RULE 4-1.1 COMPETENCE

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.

Comment

Legal knowledge and skill

In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter, and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.

A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances, for ill-considered action under emergency conditions can jeopardize the client's interest.

A lawyer may accept representation where the requisite level of competence can be

achieved by reasonable preparation. This applies as well to a lawyer who is appointed as counsel for an unrepresented person. See also rule 4-6.2.

Thoroughness and preparation

Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence. The lawyer should consult with the client about the degree of thoroughness and the level of preparation required as well as the estimated costs involved under the circumstances.

Maintaining competence

To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, engage in continuing study and education, and comply with all continuing legal education requirements to which the lawyer is subject.

[Revised: 05-22-2006]

919 So. 2d 425, *; 2006 Fla. LEXIS 5, **;
31 Fla. L. Weekly S 29

LEXSEE 919 SO2D 425

THE FLORIDA BAR, Complainant, vs. DANIEL EVERETT ABRAMS, Respondent.

No. SC04-1433

SUPREME COURT OF FLORIDA

919 So. 2d 425*; *2006 Fla. LEXIS 5*; *31 Fla. L. Weekly S 29

January 12, 2006, Decided

COUNSEL: [**1] John F. Harkness, Jr., Executive Director, and John Anthony Boggs, Staff Counsel, The Florida Bar, Tallahassee, Florida, and Lillian Archbold, Bar Counsel, The Florida Bar, Fort Lauderdale, Florida, for Complainant.

Howard W. Poznanski, Boca Raton, Florida, for Respondent.

JUDGES: PARIENTE, C.J., and WELLS, ANSTEAD, LEWIS, QUINCE, CANTERO, and BELL, JJ., concur.

OPINION

[*426] Original Proceeding - The Florida Bar

PER CURIAM.

We have for review a referee's report regarding alleged ethical breaches by Daniel Everett Abrams. We have jurisdiction. *See art. V, § 15, Fla. Const.* We approve the referee's findings of fact, recommendations as to guilt, and recommended discipline.

[*427] I. FACTS

Suzanne Akbas, a paralegal, formed a corporate entity titled U.S. Entry, Inc., to provide legal services to persons with immigration issues who were seeking to gain entry and establish lawful status in the United States. Attorney Daniel Everett Abrams was employed by U.S. Entry as "Managing Attorney" and was paid for performing "piecemeal legal work," generally at a rate of one hundred dollars per unit of [**2] work. Olga Ulershperger and Abdullah Ziya, who were husband and wife, both entered the United States in November 1999 on tourist visas and then in the spring of 2000 sought assistance from U.S. Entry in obtaining further lawful status. Ulershperger was an accomplished gymnast; Ziya was a Turkish Kurd who had suffered persecution, including torture, in his native land.

Akbas told the couple that instead of seeking political asylum based on Ziya's history of persecution, they should apply for employment visas based on Ulershperger's skills as a gymnast. The couple's applications ultimately were denied and their existing visas expired in May 2001. They did not learn of their unlawful status until March or April of 2002, after consulting with an immigration lawyer in California. That lawyer told the couple that they should not have been counseled to seek employment visas but rather should have been counseled to seek political asylum based on Ziya's persecution and torture, but that the one-year time limit for seeking asylum had expired in November 2000. The couple ultimately sought and were granted asylum under an ineffective representation exception to the one-year time limit, which [**3] prompted the present proceeding.

Based on the above matters, The Florida Bar filed a two-count complaint against Abrams, and the referee made the following findings of fact:

> The [referee] finds that [Ulershperger and Ziya] were not notified of the status of their claim or of the lapse of their lawful status. As a result, they have been substantially injured and affected by the Respondent's actions. There was no follow-through by the Respondent -- no telephone calls, no letters to INS, and no time records to support telephone calls made on behalf of his clients. Ulershperger and Ziya were the Respondent's clients and he was personally and professionally responsible for representing them. The evidence demonstrates that while an extension of status was done, nothing else was done and their lawful status expired in May of 2001. The [referee] finds no letters were sent to Ulershperger or Ziya informing

them of the status of their case. They did not know of their unlawful status until March or April of 2002, when they obtained their file from Akbas.

The [referee] finds the Respondent violated a number of disciplinary rules. There were multiple checks paid to the Respondent [**4] by U.S. Entry. Instead of Akbas being employed by and under the Respondent's supervision, it was the other way around. Akbas was the employer and she used the Respondent's license to practice law, or obtained his signature in order to practice law. This evidentiary finding is absolutely clear and there is no contradictory evidence. The checks support the fact that there were consultation and management fees paid. The payments were not even broken down by case or client names.

The [referee] further finds it compelling that the Respondent did not meet with Ulershperger or Ziya. The Respondent had no client file, whether dictated or handwritten, and there is no basis to [*428] dispute the attorney-client relationship because there is no lawyer file. . . .

This [referee] makes a clear finding that Ulershperger and Ziya went to U.S. Entry to obtain legal entry into the United States. After the Respondent found out about their difficulties, he did nothing to help his clients and was only concerned with how the situation affected him. The Respondent allowed Akbas to have the benefit of his name as Managing Attorney. This [referee] finds the Respondent's conduct involves fraud, dishonesty, [**5] and misrepresentation.

. . . .

This husband and wife were horribly taken in and they were very vulnerable. They came to Miami because it was the destination on their airline tickets. They had no friends or family in South Florida. They went to Akbas for assistance and the Respondent allowed Akbas to hold herself out as knowledgeable in the area of immigration law.

The referee recommended that Abrams be found guilty of violating the following Rules Regulating the Florida *Bar: rule 4-1.1* (a lawyer shall provide competent representation); *rule 4-5.3(a)* (a person who uses certain legal titles shall work under the direction or supervision of a lawyer or authorized business entity); *rule 4-5.3(b)* (a lawyer shall exercise supervisory responsibility over nonlawyers employed by him or her); rule 4-5.3(c) (a lawyer shall exercise ultimate supervisory responsibility over nonlawyers who assist him or her); *rule 4-5.4(a)* (a lawyer shall not share legal fees with a nonlawyer except under certain circumstances); rule 4-5.4(d) (a lawyer shall not permit his or her employer to direct or regulate the lawyer's legal judgment); *rule 4-5.5(b)* (a lawyer shall not assist a nonlawyer in the unlicensed [**6] practice of law); and rule 4-8.4(c) (a lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation).

The referee recommended that the following disciplinary measures be imposed on Abrams: a one-year suspension; restitution in the amount of $ 2,400; and payment of the Bar's costs. In recommending this discipline, the referee took into account the following factors: Abrams's age of forty-one and the fact that Abrams had been admitted to the Bar on September 29, 1997. The referee found that the following aggravating circumstances had been established: dishonest or selfish motive, pattern of misconduct, vulnerability of victim, and substantial experience in the practice of law. The referee also found that a single mitigating circumstance had been established: absence of prior discipline.

Abrams has petitioned for review, challenging the referee's recommendation that he be found guilty of violating *rules 4-1.1* and 4-8.4(c). He also challenges the recommended sanction of a one-year suspension, contending that instead a suspension of between ten and ninety days would be more appropriate. And finally, he challenges the referee's recommendation that he be [**7] required to pay restitution and costs.

II. ANALYSIS

A. *Factual Findings and Recommendations as to Guilt*

The Court's standard of review for evaluating a referee's factual findings and recommendations as to guilt is as follows:

> This Court's review of such matters is limited, and if a referee's findings of fact and conclusions concerning guilt are supported by competent, substantial evidence in the record, this Court will not [*429] reweigh the evidence and

> substitute its judgment for that of the referee.

Fla. Bar v. Rose, 823 So. 2d 727, 729 (Fla. 2002). Implicit in this standard is the requirement that the referee's factual findings must be sufficient under the applicable rules to support the recommendations as to guilt. *See Fla. Bar v. Spear, 887 So. 2d 1242, 1245 (Fla. 2004)*.

In the present case, neither party contests the referee's factual findings and neither party contests his recommendations as to guilt with respect to the alleged violations of *rules 4-5.3(a)*, *4-5.3(b)*, 4-5.3(c), *4-5.4(a)*, 4-5.4(d), and *4-5.5(b)*. Our review of the record shows that those findings and recommendations are supported by competent, substantial evidence. [**8] We approve the referee's factual findings and we approve his recommendations as to guilt with respect to the alleged violations of *rules 4-5.3(a)*, *4-5.3(b)*, 4-5.3(c), *4-5.4(a)*, 4-5.4(d), and *4-5.5(b)*.

As for the alleged violation of *rule 4-1.1*, Abrams contends that the record fails to support the referee's recommendation that he be found guilty of violating this rule. We disagree. *Rule 4-1.1* provides as follows:

> A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.

R. Regulating Fla. Bar 4-1.1.

The present record shows that Abrams was listed as the attorney of record on a status extension application submitted by Ziya and was listed as the "Managing Attorney" on the letterhead of a missive that was used by U.S. Entry in requesting alien labor certification for Ulershperger. The letter was signed, "Suzanne J. Akbas For Daniel E. Abrams, Esq." At the hearing below, immigration lawyer Elisa Brasil testified via telephonic deposition that the proper handling of asylum claims requires substantial intake [**9] by a lawyer, not a paralegal; her testimony was uncontroverted. In contrast, the present record shows that Abrams had no contact whatsoever with Ulershperger and Ziya but rather relied exclusively on Akbas's analysis of the couple's situation. Abrams has submitted no client files or other evidence showing that he did any work on their behalf. Ultimately, Ziya's and Ulershperger's lawful immigration status lapsed, and they did not discover this until almost a year later, after consulting with another lawyer. By that time, the one-year time period for seeking political asylum had long since expired. (The one-year period expired in November 2000, months after the couple had sought the assistance of U.S. Entry in the spring of 2000.) We approve the referee's recommendation that Abrams be found guilty of violating *rule 4-1.1*.

As for the alleged violation of rule 4-8.4(c), Abrams contends that the record fails to support the referee's recommendation that he be found guilty of violating this rule. We disagree. Rule 4-8.4(c) provides that a lawyer shall not "engage in conduct involving dishonesty, fraud, deceit, or misrepresentation." *See* R. Regulating Fla. Bar 4-8.4(c) [**10] . In the present case, the record shows that even though Akbas worked as a paralegal at U.S. Entry, she actually was the person in control of the corporation's day-to-day operations. She met with the clients, conducted the client interviews, and made the decisions as to the appropriate course of action for the clients. Abrams himself visited the U.S. Entry office only several times a month. Akbas testified that she unsuccessfully tried to get Abrams more involved in the company's operations. We conclude that Abrams's role and course of [*430] conduct at U.S. Entry were inconsistent with the title "Managing Attorney," and the title constituted a clear misrepresentation of his status. We approve the referee's recommendation that Abrams be found guilty of violating rule 4-8.4(c).

B. *Recommended Discipline*

In reviewing a referee's recommended discipline, this Court's scope of review is broader than that afforded to the referee's findings of fact because, ultimately, it is our responsibility to order the appropriate sanction. *See Fla. Bar v. Anderson, 538 So. 2d 852, 854 (Fla. 1989)*; *see also art. V, § 15, Fla. Const.* However, generally speaking, this Court will not [**11] second-guess the referee's recommended discipline as long as it has a reasonable basis in existing case law and the Florida Standards for Imposing Lawyer Sanctions. *See Fla. Bar v. Temmer, 753 So. 2d 555, 558 (Fla. 1999)*.

In the present case, the recommended sanction of a one-year suspension meets the above standard. First, the recommended sanction has a reasonable basis in the Court's existing case law. The main case cited by Abrams to support a ninety-day suspension, *Florida Bar v. Beach, 675 So. 2d 106 (Fla. 1996)*, is distinguishable and, in fact, supports the referee's recommended discipline. Beach had established an independent contractor relationship with a paralegal service -- based on factual debriefings by the paralegals, he provided legal advice to the paralegals, who then transmitted the advice to clients. The Court described the paralegal service as a "conduit" for the giving of legal advice. Although Beach provided legal advice, that advice was

transmitted to the clients without his supervision. Beach was suspended for ninety days.

The present case differs from *Beach* in that Abrams did not merely fail to supervise Akbas in the transmission [**12] of legal advice, but rather he provided no legal advice whatsoever. Instead, Akbas conducted client intake and formulated and dispensed legal advice. Additionally, whereas Beach did not have an attorney-client relationship with the client in that case, the referee in the present case found that Abrams had an ostensible attorney-client relationship with both Ulershperger and Ziya. And finally, whereas Beach was found guilty of committing two rule violations in that proceeding, Abrams has been found guilty of committing numerous rule violations in the present proceeding. We conclude that the recommended one-year suspension in the present case has a reasonable basis in existing case law. [1]

1 *See also Fla. Bar v. Lawless, 640 So. 2d 1098 (Fla. 1994)*. In *Lawless*, the Court approved a ninety-day suspension for a lawyer who failed to adequately supervise a paralegal. Unlike Abrams, however, Lawless attempted to rectify the paralegal's mistakes.

Second, we conclude that the recommended sanction [**13] is authorized under the Florida Standards for Imposing Lawyer Sanctions. *See* Fla. Stds. Imposing Law. Sancs. 4.52 ("Suspension is appropriate when a lawyer engages in an area of practice in which the lawyer knowingly lacks competence . . . ."); 4.62 ("Suspension is appropriate when a lawyer knowingly deceives a client, and causes injury or potential injury to the client."); and 7.2 ("Suspension is appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system.").

The presumptive sanctions under the Standards are subject to aggravating and mitigating circumstances, and a referee's findings concerning aggravating and [*431] mitigating circumstances will be upheld if supported by competent, substantial evidence. *See, e.g., Fla. Bar v. Spear, 887 So. 2d 1242, 1247 (Fla. 2004)*; *Fla. Bar v. Barley, 831 So. 2d 163, 170 (Fla. 2002)*; *Fla. Bar v. Bustamante, 662 So. 2d 687, 689 (Fla. 1995)*. In the present case, the referee found that four aggravating circumstances (dishonest or selfish motive, pattern of misconduct, [**14] vulnerability of victim, and substantial experience in the practice of law) and one mitigating circumstance (absence of prior discipline) had been established. Our review of the record shows that the referee's findings in this respect are supported by competent, substantial evidence. We agree with the referee that the lone mitigating circumstance fails to outweigh the aggravating circumstances and is insufficient to overcome the recommended sanction of a one-year suspension.

Finally, we conclude that Abrams's objection to the payment of restitution and costs is without merit. Although the Bar's complaint does not specifically request that restitution be paid to the victims in this case, it does request that Abrams be "appropriately disciplined in accordance with the provisions of the Rules Regulating the Florida Bar." Under Standard 2.8, restitution is an authorized form of discipline, and we agree with the referee that it is an appropriate sanction under the circumstances of this case. And as for the payment of costs, the Bar's statement of costs that was filed at the hearing was an "Interim Affidavit of Costs." The Bar was within its rights in timely filing a "Final Affidavit of [**15] Costs" fifteen days after the hearing. We agree that the Bar is entitled to recoup its full costs in this proceeding.

III. CONCLUSION

Based on the foregoing, we approve the referee's findings of fact, recommendations as to guilt, and recommended discipline. Daniel Everett Abrams is hereby suspended from the practice of law in Florida for a period of one year and thereafter until he proves rehabilitation. The suspension will be effective thirty days from the filing of this opinion so that Abrams can close out his practice and protect the interests of existing clients. If Abrams notifies this Court in writing that he no longer is practicing and does not need the thirty days to protect existing clients, this Court will enter an order making the suspension effective immediately. Abrams shall accept no new business from the date this opinion is filed until the date the suspension is completed. Additionally, Abrams is ordered to pay restitution to Olga Ulershperger and Abdullah Ziya in the amount of $ 2,400.00, which payment shall be made within thirty days from the filing of this opinion. And finally, judgment is entered for The Florida Bar, 651 East Jefferson Street, Tallahassee, Florida [**16] 32399-2300, for recovery of costs from Daniel Everett Abrams in the amount of $ 2,618.10, for which sum let execution issue.

It is so ordered.

PARIENTE, C.J., and WELLS, ANSTEAD, LEWIS, QUINCE, CANTERO, and BELL, JJ., concur.

LEXSEE 955 SO. 2D 535

THE FLORIDA BAR, Complainant, vs. SHELLEY GOLDMAN MAURICE, Respondent.

No. SC04-700

SUPREME COURT OF FLORIDA

955 So. 2d 535*; *2007 Fla. LEXIS 663*; *32 Fla. L. Weekly S 148

April 12, 2007, Decided

COUNSEL: [**1] John F. Harkness, Jr., Executive Director and Kenneth L. Marvin, Director of Lawyer Regulation, The Florida Bar, Tallahassee, Florida, and Alan Anthony Pascal, Bar Counsel, The Florida Bar, Fort Lauderdale, Florida, for Complainant.

Shelley Goldman Maurice, Pro se, Boynton Beach, Florida, for Respondent.

JUDGES: WELLS, ANSTEAD, PARIENTE, QUINCE, CANTERO, and BELL, JJ., concur. LEWIS, C.J., concurs in result only.

OPINION

[*536] PER CURIAM.

We review a referee's report regarding alleged ethical breaches by Shelley Goldman Maurice. We have jurisdiction. *See art. V, § 15, Fla. Const.* We approve the referee's findings of fact and conclusions as to guilt. We disapprove the recommended discipline of a two-year suspension [*537] and impose in its stead a ninety-day suspension.

Factual and Procedural Background

The Florida Bar filed a one-count complaint against Maurice, alleging that Maurice engaged in unethical conduct in administering a probate estate. Maurice admitted several of the factual allegations of the complaint, denied others, and denied violating any of the rules with which she was charged. After a hearing, the referee filed his report with the Court. The referee found that [**2] Maurice prepared a quitclaim deed for a client, Helen Spelker, in November 1998, which transferred ownership of her condominium to her son, Gerard Spelker, and her grandson, William Spelker, but reserved to Helen Spelker a life estate in the condominium. The quitclaim deed was duly recorded in the public record, making Gerard and William Spelker vested remaindermen.

Several months later, in August 1999, Maurice prepared a new will for Helen Spelker. The will purported to bequeath the condominium and the rest of her belongings to Gerard and William Spelker, and to William's mother, Pamela Spelker, to be divided equally among them. The will also required the heirs to sell the condominium to Arthur Oliveri (Oliveri), Helen Spelker's neighbor and caretaker, for not less than $ 38,000.

Helen Spelker died in April 2001, without revoking the quitclaim deed to the condominium. The bulk of her estate was exempt or transferred upon her death, making the opening of an estate unnecessary. The heirs hired Maurice to probate the estate and to handle the proper disposition of the property. Without advising the heirs of the quitclaim deed making Gerard and William Spelker the full owners of the [**3] condominium upon Helen Spelker's death or that no estate was necessary, Maurice opened formal estate proceedings. Maurice's judgment regarding the necessity of an estate was clouded by her expressed concern for Helen Spelker's caretakers.

Maurice further advised the heirs that a trust should be created for William Spelker, who was a minor, so that proceeds from the sale of the condominium could be placed in trust. The provision in the will requiring the heirs to establish a trust also named Maurice as trustee. Maurice's actions created a conflict of interest between herself and the heirs and delayed the sale of the condominium.

The referee concluded that Maurice violated *Rules Regulating the Florida Bar 4-1.1* (failing to provide competent representation to a client), *4-1.3* (failing to act with reasonable diligence and promptness in representing a client), *4-1.4(a)* (failing to keep a client reasonably informed about the status of a matter and to promptly comply with reasonable requests for information), *4-*

1.7(b) (representing a client when the lawyer's exercise of independent professional judgment may be materially limited by the lawyer's responsibilities [**4] to another client, to a third person, or the lawyer's own interest), and *4-3.2* (failing to make reasonable efforts to expedite litigation consistent with the interests of the client). These violations were alleged in the Bar's complaint. In addition, the referee found Maurice violated *rule 4-8.4(a)* (violating or attempting to violate the Rules of Professional Conduct).

The referee did not make any findings as to whether Maurice violated several rules with which she had been charged, specifically *rules 4-1.4(b)* (failing to explain a matter to the extent reasonably necessary to permit the client to make informed decisions), *4-1.5(a)* (entering into an agreement for, charging, or collecting an illegal, prohibited, or clearly excessive fee), *4-8.4(c)* (engaging in conduct involving dishonesty, [*538] fraud, deceit, or misrepresentation), and *4-8.4(d)* (engaging in conduct that is prejudicial to the administration of justice). In effect, this is a finding that the Bar failed to present clear and convincing evidence that Maurice violated these rules.

With regard to discipline, the referee found two aggravating factors: (1) vulnerability of the victim and (2) substantial experience in the practice [**5] of law. The referee found the sole mitigating factor of absence of a prior disciplinary record. The referee recommended a two-year suspension, proof of completion of continuing legal education (CLE) programs entitled Practicing with Professionalism, Basic Probate and Guardianship, and Ethics Seminar, and reimbursement of the Bar's costs.

Maurice challenges several of the referee's factual findings, conclusions of guilt, and the recommendation of a two-year suspension.

Factual Findings

Maurice takes issue with the referee's finding that she opened probate proceedings when it was unnecessary to do so, that she misrepresented to the heirs the need to open probate proceedings, and that she caused a delay in the closing for the sale of the condominium owned by Gerard and William. She argues that the Bar failed to prove intent and that the record fails to establish intent.

The party contending that the referee's findings of fact are erroneous carries the burden of demonstrating that there is no evidence in the record to support those findings. *Fla. Bar v. Carlon, 820 So. 2d 891, 898 (Fla. 2002)*. Maurice testified that she prepared a quitclaim deed for Helen Spelker [**6] before she prepared Helen Spelker's will. The quitclaim deed, which was introduced into evidence, transferred ownership of the condominium to Gerard and William Spelker. Maurice testified that Helen Spelker wanted Gerard and William Spelker to have her condominium and did not want her other son or her daughter to have it or anything else. The quitclaim deed was prepared and filed to transfer ownership of the condominium. The quitclaim deed passed remainder interests in the condominium to Gerard and William Spelker when it was completed.

When Helen Spelker died, her life estate ended and Gerard and William Spelker became full owners of the condominium. Not only was there no need for the condominium to be passed through the estate, passing it through the estate was a nullity. It was no longer Helen Spelker's condominium to bequeath. Because Maurice prepared the quitclaim deed and knew the deed had been recorded and never changed before Helen Spelker's death, she knew it was not an estate asset.

Maurice's justification for treating the condominium as an estate asset was that she wanted to ensure the disinherited children could not challenge Gerard and William Spelker's ownership of [**7] the condominium. Maurice testified as follows:

> The condominium went through the estate process for protection of creditors because we wanted to make sure that -- There were two family members that were rather irate that they had not been in the estate, so we were attempting to protect the condominium as homestead property.
>
> And then there was -- and the will directs that the condominium, except for real estate which is presently put in convenience the name of myself and my son, Eric Spelker and William Spelker, everything else would go by rights of survivorship. [1]
>
> [*539] And the bills for the estate which were to be paid out of the sale of the proceeds of the property. . . (inaudible).
>
> So it was our duty to make sure that it went through the estate so it could be sold and protected from claims of creditors.

1 Eric is Gerard Spelker's middle name.

It is clear that the referee did not accept this explanation. A referee's assessment of a witness's credibility is reviewed for abuse of discretion. *Fla. Bar v. Charnock, 661 So. 2d 1207, 1209 (Fla. 1995).* [**8]

At least two other possible reasons exist for Maurice to open probate and treat the condominium as an estate asset-- (1) to earn fees as the estate's administrator; or (2) to ensure that Oliveri would be given the right of first refusal to buy the condominium from the new owners, Gerard and William Spelker. The referee did not find that Maurice opened probate to generate fees. Nor did he find that Maurice violated *rule 4-1.5(a)* (prohibiting an attorney from entering into an agreement for, charging, or collecting an illegal, prohibited, or clearly excessive fee).

The second possible motive, to ensure that Oliveri was given the right of first refusal, is supported by the findings. The referee found that Maurice's judgment about the need for an estate "was clouded by her expressed concern for Helen Spelker's caretakers" and that her opening an estate placed her "in conflict with the heirs of the estate who sought her counsel after Helen Spelker passed." He concluded her conduct had violated *rule 4-1.7(b)* (prohibiting a lawyer from representing a client when the lawyer's exercise of independent professional judgment may be materially limited by the lawyer's responsibilities to another [**9] client, a third person, or by the lawyer's own interest).

Here, there were two possible inferences to be drawn about Maurice's motives for opening an estate and including the condominium as an estate asset when she knew the condominium already belonged to Gerard and William Spelker. Either one would have resulted in the violation of at least one of the rules charged. The referee obviously rejected one inference, but found the other. In addition, Maurice's own testimony that she was trying to ensure that Oliveri was given the opportunity to buy the condominium supports the referee's conclusion that her desire conflicted with her duties toward the heirs under the will.

We conclude that competent, substantial evidence supports the referee's findings.

Conclusions of Guilt

Maurice also challenges the referee's conclusions that she violated *rules 4-1.1* (competent representation) and *4-1.8* (representing a client with a conflict of interest). "A referee's findings of fact regarding guilt carry a presumption of correctness that should be upheld unless clearly erroneous or without support in the record." *Fla. Bar v. Brown, 905 So. 2d 76, 80 (Fla. 2005)* (quoting *Fla. Bar v. Wohl, 842 So. 2d 811, 814 (Fla. 2003)*). [**10] "Absent a showing that the referee's findings are clearly erroneous or lacking in evidentiary support, this Court is precluded from reweighing the evidence and substituting its judgment for that of the referee." *Fla. Bar v. Wohl, 842 So. 2d 811, 814 (Fla. 2003)* (quoting *Fla. Bar v. Sweeney, 730 So. 2d 1269, 1271 (Fla. 1998)*).

The referee found that Maurice violated *rules 4-1.1*, *4-1.3*, *4-1.4(a)*, *4-1.7*, *4-3.2*, and *4-8.4(a)*. Significantly, Maurice was neither charged with violating nor did the referee conclude that she violated *rule 4-1.8*. Maurice may have meant to contest the referee's conclusion that she violated *rule 4-1.7*.

[*540] The evidence and factual findings support the referee's conclusion that Maurice violated *rules 4-1.1* and *4-1.7(b)*. Maurice's belief that the condominium could be treated as an estate asset although it had previously been deeded to Gerard and William Spelker is sufficient to establish a violation of *rule 4-1.1*. *See generally Fla. Bar v. Batista, 846 So. 2d 479 (Fla. 2003)* (holding that an attorney violated the competence rule by failing to determine the probable outcome in his clients' cases within a reasonable [**11] time and failing to communicate the unavailability of a result to his clients). The referee found that probate proceedings were unnecessary, as most of Helen Spelker's property was either exempt or transferred upon her death. Maurice failed to explain this to the heirs. Maurice opened an estate in an attempt to ensure that Oliveri was given the opportunity to purchase the condominium from Gerard and William Spelker. She did not tell Pamela Spelker or her attorney that the ownership of the condominium had been transferred to Gerard and William in November 1998 and she did not provide a copy of the quitclaim deed she had prepared. The referee found that Maurice's judgment regarding the necessity of an estate was clouded by her expressed concern for Helen Spelker's caretakers, one of whom was Oliveri. These actions establish a violation of *rule 4-1.7(b)* in that her desire to ensure that Gerard and William Spelker gave Oliveri a chance to purchase the condominium conflicted with her duty to her clients, Helen Spelker's heirs.

Maurice has failed to meet her burden of proving that the referee's conclusions that she violated *rules 4-1.1* and *4-1.7(b)* are clearly erroneous or lacking in evidentiary [**12] support. Accordingly, we approve the referee's conclusions of guilt.

Aggravating and Mitigating Factors

Maurice argues that the referee failed to find several mitigating factors, including: (1) no prior disciplinary history; [2] (2) Maurice is a self-starter who put herself through law school while working at a law firm and set up her own practice two years after law school; (3) the complaining party did not pay any money to Maurice and did not lose any during the course of Maurice's representation; (4) she paid the Bar's costs within two weeks of the referee's decision; (5) she completed all required

CLE credits during her reporting cycle and has never been in violation of the CLE requirements; (6) she has always taken more CLE than necessary; (7) she has conducted a seminar on real estate transactions; and (8) she is a chairperson and has been a chairperson of the local bar association's real estate committee for the past four years. According to Maurice, the referee also failed to consider the mitigating factor that Maurice made a timely good-faith effort to make restitution or to rectify the consequences and there was no monetary loss to the complaining parties.

2 Despite Maurice's argument, the referee did find this mitigating factor.

[**13] The Bar asserts that there is no basis in standard 9.3 of the Florida Standards for Imposing Lawyer Sanctions for the additional mitigating factors that Maurice claims exist and that the referee correctly found that the only mitigating factor extant here is the fact that Maurice has no prior disciplinary record.

A referee's findings of mitigation and aggravation, like other factual findings, carry a presumption of correctness that should be upheld unless clearly erroneous or without support in the record. *Fla. Bar v. Arcia, 848 So. 2d 296 (Fla. 2003).*

[*541] Some of the factors Maurice identifies could possibly relate to the mitigating factors identified in standard 9.3, as follows: (1) the absence of a dishonest or selfish motive (the complaining party did not pay any money to Maurice and did not lose any during the course of Maurice's representation); (2) a timely good-faith effort to make restitution or to rectify the consequences of misconduct (she paid the Bar's costs within two weeks of the referee's decision; she completed all required CLE credits during her reporting cycle and has never been in violation of the CLE requirements); or (3) character or reputation [**14] (Maurice is a self-starter who put herself through law school while working at a law firm and set up her own practice two years after law school; she has always taken more CLE than necessary; she has conducted a seminar on real estate transactions; and she is a chairperson and has been a chairperson of the local bar association's real estate committee for the past four years).

Maurice does not expressly tie these facts to any of the mitigating factors. Even if these "facts" are interpreted as relating to the mitigating factors identified above, Maurice has failed to demonstrate that the referee's failure to find that these mitigating factors applied in this case was clearly erroneous or without support in the record. We therefore approve the referee's findings regarding aggravating and mitigating factors.

Recommended Sanction

The referee recommended a two-year suspension, various courses of continuing legal education offered by the Bar, and payment of the Bar's costs. Maurice argues that the recommendation of a two-year suspension is not supported by caselaw or the standards. We agree and disapprove that recommendation.

The Court's scope of review in reviewing a referee's [**15] recommendation of discipline is broader than that afforded to the referee's findings of fact because it is ultimately the Court's responsibility to order the appropriate sanction. *Fla. Bar v. Miller, 863 So. 2d 231, 235 (Fla. 2003)*; *Fla. Bar v. Anderson, 538 So. 2d 852, 854 (Fla. 1989)*; *see also art. V, § 15, Fla. Const.* Generally, however, we will not second-guess the referee's recommended discipline as long as it has a reasonable basis in existing caselaw and the Florida Standards for Imposing Lawyer Sanctions. *Fla. Bar v. Brown, 905 So. 2d 76, 83-84 (Fla. 2005)*; *Fla. Bar v. Temmer, 753 So. 2d 555, 558 (Fla. 1999).*

The referee cited no standards to support his recommendation of a suspension in this case, but some standards do apply. *See* Fla. Stds. Imposing Law. Sancs. 4.12 (suspension is appropriate when a lawyer knows or should know that he is dealing improperly with client property and causes injury or potential injury); 4.42 (suspension is appropriate when a lawyer knowingly fails to perform services for a client and causes injury or potential injury or when a lawyer engages in a pattern of neglect with [**16] respect to client matters and causes serious or potentially serious injury); 4.52 (suspension is appropriate when a lawyer engages in an area of practice in which the lawyer knowingly lacks competence, and causes injury or potential injury to a client); 4.62 (suspension is appropriate when a lawyer knowingly deceives a client and causes injury or potential injury).

As the standards do not suggest the appropriate length of a suspension, the Court examines caselaw to determine whether the referee's recommendation of a two-year suspension has a reasonable basis. The referee did not cite to any cases in support of his recommendation. The [*542] cases cited by the Bar in its brief, *Florida Bar v. Cimbler, 840 So. 2d 955 (Fla. 2002)*; *Florida Bar v. Jordan, 705 So. 2d 1387 (Fla. 1998)*; and *Florida Bar v. Theed, 246 So. 2d 745 (Fla. 1971)*, support suspension as the appropriate sanction, but also demonstrate that a two-year suspension is too harsh.

In *Cimbler*, we suspended an attorney for one year, followed by three years' probation, for neglecting to perform post-closing activities for a real estate transaction, failing to attend a hearing [**17] in a suit for specific performance, failing to notify his clients of their depositions, and other instances of neglect in three different

cases. The referee found three aggravating factors: prior discipline for similar misconduct (ninety-day suspension and three years' probation); multiple offenses; and indifference to restitution as to a specific client. The referee found six mitigating factors: timely and good-faith efforts to make restitution or to rectify the consequences of her misconduct; full and free disclosure in the disciplinary proceedings; reputation for good character; physical or mental disability; interim rehabilitation; and remorse.

In *Jordan*, we suspended the attorney for one year for failing to file an amended complaint within the twenty-day deadline in a civil suit; failing to return numerous phone calls from his co-counsel and his client; failing to respond to a show cause order from the trial court as to why the suit should not be dismissed for lack of prosecution, which resulted in the suit's dismissal; failing to advise his co-counsel or his client of the suit's dismissal; failing to seek reinstatement of the suit; and failing to advise his client to seek [**18] independent legal representation before attempting to negotiate with her to privately settle any claim she might have had against him for legal malpractice. The attorney had been previously disciplined four times, the fourth resulting in a ninety-one-day suspension. The last three of the four prior discipline cases resulted from similar misconduct.

In *Theed*, we suspended an attorney for one year for improperly handling the assets of an estate, including using estate funds for his own personal use; failing to administer the estate properly; failing to account to the parties whom he represented, ignoring their request for information, ignoring the request of their attorney, and failing to act properly in all respects as an attorney and executor. The attorney had repaid the estate, before the imposition of discipline, for the estate funds he had used.

The misconduct of the attorneys in these three cases was similar, but more egregious than Maurice's. Maurice has been a member of the Bar for over two decades and has no prior discipline. Maurice's actions resulted in the heirs and true owners of the condominium having to wait several months to obtain what was rightfully theirs, but [**19] she did not profit from it. [3] Rather, she seems to have been motivated by a genuine but misguided desire to fulfill what she believed were Helen Spelker's true wishes for the disposition of her property. According to her brief, she has already reimbursed the Bar for its costs and has already taken the CLE courses recommended by the referee.

3 The Bar's complaint alleged Maurice violated *rule 4-1.5(a)* (entering into an agreement for, charging, or collecting an illegal, prohibited, or clearly excessive fee), but the referee did not find a *rule 4-1.5(a)* violation.

Accordingly, based on the caselaw discussed above imposing one-year suspensions for more egregious misconduct of a repetitive nature, we conclude that the [*543] two-year suspension recommended by the referee is not reasonably supported by the caselaw. We disapprove that recommendation and instead suspend Maurice for ninety days. The other conditions recommended by the referee are approved.

Conclusion

Based on the foregoing, we approve the referee's [**20] factual findings and conclusions as to guilt, but disapprove the referee's recommended sanction of a two-year suspension. We approve the other recommended conditions concerning continuing legal education and reimbursement of the Bar's costs.

Shelley Goldman Maurice is hereby suspended from the practice of law for ninety days. The suspension will be effective thirty days from the filing of this opinion so that Maurice can close out her practice and protect the interests of existing clients. If Maurice notifies this Court in writing that she is no longer practicing and does not need the thirty days to protect existing clients, this Court will enter an order making the suspension effective immediately. Maurice shall accept no new business from the date this opinion is filed until her suspension is completed.

Judgment is entered for The Florida Bar, 651 East Jefferson Street, Tallahassee, Florida 32399-2300, for recovery of costs from Shelley Goldman Maurice in the amount of $ 1,399.00, for which sum let execution issue.

It is so ordered.

WELLS, ANSTEAD, PARIENTE, QUINCE, CANTERO, and BELL, JJ., concur. LEWIS, C.J., concurs in result only.

THE FILING OF A MOTION FOR REHEARING [**21] SHALL NOT ALTER THE EFFECTIVE DATE OF THIS SUSPENSION.

LEXSEE 823 SO 2D 727

THE FLORIDA BAR, Complainant, v. BRENT ALLAN ROSE, Respondent.

No. SC00-1792

SUPREME COURT OF FLORIDA

823 So. 2d 727*; *2002 Fla. LEXIS 1393*; *27 Fla. L. Weekly S 615

June 27, 2002, Decided

SUBSEQUENT HISTORY: Original Proceeding - The Florida Bar

DISPOSITION: [**1] No discipline or sanctions.

COUNSEL: John F. Harkness, Jr., Executive Director, and John Anthony Boggs, Staff Counsel, Tallahassee, Florida; and Thomas E. DeBerg, Assistant Staff Counsel, Tampa, Florida, for Complainant.

Scott T. Orsini of Orsini & Rose Law Firm, P.A., St. Petersburg, Florida, for Respondent.

JUDGES: WELLS, C.J., and SHAW, HARDING, ANSTEAD, PARIENTE, LEWIS, and QUINCE, JJ., concur.

OPINION

[*728] PER CURIAM.

We have for review a referee's report regarding alleged ethical breaches by Brent Allan Rose. We have jurisdiction. *See art. V, § 15, Fla. Const.*

The Florida Bar filed a complaint against Brent Allan Rose alleging that he violated various Rules Regulating the Florida Bar in representing a client in a criminal case.

FACTS

After a hearing, the referee made the following findings of fact:

Rose was defending a client in a criminal case. [1] The referee found that Rose failed to report several incidents which allegedly occurred that would involve improper contact with jurors in the case. The referee specifically noted that he was "not entirely persuaded that each alleged incident [**2] of improper contact actually occurred." However, the referee found that, regardless, "Rose had a duty to report the allegations of jury tampering to the trial court after they were brought to his attention," and Rose failed to do so. The referee next found that Rose did not thoroughly interview approximately fifteen defense witnesses. Rose only briefly met with the witnesses as a group for approximately forty-five minutes on the day before trial. Rose instructed the witnesses to make notes as to the testimony they would provide, but he failed to collect the notes. The referee also found that during jury selection Rose referred to his client as a child molester and stated that the reason he represents child molesters is because he gets paid for it. Based on these findings of fact, the referee recommended that Rose be found guilty of three violations of *rule 4-1.1 of the Rules Regulating the Florida Bar* (a lawyer shall provide competent representation to a client). The referee noted that Rose's reference to his client as a child molester was subsequently used by the prosecutor in closing argument and that Rose did not object. The referee, however, did not recommend that Rose's failure [**3] to object be found a violation of *rule 4-1.1*. [2]

1 The record shows that the client was charged with two counts of capital sexual battery and two counts of lewd and lascivious acts upon a child. There were two child victims in the case.

2 The referee also recommended that Rose be found not guilty of violating *rules 4-1.2(a)* (a lawyer shall abide by a client's decisions concerning the objectives of representation) and *4-1.4(b)* (a lawyer shall explain matters to the extent reasonably necessary to permit the client to make informed decisions). The Bar did not challenge the referee's recommendations of not guilty as to these rules. We approve the referee's recommendations as to these two rules without further discussion.

[*729] As to discipline, the referee recommended a thirty-day suspension followed by one year of probation, during which Rose would complete thirty credit hours of

continuing legal education in specified areas. Further, the referee recommended that costs be awarded to The Florida Bar in the amount [**4] of $ 3,902.85.

The Bar petitioned this Court to review the referee's report as to discipline, arguing that a ninety-one-day suspension, along with the other conditions recommended by the referee, is more appropriate. Rose cross-petitioned seeking review of the recommendations concerning the rule violations along with the recommended discipline.

ANALYSIS

First, Rose challenges whether the referee's finding of fact that he was informed of the alleged juror contacts is based on competent and substantial evidence, and whether the referee correctly concluded that Rose's failure to report such alleged contact to the trial court constitutes a violation of *rule 4-1.1*. This Court's review of such matters is limited, and if a referee's findings of fact and conclusions concerning guilt are supported by competent, substantial evidence in the record, this Court will not reweigh the evidence and substitute its judgment for that of the referee. *Florida Bar v. Jordan, 705 So. 2d 1387, 1390 (Fla. 1998).*

According to the record, one witness testified that she saw prosecutors and prosecution witnesses talking in a smoking area outside the courthouse, and that jurors were also [**5] in the smoking area. She testified that she did not see anyone speak to the jurors, but that she advised Rose of the circumstances. A second witness also testified as to seeing prosecution witnesses talking with prosecutors outside the courthouse in the smoking area, approximately twenty feet from jurors, and that she informed Rose of the occurrence. A third witness testified concerning an incident in the smoking area very similar to that described by the other two witnesses, as well as an incident in which a member of the victims' family supposedly assisted a female juror into a van on a rainy day. This third witness testified, however, that she did not tell Rose about the first event and could not even recall telling him about the second event. This third witness also testified that, from a window on the second or third floor of the courthouse, she observed a person she believed to be a member of the victims' family speaking with two jurors outside in the smoking area. The third witness testified that she asked her husband to summon Rose to look from that window, but she had no idea whether Rose ever saw the alleged interaction. Finally, a fourth witness testified to seeing the victims' [**6] mother speak to some jurors in passing in the cafeteria area during lunch as the mother passed a table and that the mother briefly interacted with them for less than a minute. This fourth witness had no idea whatsoever as to words spoken or what was said, and she testified that she did not even advise Rose that this incident occurred. After reviewing this testimony in the record, we note that the referee's recommendation of guilt is based on a novel standard. The referee did not find that any improper juror contacts occurred, [3] but nonetheless recommended that Rose be found to have violated a duty [*730] to report such allegations. Thus, under this recommendation, Rose would be in violation of the Rules Regulating the Florida Bar for failing to report that which the evidence did not establish had even occurred.

3 The referee stated, "Although this Court is *not entirely persuaded* that each alleged incident of improper contact actually occurred, Mr. Rose had a duty to report the allegations of jury tampering to the trial court after they were brought to his attention, and failed to do so." (Emphasis added.) The Bar even notes that the "Referee did not find that improper contact occurred between jurors and witnesses."

[**7] We simply cannot agree with the referee that the facts in this record establish a violation of *rule 4-1.1*. The testimony itself indicates that Rose was not informed of most of these alleged events. Further, we must note that merely because people involved in the trial were in an outdoor smoking area at the same time does not support the conclusion that improper juror contacts occurred or that a finding of incompetence is warranted. With regard to the standard the referee imposed upon Rose, we find that under this evidence Rose cannot be guilty of incompetence for failing to advise the trial judge of events that the referee found that he had not been persuaded even happened, especially considering many of the alleged events were not even brought to Rose's attention. Therefore, based on the facts in the record, we disapprove the referee's recommendation as to guilt with regard to the alleged improper juror contacts.

Second, we consider whether Rose violated *rule 4-1.1* because he allegedly did not thoroughly interview certain witnesses. We conclude that testimony in the record supports the referee's findings of fact that Rose performed the described acts (*i.e.*, interviewing [**8] approximately fifteen witnesses the day before trial). However, the determinative issue is whether Rose's conduct constitutes a violation of *rule 4-1.1*.

The Supreme Court of Arizona in *In re Wolfram, 174 Ariz. 49, 847 P.2d 94, 100 (Ariz. 1993)*, considered charges of incompetence against a criminal defense attorney and noted "that some of Respondent's acts and omissions, if viewed independently of one another, are not objectionable and may be explained by legitimate lawyering and trial strategy." As mentioned here, the instant disciplinary action arose from representation ren-

dered in a criminal case. In *Florida Bar v. Sandstrom, 609 So. 2d 583, 584 n.1 (Fla. 1992)*, this Court noted that "most cases of ineffective assistance of counsel do not rise to the level of a disciplinary violation." These two cases indicate that an attorney's conduct must be somewhat egregious to be considered incompetent and, therefore, a violation of *rule 4-1.1*. Also, *Wolfram* and *Sandstrom* reflect that when courts consider claims that an attorney's performance was deficient, the courts permit a certain amount of deference to an attorney's trial strategy or tactical [**9] decisions.

In *Sandstrom, 609 So. 2d at 583*, this Court suspended an attorney for deficiencies in representation under the former Code of Professional Responsibility, finding that Sandstrom

> failed to take any pretrial depositions; *failed to conduct a proper investigation* as related to evidence available to establish that the proximate cause of the wife's death was medical malpractice; failed to timely challenge the admission of evidence relating to a search of [defendant's] car trunk; failed to discover that a fence, surrounding the scene of the alleged crime and injurious to [defendant's] defense, was not erected until over a year after the alleged crime; failed to present a tape recording to impeach a prosecution witness; and failed to become familiar with or know the physical evidence in the case.

(Emphasis added.) Sandstrom was found to have performed deficiently in providing representation, based on numerous acts. Although one of those acts was a failure to conduct a proper investigation, the multiple errors in *Sandstrom* are significantly [*731] more egregious than that demonstrated in this record with regard to Rose's alleged failure to interview [**10] these particular witnesses in the instant case. In contrast to *Sandstrom*, the instant record reflects that Rose engaged in numerous acts in preparation for trial. The testimony at the disciplinary hearing demonstrates that Rose prepared for trial by traveling to Ohio to depose the victims; repeatedly meeting with the defendant and his wife; offering various theories of defense to the defendant; viewing videotapes showing the defendant with the victims; consulting with a mental health professional about the videotapes; and attempting to obtain copies of reports from the victims' counselor. Rose did not need to spend more time with the approximately fifteen witnesses because the defendant's family had already provided information as to what the alleged witnesses would say. Rose actually used three or four of these witnesses at trial. Further, there is absolutely no indication in this record that these alleged witnesses had relevant and admissible evidence or what that evidence might have been.

Although *Jennings v. State, 583 So. 2d 316, 321 (Fla. 1991)*, involved an analysis of alleged ineffective assistance of counsel, we held there that an attorney was not negligent [**11] for failing to present every witness who might have had information concerning an event. If conduct must be somewhat egregious to be considered incompetent and the lower threshold of ineffective assistance was not satisfied in *Jennings*, then, most assuredly, a similar situation in the present case of allegedly not sufficiently interviewing certain persons, whose testimony has not been shown to even be admissible or relevant and who would have basically testified to the same facts as other witnesses, should not result in a finding of incompetence here and the imposition of discipline.

Considering *Sandstrom*, *Wolfram*, and *Jennings*, as well as the totality of this record and the deference that must be accorded to an attorney's trial strategy or tactical decisions, we do not agree with the referee's recommended finding of a *rule 4-1.1* violation based on Rose's alleged inadequacies with regard to the interview with certain witnesses.

Next, we examine whether Rose violated *rule 4-1.1* by the manner in which he referred to his client, using the phrase "child molester," during voir dire. The record clearly supports the referee's factual finding that Rose used the phrase "child [**12] molester" in questioning during the jury selection process. Rose argues that he asked potential jurors, "Anybody who wants to ask me the question, 'How can you defend child molesters?'" in a light-hearted manner but to make a very significant legal and factual point. Rose testified that he knew this type of issue would be on the minds of prospective jurors and that it was essential that he confront the subject and demonstrate that the presumption of innocence is of critical importance, no matter how terrible the crime allegedly committed. It is clear that jury selection is a dynamic process and counsel must confront the difficult issues to explore those concealed or repressed thoughts that may later surface to the detriment of one charged with a distasteful crime.

We must recognize that there are certain realities a trial lawyer must confront, especially in a case in which there are allegations of harm to children. In the instant case, Rose's client was charged with two counts of capital sexual battery and two counts of lewd and lascivious acts upon a child. Such cases are often highly emotional,

and it is only natural for prospective jurors to have various feelings or questions [**13] concerning the case, the issues, the defendant, and counsel. In these sensitive [*732] cases, lawyers must utilize various mechanisms to cause jurors to surface any preconceived views or opinions the jurors might have, and to force the jurors to confront their own preconceived notions. Further, an attorney needs to make the point in these highly emotional cases that a defendant is innocent until proven guilty, no matter what the charge and no matter how insidious the allegations. There are probably numerous ways for an attorney to challenge preconceived notions and make this point. The mechanism Rose selected was to confront the issue directly and to refer to his client in the common terms of the crime with which his client was charged. This record does not support a finding that the mechanism and approach Rose used during jury selection produces a violation of *rule 4-1.1*. [4] Therefore, we disapprove the referee's recommended finding of a *rule 4-1.1* violation in connection with Rose's comment.

4 The Bar argues that Rose was incompetent when he failed to object to the state attorney's closing statement that Rose "spoke the truth when he told you . . . that he represents a child molester." In the referee's report, the referee noted that the prosecutor used Rose's comment during her closing argument and that Rose did not object, but the referee did not conclude that this conduct violated *rule 4-1.1*. We note that the Bar did not allege this violation in the complaint, so we do not address it in detail. *See Florida Bar v. Vernell, 721 So. 2d 705, 707 (Fla. 1998)* (attorneys must know the charges they face before disciplinary proceedings commence). However, it is clear that the failure to object to a single remark in the scope of a trial such as that confronting Rose does not produce a disciplinary violation for which sanctions should be imposed.

[**14] Because we find that this record does not support a finding of guilt for any violations of *rule 4-1.1*, we disapprove the referee's recommendation of a thirty-day suspension and conclude that no discipline or sanctions are warranted. Given our disapproval of the referee's recommendations as to guilt, we also decline to impose the Bar's costs on Rose.

CONCLUSION

Accordingly, we disapprove the referee's recommendations that Brent Allan Rose be found guilty of three violations of *rule 4-1.1* and, therefore, no discipline or sanctions should be imposed on Rose, nor should he be responsible for the Bar's costs under these circumstances. It is so ordered.

WELLS, C.J., and SHAW, HARDING, ANSTEAD, PARIENTE, LEWIS, and QUINCE, JJ., concur.

Member Services

Ethics Opinions

PROFESSIONAL ETHICS OF THE FLORIDA BAR

OPINION 06-2
(September 15, 2006)

A lawyer who is sending an electronic document should take care to ensure the confidentiality of all information contained in the document, including metadata. A lawyer receiving an electronic document should not try to obtain information from metadata that the lawyer knows or should know is not intended for the receiving lawyer. A lawyer who inadvertently receives information via metadata in an electronic document should notify the sender of the information's receipt. The opinion is not intended to address metadata in the context of discovery documents.

RPC:	4-1.1, 4-1.2, 4-1.4, 4-1.6, 4-4.4(b)
Opinions:	93-3, New York Opinion 749, New York Opinion 782
Case:	*Williams v. Sprint/United Management Company,* 230 F.R.D. 640, 96 Fair Empl.Prac.Cas. (BNA) 1775 (2005)
Misc:	David Hricik and Robert B. Jueneman, "The Transmission and Receipt of Invisible Confidential Information," 15 *The Professional Lawyer* No. 1, p. 18 (Spring 2004), *The Sedona Guidelines: Best Practice Guidelines and Commentary for Managing Information and Records in the Electronic Age,* Appendix F (The Sedona Conference Working Group Series, Sept. 2005 Series), Michael Silver, "Microsoft Office metadata: What you don't see can hurt you" *Tech Republic Gartner 2001*, Brian D. Zall, "Metadata: Hidden Information in Microsoft Work Documents and its Ethical Implications," 33 *Colo. Lawyer* No.10, p. 53 (Oct. 2004)

The Board of Governors of The Florida Bar has directed the committee to issue an opinion to determine ethical duties when lawyers send and receive electronic documents in the course of representing their clients. These ethical responsibilities are now becoming issues in the practice of law where lawyers may be able to "mine" metadata from electronic documents. Lawyers may also receive electronic documents that reveal metadata without any effort on the part of the receiving attorney. Metadata is information about information and has been defined as "information describing the history, tracking, or management of an electronic document."[1]

Metadata can contain information about the author of a document, and can show, among other things, the changes made to a document during its drafting, including what was deleted from or added to the final version of the document, as well as comments of the various reviewers of the document. Metadata may thereby reveal confidential and privileged client information that the sender of the document or electronic communication does not wish to be revealed.[2]

This opinion does not address metadata in the context of documents that are subject to discovery under applicable rules of court or law. For example, the opinion does not address the role of the lawyer acting as a conduit to produce documents in response to a discovery request.

The Florida Rules of Professional Conduct require lawyers to protect information that relates to the representation of a client. Rule 4-1.6(a) provides as follows:

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

The Comment to Rule 4-1.6 further provides:

> A fundamental principle in the client-lawyer relationship is that the lawyer maintain confidentiality of information relating to the representation. The client is thereby encouraged to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter.

In order to maintain confidentiality under Rule 4-1.6(a), Florida lawyers must take reasonable steps to protect confidential information in all types of documents and information that leave the lawyers' offices, including electronic documents and electronic communications with other lawyers and third parties.

Rule 4-4.4(b) addresses inadvertent disclosure of information and provides as follows:

> A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.

The comment to rule 4-4.4 provides additional guidance:

> Subdivision (b) recognizes that lawyers sometimes receive documents that were mistakenly sent or produced by opposing parties or their lawyers. If a lawyer knows or reasonably should know that such a document was sent inadvertently, then this rule requires the lawyer to promptly notify the sender in order to permit that person to take protective measures. Whether the lawyer is required to take additional steps, such as returning the original document, is a matter of law beyond the scope of these rules, as is the question of whether the privileged status of a document has been waived. Similarly, this rule does not address the legal duties of a lawyer who receives a document that the lawyer knows or reasonably should know may have been wrongfully obtained by the sending person. For purposes of this rule, "document" includes e-mail or other electronic modes of transmission subject to being read or put into readable form.
>
> Some lawyers may choose to return a document unread, for example, when the lawyer learns before receiving the document that it was inadvertently sent to the wrong address. Where a lawyer is not required by applicable law to do so, the decision to voluntarily return such a document is a matter of professional judgment ordinarily reserved to the lawyer. See rules 4-1.2 and 4-1.4.

The duties of a lawyer when sending an electronic document to another lawyer and when receiving an electronic document from another lawyer are as follows:

(1) It is the sending lawyer's obligation to take reasonable steps to safeguard the confidentiality of all communications sent by electronic means to other lawyers and third parties and to protect from other lawyers and third parties all confidential information, including information contained in metadata, that may be included in such electronic communications.

(2) It is the recipient lawyer's concomitant obligation, upon receiving an electronic communication or document from another lawyer, not to try to obtain from metadata information relating to the representation of the sender's client that the recipient knows or should know is not intended for the recipient. Any such metadata is to be considered by the receiving lawyer as confidential information which the sending lawyer did not intend to transmit. *See*, Ethics Opinion 93-3 and Rule 4-4.4(b), Florida Rules of Professional Conduct, effective May 22, 2006.[3]

(3) If the recipient lawyer inadvertently obtains information from metadata that the recipient knows or should know was not intended for the recipient, the lawyer must "promptly notify the sender." *Id.*

The foregoing obligations may necessitate a lawyer's continuing training and education in the use of technology in transmitting and receiving electronic documents in order to protect client information under Rule 4-1.6(a). As set forth in the Comment to Rule 4-1.1, regarding competency:

> To maintain the requisite knowledge and skill [for competent representation], a lawyer should engage in continuing study and education.

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[1] *The Sedona Guidelines: Best Practice Guidelines and Commentary for Managing Information and Records in the Electronic Age,* Appendix F (The Sedona Conference Working Group Series, Sept. 2005 Series), available at http://www.thesedonaconference.org. The Microsoft Word and Microsoft Office online sites also contain detailed information about metadata, showing examples of metadata that may be stored in Microsoft applications and explaining how to remove this information from a final document. Examples of metadata that may be hidden in Microsoft documents include the name of the author, the identification of the computer on which the document was typed, the names of previous document authors and revisions to the document, including prior versions of a final document.

[2] Further references regarding metadata and eliminating metadata from documents may be found on Microsoft's user support websites at http://support.microsoft.com/kb/290945 and http://support.microsoft.com/kb/q223790/. *See also*, Michael Silver, "Microsoft Office metadata: What you don't see can hurt you" *Tech Republic Gartner 2001* http://techrepublic.com.com/5100-1035_11-5034376.html. The court's discussion of metadata in *Williams v. Sprint/United Management Company,* 230 F.R.D. 640, 96 Fair Empl.Prac.Cas. (BNA) 1775 (2005) is also very helpful.

[3] The ethical implications of such hidden information in electronic documents have been discussed in legal journals and ethics opinions in other states, The

New York Bar Association has issued Opinion 749 (2001), which concluded that attorneys may not ethically use computer software applications to surreptitiously “mine” documents or to trace e-mail. New York Ethics Opinion 782 (2004), further concluded that New York lawyers have a duty to use reasonable care when transmitting documents by e-mail to prevent the disclosure of metadata containing client confidences or secrets. Legal commentators have published articles about ethical issues involving metadata. David Hricik and Robert B. Jueneman, “The Transmission and Receipt of Invisible Confidential Information,” 15 *The Professional Lawyer* No. 1, p. 18 (Spring 2004). *See also*, Brian D. Zall, "Metadata: Hidden Information in Microsoft Work Documents and its Ethical Implications," 33 *Colo. Lawyer* No.10, p. 53 (Oct. 2004).

[Updated: 10-31-2006]

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1 of 1 DOCUMENT

Restatement of the Law, Third, The Law Governing Lawyers

Case Citations

Chapter 2 - The Client-Lawyer Relationship

Topic 2 - Summary of the Duties Under a Client-Lawyer Relationship

Restat 3d of the Law Governing Lawyers, § 16

§ 16 A Lawyer's Duties to a Client--In General

To the extent consistent with the lawyer's other legal duties and subject to the other provisions of this Restatement, a lawyer must, in matters within the scope of the representation:

(1) proceed in a manner reasonably calculated to advance a client's lawful objectives, as defined by the client after consultation;

(2) act with reasonable competence and diligence;

(3) comply with obligations concerning the client's confidences and property, avoid impermissible conflicting interests, deal honestly with the client, and not employ advantages arising from the client-lawyer relationship in a manner adverse to the client; and

(4) fulfill valid contractual obligations to the client.

COMMENTS & ILLUSTRATIONS: Comment:

a. Scope and cross-references. This Section presupposes that a client-lawyer relationship has come into existence (see §§ 14 & 15) and has not been terminated (see §§ 31-33). The duties summarized here may be enforced by appropriate remedies, including disciplinary proceedings (see § 5) and suits by the client for damages, restitution, or injunctive relief (see § 6 & Chapter 4). Lawyers also owe clients duties prescribed by general law. A lawyer, for example, may not defame a client (see § 56). Other, more specific duties are specified elsewhere, for example, the duty to communicate with a client (see § 20).

b. Rationale. A lawyer is a fiduciary, that is, a person to whom another person's affairs are entrusted in circumstances that often make it difficult or undesirable for that other person to supervise closely the performance of the fiduciary. Assurances of the lawyer's competence, diligence, and loyalty are therefore vital. Lawyers often deal with matters most confidential and vital to the client. A lawyer's work is sometimes complex and technical, often is performed in the client's absence, and often cannot properly be evaluated simply by observing the results. Special safeguards are therefore necessary.

Correlatively, adequate representation is often essential to secure persons their legal rights. Persons are often unable either to know or to secure their rights without a lawyer's help. The law encourages clients to consult lawyers and limits the liability to third persons of lawyers who act vigorously for their clients (see §§ 51 & 56). Requiring lawyers to protect their clients' interests with competence, diligence, and loyalty furthers those goals.

A lawyer is not required to accept a client, to undertake representation without pay (except when a court has appointed the lawyer), or to remain in a representation when withdrawal is permissible (see §§ 14, 32, 34, & 35). By undertaking a representation, a lawyer does not guarantee success in it, unless the lawyer makes extraordinary representations or warranties or unless the matter is routine and any reasonably competent lawyer could achieve the client's objectives (for example, drafting a deed or setting up a corporation). Lawyers may have duties to others that limit those owed to a client (see Comment *c* hereto).

c. Goals of a representation. The lawyer's efforts in a representation must be for the benefit of the client (see *Restatement Second, Agency § 387*). A client-lawyer relationship is thus different from a partnership entered into for mutual profit; the lawyer may hope to further the lawyer's professional reputation and income through a representation, but may do so only as a by-product of promoting the client's success.

Individual clients define their objectives differently. One litigant might seek the greatest possible personal recovery, another an amicable or speedy resolution of the case, and a third a precedent implementing the client's view of the public interest. The client, not the lawyer, determines the goals to be pursued, subject to the lawyer's duty not to do or assist an unlawful act (see § 94). The lawyer must keep the client informed and consult with the client as is reasonably appropriate to learn the client's decisions (see § 20) and must follow a client's instructions (see § 21(2)). On a lawyer's decisions in the representation, see §§ 22-24.

The lawyer's duties are ordinarily limited to matters covered by the representation. A lawyer who has agreed to write a contract is not required to litigate its validity, even though the client's general objectives may ultimately be aided by resort to litigation (see §§ 14 & 19). Ordinarily the lawyer may not act beyond the scope of contemplated representation without additional authorization from the client (see § 27, Comment *e*). Nevertheless, some of the lawyer's duties survive termination of the representation (see § 33).

The lawyer's legal duties to other persons also limit duties to the client. On the rules governing conflicts of interest, see Chapter 8. A lawyer owes duties to the court or legal system and to an opposing party in litigation (see Chapters 6 & 7) and may owe duties to certain nonclients who might be injured by the lawyer's acts (see § 51). Sometimes a client's duties to other persons, for example as a trustee or class representative, may impose on the lawyer similar consequential duties (see § 14, Comment *f*). A lawyer may not do or assist an unlawful act on behalf of a client (see §§ 23, 32, & 94). Circumstances also exist in which a lawyer may refrain from pursuing the client's goals through means that the lawyer considers lawful but repugnant (see § 23, Comment *c*; § 32).

d. Duties of competence and diligence. In pursuing a client's objectives, a lawyer must use reasonable care (see § 52; see also *Restatement Second, Agency § 379*). The lawyer must be competent to handle the matter, having the appropriate knowledge, skills, time, and professional qualifications. The lawyer must use those capacities diligently, not letting the matter languish but proceeding to perform the services called for by the client's objectives, including appropriate factual research, legal analysis, and exercise of professional judgment. On delay in litigated matters, see § 110. The law seeks to elicit competent and diligent representation through civil liability (see Chapter 4), disciplinary sanctions (see § 5), and such other means as educational and examination requirements for admission to the bar and programs of continued legal education and peer review. Other remedies may be available, such as a new trial in a criminal prosecution because of ineffective assistance of counsel (see § 6).

The Preamble to the ABA Model Rules of Professional Conduct (1983) (see id. P [2]) and EC 7-1 of the ABA Model Code of Professional Responsibility (1969) refer to a lawyer's duty to act "zealously" for a client. The term sets forth a traditional aspiration, but it should not be misunderstood to suggest that lawyers are legally required to function with a certain emotion or style of litigating, negotiating, or counseling. For legal purposes, the term encompasses the duties of competence and diligence.

e. Duties of loyalty. The responsibilities entailed in promoting the objectives of the client may be broadly classified as duties of loyalty, but their fulfillment also requires skill in gathering and analyzing information and acting appropriately. In general, they prohibit the lawyer from harming the client. Those duties are enforceable in appropriate circumstances by remedies, such as disqualification, to enforce rules governing conflicts of interest (see § 121, Comment *f*), civil liability (see §§ 50 & 55), and professional discipline (§ 5).

A lawyer may not use or disclose sensitive information about the client, except in appropriate circumstances (see Chapter 5). Likewise, the lawyer must take reasonable measures to safeguard the client's property and papers that come into the lawyer's possession (see §§ 44-46). The rules forbidding conflicts of interest (see Chapter 8) likewise protect against the abuse of client information.

A lawyer must be honest with a client. A lawyer may not obtain unfair contracts or gifts (see §§ 126 & 127) or enter a sexual relationship with a client when that would undermine the client's case, abuse the client's dependence on the lawyer, or create risk to the lawyer's independent judgment, for example when the lawyer represents the client in divorce proceedings (see also, e.g., § 41 (abusive fee-collection methods); see generally *Restatement Second, Agency §§ 387*-398). A lawyer may not knowingly make false statements to a client and must make disclosures to a client neces-

sary to avoid misleading the client. However, a lawyer's duty of confidentiality to another client may prohibit some disclosures. On the general duty voluntarily to disclose facts to a client, see § 20.

The duties of loyalty are subject to exceptions described elsewhere in this Restatement. Those exceptions typically protect the concerns of third persons and the public or satisfy the practical necessities of the legal system.

f. Duties defined by contract. Contracts generally create or define the duties the lawyer owes the client (see *Restatement Second, Agency § 376*). One or more contracts between client and lawyer may specify the services the lawyer is being retained to provide, the services the lawyer is not obliged to provide, and the goals of the representation. They may address such matters as which lawyers in a law firm will provide the services; what reports are to be provided to the client; whether the lawyer will present a detailed budget for the representation; what arrangements will be made for billing statements for legal services and disbursements; what decisions will be made by the lawyer and what matters decided by the client; and what alternative-dispute-resolution methods the lawyer will explore. Such matters may also be handled by client instructions during the representation (see Topic 3). Various requirements govern client-lawyer contracts (e.g., §§ 18, 19, 22-23, 34-46, 121, & 126-127). A lawyer's intentional failure to fulfill a valid contract may in appropriate circumstances subject the lawyer to professional discipline as well as to contractual remedies.

With respect to contracts between lawyer and client involving business other than fees and disbursements for professional services, see § 126.

REPORTERS NOTES: REPORTER'S NOTE

Comment b. Rationale. See Frankel, Fiduciary Law, *71 Calif. L. Rev. 795 (1983);* Clark, Agency Costs Versus Fiduciary Duties, in Principals and Agents: The Structure of Business 55 (J. Pratt & R. Zeckhouser ed. 1985); C. Wolfram, Modern Legal Ethics 145-48 (1986); Cooter & Freedman, The Fiduciary Relationship: Its Economic Character and Legal Consequences, *66 N.Y.U. L. Rev. 1045 (1991).*

Comment c. Goals of a representation. See ABA Model Rules of Professional Conduct, Rule 1.2 (1983) (client to decide objectives of representation); ABA Model Code of Professional Responsibility, DR 7-101(A)(1) (1969) (lawyer must seek client's lawful objectives); Institute of Judicial Administration--ABA, Juvenile Justice Standards, Standards Relating to Counsel for Private Parties 3.1(b)(ii) (1980) (counsel ordinarily bound by client's definition of client's interests); ABA Standards Relating to the Administration of Criminal Justice, Standards 4-1.6 (2d ed.1980) (lawyer should represent client's legitimate interests); Commission on Professional Responsibility, The Roscoe Pound--American Trial Lawyers Foundation, The American Lawyer's Code of Conduct 2.1 (rev. draft 1982) (lawyer must be faithful to client's interests as perceived by client); see D. Rosenthal, Lawyer and Client: Who's in Charge? (1974).

Comment d. Duties of competence and diligence. See ABA Model Rules of Professional Conduct, Rules 1.1 & 1.3 (1983) (duties of competence); Martyn, Lawyer Competence and Lawyer Discipline: Beyond the Bar?, *69 Geo. L.J. 705 (1981);* Reporter's Notes to Chapter 4.

Comment e. Duties of loyalty. See Reporter's Notes to §§ 32, 41, 44-46, 50, 59, 60, and 121-133. On honesty to clients, see ABA Model Rules of Professional Conduct, Rule 8.4(c) (1983) (forbidding "conduct involving dishonesty, fraud, deceit or misrepresentation"); ABA Model Code of Professional Responsibility DR 1-102(A)(4) (1969) (similar); Lerman, Lying to Clients, *138 U. Pa. L. Rev. 659 (1990);* § 20, Reporter's Note. On sexual relationships between lawyer and client, see, e.g., *McDaniel v. Gile, 281 Cal. Rptr. 242 (Cal.Ct.App.1991); Iowa State Bar Ass'n Comm. on Prof. Ethics v. Hill, 436 N.W.2d 57 (1989); In re Gibson, 369 N.W.2d 695 (Wis. 1985); Office of Disciplinary Counsel v. Ressing, 559 N.E.2d 1359 (Ohio 1990);* Cal. R. Prof. Conduct, Rule 3-120; Minn. R. Prof. Conduct, Rule 1.8(k). See also ABA Canons of Legal Ethics, Canon 11 (1908) (lawyer "should refrain from any action whereby for his personal benefit or gain he abuses or takes advantage of the confidence reposed in him by his client").

Comment f. Duties defined by contract. ABA Model Code of Professional Responsibility, DR 7-101(A)(2) (1969) (discipline for intentionally failing to carry out contract of employment); *In re Burns, 679 P.2d 510 (Ariz.1984)* (discipline for charging fee larger than agreed on); *Attorney Grievance Comm'n v. Kerpelman, 438 A.2d 501 (Md.1981)* (same); *Gunn v. Mahoney, 408 N.Y.S.2d 896 (N.Y.Sup. Ct.1978)* (liability for breach of contract to incorporate client's business).

COMPETENCE MEANS NEVER HAVING TO SAY YOU'RE SORRY

Hon. Kay D. Sloan*

"I'm sorry, Your Honor, but I've just been admitted to the bar, and I didn't know about that requirement."

"This isn't my field of practice, so naturally I'm not familiar with that opinion."

"I apologize, but I don't know what the law is in this situation. I figured the court would know."

"I took this case pro bono, so I didn't think I was expected to do research."

These are all statements made by attorneys, to this Author, during hearings or nonjury trials over which the Author presided as a General Master of the court. Observations, over many years, reveal that such remarks are too commonly made to judges as well. Although most attorneys come before the court well prepared to represent their clients, many seem unaware that failure to provide competent representation is a serious breach of legal ethics.

In Florida, as in other states, the Supreme Court has established rules that set forth the responsibilities of bar members.[1] Rule 4-1.1 of the *Florida Rules of Professional Conduct* (the Rule) mandates that "[a] lawyer shall provide competent representation to a client."[2] Like its counterparts in other states, the Rule uses the mandatory language "shall," indicating that it is an imperative rule, the

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 The Honorable Kay D. Sloan, General Master, Family Law Division, Sixth Judicial Circuit, currently presides over cases involving issues of child custody, child support, domestic violence, and dissolution of marriage. Before her appointment to the Family Law Division in 1993, she was a Hearing Officer presiding over cases establishing and enforcing child support and cases establishing paternity, and from 1988 to 1991, she was General Master, Probate Division, presiding over cases involving civil commitment for mental illness, alcohol or drug abuse, and cases involving incapacity and guardianship.

General Master Sloan received her B.A. *magna cum laude* from the University of South Florida in 1983 and her J.D. *magna cum laude* from the Stetson University College of Law in 1987.

1. *See* R. REGULATING FLA. BAR Rule 1-2 (1998).
2. *Id*. Rule 4-1.1.

breach of which may result in professional discipline.[3] The Rule further provides that "[c]ompetent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation."[4] Of the four components of competent representation, this Essay focuses on the first two, legal knowledge and skill, because no lawyer can be either thorough or prepared without them. Moreover, acquiring the reasonably necessary legal knowledge and skill to represent a client is a significant part of a lawyer's thorough preparation in any representation.

Acquiring the legal knowledge and skill to competently represent the client can present special problems for the lawyer who is newly admitted, who is undertaking a case outside of his field of expertise, or who is confronted for the first time with a particular issue of great complexity. Such lawyers are not, however, the only ones faced with the challenge. Because the law is constantly and rapidly changing, experienced lawyers must exert considerable effort if they are to remain knowledgeable and skilled. Those who rise to the challenge are diligent and disciplined. They also know where to go for help.

Never let it be said that we lawyers are an irreligious lot. The lawyer who hasn't found herself praying, "Please, God, get me through this without looking like a fool," hasn't been practicing long. Under especially trying circumstances, she might pray, "Please let my malpractice insurance cover this!" Even the conscientious practitioner can be guilty of occasionally missing a significant new opinion or recent statutory change. It is no coincidence that those who seldom find themselves in such situations are the same lawyers who are often present at section meetings of the local bar, continuing legal education seminars, meetings of the local case law update group, or educational programs of the local Inn of Court. You can easily predict which lawyers will be present at any educational forum offered in your circuit. They are the same lawyers who were present last month, and last Monday. They know where to go for help, and they are disciplined and diligent enough to get there.

Jokes that liken lawyers to snakes and sharks may be clever. There is nothing funny, however, about the negative image of our profession that these jokes reflect. We can turn that image around,

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3. *See id*. Rule 3-4.2.
4. *Id*. Rule 4-1.1.

and we should, not just to avoid professional discipline, but also for the pride of knowing we have served justice and our clients well. We should follow the example of our colleagues who attend every educational forum possible, and we should face the fact that attending merely the continuing education courses necessary to stay licensed is, alone, not enough to make us competent lawyers.

If a case involves issues outside our field of expertise, we should associate with an attorney of established competence in the field or, at least, confer and then do the necessary research and study.[5] Attending bar section meetings in the new field can provide contact with experienced colleagues who might act as co-counsel. In addition, technology has given us the tools to make research faster and easier. If after diligent efforts we find we still cannot competently represent the client, the representation should not be undertaken and the client may be referred to an expert in the field. Both the client and the expert will benefit, as will the referring lawyer's reputation for professional ethics.

Whether we are new to the practice of law or old-timers, we can become and stay more competent by meeting with other lawyers whenever possible. This is especially important for those who are sole practitioners. As effective as independent study may be, study of the law is enhanced by group discussion. The differing perspectives and interpretations you encounter in group study may be the very approach taken by your opponent in your next case. In addition to continuing legal education courses, bar associations provide group learning experiences through section and committee participation. Videotapes available through bar association libraries can provide the focus for informal discussion in a law firm or just between two colleagues. Bar-sponsored forums and activities featuring the bench give members a chance to interact with, and gain insight from, their judges.

There are many other experiences that complement the important opportunities offered by state and local bar associations. For example, Inns of Court provide learning opportunities. Inns are organized for legal education and divided into pupillage groups that give new lawyers the chance to learn from experienced jurists. Every Inn meeting includes an educational program. The pupillage groups

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5. *See id.* Rule 4-1.1 cmt.

also meet separately for legal study and to prepare programs for the entire Inn.[6]

In some legal communities, informal groups gather regularly to review and discuss the most recently published legal opinions in their shared field of practice. Such groups can easily be formed by a few interested lawyers. The group might meet over breakfast or lunch, offering valuable educational interaction without cutting into court or client time.

Although nothing teaches like experience, observing competent, experienced lawyers in action may be the next best thing. In jurisdictions in which mentor programs exist, new lawyers can learn invaluable skills by observing competent mentors. It is not necessary, however, to have a mentor to benefit from observation. Most trials and hearings are open to the public, and many judges encourage lawyers to sit in and observe. The experienced lawyer will be flattered to have an interested audience, and the judge will be grateful to have you learn the rules of his or her court. In fact, knowledge of a judge's approach to, and interpretation of, the law is an important part of a lawyer's competent representation of the client. It is important to learn about a judge by observing the court and communicating with other lawyers, as opposed to learning through a court ruling adverse to your client.

If we read and research, join and participate, observe and study, we are more likely to be competent lawyers. We are more likely to serve clients and justice well, to take justifiable pride in our work, and to avoid professional discipline. We can't do it alone. We need the help of our fellow professionals and they need our help. It may seem important that a lawyer appears, to the client and the court, to be the most knowledgeable person present, but just among ourselves, we must acknowledge our continuing need to learn from each other. The result will be fewer apologies needed and, perhaps, a public awareness that the legal profession provides significant services without which our society cannot prosper.

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6. If the community in which you practice doesn't have an Inn of Court, you can contact the American Inns of Court Foundation, 127 S. Peyton St., Suite 201, Alexandria, Virginia 22314, for information about starting an Inn.

Cheatwood Inns of Court – *Breaker Morant*

Competency Scenarios

1. Bob Skills is an experienced corporate transactions attorney and represents Moneybags & Co. in almost all of its business transactions. The CEO of Moneybags & Co. is planning on retiring in the next year and he needs an attorney to prepare his will and several trusts for his substantial estate. The CEO wants the majority of his assets to be devised to his wife and children without having to go through a lengthy probate process, and he wants several trusts prepared for his grandchildren. Mr. Skills practiced probate law over 20 years ago when he first graduated from law school; however, Mr. Skills knows that he is unfamiliar with the many changes to the Florida Probate Code and Florida Trust Code since then. The CEO is a longtime friend of Mr. Skills, so he agrees to prepare the CEO's estate documents.

   Is Bob Skills competent to represent the CEO of Moneybags & Co.? If not, what could Mr. Skills do to become competent? Should Mr. Skills advise the CEO that he is not experienced with probate matters and that he may want to seek the advice of an attorney knowledgeable in estate planning?

2. Penny Wise owns her own personal injury law firm in Miami, Florida, but needs to expand her practice to cover the overhead for her firm. Ms. Wise is looking to expand her practice to immigration law because she has several clients who need assistance with visa and naturalization applications. Ms. Wise has a friend who recently started representing clients in immigration cases and she says that it is very lucrative for the minimal amount of time required. Ms. Wise's paralegal also just took a CLE on immigration law and has the basic knowledge to complete forms with the U.S. Citizenship and Immigration Services. Ms. Wise considers having her paralegal meet with the clients to discuss their immigration issues and then completing the necessary paperwork to file with the U.S. Citizenship and Immigration Services. Ms. Wise would then discuss the case with her paralegal and then sign-off as the attorney of record.

   Is Penny Wise competent to represent clients in immigration matters? Can Ms. Wise rely on her paralegal's knowledge of immigration issues? If Ms. Wise is not competent to practice immigration law, what could she do to become competent?

Rule 4-1.1 of the Florida Rules of Professional Conduct

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.

West's Florida Statutes Annotated Currentness
Rules Regulating the Florida Bar (Refs & Annos)
Chapter 4. Rules of Professional Conduct (Refs & Annos)
4-1. Client-Lawyer Relationship

Rule 4-1. 7. Conflict of Interest; Current Clients

(a) Representing Adverse Interests. Except as provided in subdivision (b), a lawyer shall not represent a client if:

(1) the representation of 1 client will be directly adverse to another client; or

(2) there is a substantial risk that the representation of 1 or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a conflict of interest under subdivision (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a position adverse to another client when the lawyer represents both clients in the same proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing or clearly stated on the record at a hearing.

(c) Explanation to Clients. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

(d) Lawyers Related by Blood or Marriage. A lawyer related to another lawyer as parent, child, sibling, or spouse shall not represent a client in a representation directly adverse to a person who the lawyer knows is represented by the other lawyer except upon consent by the client after consultation regarding the relationship.

(e) Representation of Insureds. Upon undertaking the representation of an insured client at the expense of the insurer, a lawyer has a duty to ascertain whether the lawyer will be representing both the insurer and the insured as clients, or only the insured, and to inform both the insured and the insurer regarding the scope of the representation. All other Rules Regulating The Florida Bar related to conflicts of interest apply to the representation as they would in any other situation.

CREDIT(S)

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COMMENT

Loyalty to a client

Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. Conflicts of interest can arise from the lawyer's responsibilities to another client, a former client or a third person, or from the lawyer's own interests. For specific rules regarding certain conflicts of interest, see rule 4-1.8. For former client conflicts of interest, see rule 4-1.9. For conflicts of interest involving prospective clients, see rule 4-1.18. For definitions of “informed consent” and “confirmed in writing,” see terminology.

An impermissible conflict of interest may exist before representation is undertaken, in which event the representation should be declined. If such a conflict arises after representation has been undertaken, the lawyer should withdraw from the representation. See rule 4-1.16. Where more than 1 client is involved and the lawyer withdraws because a conflict arises after representation, whether the lawyer may continue to represent any of the clients is determined by rule 4-1.9. As to whether a client-lawyer relationship exists or, having once been established, is continuing, see comment to rule 4-1.3 and scope.

As a general proposition, loyalty to a client prohibits undertaking representation directly adverse to that client's or another client's interests without the affected client's consent. Subdivision (a)(1) expresses that general rule. Thus, a lawyer ordinarily may not act as advocate against a person the lawyer represents in some other matter, even if it is wholly unrelated. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only generally adverse, such as competing economic enterprises, does not require consent of the respective clients. Subdivision (a)(1) applies only when the representation of 1 client would be directly adverse to the other and where the lawyer's responsibilities of loyalty and confidentiality of the other client might be compromised.

Loyalty to a client is also impaired when a lawyer cannot consider, recommend, or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests. The conflict in effect forecloses alternatives that would otherwise be available to the client. Subdivision (a)(2) addresses such situations. A possible conflict does not itself preclude the representation. The critical questions are the likelihood that a conflict will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client. Consideration should be given to whether the client wishes to accommodate the other interest involved.

Consultation and consent

A client may consent to representation notwithstanding a conflict. However, as indicated in subdivision (a)(1) with respect to representation directly adverse to a client and subdivision (a)(2) with respect to material limitations on representation of a client, when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When more than 1 client is involved, the question of conflict must be resolved as to each client. Moreover, there may be circumstances where it is impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and 1 of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent.

Lawyer's interests

The lawyer's own interests should not be permitted to have adverse effect on representation of a client. For example, a lawyer's need for income should not lead the lawyer to undertake matters that cannot be handled competently and at a reasonable fee. See rules 4-1.1 and 4-1.5. If the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. A lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed interest.

Conflicts in litigation

Subdivision (a)(1) prohibits representation of opposing parties in litigation. Simultaneous representation of parties whose interests in litigation may conflict, such as co-plaintiffs or co-defendants, is governed by subdivisions (a), (b) and (c). An impermissible conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party, or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil. The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than 1 co-defendant. On the other hand, common representation of persons having similar interests is proper if the risk of adverse effect is minimal and the requirements of subdivision (c) are met.

Ordinarily, a lawyer may not act as advocate against a client the lawyer represents in some other matter, even if the other matter is wholly unrelated. However, there are circumstances in which a lawyer may act as advocate against a client. For example, a lawyer representing an enterprise with diverse operations may accept employment as an advocate against the enterprise in an unrelated matter if doing so will not adversely affect the lawyer's relationship with the enterprise or conduct of the suit and if both clients consent upon consultation. By the same token, government lawyers in some circumstances may represent government employees in proceedings in which a government agency is the opposing party. The propriety of concurrent representation can depend on the nature of the litigation. For example, a suit charging fraud entails conflict to a degree not involved in a suit for a declaratory judgment concerning statutory interpretation.

A lawyer may represent parties having antagonistic positions on a legal question that has arisen in different cases, unless representation of either client would be adversely affected. Thus, it is ordinarily not improper to assert such positions in cases pending in different trial courts, but it may be improper to do so in cases pending at the same time in an appellate court.

Interest of person paying for a lawyer's service

A lawyer may be paid from a source other than the client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty to the client. See rule 4-1.8(f). For example, when an insurer and its insured have conflicting interests in a matter arising from a liability insurance agreement and the insurer is required to provide special counsel for the insured, the arrangement should assure the special counsel's professional independence. So also, when a corporation and its directors or employees are involved in a controversy in which they have conflicting interests, the corporation may provide funds for separate legal representation of the directors or employees, if the clients consent after consultation and the arrangement ensures the lawyer's professional independence.

Other conflict situations

Conflicts of interest in contexts other than litigation sometimes may be difficult to assess. Relevant factors in determining whether there is potential for adverse effect include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that actual conflict will arise, and the likely prejudice to the client from the conflict if it does arise. The question is often one of proximity and degree.

For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference of interest among them.

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

A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the 2 roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board, and the possibility of the corporation's obtaining legal advice from another lawyer in such situations. If there is material risk that the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve as a director.

Conflict charged by an opposing party

Resolving questions of conflict of interest is primarily the responsibility of the lawyer undertaking the representation. In litigation, a court may raise the question when there is reason to infer that the lawyer has neglected the responsibility. In a criminal case, inquiry by the court is generally required when a lawyer represents multiple defendants. Where the conflict is such as clearly to call in question the fair or efficient administration of justice, opposing counsel may properly raise the question. Such an objection should be viewed with caution, however, for it can be misused as a technique of harassment. See scope.

Family relationships between lawyers

Rule 4-1. 7(d) applies to related lawyers who are in different firms. Related lawyers in the same firm are also governed by rules 4-1.9 and 4-1.10. The disqualification stated in rule 4-1. 7(d) is personal and is not imputed to members of firms with whom the lawyers are associated.

Representation of Insureds

The unique tripartite relationship of insured, insurer, and lawyer can lead to ambiguity as to whom a lawyer represents. In a particular case, the lawyer may represent only the insured, with the insurer having the status of a non-client third party payor of the lawyer's fees. Alternatively, the lawyer may represent both as dual clients, in the absence of a disqualifying conflict of interest, upon compliance with applicable rules. Establishing clarity as to the role of the lawyer at the inception of the representation avoids misunderstanding that may ethically compromise the lawyer. This is a general duty of every lawyer undertaking representation of a client, which is made specific in this context due to the desire to minimize confusion and inconsistent expectations that may arise.

Consent confirmed in writing or stated on the record at a hearing

Subdivision (b) requires the lawyer to obtain the informed consent of the client, confirmed in writing or clearly stated on the record at a hearing. With regard to being confirmed in writing, such a writing may consist of a document executed by the client or one that the lawyer promptly records and transmits to the client following an oral consent. See terminology. If it is not feasible to obtain or transmit the writing at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. See terminology. The requirement of a writing does not supplant the need in most cases for the lawyer to talk with the client, to explain the risks and advantages, if any, of representation burdened with a conflict of interest, as well as reasonably available alternatives, and to afford the client a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns. Rather, the writing is required in order to impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing.

LIBRARY REFERENCES

Attorney and Client 20.1 to 21.5, 21.5(5), 21.10, 44(1).
Westlaw Topic No. 45.
C.J.S. Attorney and Client §§ 56, 79 to 80, 88, 169 to 194.

RESEARCH REFERENCES

ALR Library

67 ALR 4th 415, Negligence, Inattention, or Professional Incompetence of Attorney in Handling Client's Affairs in Family Law Matters as Ground for Disciplinary Action--Modern Cases.

69 ALR 4th 410, Negligence, Inattention, or Professional Incompetence of Attorney in Handling Client's Affairs in Criminal Matters as Ground for Disciplinary Action--Modern Cases.

66 ALR 4th 342, Negligence, Inattention, or Professional Incompetence of Attorney in Handling Client's Affairs in Estate or Probate Matters as Ground for Disciplinary Action--Modern Cases.

30 ALR 4th 742, Advertising as Ground for Disciplining Attorney.

FL Eth. Op. 02-3, 2002 WL 32180646 (Fla.St.Bar Assn.)

Florida State Bar Association

Committee on Professional Ethics

Opinion Number 02-3

June 21, 2002

The Professional Ethics Committee discusses various situations involving representation of both driver and passenger(s) in a car accident, determining that whether or not a conflict of interests exists and whether or not a conflict may be waived, must be done on a case-by-case basis.

RPC: 4-1.5(f)(4)(D)(i) and (ii), 4-1.7, 4-1.7(a), 4-1.7(a)(1) and (2), 4-1.7(b), 4-1.7(b)(1) and (2), 4-1.7(c), 4-1.9, 4-1.9(a) and (b), 4-1.16(a) and (d)

Opinions: 73-2, 89-1, 95-4, Oregon Ethics Opinion 2000-158, Texas Ethics Opinion 500

Cases: State Farm Mutual Ins. Co. v. K.A.W., 575 So.2d 630 (Fla. 1991); The Florida Bar v. Mastrilli, 614 So.2d 1081 (1993); Dean v. Dean, 607 So.2d 494 (Fla. 4th DCA 1992), rev. dismissed, 618 So.2d 208 (Fla.1993); Chandris v. Yanakakis, 668 So.2d 180 (Fla. 1995), Ard v. Ard, 414 So.2d 1066 (Fla. 1982), Garner v. Somberg, 672 So.2d 852 (Fla. 3d DCA 1996)

Statute: F.S. § 768.81 (1999)

The Committee has recently received an inquiry from a Florida Bar member regarding whether an attorney need avoid representation due to a conflict when the attorney is asked to represent both passenger and driver in a suit for negligence/property damage against a third party driver in an auto accident. This is an issue that arises in personal injury cases in various fact situations, including the following:

1. The driver and passenger prospective clients are both injured and liability is clearly with the third party driver. There are no claims of comparative negligence or fault against the plaintiff driver.
2. The driver and passenger prospective clients are both injured and liability lies mostly with the third party driver. However, the third party's insurance company is alleging comparative fault by the plaintiff driver.
3. Driver and passenger prospective clients are members of the same family and both are injured in an auto accident. While the plaintiff driver may have been partly at fault, the driver was uninsured and has no assets to satisfy an adverse judgment.
4. The driver and passenger prospective clients are both injured and evidence shows that the plaintiff driver was definitely at fault as well as the third party driver of the other vehicle.

5. The driver and passengers, who are members of the same immediate family, are all injured and the third party tortfeasor is claiming some fault on the part of the driver. The driver is the wife/mother of the passengers. Her liability policy has denied coverage for the other family members due to a "family exclusion" clause in the policy; she has no significant assets.

Regarding multiple representation of clients, Rule 4-1.7, Florida Rules of Professional Conduct, provides:

(a) **Representing Adverse Interests**. A lawyer shall not represent a client if the representation of that client will be directly adverse to the interests of another client, unless:

(1) the lawyer reasonably believes the representation will not adversely affect the lawyer's responsibilities to and relationship with the other client; and

***2** (2) each client consents after consultation.

(b) **Duty to Avoid Limitation on Independent Professional Judgment**. A lawyer shall not represent a client if the lawyer's exercise of independent professional judgment in the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person or by the lawyer's own interest, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation.

Rule 4-1.7(c), Florida Rules of Professional Conduct, continues:

(c) **Explanation to Clients**. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

The Florida Rules of Professional Conduct, ethics opinions and opinions of Florida courts provide guidance in these matters. The Florida Supreme Court has issued an opinion specifically dealing with ethical issues involved in representing both driver and passenger(s) in an auto accident. The Court held in The Florida Bar v. Mastrilli, 614 So.2d 1081 (Fla. 1993), that one attorney could not simultaneously represent both driver and passenger in an auto accident where the passenger is pursuing a claim for negligence against the driver. Dual representation in these circumstances would violate Rule 4-1.7(a), supra. This decision echoes an earlier Florida Ethics Opinion 73-2, which reached the same conclusion.

Similarly, the Court held in State Farm Mutual Ins. Co. v. K.A.W., 575 So.2d 630 (Fla. 1991), that a law firm which had represented driver and passengers against third party insurers and tortfeasors could not later represent the passengers against the driver. The firm was disqualified due to the strenuous objection of a real party in interest, the insurer, even though the driver had a new attorney at the time he was sued and had consented to the passengers' suit. Id.

Such conflict issues may not be apparent at an initial consultation with prospective clients. Conflict issues may arise later or be resolved during discovery and litigation. Conflict issues that arise in personal injury auto accident cases can present various fact situations, including the following:

Scenario 1

Where there are no actual or potential claims by passengers against the driver of the

vehicle in which the passengers were injured, one attorney can ethically represent all parties as long as there is sufficient insurance coverage by the third party tortfeasor to cover the injuries of all injured plaintiffs. If there is not sufficient funding to cover the injuries of all the plaintiffs, one attorney may represent all the parties, with their knowing consent and waiver of conflict, only if all the plaintiffs are able to agree regarding the distribution of benefits/recovery among themselves. Rule 4-1.7(a)(1) and (2), Florida Rules of Professional Conduct.

***3** Individual representation of each of the plaintiffs is advisable to determine the apportionment of benefits obtained from the third party tortfeasor. If each plaintiff is advised independently, this assures that waivers of conflict are knowing and informed as required by Rule 4-1.7(a)(1) and (2). The parties may agree among themselves to submit to intra-familial arbitration with an independent arbitrator to determine the distribution of benefits on an equitable basis. Independent guardians appointed to represent injured minors can be useful in this regard. The lawyer representing all the claimants as plaintiffs cannot be involved in determining the distribution of the recovery among the various plaintiffs.

Scenario 2

Where the third party tortfeasor is making a claim against the driver of a vehicle in which passengers were injured, and this claim is based upon valid objective evidence, one attorney cannot represent both driver and passenger(s). Similarly, in a one car accident, where there is evidence of negligence by the driver, one attorney cannot represent both driver and passenger(s). A conflict exists under Rule 4-1.7(a) and (b), Florida Rules of Professional Conduct; Ethics Opinion 73-2; The Florida Bar v. Mastrilli, supra.

As noted in the Comment to Rule 4-1.7, “when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent.” In determining whether a conflict exists, the attorney should look at the situation as if he or she were representing the passenger(s) alone. If, in that situation, the attorney would sue the driver, then in most circumstances, the attorney cannot represent both driver and passenger(s).[FN1]

Scenario 3

Typically, the only exception to the conclusion in Scenario 2 would be when passenger and driver are members of the same family and the driver is uninsured or otherwise judgment proof. Comparative fault precepts may come into play. Fla. Stat. Sec. 768.81 (1999). Where a conflict of interest exists under Rule 4-1.7, lawyers must be very cautious in undertaking multiple representation. The Florida Bar v. Mastrilli, supra. The situation must be one in which an independent attorney would determine that it is not worthwhile or appropriate to sue the driver because there is no legal or economic basis for a claim under the circumstances. Comment to Rule 4-1.7. The same conclusion would be reached if the third party tortfeasor's claim against the driver is bogus and without substantiation in fact. As set forth in Oregon Ethics Opinion 2000-158:

> There may be situations in which allegations of contributory negligence do not create an actual conflict. The passengers may disagree with the adverse driver's factual contentions. If the driver and the passengers are closely related, the passengers may not wish to pursue intra-family claims. Assuming that these decisions not to pursue claims are made voluntarily and without influence arising from the lawyer's obligations to the driver, there is no actual conflict between the clients.

***4** Again, knowing consents and waivers must be obtained from all parties in these circumstances. It may be the better practice for these consents to be obtained in writing and for the parties to be given the opportunity to consult with independent counsel before waiving an actual conflict.

Scenario 4
Where the driver and passengers are all injured, but evidence shows that the plaintiff driver was partly at fault or at least a substantial question is raised as to the fault of the plaintiff driver under objectively valid evidence obtained, such that an independent attorney would advise the passenger to sue the driver, there exists a Rule 4-1.7(a) conflict between the passengers and driver. Under these circumstances one attorney cannot represent both driver and passengers, even with the consent of the clients involved. Rule 4-1.7(a) and Comment; Mastrilli, supra.; Texas Ethics Opinion 500, Oregon Ethics Opinion 2000-158. The same result may obtain if the driver were a former client of the attorney representing the passengers in the accident. Rule 4-1.9(a) and (b), Florida Rules of Professional Conduct.

Scenario 5
When passenger and driver are members of the same family and the driver is underinsured, uninsured or otherwise judgment proof, one attorney can represent all parties against the driver's uninsured/underinsured motorist policy and against the tortfeasor if the situation is such that an independent attorney would determine that it is not worthwhile or appropriate to sue the driver because there is no legal or economic basis for a claim under the circumstances. Comment to Rule 4-1.7. The same result would obtain if the tortfeasor's claim against the driver is bogus and without substantiation in fact. Oregon Ethics Opinion 2000-158, supra. Knowing consents and waivers must be obtained from all parties in these circumstances. The attorney for the passengers may wish to have independent guardians appointed for any minor children to make sure that their interests are properly and independently represented in these circumstances. All parties, including the guardians for any minor passengers, should be given the opportunity to consult with independent counsel before waiving an actual conflict.

When conflict determinative facts do not come to light until after an attorney has already begun to represent both driver and passengers, remedial measures may be required. If discovery reveals, for example, that a non-waivable conflict exists between co-clients, the attorney may be required to withdraw from representation of both driver and passengers because of the direct conflict between them. Rule 4-1.7(a); Rule 4-1.16(a) and (d), Florida Rules of Professional Conduct; Florida Ethics Opinion 95-4. Even if the attorney had only brief meetings with both driver and passengers, representation may be deemed to have begun under pertinent caselaw. In Florida, a prospective client's subjective belief that his or her meeting with an attorney (in person or by telephone) was a meeting seeking and receiving legal advice, may create an attorney client relationship, if the client's belief was reasonable. Dean v. Dean, 607 So.2d 494 (Fla. 4th DCA 1992), review dismissed, 618 So.2d 208 (Fla.1993). The test is not whether a fee was paid or an engagement agreement signed, but whether the client reasonably believed that he or she was consulting an attorney seeking legal advice. Garner v. Somberg, 672 So.2d 852 (Fla. 3d DCA 1996).

Summary

***5** In each of the factual situations set forth above, if the attorney determines that a conflict exists, the attorneys must follow Rule 4-1.16(a) and (d), Florida Rules of Professional Conduct, withdraw from the representation and protect the clients during the withdrawal process by providing them with copies of necessary documents and, if needed, obtaining extensions of time for them to find new counsel. Where an attorney withdraws from representing either driver, passenger, or both because of a conflict, the attorney cannot take a referral fee for referring the former client's case to another lawyer. Florida Ethics Opinion 89-1. The conflict would prohibit the attorney's acceptance of joint responsibility for the representation as required by Rule 4-1.5(f)(4)(D)(i) and (ii), Florida Rules of Professional Conduct, and Chandris v. Yanakakis, 668 So.2d 180 (Fla. 1995).

As shown in the varying fact situations set forth above, each case must be dealt with on its own facts, following the guidelines set forth in Rules 4-1.7 and 4-1.9, Florida Rules of Professional Conduct and the above cited decisions.

FN1. Florida law allows suits by one spouse against the other spouse to the extent of insurance coverage. Ard v. Ard, 414 So.2d 1066 (Fla. 1982).

FL Eth. Op. 02-3, 2002 WL 32180646 (Fla.St.Bar Assn.)
END OF DOCUMENT

FL Eth. Op. 95-4, 1997 WL 307142 (Fla.St.Bar Assn.)

Florida State Bar Association
Committee on Professional Ethics

Opinion Number
95
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May 30, 1997

In a joint representation between husband and wife in estate planning, an attorney is not required to discuss issues regarding confidentiality at the outset of representation. The attorney may not reveal confidential information to the wife when the husband tells the attorney that he wishes to provide for a beneficiary that is unknown to the wife. The attorney must withdraw from the representation of both husband and wife because of the conflict presented when the attorney must maintain the husband's separate confidences regarding the joint representation.

NOTE: This opinion was approved by the Board of Governors at its May 1997 meeting.

RPC: 4-1.4, 4-1.4(b), 4-1.6, 4-1.7(a), 4-1.7(b), 4-1.9, 4-1.16

Opinions: 92-5

Cases: *Alexander v. Superior Court*, 684 P.2d 1309 (Ariz. 1984); *Brennan's, Inc. v. Brennan's Restaurants, Inc.*, 590 F.2d 168 (5th Cir. 1979); *Buntrock v. Buntrock*, 419 So.2d 402 (Fla. 4th DCA 1982); *Campbell v. Pioneer Savings Bank*, 565 So.2d 417 (Fla. 4th DCA 1990); *Gerlach v. Donnelly*, 98 So.2d 493 (Fla. 1957); *Lawyer Disciplinary Board v. McGraw*, 461 S.E.2d 850 (W.Va. 1995); *Luthy v. Seaburn*, 46 N.W.2d (Iowa 1951); *X Corp. v. Doe*, 805 F.Supp. 1298 (E.D.Va. 1992);

Statute: F.S. § 90.502(4)(e)

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The Estate Planning, Probate, and Trust Law Professionalism Committee (the "RPPTL Professionalism Committee") of the Florida Bar's Real Property, Probate, and Trust Law Section has requested a formal advisory opinion regarding some ethical issues that trusts and estates practitioners face in day-to-day practice. The RPPTL Professionalism Committee has presented the following generalized situation, reflecting a common type of estate planning representation. The RPPTL Professionalism Committee states that it has found little guidance in the Florida Rules of Professional Conduct, ethics opinions, or case law in Florida and requests that the Professional Ethics Committee address the ethical issues presented.

SITUATION PRESENTED

***2** Lawyer has represented Husband and Wife for many years in a range of personal matters, including estate planning. Husband and Wife have substantial individual assets, and they also own substantial jointly-held property. Recently, Lawyer prepared new updated wills that Husband and Wife signed. Like their previous wills, the new wills primarily benefit the survivor of them for his or her life, with beneficial disposition at the death of the survivor being made equally to their children (none of whom were born by prior marriage).

Husband, Wife, and Lawyer have always shared all relevant asset and financial information. Consistent with previous practice, Lawyer met with Husband and Wife together to confer regarding the changes to be made in updating their wills. At no point since Lawyer first started to represent them did either Husband or Wife ever ask Lawyer to keep any information secret from the other, and there was never any discussion about what Lawyer might do if either of them were to ask Lawyer to maintain such a separate confidence.

Several months after the execution of the new wills, Husband confers separately with Lawyer. Husband reveals to Lawyer that he has just executed a codicil (prepared by another law firm) that makes substantial beneficial disposition to a woman with whom Husband has been having an extra-marital relationship. Husband tells Lawyer that Wife knows about neither the relationship nor the new codicil, as to which Husband asks Lawyer to advise him regarding Wife's rights of election in the event she were to survive Husband. Lawyer tells Husband that Lawyer cannot under the circumstances advise him regarding same. Lawyer tells Husband that Lawyer will have to consider Lawyer's ethical duties under the circumstances. Lawyer tells Husband that, after consideration, Lawyer may determine to withdraw from representing Husband and Wife. Lawyer further tells Husband that, after consideration, Lawyer may determine to disclose to Wife the substance of Husband's revelation if Husband does not do so himself.

ISSUES PRESENTED

The following ethical questions have been asked by the RPPTL Professionalism Committee:

1. Prior to Husband's recent disclosure, did Lawyer owe any ethical duty to counsel Husband and Wife concerning any separate confidence which either Husband or Wife might wish for Lawyer to withhold from the other?
2. Assuming that Husband does not make disclosure of the information [[referred to in Issue 1.] to Wife:

a) Is Lawyer required to reveal voluntarily the information to Wife?

b) May Lawyer in Lawyer's discretion determine whether or not to reveal the information

FL Eth. Op. 95-4, 1997 WL 307142 (Fla.St.Bar Assn.)

Florida State Bar Association
Committee on Professional Ethics

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NOTE: This opinion was approved by the Board of Governors at its May 1997 meeting.

RPC: 4-1.4, 4-1.4(b), 4-1.6, 4-1.7(a), 4-1.7(b), 4-1.9, 4-1.16

Opinions: 92-5

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1. Prior to Husband's recent disclosure, did Lawyer owe any ethical duty to counsel Husband and Wife concerning any separate confidence which either Husband or Wife might wish for Lawyer to withhold from the other?
2. Assuming that Husband does not make disclosure of the information [[referred to in Issue 1.] to Wife:

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to the Wife? If so, what are the relevant factors which Lawyer may or should consider? c) If Lawyer does not reveal the information to Wife, is Lawyer required to withdraw from the representation? If so, what explanation, if any, should Lawyer give to Wife? ***3** 3. May Lawyer continue to represent Husband alone if Lawyer notifies Wife that Lawyer is withdrawing from the joint representation and will no longer represent Wife? If so, is disclosure to Wife necessary in order to obtain her informed consent to Lawyer's continued representation of Husband?
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The RPPTL Professionalism Committee views Lawyer's representation of Husband and Wife as a "joint representation." The committee concurs in this view in reaching the opinion expressed below.

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From the inception of the representation until Husband's communication to Lawyer of the information concerning the codicil and the extra-marital relationship (hereinafter the "separate confidence"), there was no objective indication that the interests of Husband and Wife diverged, nor did it objectively appear to Lawyer that any such divergence of interests was reasonably likely to arise. Such situations involving joint representation of Husband and Wife do not present a conflict of interests and, therefore, do not trigger the conflict of interest disclosure-and-consent requirements of Rules 4-1.7(a) and 4-1.7(b), Rules Regulating The Florida Bar.[FN1]

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representation" of a client without the client's consent. Rule 4-1.6. The duty of confidentiality "applies not merely to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source" and "continues after the client-lawyer relationship has terminated." Comment, Rule 4-1.6.

It has been suggested that, in a joint representation, a lawyer who receives information from the "communicating client" that is relevant to the interests of the non-communicating client may disclose the information to the latter, even over the communicating client's objections and even where disclosure would be damaging to the communicating client. The committee is of the opinion that disclosure is not permissible and therefore rejects this "no-confidentiality" position. The argument for a "no-confidentiality" approach -- which is a departure from the usual rule of lawyer-client confidentiality -- is premised on two bases: (1) that joint clients have an expectation that everything relating to the joint representation that is communicated by one client to the joint lawyer will be shared by the lawyer with the other client (i.e., that joint clients have no expectation of confidentiality within the joint representation); and (2) that the law governing the evidentiary attorney-client privilege sets (or should set) the standard for the lawyer's ethical duties in the joint representation setting. Both of these foundations, in the committee's opinion, are flawed.

Significantly, existing Rule 4-1.6(c)(1) allows the joint clients' lawyer to share information received from one client with the other client, without the need to obtain consent from the communicating client, when such disclosure is reasonably necessary to further the interests of the joint representation. Thus, a presumption of "no confidentiality" is not needed to facilitate representation of joint clients with a mutual goal. Rather, such a presumption would serve only to permit the lawyer to reveal an adverse separate confidence, against the communicating client's wishes and outside the parameters of Rule 4-1.6. At that point in time, it is clear that a conflict of interests has arisen and any "community of interests" has been damaged or destroyed. See *Report of the Special Study Committee on Professional Responsibility* prepared by the American Bar Association Section of Real Property, Probate and Trust Law, 28 Real Prop., Prob. & Tr. L.J. 765, 776-77 (1994) (hereinafter the "Study Committee Report") ("Because these expectations [[of joint clients] may change, the lawyer must reassess these expectations as the representation progresses.").

***5** Furthermore, accurately predicting the expectations of a typical client in a given situation is risky business. See, e.g., Zacharias, *Rethinking Confidentiality*, 74 Iowa L. Rev. 351 (1989). This would seem to be especially true concerning separate confidences imparted by one joint client to the lawyer that are in some way adverse to the other joint client. Even commentators who oppose maintaining the usual confidentiality rule in the joint client setting acknowledge that client expectations concerning confidentiality may be different in the case of separate confidences that are adverse to the non-communicating client than they are when the communication clearly furthers the objectives of the joint representation. See, e.g., *Study Committee Report*, at 788 ("Most [separate] confidences would not be imparted if the client were mindful of the lawyer's competing duty [of communication] to the other spouse."); Collett, *Disclosure, Discretion, or Deception: The Estate Planner's Ethics Dilemma from a Unilateral Confidence*, 28 Real Prop., Prob. & Tr. L.J. 683 (1994) (hereinafter, Collett), at 684 ("Absent agreement concerning the nature of the relationship, clients may have different expectations concerning the lawyer's obligation to maintain individual confidences."). Moreover, a leading case in the area of attorney-client privilege in joint

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Opinions: 92-5

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***2** Lawyer has represented Husband and Wife for many years in a range of personal matters, including estate planning. Husband and Wife have substantial individual assets, and they also own substantial jointly-held property. Recently, Lawyer prepared new updated wills that Husband and Wife signed. Like their previous wills, the new wills primarily benefit the survivor of them for his or her life, with beneficial disposition at the death of the survivor being made equally to their children (none of whom were born by prior marriage).

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to the Wife? If so, what are the relevant factors which Lawyer may or should consider? c) If Lawyer does not reveal the information to Wife, is Lawyer required to withdraw from the representation? If so, what explanation, if any, should Lawyer give to Wife? ***3** 3. May Lawyer continue to represent Husband alone if Lawyer notifies Wife that Lawyer is withdrawing from the joint representation and will no longer represent Wife? If so, is disclosure to Wife necessary in order to obtain her informed consent to Lawyer's continued representation of Husband?
4. Assuming that adequate disclosure is made to Wife, may Lawyer continue to represent both Husband and Wife if they both wish for Lawyer to do so?

The RPPTL Professionalism Committee views Lawyer's representation of Husband and Wife as a "joint representation." The committee concurs in this view in reaching the opinion expressed below.

DISCUSSION

From the inception of the representation until Husband's communication to Lawyer of the information concerning the codicil and the extra-marital relationship (hereinafter the "separate confidence"), there was no objective indication that the interests of Husband and Wife diverged, nor did it objectively appear to Lawyer that any such divergence of interests was reasonably likely to arise. Such situations involving joint representation of Husband and Wife do not present a conflict of interests and, therefore, do not trigger the conflict of interest disclosure-and-consent requirements of Rules 4-1.7(a) and 4-1.7(b), Rules Regulating The Florida Bar.[FN1]

In view of the conclusions reached in the remainder of this opinion, we conclude that, under the facts presented, Lawyer was not ethically obligated to discuss with Husband and Wife Lawyer's obligations with regard to separate confidences. While such a discussion is not ethically required, in some situations it may help prevent the type of occurrence that is the subject of this opinion.

We now turn to the central issue presented, which is the application of the confidentiality rule in a situation where confidentiality was not discussed at the outset of the joint representation. A lawyer is ethically obligated to maintain in confidence all information relating to the representation of a client. Rule 4-1.6. A lawyer, however, also has a duty to communicate to a client information that is relevant to the representation. Rule 4-1.4. These duties of communication and confidentiality harmoniously coexist in most situations. In the situation presented, however, Lawyer's duty of communication to Wife appears to conflict with Lawyer's duty of confidentiality to Husband. Thus, the key question for our decision is: Which duty must give way? We conclude that, under the facts presented, Lawyer's duty of confidentiality must take precedence. Consequently, if Husband fails to disclose (or give Lawyer permission to disclose) the subject information to Wife, Lawyer is not ethically required to disclose the information to Wife and does not have discretion to reveal the information. To the contrary, Lawyer's ethical obligation of confidentiality to Husband *prohibits* Lawyer from disclosing the information to Wife.

***4** The lawyer-client relationship is one of trust and confidence. Gerlach v. Donnelly, 98 So.2d 493 (Fla. 1957). Rule 4-1.6 recognizes a very broad duty of confidentiality on the part of a lawyer. Save for a few narrow exceptions set forth in the rule, a lawyer is prohibited from voluntarily revealing any "information relating to the

representation" of a client without the client's consent. Rule 4-1.6. The duty of confidentiality "applies not merely to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source" and "continues after the client-lawyer relationship has terminated." Comment, Rule 4-1.6.

It has been suggested that, in a joint representation, a lawyer who receives information from the "communicating client" that is relevant to the interests of the non-communicating client may disclose the information to the latter, even over the communicating client's objections and even where disclosure would be damaging to the communicating client. The committee is of the opinion that disclosure is not permissible and therefore rejects this "no-confidentiality" position. The argument for a "no-confidentiality" approach -- which is a departure from the usual rule of lawyer-client confidentiality -- is premised on two bases: (1) that joint clients have an expectation that everything relating to the joint representation that is communicated by one client to the joint lawyer will be shared by the lawyer with the other client (i.e., that joint clients have no expectation of confidentiality within the joint representation); and (2) that the law governing the evidentiary attorney-client privilege sets (or should set) the standard for the lawyer's ethical duties in the joint representation setting. Both of these foundations, in the committee's opinion, are flawed.

Significantly, existing Rule 4-1.6(c)(1) allows the joint clients' lawyer to share information received from one client with the other client, without the need to obtain consent from the communicating client, when such disclosure is reasonably necessary to further the interests of the joint representation. Thus, a presumption of "no confidentiality" is not needed to facilitate representation of joint clients with a mutual goal. Rather, such a presumption would serve only to permit the lawyer to reveal an adverse separate confidence, against the communicating client's wishes and outside the parameters of Rule 4-1.6. At that point in time, it is clear that a conflict of interests has arisen and any "community of interests" has been damaged or destroyed. See *Report of the Special Study Committee on Professional Responsibility* prepared by the American Bar Association Section of Real Property, Probate and Trust Law, 28 Real Prop., Prob. & Tr. L.J. 765, 776-77 (1994) (hereinafter the "Study Committee Report") ("Because these expectations [[of joint clients] may change, the lawyer must reassess these expectations as the representation progresses.").

***5** Furthermore, accurately predicting the expectations of a typical client in a given situation is risky business. See, e.g., Zacharias, *Rethinking Confidentiality*, 74 Iowa L. Rev. 351 (1989). This would seem to be especially true concerning separate confidences imparted by one joint client to the lawyer that are in some way adverse to the other joint client. Even commentators who oppose maintaining the usual confidentiality rule in the joint client setting acknowledge that client expectations concerning confidentiality may be different in the case of separate confidences that are adverse to the non-communicating client than they are when the communication clearly furthers the objectives of the joint representation. See, e.g., *Study Committee Report*, at 788 ("Most [separate] confidences would not be imparted if the client were mindful of the lawyer's competing duty [of communication] to the other spouse."); Collett, *Disclosure, Discretion, or Deception: The Estate Planner's Ethics Dilemma from a Unilateral Confidence*, 28 Real Prop., Prob. & Tr. L.J. 683 (1994) (hereinafter, Collett), at 684 ("Absent agreement concerning the nature of the relationship, clients may have different expectations concerning the lawyer's obligation to maintain individual confidences."). Moreover, a leading case in the area of attorney-client privilege in joint

representations states, "As between joint clients, there can be no 'confidences' or 'secrets' *unless one client manifests a contrary intent.*" Brennan's, Inc. v. Brennan's Restaurants, Inc., 590 F.2d 168, 173 (5th Cir. 1979) (emphasis added). The committee is of the opinion that it would be inadvisable to rely on such a speculative basis as "joint client expectations" to justify altering the usual lawyer-client confidentiality rule when applied to joint representation situations. This is especially true where-confusion or misunderstanding on the part of the clients may be minimized or eliminated by means of a discussion between the lawyer and the clients at the outset of the representation. See Collett, at 738-39.

The second basis advanced for a no-confidentiality rule is the law governing the evidentiary attorney-client privilege. See *Restatement of the Lawyer Governing Lawyers* (Proposed Final Draft) (hereinafter the "*Restatement* "), sec. 112, comment *I.* Communications relevant to a matter of common interest between joint clients generally are not privileged as a matter of law. See, e.g., F.S. sec. 90.502(4)(e). Case law cited in support of a no-confidentiality rule invariably is grounded in the law of attorney-client privilege. See, e.g., Alexander v. Superior Court, 685 P.2d 1309 (Ariz. 1984); Luthy v. Seaburn, 46 N.W.2d 44 (Iowa 1951).

***6** It is important to note that the ethical duty of confidentiality is broader than the evidentiary attorney-client privilege. Campbell v. Pioneer Savings Bank, 565 So. 2d 417 (Fla. 4th DCA 1990); Buntrock v. Buntrock, 419 So.2d 402 (Fla. 4th DCA 1982); Opinion 92-5. This distinction holds true even in a joint client setting. Lawyer Disciplinary Board v. McGraw, 461 S.E.2d 850 (W.Va. 1995). The Comment to Rule 4-1.6 clearly explains the difference between confidentiality and privilege:

> The principle of confidentiality is given effect in 2 related bodies of law, the attorney-client privilege (which includes the work product doctrine) in the law of evidence and the rule of confidentiality established in professional ethics. The attorney-client privilege applies in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule applies not merely to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or by law.

The ethical duty of confidentiality assures a client that, throughout the course of the representation and beyond, the lawyer ordinarily may not voluntarily reveal information relating to the representation to anyone else without the client's consent. In contrast, the evidentiary privilege becomes relevant only after legal proceedings have begun. The privilege is a limited exception to the general principle that, in formal legal proceedings, the legal system and society should have all relevant information available as part of the search for truth. Thus, there are different purposes underlying the concepts of confidentiality and privilege. See, e.g., Brennan's, Inc. v. Brennan's Restaurants, Inc., 590 F.2d 168 (5th Cir. 1979); X Corp. v. Doe, 805 F.Supp. 1298 (E.D.Va. 1992); *Study Committee Report*, at 774. The committee is of the opinion that the law of privilege does not, and should not, set the ethical standard of lawyer-client confidentiality.

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It has been argued in some commentaries that the usual rule of lawyer-client confidentiality does not apply in a joint representation and that the lawyer should have

the *discretion* to determine whether the lawyer should disclose the separate confidence to the non-communicating client. This discretionary approach is advanced in the *Restatement*, sec. 112, comment *I.* This result is also favored by the American College of Trusts and Estates in its *Commentaries on the Model Rules of Professional Conduct* (2d ed. 1995) (hereinafter the "ACTEC Commentaries"). The *Restatement* itself acknowledges that no case law supports the discretionary approach. Nor do the *ACTEC Commentaries* cite any supporting authority for this proposition.

***7** The committee rejects the concept of discretion in this important area. Florida lawyers must have an unambiguous rule governing their conduct in situations of this nature. We conclude that Lawyer owes duties of confidentiality to both Husband and Wife, regardless of whether they are being represented jointly. Accordingly, under the facts presented Lawyer is ethically precluded from disclosing the separate confidence to Wife without Husband's consent.

The conclusion we reach is consistent with the Rules of Professional Conduct and with prior committee decisions. For example, the Comment to Rule 4-1.6 notes:

> The Rules of Professional Conduct in various circumstances permit or require a lawyer to disclose information relating to the representation. See rules 4-2.2, 4-2.3, 4-3.3, and 4-4.1. In addition to these provisions, a lawyer may be obligated or permitted by other provisions of law to give information about a client. *Whether another provision of law supersedes rule 4-1.6 is a matter of interpretation beyond the scope of these rules, but a presumption should exist against such a supersession.* [Emphasis added.]

Additionally, in Opinion 92-5 we concluded that a lawyer who was faced with a federal law purporting to require the lawyer to disclose client information that was confidential under Rule 4-1.6, but not protected by the attorney-client privilege, could not disclose the information without client consent until compelled to do so by legal process.

Our conclusion is also supported by out-of-state authorities. Facing an issue quite similar to that presented by the instant inquiry, the Committee on Professional Ethics of the New York State Bar Association in its Opinion 555 concluded that the lawyer's duty of confidentiality to the communicating joint client (a partner in a two-partner partnership) must take precedence over the lawyer's duty to provide relevant information to the non-communicating joint client (the other partner). That committee reasoned that the mere joint employment of a lawyer does not imply consent on the part of the joint clients to reveal a communication to the non-communicating joint client where disclosure would be adverse to the communicating client. See American Bar Association Formal Opinion 91-361; New York State Bar Association Opinion 674; Monroe County (N.Y.) Bar Association Opinion 87-2. See also *Study Committee Report*, at 788.

The committee further concludes that Lawyer must withdraw from the joint representation under the facts presented. An adversity of interests concerning the joint representation has arisen. This creates a conflict of interest. Many conflicts can be cured by obtaining the fully informed consent of the affected clients. Rule 4-1.7. Some conflicts, however, are of such a nature that it is not reasonable for a lawyer to request consent to continue the representation. The Comment to Rule 4-1.7 provides in pertinent part:

> ***8** A client may consent to representation notwithstanding a conflict. However, as indicated in subdivision (a)(1) with respect to representation directly adverse to a client and subdivision (b)(1) with respect to material limitations on representation of a client, when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot

properly ask for such agreement or provide representation on the basis of the client's consent.

In the situation presented, the conflict that has arisen is of an personal and, quite likely, emotionally-charged nature. Lawyer's continued representation of both Husband and Wife in estate planning matters presumably would no longer be tenable. Rule 4-1.16 thus requires Lawyer's withdrawal from representation of both Husband and Wife in this matter.

In withdrawing from the representation, Lawyer should inform Wife and Husband that a conflict of interest has arisen that precludes Lawyer's continued representation of Wife and Husband in these matters. Lawyer may also advise both Wife and Husband that each should retain separate counsel. As discussed above, however, Lawyer may not disclose the separate confidence to Wife. The committee recognizes that a sudden withdrawal by Lawyer almost certainly will raise suspicions on the part of Wife. This may even alert Wife to the substance of the separate confidence. Regardless of whether such surmising by Wife occurs when Lawyer gives notice of withdrawal, Lawyer nevertheless has complied with the Rules of Professional Conduct and has not violated Lawyer's duties to Husband.

Finally, whether Lawyer ethically may represent Husband or Wife in other matters will be governed by Rule 4-1.9.

FN1. It is important to recognize, however, that some spouses do not share identical goals in common matters, including estate planning. For example, one spouse may wish to make a Will providing substantial beneficial disposition for charity but the other spouse does not. Or, either or both of them may have children by a prior marriage for whom they may wish to make different beneficial provisions. Given the conflict of interest typically inherent in those types of situations, in such situations the attorney should review with the married couple the relevant conflict of interest considerations and obtain the spouses informed consent to the joint representation.

FL Eth. Op. 95-4, 1997 WL 307142 (Fla.St.Bar Assn.)
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§ 128. Representing Clients with Conflicting Interests in Civil Litigation

Unless all affected clients consent to the representation under the limitations and conditions provided in § 122, a lawyer in civil litigation may not:

(1) represent two or more clients in a matter if there is a substantial risk that the lawyer's representation of one client would be materially and adversely affected by the lawyer's duties to another client in the matter; or

(2) represent one client to assert or defend a claim against or brought by another client currently represented by the lawyer, even if the matters are not related.

Comment:

a. Scope and cross-references. This Section applies the general conflicts standard in § 121 to situations in which a lawyer represents two or more parties in civil litigation. On identifying who is the lawyer's client within the meaning of this rule, see § 121, Comment *d.* Conflicts under this Section are subject to consent under the limitations and conditions provided in § 122. The conflicts are imputed to affiliated lawyers by § 123, and the imputation can be removed as described in § 124. On limiting conflicts of interest in the case of a prospective client, see § 15.

Multiple representation in criminal litigation is considered in § 129 and, in matters not involving litigation, in § 130. Conflicts arising when a lawyer represents both an entity and one or more of its officers, employees, or other associated persons are considered in § 131. Conflicts in filing and settling class actions are examined in § 125, as well as in this Section.

Remedies for violation of this Section include those set forth in § 121, Comment *f.* The most common remedy is the lawyer's disqualification from further representation of one or more clients in a matter (see § 6, Comment *i*). A suit for professional malpractice is available if a client has suffered damage as a result of a lawyer's conflict of interest (see § 48 and following). In appropriate cases, the lawyer is also subject to professional discipline (see § 5) or fee forfeiture (see § 37).

b. Rationale. Dealing with a conflict of interest among current clients requires reconciling four fundamental and sometimes competing values. First, confidential information of one client must not be

used, intentionally or inadvertently, on behalf of another client in ways that would have material and adverse consequences for the disadvantaged client. Although such use violates the requirement of § 60(1), the fact of use will often be difficult to detect and therefore requires preventive measures. Second, the client's faith in the lawyer's loyalty to the client's interests will be severely tried whenever the lawyer must be loyal to another client whose interests are materially adverse. Third, a tribunal properly wishes assurance that its own processes not be compromised by less than vigorous advocacy, delayed by a necessary change of counsel in the course of the proceeding, or later reversed because a litigant was inadequately represented. Even if the parties would give informed consent to being represented by one lawyer, in some cases the parties' positions cannot be effectively presented through the same advocate (see § 122(2)(b) & Comment *g(iii)* thereto). Fourth, clients might want to reduce the costs of litigation and achieve the benefits of a coordinated position in their cases. Clients normally are allowed to give informed consent to a representation that otherwise would violate this Section.

c(i). Clients aligned in opposition to each other—in general. Fundamental conflicts of loyalty and threats to client confidentiality would be inevitable if a lawyer were to represent clients opposing each other in the same litigation. Many actions that the lawyer took on behalf of one client would have the potential for being at the expense of the other. Furthermore, the public interest in the orderly management of litigation could be seriously compromised. Thus, the same lawyer may not represent both plaintiff and defendant in a breach-of-contract lawsuit, for example. A similar rule applies, as stated in Subsection (2), when the clients are involved in two or more lawsuits that are otherwise unrelated. The rule of Subsection (2) applies without regard to the specific inquiries relevant in assessing a conflict under Subsection (1). See Comment *e* hereto.

c(ii). Opposing clients in multiparty litigation. Certain types of civil proceedings may involve multiple parties and disputes, such as bankruptcy cases and proceedings involving environmental liability for alleged polluted conditions. In general, in all multiparty situations the lawyer must comply with Subsection (1) and § 121 generally, both before and after the filing of a formal proceeding.

With respect to bankruptcy, there is substantial disagreement whether certain types of cases or proceedings should be considered under the automatic rule of Subsection (2) or under the general rule of § 121 and, in general, whether general conflict-of-interest rules should be changed in some instances. Tribunals must resolve such questions in light of a body of decisions developed in the specific context of bankruptcy, and often the issues are controlled by statute. The Re-

statement takes no position on the applicability of Subsection (2) in the many situations that may arise in bankruptcy.

d. Clients nominally aligned on the same side in the litigation. Multiple representation is precluded when the clients, although nominally on the same side of a lawsuit, in fact have such different interests that representation of one will have a material and adverse effect on the lawyer's representation of the other. Such conflicts can occur whether the clients are aligned as co-plaintiffs or co-defendants, as well as in complex and multiparty litigation.

d(i). Clients aligned as co-plaintiffs. No conflict of interest is ordinarily presented when two or more of a lawyer's clients assert claims against a defendant. However, sometimes two parties aligned on the same side of a case as co-claimants might wish to characterize the facts differently. The client-claimants might also have a potential lawsuit against each other. For example, a passenger in an automobile damage action might be a co-plaintiff with the driver of the car in a suit alleging negligence of the driver of the other car, but also be able to contend that the driver of the passenger's car was negligent as well, a conclusion that the driver would be motivated to deny. Where there are such possible claims, the lawyer must warn clients about the possibilities of such differences and obtain the consent of each before agreeing to represent them as co-claimants (see § 122).

When multiple claimants assert claims against a defendant who lacks sufficient assets to meet all of the damage claims, a conflict of interest might also be presented. Indeed, whether or not the defendant has assets sufficient to pay all claims, a proposed settlement might create conflicts because the plaintiffs differ in their willingness to accept the settlement. Before any settlement is accepted on behalf of multiple clients, their lawyer must inform each of them about all of the terms of the settlement, including the amounts that each of the other claimants will receive if the settlement is accepted. A similar conflict of interest can arise for a lawyer representing multiple defending parties.

Illustrations:

1. Lawyer represents A and B, pedestrians struck by an automobile as they stood at a street corner. Each has sued C, the owner-driver, for $150,000. C has $100,000 in liability insurance coverage and no other assets with which to satisfy a judgment. Neither A nor B can be paid the full amount of their claims and any sum recovered by one will reduce the assets available to pay the other's claim. Because of the conflict of interest, Lawyer can

continue to represent both A and B only with the informed consent of each (see § 122).

2. The same facts as in Illustration 1, except that C offers to settle A's claim for $60,000 and B's claim for $40,000. Lawyer must inform both A and B of all of the terms of the proposed settlement, including the amounts offered to each client. If one client wishes to accept and the other wishes to reject the proposed settlement, Lawyer may continue to represent both A and B only after a renewal of informed consent by each.

d(ii). Clients aligned as co-defendants in civil case. Clients aligned as co-defendants also can have conflicting interests. Each would usually prefer to see the plaintiff defeated altogether, but if the plaintiff succeeds, each will often prefer to see liability deflected mainly or entirely upon other defendants. Indeed, a plaintiff often sues multiple defendants in the hope that each of the defendants will take the position that another of them is responsible, thus enhancing the likelihood of the plaintiff's recovering. Such conflicts preclude joint representation, absent each co-defendant's informed consent (see § 122).

A contract between the parties can eliminate the conflict. When an employee injures someone in an incident arising out of the employment, for example, an employer that is capable of paying the judgment might agree in advance to hold the employee harmless in the matter so that only the employer will bear any judgment ultimately entered. If only one of the parties will ultimately be liable to the plaintiff, there is little reason to incur the expense of separate counsel. However, the initial conflict must be understood by both defendants and each must consent, particularly if the clients must negotiate an agreement governing who will bear ultimate liability (see § 130).

d(iii). Complex and multiparty litigation. Not all possibly differing interests of co-clients in complex and multiparty litigation involve material interests creating conflict. Determination whether a conflict of material interests exists requires careful attention to the context and other circumstances of the representation and in general should be based on whether (1) issues common to the clients' interests predominate, (2) circumstances such as the size of each client's interest make separate representation impracticable, and (3) the extent of active judicial supervision of the representation. For example, a lawyer might represent several unsecured creditors in a bankruptcy proceeding. In addition to general conflict-of-interest rules that may apply, a lawyer representing such multiple clients must also comply with statutory regulations if more stringent.

Similar considerations apply in representing multiple co-parties in class-action proceedings, due to the possible existence of different objectives or other interests of class members (see also § 125 on creation and settlement of class actions). A plaintiff class might agree, for example, that the local school system discriminates against a racial or ethnic minority, but there might be important differences within the class over what remedy is appropriate (see § 14, Comment *f*). As one possible corrective, under procedural law a class may be subdivided. Through that process objecting members of the class may be heard. However, such differences within the class do not necessarily produce conflicts requiring that the lawyer for the class not represent some or all members of the class or necessitate creation of subclasses. The tasks of a lawyer for a class may include monitoring and mediating such differences. In instances of intractable difference, the lawyer may proceed in what the lawyer reasonably concludes to be the best interests of the class as a whole, for example urging the tribunal to accept an appropriate settlement even if it is not accepted by class representatives or members of the class. In such instances, of course, the lawyer must inform the tribunal of the differing views within the class or on the part of a class representative.

e. Suing a present client in an unrelated matter. A lawyer's representation of Client A might require the lawyer to file a lawsuit against Client B whom the lawyer represents in an unrelated matter. Because the matters are unrelated, no confidential information is likely to be used improperly, nor will the lawyer take both sides in a single proceeding. However, the lawyer has a duty of loyalty to the client being sued. Moreover, the client on whose behalf suit is filed might fear that the lawyer would pursue that client's case less effectively out of deference to the other client. Thus, a lawyer may not sue a current client on behalf of another client, even in an unrelated matter, unless consent is obtained under the conditions and limitations of § 122. On identifying who is a present client, see § 14 and § 121, Comment *d*. On the possibility of informed consent in advance to such suits in certain cases, see § 122, Comment *d*.

Illustrations:

3. Lawyer represents Client B in seeking a tax refund. Client A wishes to file suit against Client B in a contract action unrelated to the tax claim. Lawyer may not represent Client A in the suit against Client B as long as Lawyer represents Client B in the tax case, unless both clients give informed consent. On withdrawal, see § 121, Comment *e*.

4. The same facts as in Illustration 3, except that Client A's contract action is against corporation C, which is not Lawyer's client. After A's suit has been filed, C is acquired by and merged into Lawyer's client B, thus creating the conflict. Unauthorized use of confidential information would not be an issue in such a case, and any remedy imposed by a tribunal should minimize adverse impact on the parties. Because the action of B created the conflict, Lawyer might be permitted to withdraw from pursuing the tax claim on behalf of B, for example, but continue to pursue the contract action. Compare the discussion at § 132, Comment *e*.

f. Concurrently taking adverse legal positions on behalf of different clients. A lawyer ordinarily may take inconsistent legal positions in different courts at different times. While each client is entitled to the lawyer's effective advocacy of that client's position, if the rule were otherwise law firms would have to specialize in a single side of legal issues.

However, a conflict is presented when there is a substantial risk that a lawyer's action in Case A will materially and adversely affect another of the lawyer's clients in Case B. Factors relevant in determining the risk of such an effect include whether the issue is before a trial court or an appellate court; whether the issue is substantive or procedural; the temporal relationship between the matters; the practical significance of the issue to the immediate and long-run interests of the clients involved; and the clients' reasonable expectations in retaining the lawyer. If a conflict of interest exists, absent informed consent of the affected clients under § 122, the lawyer must withdraw from one or both of the matters. Informed client consent is provided for in § 122. On circumstances in which informed client consent would not allow the lawyer to proceed with representation of both clients, see § 122(2)(c) and Comment *g(iv)* thereto.

Illustrations:

5. Lawyer represents two clients in damage actions pending in different United States District Courts. In one case, representing the plaintiff, Lawyer will attempt to introduce certain evidence at trial and argue there for its admissibility. In the other case, representing a defendant, Lawyer will object to an anticipated attempt by the plaintiff to introduce similar evidence. Even if there is some possibility that one court's ruling might be published and cited as authority in the other proceeding, Lawyer may

proceed with both representations without obtaining the consent of the clients involved.

6. The same facts as in Illustration 5, except that the cases have proceeded to the point where certiorari has been granted in each by the United States Supreme Court to consider the common evidentiary question. Any position that Lawyer would assert on behalf of either client on the legal issue common to each case would have a material and adverse impact on the interests of the other client. Thus, a conflict of interest is presented. Even the informed consent of both Client A and Client B would be insufficient to permit Lawyer to represent each before the Supreme Court.

REPORTER'S NOTE

Comment b. Rationale. See generally 1 G. Hazard & W. Hodes, The Law of Lawyering § 1.7:200–1.7:300 (2d ed.1990); C. Wolfram, Modern Legal Ethics §§ 7.3.1–7.3.3 (1986); Moore, Conflicts of Interest in the Simultaneous Representation of Multiple Clients: A Proposed Solution to the Current Confusion and Controversy, 61 Tex. L. Rev. 211 (1982); Note, Attorney's Conflict of Interest in Divorce and Child Custody Cases, 7 J. Leg. Prof. 183 (1982).

Ethical Consideration 5–15 of the ABA Model Code of Professional Responsibility (1969) articulated the traditional warning about representing multiple clients in litigation:

> A lawyer should never represent in litigation multiple clients with differing interests; and there are few situations in which he would be justified in representing in litigation multiple clients with potentially differing interests. If a lawyer accepted such employment and the interests did become actually differing, he would have to withdraw from employment with likelihood of resulting hardship on the clients; and for this reason it is preferable that he refuse the employment initially. . . .

The ABA Model Rules of Professional Conduct (1983) distinguish between "direct" conflicts, which are prohibited by Rule 1.7(a), and other conflicts—such as those between coparties—which are governed by Rule 1.7(b). That distinction is reflected in Comments *c* and *d* of this Section, quoted in the Reporter's Notes thereto.

Comment c. Clients aligned in opposition to each other. See ABA Model Rules of Professional Conduct, Rule 1.7(a) & Comment ¶ [7] (1983). The Comment states that Rule 1.7(a) "prohibits representation of opposing parties in litigation." Examples of a lawyer trying to represent both sides in contested litigation are rarely found in the decisions. Where they are found, however, the courts do not allow the dual representation, even if the clients consent. See, e.g., Sapienza v. New York News, 481 F.Supp. 676 (S.D.N.Y.1979) (where lawyer represented A as plaintiff in antitrust case against B and, in second case,

represented C alleging same basic antitrust violation against both A and B while purporting also to represent A as defendant, representation of C was improper, even with consent of C and A); Chateau De Ville Prods., Inc. v. Tams–Witmark Music Library, Inc., 474 F.Supp. 223 (S.D.N.Y.1979) (law firm could not continue to represent both plaintiffs and alleged co-conspirator of defendant, and consent not sufficient to overcome conflict). But compare MGIC Indem. Corp. v. Weisman, 803 F.2d 500 (9th Cir.1986) (lawyer who represented client as shareholder-plaintiff in suit over bank collapse may also represent same client as director-defendant in the case).

The question of representing opposing clients in hearings on uncontested marital dissolution has arisen frequently. Some courts have permitted use of only one lawyer in some of those situations. While the divorce proceeding is still a nominally contested litigation in most jurisdictions, in some remedial contexts courts will confirm a negotiated property settlement where both parties consented to the simultaneous representation and the settlement appears fair. See, e.g., Klemm v. Superior Court, 142 Cal. Rptr. 509 (Cal.Ct.App.1977) (while parties may not waive conflict in contested litigation, they may do so in an uncontested dissolution); Blum v. Blum, 477 A.2d 289 (Md.Ct. Spec.App.1983) (joint representation not basis for setting aside property settlement; court strongly advises against representing both husband and wife in dissolution proceeding even if parties seem to agree on all aspects of dissolution); but compare, e.g., Levine v. Levine, 436 N.E.2d 476 (N.Y.1982) (discouraging joint representation, which is permissible only under strict conditions, and voiding dissolution agreement here). Several jurisdictions treat joint representation of spouses in a dissolution action as a nonconsentable conflict in all instances. See generally ABA/BNA Lawy. Man. Prof. Conduct 51:308 (1994); Wolfram, Modern Legal Ethics § 8.6 at 437–38 (1986). The dangers in so proceeding are illustrated by Ishmael v. Millington, 50 Cal.Rptr. 592 (Cal.Ct.App.1966) (cause of action stated for legal malpractice in divorce case where lawyer who represented both parties failed to inquire about husband's assets and wife waived rights to certain community property). In some factual situations, of course, nominal agreement (or compliance) by both spouses must be suspect to a reasonable lawyer. E.g., In re Houston, 985 P.2d 752 (N.M.1999) (discipline for representing both husband and wife with consent in assertedly amicable divorce, and husband with respect to substantial domestic violence and sexual-abuse charges).

Comment d. Clients nominally aligned on the same side in the litigation. See ABA Model Rules of Professional Conduct, Rule 1.7, Comment ¶ [7] (1983):

> . . . Simultaneous representation of parties whose interests in litigation may conflict, such as co-plaintiffs or co-defendants, is governed by paragraph (b) [on conflicts caused by material limitations on lawyer's ability to represent]. An impermissible conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. . . . [C]ommon representation of per-

sons having similar interests is proper if the risk of adverse effect is minimal and [the clients consent].

Comment d(i). Clients aligned as co-plaintiffs. Courts permit common representation of co-parties whose interests possibly could become conflicting but are unlikely to do so. See, e.g., Hurt v. Superior Court, 601 P.2d 1329 (Ariz.1979) (no necessary conflict for same lawyer to represent both mother and child in suit for wrongful death of husband-father, but court must have special concern for interests of minor and honor request for separate counsel). See generally C. Wolfram, Modern Legal Ethics § 7.3.3 (1986).

The position in the Comment with respect to conflicting claims to a settlement is consistent both with Disciplinary Rule 5–106 of the ABA Model Code of Professional Responsibility (1969) and Rule 1.8(g) of the ABA Model Rules of Professional Conduct (1983). The requirement of informed consent by each client can be of interest to the settling defendant as well as the plaintiffs, because a dissatisfied plaintiff later can attempt to rescind the settlement by claiming insufficient information for informed consent. See, e.g., Hayes v. Eagle-Picher Indus., 513 F.2d 892 (10th Cir. 1975) (because lawyer may not represent both clients who favor settlement and those who do not, dissenting clients not bound by settlement approved only by majority vote); Quintero v. Jim Walter Homes, Inc., 709 S.W.2d 225 (Tex.Civ.App.1985) (where lawyer settling aggregate claims violated DR 5–106, entire settlement set aside because client not fully informed); In re Guardianship of Lauderdale, 549 P.2d 42 (Wash.Ct. App.1976) (improper to make aggregate wrongful-death settlement where beneficiaries could not agree on its division or adequacy).

An automobile driver and passengers who join in suing another driver are frequently co-plaintiffs with conflicting interests. Because the passengers could often sue their own driver, representation of driver and passengers by a single lawyer has been held to be a conflict. E.g., In re Thornton, 421 A.2d 1 (D.C.1980) (one-year suspension of lawyer who undertook such representation); In re Shaw, 443 A.2d 670 (N.J.1982) (disbarment); Weinberg v. Underwood, 244 A.2d 538 (N.J.1968) (although driver was adult daughter of car's owner, owner and driver still could not have common lawyer); Jedwabny v. Philadelphia Transportation Co., 135 A.2d 252 (Pa.1957) (conflict not waivable). Cf. Rice v. Baron, 456 F.Supp. 1361 (S.D.N.Y.1978) (because counterclaim defendants could cross-claim against each other, two corporations added as counterclaim defendants could not be represented by firm that represented original plaintiff, who was third counterclaim defendant). Unlike some of the cited cases, the Section and Comment take the position that such conflicts are subject to consent under the limitations and conditions described in § 122.

Comment d(ii). Clients aligned as co-defendants in civil case. Where only possible differences of positions exist, informed consent of both parties suffices to permit a joint representation. E.g., Kerry Coal Co. v. United Mine Workers, 470 F.Supp. 1032 (W.D.Pa.1979) (where coal company sued union and various union officers, possible future conflict among defendants' interests amenable to informed waiver); Messing v. FDI, Inc., 439 F.Supp. 776 (D.N.J.

1977) (inside and outside directors might have different interests in derivative suit, because latter might say they were deceived by former, but conflict subject to waiver); Wait v. Second Judicial District Court, 407 P.2d 912 (Nev.1965) (where husband and wife were adversaries in divorce proceeding but were joint defendants in tort action arising out of store they owned, no conflict in using common lawyer to defend tort action). Where the conflict will result in inconsistent trial positions, however, representation by a single lawyer is normally improper. E.g., Dunton v. County of Suffolk, 729 F.2d 903 (2d Cir.1984) (police officer represented by county attorney in civil-rights action; county defense of no color of state law was contrary to officer's interest); see also, e.g., Office of Disciplinary Counsel v. Mazer, 712 N.E.2d 1246 (Ohio 1999) (given expressed differences between co-defendants in litigation against them arising out of their joint sale of business, lawyer should not have co-represented).

Courts regularly permit representation by a common lawyer, after informed consent, in suits against employees and their employers in which the employers contract to pay any damages. E.g., Aetna Casualty & Sur. Co. v. United States, 570 F.2d 1197 (4th Cir.1978) (no conflict for government lawyers to represent air-traffic controllers in suit where government alone faced real threat of liability and controllers had union advice to agree to the government offer of representation); Smith v. City of New York, 611 F.Supp. 1080 (S.D.N.Y.1985) (corporation counsel could represent both city and police officers in action for police misconduct); Clay v. Doherty, 608 F.Supp. 295 (N.D.Ill.1985) (single law firm may represent county and county officials accused of civil-rights violation); Bell v. City of Milwaukee, 536 F.Supp. 462 (E.D.Wis.1982), aff'd in part and rev'd in part on other grounds, 746 F.2d 1205 (7th Cir.1984) (conflict only if city disclaimed liability for damages); Spindle v. Chubb/Pacific Indem. Group, 152 Cal. Rptr. 776 (Cal.Ct.App.1979) (two doctors were sued for malpractice in same incident).

Comment d(iii). Complex and multiparty litigation. On conflicts of interest in bankruptcy representation, see, e.g., In re National Liquidators, Inc., 182 B.R. 186 (S.D.Ohio 1995) (concurrent representation of unsecured creditors' committee and individual unsecured creditors permissible in absence of showing of actual dispute); In re Rusty Jones, Inc., 107 B.R. 161 (Bankr.N.D.Ill.1989) (on facts, lawyer may represent both creditors' committee and individual creditors absent showing of actual conflict of interest). On the split of authority on whether a lawyer is disinterested within the required meaning of the Bankruptcy Code when the lawyer attempts to represent both a debtor in possession and one or more creditors in unrelated matters, see authority cited in In re Aircraft Instrument & Dev., Inc., 151 B.R. 939, 943–44 (Bankr.D.Kan.1993). As indicated in these and other bankruptcy decisions, resolution of conflict-of-interest issues in bankruptcy representations depends on the interpretation of bankruptcy statutes and court rules in addition to lawyer-code provisions and judicial decisions.

On class actions, see generally Bell, Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation, 85 Yale L.J. 470 (1976); Rhode, Class Conflicts in Class Actions, 34 Stan. L.

Rev. 1183 (1982); see also, e.g., Malchman v. Davis, 706 F.2d 426 (2d Cir.1983) (lower court must determine whether interests of class representatives were consistent with those of class).

On representing dissident class members on appeal, see, e.g., Bash v. Firstmark Standard Life Ins. Co., 861 F.2d 159 (7th Cir.1988) (lawyer for class who had negotiated settlement not precluded from representing dissenting class members in appellate attack on settlement); In re Agent Orange Prod. Liability Litigation, 800 F.2d 14 (2d Cir.1986) (balancing required of the interests of various groups of class members, public, and court in resolving matter expeditiously and fairly). But cf. In re Corn Derivatives Antitrust Litigation, 748 F.2d 157 (3d Cir.1984) (where lawyer had represented two plaintiffs in multidistrict case, improper for lawyer to represent one of them in later attack on settlement that other plaintiff approved). The Third Circuit later adopted a more balanced view of the role of class counsel in a class action, recognizing that dissent among class members and even class representatives may be inevitable, and that class counsel must exercise reasonable judgment in determining which position to support. Lazy Oil Co. v. Witco, 166 F.3d 581 (3d Cir. 1999).

Comment e. Suing a present client in an unrelated matter. See ABA Model Rules of Professional Conduct, Rule 1.7(a) (1983). Comment ¶ [8] to the rule says: "Ordinarily, a lawyer may not act as advocate against a client the lawyer represents in some other matter, even if the other matter is wholly unrelated." The only exception noted is for client consent, if the conflict is consentable. The principle is well settled in the decisions. Among the leading cases are IBM v. Levin, 579 F.2d 271 (3d Cir.1978) (lawyer may not take case against regular client even though not representing that client in a current matter); Cinema 5, Ltd. v. Cinerama, Inc., 528 F.2d 1384 (2d Cir.1976) (where lawyer was partner in two law firms, one of which represented client in case A and other sued same client in case B, impermissible conflict existed because law firms had single, common lawyer); City of Little Rock v. Cash, 644 S.W.2d 229 (Ark.1982) (denial of fee to lawyer who filed suit against city successfully challenging its privilege tax while defending city in police-misconduct suit); Grievance Comm. v. Rottner, 203 A.2d 82 (Conn.1964) (law firm could not appear in personal-injury case against client it was representing in unrelated collection matter); Margulies v. Upchurch, 696 P.2d 1195 (Utah 1985) (firm barred from filing medical-malpractice action because it represented limited partnership of defendant physicians in unrelated commercial litigation). But see Aerojet Properties, Inc. v. State of New York, 530 N.Y.S.2d 624 (N.Y.App.Div.1988) (law firm representing one state agency may pursue claim for private client against state in court of claims based on unrelated conduct of another state agency); Morgan, Suing a Current Client, 9 Geo. J. Leg. Ethics 1157 (1996) (arguing for change in law to permit).

The strictness of the prohibition might be tempered when the client being sued is one for whom the lawyer is performing services other than handling litigation. E.g., City Council v. Sakai, 570 P.2d 565 (Hawaii 1977) (lawyer may do bond work for city while representing client suing city

on unrelated matter); People v. Crawford Distrib. Co., 382 N.E.2d 1223 (Ill.App.Ct.1978) (criminal-defense counsel's acting as part-time assistant attorney general for civil matters in state does not deny due process); In re Ainsworth, 614 P.2d 1127 (Or.1980) (one matter was in litigation and other was real-estate transaction).

Illustration 4 is based on Pennwalt v. Plough, Inc., 85 F.R.D. 264 (D.Del. 1980). See also Whiting Corp. v. White Mach. Corp., 567 F.2d 713 (7th Cir.1977) (where lawyer represented plaintiff and, on unrelated matters, corporation that owned 20% of defendant corporation, no abuse of discretion to refuse to disqualify firm when plaintiff consented and firm promised not to represent part-owner of defendant during pendency of case).

Comment f. Concurrently taking adverse legal positions on behalf of different clients. See 1 G. Hazard & W. Hodes, The Law of Lawyering § 1.7:104 (2d ed.1990); C. Wolfram, Modern Legal Ethics § 7.3.3, at 355 (1986). The ABA Model Rules of Professional Conduct (1983) provide in Rule 1.7, Comment ¶ [9]:

> A lawyer may represent parties having antagonistic positions on a legal question that has arisen in different cases, unless representation of either client would be adversely affected. Thus, it is ordinarily not improper to assert such positions in cases pending in different trial courts, but it may be improper to do so in cases pending at the same time in an appellate court.

More relevant factors are identified in this Comment than are suggested in the above-quoted Comment to ABA Model Rule 1.7. ABA Formal Opinion 93–377 (1993) also finds the trial/appellate distinction insufficient and suggests that the issue should be whether the lawyer in either case would be caused to "soft-pedal" or alter arguments on behalf of one client so as not to undercut the position of the other client.

See also Fiandaca v. Cunningham, 827 F.2d 825 (1st Cir.1987) (conflict found when lawyer argued on behalf of client A that facility should be used as state mental hospital but simultaneously argued, in another proceeding pending simultaneously, on behalf of client B that it should be used to expand the state's prison facilities). Cf. Estates Theatres, Inc. v. Columbia Pictures Indus., Inc., 345 F.Supp. 93 (S.D.N.Y.1972) (conflict found where lawyer who was defending A against antitrust charges in one case filed a very similar antitrust case against A on behalf of B).

§ 129. Conflicts of Interest in Criminal Litigation

Unless all affected clients consent to the representation under the limitations and conditions provided in § 122, a lawyer in a criminal matter may not represent:

(1) two or more defendants or potential defendants in the same matter; or

(2) a single defendant, if the representation would involve a conflict of interest as defined in § 121.

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Feature

***39** JOINT REPRESENTATION OF SPOUSES IN ESTATE PLANNING: THE SAGA OF ADVISORY OPINION 95-4

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After extended proceedings commencing in 1995, the final text of Advisory Opinion 95-4 [FN1] was approved by The Florida Bar Board of Governors at its May 1997 meeting. Advisory Opinion 95-4 provides guidance regarding confidentiality and conflict of interest concerns for attorneys undertaking to represent spouses as joint clients in estate planning matters. [FN2] A summary of Advisory Opinion 95-4 is contained in its headnote prepared by the Ethics Department of The Florida Bar:

In a joint representation between husband and wife in estate planning, an attorney is not required to discuss issues regarding confidentiality at the outset of representation. The attorney may not reveal confidential information to the wife when the husband tells the attorney that he wishes to provide for a beneficiary that is unknown to the wife. The attorney must withdraw from the representation of both husband and wife because of the conflict presented when the attorney must maintain the husband's separate confidences regarding the joint representation.

This article examines the holdings of Advisory Opinion 95-4, with a particular focus on its procedural history and the analysis developed during deliberations prior to its final issuance.

In 1995, the Real Property, Probate and Trust Law Section approved the recommendation of its Estate Planning, Probate and Trust Professionalism Committee to request an ethics advisory opinion with respect to joint representation of spouses in estate planning. [FN3] Professor Geoffrey C. Hazard, Jr. was retained as advisor and reporter for the project. [FN4]

The advisory opinion was sought because of the sparse guidance on this subject under the Florida Rules of Professional Conduct (FRPC) and ethics opinions and case law in Florida. [FN5] At the time the request for the opinion was made, two national organizations of trusts and estates practitioners had recently concluded major projects relating to this subject focusing on the Model Rules of Professional Conduct (MRPC). The Special Study Committee on Professional Responsibility of the American Bar Association Section of Real Property, Probate and Trust Law published three reports, one of which directly addressed multiple representation of spouses (the study committee report). [FN6] Separately, the American College of Trusts and Estates Counsel (ACTEC) released its own Commentaries on the Model Rules of Professional Conduct (the ACTEC commentaries), which also devoted significant consideration to this subject. [FN7] An important objective of the RPPTL Section in seeking an ethics advisory opinion was to promote the feasibility of joint representation in estate planning. [FN8]

In making its request for an ethics advisory opinion, the RPPTL Section submitted a generalized situation to illustrate the ethical issues for which guidance was sought. [FN9] The situation presented by the RPPTL request letter [FN10] and addressed in Advisory Opinion 95-4 follows:

Lawyer has represented Husband and Wife for many years in a range of personal matters, including estate planning. Husband and Wife have substantial individual assets, and they also own substantial jointly held property. Recently, Lawyer prepared new updated Wills which Husband and Wife signed. Like their previous Wills, the new Wills primarily benefit the survivor of them for his or her life, with beneficial disposition at the death of the survivor being made equally to their children (none of whom were born by prior marriage).

Husband, Wife, and Lawyer have always shared all relevant assets and financial information. Consistent with previous practice, Lawyer met with Husband and Wife together to confer regarding the changes to be made in updating their Wills. At no point since Lawyer first started to represent them did either Husband or Wife ever ask Lawyer to keep any information secret from the other, and there was never any discussion ***40** about what Lawyer might do if either of them were to ask Lawyer to maintain such a separate confidence.

Several months after the execution of the new Wills, Husband confers separately with Lawyer. Husband reveals to Lawyer that he has just executed a Codicil (prepared by another law firm) which makes substantial beneficial disposition to a woman with whom Husband has been having an extra-marital relationship. Husband tells Lawyer that Wife knows about neither the relationship nor the new Codicil, as to which Husband asks Lawyer to advise him regarding Wife's rights of election in the event she were to survive Husband. Lawyer tells Husband that Lawyer cannot under the circumstances advise him regarding same. Lawyer tells Husband that Lawyer will have to consider Lawyer's ethical duties under the circumstances. Lawyer tells Husband that, after consideration, Lawyer may determine to disclose to Wife the substance of Husband's revelation if Husband does not do so himself.

Ethical Dilemma Arising From a Separate Confidence

The central issue in Advisory Opinion 95-4 concerns the lawyer's duties under FRPC 4-1.4 [FN11] (communication), FRPC 4-1.6 [FN12] (confidentiality), and FRPC 4-1.7 [FN13] (conflict of interest) with respect to the husband's communication to the lawyer of the information concerning the codicil and the extra-marital relationship, which is defined in Advisory Opinion 95-4 as the "separate confidence." Advisory Opinion 95-4 begins its analysis by characterizing the lawyer's representation of the husband and wife as a "joint representation," consistent with the RPPTL request letter, [FN14] although Advisory Opinion 95-4 does not address the differences inherent in a "joint representation" as compared to a so-called "separate representation" of spouses in estate planning. A "joint representation" generally refers to representation of co-clients having similar goals and interests in which it is understood that information relating to the subject of representation will be shared by the co-clients. [FN15] A "separate representation" may also involve sharing of information but would permit each client to disclose to his or her attorney certain information which is not to be shared with the other co-client. [FN16] Absent agreement otherwise, the "default" rule is that a co-client relationship involving estate planning for married persons generally is presumed to be a joint representation. [FN17]

Advisory Opinion 95-4 devotes substantial analysis to the positions taken in the study committee report regarding separate confidences imparted in a joint representation. The study committee report focuses on the ethical dilemma which confronts the attorney under, on the one hand, the duty of confidentiality under MRPC 1.6 which the attorney owes the confiding client (husband) and, on the other hand, the duty under MRPC 1.4 to communicate to the nonconfiding client (wife) important information which naturally relates to the attorney's representation of her. [FN18] The study committee report recommends that the attorney seek either to persuade the confiding client to disclose the separate confidence to the other spouse or to obtain express authorization for the attorney to do so. Assuming (as would be expected in the situation presented in Advisory Opinion 95-4) that the confiding client is unwilling to do so, analysis of the study committee report focuses on the insoluble nature of the ethical dilemma--whatever action the attorney takes seemingly will fail to comply with an ethical duty owed by the attorney to one or the other of the attorney's two clients. Applied to the situation presented in Advisory Opinion 95-4, compliance with the lawyer's duty to inform the wife of material information relating to the lawyer's representation of her would run contrary to the lawyer's duty of confidentiality owed to the husband--but compliance with the lawyer's duty of confidentiality relating to the husband's separate confidence would be contrary to the lawyer's duty owed to the

wife to communicate important information to her.

The study committee report and the ACTEC commentaries conclude that the attorney, faced with this insoluble dilemma, must act as fiduciary toward the joint clients [FN19] and may exercise discretion [FN20] to determine whether to make disclosure to the nonconfiding client. [FN21] The study committee report states that the attorney should balance the potential for material harm to the confiding client (husband) which may be caused by revealing the separate confidence against the potential for material harm to the nonconfiding client (wife) which may be expected by failure to reveal same. [FN22]

Advisory Opinion 95-4 does not follow this approach. Instead, it gives precedence to the duty of confidentiality:

[The] duties of communication and confidentiality harmoniously coexist in most situations. In the situation presented, however, Lawyer's duty of communication to Wife appears to conflict with Lawyer's duty of confidentiality to Husband. Thus, the key question for our decision is: Which duty must give way? We conclude that, under the facts presented, Lawyer's duty of confidentiality must take precedence. Consequently, if Husband fails to disclose (or give Lawyer permission to disclose) the subject information to Wife, Lawyer is not ethically required to disclose the information to Wife and does not have discretion to reveal the information. To the contrary, Lawyer's ethical obligation of confidentiality to Husband prohibits Lawyer from disclosing the information to Wife.

In analyzing the rationale underlying the discretion approach (which the opinion refers to as a "no-confidentiality" position), Advisory Opinion 95- 4 identifies and rejects two separate bases for it. The first basis advanced is that clients have an expectation that everything communicated to the attorney by one client which relates to the joint representation will be shared with the other ***41** client. Citing law journal authority as well as a passage in the study committee report itself, the opinion rejects this argument, stating that "accurately predicting the expectations of a typical client in a given situation is risky business." The second basis is grounded in the law of evidentiary privilege which specifically provides for a common interest exception to attorney-client privilege (F.S. §90.502(4)(e)). [FN23] Citing the comment to FRPC 4-1.6 which explains the difference between confidentiality and privilege, Advisory Opinion 95-4 states that the privilege exception under F.S. §90.502(4)(e) becomes relevant only after legal proceedings have begun between the co-clients in which the separate confidence may be relevant.

After dismissing the two bases identified to support a discretionary approach, Advisory Opinion 95-4 concludes:

The committee rejects the concept of discretion in this important area. Florida lawyers must have an unambiguous rule governing their conduct in situations of this nature. We conclude that Lawyer owes duties of confidentiality to both Husband and Wife, regardless of whether they are being represented jointly. Accordingly, under the facts presented Lawyer is ethically precluded from disclosing the separate confidence to Wife without Husband's consent.

In support of this position, the opinion then cites the portion of the comment to FRPC 4.1-6 which provides that "whether another position of law supersedes Rule 4-1.6 is a matter of interpretation beyond the scope of these rules, but a presumption should exist against such a supersession." The opinion also cites, as Florida supporting authority, Advisory Opinion 92-5, [FN24] which addresses the extent to which privileged information may be disclosed when required by law, as well as a 1984 opinion of the New York State Bar Association involving a partnership. [FN25]

The RPPTL Section supported the conclusion reached in Advisory Opinion 95-4. [FN26] As additional authority for this conclusion, the RPPTL Section pointed to agency law doctrine, which is not discussed in Advisory Opinion 95- 4. The rationale advanced by the RPPTL Section is that a separate confidence unilaterally terminates an agreement among two principals (co-client) and their agent (attorney) regarding sharing of information, and that, as a consequence of this unilateral termination, the separate confidence is not to be shared. [FN27]

Withdrawal

Because of the conflict of interest which the separate confidence evidences between the co-clients, Advisory Opinion 95-4 mandates that the attorney withdraw from the representation:

An adversity of interests concerning the joint representation has arisen. This creates a conflict of interest. Many conflicts can be cured by obtaining the fully informed consent of the affected clients. Rule 4-1.7. Some conflicts, however, are of such a nature that it is not reasonable for a lawyer to request consent to continue the representation ... In the situation presented, the conflict that has arisen is of a personal and, quite likely, emotionally-charged nature. The Lawyer's continued representation of both Husband and Wife in estate planning matters presumably would no longer be tenable. Rule 4-1.16 thus requires Lawyer's withdrawal from representation of both Husband and Wife in this matter.

The conclusion that the separate confidence may not be revealed dictates that withdrawal is required. Certainly the lawyer cannot continue to represent the wife after the lawyer learns the information imparted to him or her in the separate confidence from the husband. In the deliberations prior to issuance of Advisory Opinion 95-4, however, significant focus was directed toward the manner in which withdrawal is to be effected by the lawyer. The initial conclusion contained in Proposed Advisory Opinion 95-4 issued by the Professional Ethics Committee (PEC) provided for a "silent" withdrawal: "In withdrawing from the representation, Lawyer should take care to avoid disclosing the separate confidence to Wife. Lawyer should simply cite 'professional obligations' or a similar reason in providing notice of withdrawal to Wife." [FN28]

The RPPTL Section opposed this initial conclusion and sought review by The Florida Bar Board Review Committee on Professional Ethics (BRC). [FN29] The basic concern expressed by the RPPTL Section was the unfair treatment which the nonconfiding client (wife) may receive as a consequence of a silent withdrawal, as well as the potential that the nonconfiding client might be deceived regarding the significance of the withdrawal. [FN30]

The foregoing language was removed from the final text of Advisory Opinion 95-4, which instead provides as follows:

In withdrawing from the representation, Lawyer should inform Wife and Husband that a conflict of interest has arisen that precludes Lawyer's continued representation of Wife and Husband in these matters. Lawyer may also advise both Wife and Husband that each should retain separate counsel. As discussed above, however, Lawyer may not disclose the separate confidence to Wife. The committee recognizes that a sudden withdrawal by Lawyer almost certainly will raise suspicions on the part of Wife. This may even alert Wife to the substance of the separate confidence. Regardless of whether such surmising by Wife occurs when Lawyer gives notice of withdrawal, Lawyer nevertheless has complied with the Rules of Professional Conduct and has not violated Lawyer's duties to Husband.

The practical effect of Advisory Opinion 95-4 is that, because of the attorney's "noisy withdrawal," [FN31] the noncommunicating client--the wife--should be alerted that circumstances adversely affecting her interests have developed.

The attorney should have some reasonable latitude as to the timing in which to make the notification. In some situations, the notification by the attorney may be tantamount to disclosure, as the wife may be expected to find out the substance of the separate confidence. The better practice is for the attorney to make notification only after conferring with the confiding client to explain the consequences if the client refuses to permit the separate confidence to be revealed to his or her spouse. [FN32] This suggests that the attorney should have a reasonable period of time (depending on the circumstances) to seek to resolve the situation short of withdrawal, which may in some situations result in disclosure of the separate confidence to the other spouse. [FN33] While Advisory Opinion 95-4 requires that the attorney state to both spouses that the withdrawal is because of conflict of interest,***42** the opinion states that the attorney may advise them that they should each retain separate counsel. [FN34] This appropriately leaves the attorney

some element of discretion to tailor the withdrawal to the particular circumstances of the situation the attorney faces. [FN35]

Continuing Representation

Advisory Opinion 95-4 states that the lawyer must withdraw "from representation of both Husband and Wife in this matter." [FN36] As to future representation of either spouse, the opinion states only that "[f]inally, whether Lawyer ethically may represent Husband or Wife in other matters will be governed by Rule 4-1.9." [FN37] This statement is obvious, as FRPC 4-1.9 sets forth conflict of interest and informed consent rules applicable to representation of a client where the client's interests are materially adverse to the interests of a former client in the same or a substantially related matter. Unfortunately, Advisory Opinion 95-4 does not provide any substantial guidance with respect to specific questions raised by the RPPTL Section request letter regarding continuing representation. [FN38] Nevertheless, the RPPTL Section suggested the following basic conclusion:

In the situation presented, Lawyer may not continue to represent either Husband or Wife without obtaining informed consent. Because Husband refuses to permit disclosure of the separate confidence, Lawyer is unable to seek Wife's informed consent to waiver of conflict of interest by her (which would be required under Rule 4-1.9 in order for Lawyer going forward to be able to represent Husband alone). On the other hand, Rule 4-1.4 bars Lawyer from representing Wife alone (even if Husband were to consent thereto) as long as Lawyer is unable to advise Wife of information which seriously and adversely affects her interests but which Husband refuses to allow be disclosed. [FN39]

This conclusion is consistent with applicable provisions of the Restatement. [FN40] Advisory Opinion 95-4 apparently did not address this subject on account of the extensive deliberations on the other issues presented, which the RPPTL Section urged receive primary focus. [FN41]

Waiver of Conflict of Interest

Apart from the ethical dilemma confronting the attorney who receives a separate confidence, Advisory Opinion 95-4 also considers the subject of waiver of conflict of interest in a joint representation. The situation presented in Advisory Opinion 95-4 was intended to reflect a common type of joint representation, in which the spouses' interests at the outset have similar interrelated goals and interests. [FN42] Advisory Opinion 95-4 concluded that this situation does not involve a conflict of interest under FRPC 4-1.7:

From the inception of the representation until Husband's communication to Lawyer of the separate confidence, there was no objective indication that the interests of Husband and Wife diverged, nor did it objectively appear to Lawyer that any such divergence of interests was reasonably likely to arise. Such situations involving joint representation of Husband and Wife do not present a conflict of interests and, therefore, do not trigger the conflict of interest disclosure-and-consent requirements of Rules 4-1.7(a) and 4-1.7(b), Rules Regulating The Florida Bar.

Accordingly, the lawyer was not required to conduct advance consultation to review relevant conflict of interest concerns and obtain client informed consent to the joint representation. [FN43]

Advisory Opinion 95-4 does state, however, that informed consent may be required in some joint representation situations:

It is important to recognize, however, that some spouses do not share identical goals in common matters, including estate planning. For example, one spouse may wish to make a Will providing substantial beneficial disposition for charity but the other spouse does not. Or, either or both of them may have children by a prior marriage for whom they may wish to make different beneficial provisions. Given the conflict of interest typically inherent in those types of

situations, in such situations the attorney should review with the married couple the relevant conflict of interest considerations and obtain the spouses' informed consent to the joint representation. [FN44]

This distinction between situations involving conflict of interest and situations in which no conflict of interest is presented is consistent with § 211 of the Restatement of the Law Governing Lawyers, which contains additional examples involving estate planning matters. [FN45] When a conflict of interest is presented, a joint representation may proceed only if both clients consent after consultation in which the lawyer (as required by FRPC 4-1.7(c)) explains "the implications of the common representation and the advantages and risks involved." [FN46]

In taking on a married client situation in which the practitioner may be uncertain at the outset whether a conflict of interest is presented, it is good practice (even though it may not be required) to obtain a waiver of conflict after consultation. Typically, the consultation should include discussion regarding the potential advantages to each spouse if he or she were to be represented by separate counsel, and also the considerations involved if the attorney receives a separate confidence from either of them. [FN47] Explanation of the separate confidence concern presumably may be handled by reviewing Advisory Opinion 95-4 with the clients and perhaps in some situations furnishing the clients with the text of the opinion or a summary thereof. [FN48]

If a conflict of interest does exist and the attorney fails to obtain an informed consent waiver, the potential consequences can be dire. One untoward possible consequence (regardless of whether a separate confidence may at some point be imparted) may be the invalidation of testamentary documents, which in turn could lead to possible attorney malpractice liability to disappointed beneficiaries. [FN49] If a separate confidence is imparted, the attorney is ***43** confronted with an impossible situation. By failing to advise the spouses at the outset regarding separate confidences, the attorney is at risk of malpractice liability to both spouses for consequences flowing from the separate confidence. [FN50] Of course, the extent of attorney malpractice liability depends on the particular circumstances presented in each individual case and may be difficult to quantify. Apart from malpractice considerations, the attorney may also be subject to disciplinary proceedings for failure to obtain conflict waiver by informed consent.

As a preventive measure, some attorneys may routinely obtain conflict waivers from estate planning clients, regardless of the potential for conflict of interest. Cautious practice is for the conflict waiver to be in writing and to include a recitation of the relevant considerations, which might be set out in a general memorandum furnished to all married clients. In some circumstances, the careful practitioner may review this memorandum with clients periodically during the course of the representation and also consider at appropriate intervals whether any specific emerging conflict may reasonably be determined to have been within the clients' contemplation when the original waiver was made. [FN51]

Requirement of Advance Confidentiality Warning

The initial opinion issued by the Professional Ethics Committee contained a requirement concerning an advance confidentiality warning. Regardless of whether a conflict of interest might exist, Proposed Advisory Opinion 95-4 concluded that FRPC Rule 4-1.4(b) and Rule 4-1.7(c) imposed a duty on an attorney in every joint representation to make explanation at the outset to joint clients regarding the attorney's professional obligations in connection with the representations:

One aspect of this explanation is the lawyer's obligation of confidentiality. Clients have a right to know whether, and under what circumstances, information provided by one of them to the lawyer may be shared with other persons, including a co-client .... We conclude that Lawyer was ethically obligated to discuss with Husband and Wife Lawyer's obligations with regard to separate confidences. This required explanation is one that, of course, should be tailored to the specific circumstances involved. The explanation is not required to be in writing; however, the committee strongly believes that a written disclosure is advisable for the protection of both client and lawyer. [FN52]

Upon its review, the Board Review Committee rejected this approach. Instead, the final text of Advisory Opinion 95-4 provides:

In view of the conclusions reached in the remainder of this opinion, we conclude that, under the facts presented, Lawyer was not ethically obligated to discuss with Husband and Wife Lawyer's obligations with regard to separate confidences. While such a discussion is not ethically required, in some situations it may help prevent the type of occurrence that is the subject of this opinion.

The final text of Advisory Opinion 95-4 follows the position advanced by the RPPTL Section, which argued in connection with which its petition for review as follows:

The Professional Ethics Commission version of Proposed Advisory Opinion 95-4 would impose a per se requirement that a lawyer must give a "confidentiality warning" upon commencing every multiple representation--regardless of whether or not conflict of interest concerns (actual or potential) are presented. This per se rule is not supported by any authority, and the Professional Ethics Commission cites no case law or ethics opinion in any jurisdiction for this proposition. This per se rule clashes head-on with the basic position contained in Section 211 of the Restatement of the Law Governing Lawyers. Section 211 of the Restatement draws sharp distinction between: (i) those multiple clients who do not share substantially similar goals and interests (i.e., where waiver of conflict of interest is required; and (ii) those multiple clients who do share similar goals and interests (i.e., where no conflict of interest is reasonably foreseeable or apparent, and hence no waiver is required). To impose a "confidentiality warning" rule for the latter situation would wrongly require, in effect, that a lawyer at the outset take up conflict of interest concerns even though no conflict of interest may exist. The Professional Ethics Commission version of Proposed Advisory Opinion 95-4 would extend its iron rule to a broad range of multiple representations (i.e., largely outside estates and trust practice, and also affecting representations which may not be initiated at the same time but which may arise more gradually over a longer period in the course of practice). Bar members concerned that floodgates of attorney malpractice litigation not be opened to unwarranted claims should worry about the prospective troubling malpractice consequences if the Professional Ethics Committee version of Proposed Advisory Opinion 95-4 were to be followed. [FN53]

In presenting its position, the RPPTL Section also submitted a parallel example presented in a personal injury litigation context to illustrate its concern regarding potential general application of the advance warning requirement contained in Proposed Advisory Opinion 95-4. [FN54]

The important practical significance of Advisory Opinion 95-4 is its determination against impressing a per se rule which would require Florida lawyers to explain confidentiality considerations in every multiple representation setting. In rejecting the Professional Ethics Committee's position, however, the brief portion of Advisory Opinion 95-4 addressing this issue does not set out the rationale for its conclusion. The Board Review Committee apparently decided not to add any potential precedential discussion beyond the bare minimum to a subject where there is little authority under case law, ethics opinions, or commentary. [FN55]

Variations on the Situation Presented

The situation presented in Advisory Opinion 95-4 involved a long-term joint representation in which, after many years, a serious conflict of interest arose. The basic form of ethical dilemma which it addressed may arise in any number of comparable estate planning situations, as stated in the RPPTL request letter:

A husband may ask the attorney to prepare a Codicil (without informing his Wife) to make a substantial disposition to charity. Or, a wife may disclose to the attorney that her child (whom her husband believes is his child also) was actually born out of wedlock and is not her husband's child. A myriad of variation may arise, and each situation presents its own specific degree of seriousness and potential material adversity in respect to the spouses' goals and

interests in their estate planning. [FN56]

At what point is a particular separate confidence serious enough so that the attorney must withdraw if the confiding spouse does not permit ***46** its disclosure to the other spouse? The ACTEC commentaries take the position that some separate confidences concern "irrelevant (or trivial) matters" and gives the following illustration: "For example, a lawyer who represents a husband and wife in estate planning matters might conclude that information imparted by one of the spouses regarding a past act of marital infidelity need not be communicated to the other spouse." [FN57]

Likewise, the Restatement contains an estate planning example involving a separate confidence by one spouse which does not present an ethical problem because of the "lack of material effect" on the other spouse. [FN58]

This position is consistent with dicta in the recent Florida appellate decision in Cone v. Culverhouse, 687 So. 2d 888 (Fla. 2d DCA 1997). Culverhouse addressed the applicability of the common interest exception to attorney-client privilege in litigation brought by the wife after husband's death concerning a wide range of professional services rendered mostly to the husband but also including estate planning for both spouses. The court's decision states that in order for the common interest exception to be applicable:

[T]he clients' interests must be sufficiently compatible that a reasonable client would expect his or her communications concerning the matter to be accessible to the other client. For example, a married couple creating an estate plan with interrelated documents probably have no reasonable expectation of confidentiality concerning the matter of the joint estate plan, but might still have such expectations concerning their individual, private discussions with their lawyer about the reasons for including or excluding specific bequests to third persons in their individual wills. [FN59]

This statement should be interpreted to permit a separate confidence only to the extent that it does not give rise to conflict of interest--that is, a confidential communication from one spouse which has no material effect on the other spouse should be permissible, whereas a separate confidence which does have a material effect on the other spouse is and triggers the requirement for attorney withdrawal under Advisory Opinion 95-4.

Conclusion

The conclusions of Advisory Opinion 95-4 are consistent with the RPPTL Section's goal of promoting the feasibility of joint representation of spouses in estate planning. The final text of Advisory Opinion 95-4 avoids serious difficulties inherent in the conclusions of Proposed Advisory Opinion 95-4 and provides helpful general guidance to practitioners counselling married couples together concerning estate and trust matters.

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[FN1]. The final text of Advisory Opinion 95-4 (May 30, 1997) is published in The Florida Bar NEWS, July 1, 1997,

at 6.

[FN2]. The emphasis which Advisory Opinion 95-4 places on the duty of confidentiality has significance beyond issues involving joint representation. See James G. Pressly, Jr., Rohan Kelley and Michael Simon, Estate Planning, Ethics and Strategies in Dealing with Potentially Incapacitated Clients, at 1- 2, 14th Annual Estate and Property Seminar (Palm Beach County Bar Association, 1997), addressing the relevance of Advisory Opinion 95-4 with respect to confidentiality duties owed to clients having diminished capacity. The emphasis placed on the duty of confidentiality in Advisory Opinion 95-4 should also be considered in connection with responsibilities owed to beneficiaries by a fiduciary's attorney concerning breach of fiduciary duty. See generally, Counseling the Fiduciary, 28 REAL PROP., PROB. & TR. J. 825, 830-839, 848-855. See also FRPC Rule 4-1.7, comment relating to "Other conflicts situations" ("In Florida, the personal representative is the client rather than the estate or the beneficiaries."); Barnett Banks Trust Co., N.A. v. Compson, 629 So. 2d 849 (Fla. 2d D.C.A. 1993); Estate of Gory, 570 So. 2d 1381 (Fla. 4th D.C.A. 1990); but see Fla. Atty. Gen. Op. 96-94.

[FN3]. Minutes of Oct. 20, 1995, Meeting of the Executive Council of the Real Property, Probate, and Trust Law Section of The Florida Bar (on file in the Office of the RPPTL Section Administrator, Tallahassee).

[FN4]. Id.

[FN5]. Prior to Advisory Opinion 95-4, estate planning attorneys had little guidance in Florida beyond the following very limited analysis contained in FRPC 4-1.7, which provides: "Conflict questions may also arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may arise."
Discussion of Florida decisional authorities generally addressing confidentiality concerns involved in multiple representation are summarized in FLORIDA LEGAL ETHICS at §§7.11 and 8.7 (1992, 1996, The Florida Bar).

[FN6]. Comments and Recommendations on Lawyer's Duties in Representing Husband and Wife, 28 REAL PROP., PROB. & TR. J. 765 (1994).

[FN7]. Commentaries on the Model Rules of Professional Conduct (2d ed. March 1995, ACTEC), updating its first edition published in October 1993.

[FN8]. The RPPTL Section's request for an advisory opinion states: "The Florida Rules of Professional Conduct are intended to facilitate the delivery of legal services in an efficient and economically feasible manner. Accordingly, their interpretation should encourage joint representation of spouses in nonadversarial representations, such as estate planning." November 30, 1995, letter submitted by Hollis F. Russell on behalf of the RPPTL Section to Don Beverly, chair of the Professional Ethics Committee of The Florida Bar (the "RPPTL Section Request Letter") at 4. This letter is available on the Internet at <http://www.flabarrpptl.org> in the materials relating to the Estate Planning, Probate and Trust Professionalism Committee. In this connection, the ACTEC Commentaries at 85 provide: "It is often appropriate for a lawyer to represent more than one member of the same family in connection with their estate plans .... In some instances the clients may actually be better served by such a representation, which can result in more economical and better coordinated estate plans prepared by counsel who has a better overall understanding of all of the relevant family and property considerations."

[FN9]. In this connection, the RPPTL Section Request Letter stated: "The focus of this inquiry is directed not toward the litigation context but rather toward the non-adversarial context in which estate planning services typically are rendered, involving long-term planning for appropriate ultimate disposition of family assets. The situation presented is intended to reflect a common type of estate planning representation--an attorney represents spouses whose interrelated interests and goals are similar over an extended period of time, but then diverge. The situation presented is adapted from Fox, Liability Squared (PROB. & PROP., Sept./Oct. 1995), and is intended to provide an illustrative factual

background as an aid to analysis of the issues presented." RPPTL Section Request Letter at 1-2.

[FN10]. RPPTL Section Request Letter at 3.

[FN11]. FRPC 4-1.4 is identical to MRPC 1.4 and provides as follows:
"(a) Informing Client of Status of Representation. A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.
"(b) Duty to Explain Matters to Client. A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."

[FN12]. Relevant portions of FRPC 4-1.6 provide as follows:
"(a) Consent Required to Reveal Information. A lawyer shall not reveal information relating to representation of a client except as stated in subdivisions (b), (c), and (d), unless the client consents after disclosure to the client.
"(b) When Lawyer Must Reveal Information. A lawyer shall reveal such information to the extent the lawyer reasonably believes necessary:
"(1) to prevent a client from committing a crime; or
"(2) to prevent a death or substantial bodily harm to another.
"(c) When Lawyer May Reveal Information. A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:
"(1) to serve the client's interest unless it is information the client specifically requires not to be disclosed ....
"(5) to comply with the Rules of Professional Conduct ....
"(e) Limitation on Amount of Disclosure. When disclosure is mandated or permitted, the lawyer shall disclose no more information than is required to meet the requirements or accomplish the purposes of this rule."
Advisory Opinion 94-5 makes no mention of the fact that Florida is a state in which lawyers must reveal confidential client information to prevent a client from committing any crime, as required by FRPC 4-1.6(b)(1), making Florida one of the least protective jurisdictions of client confidentiality in this context. See generally FLORIDA LEGAL ETHICS, supra note 5, at §§7.15 et seq. Unlike Florida, the majority of states permit attorney use and disclosure of confidential client information only in the case of a criminal act that the lawyer believes is likely to result in imminent death, substantial bodily harm or substantial financial injury. See Restatement (Third) of the Law Governing Lawyers, Proposed Final Draft No. 1 (March 29, 1996, ALI) §117A, cmt. b and accompanying reporter's note (containing chart of each state's rules concerning disclosure of client crimes, fraud and perjury). Unless otherwise indicated, all references herein to "the Restatement" are to Restatement (Third) of the Law Governing Lawyers (Proposed Final Draft No. 1, March 29, 1996) (ALI), final adoption of which may occur in 1998. See ALI Approves Nearly Half of Restatement of Law Governing Lawyers, Daily Report for Executives (BNA), No. 102, at C-1 (May 28, 1996).

[FN13]. Relevant portions of FRPC 4-1.7 provide as follows:
"(a) Representing Adverse Interests. A lawyer shall not represent a client if the representation of that client will be directly adverse to the interests of another client, unless:
"(1) the lawyer reasonably believes the representation will not adversely affect the lawyer's responsibilities to and relationship with the other client; and
"(2) each client consents after consultation.
"(b) Duty to Avoid Limitation on Independent Professional Judgment. A lawyer shall not represent a client if the lawyer's exercise of independent professional judgment in the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person or by the lawyer's own interest, unless:
"(1) the lawyer reasonably believes the representation will not be adversely affected; and
"(2) the client consents after consultation.
"(c) Explanation to Clients. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved."

[FN14]. See RPPTL Section Request Letter at 4-5. The facts set forth in the situation presented indicate a history in the representation in which all relevant information over many years was shared among lawyer, husband, and wife,

thereby confirming a joint representation relationship.

[FN15]. See ACTEC Commentaries at 65-66; Study Committee Report at 772-73.

[FN16]. See ACTEC Commentaries at 66-69; Study Committee Report at 771.

[FN17]. See ACTEC Commentaries at 66; Study Committee Report at 778; Theresa Stanton Collett, Disclosure, Discretion or Deception: The Estate Planner's Ethical Dilemma from a Unilateral Confidence, 28 REAL PROP., PROB. & TR. J. 683, 687 (1994).

[FN18]. Study Committee Report at 783-93. The separate confidence addressed in Advisory Opinion 95-4 constitutes a "prejudicial confidence" as well as a "factual confidence" under the terminology of the Study Committee Report, at 785-786.

[FN19]. Id. at 787.

[FN20]. The ACTEC Commentaries at 68-69 provide: "[T]he lawyer faces an extremely difficult situation with respect to which there is often no clearly proper course of action. In such cases the lawyer should have a reasonable degree of discretion in determining how to respond to any particular case. In fashioning a response the lawyer should consider his or her duties of impartiality and loyalty to the clients; any express or implied agreement among the lawyer and the joint clients that information communicated by either client to the lawyer regarding the subject of representation would be shared with the other client; the reasonable expectations of the clients; and the nature of the confidence and the harm that may result if the confidence is, or is not, disclosed."

[FN21]. This approach had been favored earlier in formal action taken by the RPPTL Section in 1994, when the RPPTL Section recommended that The Florida Bar adopt a proposed amendment to add the following new section to FRPC Rule 4- 1.7: "(e) Representation of Spouses. Except as may otherwise be agreed (in a manner consistent with the Rules of Professional Conduct) among spouses and a lawyer representing both spouses in common or related matters: (1) There shall be no confidentiality pursuant to Rule 4-1.6 as between the spouses insofar as the representation in such matters is concerned; and (2) If in the course of the representation one spouse communicates to the lawyer information which the lawyer reasonably should know the lawyer must disclose to the other spouse in order for the lawyer to provide competent representation to the other spouse, the lawyer shall, at the first reasonable opportunity, either (i) make such disclosure or (ii) withdraw entirely from representation of each spouse in such matters (in which event the lawyer shall not be required to make such disclosure or state any reason for withdrawal)."
Minutes of Jan. 29, 1994, Meeting of the Executive Council of the Real Property, Probate and Trust Law Section of The Florida Bar, approving motion to propose amendment to FRPC Rule 4-1.7 (on file at office of section administrator of RPPTL Section, Tallahassee). At its meeting on June 4, 1994, the Disciplinary Procedure Committee of The Florida Bar Board of Governors rejected this proposal, as reflected in the minutes of that meeting (on file at Office of Executive Director of The Florida Bar, Tallahassee).

[FN22]. Study Committee Report at 787. Professors Hazard's and Hodes' treatise describes this approach as "lawyering for the situation" and sets out a succinct analysis of the relevant critical commentary. See 1 GEOFFREY C. HAZARD, JR., & W. WILLIAM HODES, THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT §2.2:102 (2d ed. 1997) ("HAZARD & HODES").

[FN23]. Fla. Stat. §90.502(4)(e) (1996) provides an exception to attorney-client privilege as follows: "A communication is relevant to a matter of common interest between two or more clients, or their successors in interest, if the communication was made by any of them to a lawyer retained or consulted in common when offered in a civil action between the clients or their successors in interest."

[FN24]. Florida Advisory Opinion 92-5 holds that an attorney faced with federal law requiring disclosure of confidential client information which is not protected by attorney-client privilege may not make disclosure without client consent until compelled by legal process.

[FN25]. N. Y. State Bar Ass'n Op. 555 (1984) (A and B to form a partnership, lawyer who received communication from B indicating that B was violating the partnership agreement may not disclose the information to A although it would not be within the lawyer-client evidentiary privilege and the lawyer must withdraw from representing the partners with respect to partnership affairs). Also cited are ABA Comm. on Ethics and Professional Responsibility, Formal Op. 91-361; N.Y. State Bar Ass'n Op. 674; and Monroe County (N.Y.) Bar Ass'n Op. 87-2.

[FN26]. See May 9, 1997, RPPTL Section Memorandum to The Florida Bar Board of Governors at 1, which is available on the Internet at <http:// www.flabarrpptl.org>. The RPPTL Section initially favored a discretionary approach (see RPPTL Section Request Letter at 3) but modified its position (as reflected in the memorandum of May 9, 1997) prior to the issuance of the final text of Advisory Opinion 95-4.

[FN27]. See July 24, 1996, RPPTL Section Memorandum to John F. Harkness, Jr., Executive Director of The Florida Bar, Attachment I at 2-3, which is available on the Internet at <http://www.flabarrpptl.org>, and which provides as follows: "An agreement regarding the sharing of information may be subsequently terminated either mutually or unilaterally. In the case of mutual termination, both clients are aware of termination (and hence are on equal footing). In the case of unilateral termination by one co-client, the attorney must inform the other co-client thereof at the first reasonable opportunity so as to avoid any prejudice to that other client. When one co-client discloses to the attorney a separate confidence which materially impacts the interests of the other co-client with instructions not to share that information, the agreement is necessarily unilaterally terminated. It is then incumbent upon the attorney to confirm same with the client imparting the unilateral confidence and also to so notify the non-confiding client. Thereafter, information shared between the co-clients before the termination remains available to both of them. However, the information which is unilaterally confided to Lawyer by the one co-client (Husband) with instructions not to share it may not under Rule 4- 1.6 be disclosed by Lawyer to the non-confiding client (Wife)."
For a discussion of agency law considerations, see Theresa Stanton Collett, Disclosure, Discretion, or Deception: The Estate Planner's Ethics Dilemma from a Unilateral Confidence, 28 REAL PROP., PROB. & TR. J. 683, 706-711 (1994).

[FN28]. Proposed Advisory Op. 95-4 (March 22, 1996), published in The Florida Bar NEWS, April 15, 1996, at 8.

[FN29]. See July 24, 1996 RPPTL Section Memorandum at 1, and Attachment V thereto.

[FN30]. The RPPTL Section argued: "Proposed Advisory Opinion 95-4 suggests that the lawyer may merely cite 'professional obligations' to the non-confiding co-client (i.e., the wife) as the reason for the lawyer's withdrawal. We believe that such a cryptic course of action may deceive the wife (who is, of course, a co-client) concerning the degree to which her interests may be threatened. Tracking §112(1) of the Restatement of the Law Governing Lawyers, the lawyer should, at the first reasonable opportunity, alert the wife that a matter seriously and adversely affecting her interests has come to light, which the husband refuses to permit the lawyer to disclose. Proposed Advisory Opinion 95-4 should be revised to so state." Id. at 4.

[FN31]. See 1 HAZARD & HODES §1.6 (generally referring to "noisy withdrawals"); cf. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 92-366 (concluding that when a lawyer determines that his or her work product will be used by the client to perpetrate a fraud, the lawyer must withdraw and may also disaffirm documents prepared in the course of representation, "even though such a 'noisy' withdrawal may have the collateral effect of inferentially revealing client confidences").

[FN32]. The ACTEC Commentaries at 68 provide: "In order to minimize the risk of harm to the clients' relationship

and, possibly to retain the lawyer's ability to represent both of them, the lawyer may properly urge the communicating client himself or herself to impart the confidential information directly to the other client....In doing so the lawyer may properly remind the communicating client of the explicit or implicit understanding that relevant information would be shared and of the lawyer's obligation to share the information with the other client. The lawyer may also point out the possible legal consequences of not disclosing the confidence to the other client, including the possibility that the validity of actions previously taken or planned by one or both of the clients may be jeopardized." See also RPPTL Section Request Letter at 3.

[FN33]. See RPPTL Section Request Letter at 10-11.

[FN34]. Upon reconsideration, the Professional Ethics Committee modified its opinion to mandate that the attorney be required (like the final text of Advisory Opinion 95-4) to notify both spouses that withdrawal is because of conflict of interest, and also required (unlike the opinion's final text, which is permissive) to advise the spouses that each should retain separate counsel. Proposed Advisory Opinion 95-4, as modified on January 24, 1997, on file with The Florida Bar Ethics Department, Tallahassee.

[FN35]. In addressing this subject, Restatement §112, comment 1 provides as follows: "In the course of withdrawal, the lawyer has discretion to warn the affected co-client that a matter seriously and adversely affecting that person's interest has come to light, which the other co-client refuses to permit the lawyer to disclose."
Restatement §112, cmt. 1, illus. 3, discussed at note 58 and accompanying text, further provides that the lawyer may inform the nonconfiding client that the reason for withdrawal is that the confiding client will not permit disclosure of the separate confidence. Florida practitioners must be mindful, however, that Advisory Opinion 95-4 does not address whether or not the attorney may indicate to the nonconfiding spouse that the reason for the conflict of interest is because of separate confidence. It is uncertain how the text of the opinion should be interpreted as to this issue, which remains unsettled after Advisory Opinion 95-4.

[FN36]. Advisory Op. 95-4 at 8.

[FN37]. Id.

[FN38]. The RPPTL Section inquired: "May Lawyer continue to represent Husband alone if Lawyer notifies Wife that Lawyer is withdrawing from the joint representation and will no longer represent Wife? If so, is disclosure to Wife necessary in order to obtain her informed consent to Lawyer's continued representation of Husband?" RPPTL Section Request Letter at 3.
FRPC 4-1.9(a) provides (similar to MRPC 1.9) that "A lawyer who has formally represented a client in a matter shall not thereafter represent another person in the same or substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation." The ACTEC Commentary at 122 on MRPC 1.9 provides the following example applying the rule to the estate planning context: "A lawyer who assisted a client in establishing a revocable trust for the benefit of the client's spouse and issue may not later represent another party in an attempt to satisfy the new client's claims against the trust by invading the assets of the trust. Similarly, the lawyer may not without informed consent of a former client use to the detriment of the former client any confidential information that was obtained during the course of the representation." Ethics opinions outside Florida have reached different conclusions as to whether the continued representation of one spouse, in a matter related to an estate plan created during the initial joint representation of the spouses, presents an inherent conflict of interest. For example, the Committee on Ethics of the Maryland State Bar Association found no inherent conflict of interest where a law firm that represented both a husband and wife prior to their divorce wished to continue to represent the husband in redrafting his will, deleting the former spouse and provided no discussion of whether the wife must provide consent for the lawyer's continued representation of the husband. Comm. on Ethics of the Md. State Bar Ass'n, Op. 86-2. By contrast, the Rhode Island Bar Association ruled that where a lawyer prepared an estate plan for both husband and wife, including trusts and wills, the lawyer may not thereafter redesign the wife's estate to exclude her husband absent the husband's consent pursuant to MRPC 1.9 if the wife's modification of her estate

becomes materially adverse to her husband's interests. R.I. Op. 96- 07.

[FN39]. July 24, 1996, RPPTL Section Memorandum, Attachment I at 3, 4. See also FRPC 4-1.7, Comment relating to "Consultation and consent," which provides in part: "There may be circumstances where it is impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and 1 of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent."

[FN40]. See Restatement §213, cmts. d & e. The RPPTL Section Request Letter at 4 also contained the following analysis: "Lawyer must inform Wife that, if she assents to Lawyer's continued representation of Husband, Lawyer may utilize (possibly to Wife's disadvantage) any information acquired by Lawyer during the joint representation. See ACTEC Commentaries at 122. Lawyer would not be required to obtain Wife's assent to Lawyer's representation of Husband alone in an unrelated matter (e.g., a business transaction) in which the spouses' interests were not materially adverse, assuming Wife will not suffer any material harm on account thereof. In the event of the spouses' subsequent divorce, Lawyer might be able to represent Husband alone (without obtaining Wife's assent) in estate planning upon the proceeding's conclusion, as long as there were to be no relevant material adversity between the spouses' interests (insofar as concerns Husband's estate planning) at that time."

[FN41]. See May 15, 1996 RPPTL Section Memorandum to the Florida Bar Professional Ethics Committee at 4; this Memorandum is available on the Internet at <http:// www.flabarrpptl.org>.

[FN42]. See note 1, supra.

[FN43]. This conclusion is consistent with the Study Committee Report, which determined that no conflict is presented "if there is a mere possibility of conflict between the spouses in the estate planning process" and that a conflict only arises where there exists "a substantial potential for a material limitation on the lawyer's representations of either spouse--the equivalent of a material potential for conflict." Study Committee Report, at 779, 780. See also Standing Comm. On Legal Ethics of VA State Bar, Op. 708 (1985); but see Professional Ethics Comm. Of Allegheny County Bar Ass'n, Formal Op. 4 (Pa. 1983). See generally Restatement §211, cmt. c.

[FN44]. Advisory Op. 95-4 at n.1. This language was taken directly from the RPPTL Section Request Letter at 6. The RPPTL Section Request Letter at 2 further provides: "Where the quality of representation which either spouse may receive may be materially limited in a joint representation on account of divergent goals or interests, each of them should have the opportunity to know that he or she may be better served if each spouse were to be represented by separate attorneys. When this subject is raised, most spouses may be expected to choose the joint representation--however, it is important that they be informed that their divergent interest could, to some degree, affect the quality of representation they may receive in the estate planning process."

[FN45]. See Restatement §211, cmt. c, illus. 1-3. See also Study Committee Report at 780-781.

[FN46]. FRPC 4-1.7(c). For a general discussion of Florida decisional authorities addressing full disclosure and informed consent, see FLORIDA LEGAL ETHICS, supra note 5, at §7.12.

[FN47]. For a discussion of client informed consent, see Restatement §202, cmt. c. One noteworthy case is In re Boivin, 533 P.2d 171 (Ore. 1975) (notice of dual representation held insufficient to inform clients of potential conflict where attorney represented both buyer and seller in a business transaction, as attorney must explain nature of conflict of interest in such detail that the clients understand the reasons why it might be beneficial to retain independent counsel). See also Professional Ethics Comm. of Allegheny County Bar Ass'n, Formal Op. 4 (Pa. 1983) (finding that, in estate planning situations involving conflict of interest between spouses, counsel should be authorized to and should in fact make full disclosure to each party of all assets involved and the terms and significance of the distributive

scheme adopted by both, since "the failure to provide such pertinent information, if deliberate, may border on fraudulent conduct, or if through neglect, might well vitiate the immunization sought" by an initial waiver of conflict of interest). Cf. Colo. Bar Ass'n Op. April 20, 1985 at 196 (opining that prior to agreeing to represent both a purchaser and a seller or a residential real estate transaction, the lawyer must determine that the parties agree on all material terms, disclose the risks of multiple representation, and disclose that if a dispute develops, the lawyer would have to withdraw from representing either party absent knowing consent of the information by each party). Even where the attorney only represents one spouse, potential malpractice concerns may arise concerning the quality of the attorney's independent advice, as illustrated in Lovett v. Lovett, 593 A.2d 382 (N.J. Sup. 1991) (legal malpractice claim dismissed where new attorney prepared new will for husband containing substantially different provisions from husband's earlier estate plan, notwithstanding second wife's relatively passive participation in the estate planning services rendered for husband, who was age 73 and having memory difficulties).

[FN48]. As of the writing of this article, the Estate Planning, Probate and Trust Professionalism Committee of the RPPTL Section is undertaking a project to develop model forms for estate planning engagement letters, including matters relating to Advisory Opinion 95-4. Draft language relating to this project may be found on the Internet at <http://www.flabarrpptl.org>.

[FN49]. See, e.g., Hotz v. Minyard, 403 S.E.2d 634 (S.C. 1991) (where one client made two wills, second of which would adversely affect his daughter's interests and where both were clients of same attorney, finding no duty to disclose existence of second will against wishes of testator but finding duty to deal with other client (daughter) in good faith and not actively misrepresent first will); Haynes v. First Nat'l State Bank of New Jersey, 432 A.2d 890 (N.J. 1981) (finding mere possibility of conflict of interest due to possibility of undue influence at outset of attorney-client relationship sufficient to establish ethical breach by attorney; further finding that even where representation of two clients has become routine practice, when latent conflict becomes real, attorney must fully disclose all material information and, if need be, extricate himself from conflict by terminating his relationship with at least one party).

[FN50]. In Florida, an ethics rule violation may be introduced as "some evidence" of malpractice. Pressley v. Farley, 579 So. 2d 160, 161 (Fla. 1st D.C.A. 1991), cause dismissed, 583 So. 2d 1036. Malpractice liability for estate planning under Florida law is addressed in BASIC ESTATE PLANNING IN FLORIDA §§ 13.24 et seq. (2d 1993, 1996, The Florida Bar) and in Professional Liability of Lawyers in Florida, §§3.11 et seq. (1989, 1993 The Florida Bar), which summarize the modified privity requirements under Florida case law. See also Kinney v. Shinholser, 663 So. 2d 643 (Fla. 5th D.C.A. 1995). No reported Florida case has addressed the application of malpractice privity requirements with respect to challenge to estate planning documents grounded on a conflict of interest ethics violation. For a general discussion of the significance of ethical violations with respect to attorney civil liability in estates and trust practice, see Bruce S. Ross, How To Do Right By Not Doing Wrong: Legal Malpractice and Ethical Considerations in Estate Planning and Administration, 28 U. Miami Heckerling Inst. ¶ 800, at ¶ 806.2 (1994). See generally Restatement (Third) of the Law Governing Lawyers (Tentative Draft No. 8, March 21, 1997) (ALI) §§71 et seq.; 1 Hazard & Hodes §1.7:306 and 2 Hazard & Hodes § 8.4:201.

[FN51]. 1 HAZARD & HODES §1.7:305.

[FN52]. Proposed Advisory Op. 95-4. This conclusion of Proposed Advisory Opinion 95-4 is reported in Christopher H. Gadsden, Familiar Ethics Themes Receive Additional Attention, TR. & EST., May 1997 (vol. 136, no. 6), at 39, 40, a lthough the Gadsden article does not report that this conclusion has been rejected and reversed in the final text of Advisory Opinion 95-4.

[FN53]. May 9, 1997, RPPTL Section Memorandum, at 2-3. This position follows In re Samuels, 674 P.2d 1166 (Ore. 1983), which held that no advance confidentiality warning was required prior to representation of multiple clients in the formation of a partnership where no conflict of interest was presented. In an earlier submission, the RPPTL Section had also set out its analysis that, from purely an interpretation viewpoint, FRPC Rules 4-1.4(b) and 4-1.7(c) were not intended to be read to require an advance confidentiality warning in the absence of a conflict of interest. May 15, 1996

RPPTL Section Memorandum at 8-10. In recent action consistent with this position, the New York State Bar Association approved a proposed amendment to DR 5-105 (C) that incorporates language similar to FRPC 4-1.7(c) and the last sentence of MRPC 1.7(b). In explaining the change, the comment to the proposed amendment indicates that it is to be applicable in situations where lawyers are seeking waiver of conflict of interest. N.Y. State Bar Ass'n, Proposed Amendments to the N.Y. Lawyers' Code of Professional Responsibility, DR 5-105 (C) (January 24, 1997).

[FN54]. This example is as follows: "Lawyer Represents Husband and Wife as plaintiffs jointly in a substantial personal injury matter. Husband's claims are based upon serious injuries received in an automobile accident, and Wife's claims are based on loss of consortium. At the outset of the litigation and throughout its prosecution Lawyer does not learn any information which might reasonably indicate that the interests of his co-clients were divergent. At no point does Lawyer discuss with them conflict of interest or separate confidence concerns. After substantial discovery, settlement negotiation discussions reach tentative agreement on a settlement amount. However, Husband separately confides to Lawyer that he is having an extra-marital relationship and insists that the settlement agreement be structured to provide that Husband alone is to be entitled to the entire settlement proceeds." May 9, 1997 RPPTL Section Memorandum at 4.
The RPPTL Section opposed the per se rule favored by the Professional Ethics Committee because it would "add a severe requirement on Florida lawyers which would essentially censure ethical conduct currently practiced by a large segment of Florida's lawyers." Id. See also Monroe County Bar Ass'n Ethics Comm., Op. 87-2 (N.Y. 1988), which presented facts similar to the above personal injury example. Although that opinion did not address the issue whether the joint representation of a husband and wife as plaintiffs in a personal injury litigation (arising from injuries sustained by the husband) created a conflict at the outset or a need for an advance confidentiality warning, it concluded that where a lawyer learns during the course of the trial that the husband intends to divorce the wife after the lawsuit has concluded and a settlement has been paid to both, there is no implied consent on the part of the husband to the disclosure to the wife simply by virtue of the fact that the spouses have jointly employed the lawyer. Presented with this dilemma, the opinion concludes that the lawyer should first ask for the husband's permission to disclose the information to the wife so that the lawyer may continue to represent the husband after the wife seeks the services of another lawyer and, if the request is refused and the information remains confidential, the lawyer cannot continue to represent the husband after the wife seeks the services of another lawyer.

[FN55]. Advisory Opinion 95-4 does indicate that, while not ethically required, an advance discussion of confidentiality may be desirable, as "in some situations it may help prevent the type of occurrence" addressed therein. In subsequent discussion regarding separate confidences, Advisory Opinion 95-4 also states that "confusion or misunderstanding on the part of the clients may be minimized or eliminated by means of a discussion between the lawyer and the clients at the outset of the representation." In this connection, the ACTEC Commentaries at 86 provide as follows: "Prospective clients and the lawyer should discuss the extent to which material information imparted by either client would be shared with the other and the possibility that the lawyer would be required to withdraw if a conflict in their interests developed to the degree that the lawyer could not effectively represent each of them. The information may be best understood by the clients if it is discussed with them in person and also provided to them in written form, as in an engagement letter or brochure."
Taking into account Advisory Opinion 95-4, the foregoing quotation should be interpreted as a practice suggestion (and not as an ethical requirement) for estate planning attorneys in Florida.

[FN56]. RPPTL Section Request Letter at 2. Neither the ACTEC Commentaries nor the Study Committee Report specifically consider the lawyer's duties in the event that the lawyer learns from another source detrimental information of material impact which the lawyer expects one spouse would not wish the lawyer to disclose to the other spouse. For example, suppose the situation presented in Advisory Opinion 95-4 were altered such that the lawyer only became aware of the husband's extra-marital relationship from another source. Presumably, the husband, if confronted by the lawyer, would object to disclosure to the wife, and the basic ethical duties as dictated by Advisory Opinion 95-4 would govern the lawyer's conduct. For another example involving information learned from a third party, see Burnele v. Powell and Ronald C. Link, The Sense of a Client: Confidentiality Issues in Representing the Elderly, 62 FORDHAM L. REV. 1197, 1212 (1994).

[FN57]. ACTEC Commentaries at 67. In contrast, the ACTEC Commentaries gives two other examples of separate confidences of a more serious nature: "After she signs the trust agreement I intend to leave her" or "All of the insurance policies on my life that name her beneficiary have lapsed." Id. at 68. Other noteworthy examples are analyzed in Powell and Link, supra note 56, at 1205- 1216. See also Jeffrey N. Powell, Professional Responsibility: Reforms are Needed to Accommodate Estate Planning and Family Counselling, 25 U. Miami Heckerling Inst. ¶¶1803.2, 1805.1 (1991).

[FN58]. Restatement §112, cmt. l, illus. 2, provides: "Lawyer has been retained by Husband and Wife to prepare wills pursuant to an arrangement under which each spouse agrees to leave most of their property to the other ... Shortly after the wills are executed, Husband (unknown to Wife) asks Lawyer to prepare an inter vivos trust for an illegitimate child whose existence Husband has kept secret from Wife for many years and about who Husband has not previously informed Lawyer. Husband states that Wife would be distraught at learning of Husband's infidelity and of Husband's years of silence and that disclosure of this information could destroy their marriage. Husband directs Lawyer not to inform Wife. The inter vivos trust that Husband proposes to create would not materially affect Wife's own estate plan or her expected receipt of property under Husband's will, because Husband propose to use property designated in Husband's will for a personally favored charity. In view of the lack of material effect on Wife, Lawyer may assist Husband to establish and fund the inter vivos trust and refrain from disclosing Husband's information to Wife." (Emphasis added.)
In contrast, an ethical problem arises under Restatement §112, cmt. l, illus. 3, which varies the facts of Illustration 2 such that the prepared trust "would significantly deplete Husband's estate, to Wife's material detriment and in frustration of the spouses' intended testamentary arrangements."

[FN59]. Cone v. Culverhouse, 687 So. 2d at 893.

END OF DOCUMENT

Excerpts from Engagement Letters re Representation of Multiple Clients

Form 1.

Confidentiality and Conflict. Both of you have asked us to represent you in connection with the _____. Based on our conversations thus far, we do not believe a conflict of interest exists between you. In the event a conflict were to arise in the future, you should know that we might be required to withdraw from our representation of both of you. In that event, you would likely incur additional costs and fees to bring other lawyers up to speed on the matter.

Because we will representing both of you, we have ethical obligations to both of you and we cannot keep anything either of you disclose to us confidential from the other.

Form 2.

Joint Representation. The Rules of Professional Conduct applicable to Florida lawyers prohibit a lawyer from undertaking the joint representation of multiple clients unless each client consents in writing after consultation regarding the nature of the conflicts, the implications of common representation, and the risks and benefits of common representation. The responsible lawyer also must reasonably believe that the representation of any one client will not adversely affect the lawyer's responsibility to or relationship with any of the other clients. The following discussion will confirm my consultation with you about possible issues that may arise as a result of joint representation.

To begin with, we owe each of you a duty of undivided loyalty. This means that we must act in your best interests at all times and must not favor the interests of one of you over the interests of the other, or allow anything to interfere with our loyalty to you or our judgment on your behalf. You have advised us that [briefly summarize factual information upon which common interests are based]. If my understanding in this regard is incorrect, please advise me immediately.

Based upon the understanding set forth above, I have concluded that each of you has common interests that allow common representation. Moreover, common representation has the benefits of efficiency, both reducing costs and facilitating the coordination of negotiation strategies or strategy in any litigation which may ensue. I do not believe that our representation of either of you adversely affects our responsibilities to or relationship with the other client.

You should understand, however, that multiple representation carries with it the risk that divided or shared attorney-client loyalties may arise in the *future*. Stated another way, although we are not currently aware of any actual or reasonably foreseeable adverse effects of any such divided or shared loyalty, it is possible that issues may arise as to which

our representation of one of you may be materially limited by our representation of the other individual client.

Furthermore, because we have been jointly retained by each of you, in the event of any dispute between you, the attorney-client privilege generally will not protect communications that have taken place between either of you and the attorneys in our firm. Moreover, pursuant to this "joint client" arrangement, anything that either of you discloses to us may be disclosed to the other jointly represented client.

In the event of a future dispute or conflict between the two of you, there is a risk that we may be disqualified from representing either of you. An impermissible conflict would arise if one of you decided to pursue a different negotiation strategy or pursue a defense or position in the litigation that would adversely affect the interests of the other. If such a conflict arises in the future, we will ask you to resolve your differences between yourselves, without any assistance by us. If you cannot resolve your differences, we will be unable to represent either of you as to that issue. If the differences are serious enough, we may be required by the applicable ethics rules to withdraw from the matter completely. In that case, each of you would need to retain separate counsel to represent your interests from that point forward. If this were to occur, there would certainly be some duplication of legal expense in retaining and educating new counsel about the case.

You should understand that we cannot undertake a joint representation unless each of you is informed of the considerations set forth above and nevertheless consents to the joint representation. By signing this letter below, you are indicating that you have concluded that the benefits of common representation outweigh the risks and that you wish for us to jointly represent you. Please discuss the issue of joint representation further with your personal attorney or with us before you sign this letter if you have any questions or concerns about it.

CHEATWOOD INN OF COURT
JUDGE BERNARD SILVER PUPILLAGE GROUP
SCENARIOS AND QUESTIONS FROM BREAKER MORANT
(JOINT REPRESENTATION)
January 13, 2009

Scenario 1

Company A hires Mr. Aggressive, the VP of Sales from Company B. Company B sues both Mr. Aggressive and Company A for misappropriation of trade secrets and tortious interference with Company B's sales force and business relationships. Company A's general counsel asks you to represent both Company A and Mr. Aggressive.

Mr. Aggressive denies taking anything from Company B. However, during the initial interview of the potential clients you learn he took some notebooks, which he claims were "just forms". Eventually, he also acknowledges he downloaded some information on customers , but he says he threw it away. Both Company A and Mr. Aggressive want you to represent them jointly, but you have concerns that Mr. Aggressive may not be entirely truthful.

Can you take on the representation at all? If so, under what circumstances? Having learned of the information down load, can you still represent Company A even if you don't represent Mr. Aggressive? Can you counsel Company A on the best way to protect itself from potential liability - i.e., the steps it should take to isolate any liability at the level of Mr. Aggressive? Can you interview the clients separately, to flesh out the potential conflicts further?

Scenario 2

Husband and Wife both work for the same company. He is head of purchasing, she works in the accounting department. They have both been asked to "take a few days off" without notice as to the reason. They call and ask you to represent them both advising them with respect to their respective rights vis a vis the employer.

During the initial interview, the husband confesses that he has been taking kickbacks from suppliers. The wife was unaware and has had no involvement, but because of her marital relationship with the husband and position in the company, she is now under suspicion and it appears her job is in jeopardy as well.

Can you represent them both - for any purpose? What do you plan to do if the employer terminates them both? What would you have done if the husband had shared the kickback information with you privately and asked you to keep it confidential from his wife?

Scenario 3

Minority Shareholders "Pushy" and "Meek" ask you to represent them in pursuing claims against Company A and its majority shareholder in connection with a buyout of majority shareholder that fell apart. Pushy has vast resources to pursue litigation. Meek's resources are more limited and Meek has a weaker appetite for litigation generally.

Can you take on the representation? What should you tell them at the inception? What do you do if you sense Pushy is controlling/coercing Meek?

Code of Judicial Conduct

Canon 1

A Judge Shall Uphold the Integrity And Independence of the Judiciary

An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary may be preserved. The provisions of this Code should be construed and applied to further that objective.

COMMENTARY

Deference to the judgments and rulings of courts depends upon public confidence in the integrity and independence of judges. The integrity and independence of judges depend in turn upon their acting without fear or favor. Although judges should be independent, they must comply with the law, including the provisions of this Code. Public confidence in the impartiality of the judiciary is maintained by the adherence of each judge to this responsibility. Conversely, violation of this Code diminishes public confidence in the judiciary and thereby does injury to the system of government under law.

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Code of Judicial Conduct

Canon 2

A Judge Shall Avoid Impropriety and the Appearance of Impropriety in all of the Judge's Activities

A. A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

B. A judge shall not allow family, social, political or other relationships to influence the judge's judicial conduct or judgment. A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge. A judge shall not testify voluntarily as a character witness.

C. A judge should not hold membership in an organization that practices invidious discrimination on the basis of race, sex, religion, or national origin. Membership in a fraternal, sororal, religious, or ethnic heritage organization shall not be deemed to be a violation of this provision.

COMMENTARY

Canon 2A. Irresponsible or improper conduct by judges erodes public confidence in the judiciary. A judge must avoid all impropriety and appearance of impropriety. A judge must expect to be the subject of constant public scrutiny. A judge must therefore accept restrictions on the judge's conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly. Examples are the restrictions on judicial speech imposed by Sections 3B(9) and (10) that are indispensable to the maintenance of the integrity, impartiality, and independence of the judiciary.

The prohibition against behaving with impropriety or the appearance of impropriety applies to both the professional and personal conduct of a judge. Because it is not practicable to list all prohibited acts, the proscription is necessarily cast in general terms that extend to conduct by judges that is harmful although not specifically mentioned in the Code. Actual improprieties under this standard include violations of law, court rules, or other specific provisions of this Code. The test for appearance of impropriety is whether the conduct would create in reasonable minds, with knowledge of all the relevant circumstances that a reasonable inquiry would disclose, a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality, and competence is impaired.
See also Commentary under Section 2C.

Canon 2B. Maintaining the prestige of judicial office is essential to a system of government in which the judiciary functions independently of the executive and legislative branches. Respect for the judicial office facilitates the orderly conduct of

legitimate judicial functions. Judges should distinguish between proper and improper use of the prestige of office in all of their activities. For example, it would be improper for a judge to allude to his or her judgeship to gain a personal advantage such as deferential treatment when stopped by a police officer for a traffic offense. Similarly, judicial letterhead must not be used for conducting a judge's personal business, although a judge may use judicial letterhead to write character reference letters when such letters are otherwise permitted under this Code.

A judge must avoid lending the prestige of judicial office for the advancement of the private interests of others. For example, a judge must not use the judge's judicial position to gain advantage in a civil suit involving a member of the judge's family. In contracts for publication of a judge's writings, a judge should retain control over the advertising to avoid exploitation of the judge's office. As to the acceptance of awards, see Section 5D(5) and Commentary.

Although a judge should be sensitive to possible abuse of the prestige of office, a judge may, based on the judge's personal knowledge, serve as a reference or provide a letter of recommendation. However, a judge must not initiate the communication of information to a sentencing judge or a probation or corrections officer but may provide to such persons information for the record in response to a formal request.

Judges may participate in the process of judicial selection by cooperating with appointing authorities and screening committees seeking names for consideration, and by responding to official inquiries concerning a person being considered for a judgeship. See also Canon 7 regarding use of a judge's name in political activities.
A judge must not testify voluntarily as a character witness because to do so may lend the prestige of the judicial office in support of the party for whom the judge testifies. Moreover, when a judge testifies as a witness, a lawyer who regularly appears before the judge may be placed in the awkward position of cross-examining the judge. A judge may, however, testify when properly summoned. Except in unusual circumstances where the demands of justice require, a judge should discourage a party from requiring the judge to testify as a character witness.

Canon 2C. Florida Canon 2C is derived from a recommendation by the American Bar Association and from the United States Senate Committee Resolution, 101st Congress, Second Session, as adopted by the United States Senate Judiciary Committee on August 2, 1990.

Membership of a judge in an organization that practices invidious discrimination gives rise to perceptions that the judge's impartiality is impaired. Whether an organization practices invidious discrimination is often a complex question to which judges should be sensitive. The answer cannot be determined from a mere examination of an organization's current membership rolls but rather depends on the history of the organization's selection of members and other relevant factors, such as that the organization is dedicated to the preservation of religious, ethnic, or cultural values of legitimate common interest to its members, or that it is in fact and effect an intimate, purely private organization whose membership limitations could not be constitutionally prohibited. See New York State Club Ass'n Inc. v. City of New York, 487 U.S. 1, 108 S.Ct. 2225, 101 L.Ed.2d 1 (1988); Board of Directors of Rotary International v. Rotary Club of Duarte, 481 U.S. 537, 107 S.Ct. 1940, 95 L.Ed.2d 474 (1987); Roberts v. United States Jaycees, 468 U.S. 609, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984). Other relevant factors include the size and nature of the organization and the diversity of persons in the locale who might reasonably be considered potential members. Thus the mere absence of diverse membership does not by itself demonstrate a violation unless reasonable persons with knowledge of all the relevant circumstances would expect that the membership would be diverse in the absence of invidious discrimination. Absent such factors, an organization is generally said to discriminate invidiously if it arbitrarily excludes from membership on the basis of race, religion, sex, or national origin persons who would otherwise be admitted to membership.

This Canon is not intended to prohibit membership in religious and ethnic clubs, such as Knights of Columbus, Masons, B'nai B'rith, and Sons of Italy; civic organizations, such as Rotary, Kiwanis, and The Junior League; young people's organizations, such as Boy Scouts, Girl Scouts, Boy's Clubs, and Girl's Clubs; and charitable organizations, such as United Way and Red Cross.

Although Section 2C relates only to membership in organizations that invidiously discriminate on the basis of race, sex, religion or national origin, a judge's membership in an organization that engages in any discriminatory membership practices prohibited by the law of the jurisdiction also violates Canon 2 and Section 2A and gives the appearance of impropriety. In addition, it would be a violation of Canon 2 and Section 2A for a judge to arrange a meeting at a club that the judge knows practices invidious discrimination on the basis of race, sex, religion or national origin in its membership or other policies, or for the judge to regularly use such a club. Moreover, public manifestation by a judge of the judge's knowing approval of invidious discrimination on any basis gives the appearance of impropriety under Canon 2 and diminishes public confidence in the

integrity and impartiality of the judiciary, in violation of Section 2A.

When a person who is a judge on the date this Code becomes effective learns that an organization to which the judge belongs engages in invidious discrimination that would preclude membership under Section 2C or under Canon 2 and Section 2A, the judge is permitted, in lieu of resigning, to make immediate efforts to have the organization discontinue its invidiously discriminatory practices, but is required to suspend participation in any other activities of the organization. If the organization fails to discontinue its invidiously discriminatory practices as promptly as possible (and in all events within a year of the judge's first learning of the practices), the judge is required to resign immediately from the organization

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Code of Judicial Conduct

Canon 3

A Judge Shall Perform the Duties

of Judicial Office Impartially and Diligently

A. Judicial Duties in General.

The judicial duties of a judge take precedence over all the judge's other activities. The judge's judicial duties include all the duties of the judge's office prescribed by law. In the performance of these duties, the specific standards set forth in the following sections apply.

B. Adjudicative Responsibilities.

(1) A judge shall hear and decide matters assigned to the judge except those in which disqualification is required.

(2) A judge shall be faithful to the law and maintain professional competence in it. A judge shall not be swayed by partisan interests, public clamor, or fear of criticism.

(3) A judge shall require order and decorum in proceedings before the judge.

(4) A judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity, and shall require similar conduct of lawyers, and of staff, court officials, and others subject to the judge's direction and control.

(5) A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status, and shall not permit staff, court officials, and others subject to the judge's direction and control to do so. This section does not preclude the consideration of race, sex, religion, national origin, disability, age, sexual orientation, socioeconomic status, or other similar factors when they are issues in the proceeding.

(6) A judge shall require lawyers in proceedings before the judge to refrain from manifesting, by words, gestures, or other conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status, against parties, witnesses, counsel, or others. This Section 3B(6) does not preclude legitimate advocacy when race, sex, religion, national origin, disability, age, sexual orientation, socioeconomic status, or other similar factors are issues in the proceeding.

according to law. A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding except that:

(a) Where circumstances require, ex parte communications for scheduling, administrative purposes, or emergencies that do not deal with substantive matters or issues on the merits are authorized, provided:

(i) the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication, and

(ii) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication and allows an opportunity to respond.

(b) A judge may obtain the advice of a disinterested expert on the law applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of the advice and affords the parties reasonable opportunity to respond.

(c) A judge may consult with other judges or with court personnel whose function is to aid the judge in carrying out the judge's adjudicative responsibilities.

(d) A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to mediate or settle matters pending before the judge.

(e) A judge may initiate or consider any ex parte communications when expressly authorized by law to do so.

(8) A judge shall dispose of all judicial matters promptly, efficiently, and fairly.

(9) A judge shall not, while a proceeding is pending or impending in any court, make any public comment that might reasonably be expected to affect its outcome or impair its fairness or make any nonpublic comment that might substantially interfere with a fair trial or hearing. The judge shall require similar abstention on the part of court personnel subject to the judge's direction and control. This Section does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court. This Section does not apply to proceedings in which the judge is a litigant in a personal capacity.

(10) A judge shall not, with respect to parties or classes of parties, cases, controversies or issues likely to come before the court, make pledges, promises or commitments that are inconsistent with the impartial performance of the adjudicative duties of the office.

(11) A judge shall not commend or criticize jurors for their verdict other than in a court order or opinion in a proceeding, but may express appreciation to jurors for their service to the judicial system and the community.

(12) A judge shall not disclose or use, for any purpose unrelated to judicial duties, nonpublic information acquired in a judicial capacity.

C. Administrative Responsibilities.

(1) A judge shall diligently discharge the judge's administrative responsibilities without bias or prejudice and maintain professional competence in judicial administration, and should cooperate with other judges and court officials in the administration of court business.

(2) A judge shall require staff, court officials, and others subject to the judge's direction and control to observe the standards of fidelity and diligence that apply to the judge and to refrain from manifesting bias or prejudice in the performance of their official duties.

(3) A judge with supervisory authority for the judicial performance of other judges shall take reasonable measures to assure the prompt disposition of matters before them and the proper performance of their other judicial responsibilities.

(4) A judge shall not make unnecessary appointments. A judge shall exercise the power of appointment impartially and on the basis of merit. A judge shall avoid nepotism and favoritism. A judge shall not approve compensation of appointees beyond the

D. Disciplinary Responsibilities.

(1) A judge who receives information or has actual knowledge that substantial likelihood exists that another judge has committed a violation of this Code shall take appropriate action.

(2) A judge who receives information or has actual knowledge that substantial likelihood exists that a lawyer has committed a violation of the Rules Regulating The Florida Bar shall take appropriate action.

(3) Acts of a judge, in the discharge of disciplinary responsibilities, required or permitted by Sections 3D(1) and 3D(2) are part of a judge's judicial duties and shall be absolutely privileged, and no civil action predicated thereon may be instituted against the judge.

E. Disqualification.

(1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:

(a) the judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(b) the judge served as a lawyer or was the lower court judge in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge has been a material witness concerning it;

(c) the judge knows that he or she individually or as a fiduciary, or the judge's spouse, parent, or child wherever residing, or any other member of the judge's family residing in the judge's household has an economic interest in the subject matter in controversy or in a party to the proceeding or has any other more than de minimis interest that could be substantially affected by the proceeding;

(d) the judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) is acting as a lawyer in the proceeding;

(iii) is known by the judge to have a more than de minimus interest that could be substantially affected by the proceeding;

(iv) is to the judge's knowledge likely to be a material witness in the proceeding;

(e) the judge's spouse or a person within the third degree of relationship to the judge participated as a lower court judge in a decision to be reviewed by the judge.

(f) the judge, while a judge or a candidate for judicial office, has made a public statement that commits, or appears to commit, the judge with respect to:

(i) parties or classes of parties in the proceeding;

(ii) an issue in the proceeding; or

(iii) the controversy in the proceeding.

(2) A judge should keep informed about the judge's personal and fiduciary economic interests, and make a reasonable effort to keep informed about the economic interests of the judge's spouse and minor children residing in the judge's household.

F. Remittal of Disqualification.

A judge disqualified by the terms of Section 3E may disclose on the record the basis of the judge's disqualification and may

disclosure of any basis for disqualification other than personal bias or prejudice concerning a party, the parties and lawyers, without participation by the judge, all agree the judge should not be disqualified, and the judge is then willing to participate, the judge may participate in the proceeding. The agreement shall be incorporated in the record of the proceeding.

COMMENTARY

Canon 3B(4). The duty to hear all proceedings fairly and with patience is not inconsistent with the duty to dispose promptly of the business of the court. Judges can be efficient and business-like while being patient and deliberate.

Canon 3B(5). A judge must refrain from speech, gestures or other conduct that could reasonably be perceived as sexual harassment and must require the same standard of conduct of others subject to the judge's direction and control.
A judge must perform judicial duties impartially and fairly. A judge who manifests bias on any basis in a proceeding impairs the fairness of the proceeding and brings the judiciary into disrepute. Facial expression and body language, in addition to oral communication, can give to parties or lawyers in the proceeding, jurors, the media and others an appearance of judicial bias. A judge must be alert to avoid behavior that may be perceived as prejudicial.

Canon 3B(7). The proscription against communications concerning a proceeding includes communications from lawyers, law teachers, and other persons who are not participants in the proceeding, except to the limited extent permitted.

To the extent reasonably possible, all parties or their lawyers shall be included in communications with a judge.

Whenever presence of a party or notice to a party is required by Section 3B(7), it is the party's lawyer, or if the party is unrepresented, the party who is to be present or to whom notice is to be given.

An appropriate and often desirable procedure for a court to obtain the advice of a disinterested expert on legal issues is to invite the expert to file a brief as amicus curiae.

Certain ex parte communication is approved by Section 3B(7) to facilitate scheduling and other administrative purposes and to accommodate emergencies. In general, however, a judge must discourage ex parte communication and allow it only if all the criteria stated in Section 3B(7) are clearly met. A judge must disclose to all parties all ex parte communications described in Sections 3B(7)(a) and 3B(7)(b) regarding a proceeding pending or impending before the judge.
A judge must not independently investigate facts in a case and must consider only the evidence presented.

A judge may request a party to submit proposed findings of fact and conclusions of law, so long as the other parties are apprised of the request and are given an opportunity to respond to the proposed findings and conclusions.

A judge must make reasonable efforts, including the provision of appropriate supervision, to ensure that Section 3B(7) is not violated through law clerks or other personnel on the judge's staff.

If communication between the trial judge and the appellate court with respect to a proceeding is permitted, a copy of any written communication or the substance of any oral communication should be provided to all parties.

Canon 3B(8). In disposing of matters promptly, efficiently, and fairly, a judge must demonstrate due regard for the rights of the parties to be heard and to have issues resolved without unnecessary cost or delay. Containing costs while preserving fundamental rights of parties also protects the interests of witnesses and the general public. A judge should monitor and supervise cases so as to reduce or eliminate dilatory practices, avoidable delays, and unnecessary costs. A judge should encourage and seek to facilitate settlement, but parties should not feel coerced into surrendering the right to have their controversy resolved by the courts.

Prompt disposition of the court's business requires a judge to devote adequate time to judicial duties, to be punctual in attending court and expeditious in determining matters under submission, and to insist that court officials, litigants, and their lawyers cooperate with the judge to that end.

Canon 3B(9) and 3B(10). Sections 3B(9) and (10) restrictions on judicial speech are essential to the maintenance of the integrity, impartiality, and independence of the judiciary. A pending proceeding is one that has begun but not yet reached final disposition. An impending proceeding is one that is anticipated but not yet begun. The requirement that judges abstain from public comment regarding a pending or impending proceeding continues during any appellate process and until final disposition. Sections 3B(9) and (10) do not prohibit a judge from commenting on proceedings in which the judge is a litigant in a personal

capacity, but in cases such as a writ of mandamus where the judge is a litigant in an official capacity, the judge must not comment publicly. The conduct of lawyers relating to trial publicity is governed by Rule 4-3.6 of the Rules Regulating The Florida Bar.

Canon 3B(10). Commending or criticizing jurors for their verdict may imply a judicial expectation in future cases and may impair a juror's ability to be fair and impartial in a subsequent case.

Canon 3C(4). Appointees of a judge include assigned counsel, officials such as referees, commissioners, special magistrates, receivers, mediators, arbitrators, and guardians and personnel such as clerks, secretaries, and bailiffs. Consent by the parties to an appointment or an award of compensation does not relieve the judge of the obligation prescribed by Section 3C(4). See also Fla.Stat. § 112.3135 (1991).

Canon 3D. Appropriate action may include direct communication with the judge or lawyer who has committed the violation, other direct action if available, or reporting the violation to the appropriate authority or other agency. If the conduct is minor, the Canon allows a judge to address the problem solely by direct communication with the offender. A judge having knowledge, however, that another judge has committed a violation of this Code that raises a substantial question as to that other judge's fitness for office or has knowledge that a lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, is required under this Canon to inform the appropriate authority. While worded differently, this Code provision has the identical purpose as the related Model Code provisions.

Canon 3E(1). Under this rule, a judge is disqualified whenever the judge's impartiality might reasonably be questioned, regardless of whether any of the specific rules in Section 3E(1) apply. For example, if a judge were in the process of negotiating for employment with a law firm, the judge would be disqualified from any matters in which that law firm appeared, unless the disqualification was waived by the parties after disclosure by the judge.

A judge should disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no real basis for disqualification. The fact that the judge conveys this information does not automatically require the judge to be disqualified upon a request by either party, but the issue should be resolved on a case-by-case basis. Similarly, if a lawyer or party has previously filed a complaint against the judge with the Judicial Qualifications Commission, that the fact does not automatically require disqualification of the judge. Such disqualification should be on a case-by-case basis.

By decisional law, the rule of necessity may override the rule of disqualification. For example, a judge might be required to participate in judicial review of a judicial salary statute, or might be the only judge available in a matter requiring immediate judicial action, such as a hearing on probable cause or a temporary restraining order. In the latter case, the judge must disclose on the record the basis for possible disqualification and use reasonable efforts to transfer the matter to another judge as soon as practicable.

Canon 3E(1)(b). A lawyer in a government agency does not ordinarily have an association with other lawyers employed by that agency within the meaning of Section 3E(1)(b); a judge formerly employed by a government agency, however, should disqualify himself or herself in a proceeding if the judge's impartiality might reasonably be questioned because of such association.

Canon 3E(1)(d). The fact that a lawyer in a proceeding is affiliated with a law firm with which a relative of the judge is affiliated does not of itself disqualify the judge. Under appropriate circumstances, the fact that "the judge's impartiality might reasonably be questioned" under Section 3E(1), or that the relative is known by the judge to have an interest in the law firm that could be "substantially affected by the outcome of the proceeding" under Section 3E(1)(d)(iii) may require the judge's disqualification.

Canon 3E(1)(e). It is not uncommon for a judge's spouse or a person within the third degree of relationship to a judge to also serve as a judge in either the trial or appellate courts. However, where a judge exercises appellate authority over another judge, and that other judge is either a spouse or a relationship within the third degree, then this Code requires disqualification of the judge that is exercising appellate authority. This Code, under these circumstances, precludes the appellate judge from participating in the review of the spouse's or relation's case.

Canon 3F. A remittal procedure provides the parties an opportunity to proceed without delay if they wish to waive the

solicit, seek, or hear comment on possible remittal or waiver of the disqualification unless the lawyers jointly propose remittal after consultation as provided in the rule. A party may act through counsel if counsel represents on the record that the party has been consulted and consents. As a practical matter, a judge may wish to have all parties and their lawyers sign the remittal agreement.

Technical Problem?

publicinformation@flcourts.org

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c

West's Florida Statutes Annotated Currentness
Title V. Judicial Branch (Chapters 25-44)
Chapter 38. Judges: General Provisions (Refs & Annos)
38.10. Disqualification of judge for prejudice; application; affidavits; etc.

Whenever a party to any action or proceeding makes and files an affidavit stating fear that he or she will not receive a fair trial in the court where the suit is pending on account of the prejudice of the judge of that court against the applicant or in favor of the adverse party, the judge shall proceed no further, but another judge shall be designated in the manner prescribed by the laws of this state for the substitution of judges for the trial of causes in which the presiding judge is disqualified. Every such affidavit shall state the facts and the reasons for the belief that any such bias or prejudice exists and shall be accompanied by a certificate of counsel of record that such affidavit and application are made in good faith. However, when any party to any action has suggested the disqualification of a trial judge and an order has been made admitting the disqualification of such judge and another judge has been assigned and transferred to act in lieu of the judge so held to be disqualified, the judge so assigned and transferred is not disqualified on account of alleged prejudice against the party making the suggestion in the first instance, or in favor of the adverse party, unless such judge admits and holds that it is then a fact that he or she does not stand fair and impartial between the parties. If such judge holds, rules, and adjudges that he or she does stand fair and impartial as between the parties and their respective interests, he or she shall cause such ruling to be entered on the minutes of the court and shall proceed to preside as judge in the pending cause. The ruling of such judge may be assigned as error and may be reviewed as are other rulings of the trial court.

CREDIT(S)

Laws 1919, c. 7852, § 4; Rev.Gen.St.1920, § 2674; Laws 1923, c. 9276, § 1; Comp.Gen.Laws 1927, § 4341; Laws 1983, c. 83-260, § 3; Laws 1995, c. 95-147, § 212.

West's Florida Statutes Annotated Currentness
Florida Rules of Judicial Administration (Refs & Annos)
Part III. Judicial Officers
Rule 2.330. Disqualification of Trial Judges

(a) Application. This rule applies only to county and circuit judges in all matters in all divisions of court.

(b) Parties. Any party, including the state, may move to disqualify the trial judge assigned to the case on grounds provided by rule, by statute, or by the Code of Judicial Conduct.

(c) Motion. A motion to disqualify shall:

(1) be in writing;

(2) allege specifically the facts and reasons upon which the movant relies as the grounds for disqualification;

(3) be sworn to by the party by signing the motion under oath or by a separate affidavit; and

(4) include the dates of all previously granted motions to disqualify filed under this rule in the case and the dates of the orders granting those motions.

The attorney for the party shall also separately certify that the motion and the client's statements are made in good faith. In addition to filing with the clerk, the movant shall immediately serve a copy of the motion on the subject judge as set forth in Florida Rule of Civil Procedure 1.080.

(d) Grounds. A motion to disqualify shall show:

(1) that the party fears that he or she will not receive a fair trial or hearing because of specifically described prejudice or bias of the judge; or

(2) that the judge before whom the case is pending, or some person related to said judge by consanguinity or affinity within the third degree, is a party thereto or is interested in the result thereof, or that said judge is related to an attorney or counselor of record in the cause by consanguinity or affinity within the third degree, or that said judge is a material

witness for or against one of the parties to the cause.

(e) Time. A motion to disqualify shall be filed within a reasonable time not to exceed 10 days after discovery of the facts constituting the grounds for the motion and shall be promptly presented to the court for an immediate ruling. Any motion for disqualification made during a hearing or trial must be based on facts discovered during the hearing or trial and may be stated on the record, provided that it is also promptly reduced to writing in compliance with subdivision (c) and promptly filed. A motion made during hearing or trial shall be ruled on immediately.

(f) Determination -- Initial Motion. The judge against whom an initial motion to disqualify under subdivision (d)(1) is directed shall determine only the legal sufficiency of the motion and shall not pass on the truth of the facts alleged. If the motion is legally sufficient, the judge shall immediately enter an order granting disqualification and proceed no further in the action. If any motion is legally insufficient, an order denying the motion shall immediately be entered. No other reason for denial shall be stated, and an order of denial shall not take issue with the motion.

(g) Determination -- Successive Motions. If a judge has been previously disqualified on motion for alleged prejudice or partiality under subdivision (d)(1), a successor judge shall not be disqualified based on a successive motion by the same party unless the successor judge rules that he or she is in fact not fair or impartial in the case. Such a successor judge may rule on the truth of the facts alleged in support of the motion.

(h) Prior Rulings. Prior factual or legal rulings by a disqualified judge may be reconsidered and vacated or amended by a successor judge based upon a motion for reconsideration, which must be filed within 20 days of the order of disqualification, unless good cause is shown for a delay in moving for reconsideration or other grounds for reconsideration exist.

(i) Judge's Initiative. Nothing in this rule limits the judge's authority to enter an order of disqualification on the judge's own initiative.

(j) Time for Determination. The judge shall rule on a motion to disqualify immediately, but no later than 30 days after the service of the motion as set forth in subdivision (c). If not ruled on within 30 days of service, the motion shall be deemed granted and the moving party may seek an order from the court directing the clerk to reassign the case.

H

United States Court of Appeals, Eleventh Circuit.
FOUR SEASONS HOTELS AND RESORTS, B.V., Four Seasons Hotels (Barbados), Four Seasons Hotels Limited, Plaintiffs-Appellees,
v.
CONSORCIO BARR, S.A., Carlos L. Barrera, Defendants-Appellants.
No. 01-16588.

Feb. 5, 2003.

Hotel trademark licensor sued hotel builder, alleging that builder had wrongfully accessed licensor's computer network and acquired licensor's computer equipment in violation of Computer Fraud and Abuse Act (CFAA), Wire and Electronic Communications Interception Act, and Florida Uniform Trade Secrets Act. The United States District Court for the Southern District of Florida, No. 01-04572-CV-PAS, Donald M. Middlebrooks, J., entered preliminary injunction in favor of licensor, restraining builder's access to network and ordering builder to return computer equipment. Builder appealed. The Court of Appeals, Pogue, Judge, sitting by designation, held that: (1) District Court failed to provide sufficient notice to builder prior to issuing preliminary injunction, and (2) District court abused its discretion in canceling planned evidentiary hearing in favor of telephone hearing.

Reversed and vacated.

West Headnotes

[1] Federal Courts 170B 815

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)4 Discretion of Lower Court
170Bk814 Injunction
170Bk815 k. Preliminary Injunction; Temporary Restraining Order. Most Cited Cases
The Court of Appeals reviews a district court's order granting or denying a preliminary injunction for abuse of discretion.

[2] Federal Courts 170B 13

170B Federal Courts
170BI Jurisdiction and Powers in General
170BI(A) In General
170Bk12 Case or Controversy Requirement
170Bk13 k. Particular Cases or Questions, Justiciable Controversy. Most Cited Cases
Hotel trademark licensor's action against hotel builder, alleging that builder had wrongfully accessed licensor's computer network and acquired licensor's computer equipment in violation of Computer Fraud and Abuse Act (CFAA), Wire and Electronic Communications Interception Act, and Florida Uniform Trade Secrets Act, was not rendered moot when builder returned computer equipment, as parties retained legally cognizable interest in outcome. 18 U.S.C.A. §§ 1030(a)(2)(d), (a)(4), 2511(1)(a, d); West's F.S.A. § 688.001 et seq.

[3] Federal Courts 170B 12.1

170B Federal Courts
170BI Jurisdiction and Powers in General
170BI(A) In General
170Bk12 Case or Controversy Requirement
170Bk12.1 k. In General. Most Cited Cases
Compliance with the terms of an injunction does not moot a case where the action in question could be resumed or undone.

[4] Federal Courts 170B 612.1

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(D) Presentation and Reservation in Lower Court of Grounds of Review
170BVIII(D)1 Issues and Questions in Lower Court
170Bk612 Nature or Subject-Matter of Issues or Questions
170Bk612.1 k. In General. Most Cited Cases
Hotel builder did not waive its objection to preliminary injunction restraining its access to hotel trade-

mark licensor's computer trademark, in action under Computer Fraud and Abuse Act (CFAA), Wire and Electronic Communications Interception Act, and Florida Uniform Trade Secrets Act, when builder stated it had "no problem with" prohibitory portion of the injunction, inasmuch as its statements constituted substantive denials of wrongdoing, rather than acquiescence to injunction. 18 U.S.C.A. §§ 1030(a)(2)(d), (a)(4), 2511(1)(a, d); West's F.S.A. § 688.001 et seq.

[5] Injunction 212 138.1

212 Injunction
212IV Preliminary and Interlocutory Injunctions
212IV(A) Grounds and Proceedings to Procure
212IV(A)2 Grounds and Objections
212k138.1 k. In General. Most Cited Cases
A district court may issue a preliminary injunction where the moving party demonstrates: (1) a substantial likelihood of success on the merits; (2) that irreparable injury will be suffered unless the injunction issues; (3) the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) if issued, the injunction would not be adverse to the public interest.

[6] Injunction 212 143(1)

212 Injunction
212IV Preliminary and Interlocutory Injunctions
212IV(A) Grounds and Proceedings to Procure
212IV(A)4 Proceedings
212k143 Notice of Application
212k143(1) k. In General. Most Cited Cases

Injunction 212 152

212 Injunction
212IV Preliminary and Interlocutory Injunctions
212IV(A) Grounds and Proceedings to Procure
212IV(A)4 Proceedings
212k152 k. Hearing and Determination. Most Cited Cases
For a preliminary injunction to issue, the nonmoving party must have notice and an opportunity to present its opposition to the injunction. Fed.Rules Civ.Proc.Rule 65(a)(1), 28 U.S.C.A.

[7] Injunction 212 143(1)

212 Injunction
212IV Preliminary and Interlocutory Injunctions
212IV(A) Grounds and Proceedings to Procure
212IV(A)4 Proceedings
212k143 Notice of Application
212k143(1) k. In General. Most Cited Cases
A district court may convert a hearing for a temporary restraining order into a hearing for a preliminary injunction as long as the adverse party had notice of the hearing.

[8] Injunction 212 143(1)

212 Injunction
212IV Preliminary and Interlocutory Injunctions
212IV(A) Grounds and Proceedings to Procure
212IV(A)4 Proceedings
212k143 Notice of Application
212k143(1) k. In General. Most Cited Cases
Sufficiency of notice preceding issuance of a preliminary injunction is a matter left within the discretion of the trial court. Fed.Rules Civ.Proc.Rule 65(a)(1), 28 U.S.C.A.

[9] Injunction 212 152

212 Injunction
212IV Preliminary and Interlocutory Injunctions
212IV(A) Grounds and Proceedings to Procure
212IV(A)4 Proceedings
212k152 k. Hearing and Determination. Most Cited Cases
While an evidentiary hearing is not always required before the issuance of a preliminary injunction, where facts are bitterly contested and credibility determinations must be made to decide whether injunctive relief should issue, an evidentiary hearing must be held.

[10] Injunction 212 152

212 Injunction
212IV Preliminary and Interlocutory Injunctions
212IV(A) Grounds and Proceedings to Procure
212IV(A)4 Proceedings
212k152 k. Hearing and Determination. Most Cited Cases
Where conflicting factual information places in serious dispute issues central to a party's claims, and much depends upon the accurate presentation of numerous facts, the trial court, in deciding whether to issue a preliminary injunction, errs in not holding an evidentiary hearing to resolve these hotly contested issues.

[11] Injunction 212 143(1)

212 Injunction
212IV Preliminary and Interlocutory Injunctions
212IV(A) Grounds and Proceedings to Procure
212IV(A)4 Proceedings
212k143 Notice of Application
212k143(1) k. In General. Most Cited Cases
District court failed to provide sufficient notice to Venezuelan hotel builder prior to issuing preliminary injunction prohibiting builder from accessing hotel trademark licensor's computer network, where builder was served in Venezuela with motion for temporary restraining order (TRO) and notice of hearing only two days before hearing was to take place in Miami, Florida, and builder's attorney stated at hearing that he had learned of the matter at close of business on previous day. Fed.Rules Civ.Proc.Rule 65(a)(1), 28 U.S.C.A.

[12] Injunction 212 143(1)

212 Injunction
212IV Preliminary and Interlocutory Injunctions
212IV(A) Grounds and Proceedings to Procure
212IV(A)4 Proceedings
212k143 Notice of Application
212k143(1) k. In General. Most Cited Cases
District court abused its discretion in canceling planned evidentiary hearing in favor of telephone hearing to decide whether to issue preliminary injunction prohibiting Venezuelan hotel builder from accessing hotel trademark licensor's computer network, inasmuch as builder was deprived of meaningful opportunity to adequately present its evidence, and court effectively issued and upheld injunction based on evidence presented by only one party.

[13] Injunction 212 143(1)

212 Injunction
212IV Preliminary and Interlocutory Injunctions
212IV(A) Grounds and Proceedings to Procure
212IV(A)4 Proceedings
212k143 Notice of Application
212k143(1) k. In General. Most Cited Cases
Where the material facts underlying a complaint and a preliminary injunction are disputed, the district court, in deciding whether to issue the injunction, is required to hold a hearing which affords both parties an adequate opportunity to present their arguments and educate the court about the complex issues involved.

***1207** Eduardo Palmer,Edwin G. Torres, Robert W. Pittman, Steel, Hector & Davis, LLP, Miami, FL, for Defendants-Appellants.
John C. Carey, Kilpatrick Stockton, Miami, FL, for Plaintiffs-Appellees.

Appeal from the United States District Court for the Southern District of Florida.

Before EDMONDSON, Chief Judge, ANDERSON, Circuit Judge, and POGUE [FN*], Judge.

FN* Honorable Donald C. Pogue, Judge, United States Court of International Trade, sitting by designation.

POGUE, Judge:
Appellants **Consorcio** Barr, S.A., and Carlos L. Barrera (collectively, "Appellants" or " **Consorcio**") appeal the district court's entry of a preliminary **injunction** in favor of Appellees **Four Seasons** Hotels and Resorts, B.V., **Four Seasons** Hotels (Barbados) Ltd., and **Four Seasons** Hotels Limited (collectively, "Appellees" or " **Four Seasons**") restraining Appellants' access to a computer network and requiring

Appellants to return certain items of computer equipment to the custody of Appellees. This Court exercises jurisdiction over this appeal under 28 U.S.C. § 1292(a)(1).[FN1] For ***1208** the reasons expressed below, we reverse and vacate the **injunction**.

FN1. The district court exercised jurisdiction over the underlying action on the basis of contractual consent. **Four Seasons** Hotels and Resorts, B.V. is a Dutch corporation domiciled in Amsterdam. **Four Seasons** Hotels (Barbados) Ltd. is a Barbadian corporation domiciled in Bridgetown, Barbados. **Four Seasons** Limited is a Canadian corporation domiciled in Toronto, Ontario, Canada. Appellants indicate in their brief that the **Four Seasons** Hotel in Caracas is operated by **Four Seasons** Caracas, C.A., a wholly owned Venezuelan corporate subsidiary of **Four Seasons** Hotels Ltd. Appellant's Br. at 5. **Consorcio** Barr is a Venezuelan corporation domiciled in Caracas. Carlos Barrera is a citizen of Venezuela and a resident of Caracas. The licensing agreement between **Consorcio** and **Four Seasons** includes dispute resolution provisions which, inter alia, entitle **Four Seasons** to "commence legal proceedings in the City of Miami, Florida" in connection with a breach of any provision of the agreement "relating to the Trademarks or the Proprietary Materials." Hotel License Agreement, Rec. Ex. 1, § 11.06(a)(ii).

I.

In April 1997, Four Seasons and Consorcio entered into a licensing agreement for the operation of a Four Seasons hotel in Caracas, Venezuela (the "Four Seasons Caracas"). The agreement provided that Consorcio would build a luxury hotel in Caracas, and Four Seasons would license its trademark to the hotel and provide "advisory, operations, and management services." Compl., Rec. Ex. 1 at 5 ¶ 13.

On November 6, 2001, Four Seasons filed a complaint in the District Court for the Southern District of Florida alleging that Consorcio was gaining unauthorized access to the Four Seasons computer network, and thus to e-mail and other proprietary and confidential materials located on the network, in violation of the Computer Fraud and Abuse Act, 18 U.S.C. §§ 1030(a)(4) and 1030(a)(2)(d), the Wire and Electronic Communications Interception Act, 18 U.S.C. §§ 2511(1)(a) and 2511(1)(d), and the Florida Uniform Trade Secrets Act, Fla. Stat. § 688. On the same date, **Four Seasons** filed an emergency motion for an ex parte temporary restraining order ("TRO"), seeking to prevent **Consorcio** from accessing its computer network.

On November 12, 2001, Appellants were served with the complaint, motion, and written notice of a preliminary **injunction hearing** to be held on November 14, 2001 in Miami, Florida. Appellants' counsel at the November 14 **hearing** stated that he had learned of the action late in the day on November 13 and requested additional time to prepare. The district court proceeded with the **hearing** and **Four Seasons** presented witness testimony to support its allegations. Appellants' lawyer cross-examined **Four Seasons**' witness but did not present any witnesses or affidavits.

The facts surrounding the alleged unauthorized computer use are in dispute. Dr. Jozel Venegas, a **Four Seasons** employee who investigated the computer problems at the **Four Seasons** Caracas, testified at the November 14 **hearing** that by using a protocol called NetBEUI, he was able to ascertain that **Consorcio** computers were accessing the **Four Seasons** network and that packets of data, including files from a **Four Seasons** guest history database, were being sent between **Consorcio's** computers and the **Four Seasons** network. Dr. Venegas named specific **Consorcio** employees whose computers were accessing the network, and stated that at one point, the unauthorized access took place almost daily and was continuing at the time of the preliminary **injunction hearing**. Dr. Venegas admitted on cross examination that he had no direct evidence that trademark or proprietary information had been accessed; however, he indicated that such information would be freely available to anyone who gained access to the network. **Four Seasons** also alleged that Eduardo Bencomo, a former **Four Seasons** employee later hired by **Consorcio**, appropriated computer equipment owned by **Four Seasons** and a CD-ROM containing proprietary and confidential information, and that **Consorcio** had refused to grant **Four Seasons** employees access to the **Four Seasons** server and other equipment located at the Caracas hotel.

Following the **hearing**, the district court issued an **injunction** restraining Appellants from (1) gaining access to Appellees' computer network; (2) obtaining, disclosing, or using any information or data accessible ***1209** through **Four Seasons**' computer network and e-mail system; and (3) denying **Four Seasons** access to any computer connected to the **Four Seasons** network systems. The **injunction** further ordered Appellants to return to **Four Seasons**' custody and control certain items of computer equipment, including a three-com switch, a server, and a computer used by Eduardo Bencomo, and any information obtained through access to **Four Seasons**' computer systems.

On November 19, 2001, **Consorcio** filed an emergency motion to dissolve, stay, or modify the **injunction**. Attached to the motion were affidavits presenting a serious factual dispute on issues essential to **Four Seasons**' claim. Specifically, the affidavit of **Consorcio's** vice president, Lautaro Barrera, indicated that the computer activity data submitted by **Four Seasons** in support of its allegations of computer hacking demonstrated only that **Four Seasons** used the shared building computer network. The affidavit indicated that packets of information sent over the network arrive at each computer connected to the network, and computers that are not the intended recipients of a particular information packet simply reject or deny the packet. Therefore, the computer activity reports showing transmission of information packets merely illustrate the network's normal functioning. The affidavits also asserted that the computer equipment ordered returned to **Four Seasons** was owned by **Consorcio** and formed part of the building computer network used by **Consorcio**, **Four Seasons**, and other building tenants.

The district court scheduled an evidentiary **hearing** to consider **Consorcio's** motion on November 28, 2001. The November 28 **hearing**, however, was not held; instead, the court held a telephone **hearing** on November 21, 2001. During the telephone **hearing**, **Consorcio** asserted that it had not appropriated any proprietary information belonging to **Four Seasons** or gained unauthorized access to the **Four Seasons** network, and that **Consorcio** owned the computer equipment at issue. **Consorcio** disputed that the evidence offered by **Four Seasons** indicated computer hacking, arguing that it indicated only that **Consorcio**, **Four Seasons**, and other building tenants shared the building computer network. **Consorcio** also requested that the district court hold the November 28 evidentiary **hearing** so that **Consorcio** could present evidence, including witness testimony, to disprove the allegations of hacking and unauthorized access.

At the conclusion of the November 21 telephone **hearing**, the district court, without issuing any further findings on the disputed issues of fact, denied **Consorcio's** motion to dissolve, stay, or modify the preliminary **injunction**. No evidentiary **hearing** was held. This appeal ensued.

II.

[1][2][3][4] This Court reviews a district court's order granting or denying a preliminary **injunction** for abuse of discretion. *McDonald's Corp. v. Robertson*, 147 F.3d 1301, 1306 (11th Cir.1998) (citing *Baker v. Buckeye Cellulose Corp.*, 856 F.2d 167, 169 (11th Cir.1988)).[FN2]

FN2. Appellees argue that the appeal is moot because Consorcio has already returned the computer equipment in question. Alternatively, Appellees contend that Consorcio waived any objection to the prohibitory portion of the injunction. These assertions are without merit. The appeal is not moot, as the parties retain a "legally cognizable interest in the outcome." *Bekier v. Bekier*, 248 F.3d 1051, 1054 (11th Cir.2001)(quoting *Reich v. Occupational Safety & Health Review Comm'n*, 102 F.3d 1200, 1201 (11th Cir.1997)). Moreover, compliance with the terms of an injunction does not moot a case where the action in question could be resumed or undone. *See Bakery Sales Drivers Local Union v. Wagshal*, 333 U.S. 437, 442, 68 S.Ct. 630, 92 L.Ed. 792 (1948); *see also United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203-04, 89 S.Ct. 361, 21 L.Ed.2d 344 (1968).

Appellees' claim of waiver rests on Appellants' statements that they had "no problem with" the prohibitory portion of the injunction. Telephone Hrg. Trans. at 14,

> 20-22. Appellants' counsel stated, for example, that if the court chose to prohibit defendants from "attempting to or gaining unauthorized access to the plaintiff's network, frankly, we would have no problem with that because we are not doing it from our vantage point." *Id.* at 14. Appellants' statements constitute substantive denials of wrongdoing, rather than acquiescence to the injunction, and will not be construed to bar Appellants' right to defend against the allegations or appeal the injunction.

***1210** [5] A district court may issue a preliminary injunction where the moving party demonstrates (1) a substantial likelihood of success on the merits; (2) that irreparable injury will be suffered unless the injunction issues; (3) the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) if issued, the injunction would not be adverse to the public interest. *Siegel v. LePore*, 234 F.3d 1163, 1176 (11th Cir.2000); *McDonald's Corp.*, 147 F.3d at 1306; *All Care Nursing Serv., Inc. v. Bethesda Mem'l Hosp., Inc.*, 887 F.2d 1535, 1537 (11th Cir.1989). "[A] preliminary injunction is an extraordinary and drastic remedy not to be granted unless the movant clearly established the 'burden of persuasion' " as to each of the four prerequisites. *McDonald's Corp.*, 147 F.3d at 1306 (internal citations and quotations omitted); *see also Texas v. Seatrain Int'l, S.A.*, 518 F.2d 175, 179 (5th Cir.1975) (grant of preliminary injunction "is the exception rather than the rule," and movant must clearly carry the burden of persuasion).

[6][7][8] In order for a preliminary injunction to issue, the nonmoving party must have notice and an opportunity to present its opposition to the injunction.[FN3] Fed.R.Civ.P. 65(a)(1) ("No preliminary injunction shall be issued without notice to the adverse party."); *Granny Goose Foods, Inc. v. Teamsters*, 415 U.S. 423, 434 n. 7, 94 S.Ct. 1113, 39 L.Ed.2d 435 (1974). While Rule 65 does not define "notice," and the sufficiency of notice "is a matter left within the discretion of the trial court,"*United States v. Alabama*, 791 F.2d at 1458, the Supreme Court has stated that the notice requirement "implies a hearing in which the defendant is given a fair opportunity to oppose the application and to prepare for such opposition." *Granny Goose Foods, Inc. v. Teamsters*, 415 U.S. at 434 n. 7, 94 S.Ct. 1113 (internal citations omitted); *see also McDonald's Corp.*, 147 F.3d at 1311; *All Care Nursing*, 887 F.2d at 1538. Furthermore, "[a]lthough the timing requirements are applied flexibly in practice, the underlying principle of giving the party opposing the application notice and an adequate opportunity to respond is carefully honored by the courts." 11A Charles A. Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2949 at 215.

> FN3. The district court may convert a hearing for a temporary restraining order into a hearing for a preliminary injunction as long as the adverse party had notice of the hearing. *See United States v. Alabama*, 791 F.2d 1450, 1458 (11th Cir.1986) (citing *Dilworth v. Riner*, 343 F.2d 226, 229 (5th Cir.1965)).

This principle is reflected in case law. In *All Care Nursing*, defendants opposing an emergency motion for a preliminary injunction received two days' notice that oral argument on the motion had been scheduled, and that the court would accept affidavits and written submissions at that time. On appeal, this Court stated that "[a] two-day notice, coupled with thirty minutes for oral presentations[,] can hardly be said to constitute a meaningful opportunity to oppose appellees' motion for ***1211** preliminary injunction. The court thus determines that under the facts of this case appellants were deprived of a fair and meaningful opportunity to oppose appellees' motion." *All Care Nursing*, 887 F.2d at 1538. In *Marshall Durbin Farms, Inc. v. Nat'l Farmers Org., Inc.*, 446 F.2d 353 (5th Cir.1971),[FN4] the court found that service of notice of a preliminary injunction hearing five days prior to the hearing was insufficient where the underlying complaint and nine attached affidavits described over fifty incidents, and plaintiffs provided defendants with only forty-seven of the sixty-eight additional affidavits presented at the hearing. The court stated that defendants must have "fair notice and an effective opportunity to controvert the facts adduced in support of plaintiffs' motion." 446 F.2d at 356. The court further stated that a

> FN4. Decisions rendered by the former Fifth Circuit prior to October 1, 1981 were adopted as binding precedent by the Elev-

enth Circuit. *See* *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981).

> [h]earing requires a trial of issues of fact. Trial of issues of fact necessitates an opportunity to present evidence, and not by only one side of the controversy. The right of defendants to present controverting factual data is illusory unless there is adequate notice of plaintiffs' claims. It goes without saying that the requirements of a fair hearing include notice of the claims of the opposing party and an opportunity to meet them.... [T]he right to a hearing means the right to a meaningful hearing.
>
> *Marshall Durbin Farms*, 446 F.2d at 356 (internal citations and quotations omitted). The court found that the defendants were placed in an "impossible position insofar as both preparing and presenting an effective response to the motion," as the defendants, "within a few days," had to "retain [ ] counsel, locat[e] the numerous persons and investigat[e] the multitude of occurrences alleged ... determin[e] if there was evidence to controvert what was said to have occurred, and either procur[e] affidavits or arrang[e] for live testimony from witnesses." *Id.* at 356-57.

[9][10] While an evidentiary hearing is not always required before the issuance of a preliminary injunction, "where facts are bitterly contested and credibility determinations must be made to decide whether injunctive relief should issue, an evidentiary hearing must be held." *McDonald's Corp.*, 147 F.3d at 1312 (citing *All Care Nursing*, 887 F.2d 1535). Where conflicting factual information "place[s] in serious dispute issues central to [a party's] claims" and "much depends upon the accurate presentation of numerous facts, the trial court err[s] in not holding an evidentiary hearing to resolve these hotly contested issues." *All Care Nursing*, 887 F.2d at 1539; *cf.* *McDonald's Corp.*, 147 F.3d at 1308 (concluding that no evidentiary hearing was necessary where the nonmoving party did not deny the moving party's factual allegations and offered no contradictory evidence).

III.

[11] In the instant case, a corporation and an individual in Venezuela were served with a motion for a TRO and notice of a hearing only two days before the hearing was to take place in Miami, Florida. Appellants' attorney stated at the hearing that he had learned of the matter at the close of business on the previous day and was not sufficiently prepared for the hearing. Counsel requested a delay in order to familiarize himself with the documents, locate witnesses, and prepare a response to Four Seasons' allegations. While the circumstances here involve fewer persons and incidents than in *Marshall Durbin Farms*,***1212** the difficulties faced by the appellants were similar. The two day notice period provided insufficient time to read the pertinent documents, obtain and consult with counsel, and locate witnesses or obtain affidavits supporting Appellants' position.

Appellees correctly argue that the decision to determine the appropriate amount of notice is properly left to the district court's discretion, relying on cases in which the courts have determined that short notice may be adequate.[FN5] Nonetheless, while courts have, on occasion, accepted short notice periods, we conclude that under the circumstances of this case, the notice was insufficient and the district court's decision to issue the injunction was an abuse of discretion.

> FN5. Short notice periods have been accepted as adequate where, for example, appellants did not establish prejudice due to inadequate notice, *see, e.g.* *United States v. Alabama*, 791 F.2d at 1458; did not protest the lack of notice or request additional time to prepare; *see* *Dominion Video Satellite, Inc. v. EchoStar Satellite Corp.*, 269 F.3d 1149, 1153-54 (10th Cir.2001); or had ample actual notice of the request for preliminary relief. *See* *Anderson v. Davila*, 125 F.3d 148, 156-57 (3d Cir.1997).

[12][13] The district court compounded its error by declining to hold the subsequent evidentiary hearing. The court did hold a telephone hearing, providing the parties an opportunity to argue Consorcio's emergency motion to dissolve, stay, or modify the injunction. However, where, as here, the material facts underlying the complaint and the injunction are disputed, the district court is required to hold a hearing which affords both parties an adequate opportunity to present their arguments and educate the court about the complex issues involved. *See* *Marshall Durbin Farms*, 446 F.2d at 356 (evidence should not come from only one side of a controversy); *Sims v.*

Greene, 161 F.2d 87, 88-89 (3d Cir.1947) ("Trial of an issue of fact necessitates opportunity to present evidence and not by only one side to the controversy;" additionally, both sides must be afforded the opportunity to argue the effect of the evidence to the court.); *see also* Wright et al. § 2949 at 228-32. Here, the district court's decision to cancel the November 28 evidentiary hearing in favor of a telephone hearing deprived the Appellants of any meaningful opportunity to adequately present their evidence rebutting the Appellees' assertions. Rather, the district court effectively issued and upheld the injunction based on evidence presented by only one party. Consequently, we hold that the district court abused its discretion by issuing and affirming the injunction without holding an evidentiary hearing.

For the foregoing reasons, we REVERSE the decision of the district court and VACATE the injunction.

Appellees' suggestion of partial mootness of this appeal, construed as a motion to dismiss this appeal in part as moot is DENIED.

Appellants' motion to stay the pending appeal and to remand jurisdiction to the district court for further proceedings is DENIED AS MOOT.

REVERSED and VACATED.

C.A.11 (Fla.),2003.
Four Seasons Hotels And Resorts, B.V. v. Consorcio Barr, S.A.
320 F.3d 1205, 55 Fed.R.Serv.3d 406, 65 U.S.P.Q.2d 2012, 16 Fla. L. Weekly Fed. C 284

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United States Court of Appeals, Fifth Circuit.
SMITH-WEIK MACHINERY CORPORATION, etc., et al., Plaintiffs-Appellees,
v.
MURDOCK MACHINE AND ENGINEERING CO., Defendant-Appellant.
No. 27950.

March 30, 1970.

Breach of contract action. The United States District Court for the Northern District of Texas, at Dallas, Sarah Tilghman Hughes, J., entered judgment on a verdict for plaintiff, and defendant appealed. The Court of Appeals, Wisdom, Circuit Judge, held that considering that a number of complicated legal questions were at issue, interests of justice required that both parties be represented by able counsel well informed on facts and pertinent law, and, thus, illness of defendant's principal attorney and local counsel's relative unfamiliarity with case tipped scales so heavily in favor of plaintiff as to effectually deprive defendant of its rightful day in court when its motion for a short continuance, based on illness of principal counsel, was denied.

Reversed and remanded for new trial.

West Headnotes

[1] Federal Civil Procedure 170A 1855.1

170A Federal Civil Procedure
170AXII Continuance
170Ak1855 Grounds
170Ak1855.1 k. In General. Most Cited Cases
(Formerly 170Ak1855)
Interests of justice in a hotly contested breach of contract action wherein a number of complicated legal questions were at issue required that both parties be represented by able counsel well informed on facts and pertinent law, and, thus, illness of defendant's principal attorney and local counsel's relative unfamiliarity with case tipped scales so heavily in favor of plaintiff as to effectually deprive defendant of its rightful day in court when its motion for a short continuance, based on illness of principal counsel, was denied.

[2] Federal Civil Procedure 170A 1852

170A Federal Civil Procedure
170AXII Continuance
170Ak1852 k. Discretion of Court. Most Cited Cases

Federal Civil Procedure 170A 1855.1

170A Federal Civil Procedure
170AXII Continuance
170Ak1855 Grounds
170Ak1855.1 k. In General. Most Cited Cases
(Formerly 170Ak1855)

Federal Courts 170B 819

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)4 Discretion of Lower Court
170Bk819 k. Change of Venue; Disqualifying Judge; Continuance. Most Cited Cases
Generally, granting or refusal of a continuance is a matter of judicial discretion which will not be reversed unless an abuse is shown, but an exception exists when illness of principal counsel is ground for continuance, especially where local counsel is relatively unprepared, time for continuance is short, and case is complicated.

***843** A. F. Ringold, Tulsa, Okl., Gerald R. Coplin, Dallas, Tex., for defendant-appellant.
William E. Bartley, San Bernardino, Cal., James L. McNees, Jr., Dallas, Tex., for plaintiffs-appellees.

Before WISDOM, GOLDBERG and INGRAHAM, Circuit Judges.

WISDOM, Circuit Judge.
We reverse and remand for failure of the trial court to

grant the defendant's motion for a continuance based on the illness of defendant's principal counsel. [FN1]

FN1. The facts are substantially as follows:

November 16, 1968: Counsel were notified that the Court had set the case for trial on the non-jury docket for December 2, 1968.

December 2, 1968: Smith-Weik, the plaintiff on the date of trial, moved for an indefinite continuance on the ground that 'trial counsel for plaintiffs has recently had an illness for a period of approximately three weeks'. On the same day, the Court granted the motion, and continued the case until February 10, 1969. The Court admonished Smith-Weik 'that if this case is not ready by that date, that this case will be dismissed for want of prosecution with prejudice to refiling of same'.

January 9, 1969: Counsel were notified that the Court had set the case on the non-jury docket for February 10, 1969. The case was number 17 in the order of cases set on the docket.

February 7, 1969: The senior partner of A. F. Ringold, principal counsel for Murdock, notified local counsel, Mr. Gerald B. Coplin, that Mr. Ringold had become ill with the flu. Principal counsel's partner prepared and forwarded to local counsel a Motion for Continuance and Affidavit in support thereof. Local counsel for Murdock notified local counsel for Smith-Weik of Mr. Ringold's illness and that a continuance might be requested. Mr. Coplin wrote a letter, air mail, special delivery to Smith-Weik's principal counsel in California, advising him that it would be precipitous to appear on February 10, with clients, since the case was far down on the docket, and several pre-trial matters needed resolution.

February 10, 1969: At the call of the jury and non-jury dockets, the court took under consideration Smith-Weik's demand for jury trial, filed out of time, as well as other pending matters. Over Murdock's objection, the court transferred the case to the jury docket and assigned it approximately fourth in line for trial. Thus, unexpectedly, the court advanced the actual trial date for the case. Local counsel for Murdock advised the Court of principal counsel's illness, that Murdock's witnesses were not in the jurisdiction, and that he would need time to bring them to court. The Court then proceeded into trial of other matters on the the docket for that week. Local counsel assumed at that point, because February 12 was a federal holiday, because several disputed cases were prior to this action on the jury docket, and because of the illness of principal counsel which had been made known to the Court and Smith-Weik's counsel, that the case would not be called to trial prior to Monday, February 17, 1969. Local counsel so advised the law firm of principal counsel.

February 13, 1969: Murdock's local counsel was called to court at approximately ten o'clock, Thursday morning and advised by the court that the trial of the case would begin at 2:00 that same afternoon. Counsel restated to the court that principal counsel was still quite ill and that he, as local counsel, was not adequately prepared to try the case, since he had not attended all of the multiple depositions, and did not have copies of all of the depositions to review. The Court advised counsel that a continuance would not be granted under the circumstances. Murdock's local counsel then formally moved for a continuance, accompanied by the Affidavit, until no later than the following Monday, February 17. The Court denied the motion, stating orally as the primary reason that plaintiffs and their counsel had been in Dallas since February 10, awaiting trial.

Defendant's local counsel than orally moved for a continuance until the next morning, February 14, so that he might immediately fly to Tulsa to confer with principal counsel at his residence and obtain material documents and depositions necessary to enable him to attempt to try the case effectively. The Court overruled this motion and instructed local counsel to be present at 2:00

P.M. that afternoon to begin selection of the jury and the trial. Local counsel, after court had ended for that day, took the first plane available to Tulsa, and arrived at principal counsel's house at approximately 10:00 P.M. Principal counsel, although still in bed with the flu, reviewed the facts, depositions and law applicable in the case until 2:30 A.M., when local counsel left for his motel to continue his study of the case.

February 14, 1969: In order to be back in court on time, local counsel returned to Dallas on the 6:50 A.M. flight from Tulsa, thus preventing him from getting any sleep the night of February 13. He appeared in court on time, and completed participation in the case. The court submitted the case to the jury at 4:30 P.M. The jury returned a verdict for Smith-Weik for $22,500 actual damages, the full recovery sought, and $22,500 punitive damages.

***844** 'Abuse of judicial discretion' as the basis for reversal of a trial court's judgment has more bark than bite- in terms of the reviewing court's assessment of the trial judge's exercise of discretion. Here, for example, our holding involves no criticism of the district judge. The magic words mean only that in the light of the record as a whole this Court feels that the denial of the motion for a continuance severely prejudiced the defendant; that, on balance, the interests in favor of a fair trial heavily outweighed the interests in favor of an immediate trial. The trial judge did not have the benefit of the hindsight this Court has as a result of reading the record. When the case was called for trial, it may have appeared to the trial judge to have been a relatively simple breach-of-contract action, which local counsel was well enough prepared to handle. In the light of the record, we find that the matter was hotly contested on the facts and at issue were a number of legal questions, including (1) proper application of the law of accord and satisfaction, (2) the propriety of awarding anticipatory profits, and (3) the right to punitive damage in a suit of this sort.

[1] In Anglo-American law, with trials based on the adversary system as the best means of arriving at a just and legal result, the interests of justice in this case required that both parties be represented by able counsel well informed on the facts and the pertinent law. The illness of the defendant's principal attorney and local counsel's relative unfamiliarity with the case tipped the scales so heavily in favor of the plaintiff as to effectually deprive the defendant of its rightful day in court.

[2] This conclusion does not undermine the rule in this Circuit that the granting or refusal of a continuance is a matter of judicial discretion and the trial court's judgment will not be reversed unless abuse is shown. ***845**Thompson v. Fleming, 5 Cir. 1968, 402 F.2d 266; Peckham v. Family Loan Company, 5 Cir. 1959, 262 F.2d 422. An exception to this general rule exists in certain cases when the illness of counsel is the ground for a continuance. See Annotation: Continuance- Illness of Counsel, 67 A.L.R.2d 497 and 17 C.J.S. Continuances § 36, and cases cited therein. Here principal counsel was ill, local counsel was relatively unprepared, the time for continuance was short, and the case was complicated. In these circumstances we feel that the general rule must yield to the exception.

We find it unnecessary to discuss the other issues raised on appeal.

The case is reversed and remanded for a new trial.

C.A.Tex. 1970.
Smith-Weik Machinery Corp. v. Murdock Mach. & Engineering Co.
423 F.2d 842

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Cheatwood Inn of Court – *Breaker Morant*
Judicial Impartiality and Due Process Scenarios

Scenario I

ProductCo was sued in Hillsborough County state court by an individual who was severely injured as a result of an alleged defect in a product sold by ProductCo. The parties spent five years preparing the case for trial. The case was continued twice to allow the parties to conduct additional discovery. The court indicated that there would be no further continuances. ProductCo was represented by a small local firm and its national counsel out of Washington D.C. Approximately 10 days before trial, ProductCo's lead counsel became very ill and would be unable to attend the trial. The Judge knew that most of the trial preparation was being handled by ProductCo's counsel in Washington D.C. When ProductCo informed the court that its lead counsel was ill, the judge commented: "I'm sorry to hear that your lawyer is ill, but there's no way you can win this case anyway. If I were you, I would explore your settlement options." Based on its lead counsel's illness and unavailability, ProductCo moved for a continuance.

Questions

How should the Plaintiff's counsel advise the Plaintiff regarding the request for continuance? Should the Court make an exception to allow the out-of-town company to have its lead counsel at the trial? Should ProductCo also move to disqualify the judge?

Scenario II

Tina Laws is a litigator representing a company, LocalSales Corp. ("LocalSales"), which recently lost three employees to a competitor, NewFirm Sales, Inc. ("NewFirm"). NewFirm just opened a branch office in the Tampa area. LocalSales believes that its former employees took customer lists and other trade secret files with them to NewFirm. LocalSales heard from two of its customers that the former NewFirm employees were calling and offering lower rates than the contract rate with LocalSales.

On Monday, Tina Laws filed a complaint and motion for preliminary injunction against NewFirm and the employees alleging misappropriation of trade secrets. The district court set an evidentiary hearing on the motion for preliminary injunction two days later, on Wednesday. On Tuesday afternoon, Tina Laws was preparing for the hearing with her clients. Counsel for NewFirm called Tina Laws from out of state and left a message asking Ms. Laws if LocalSales would agree to a short continuance of the hearing to allow NewFirm additional time to find local counsel and prepare for the hearing. NewFirm then filed an emergency motion for continuance.

Questions

How should Tina advise her client regarding the request for continuance? Is there any risk to opposing the continuance? Should the Court give an immediate hearing to LocalSales? Does fundamental fairness require the district court to allow NewFirm additional time to find counsel in Tampa? Does the district court have any obligation to give the out-of-state company additional time to retain local counsel?