supervise the execution of the documents for Donny who is currently in Florida. Can you assist Willy? Who is the client- Willy or Donny?

2. Key Considerations

a. Unauthorized Practice of Law. The Florida Bar, Florida attorneys, and the citizens of Florida undoubtedly have an interest in making sure that out-of-state unlicensed attorneys are not permitted to practice law in the State of Florida. Among other things, it maintains the integrity of the legal profession. In fact, the unlicensed practice of law in Florida is a third degree felony. Pursuant to Rule 4-5.5(a) of the Rules Regulating the Florida Bar, Florida lawyers are not permitted to assist a non-lawyer in engaging in the unlicensed practice of law. Would it be considered aiding and abetting the unauthorized practice of law to assist Willy Willmaker?

The definition of unlicensed practice of law in Rule 10- 2.1(c), Rules Governing the Investigation and Prosecution of the Unlicensed Practice of Law, covers attorneys admitted in other jurisdictions who are not licensed to practice in Florida. Florida courts have defined practice of law broadly:

> "if the giving of [the] advice and performance of [the] services affect important rights of a person under the law, and if the reasonable protection of the rights and property of those advised and served requires that the persons giving such advice possess legal skill and a knowledge of the law greater than that possessed by the average citizen, then the giving of such advice and the performance of such services by one for another as a course of conduct constitute the practice of law."

Florida Bar v. Sperry, 140 So. 2d 587, 591 (Fla. 1962), vacated on other grounds, 373 U.S. 379 (1963).

When applying this test, courts have held that "the single most important concern in the Court's defining and regulating the practice of law is the protection of the public from incompetent, unethical, or irresponsible representation." Florida Bar v. Moses, 380 So. 2d 412, 417 (Fla. 1980). The Florida Supreme Court noted in Sperry that the practice of law includes the rendering of advice to others as to their rights and obligations under the law even though such matters may not then or ever be subject to proceedings in court. Sperry, 140 So. 2d at 591.

Rule 4-5.5(c)(4) provides a broad exception that allows an out-of-state lawyer to provide legal services on a "temporary basis" in Florida if they are performed for a client who resides in or has an office in the jurisdiction in which the lawyer is authorized to practice.

Further, over 30 years ago, in Florida Bar v. Larkin, 298 So.2d 371 (Fla. 1974), the Florida Supreme Court seemed to endorse the practice of having Florida counsel review documents prepared by an out-of-state attorney. In Larkin, the Supreme Court of Florida determined that the preparation of a will by a person not authorized to practice law in the State of Florida constituted the unlicensed practice of law. However, the Larkin court suggested that if the out-of-state attorney had the documents reviewed and approved by a Florida lawyer, the out-of-state attorney would avoid the claim of the unlicensed practice of law. Many practitioners followed the tacit approval of the Florida Supreme in the Larkin opinion.

In 2003, Florida Bar ethics counsel created a stir when it issued Florida Bar Staff Opinion 24894 (September 3, 2003). The opinion dealt with how a Florida lawyer should respond to correspondence or demands from out-of-state lawyers who are legal advice to their clients interpreting Florida real estate documents, Florida condominium documents, and Florida law in general. The opinion noted, in many instances, the lawyers are writing on behalf of clients who reside in Florida part-time and have a residence in the location where the lawyer is admitted. Florida Bar ethics counsel considered the activities of the out-of-state lawyer in writing demand letters and interpreting Florida legal documents as the unauthorized practice of law.

Shortly after this opinion was released, ActionLine printed article wherein the author opined that if this ethics opinion were interpreted literally it may prohibit Florida lawyers from reviewing estate planning documents for out-of-state lawyers because it could amount to the aiding and abetting the unauthorized practice of law. Keith S. Kromash, A Primer on Florida Attorneys' Ethical Obligation to Avoid Assisting in the Unauthorized Practice of Law- Florida Bar Staff Opinion 24894, ActionLine, The Florida Bar, RPPTL Section (Spring 2004). Many other commentators picked up on this issue around the country.

Ultimately, the Division Director for Ethics, UPL, and Professionalism for the Florida Bar took the unique step of writing a letter to the Chair of the RPPTL Section on May 25, 2004 clarifying the Staff Opinion and the ActionLine article. The letter is published in the ActionLine Fall 2004 edition. The letter noted that the Staff Opinion was written in response to a specific set of facts regarding an attorneys own conduct and is not necessarily applicable to anyone other than the inquiring attorney on the specific facts presented. The letter noted that the ActionLine article presented "additional facts and scenarios not presented in the staff opinion" as well as opinions that are not necessarily that of The Florida Bar. The letter noted:

> "There are many situations where a Florida attorney may communicate with a member of another state bar on Florida matters. For example, out-of-state attorneys may consult with a Florida attorney on Florida law as it relates to a real estate transaction for the purpose of giving that information to their client or incorporating that information into an opinion for their client. Such communication is not prohibited. Nor is the Florida attorney prohibited from

reviewing the documents as stated in the article. As noted in the article, Florida attorneys are often asked to review estate planning documents drafted by out-of-state attorneys. This review is not improper and is in fact encouraged."

Thus, it appears that a Florida lawyer, at least in some circumstances, may safely review estate planning documents prepared by out of state counsel.

b. Who is the client? Assuming the unauthorized practice of law issues are not implicated, there is still a second issue which needs to be addressed, to wit, who is the client? Can the lawyer review the documents on behalf of the law firm and receive compensation from the law firm? Is it better to represent the client or the firm? The answers are unclear. However, the following issues should be considered:

- Rule 4-1.2 permits a lawyer to limit the scope of a representation if the limitation is reasonable under the circumstances and the client gives informed consent confirmed in writing. If your review is limited to "Florida compliance", does it make sense to have the client confirm the scope of the representation? Does the client understand the scope of your review?

- Rule 4-1.4 requires a lawyer to communicate with the client and explain a matter to the extent reasonably necessary to permit the client to make an informed decision.

- Rule 4-1.5(g) only permits a division of fees between lawyers who are not in the same firm if the total fee is reasonable and (a) the division is in proportion to the services performed by each lawyer; or (b) the client agrees in writing, each lawyer assumes joint responsibility and is available to consult with the client, and the fee agreement specifies the division of fees.

- Rule 4-1.6, which is patterned on the model rule, requires a lawyer to keep information confidential unless it is reasonably necessary to serve a client's interest.

Most lawyers expect that they will be charged with the duty to properly supervise other lawyers within their own firm. However, many lawyers may not realize that, under certain circumstances, they may have duties to supervise a lawyer who is not only associated with another law firm, but who practices law in another state. In the case of Whalen vs. Degraff, 863 N. Y. S. 2d 100 (2008 N. Y. Slip Op. 06342), plaintiff/client initially retained defendant/lawyer ("Lawyer 1") to represent her in a partnership dispute. Lawyer 1 ultimately obtained a judgment for client in the amount $1,235,976.00 against Julius Gerzof. Before the judgment was satisfied, Gerzof died a resident of Florida. Lawyer 1 sought the assistance of a Florida attorney ("Lawyer 2") to preserve client's rights against Gerzof's estate. Lawyer 2 did not properly preserve client's rights in Gerzof's estate and Lawyer 1 got sued by client for, among other things, vicarious liability for Lawyer 2's action and/or negligently failing to supervise Lawyer 2. The court ultimately found Lawyer 1 liable for damages to client.

The court found that the general rule is that a lawyer is not ordinarily liable for the acts or omissions of co-counsel in another firm because that lawyer is usually an independent agent of the client. (Restatement (Third) of Law Governing Lawyers, § 58, comment e) In this case,

however, Lawyer 1 solicited Lawyer 2 and obtained his assistance without client's knowledge. Although client was later advised that Lawyer 2 had been retained by Lawyer 1, client had no contact with Lawyer 2 and did not enter into a retainer agreement with Lawyer 2. Lawyer 1 conceded that client completely relied on him to take the necessary steps to protect her interests in the Florida estate. The court found that under those circumstances, Lawyer 1 assumed responsibility to client for the Florida estate claim and Lawyer 2 became a "sub-agent" of Lawyer 1. As such, Lawyer 1 had a duty to supervise the actions of Lawyer 2. The court again cited to Restatement (Third) of Law Governing Lawyers, § 58, comment e, as well as Restatement (Third) Agency, § 3.15 and Restatement (Second) Agency, §§ 5 and 406.

Another example where three of the Four Horsemen doomed the lawyer (poor communication, inadequate documentation and failure to properly identify legal relationships).

D. When Does A "Current Client" Become a "Former Client"?

This can be a difficult question for estate and trust lawyers. There are many reasons why a lawyer may wish to terminate the attorney/client relationship once the task at hand is complete.

We know that the rules governing conflicts of interest for current clients (e.g. Model Rule 1.7) are much more restrictive than the rules governing conflicts of interest with former clients (e.g. Model Rule 1.9). Further, in many states the "continuing representation doctrine" may toll the statute of limitations for professional malpractice until the representation terminates. See e.g., Wilder v. Meyer, 779 F. Supp. 164 (S.D. Fla. 1991). In addition, a lawyer may have a number of continuing duties (and associated liabilities) to "current" or "dormant" clients, even though the client's estate planning documents have long been resting in the attorney's will vault.

On the other hand, a lawyer may value the client and wish to continue the representation. Some lawyers do not want to offend a client with an "I don't represent you" letter. Many estate planning lawyers hope the client will consider them when the client has future business or that the attorney will have some role in administering the client's estate.

There is a well drafted section of Freivogel on Conflicts (www.freivogelonconflicts.com) which discusses this topic. In addition, the ACTEC Commentaries on the Model Rules of Professional Conduct relating to Model Rules 1.8 and 1.4 are very instructional.

Although this topic is very fact specific, there are a few common themes worth noting. First, the relationship between a lawyer and a client is consensual and, under most circumstances, it can be terminated at any time by any party. That same concept applies to corporate fiduciaries and their customers. As to the lawyers, there are certain exceptions to this rule in the litigation context where court approval may be required before the attorney and client may sever their relationship. However, in most circumstances, a clear writing should accomplish the task of severing the lawyer-client relationship. Under some circumstances, the passage of time has been held to terminate the lawyer-client relationship. Several cases on this point are cited within the Freivogel and ACTEC materials referenced above. Finally, a client's disability may terminate the attorney/client relationship. See Restatement (Third) of the Law Governing Lawyers § 24 (2000) and comments thereto.

In the estate planning area, it is fairly common to see what has been described as a "dormant" relationship. In a "dormant" relationship, the active representation, such as the task of preparing estate planning documents, has been completed but the relationship has not been formally terminated. See ACTEC Commentaries on the Model Rules of Professional Conduct comment to Model Rule 1.4. The Commentaries state as follows:

> "The execution of estate planning documents and the completion of related matters, such as changes in beneficiary designations and the transfer of assets to the trustee of a trust, normally ends the period during which the estate planning lawyer actively represents an estate planning client. At that time, unless the representation is terminated by the lawyer or client, the representation becomes dormant, awaiting activation by the client. At the client's request the lawyer may retain the original documents executed by the client . . . Although the lawyer remains bound to the client by some obligations, including the duty of confidentiality, the lawyer's responsibilities are diminished by the completion of the active phase of the representation. As a service the lawyer may communicate periodically with the client regarding the desirability of reviewing his or her estate planning documents. Similarly, the lawyer may send the client an individual letter or a form letter, pamphlet, or brochure regarding changes in the law that might affect the client. In the absence of an agreement to the contrary, a lawyer is not obligated to send a reminder to a client whose representation is dormant or to advise the client of the effect that changes in the law or the client's circumstances might have on the client's legal affairs."

Concepts of dormant representation can make it difficult to determine whether an estate planning client is "current" or "former" client for purposes of conflict of interest analysis. The ACTEC Commentaries suggests that a client whose representation by the lawyer is dormant only becomes a former client if the lawyer or the client terminates the representation. "The lawyer may terminate the relationship in most circumstances, although the disability of a client may limit the lawyer's ability to do so. Thus, the lawyer may terminate the representation of a competent client by a letter, sometimes called an "exit" letter, that informs the client that the relationship is terminated. The representation is also terminated if the client informs the lawyer that another lawyer has undertaken to represent the client in trusts and estates matters. Finally, the representation may be terminated by the passage of an extended period of time during which the lawyer is not consulted." ACTEC Commentary on MRPC 1.4.

There are two good examples included in the ACTEC Commentaries explaining the concept of dormant representation in typical estate planning scenarios.

Example 1.4-1. Lawyer (L) prepared and completed an estate plan for Client (c). At C's request L retained the original documents executed by C. L performed no other legal work for C in the following two years but has no reason to believe that C has engaged other estate planning counsel. L's representation of C is dormant. L may, but is not obligated to, communicate with C regarding changes in the law. If L communicates with C about changes in the law, but is not asked by C to perform any legal services, L's representation remains dormant. C is properly

characterized as a client and not a former client for purposes of MRPCs 1.7 and 1.9.

Example 1.4-2. Assume the same facts as in Example 1.4-1 except that L's partner (P) in the two years following the preparation of the estate plan renders legal services to C in matters completely unrelated to estate planning, such as a criminal representation. L's representation of C with respect to estate planning matters remains dormant, subject to activation by C.

ACTEC Commentary on MRPC 1.4.

III. Fiduciary Appointments

A. Drafting Lawyer Named as Fiduciary

There are many good reasons why a client may wish to appoint their attorney as a fiduciary. Many commentators have pointed out that often the lawyer who drafts the will or trust is the one best-suited to serve as personal representative or trustee because of their training in issue spotting and analysis, substantive law, communication, conflict resolution, and legal ethics. *See generally* ABA Formal Op. 02-426 (May 31, 2002); Edward D. Spurgeon & Mary Jane Ciccarello, The Lawyer in Other Fiduciary Roles: Policy and Ethical Considerations, 62 Fordham L. Rev. 1357, 1378-79 (1994).

However, this does not mean that a lawyer may *solicit* such appointments with impunity. **On November 9, 2017, the Florida Supreme Court adopted a change to the comments to Rule 4-1.8 of the Rules Regulating the Florida Bar specifically addressing the issue of fiduciary appointments.** The text of the change is as follows:

> **"This rule does not prohibit a ~~lawyer from seeking to have the~~ lawyer or a partner or associate of the lawyer ~~named~~ from serving as personal representative of the client's estate or ~~to~~ 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 person related to the lawyer to a fiduciary office so long as 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. ~~Nevertheless, such appointments will be subject to the general conflict of interest provision in rule 4-1.7 when there is a significant risk that the lawyer's interest in obtaining the appointment will materially limit the lawyer's independent professional judgment in advising the client concerning the choice of a personal representative or other fiduciary~~. In obtaining the client's informed consent to the conflict, the lawyer should advise the client in writing concerning ~~the nature and extent of the lawyer's financial interest in the appointment, as well as the availability of alternative candidates for the position~~ 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 attorneys' fees that**

the lawyer or the lawyer's firm may earn for serving as a lawyer for the fiduciary."

Note that this change to the Comments does two things. First, it removes the language which seemed to permit a lawyer to *seek* a fiduciary appointment. It specifically provides that the appointment cannot be the product of improper solicitation. There have been bar opinions and legal decisions addressing this issue which will be discussed in more detail below. Second, it requires a lawyer to obtain the client's consent confirmed in writing and requires disclosures in writing as to who is eligible to serve, the fact that they lawyer may be entitled to a fee for serving, and that the fiduciary fee may be in addition to any legal fees that the lawyer may earn for serving as lawyer for the fiduciary.

The American College of Trusts and Estates Counsel ("ACTEC") has promulgated its own Commentaries to the Model Rules of Professional Conduct which contain an extensive discussion concerning the appointment of the lawyer as a fiduciary. *See ACTEC Commentaries on the Model Rules of Professional Conduct, ACTEC Commentary on MRPC 1.7* (ACTEC Foundation 5th ed. 2016). The ACTEC Commentaries provide that "a lawyer should be free to prepare a document that appoints the lawyer to a fiduciary office so long as the client is properly informed, the appointment does not violate the conflict of interest rule of MRPC 1.7, and the appointment is not the product of undue influence or improper solicitation by the lawyer."

The Commentaries note that:

"a client is properly informed if the client is provided with information regarding the role and duties of the fiduciary, the ability of a lay person to serve as fiduciary with legal and other professional assistance, and the comparative costs of appointing the lawyer or another person or institution as fiduciary."

Id.

The American Bar Association has issued a Formal Opinion on this issue as well. The ABA opines that:

One of a lawyer's important responsibilities in providing estate planning for his client is to help her select an appropriate personal representative to administer her estate and a trustee to manage any trust established by the will. The lawyer is required by Rule 1.4(b) to discuss frankly with the client her options in selecting an individual to serve as fiduciary. This discussion should cover information reasonably adequate to permit the client to understand the tasks to be performed by the fiduciary; the fiduciary's desired skills; the kinds of individuals or entities likely to serve most effectively, such as professionals, corporate fiduciaries, and family members; and the benefits and detriments of using each, including relative costs. When exploring the options with his client, the lawyer may disclose his own availability to serve as a fiduciary. The lawyer must not, however, allow his potential self interest to interfere with his exercise of independent

> **professional judgment in recommending to the client the best choices for fiduciaries. When there is a significant risk that the lawyer's independent professional judgment in advising the client in the selection of a fiduciary will be materially limited because of the potential amount of the fiduciary compensation or other factors, the lawyer must obtain the client's informed consent and confirm it in writing. When the client is considering appointment of the lawyer as a fiduciary, the lawyer must inform the client that the lawyer will receive compensation for serving as fiduciary, whether the amount is subject to statutory limits or court approval, and how the compensation will be calculated and approved. The lawyer also should inform the client what skills the lawyer will bring to the job as well as what skills and services the lawyer expects to pay others to provide, including management of investments, custody of assets, bookkeeping, and accounting. The lawyer should learn from the client what she expects of him as fiduciary and explain any limitations imposed by law on a fiduciary to help the client make an informed decision. One reason for selecting the lawyer as fiduciary is his capacity to handle the legal services that will be required from time to time. The lawyer should discuss with the client the fact that the lawyer, acting as fiduciary, may select himself or his firm to serve as the lawyer for the trust or estate, with the result that additional fees may be received by the lawyer.**

ABA Formal Op. 02-426 (May 31, 2002).

Because of the potential for overreaching, some states have enacted statutory safeguards to ensure that the decision by the client to select the lawyer as fiduciary is an informed one. In California, a drafting lawyer who is unrelated to the client is subject to removal unless (1) an independent attorney certifies on a statutory form that the appointment was not the product of fraud or undue influence before the document is executed or (2) the court finds that it is consistent with the settlor's intent that the trustee continue to serve and that the appointment was not the product of fraud or undue influence. Cal. Prob. Code § 15642(b)(6). The California statutes also limit the amount of compensation that the attorney can receive. California Probate Code § 10804 specifically provides that "a personal representative who is an attorney shall be entitled to receive the personal representative's compensation as provided in this part, *but shall not receive compensation for services as the attorney for the personal representative unless the court specifically approves the right to the compensation in advance and finds that the arrangement is to the advantage, benefit, and best interests of the decedent's estate*."

New York has followed a similar approach requiring the client sign an affidavit acknowledging the alternatives for the appointment of an executor and the nature and extent of the compensation that the lawyer may be entitled to receive. The failure to obtain the affidavit reduces the amount of the executor commissions payable to the lawyer by one-half. *See* NY Surr. Ct. P. R. § 2307-a.

Some have argued that our Florida Statutes permit the lack of disclosures made to the client to be considered in setting a fee for a lawyer who serves in the dual roles of personal representative and attorney for the personal representative. *See* John Arthur Jones and Rohan

Kelley, *Fees and Other Expenses of Administration, PRACTICE UNDER FLORIDA PROBATE CODE* §15.52 (Fla. Bar CLE 2010). The Florida Statutes allow the Court to consider the fees paid to the personal representative in other capacities in setting a reasonable fee. "Any fees and compensation paid to a person who is the same as, associated with, or employed by, the personal representative shall be taken into consideration in determining the personal representative's compensation." Fla. Stat. § 733.612(19). ABA Opinion 02-426 discussed above provides that the fiduciary compensation that a lawyer and his firm receive for time and labor is relevant in determining what amount of fees is ethically permissible and reasonable under Model Rule 1.5(a). A lawyer who charges excessive compensation as a fiduciary could be found guilty of a bar violation. In Florida Bar v. Della-Donna, 583 So. 2d 307, 309 (Fla. 1989), a lawyer was disbarred for 5 years for charging excessive fiduciary fees and engaging in conflict of interest transactions in various fiduciary capacities as personal representative and trustee.

There have been a number of cases and ethics opinions wherein lawyers have been criticized for soliciting or routinely preparing documents appointing themselves as fiduciaries. Michigan Eth. Op. RI-291 (1997) draws a distinction between accepting an appointment if asked independently by the client and suggesting or soliciting the appointment by the lawyer. The Michigan Bar indicated that solicitation of a fiduciary appointment is akin to solicitation of legal work which is clearly a violation of the bar rules. In State v. Gulbankian, 196 N.W.2d 733 (Wis. 1972), lawyers were disciplined for consistently drafting wills which named themselves or their relatives as fiduciaries. In that case, the lawyers filed 135 wills, which they had drafted, for probate in their local county over a period of 14 years. Only one will of those wills failed to name a member of the lawyer's family to some fiduciary capacity. The Gulbankian court found that there sheer number of wills was sufficient to raise an inference that the attorneys had solicited their appointments. The court held that "an attorney cannot solicit either directly or by any indirect means a request or direction of a testator that he or a member of his firm be named executor or be employed as an attorney to probate the estate" nor can the attorney "use a will form which provides for a designation of an attorney for the probate of the estate or executor for submission to the testator on the theory it is properly a part of a standard form of a will; no such form of suggestion may be used." The court noted that an attorney, merely because he drafts a will, "has no preferential claim to probate it."

New York Eth. Op. 481 (1977) cautions that a lawyer may prepare a will in which the lawyer is appointed as fiduciary only if there has been a longstanding relationship between the lawyer and client and the suggestion that the lawyer serve as fiduciary originates with the client.

As set forth above, there is no, per se, statutory or ethical prohibition in Florida on lawyers preparing documents appointing themselves as fiduciaries. However, it is important to document the nature of the disclosure which was made to the client to avoid allegations of overreaching and improper conduct. Former EC 5-6 of The Florida Bar Code of Professional Responsibility provided: **"A lawyer should not consciously influence a client to name him as executor, trustee, or lawyer in an instrument. In those cases, where a client wishes to name his lawyer as such, care should be taken by the lawyer to avoid even the appearance of impropriety".**

In the case of Rand v. Giller, 489 So. 2d 796 (Fla. 3d DCA 1986), the court grappled with the difficulties involved when a lawyer fails to confirm the nature of the discussion concerning

the selection of a fiduciary in writing. In Rand v. Giller, a beneficiary and co-personal representative of an estate filed an action to remove a lawyer, Mr. Giller, who had prepared a will which nominated himself as personal representative. Mr. Giller had only know the decedent for a "few hours" at the time the will was prepared. Judge Nesbitt, writing for the court, noted that:

> Giller testified that he attempted to discourage Mrs. Rosen from appointing him and his law firm as co-personal representative and trustee, but that she indicated a desire that they serve in those capacities. There was no documentary or testimonial evidence to corroborate that fact. *For the benefit of the bar, we strongly suggest that attorneys establish procedures for such cases which allow for evidence, other than the self-serving testimony of the attorney involved, of the care taken to avoid the appearance of impropriety*.

Rand v. Giller, 489 So. 2d at 797, n. 2.

B. Attorney Conflicts and Liability in Recommending a Fiduciary

It is common for a drafting lawyer to be asked by a client for a suggestion as to who should serve as corporate fiduciary. When this issue arises, practitioners should consider the potential for allegations of conflict if the client ultimately selects a fiduciary which the lawyer or the lawyer's firm represents on unrelated matters. **The ACTEC Commentaries to the Model Rules provide that a client should be informed "of any significant lawyer-client relationship that exists between the lawyer or the lawyer's firm and a corporate fiduciary under consideration."** ACTEC Commentary on MRPC 1.7, Appointment of Scrivener as Fiduciary. The Commentaries caution that:

> **The lawyer advising a client regarding the selection and appointment of a fiduciary should make full disclosure to the client of any benefits that the lawyer may receive as a result of the appointment. In particular, the lawyer should inform the client of any policies or practices known to the lawyer that the fiduciaries under consideration may follow with respect to the employment of the scrivener of an estate planning document as counsel for the fiduciary. The lawyer may also point out that a fiduciary has the right to choose any counsel it wishes. If there is a significant risk that the lawyer's independent professional judgment in the selection of a fiduciary would be materially limited by the lawyer's self interest or any other factor, the lawyer must obtain the client's informed consent, confirmed in writing.**

ACTEC Commentary on MRPC 1.7, Selection of Fiduciaries.

In Gunster, Yoakley & Stewart, P.A. v. McAdam, 965 So. 2d 182 (Fla. 4th DCA 2007), two beneficiaries sued the law firm alleging that a lawyer in the firm wrongfully procured a corporate fiduciary's appointment and "caused the estate administration to be more expensive" by suggesting a client of the firm to serve as a fiduciary. The beneficiaries sought damages for "all avoidable probate expenses" as well as disgorgement of fees paid for estate planning. Basically, the plaintiffs alleged that a corporate fiduciary was unnecessary, but that JP Morgan

and the Gunster law firm, acting in cahoots, by unlawful, unethical and deceitful means, procured JP Morgan's appointment solely for the personal enrichment of the bank and the law firm. Plaintiffs' settled their claims with JP Morgan and proceeded to trial against Gunster Yoakley where they ultimately won a $1.2 million jury verdict, which was reduced on remittitur to a final judgment of approximately $1 million.

This case contains several significant rulings. First, the court ruled that plaintiffs could collaterally attack the law firm for recommending a corporate fiduciary by bringing an action against the firm for breach of fiduciary duty, constructive fraud, civil conspiracy, negligence and unjust enrichment, because the relief sought was not available in probate court. Id. at 183. The court also found that the issue of whether the law firm had a duty to fund decedent's revocable trust during the decedent's lifetime was an issue for the jury. Id. Even though there was no direct evidence on that point, the court determined that there was sufficient evidence for the jury to determine that the law firm had "implicitly agreed" to fund the trust. The court cited Lane v. Cold, 882 So. 2d 436 (Fla. 1st DCA 2004) for the proposition that, in an action for breach of fiduciary duty, a party may demonstrate that the attorney implicitly agreed to undertake certain responsibilities.

Further, the court allowed an award of damages against the law firm under the "Wrongful Act Doctrine." This doctrine states that where the wrongful act of a defendant causes plaintiff to be involved in litigation with others, and places the plaintiff in a situation which makes it necessary for the plaintiff to incur expenses to protect its interests, such costs and expenses, including reasonable attorneys' fees may be recovered as an element of damages. (Quoting Baxter's Asphalt & Concrete, Inc. v. Liberty County, 406 So. 2d 461 (Fla. 1st DCA 1981)). Finally, the court upheld a summary judgment in favor of the law firm on the plaintiff's family limited partnership claim finding that that claim was too speculative to withstand summary judgment because there was insufficient proof of damages or source of funding. Id. at 184.

As in so many other cases, alleged conflicts were a factor in this case. Because the law firm represented JP Morgan on unrelated matters, plaintiffs were able to allege that the law firm had a conflict of interest and that based on the law firm's conflict of interest, it could not provide the testator with independent advice regarding the necessity of the corporate fiduciary or give him independent advice regarding his ability to negotiate JP Morgan's fees for serving as a fiduciary. Unfortunately, regardless of whether the client was fully advised about the law firm's relationship with the bank, and advised to seek independent advice, if this fact is not in writing, it is most often treated as if it did not happen.

When counseling a client regarding the use of a corporate fiduciary, a lawyer's exposure to liability will certainly be reduced with a writing setting forth the following: 1) an explanation of the pros and cons of the use of a corporate fiduciary; 2) an adequate disclosure of any relationship between the law firm and the bank and, if there is any significant relationship, a suggestion that the client obtain independent advice regarding the nomination of the bank as a fiduciary; 3) the lawyer may want to give the client the names of several institutions; 4) informing the client that the terms of the corporate fiduciary's service may be negotiable, that this can be done by the client during his lifetime, and that the client should seek whatever independent advice he feels is necessary to be fully informed if he chooses to engage in these negotiations; and 5) a summary of your discussions with the client about his ability to include in

the will or trust a provision allowing the beneficiaries to remove and replace the nominated corporate fiduciary (possibly with another corporate fiduciary).

Another interesting case involving similar issues is the Georgia Court of Appeals case of Savu v. SunTrust Bank, 668 S. E. 2d 276 (Ga. App. 2008). The Savu case, like the McAdam case, centered on allegations by estate beneficiaries that the estate planning lawyer and the corporate fiduciary had conspired to enrich each other at the expense of the testator and the estate's beneficiaries. In Savu, the George Court of Appeals exonerated the lawyer and the bank.

In Savu, the testator was a SunTrust customer. SunTrust recommended the drafting lawyer to the testator. Thereafter, the lawyer prepared testamentary documents naming SunTrust as a co-executor of the estate. After the testator died and SunTrust was appointed as co-executor, it employed the attorney who drafted the will to provide the bank with legal services in the administration of the estate.

The beneficiaries of the estate sued the bank for its decision to employ the lawyer the bank had recommended to the testator, alleging a conflict of interest. They also sued the bank for breach of fiduciary duty for failure to bring a legal malpractice action against the attorney based on allegations that the attorney failed to advise the testator about the use of a family limited partnership as an estate tax savings strategy; and they alleged that a fiduciary relationship was formed when the bank advised the testator to seek estate planning advice.

The court held that the bank's decision to employ the attorney it had recommended did not create a conflict of interest and that the practice of employing the attorney who drafted the testator's will to provide legal services in the administration of the estate was a practical decision and was common in the community. Further, the court found that there was no evidence that the estate attorney had recommended to the testator that he name the bank as a co-executor. It also seemed to be helpful that the will gave the testator, or a majority of the beneficiaries, the power to remove the bank as co-executor and substitute another qualified bank or trust company. The court also found that the bank did not breach its fiduciary duty by failing to bring a legal malpractice action against the estate attorney for failing to advise the testator about the use of a family limited partnership as a tax savings strategy. The evidence at trial indicated that the attorney had advised the testator about the use of a family limited partnership but that the proposal was rejected by the testator. Finally, the court held that a fiduciary relationship was not created when the bank advised the testator to seek estate planning advice. Although the bank advised the testator to engage in estate planning for the purpose of saving taxes, the bank referred the testator to a competent attorney for advice on the specific strategies to employ. Therefore, the court found that the bank did not undertake to advise the testator on specific strategies and that the testator could not have reasonably relied on the bank for such advice.

C. Drafting Considerations

As indicated above, there are many good reasons why a client may choose to appoint a lawyer as fiduciary, including, among other things, their knowledge and experience in the area as well as the familiarity with the client's wishes and affairs. Likewise, a client may choose to appoint a corporate fiduciary with whom the lawyer has a long-standing relationship. To avoid arguments of conflict of interest, the typical boilerplate provisions in the document should be

reviewed to determine whether they are appropriate. Standard clauses in a will or trust can sometimes raise questions.

For example, many wills and trusts contain exculpatory provisions. Florida Statutes § 736.1011 provides that an exculpatory provision is unenforceable to the extent that it was inserted into the trust instrument as a result of an abuse by the trustee of a fiduciary or confidential relationship with the settlor. An exculpatory term drafted or caused to be drafted by the trustee is invalid as an abuse of fiduciary or confidential relationship unless the clause is fair under the circumstances and the term's existence and contents were adequately communicated directly to the settlor or the independent attorney of the settlor. Fla. Stat. §736.1011(2); see also Fla. Stat. § 733.620 (addressing exculpatory provisions in wills in an identical way). In Petty v. Privette, 818 S.W.2d 743 (Tenn. Ct. App. 1989), the court held that a scrivener could only rely on exculpatory provisions in a will which named him as executor if he rebutted the presumption that the inclusion of the exculpatory clause in the will resulted from undue influence. *See also* Fred Hutchinson Cancer Research Center v. Holman, 732 P.2d 974, 980 (Wash. 1987)(The scrivener of a will "is precluded from reliance on the clause to limit his own liability when the testator did not receive independent advice as to its meaning and effect."). It is also important to consider the impact of Rule 4-1.8(h) which provides that "a lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently representing in making the agreement." The ACTEC Commentaries provides that: "[u]nder some circumstances and at the client's request, a lawyer may properly include an exculpatory provision in a document drafted by the lawyer for the client that appoints the lawyer to a fiduciary office … The lawyer ordinarily should not include an exculpatory clause without the informed consent of an unrelated client."

Other clauses to consider include boilerplate compensation provisions, waivers of the prudent investor rule, and removal provisions. In some cases, beneficiaries have argued that as part of the "conflict", the lawyer allowed a corporate fiduciary client to self deal by investing in institutional products, to be compensated at standard fee schedules, and to be locked into the fiduciary position by not providing a mechanism for removal and replacement.

IV. Gifts to Charities

Another common scenario which presents potential conflict of interest considerations is the issue of a lawyer preparing a will or trust which makes a gift to a charity with which the lawyer has an affiliation. For example, many estate planning lawyers serve on the boards or as officers of local charities. It is generally not improper for a lawyer to prepare an instrument which makes a gift to a charity with which the lawyer is the affiliated. However, there are a number of conflict of interest and undue influence issues which come into play.

One of the leading ethics opinions which is cited frequently in this area is Oregon Ethics Opinion 525 (1989). The opinion addresses two separate issues: (a) whether the lawyer who represents a charitable organization and sits on its board may draft a will in which the charity is designated as a beneficiary if the lawyer discloses his or her representation of the charity to the testator; and (b) whether the lawyer may prepare a document for the client making a lifetime gift to that charity.

Under the facts of the ethics opinion, the lawyer represented the charity on a continuing basis and was also a member of its board of directors. The lawyer's client asked the lawyer to assist him in making a sizable gift to the charity. The client also asked the lawyer to prepare a will in which the charity would be a named beneficiary. The opinion answered the following questions: (a) may the attorney represent both the charity and the donor in the charitable gift transaction? (No); (b) may the attorney represent only the donor in the charitable gift transaction? (Yes, qualified); and (c) may the attorney prepare the donor's will naming the charity as a beneficiary? (Yes, qualified)

The opinion concluded that because of the potential for differing interests or positions between charity and donor concerning the terms of the transaction, representation of both charity and donor in a transaction making a gift would constitute a prohibited, nonwaivable conflict of interest under Oregon RPC 1.7(a)(1) and (b)(3). The opinion compared such a transaction to that in which the lawyer undertakes simultaneously to represent both sides of a buyer-seller, lender-borrower, or similar transaction.

The Oregon Bar concluded, however, that lawyer could proceed with preparing the documents necessary to make the gift <u>if the lawyer only represented the donor</u> even though the lawyer continued to represent the charity in other matters and to serve on its board. The opinion noted that "when, as here, there is a significant risk that Lawyer's representation of Donor would be materially limited by Lawyer's obligations to Charity, the representation is permissible with the informed consent of all clients, confirmed in writing." The opinion notes that the same rules would apply to the lawyer's efforts to draft the donor's will if the charity is to be a beneficiary. The opinion concluded that, in both instances, there is a significant risk, that the lawyer's representation of the donor would be materially limited by lawyer's obligations to the charity. As a consequence, the Oregon Bar found that, under the circumstances, the lawyer would have to obtain "informed consent, confirmed in writing" pursuant to Rule 1.7(b) from both the donor and the charity before undertaking the work.

In Maryland State Bar Association Ethics Opinion 2003-09, the bar was requested to opine on whether an attorney who chairs his church's legacy committee could prepare, on a pro bono basis, wills for parishioners in which the parishioners bequeath property to the church. The facts of the opinion were a bit peculiar in that the lawyer would be chairing a church committee that "promotes legacy giving from its parishioners (i.e., bequests in wills, charitable trusts, charitable annuities, etc.)" As chair, the lawyer was expected to "explain the program to parishioners."

Like Oregon, the Maryland Bar concluded that the lawyer's role on the church's legacy committee implicated Rule 1.7(b). The Maryland Bar noted that under Rule 1.7(b), in order to represent fellow parishioners, the lawyer would have to reasonably believe that his representation of such parishioners would not be "adversely affected" by his responsibilities to his church or his own interests before obtaining a parishioner's consent to such representation. However, in the Maryland opinion, the lawyer was actually being put in the position of talking to parishioners about making a gift to the church. The Maryland Bar concluded that it was unethical to proceed with the representation under such circumstances:

"It is the consensus of the Committee, which correlates to the hypothetical "disinterested attorney" referred to in the comments to Rule 1.7, that such a belief would not be reasonable, and that consequently, you cannot simultaneously serve as a member of the Legacy Committee and represent parishioners in connection with their estate planning when they may contemplate a gift or bequest to the church. The Committee's opinion in this regard is based upon Rule 2.1 which provides that "(i)n representing a client, a lawyer shall exercise independent professional judgment and render candid advice." Similarly, Rule 5.4C provides that "(a) lawyer shall not permit a person who recommends the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services." The Committee believes that your laudable interest in advancing your church's interests would inevitably compromise your independent professional judgment in advising practitioners regarding whether their own interests will be served by such giving in general or by bequests to your church in particular, as issues regarding the nature, magnitude, and timing of parishioners' giving might be affected by considerations relating to your church's financial needs. The Committee also has reservations regarding whether parishioners would be sophisticated enough to weigh the risks involved in order to knowingly consent to your representation. Consequently, it is the Committee's opinion that the conflict posed by virtue of your membership on the Legacy Committee will not be able to be addressed by the consultation and consent requirements of Rule 1.7(b)(2) and (c) (and/or Rule 2.2) and that to advise parishioners as your propose, you would have to resign from the Legacy Committee."

A similar issue was presented in Washington State Bar Association Ethics Opinion 1568 (1994). The lawyer in that case inquired whether a law firm can enter into a business arrangement with a charitable organization to represent church members wishing to make charitable donations to the church. The charity wanted to recommend the firm to members who asked for recommendations for an attorney to prepare the documents for donating to the church. The charity would pay for the prospective donor to have the attorney review the documents. In addition, the law firm could be asked to do legal work on general charity matters unrelated to the giving department. The Washington Bar was of the opinion that the proposed arrangement for representation was impermissible on three grounds:

1) It would be a conflict of interest under RPC 1.7(b) if the firm represents the charity on general matters because under the plan, the lawyer's duty to the client/donor competes with the lawyer's duty to the church.

2) It would violate RPC 1.7(b)(2) because the plan does not allow for consultation and full disclosure to the client; and

3) The communication between the client/donor and the lawyer would be violated under RPC 1.4(b).

In addition to these ethical issues, gifts to the charities with which the lawyer is affiliated implicate issues of undue influence. As explained above in the discussion in In re Estate of Murphy, a will or trust procured by the undue influence of a lawyer is void. Under Florida law, a presumption of undue influence will arise when three element are present: (1) the existence of a confidential or fiduciary relationship between the decedent and the procurer of a will; (2) the active participation of the procurer in the planning and drafting of the will; and (3) the realization by the procurer of a substantial benefit under the provisions of the will. In Re Estate of Carpenter, 253 So.2d 697 (Fla.1971); Allen v. Dutton, 394 So.2d 132 (5th DCA 1981) In Re Estate of Nelson, 232 So.2d 222 (Fla. 1st DCA 1970).

Generally, the drafting attorney will almost always satisfy the first two prongs of this analysis: "fiduciary or confidential relationship" and "active procurement". *See, e.g.* Allen, 394 So. 2d at 134-35. The issue will be whether a gift to a charity selected by the lawyer meets the test of "substantial benefit".

In Allen, the lawyer was not only named as the personal representative and trustee under the will but had "absolute discretion to distribute the bulk of [the decedent's] estate" to charities selected by the lawyer. The court held that the under those circumstances the lawyer had "sufficient collateral benefits" to make him a substantial beneficiary of the will. Id. 134-35. *See also* In Re Estate of Nelson, 232 So.2d 222 (Fla. 1st DCA 1970) (finding that the presumption of undue influence was raised where the attorneys were named as personal representatives and trustees and had "unlimited discretion to distribute the income or corpus thereof for such religious, educational, scientific, charitable, or literary purposes as they shall see fit.").

In re Estate of Edel, 700 N.Y.S.2d 664 (Sur. Ct. 1999), a gift under the will was attacked on undue influence grounds where the law firm represented the charity and the lawyer's partner served on the charity's board. The issue presented was whether a presumption of undue influence arose when an attorney prepares a will that leaves the bulk of the testator's estate to a charity that the attorney represents in its legal matters and also serves as chairman of the charity's board of directors. The decedent's estranged son and granddaughter contested a gift of $250,000 and the residue of the estate to a hospital. They claimed that the attorney and the CEO of the hospital utilized "fraud and undue influence" to induce the gift.

The decedent had executed a will drafted by the lawyer in 1980 under which nothing was left to the hospital charity (although it did leave 40% to another hospital which was ultimately acquired by the charity named in the last will). In 1985, the lawyer became a member of the hospital board of directors, and later that year the hospital was named a 30% residuary legatee under the decedent's new will. As time went on, and the lawyer's relationship with the decedent increased and the lawyer was ultimately appointed chairman of the board of the hospital, the percentage of the residue passing to the hospital increased to 100% of the residue.

The will contestants argued that the lawyer's relationship with the charity created a conflict of interest which required written consent by the client. However, the court refused to find that this presented a conflict as a matter of law. The court was "not convinced that an attorney draftsman who serves without pay on the board of directors of a charitable organization has a conflict of interest simply because the attorney's client names the charity in her will." The

court noted that "such a holding would serve to discourage attorneys from serving on the boards of charitable and civic organizations."

Further, the court declined to apply cases which hold that a gift to the lawyer or lawyer's family are presumed to be void on undue influence grounds. The court held that the presumption of undue influence was not applicable to a situation where the lawyer is not the direct recipient of the gift. Notwithstanding the fact that the beneficiaries could not raise the presumption, the court held that the beneficiaries were entitled to a trial on whether the lawyer and the charity had engaged in undue influence noting that the beneficiaries raised a number of issues which warranted serious inquiry by the trier of fact.

The bottom line is that attorneys who render charitable planning advice must be mindful that charitable gift planning is governed by the same conflict of interest considerations as other areas of law practice.

V. Multigenerational Planning

It is fairly common for an estate and trust lawyer to represent multiple family members and multiple generations of the same family. This practice raises a number of issues which are worthy of consideration when a lawyer evaluates the ethical issues involved in an existing matter or a potential new matter. Among other things, what are an attorney's ethical obligations if a client requests that he or she prepare a will or codicil that substantially diminishes the share of a family member who is also a client?

This issue was addressed in Chase v. Bowen, 771 So. 2d 1181 (Fla. 5th DCA 2000). In Chase, a daughter sued her mother's lawyer for legal malpractice because he revised her mother's will omitting the daughter as a beneficiary. The lawyer represented the testator (mother), the daughter, and the alleged undue influencers on unrelated matters. The essence of the daughter's malpractice claim against the lawyer was that he committed a breach of professional ethics when he represented multiple family members continuously and over a period of time, including the time when he drafted amendments to the decedent's trust and will, which disinherited the daughter and replaced her with other beneficiaries (also his clients), and that he did not recuse himself or obtain the daughter's consent, after disclosure to her of his adverse representation. The daughter's contention was that if the lawyer had consulted with the daughter and obtained her consent to represent her mother, or if he had refused to represent the mother and sent her to another lawyer with no conflict of interest, she might have had a chance to inquire as to the reasons for her mother's change of mind and ascertain whether the change was the product of undue influence. Due to his failure to comply with the ethical rule quoted above, the daughter claimed that she lost that opportunity. Id. at 1184.

The majority of the Chase court held that if a lawyer prepares the wills of various members of a family, he or she assumes no obligation to oppose any changes to the wills. Further, the lawyer is not precluded from assisting in the redrafting of the wills. Id. at 1182-83. The court stated that: "**It is our view that a lawyer who prepares a will owes no duty to any previous beneficiary, even a beneficiary he may be representing in another matter, to oppose the testator or testatrix in changing his or her will and, therefore, that assisting in that change is not a conflict of interest**." Thus, the Chase court concluded that the lawyer

breached no duty to the daughter.

The dissent in Chase argued that a lawyer has a conflict of interest in preparing a will which disinherits another current client. In a well articulated dissent, Judge Sharp opined as follows:

> It is clear that an attorney should not represent two different clients (without disclosure and consent), who have adverse interests in the same transaction or series of transactions, all of which involve the same clients. Nor can an attorney, after representing a client, assume the representation of a different client in a later matter that is adverse to the first client's interest, again without consultation and consent. As alleged in this case, when [the lawyer] redrafted [the mother's] trust and will, he represented not only [the mother] and [the daughter], but also the [alleged undue influencers], the new beneficiaries . . . [i]t appears [the lawyer's] actions may have created a conflict of interest and a violation of this ethical rule.
>
> The Professional Ethics of The Florida Bar Op 95–4 (May 30, 1997), approved by the Board of Governors in May of 1997, supports the conclusion that a breach of professional ethics occurred in this case. That opinion deals with a hypothetical husband and wife, who consult an attorney to draft their wills and do joint estate planning. Later the husband comes to the attorney seeking his advice on whether or not his wife would have the right to elect against his will, if she survived him, because he had executed a codicil leaving a substantial disposition to his mistress (unknown to his wife). This puts the lawyer in an ethical dilemma because he owes a duty of confidentiality to the husband, and yet he owes a duty of communication to the wife and a duty of loyalty—not to take steps to adversely affect her interest without her knowledge and consent.
>
> The opinion concludes that the duty of confidentiality takes precedence, and the lawyer can not disclose the information to the wife. Further, the Committee concludes, the lawyer must withdraw from the representation of *both* the husband and the wife. In so doing, the lawyer should inform the wife that a conflict of interest has arisen that precludes the lawyer from continuing to represent her, and he could also say both the husband and wife should retain separate counsel. The Committee recognized that a sudden withdrawal by a lawyer almost certainly would raise suspicions on the part of the wife, which might alert her to the substance of the husband's adverse confidence. This appears to be more stringent than other states' views, which would allow the lawyer, in his discretion to make the disclosure to the wife, but which consistent with the Florida opinion, would still require the lawyer to withdraw from representing either one.
>
> Although this Florida opinion concerns a joint representation case, it is not clear in the instant case that [the lawyer] was not representing [the mother and daughter] jointly in their estate planning. But even if the representation in this case was not joint, the opinion would be applicable to require [the lawyer] to withdraw from representing [the mother], although it might not require [the

> lawyer] to tell [the daughter] a conflict of interest had arisen and that he could no longer represent either of them.
>
> I believe enough facts have been alleged generally that [the daughter] might be able to state a cause of action against [the lawyer] for interference with her inheritance, caused and achieved by his breach of fiduciary duty owed to her as a client while representing the interests of [the mother] and the [alleged undue influencers], which were adverse to hers.

Id. at 1185.

Courts in other jurisdictions that have addressed this issue have sided with the majority in Chase. In Mali v. De Forest & Duer, 553 N.Y.S.2d 391, 392 (N.Y. App. Div. 1990), the court held that attorneys have no obligation to disclose to beneficiaries, who are also their current clients, any legal advice they may have given to the testator. The plaintiff in Mali argued that the attorney breached his fiduciary duty by failing to disclose recommendations the attorney made to the testator because it deprived him of the opportunity to discuss the issues with the testator. Id.

In dismissing this argument, the court held that attorneys have no obligation to inform the beneficiaries of advice they might have given to the testator regarding the estate plan. Id. The court reasoned that instead, under the rules of professional responsibility, they are required to preserve the testator's confidences and secrets. Id. Therefore, the court held that although the attorney was a long time legal advisor to the entire family and represented the beneficiary in other matters, the parties' relationship vis-à-vis the testator's will does not change. Id.

Similarly, in Thompson v. Deloitte & Touche, L.L.P., 902 S.W.2d 13, 16 (Tex. Ct. App. 1995) the court held that accountants have no duty to inform a beneficiary, who is also a former client, that the testator has changed his will. Again, the court found that they instead have a fiduciary duty to the testator not to reveal his confidences. Id. The beneficiaries in Thompson alleged that the accountants had a duty to tell them that the testator intended to change or had changed his will. Id. The beneficiaries claimed that if given the opportunity, they could have prevented the testator from making the changes. Id. In rejecting this argument, the court held that there is no cause of action for lost opportunity to prevent someone from changing his or her will. Id.

The beneficiaries also claimed the accountants breached their fiduciary duty by assisting the testator in making the changes. Id. at 17. However, the court found that the testator "knew what he was doing, did what he wanted to do, and had a right to do what he did with his property." Id. Moreover, the court noted the accountants were following the testator's directions. Id. Therefore, despite the fact that the beneficiaries were current clients, the court found that the accountants did not injure the beneficiaries by helping the testator change his will or by keeping his confidences. *Id*. at 16-17.

Thus, under the current state of the law, an attorney may be able to prepare a will for a client that substantially reduces or eliminates a bequest to another client without breaching his or her fiduciary duties. Moreover, an attorney may have no fiduciary obligation to disclose client confidences to the beneficiaries of a will. However, as reflected by the position of the dissent in

Chase, this continues to be a developing area where you should tread with caution.

The results of each of these cases might be different if the attorney actively misrepresents the contents of the testator's will to his or her client beneficiary. *See e.g.*, Hotz v. Minyard, 403 S.E.2d 634, 637 (S.C. 1991). In Hotz, the court held that while an attorney has no duty to disclose the existence of a second will against the testator's wishes, he does owe a beneficiary client the duty to deal with them in good faith and not actively misrepresent the contents of the first will. Id. In Hotz, the beneficiary under the will was a long time client of the attorney. Id. The testator executed a will in the beneficiary's presence. Id. at 635. Shortly thereafter, the testator executed a codicil changing the contents of the will and instructed the lawyer not to inform the beneficiary. Id. at 636. The beneficiary later asked the lawyer for advice regarding the testator's will. Id. The lawyer actively represented to his client beneficiary that the first will had not been changed in any way. Id.

The court found that although the attorney represented the testator and not the beneficiary regarding the testator's will, the attorney did have an ongoing attorney-client relationship with the beneficiary and the beneficiary had a "special confidence in him." Id. at 637. Therefore, the court held that the attorney owed the beneficiary a fiduciary duty to deal with her in good faith and not actively misrepresent the contents of the first will. Id.

The American Bar Association weighed in on these issues in Formal Opinion 05-434 of the Standing Committee on Ethics and Professional Responsibility. The ABA committee came to the conclusion that under most circumstances, it is not a conflict of interest for a lawyer to prepare a will that disinherits a beneficiary whom the lawyer represents on other matters. The ABA noted that the "preparation of an instrument disinheriting a beneficiary ordinarily is a simple, straightforward, almost ministerial task, without call for the lawyer to consider alternative courses of action, and it is difficult to imagine a circumstance in which a responsibility of the lawyer to her other client (even a client who is a presumptive beneficiary of the testator's bounty) would pose a significant risk of limiting the lawyer's ability to discharge her professional obligations to the testator."

The ABA committee stated, however, that the issue becomes more complicated if the testator asks for the lawyer's advice as to whether the beneficiary should be disinherited, or if the lawyer initiates such advice. The ABA opined that by "advising the testator whether rather than how, to disinherit the beneficiary, the lawyer has raised the level of engagement from the purely ministerial to a situation in which the lawyer must exercise judgment and discretion on behalf of the testator" creating the potential for conflicts of interest. Further, the ABA committee noted that a lawyer may owe a duty to a beneficiary who has made an estate plan based upon a "shared assumption" that the testator has a particular plan in place. In these instances, the ABA concluded that there may be a risk that the lawyer's responsibilities to the testator will be materially limited by his or her responsibilities to the beneficiaries.

Of course, there is no bright line rule governing the representation of multiple family members. You should analyze each set of circumstances independently to determine if the representation is proper. Depending on the circumstances, you may want to consider the following:

- Under Rule Regulating the Florida Bar 4-1.7(a), is the representation of one client "directly adverse" to another client? That is, is there a conflict as to the legal rights and duties of the client, not merely conflicting economic interests?

- Does a potential beneficiary named in a testamentary instrument have a legal right to the bequest, or is it merely an expectancy?

- Under Rule Regulating the Florida Bar 4-1.7(b), is there a significant risk that the representation of one client will be "materially limited" by the lawyer's responsibility to another client? See also Florida Bar Ethics Opinion 87-1, which states that a lawyer may represent multiple parties having potential conflicts only if he reasonably believes the representation of any one of them will not be adversely affected by the lawyer's responsibilities to the others, and if each client consents after consultation.

- Does the lawyer owe duties to prospective beneficiaries other than the duty to effect the testator's intent? Is there a difference between advising the testator whether, rather than how, to disinherit a beneficiary?

- Is the lawyer limited by any shared assumptions in a family's estate plan, or any contractual obligation as to the beneficiary?

Representation of multiple family members, although it may be common, is a delicate matter and should be undertaken with care. The lawyer should carefully craft the engagement letter and have a conflict waiver letter to ensure that the prospective clients have sufficient information to provide their "informed consent" to the joint representation. In addition, the lawyer would be well advised to use the initial writings to anticipate and address some of the issues that may arise during the course of the representation. A copy of the form ACTEC Engagement Letters for joint and separate representation of multiple family members are included the appendix to these materials.

VI. The Erosion of the Privity Doctrine

Traditionally, the liability of estate planning lawyers for breach of duty was limited by the Doctrine of Strict Privity. "In a legal context, the term "privity" is a word of art derived from the common law of contracts and used to describe the relationship of persons who are parties to a contract. Espinosa v. Sparber, Shevin, et al., 612 So. 2d 1378 (Fla. 1993). Essentially, a client could bring an action against the estate planning attorney but a third party could not. Although the executor of the client's estate could sue the drafting attorney, many times the "estate" suffered little or no damages because the client, while alive, could have simply revised his estate plan to remedy the error. The real damages were visited upon the beneficiaries of the estate, who had no standing to sue when the Doctrine of Strict Privity was applied. Based in part on this perceived inequity, over time, the privy doctrine has eroded in all but a handful of states (Alabama, Arkansas, Maine, Maryland, Nebraska, New York, Ohio, Texas and Virginia are still considered, at last check, strict privity states).

Through their efforts to remedy one perceived injustice, the courts may have simply created another. Initially, many courts took only a small step away from strict privity. For example, the Florida Supreme Court recognized a "limited exception to the strict privity

requirement," but it also seemed to acknowledge that it may be opening Pandora's box. As of the date of the Espinosa opinion (1993), Florida allow a limited exception to the strict privity requirement only where it could be demonstrated that the intent of the client who engaged the services of the lawyer was to benefit a third party. Espinosa at 1380. In what many would argue has turned out to be a prophetic pronouncement, Florida's Supreme Court recognized that even this limited exception to privity doctrine could create significant issues.

> "Because the client is no longer alive and is unable to testify, the task of identifying those persons who are intended third party beneficiaries causes an evidentiary problem closely akin to the problem of determining the client's general testamentary intent. To minimize such evidentiary problems, the will was designed as a legal document that affords people a clear opportunity to express the way in which they desire to have their property distributed upon death. To the greatest extent possible, courts and personal representatives are obligated to honor the testator's intent in conformity with the contents of the will." (citations omitted)
>
> If extrinsic evidence is admitted to explain testamentary intent, as recommended by the petitioners, the risk of misinterpreting the testator's intent increases dramatically. Furthermore, admitting extrinsic evidence heightens the tenancy to manufacture false evidence that cannot be rebutted due to the unavailability of the testator. For these reasons, we adhere to the rule that standing in legal malpractice actions is limited to those who can show that the testator's intent, *as expressed in the will*, is frustrated by the negligence of the testator's attorney. Id. (underlined emphasis added)

Unfortunately for the drafting attorney, the Strict Privity Doctrine has continued to erode in many jurisdictions, including Florida.

The case of Gallo v. Brady, 925 So. 2d 363 (Fla. 4th DCA 2006), is a good example of the current state of affairs. The testator hired Attorney Brady to provide estate planning services. Following the client's death, Attorney Brady was sued for legal malpractice relating to the drafting of client's estate planning documents. The drafting attorney Brady obtained a summary judgment in his favor by arguing that the trust instrument itself did not contain language reflecting that the settlor's intent was to save federal estate taxes and that the settlor's intent could not legally be established by extrinsic evidence.

The court made two significant rulings. First, they found that a jury could look at the facts alleged by the plaintiff and, without resort to extrinsic evidence, "reasonably infer" the testator's intent and purposes (in this case the Plaintiff asked the jury to infer that the settlor's intent was to save taxes). Id. at 364. Based on this first ruling, it certainly appears that the Gallo court has given a jury the right to engage in rank speculation about a testator's intent.

Second, the court permitted the plaintiff to rely on extrinsic evidence to establish the deceased client's intent and purposes regarding the testamentary document, even though the document itself was not ambiguous on its face. Id.

As the Florida Supreme Court noted in Espinosa, allowing the admission of extrinsic evidence presents a whole host of evidentiary problems for a lawyer defending a malpractice action, after the death of his client, based on the drafting of testamentary documents. For example, it has become more common for estate beneficiaries to bring malpractice actions alleging that the drafting attorney failed to maximize estate tax savings. As most estate and trust practitioners know, clients often choose to forego planning techniques which would save estate taxes because many of those techniques require the client to part with some of their assets or give up a significant degree of control. At trial, the beneficiary may produce several witnesses to testify about the many occasions when the testator expressed his disdain for paying estate taxes. While this may be true, the testator's desire to hold on to his assets and remain in a position of control may have outweighed his desire to save estate taxes. How does that fact get to the jury?

So, where does that lead us? As one commentator noted, "the requirement of privity has eroded, the standard for liability is ill-defined, and the specific duties are not well elucidated. Yet the number of lawsuits against estate planning attorneys is increasing." Casteel, McDonald, Odom and Wade, The Modern Estate Planning Lawyer, Avoiding the Maelstrom of Malpractice Claims, 22-Dec. Prob. & Prop. 46 (December 2008).

What can the estate planner do to reduce the likelihood of a successful malpractice claim? First, the lawyer should have a well documented file. All options discussed with the client should be accompanied by a contemporaneous writing or followed closely by a writing. Further, the lawyer should document the client's response to the lawyer's estate planning advice. If the client elects not to pursue tax saving strategies in order to retain control over his assets, this fact should be put in writing. The lawyer may also involve the client's other professional advisors (e.g. accountants, financial advisors, etc.) in meetings involving the client's estate planning. It is unlikely that the presence of these agents would cause a waiver of the attorney/client privilege. If the lawyer is ever sued for malpractice, these other professionals could provide testimony as to the client's intent and the advice provided to him.

The estate planning lawyer should also recommend that the client engage the assistance of additional experts or independent counsel when necessary. If the planning techniques are beyond the expertise of the lawyer or if a conflict of interest is present, recommending that the client obtain independent professional advice will significantly reduce the planning lawyer's liability risk.

The lawyer may have the client execute a questionnaire to prevent any allegations that the lawyer failed to investigate the client's assets or the identity of the client's heirs. To the extent that the client is reluctant to provide details about his finances or family, having this document in the file will show that the lawyer asked the right questions, even if the client chose not to provide the requested information.

The drafting lawyer might identify those heirs most likely to be affected by the client's planning decisions and suggest that the client meet with those individuals and directly express to them his intentions and purposes. The author realizes that these "family meetings" sound good in theory, but that the concept is rarely embraced by the client. Nevertheless, suggesting the idea to the client, and documenting that fact, may go a long way to demonstrate to a disappointed or frustrated beneficiary that the lawyer was not the "bad guy."

VIII. Helpful Writings

In the estate planning context, a well-documented file is one of the best ways to minimize exposure to liability. Lawyers may want to consider having the following writings in their file:

a) Fee Agreement – a fee agreement should carefully define who you represent and in what capacity. It should also address the scope of the work to be performed, including what you will not be doing (e.g., I will not be providing litigation services, etc.);

b) Declination Letter – if you elect not to accept a matter, or the prospective client decides not to hire you, this fact should be memorialized with a written communication to the potential client. In the letter, you may want to caution the individual about time sensitive matters such as statutes of limitation or "claims" periods and be clear as to whether any confidential information was revealed during your discussions. The writing should also state, simply and directly, that you are not their lawyer, you are not rendering an opinion one way or the other about the merits of their claims, and that you will not be performing any work on their behalf;

c) Letters to "non-clients" – estate and trust lawyers interact with many individuals and entities who are not their "clients." These may include beneficiaries, creditors, family members or "agents" of your client. A writing early in the relationship clearly stating "I am not your lawyer" will avoid any confusion about the duties owed to that individual and will be very beneficial if there is ever litigation relating to the interactions between the lawyer and that particular individual. If a client requests that you share attorney/client communications with a third party, a writing confirming that the third party is an "agent" of the client, that the communications are authorized by the client and that these communications with the agent are necessary to facilitate the attorney/client relationship, will make it much less likely that there is a waiver of the attorney/client privilege or that the "agent" will be able to successfully claim, at some later date, that you are his lawyer too;

d) Document your conflict check – the initial conflict check should be evidenced by a writing and do not forget to update your conflict check as the matter proceeds. The updated conflict check should also be evidenced by a writing;

e) Joint Representation Letters and Waivers – the ABA Model Rules and corresponding state rules will assist the practitioner with the contents of these letters, including what is "adequate disclosure" (see, e.g., Restatement (Third) of the Law Governing Lawyers Section 122 (2000) and ABA Model Rule 1.0(e) and Comments [6] and [7] thereto). You may also want to include language in these letters about who the lawyer will represent, if a conflict develops, and the lawyer is only able to continue representing one of the parties;

f) Writings confirming significant client directions and instructions – most jurisdictions recognize that a lawyer acts, for the most part, at the direction of the client. If there is ever a dispute about whether a lawyer met his duties to his client, these letters will be very helpful; and

g) Termination Letters – although not required, it is a good practice to have a clear writing terminating the attorney/client relationship. If there are important deadlines in the future, they should be set forth in this writing. The lawyer may also suggest that the former client

obtain another lawyer to assist him with his legal matters. When the attorney/client relationship terminates, the lawyer should return all unused trust money and resolve all outstanding billing issues. Finally, the lawyer should return all property in his possession which belongs to the client and do a review of the client's file to make sure that the lawyer has returned original documents to the client.

IX. Conclusion

Many of the problems encountered by good lawyers can be avoided with properly directed effort, some clear communication and a few good writings. Hopefully, these materials will assist lawyers in their efforts to improve the services they provide to their clients.

The opinions and views in these materials are solely those of the author and are not necessarily the opinions, views, policies or procedures of the author's law firm. It is not the author's intent to imply that anything in these materials sets forth minimum standards of care or required standards of practice. To the contrary, these materials are merely intended to provide a good lawyer with a well-documented file and to help avoid ethical violations and legal liability.

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