



The Florida Bar
FAMILY LAW SECTION
Bounds of Advocacy



GOALS FOR FAMILY LAWYERS



BOUNDS OF ADVOCACY

Goals for Family Lawyers in Florida

Preface

The original *Bounds of Advocacy* was published by the American Academy of Matrimonial Lawyers (AAML) in 1991. It was revised in 2002. Also in 2002, a committee was formed by the Family Law Section of The Florida Bar to adapt the *Bounds* to Florida law and practice. Because of that effort, the *Bounds of Advocacy Goals for Family Lawyers in Florida* was originally published in 2004. A new committee was appointed by Nicole Goetz, chair of the Family Law Section, to update the *Bounds* to capture changes in marital and family law, ethics and professionalism, and social media and technology since the original publication. The Family Law Section Ad Hoc Bounds of Advocacy Committee submits this 2018 revision to The Florida Bar and the Family Law Section to be used as guidance in this important area of practice.

May 1, 2018

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PRELIMINARY STATEMENT

The purpose of the *Bounds* is to guide Florida family lawyers through the quagmire of professional and ethical dilemmas that are unique to the practice of family law. The intent is to suggest a higher level of practice than the minimum baseline of conduct required by the Rules Regulating The Florida Bar. Many family lawyers encounter situations where the rules provide insufficient guidance.

Since the original publication in 2004, there has been an ever-increasing emphasis on the importance and requirement of greater professionalism in all areas of practice. The Florida Supreme Court, with encouragement from The Florida Bar, concluded in 2013 that further integrated, affirmative, practical, and active measures were needed. The court adopted the Standards of Professionalism, which collectively include (1) Oath of admission to The Florida Bar, (2) The Florida Bar Creed of Professionalism, (3) The Florida Bar Professionalism Expectations, (4) the Rules Regulating The Florida Bar, and (5) the decisions of the Florida Supreme Court. See *In re: Code for Resolving Professionalism Complaints*, 116 So. 3d 280 (Fla. 2013). "Members of The Florida Bar shall not engage in unprofessional conduct. 'Unprofessional conduct' means substantial or repeated violations of" any of the above integrated sources.

Even with the further guidance of the Standards of Professionalism, there are still areas unique to family law. The breakup of a family, however "family" is defined, carries a ripple effect that impacts not only the couple, but children, other family members, and an array of third parties. Disputes occur in a volatile and emotional atmosphere. The family lawyer is tasked with the delicate balancing act of protecting the client, looking out for the well-being of the children, advancing the case with the need for due diligence and cost-effective speed, scrupulously following the rules of professional responsibility, and maintaining civility and courtesy to all.

It is the goal of the *Bounds* to elevate professionalism in the practice of family law. It is our responsibility as family lawyers to ensure that concern for a client's desired result does not subvert our fairness, honesty, civility, respect, and courtesy throughout the process. We are problem solvers. We must model appropriate behavior. We have a responsibility to assist in providing pro bono public service as provided in the Rules Regulating The Florida Bar, 4-6.1 and 4-6.2. We have an obligation to our profession and the people we represent to help solve disputes with grace and dignity.

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[1] PROFESSIONAL COOPERATION AND THE ADMINISTRATION OF JUSTICE

People often have domestic problems that involve legal and non-legal issues. Problems arising within a family are exceptionally emotional and transform the family. The family lawyer's duties encompass many roles, from counseling to litigation. Methods for resolving conflicts include negotiation, mediation, arbitration, collaborative law, and other alternative dispute methods. The family lawyer's approach to resolving problems is crucial to the future health of the family. The family lawyer has a critical and demanding counseling role in addressing these problems. The family lawyer serves a role similar to a physician who diagnoses the causes of the patient's pain and counsels the patient about many treatments before undertaking treatment.

The *Bounds* reflects a shift toward the role of constructive advocacy and a counseling, problem-solving approach.

Candor, courtesy, and cooperation are especially important in family matters in which strong emotions can engulf the lawyers, the court, and the parties. Allowing the adverse emotional climate to infect the relations between the lawyers inevitably harms everyone, including the clients, their children, and other family members.

Combative, discourteous, abrasive, "hard ball" conduct by family lawyers contradicts both their obligations to effectively represent their clients and their roles as problem-solvers. Family lawyers can be cordial and friendly without diminishing effective advocacy on behalf of their clients. Candor, courtesy, and cooperation facilitate faster, less costly, and mutually-acceptable resolution of disputes; reduce stress for lawyers, staff, and clients; reduce waste of judicial resources; and generate respect for the court system, the individual lawyer, and the profession.

[1.1] A LAWYER MUST STRIVE TO LOWER THE EMOTIONAL LEVEL OF FAMILY DISPUTES BY TREATING EVERYONE WITH RESPECT.

Comment

Some clients expect and want the family lawyer to reflect the highly emotional, vengeful relationship between the parties. The lawyer must decline to do so and must explain to the client that discourteous or uncivil conduct is inappropriate and counterproductive, that measures of respect are essential to competent and ethical representation of the client, and that it is unprofessional for the lawyer to act otherwise.

Pleadings, motions, and correspondence should contain only necessary facts, allegations, and conclusions. Unnecessary and scurrilous language and allegations are inappropriate.

Ideally, the relationship between counsel is that of colleagues using constructive problem-solving techniques to settle their clients' disputes consistent with the realistic objectives of each client. Examples of appropriate measures of respect include cooperating with mediation; meeting with opposing counsel to reduce disputed issues and facilitate settlement; promptly answering phone calls and correspondence; advising opposing counsel at the earliest possible time of any perceived conflict of interest; and refusing to attack, demean, or disparage other counsel, the court, or other parties.

The lawyer should ensure that no adversarial relationship with or personal feeling toward another lawyer interferes with negotiations, the level of professionalism maintained, or effective representation of the client. Although it may be difficult to be courteous and cooperative when opposed by an unprofessional, discourteous or rude lawyer, a lawyer should not react in kind. Pointing out the unprofessional conduct and requesting that it cease is appropriate.

Inflammatory and purely derogatory statements serve no purpose and must be avoided. Family lawyers must recognize the effect that their words and actions have on each client's attitudes about the justice system and about the conduct and outcome of the client's case. The client's interests in a family matter may include the well-being of children, future relations with a former spouse and family members, and family financial interests. Family law clients look to lawyers' words and deeds for guidance for their own actions and attitudes. Even when involved in highly contested matters, family lawyers must demonstrate and promote civility and professional behavior toward the parties, the lawyers, and the court.

[1.2] A LAWYER MUST STIPULATE TO UNDISPUTED FACTS.

Comment

By stipulating to undisputed facts, the lawyer avoids unnecessary expense and waste of time. The lawyer seeking a stipulation should do so in writing, attempting to state

the true agreement of the parties. The other lawyer should promptly indicate whether the stipulation is acceptable.



[1.3] A LAWYER MUST NOT MISLEAD ANYONE.

Comment

Lawyers need to be able to rely on statements by other counsel. Lawyers should correct any inaccurate or misleading prior

statements made by counsel or their clients. Although a lawyer must maintain the client's confidences, the duty of confidentiality does not permit the lawyer to deceive, or permit

the client to deceive, other counsel.¹ When another party or counsel specifically requests information that: (a) the lawyer is not required to provide; (b) the lawyer has been instructed to withhold; or (c) may be detrimental to the client's interests, the lawyer should refuse to provide the information, rather than mislead other counsel.

Examples

1. The wife's lawyer is approached by the husband's lawyer, who asks, "Although my client realizes there is no hope for reconciliation, he is desperate to know whether his wife is seeing another

man. Is she?" The wife's lawyer knows that the wife has been having an affair. It would be proper for the lawyer to indicate an unwillingness or inability to answer that question, but it would be improper to suggest that the client has not had an affair.²

2. The lawyer believes that the other party has engaged in activity that the party would not want made public. It is improper to threaten public disclosure of potentially embarrassing matters that would be clearly inadmissible or irrelevant in the case.

[1.4] A LAWYER MUST NOT MISREPRESENT THE AUTHORITY TO SETTLE.

Comment

In doing so, the lawyer has improperly induced reliance by other counsel that could damage the attorney-client relationship. Family lawyers who are uncertain of their authority, or simply

do not believe that other counsel is entitled to know such information, should either truthfully disclose their uncertainty, or state that they are unwilling or unable to respond at all.

¹ *R. Regulating The Florida Bar* 4-4.1 provides that a lawyer shall not knowingly: "(a) make a false statement of material fact or law to a third person; or (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by rule 1.6." *R. Regulating The Florida Bar* 4-1.6(b)(1) requires a lawyer to disclose information to prevent a client from committing a crime.

² See *R. Regulating The Florida Bar* 4-1.6.

[1.5] A LAWYER SHOULD CORRECT INADVERTENT ERRORS MADE BY THE OTHER SIDE THAT DO NOT REFLECT THE AGREEMENT.

Comment

The need for trust between lawyers, even those representing opposing sides in a dispute, requires more than simply avoiding fraudulent and intentionally deceitful conduct. Misunderstandings should be corrected and not relied on in hopes that they will benefit the client. Therefore, for example, the lawyer reducing an oral agreement to writing should

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not only avoid misstating the understanding but should correct inadvertent errors by other counsel that are inconsistent with prior understandings or agreements.

Whether conduct or statements by counsel not necessarily in their client's best interests should be corrected may not always be clear and will depend on the particular facts of a case. The crucial consideration should be whether the lawyer induced the misunderstanding or knows that other counsel's statements do not accurately

reflect any prior agreement. It is unlikely that tactical, evidentiary, or legal errors made by other counsel at trial require correction.³

Examples

1. To compromise on a dispute over alimony, the parties agree that payments are to be deductible by the husband and taxable to the wife. While reviewing the agreement, the lawyer for the wife realizes that the language will not create the tax consequences both sides had assumed because the payments will be treated neither as deductible alimony to the husband nor taxable to the wife. The family lawyer should disclose this information to opposing counsel.

If, however, counsel's mistake goes to a matter not discussed and agreed on, either explicitly or implicitly, the obligation to the client precludes disclosure of the mistake without the client's permission. Therefore, if alimony was agreed on with no discussion of tax consequences, the wife's lawyer would not be obligated to provide the language to make

³ But see *R. Regulating The Florida Bar* 4-3.3(a)(3) duty to disclose to the court "legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel." See also *R. Regulating The Florida Bar* 4-3.3(a)(3).

payments tax-deductible by the husband and includable by the wife.

2. The lawyer for the wife prepares a stipulation erroneously providing for the termination of maintenance on the remarriage of either party. If

the husband asks his lawyer if by remarriage he can terminate his liability to pay any further maintenance, the lawyer should correct the mistake in the stipulation or a judgment entered on it. The lawyer should also bring this to the attention of opposing counsel.

[1.6] A LAWYER RECEIVING MATERIALS THAT APPEAR TO BE CONFIDENTIAL MUST REFRAIN FROM REVIEWING THE MATERIALS AND MUST RETURN THEM TO THE SENDER.

Comment

There are many circumstances in which a lawyer receives materials inadvertently sent by another lawyer or party. Such instances have been increasing because of electronic communications, the ability to send simultaneous communications to multiple persons, and the sheer volume of materials provided through discovery in complex cases. If the materials are not harmful or confidential, no issue is raised. If, however, the materials were not intended to be provided and contain confidential information, the temptation to use them to the client's benefit is great.

Goal 1.6 follows Florida Bar ethics opinions in providing that once the inadvertence is discovered, the receiving lawyer must not further examine the materials and must return them to the sending lawyer.⁴ This goal also follows Goal 1.5, that a lawyer should not rely on a mistake by opposing counsel but should instead correct inadvertent errors. The error is appropriate for correction between the lawyers without client consultation.⁵

Examples

1. The wife's lawyer receives a fax with a cover sheet addressed to the husband from the husband's lawyer.

⁴ *Opinion 93-3, Professional Ethics of The Florida Bar* (1994).

⁵ Under *R. Regulating The Florida Bar* 4-1.4 Comments: "[t]he guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests and the client's overall requirements as to the character of misrepresentation." As such, if the client's best interests are not compromised by the misdelivered documents, then it could be suggested that the lawyer does not need to disclose the inadvertent delivery of the documents.

In many cases that would be sufficient to indicate that the wife's lawyer was an unintended recipient. If, however, the receiving lawyer has a reasonable basis to believe a copy was intended for him or her, he or she may read the message unless and until it becomes evident that the message was sent unintentionally.

2. The lawyer for the husband has sought discovery of numerous documents from the wife relating to issues in the case. In response to the document request, the wife's lawyer sends over

ten large boxes. While reviewing the documents, the husband's lawyer discovers in a seemingly unrelated file a letter from the wife's lawyer to the wife that begins: "As to your question about your use of drugs prior to your marriage to husband ..." Unless the husband's lawyer has a reasonable basis to believe the letter was provided intentionally, was relevant, and was not otherwise confidential, the lawyer should stop reading and return the letter to the wife's lawyer.

[1.7] A LAWYER MAY USE MATERIALS RECEIVED FROM ANY SOURCE UNLESS THE MATERIALS APPEAR TO BE PRIVILEGED, CONFIDENTIAL, OR IMPROPERLY OBTAINED.

Comment

Lawyers occasionally receive papers from outside of the expected sources. Such materials may have been sent anonymously. The materials should be treated differently depending on both their source (if known) and apparent nature.

Clearly confidential or privileged material, regardless of the sender, should be returned to the other lawyer, unread. Documents

not clearly confidential may be used by the receiving lawyer. For example, a lawyer receiving an unmarked envelope containing statements of undisclosed accounts in the name of the other party may use the materials. A receiving lawyer who believes the materials were intentionally withheld from a response to a proper discovery request should report the fraud to the court.

[1.8] A LAWYER MUST COOPERATE IN THE EXCHANGE OF DISCOVERY.

Comment

A lawyer should frame reasonable discovery requests that are tailored to the issues in dispute. As a basic rule of courtesy and cooperation, lawyers should try to conduct all discovery by agreement, never using the discovery process to harass other lawyers or their clients. This principle applies both to

Discovery in family law cases is information gathering, not an adversarial weapon.

lawyers attempting to obtain discovery and to those from whom discovery is sought. The discovery rules eliminate or reduce unfair

surprise, excessive delay and expense, unnecessary and futile litigation, and the emotional and financial costs of extended and overly adversarial litigation. In addition, pretrial discovery often results in settlements that are more beneficial than results obtained after protracted litigation.

Avoiding unnecessary litigation and acrimony will assist the parties because they need to continue dealing with each other after the litigation ends. It is in the interest of all parties to assist, rather than resist, legitimate discovery. Discovery in family law cases is information gathering, not an adversarial

weapon. Florida has imposed mandatory disclosure requirements on all divorcing parties. Parties must supplement mandatory disclosure documents and other discovery, including financial affidavits, whenever a material change in their financial status occurs.⁶

It is in the interest of all lawyers and the parties to avoid improper tactics. To advance the interests of their clients, lawyers may be tempted to wear down the opposing party or counsel by means of oppressive “hardball” discovery tactics. These tactics do not advance the legitimate interests of clients and are improper.

Improper discovery conduct under Goal 1.8 includes:

- (1) avoidance of compliance with discovery through overly narrow construction of interrogatories or requests for production;
- (2) objection to discovery without a good faith basis;
- (3) improper assertion of privilege;
- (4) production of documents in a manner designed to hide or obscure the existence of particular documents;

⁶ Fla. Fam. L. R. P. 12.285(e)(i) and Fla. Fam. L. R. P. 12.280(b)(2).

- (5) directions to parties and witnesses to not respond to deposition questions without adequate justification;
- (6) requests for unnecessary information that does not bear on the issues in the case; and
- (7) failure to make a good faith effort to resolve legitimate discovery disputes.

A lawyer's behavior during depositions is as important as behavior before the court. Because most cases are settled rather than tried, the parties' only direct experience with the legal process may be during depositions. Lawyers, therefore, should conduct themselves at depositions with the same courtesy and respect for the legal process as is expected in court. For example, they should not conduct an examination or engage in other behavior that is purposely offensive, demeaning, harassing, or intimidating or that unnecessarily invades the privacy of anyone. Lawyers should attempt to minimize arguments during deposition. If sensitive or controversial matters are to be the subject of deposition questioning, when not contrary to the client's interests the deposing lawyers should consider discussing such matters in advance to reach any appropriate agreements.

With the focus of discovery being the legitimate pursuit of information rather than strategic confrontation, lawyers should not coach deponents by objecting, commenting, or otherwise acting in a manner that suggests a particular answer to a question. Nor should lawyers object for the purpose of

disrupting or distracting the questioner or witness. Objections should only be made in the manner and on grounds provided by applicable court rules. Lawyers should not intentionally misstate facts, prior statements, or testimony. Such conduct increases animosity without legitimate purpose.

Obstreperous conduct is specifically forbidden by the Florida Family Law Rules of Procedure, Rule 12.310(c). The rule requires that any objection during a deposition shall be stated concisely and in a non-argumentative and non-suggestive manner. Furthermore, a party may instruct a deponent not to answer only when necessary to preserve a privilege, enforce a limitation on evidence directed by the court, or present a motion to terminate or limit the examination. In Florida, all objections are reserved except as to the form of questions. Therefore, it is inappropriate to make objections to any evidentiary basis other than the form of a question, or as permitted by Rule 12.310.

Trial courts have great power to enforce appropriate conduct at depositions. Rule 12.310(d) gives the court great latitude to order sanctions, limit the scope of discovery, or impose other restrictions on a showing that the deposition is being conducted in bad faith or in such a manner as to unreasonably annoy, embarrass, or oppress the deponent or party or that objections are being made in violation of Rule 12.310(c).

Lawyers should not engage in any conduct during a deposition that would not be allowed in the presence of a judicial officer, including

disparaging personal remarks or acrimony toward opposing counsel, and gestures, facial expressions, audible comments, or other

manifestations of approval or disapproval during a witness's testimony. *The Florida Bar Guidelines for Professional Conduct*, F.10.



[1.9] A LAWYER MUST NOT USE DISCOVERY FOR DELAY, HARASSMENT, OR OBSTRUCTION.

Comment

A lawyer should only schedule depositions to ascertain relevant facts, not to generate income or harass deponents or opposing counsel. The Florida Bar Professionalism Expectations Rule 3 provides that courtesy, cooperation, integrity, fair play, and abiding by a sense of honor are paramount for preserving the integrity of the profession

and to ensuring fair, efficient, and effective administration of justice for the public.

A lawyer must not use discovery to harass or improperly burden the other party or to cause the other party to incur unnecessary expense. *Fla. Bar Professionalism Expectations*, 4.7.

[1.10] A LAWYER MUST NOT ASK IRRELEVANT PERSONAL QUESTIONS OR QUESTIONS DESIGNED TO EMBARRASS THE WITNESS.

Comment

See Fla. Bar Professionalism Expectations 3.9.

[1.11] A LAWYER SHOULD GRANT REASONABLE EXTENSIONS OF TIME THAT WILL NOT ADVERSELY AFFECT THE CLIENT'S LEGITIMATE INTERESTS.

Comment

A lawyer should attempt to accommodate counsel who, because of scheduling conflicts or personal considerations, requests additional time to prepare a response or

comply with a legal requirement. Such accommodations save the time and expense of unnecessary motions and hearings. No lawyer should request an extension of time to obtain an unfair advantage.

[1.12] A LAWYER SHOULD COOPERATE IN SCHEDULING HEARINGS AND DEPOSITIONS.

Comment

Lawyers have an affirmative obligation to check availability prior to scheduling matters. Likewise, opposing counsel has an affirmative obligation to respond within a reasonable period of time. This should not be used as a delay tactic. Because prior consultation about scheduling is a courtesy measure, it is proper to schedule hearings or depositions without

agreement if the other counsel fails or refuses to respond promptly to the time offered or raises unreasonable calendar conflicts or objections. The lawyer is reminded that attempts to prearrange schedules should focus on availability. They are not requests for "permission" or "consent" to schedule particular hearings or depositions.

[1.13] A LAWYER MUST PROVIDE NOTICE AS SOON AS POSSIBLE OF THE NEED TO CANCEL ANY SCHEDULED MATTER.

Comment

Notice of cancellation should be given to the court, all lawyers, the client, and witnesses. Adherence to this goal will avoid unnecessary travel, expense, and expenditure of time by other counsel and will also free the

court's time for other matters. The same principles apply to all scheduled meetings, conferences, and production sessions with other lawyers.



[1.14] A LAWYER MUST TRANSMIT PROPOSED ORDERS, OTHER THAN EX PARTE ORDERS, TO THE OTHER SIDE BEFORE SUBMISSION TO THE COURT. A LAWYER MUST PROMPTLY COMMUNICATE APPROVAL OR OBJECTION TO THE PROPOSED ORDER.

Comment

Proposed orders following hearings should generally be submitted at the earliest practicable time. Proposed orders should be limited to and accurately reflect the judges'

rulings. Only after submitting the order to the other lawyer should the proposed order be submitted to the court. Upon receipt of a proposed order, and without delay, a lawyer should promptly reply with approval or revisions.

[1.15] A LAWYER MUST NOT SEEK AN EX PARTE ORDER EXCEPT IN EXIGENT CIRCUMSTANCES.

Comment

There are few things more damaging to a client's confidence in his or her lawyer, or to relationships between lawyers, than for a party to be served with an ex parte order about which his or her lawyer knows nothing.⁷

N.B. Ex parte orders permitted by administrative orders or otherwise (i.e., discovery matters) do not require exigent circumstances.

[1.16] A LAWYER MUST DELIVER DOCUMENTS TO THE COURT AND THE OTHER SIDE AT THE SAME TIME.

Comment

When a lawyer sends documents to the court, copies must be transmitted at the same time to all counsel of record. An identical method need not be employed if delivery is at approximately the same time.

For example, if the court is one block from counsel's office and opposing counsel's office is 50 miles away, it would be acceptable to hand deliver a document to the court and to email it to counsel, so it arrives at approximately the same time.

⁷ Even when authorized by law, ex parte proceedings present the potential for unfairness since "there is no balance of presentation by opposing advocates." *R. Regulating The Florida Bar* 4-3.3(d) Comment. The lawyer for the represented party must disclose all "material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse." *R. Regulating The Florida Bar* 4- 3.3(d). Fairness and professional courtesy call for notice to other counsel.

[1.17] A LAWYER MUST AVOID DISPARAGING PERSONAL REMARKS OR ACRIMONY TOWARD THE OPPOSING PARTY, OPPOSING COUNSEL, THIRD PARTIES, OR THE COURT.

Comment

Rules Regulating The Florida Bar 4-3.3 mandates candor toward the Tribunal. Rule 4-3.4 requires fairness to opposing party and

counsel. Professionalism Expectations 3, 4, and 5 dictate adherences to a fundamental sense of honor, integrity, and fair play; the fair and efficient administration of justice; and using decorum and courtesy.

[1.18] A LAWYER MUST NOT INAPPROPRIATELY COMMUNICATE WITH A PARTY REPRESENTED BY A LAWYER.

Comment

While representing a client, a lawyer must not communicate with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other person's lawyer. *R. Regulating The Florida Bar 4-4.2(a)*. This rule applies even though the represented person initiates or consents to the communication. *R. Regulating The Florida Bar. 4-4.2(a), Comment*. The lawyer must terminate contact immediately upon learning that the person is represented.

A lawyer should not accept or send a "friend request" to an opposing party or engage in any social media or electronic communication. This includes not responding to "reply all" emails. A lawyer should avoid sending emails to opposing counsel copied to the client simultaneously, especially when doing so would inflame the issues unnecessarily and may result in the clients replying to all in the email and inadvertently communicating with opposing counsel.

[2] COMPETENCE AND ADVICE

[2.1] A LAWYER SHOULD ADVISE THE CLIENT OF THE EMOTIONAL AND ECONOMIC IMPACTS OF ALTERING THE FAMILY STRUCTURE, AND EXPLORE ALL OPTIONS INCLUDING RECONCILIATION.

Comment

Family law cases can exact heavy economic and emotional tolls. The decision to alter the family structure should never be made casually. A lawyer should discuss reconciliation and whether the client has considered counseling or therapy.

A lawyer's role in family matters is to act as a counselor and advisor, and as an advocate. The Rules Regulating The Florida Bar permit the lawyer to address moral, economic, social, and political factors that may relate to the client's situation. When consultation with a

professional in another field is appropriate, the lawyer should make such a recommendation. A discussion of the emotional and monetary repercussions of restructuring family relationships is always appropriate.

If the client wishes to attempt reconciliation, the family lawyer should limit litigation-related activities that might undermine the effectiveness of counseling and marital harmony. The lawyer should advise the client how best to protect the client's legal interests while the reconciliation is attempted.

[2.2] A LAWYER SHOULD ADVISE THE CLIENT OF THE POTENTIAL EFFECT OF THE CLIENT'S CONDUCT IN DISPUTES INVOLVING CHILDREN.

Comment

The parties' conduct may affect the children's adjustment, the children's relationship with the parents, and the ultimate decisions on

parental responsibility and parenting time. The lawyer has an affirmative obligation to advise the client of the effect of his or her conduct on the children. Conduct conforming to such advice will often benefit both the



children and the parents, independent of any dispute. Suggesting that the client spend more time with the child and consult with the child's doctor, teacher, and babysitter is appropriate. It is also proper to describe the potential harmful consequences to the children (and to the client legally) of prematurely introducing the children to a new romantic partner or engaging in substance abuse, abusive or derogatory behavior toward the other parent, or other inappropriate behavior.

Pre-litigation planning is an ideal opportunity to advise the client on ways to make it easier for the children to move on after the litigation is over. For example, the lawyer might provide resources to the client on the impact of divorce and separation on the children. The lawyer might describe ways for the parents to inform the children together about the parents' separation. The lawyer might describe programs available in the client's community to aid both parents and children in adjusting to change. Most important, pre-litigation planning is an opportunity to orient the client toward consideration of the

children's needs first and the desirability of working out a cooperative parenting plan.

The lawyer should explain that adversarial litigation may be harmful to children because it drives parents further apart when the children need them to work together. The lawyer should explain that family relationships last forever. If parental responsibility is an issue, the lawyer should refer the client to the parent stabilization course required by F.S. §61.21 at the earliest opportunity. Parents who are separating or divorcing are more likely to receive maximum benefit from a program if they attend at the early stages of their dispute. A petitioner is required to complete the course within 45 days after filing and other parties within 45 days after service. There are similar requirements for never-married parents.

The lawyer should describe how mediation of children's issues might help the parents reach an agreement and in the process conserve emotions and money. When appropriate: (1) the client should be referred to a mental health professional for his or her adjustment to the circumstances, and (2) the lawyer should recommend an agreed-upon mental

health professional to assist the parents in developing a parenting plan.

The lawyer should consider whether the client's position on children's issues is asserted in good faith. If not, the lawyer should advise the client of a meritless claim's harmful consequences to the client, the child, and the client's spouse. If the client persists in

demanding advice to build a spurious case or to use a parenting claim as a bargaining chip or a means of inflicting revenge (see Goal 6.3 and Comment), the lawyer should withdraw.

The parents' fundamental obligations for the well-being of children provide a basis for the lawyer's consideration of the children's best interests.



[2.3] A LAWYER MUST ADVISE THE CLIENT ABOUT ALTERNATIVE DISPUTE RESOLUTION.

Comment

A lawyer should advise clients of various methods of alternative dispute resolution, including collaborative law, mediation, arbitration, private judging, and parent coordination, among others.

Many clients favor an alternative dispute resolution model over litigation. Family

lawyers must have sufficient knowledge about alternative dispute resolution to understand the advantages and disadvantages for a particular client and to counsel the client appropriately about the particular dispute resolution method selected. The lawyer should understand the effects that the dynamics of domestic violence have on any alternative dispute resolution model.

In non-collaborative cases, the lawyer should discuss a reasonable range of predictable litigation outcomes with the client before

beginning a form of alternative dispute resolution, including the costs of litigation, both financial and emotional.

[2.4] A LAWYER MUST NOT CONDONE, ASSIST, OR ENCOURAGE A CLIENT TO TRANSFER, HIDE, DISSIPATE, OR MOVE INCOME OR ASSETS TO IMPROPERLY DEFEAT ANOTHER PARTY'S CLAIM.

Comment

It is improper for a lawyer to counsel a client to engage or to assist a client in engaging in conduct that the lawyer knows or reasonably should know is criminal or fraudulent.

A client's efforts to transfer assets beyond the reach of the court indicates an improper motive.

A lawyer should discuss the legal consequences of any proposed course of conduct with a client. Whether the client proposes opening a secret

out-of-state bank account, moving assets to an offshore trust, or having a family member hold sums of cash for concealment, the advice to the client must be the same: "Do not do it." A client's efforts to transfer assets beyond the reach of the court indicates an improper motive.

Hiding assets to defeat a claim is a fraud upon the client's spouse and is likely to result in a fraud upon the court. The client must be advised not to conceal information about property, fail to furnish documents, insist on placing unrealistic values on properties, or omit assets from sworn financial statements. If the lawyer learns that the client has already engaged in criminal behavior, it is appropriate to refer the client to criminal counsel.

There is a critical distinction between advising on the legal aspects of questionable conduct and recommending how a crime or fraud might be committed with impunity. Sometimes, it may be difficult to determine whether a client's questions are asked to facilitate an improper purpose. Although the lawyer should initially give the client the benefit of any doubt, later discovery of improper conduct requires that the lawyer immediately take remedial measures and may require withdrawal from representation.

R. Regulating The Florida Bar 4-1.16

[2.5] A LAWYER SHOULD ATTEMPT TO RESOLVE FAMILY DISPUTES BY AGREEMENT AND SHOULD CONSIDER ALL APPROPRIATE MEANS OF ACHIEVING RESOLUTION.

Comment

In family law matters, a cooperative resolution of disputes is highly desirable. Family law is not a matter of winning or losing. Disputes should be resolved equitably for all parties, including children. Major tasks of the family lawyer include helping the client develop realistic objectives and attempting to attain them with the least injury to the family.

Parties are more likely to abide by their own agreements than by court-imposed

outcomes. Reaching an agreement may establish a positive tone for continuing post-dispute family relations by avoiding the animosity and pain of court battles. It may also be less costly than a litigated outcome.

The lawyer must recognize when further efforts at out-of-court settlement are fruitless and discuss this with the client. Although litigation can be expensive and emotionally draining, further compromise or concessions may not be appropriate.

[2.6] A LAWYER MUST COMPETENTLY HANDLE ALL ASPECTS OF THE REPRESENTATION.

Comment

Family law practice requires knowledge beyond questions of dissolution of marriage, parental responsibility, and support—such as property, tax, business entities, trusts and estates, bankruptcy, and pensions. All family lawyers should possess enough knowledge to recognize the existence of potential issues in the myriad of legal areas relevant to the representation.

Knowledge is not limited to legal information. A family lawyer should be familiar with the dynamics of domestic violence, substance

abuse, and mental and emotional disorders. Cases involving children require knowledge of child development. A lawyer should be knowledgeable about intervention options.

Competent handling might include engaging (with the client's informed consent) persons knowledgeable in other fields to assist in obtaining the knowledge necessary to effectively represent the client. A lawyer who cannot obtain competence through reasonable study and preparation should seek to withdraw or, with the client's consent, associate with or recommend a more qualified lawyer.

[2.7] A LAWYER SHOULD ADVISE THE CLIENT ABOUT THE AVAILABILITY OF “UNBUNDLED SERVICES.”

Comment

Rules Regulating The Florida Bar 4-1.2(c) and Florida Family Law Rules of Procedure 12.040 allow the lawyer and client to limit representation when it is reasonable. The idea is to “unbundle” legal services to make them more affordable. For example, the lawyer and client may agree to limit the lawyer’s services to a consultation on how to handle a specific legal problem. The time allowed must be sufficient to provide appropriate information. It is also permissible to assist a self-represented party in drafting documents to be submitted to the court. The lawyer is not required to sign the documents, but the client must disclose that the documents were “prepared with the advice of counsel.”

The lawyer and client may also limit the lawyer’s services to a court appearance on a specific issue. The lawyer must explain the specific limitation, so the client is able to give informed consent to the representation. *R. Regulating The Florida Bar* 4-1.4(b). Informed consent is “the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and reasonably available alternatives to the proposed course of conduct.” *R. Regulating The Florida Bar*, Preamble, Terminology. The lawyer must file a notice limiting the appearance to a particular task or the lawyer will be the “attorney of record throughout the entire family law matter.” *Fla. Fam. L. R. P.* 12.040(a).

[2.8] A LAWYER SHOULD ENDEAVOR TO ACHIEVE THE CLIENT’S LAWFUL OBJECTIVES AS ECONOMICALLY AND EXPEDITIOUSLY AS POSSIBLE.

Comment

Some clients expect and want the family lawyer to reflect the highly emotional and vengeful personal feelings between the parties. The lawyer should counsel the client that discourteous and retaliatory conduct is inappropriate, unprofessional, and counterproductive. Respect follows

competent and ethical representation. It is unprofessional for the lawyer to act otherwise.

The client may determine the objectives of representation. After consulting with the client, the lawyer may limit the objectives and the means by which the objectives are to be pursued. The family lawyer should try to lower the emotional level of the interaction

between parties and counsel. Some dissension and bad feelings can be avoided by a frank discussion with the client at the outset of how the lawyer handles cases, including what the lawyer will and will not do regarding vindictive conduct or actions likely to hurt the children's interests.

For example, the lawyer will not respond in kind to unnecessary or unreasonable

discovery requests or accusations of irrelevant fault or misconduct. The lawyer should never counsel for the use of injunctions for protection against domestic violence solely to gain an advantage. If the client is unwilling to accept the lawyer's limitations on objectives or means, the lawyer should decline the representation.

[2.9] A LAWYER MUST BE FAMILIAR WITH ETHICAL GUIDELINES REGARDING SOCIAL MEDIA, DATA, AND ELECTRONIC COMMUNICATION.

Comment

Social Media. Normal discovery principles apply to electronic communication and social media included but not limited to email, text, FaceTime, Facebook, LinkedIn, Twitter, Instagram, Snapchat, My Space, blogs and phone apps. If clients specifically ask their lawyers about removing information from their social media, their lawyers' advice must comply with Rules Regulating The Florida Bar 4-3.4(a). A lawyer may advise a client to change his or her privacy settings and use the highest levels of privacy settings on social media pages so they are not publicly accessible. However, if the lawyer knows, or should reasonably know, the information or data relates to a foreseeable proceeding, then an appropriate record of the social media information or data must be preserved.

The Professional Ethics Committee has recommended that a lawyer may advise the client pre-litigation to remove information from a social media page, regardless of its relevance to a reasonably foreseeable proceeding, as long as the removal violates no substantive law regarding preservation and/or spoliation of evidence. However, an appropriate record of the social media information or data must be preserved.

A lawyer must not engage or assist others in the destruction or concealment of evidence, improperly influencing witnesses, or obstructive tactics in the discovery process.

A lawyer should avoid using text messages to communicate with a client or opposing counsel absent agreement.

Absent employing encryption methods, a client's email communications with a family lawyer may not adequately protect the attorney-client privileged communications. A lawyer should try to protect the attorney-client privilege or confidentiality when utilizing any electronic communication or social media to communicate with a client.

Metadata. A lawyer should take precaution to protect the confidentiality of all information in electronic documents and electronic communications, including metadata. Likewise, a lawyer should not seek to obtain information from within the metadata that the lawyer knows is not intended to be available by the sender. A lawyer must promptly return any inadvertently received metadata to the sender.

[2.10] A LAWYER SHOULD ADVISE THE CLIENT ABOUT THE POTENTIAL LEGAL CONSEQUENCES OF INTERCEPTING AND OPENING MAIL OR ELECTRONIC COMMUNICATIONS ADDRESSED TO ANOTHER.

Comment

A plethora of statutes prohibit intercepting phone calls, unlawfully accessing written communication, and unauthorized access to computers or stored electronic data. See F.S. §815.06, Florida Computer Crimes Act; F.S. §934.03, Interception and disclosure of wire, oral or electronic communications prohibited; F.S. §934.21, Unlawful access to stored communications; F.S. §934.04, Distribution or possession of wire, oral or electronic communication intercepting devices prohibited; and F.S. §934.425 prohibiting the installation of a tracking device as a few examples.

A lawyer's use, possession, or even awareness of such illegally obtained material

has consequences. Rule 4-4.4(a) prohibits a lawyer from knowingly using methods of obtaining evidence that violate the rights of a third person. Rule 4-1.2(d) prohibits a lawyer from assisting a client if the lawyer knows or should know that the conduct is criminal or fraudulent. Rule 4-1.4 requires a lawyer to advise a client about improper or illegal conduct. Rule 4-8.4 prohibits a lawyer from violating the rules through the acts of another; a lawyer cannot hire a private investigator to perform acts the lawyer could not perform. Rule 4-8.4(c) and (d) prohibit a lawyer from engaging in conduct that is dishonest or prejudicial to the administration of justice.

Ethics Opinion 07-1 says that a lawyer whose client provides wrongfully obtained documents needs to advise the client to

consult with a criminal lawyer. Further, the materials cannot be retained, reviewed, or used without informing the aggrieved party and that person's lawyer about the documents.

Disqualification of the lawyer who receives and reviews unlawfully obtained material

is a proper remedy if the lawyer obtained an unfair advantage or was guilty of the inequitable conduct doctrine. See *Castellano v. Winthrop*, 27 So. 3d 134 (Fla. 5th DCA 2010) and *Minakan v. Husted*, 27 So. 3d (Fla. 4th DCA 2010).



[3] CLIENT RELATIONSHIP AND DECISION-MAKING

Clients come to family lawyers when there are significant problems in family relationships. At times, clients have not had sufficient time to engage in rational thought, and emotions often render rational

decision-making difficult. Clients also seek the advice and judgment of their family lawyers about non-legal matters.



[3.1] A LAWYER SHOULD INFORM EVERY CLIENT WHAT THE LAWYER EXPECTS FROM THE CLIENT AND WHAT THE CLIENT CAN EXPECT FROM THE LAWYER.

Comment

Family lawyers should set forth clear expectations regarding communications, behavior, and responsibilities among the lawyer, staff, and client. As an example, the lawyer should appear on time for all appointments; be prepared for appointments, depositions, and meetings; immediately notify the client of the results of a hearing, deposition, or a meeting at which the client was not in attendance; listen, understand, and recognize a client's concern; and train office staff to treat the client with professional respect and to assist in problem-solving.

The lawyer should recognize the client's perception of meetings held between the court and counsel without the client being present. The client should be advised in advance, if practical, of the possibility of any such meetings and must be advised of the content and outcome of any meeting actually held.

In advising a client, a lawyer should not understate or overstate achievable results or otherwise create unrealistic expectations.

[3.2] A LAWYER MUST EDUCATE THE CLIENT SO THE CLIENT CAN MAKE INFORMED DECISIONS.

Comment

It is important for the lawyer to accurately and thoroughly advise the client and provide the client with a realistic assessment of the case, including strengths and weaknesses.

The lawyer should explain the matter to permit the client to make informed decisions. The client should have sufficient information to participate intelligently in deciding the objectives of the representation and the means by which they are to be pursued. The lawyer should copy the client with every pleading, motion, notice, and order.

A lawyer's consideration of the client's interests and timely communication with the client in response to the client's inquiries are vital and necessary parts of the attorney-client relationship. Although relevant information should be conveyed promptly, in rare instances a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. For example, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer is never justified in withholding information solely for the lawyer's own convenience.

A difficult question is whether the family lawyer should provide, either voluntarily or on request, a negative opinion of opposing

counsel, the judge, or the law. For example, should the client be told that a case is assigned to a judge who has demonstrated prejudice or bias or who has difficulty with complex tax or financial issues, or that the other lawyer seems incapable of settlement and invariably ends up in difficult trials?

Although lawyers must use their best judgment in individual cases, some general guidelines are:

- (1) Do not lie or tell the client less than the whole truth;
- (2) Answer specific questions ("If we go to court, how is the judge likely to rule?" or "What are the risks?") diplomatically but completely; and
- (3) Do not criticize the court, opposing counsel, or the system unless necessary for the client to understand delays or the necessity of responding to conduct of the court or opposing counsel.

Unnecessary criticism of the court, the legal system, opposing parties, or opposing counsel undermines the effectiveness and enforceability of judgments and undermines trust and confidence in the legal system.

[3.3] A LAWYER MUST KEEP THE CLIENT INFORMED OF DEVELOPMENTS IN THE CASE.

Comment

The lawyer or a staff member must promptly respond to the client's telephone calls or emails, normally by the end of the next business day. The lawyer should also:

- (1) Utilize an out-of-office email message with a forward to staff equipped to respond to the client promptly;
- (2) Provide notice before incurring any major costs;
- (3) Provide notice of any calendar changes, scheduled court appearances, and discovery proceedings;
- (4) Communicate all settlement offers, no matter how unreasonable;

- (5) Advise of major changes in the law affecting the proceedings;
- (6) Provide reports of major changes of strategy; and
- (7) Communicate all news, good and bad, promptly.

Frequent and prompt communication with the client on all important matters helps build a positive attorney-client relationship and is necessary for the client to make informed decisions. The lawyer should understand that the client's case is usually the most important matter in the life of the client.

[3.4] A LAWYER MUST RESPOND PROMPTLY TO ALL COMMUNICATIONS FROM THE CLIENT.

Comment

The target goal is to respond to emails and return telephone calls within twenty-four hours, excepting weekends. Responding the same business day is preferable.

[3.5] A LAWYER SHOULD SHARE DECISION-MAKING RESPONSIBILITY WITH THE CLIENT, AND COUNSEL THE CLIENT ABOUT THE PROPRIETY OF THE OBJECTIVES SOUGHT AND THE MEANS EMPLOYED TO ACHIEVE THEM.

Comment

Resolving a case may require making many decisions relating to minor children, property division, and financial matters. Decision-making authority may reside with the client,

The lawyer and client should jointly make significant decisions.

the lawyer, or both. The lawyer should consult with the client on the means by which objectives

are to be pursued, but the lawyer should assume responsibility for procedural and tactical issues (e.g., choosing forum, type of pleadings, or judicial remedy). The lawyer should defer to the client regarding expenses to be incurred and concern for third persons who might be adversely affected.⁸

It is appropriate as part of the lawyer's counseling function to assist the client in evaluating objectives. A lawyer should counsel a client not only as to the law, but also as to "other considerations such as moral, economic, social, and political factors that may be relevant to the client's situation."⁹

The lawyer and client should jointly make significant decisions, such as whether to file a costly motion or whether to retain certain experts. Even when the client has ultimate decision-making authority, as in the decision to surrender parental rights, the lawyer should provide counsel and advice.

A client may need or request advice regarding matters beyond the lawyer's expertise. These matters may include but are not limited to the disciplines of psychiatry, psychology, social work, accounting, estate planning, realtors, or financial planning. The lawyer should recommend that the client consult with a professional in the particular field.¹⁰

If a client proposes a course of action likely to result in substantial adverse consequences to the client or the client's minor child, the lawyer should advise the client on the adverse consequences and any available options. However, duty to the client may require the lawyer to act in accordance with the client's wishes, unless the lawyer

⁸ R. Regulating The Florida Bar 4-1.2, Comment.

⁹ R. Regulating The Florida Bar 4-2.1.

¹⁰ R. Regulating The Florida Bar 4-2.1, Comment.

finds the objectives or means repugnant or imprudent.¹¹

Examples

1. The client insists that the family lawyer bring issues to the court's attention during the trial that are legally irrelevant. The lawyer should specifically explain how using irrelevant evidence or arguments could result in sanctions against the client or the lawyer, or both.¹²
2. The client (wife) has a claim for alimony that the lawyer believes will succeed and the husband offers to give a larger share of the assets to the wife if she will waive the right to alimony. Alimony will terminate at the death of either party or on the wife's remarriage. If the client does not remarry, she will benefit far more from alimony than the additional assets. If she remarries, she will benefit more from the additional assets. The lawyer's role is to educate the client and allow her to make the choice.
3. The father in a dependency case wishes to admit dependency, agree the mother should have sole parental responsibility, and agree to have no contact with the children. The mother and the Department of Children and Families are eager to accept this outcome. The mother's lawyer should inform the mother about the risks of future litigation and the potential adverse consequences to the children. The lawyer representing the father should explain the legal options that would allow him to maintain contact with the children and the potential adverse consequences to the children. When a client insists on settlement that the lawyer feels is unfair, inadvisable, or harmful, the lawyer should consider: (1) putting the advice in writing; (2) advising the client to obtain the advice of another lawyer, a counselor, or a responsible friend or family member; or (3) withdrawing from the case, subject to approval by the court.

¹¹ *R. Regulating The Florida Bar* 4-1.16(b)(3) and Comment.

¹² *Moakley v. Smallwood*, 826 So. 2d 221 (Fla. 2002) (court has inherent authority to assess attorney's fees against a lawyer for bad faith conduct); *Bitterman v. Bitterman*, 714 So. 2d 356 (Fla. 1998); *Rosen v. Rosen*, 696 So. 2d 697, 701 (Fla. 1997) (court may deny party's request for attorney's fees because litigation was frivolous or spurious or was brought primarily to harass the adverse party).

[3.6] A LAWYER SHOULD PROTECT THE CLIENT WHEN THE CLIENT'S DECISION-MAKING ABILITY APPEARS TO BE IMPAIRED.

Comment

The client whose ability to make reasonable decisions is impaired poses special problems for the lawyer.

Although not incapacitated as a result of substance abuse or other physical or psychological conditions, a client may be impaired in his or her ability to assist in the preparation of the case. A lawyer with reasonable cause to believe

The lawyer is not compelled to follow irrational or potentially harmful directives of a client.

that the client's impairment will interfere with the representation should refer the client for an evaluation to determine the extent of the client's impairment. The lawyer may seek to withdraw from the representation of a client who will not undergo an evaluation.

The lawyer is not compelled to follow irrational or potentially harmful directives of a client, particularly one who is distraught

or impaired, even if the client is not legally incapacitated. The lawyer should oppose any client's illegal or improper decision (i.e., "I don't care what the court says, I won't pay a cent."). The lawyer should attempt to dissuade the client before accepting any clearly detrimental decision. The lawyer should encourage the client to consult with others who may have a stabilizing influence on the client such as the client's therapist, doctor, or clergy. Under extraordinary circumstances, it may be necessary for a lawyer to initiate appointment of a guardian in a situation in which the client appears to be legally incapacitated.¹³

When a client's rejection of the lawyer's advice is likely to hurt the client's interests, the lawyer should document both the advice and the client's refusal to follow it. Doing so emphasizes the risk to the client, formalizes the importance of the client's decision, and protects the lawyer from later allegations of complicity in conduct or failure to properly advise the client of the risks. In appropriate cases, the lawyer may withdraw from representation.

¹³ R. Regulating The Florida Bar 4- 1.14, Comment.

[3.7] THE LAWYER SHOULD NOT PERMIT RELATIVES OR OTHER THIRD PERSONS TO INTERFERE WITH REPRESENTATION OR AFFECT THE LAWYER'S INDEPENDENT PROFESSIONAL JUDGMENT.

Comment

Third persons often try to play parts in clients' cases. Frequently, the client asks to have one or more persons present at conferences and to consult with the person(s) about major decisions in the case. Potential conflicts are exacerbated when the third person is paying litigation expenses or the attorney's fee. Neither payment to the lawyer, nor sincere concern about the client's welfare makes those third persons "clients." At the outset, the lawyer must inform the client and the person paying for the representation that nothing communicated by the client to the lawyer will be disclosed without the client's written consent. The lawyer must also explain the protection of attorney-client privilege and how it may be waived by disclosures to third persons and by their presence during confidential discussions.¹⁴ Upon receiving the client's written consent, the lawyer may discuss the client's options with third parties.

In some situations, the presence of a third person may undermine or impair the decision-making ability of the client. In those situations, the lawyer must confer with the client in private. While it is important for

persons with family law issues to receive advice and support from those they trust, the client must live with the decisions. The client, with the advice of the lawyer, should make the final decision on important issues.

Example

A lawyer represents an elderly woman. The client's son, who is paying the lawyer's fee, instructs the lawyer to establish a trust to manage the client's assets. The lawyer should explain the lawyer's obligation to act only as requested by the client. Additionally, the lawyer may not accept payment from the son without consent of the client and unless the lawyer can avoid interference with the client-lawyer relationship and preserve the confidentiality of communications with the client.¹⁵ Although the son's instructions may be best for the client, the lawyer must ensure that the client has exercised her choice independently with the appropriate advice of the lawyer.

¹⁴ R. Regulating The Florida Bar 4-1.8.

¹⁵ R. Regulating The Florida Bar 4-1.8.

[3.8] A LAWYER SHOULD NOT ALLOW PERSONAL, MORAL, OR RELIGIOUS BELIEFS TO DIMINISH LOYALTY TO THE CLIENT OR USURP THE CLIENT'S RIGHT TO MAKE DECISIONS CONCERNING THE OBJECTIVES OF REPRESENTATION.

Comment

Lawyers should not be expected to ignore strongly held personal beliefs. However, the lawyer may only limit the objectives of the representation if the client consents after consultation.¹⁶ The client has the right to be consulted about the means by which the objectives are to be pursued, matters

normally within the lawyer's discretion.¹⁷ The lawyer should withdraw from representation if personal, moral, or religious beliefs are likely to cause the lawyer to take actions that are not in the client's best interest. If there is any question as to the possible effect of those beliefs on the representation, the client should be consulted, and consent obtained.

[3.9] A LAWYER SHOULD DISCOURAGE THE CLIENT FROM INTERFERING IN THE OTHER PARTY'S EFFORT TO OBTAIN COUNSEL OF CHOICE.

Comment

The lawyer should discourage a client or prospective client from interviewing other lawyers solely to deny the other party access to counsel of choice. The lawyer should not assist the client, for example, by responding

to the client's request for a list of lawyers, if improper motives are suspected.

¹⁶ *R. Regulating The Florida Bar* 4-1.2(c).

¹⁷ *R. Regulating The Florida Bar* 4- 1.2(a). See *R. Regulating The Florida Bar* 4- 1.2 Comment: "In questions of means, the lawyer should assume responsibility for technical and legal tactical issues but should defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected."

[3.10] A LAWYER SHOULD NOT COMMUNICATE WITH THE MEDIA ABOUT A FAMILY LAW CASE EXCEPT TO PROTECT THE CLIENT'S LEGITIMATE INTERESTS AND WITH THE CLIENT'S CONSENT.

Comment

A lawyer should not communicate with the media about a case, a client, or a former

A lawyer's desire to obtain publicity conflicts with the duty to the client.

client without the client's prior knowledge and consent, except to state that the client and the family appreciate the media

respecting their privacy. Statements to the media by a lawyer representing a party in a case will generally be inappropriate because family law matters tend to be private and intimate. Public discussion of a case is inconsistent with constructive advocacy because it can obstruct settlement, cause embarrassment, diminish the opportunity for reconciliation, and harm the family, especially the children. Statements to the media by a lawyer representing a party are also potentially improper because they tend to prejudice an adjudicative proceeding.¹⁸

A lawyer's desire to obtain publicity conflicts with the duty to the client. If contacted by the media, the lawyer should respond by saying: "I cannot give you information on that matter

because it deals with the personal life of my client." The lawyer, as an officer of the court, has duties to both the courts and the client. The parties, subject to order, may discuss their case if they so desire, despite the advice of their counsel. However, a lawyer's statements may influence an adjudicative body sitting or to be convened. A lawyer may withdraw if the client rejects instructions not to speak publicly about the case.

It is no excuse that the opposing party or his or her counsel or agents first discussed the matter with the media. However, if necessary to mitigate recent adverse publicity, the lawyer may make a statement required to protect the

¹⁸ R. Regulating The Florida Bar 4-3.6 and Comment.

client's legitimate interests. Any such statement should be limited to information essential to mitigate the recent adverse publicity.¹⁹

A lawyer should never attempt to gain an advantage for the client by informing the media to embarrass or humiliate the opposing party or counsel.



¹⁹ See *ABA Model Rules of Professional Conduct* 3.6(c) "Notwithstanding paragraph (a), lawyer "may make a statement a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity."



[4] CONFLICT OF INTEREST

A conflict exists if the representation of a client may be materially limited by the lawyer's responsibilities to another client or a third person, or by the lawyer's own interests.²⁰ The key to preventing unintentional violations of the conflict of interest rules lies

in anticipating the possibility that a conflict will develop. In family law matters, where "winning" and "losing" in the traditional sense often lose their meaning, determination of the appropriate ethical conduct can be difficult.

[4.1] A LAWYER MUST NOT REPRESENT BOTH PARTIES IN A FAMILY LAW MATTER, EVEN IF THE PARTIES DO NOT WISH TO OBTAIN INDEPENDENT REPRESENTATION.

Comment

A lawyer is often the "family's lawyer," and has represented the husband, wife, family

corporations, and even the children.²¹

However, it is impossible for the lawyer to provide impartial advice to both parties. Even a seemingly amicable separation or divorce

²⁰ *R. Regulating The Florida Bar 4-1.7(b).*

²¹ *R. Regulating The Florida Bar 4-1.7 Comments 5 and 27.* For example, a lawyer representing a husband with respect to his corporation would be precluded from representing his wife against him in an unrelated dissolution of marriage or custody proceeding.

may cause bitter litigation over financial matters or parental responsibility.

A conflict does not exist when the lawyer serves as a mediator. The mediator must remain impartial and advise the participants that the mediator represents neither party.

This goal does not apply in adoption proceedings or other similar matters in which the parties' positions are not adverse, or likely to become adverse.

[4.2] A LAWYER SHOULD NOT OFFER LEGAL ADVICE TO AN UNREPRESENTED OPPOSING PARTY.

Comment

Once it becomes apparent that the opposing party intends to proceed without a lawyer, the lawyer should, at the earliest opportunity, inform the other party in writing as follows:²²

- (1) I am not your lawyer;
- (2) I do not and will not represent you;
- (3) I will at all times represent my client's interests, not yours;
- (4) Any statements I make to you about this case should be taken by you as negotiation or argument on behalf of my client and not as advice to you as to your best interest; and
- (5) I urge you to obtain your own lawyer.

²² R. Regulating The Florida Bar 4-4.3.

[4.3] A LAWYER SHOULD NOT SIMULTANEOUSLY REPRESENT BOTH A CLIENT AND THE PERSON WITH WHOM THE CLIENT IS ROMANTICALLY INVOLVED.

Comment

Simultaneous representation may create a conflict of interest because the interest of the client and the other person may be adverse. For example, it may be difficult to advise the client of the need to recover from the

emotional trauma of divorce, the desirability of a prenuptial agreement, or the dangers of early remarriage. The testimony of either might be adverse to the other at deposition or trial. In addition, the client may want to waive support payments anticipating an early remarriage.

[4.4] A LAWYER SHOULD NOT HAVE A ROMANTIC RELATIONSHIP WITH A CLIENT, OPPOSING COUNSEL, OR A JUDICIAL OFFICER ASSIGNED TO THE CASE DURING THE TIME OF THE REPRESENTATION.

Comment

Clients are often in vulnerable emotional states. An intimate relationship may endanger both the client's welfare and the lawyer's objectivity. These risks, present in all lawyer-client sexual relations, are particularly serious

in family law matters. Rules Regulating The Florida Bar 4-4.8(i) specifically defines misconduct to engage in sexual conduct with a client or a representative of a client that exploits or adversely affects the interests of the client or the lawyer-client relationship.



[5] FEES

Many family law clients have never hired lawyers. They are vulnerable because of fear, insecurity, and the emotional upheaval associated with family problems. Clients may not understand fees. Clients may misunderstand or forget the terms of fee agreements unless they are in writing.

It is not unusual for a party to a family law matter to lack sufficient funds to pay a lawyer. This lack of resources is aggravated by restrictions against contingent fee contracts.

There is also an unwillingness of some courts to redress the economic balance between the parties with fee awards. The tendency of clients to blame their lawyers for undesirable results can make collecting fees extremely difficult.

These factors help to explain why the number of fee disputes arising from family law cases is often greater than those from other types of cases. Financial arrangements with clients are to be agreed upon and documented.

[5.1] FEE AGREEMENTS SHOULD BE IN WRITING AND CLEARLY STATED.

Comment

The family lawyer should tell the client how fees will be charged, and when and how the lawyer expects to be paid.²³ Written fee agreements should delineate the mutual obligations of lawyer and client. Agreements should be in writing. They should specify the scope of the

representation. Absent an emergency, a fee agreement should be presented in a manner that allows the client time to consider the terms, consult another lawyer before signing, and obtain answers to any questions before entering into it. Fees and costs are to be discussed at the outset of every representation and confirmed in writing.²⁴

[5.2] FEE AGREEMENTS SHOULD CLEARLY DEFINE THE SCOPE OF THE REPRESENTATION.

Below are various examples of defining the scope of the representation:

- (1) Full Scope: Our representation includes advising, counseling, drafting, negotiating, investigating, analyzing, and handling this family law matter to a final resolution, whether by negotiated settlement or, if necessary, by trial and adjudication by a court. Depending on the specifics of your case, issues may include parental responsibility, parenting time and child support, classification of assets as marital or non-marital, the valuation and division of marital property, the determination of maintenance for you or for your spouse, and the determination of whether the attorney's fees and costs incurred may be shifted from you to your spouse, or vice versa.
- (2) Co-Counsel: Our representation as co-counsel is limited to settlement or trial of the following specific issue. We

²³ When appropriate, this information might include the fact that total fees and costs cannot be predicted. *R. Regulating The Florida Bar* 4-1.5(b) provides the factors to be used in determining a reasonable fee.

²⁴ Some attorney-client relationships would justify the lawyer drafting a letter confirming the fee agreement. Such a confirming letter would be permissible under this goal. However, it is far safer for lawyer and client to have the terms approved by the client in writing.

have not agreed to appeal any decisions or court orders.

(3) Limited Representation: Our representation is limited to assisting in settlement through negotiation and mediation. If attempts at settlement are unsuccessful and litigation is instituted, our representation will cease, unless a new fee agreement is signed. You agree to then retain trial counsel to represent you thereafter. NOTE: The lawyer needs to comply with Florida Family Law Rules of Procedure 12.040 on unbundled services.

(4) Collaborative: I, _____, hereby retain the law firm to represent me with respect to a Collaborative Law dissolution of marriage proceeding. I authorize you to do and perform all acts that are necessary and appropriate in this representation. I understand that this agreement covers legal representation only through a final hearing and entry of a final judgment. It does not include any representation, engagement or fees incurred thereafter. I understand the law firm must withdraw from representation in the event of any litigation, as set forth in the Collaborative Family Law Participation Agreement.

(5) Liens: It is specifically agreed that the law firm shall have and is hereby granted all general, possessory, and retaining liens and all equitable, special

and attorneys' charging liens, upon my interest in all real and personal property for any balance due. Additionally, despite any specific right or remedy set forth above, these rights or remedies shall not be exclusive but shall be in addition to all other rights and remedies allowed by law.

(6) Conclusion of representation: I understand that this agreement covers legal representation only through trial and final judgment. It does not include appeals, filing or defending motions for contempt, or post-judgment proceedings to modify or enforce the final judgment.

(7) Scope: I also understand that the firm's representation does not include other related matters such as temporary or permanent injunctions for protection from domestic violence, bankruptcy proceedings, or real estate transactions, unless these are included in the instant action and bear the same case number. Additionally, I understand you are not responsible for the preparation of a Qualified Domestic Relations Order (QDRO) if one is required in my case. In the event a QDRO is necessary, you will refer me to specialists in that area of law and I will be solely responsible for the payment of those fees.

[5.3] A LAWYER SHOULD PROVIDE CLEAR, CONCISE, AND PERIODIC STATEMENTS OF FEES AND COSTS.

Comment

The statement should be sufficiently detailed to apprise the client of the basis of the charges incurred. Clients have a right to know the status of their accounts. The *Bounds of*

Advocacy Committee recommends recording time contemporaneously and providing the client with billing statements monthly.

[5.4] ALL TRANSACTIONS THAT PROVIDE SECURITY FOR PAYMENT OF ATTORNEY'S FEES SHOULD BE IN WRITING.

Comment

Security agreements are a source of potential problems. All security agreements should be arms-length transactions and the terms of the agreements should be in writing.²⁵ When taking mortgages on real property from a client, the lawyer should advise the client to seek independent representation. A security interest in real estate will not create an enforceable lien unless in writing, notarized, and witnessed by two witnesses. If a lawyer takes personal property as security, it should

be appraised, photographed, and identified by a qualified appraiser to establish its precise identity and value. The lawyer should then secure it in a safe place where there is no danger that it can be removed, substituted, or lost. If using a safe deposit box, the bank must be notified that you are housing personal property belonging to others. See *R. Regulating The Florida Bar* 5-1.1. Except for charging liens, the lawyer may not acquire a proprietary interest in property that is the subject of the litigation.²⁶

²⁵ As stated in the Comment to *R. Regulating The Florida Bar* 4-1.5: "A lawyer may accept property in payment for services, such as an ownership interest in an enterprise, providing this does not involve acquisition of a proprietary interest in the cause of action or subject matter of the litigation contrary to Rule 4-1.8. However, a fee paid in property instead of money may be subject to special scrutiny because it involves questions concerning both the value of the services and the lawyer's special knowledge of the value of the property."

²⁶ *R. Regulating The Florida Bar* 4-1.8.

[5.5] A LAWYER'S FEE SHOULD BE REASONABLE AND BASED ON APPROPRIATE FACTORS.

Comment

Lawyers should charge reasonable fees for services performed under valid fee agreements. Although the starting point in determining a reasonable fee is often the lawyer's hourly rate multiplied by the hours spent on the case, several other factors may be relevant in determining an appropriate fee in a particular representation. Rules Regulating The Florida Bar 4-1.5(b) lists many factors.

Clients, as consumers, should be able to negotiate fee agreements that best suit

Lawyers are advised that charging an administrative fee instead of billing for actual costs is prohibited.

their needs and circumstances. Besides a fee agreement based solely on an hourly rate, a fee agreement may provide for a flat fee, or one or more factors provided in

Rules Regulating The Florida Bar 4-1.5(b). No single factor is appropriate in all family law cases because clients and the nature of the representations vary greatly. Therefore, it is important at the outset for the lawyer to explain the factors to be used in determining the fee and provide the fee agreement in writing. See Goal 5.1.

Florida has prohibited fees in family cases in any way based on the results obtained, holding that such fees constitute contingent fees.

However, a contingent fee may be appropriate in post-dissolution cases in which the enforcement of a liquidated judgment is sought. Examples include an alimony arrearage enforcement proceeding or an action to collect a specific debt or obligation. Although the Rules Regulating The Florida Bar specifically reference "domestic relations matters," it is the Committee's opinion that what is prohibited is any contingent fee in an original dissolution of marriage action. Please note contingent fees are prohibited in any action to enforce or collect child support.

A fee may be based on the lawyer's usual hourly rate, but enhanced by any combination of these circumstances: the complexity of the case; the shortness of the time between the lawyer's retention and impending proceedings; the difficult or aggressive nature of the opposing party and counsel; a particular lawyer's unique ability to settle a case quickly and avoid lengthy and acrimonious trial proceedings; and a substantial risk that the representation will be unsuccessful due to an unfavorable factual or legal context.

Lawyers are advised that charging an administrative fee instead of billing for actual costs is prohibited.

It is illegal for a lawyer to charge or collect a clearly excessive fee.²⁷ Family lawyers must counsel their clients about needless and vexatious litigation. Although the financial resources of the parties are a primary consideration, the court can consider other factors such as the scope and history of the litigation; the duration of the litigation;

the merits of the respective positions; and whether the litigation is brought or maintained primarily to harass. The court can deny attorney's fees for improper conduct or award attorney's fees for egregious conduct or bad faith. The court has inherent authority to award attorney's fees against a lawyer who pursues a claim or defense not supported by the law and facts.

[5.6] A LAWYER MAY MOVE TO WITHDRAW FROM A CASE WHEN THE CLIENT FAILS TO HONOR THE FEE AGREEMENT.

Comment

The fee agreement should set forth the circumstances under which the family lawyer may withdraw for nonpayment. Before seeking to withdraw, the lawyer must take reasonable steps to avoid foreseeable prejudice to the rights of the client, allowing time for employment of other counsel, and

delivering to the client papers and property to which the client is entitled.²⁸ However, the lawyer should not seek to withdraw from a case on the eve of trial unless there was a clear prior understanding that withdrawal would result from nonpayment.²⁹

²⁷ *R. Regulating The Florida Bar* 4-1.5(a).

²⁸ *R. Regulating The Florida Bar* 4-1.16(d).

²⁹ *R. Regulating The Florida Bar* 4-1.16(b).

[5.7] A LAWYER MAY TAKE ALL APPROPRIATE STEPS TO COLLECT FEES, INCLUDING MEDIATION, ARBITRATION, OR SUIT, FROM A CLIENT WHO FAILS TO HONOR THE FEE AGREEMENT.

Comment

Lawyers are entitled to be paid reasonable fees for services performed. Alternatives to litigation should be used to collect a fee unless they are

unlikely to be effective. The lawyer should be cautioned that a suit for fees may be followed by a malpractice action.





[6] CHILDREN

A primary goal of the *Bounds of Advocacy* is to protect children from adverse effects of the divorce process. Research continues to show that exposing children to parental conflict is harmful to children. See Rebecca Love Kourlis, et. al, *laas' Honoring Families Initiative: Courts and Communities Helping Families in Transition Arising from Separation and Divorce*, 51 Fam. Ct. Rev. 351, 359 (2013). However, ethical rules do not impose on a parent's lawyer any direct responsibility to protect children in the process of divorce litigation. *R. Regulating The Florida Bar* 4-1.2, Comment

The lawyer must competently represent the interests of the client (a parent) but should not do so at the expense of the children. The parents' fundamental obligations for the well-being of children provide a basis for the lawyer's consideration of the children's best interests consistent with traditional advocacy and client loyalty principles.

A lawyer is required to put the interests of the client ahead of third parties. This does not mean that the lawyer can ignore the interests of others. Florida law supports this approach in family cases. Children are raised in families, even if the family is not a traditional family. In most cases, family relationships continue after the case is over. This means the lawyer must try to achieve the best result for the client without destroying the relationships that are essential to the future welfare of the family.

Concern for the children and in some cases, the other party, are consistent with the lawyer's responsibility to the legal system and society to "safeguard meaningful family relationships," "promote amicable settlement of disputes," and "mitigate potential harm to the spouses and their children caused by the process of dissolution of marriage." *Fla. Stat.* §61.001 (2017). F.S. §39.001 (2017) includes the importance of the family unit in addressing child abuse and neglect.

[6.1] A LAWYER REPRESENTING A PARENT SHOULD CONSIDER THE WELFARE OF THE MINOR CHILDREN AND SEEK TO MINIMIZE THE ADVERSE IMPACT OF THE FAMILY LAW LITIGATION ON THEM.

Comment

Although the substantive law in Florida about parental responsibility, child abuse, and termination of parental rights is premised on "best interests of the child," the ethical codes provide little (or contradictory) guidance for a lawyer whose client's expressed wishes, interests, or conduct directly conflict with the well-being of children. The welfare of each family member is interrelated.

The adversarial process is an ineffective way to resolve children's issues. The heightened conflict between the parents creates

Children suffer from involvement in their parents' family law litigation.

frustration and stress that detracts from the parents' attention to the children, and litigation costs drain resources

that could otherwise meet the children's needs. The very process intended to protect children may work to their detriment. Family lawyers should counsel parties to examine their wishes in light of the needs and interests of their children and the relationships to other family members. The family lawyer is not only advising the client to adhere to substantive law but is also reminding the client that the

family relationship continues after the litigation is over.

Both parents owe a continuing, fundamental duty to their children to serve their children's best interests. Parents should tell their children about the separation and dissolution together, in a simple age-appropriate manner. If known, the children should know the plan for their care. The children need to be reinforced that the breakup is not their fault. They need to know their family will continue. They do not need to know the details of why their parents are breaking up.

Often, parents should subordinate their own interests to those of their children. When appropriate, family lawyers and parents should cooperate and seek parenting arrangements that eliminate fractious contact between parents, minimize transition or transportation difficulties, and preserve stability for the children.

Children suffer from involvement in their parents' family law litigation. Regardless of the dispute, the lawyer should warn the client against leaving litigation-related documents where children can read them. Parents must avoid talking about the case when children can overhear. Parents must be vigilant against others discussing the case with the children or in their presence.

The lawyer must know which services are effective and available in the particular community to help restructure a dysfunctional family and to preserve the child's relationship with each parent. All professionals involved in family law litigation should become sufficiently educated in the interdisciplinary aspects of their work to function effectively in collaborative problem-solving. Lawyers need basic training in child development to understand issues related to child-parent relationships, child development, and risk assessment.

If the parents disagree about parental responsibility and other parenting issues, both lawyers should consider sending the parties to a neutral mental health professional. Joint stipulation or court order should include

confidentiality for all contacts with the therapist and exclusion of that therapist as a witness in the family law case.

The lawyer should discourage the client, and refuse to participate in, multiple psychological evaluations of children in order to find an expert who will testify in the client's favor. Repeated psychological evaluations of children are contrary to the children's best interests.³⁰

It may also be appropriate to seek the appointment of a guardian ad litem or attorney ad litem for the child or children. The goal of the family law system is to make the child's well-being the highest priority.



³⁰ Committee note to *Fla. Fam. L. R. P.* 12.363, "This rule [evaluation of minor child] should be interpreted to discourage subjecting children to multiple interviews, testing, and evaluations, without good cause shown. The court should consider the best interests of the child in permitting evaluations, testing or interviews of the child."

[6.2] A LAWYER SHOULD NOT COMMUNICATE WITH MINOR CHILDREN REGARDING ISSUES IN THE LITIGATION.

Comment

Absent exigent circumstances, the lawyer for a parent should not speak to a minor child without court approval. Lawyers should

caution the client to not bring the child to the lawyer's office.

[6.3] A LAWYER MUST COUNSEL A CLIENT NOT TO USE CHILDREN'S ISSUES FOR LEVERAGE IN THE LITIGATION.

Comment

The family lawyer should counsel against asserting parental rights as leverage toward attaining other goals. Proper consideration for the welfare of children requires that they not be pawns in the family law process. For example, in Florida, child support is determined partly on the number of overnights a parent spends with the child. However, the lawyers should

negotiate parenting issues based solely on considerations related to the child, then negotiate child support based on financial considerations. The family lawyer should refuse to assist the client in making unwarranted allegations of child abuse or domestic violence. If the client persists despite the lawyer's advice, the lawyer should seek to withdraw.³¹

³¹ *Oath of Admission to The Florida Bar; Creed of Professionalism.*

[6.4] A LAWYER MUST CONSIDER ANY IMPACT ON A CHILD OF BRINGING THAT CHILD TO COURT. THIS SHOULD BE DONE IN FULL DISCUSSION WITH THE CLIENT AND OTHER PROFESSIONALS INVOLVED.

Comment

Florida Family Law Rules of Procedure 12.407 prohibits a lawyer from bringing a child to court or to a deposition without prior court order, except for good cause shown, unless in an emergency situation. (The child may be a necessary witness to domestic violence, leaving only 15 days to seek leave of court to appear.) The Florida Bar Family Law Rules Committee has proposed removing a litigant's discretion to determine what situations create an emergency. The Committee did not anticipate conflict with Florida Rule of Juvenile Procedure 8.255 which allows, and in some cases requires, the child's attendance at hearings. Also, the child is a party to juvenile proceedings and has a right to appear. The Supreme Court has not resolved this conflict.

Taking sides against either parent in a legal proceeding imposes a huge emotional burden on a child. Some children do not want to express a preference in parental responsibility disputes; they want their parents to resolve the issue without involving them. Other children want their views known,

and their views may be highly relevant to the outcome of the dispute. Yet lawyers should be cautious because children are susceptible to coaching. All participants in a family law proceeding (for example, lawyers for all parties, any party's therapist, a child custody evaluator, and the judge) should strive to permit a child's views and information to be expressed in a manner that minimizes exposure of the child to the rigors of the courtroom.³² The lawyer should weigh carefully the risks and benefits to the child of testifying, and consult with appropriate experts as to the potential for harm. After consideration of all these factors, a lawyer who intends to call a child as a witness should ensure that the child is prepared for the experience of testifying.

When a child's testimony is material on an issue other than parental responsibility, counsel should explore whether the same testimony can be introduced from another source, rendering the child's testimony cumulative and unnecessary.

³² Although Florida law generally requires that domestic relations case files and hearings are public, the Commentary to *Fla. Fam. L. R. P.* 12.400 notes that the rule allowing closure under some circumstances should be applied "to protect the interests of minor children from offensive testimony and to protect children in a divorce proceeding."

[6.5] A LAWYER MUST REVEAL INFORMATION TO THE EXTENT THE LAWYER REASONABLY BELIEVES NECESSARY TO PREVENT A CLIENT FROM COMMITTING A CRIME; OR TO PREVENT A DEATH OR SUBSTANTIAL BODILY HARM TO ANOTHER.

Comment

Under Rules Regulating The Florida Bar 4-1.6(b), a lawyer must reveal information reasonably believed necessary “to prevent a client from committing a crime; or to prevent a death or substantial bodily harm to another.”³³ The current Florida rule and statutory “crime-fraud” exception to the Florida evidence code³⁴ require the lawyer to reveal the intention of the client to commit a crime and the information necessary to prevent it. The rules do not appear to address noncriminal conduct, even if it is detrimental to the child. The family lawyer also may become convinced that the client or a person with whom the client has a relationship has abused one of the children. The lawyer may withdraw if the client will not be adversely affected and the court grants any required permission. Disclosure of risk to a child based

on past abuse would not be permitted under this analysis, unless there is a factual basis adequate to support a good faith belief by a reasonable person in the lawyer’s position that a child’s life is in danger, that a child is at risk of substantial bodily harm, or that a client will commit a specific crime if the disclosure is not made.³⁵

Disclosure of confidential information to prevent future harm does not nullify the client’s privilege to refuse to disclose confidential lawyer-client communications. *Newman v. State*, 863 A.2d 32, 333 (Md. 2004). If the lawyer is subpoenaed to testify against the former client, the lawyer must raise the client’s privilege and refuse to testify without the client’s consent. *Fla. Stat.* §90.502(2) (2017). If the judge orders the lawyer to testify, the lawyer must appeal the ruling. *R. Regulating The Florida Bar* 4-1.6(d).

³³ The Comment to *R. Regulating The Florida Bar* 4-1.6 states: “The lawyer’s exercise of discretion requires consideration of such factors as the nature of the lawyer’s relationship with the client and with those who might be injured by the client, the lawyer’s own involvement in the transaction, and factors that may extenuate the conduct in question. Where practical the lawyer should seek to persuade the client to take suitable action. In any case, a disclosure adverse to the client’s interest should be no greater than the lawyer reasonably believes necessary to the purpose.”

³⁴ *Fla. Stat.* §90.502(4)(a) (2017).

³⁵ *R. Regulating The Florida Bar* 4-1.6(b).



THE FAMILY LAW SECTION

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