



Title of Program _____

Date of Program _____

Presenting Inn _____ Inn Number _____

Inn City _____ Inn State _____

Contact Person _____ Phone _____

E-mail Address _____

Please consider this program for the Program Awards: Yes No This program is being submitted for Achieving Excellence: Yes No

Program Summary:

Indicate the legal focus and be concise and detailed in summarizing the content and setup of your program. Please attach additional sheets if necessary.

Program Materials:

The following materials checklist is intended to insure that all the materials that are required to restage the program are included in the materials submitted to the Foundation office.

Did the program use a written script? Yes No

Did the program material include any newspaper, magazine, or web articles? Yes No

Did the program material include any copies of citations of law or legal documents? Yes No

Did the program material include a fact pattern for the program? Yes No

Did the program material include a list of questions for the program? Yes No

Did you hand out any materials before or during the program? Yes No

Did this program use PowerPoint, CD, DVD or other media during the course of the presentation? Yes No

Please include a copy of any of the above existing materials with your program submission.

Specific Information Regarding the Program

Number of participants required for the program _____ Has this program been approved for CLE? Yes No

Which state's CLE? _____ How many hours? _____

Program Submission Form

Roles:

List the exact roles used in the demonstration and indicate their membership category; *i.e.*, Pupil, Associate, Barrister or Master of the Bench.

Role	Membership Category

Agenda of Program:

List the segments and scenes of the demonstration and the approximate time each step took; *i.e.*, "Introduction by judge (10 minutes)."

Item	Time

Recommended Physical Setup and Special Equipment:

i.e., VCR and TV, black board with chalk, easel for diagrams, etc. When submitting video, please indicate the length of all videos. *i.e.*, 30 or 60 min.

Comments:

Clarify the procedure, suggest additional ways of performing the same demonstration, or comment on the response from the Inn members regarding the demonstration.

Questions:

Please contact Andrew Young at (703) 684-3590 ext 106 or by e-mail at ayoung@innsofcourt.org.

Craig S. Barnard Inn of Court
Gray's Inn Presents
Ethics and Professionalism in Civil Litigation
October 18, 2011 - West Palm Beach

Overview

A one-hour seminar providing a broad overview of the unique ethical "gray areas" faced by attorneys during the course of litigation up to and including mediation presented through various fact scenarios. The seminar generally deals with attorney conduct towards opposing counsel and others under the Misconduct and Candor canons found in Rules Regulating the Florida Bar 4-8.4, 4-4.1 and 4-4.3 as well as ethical issues of dealing with clients who are under a disability are addressed under Rule 4-1.14. Additionally, the seminar examines the borderline circumstances where attorneys should withdraw from representation, the questionable discovery of documents which may have been stolen, whether such documents must be disclosed to opposing counsel via discovery requests as well as any disqualification implications under Rules Regulating the Florida Bar 4-1.7, 4-1.9 and applicable case law. The seminar will also scrutinize suspect attorney transactions with clients under Rules Regulating the Florida Bar 4-1.8 and the general duty to communicate under 4-1.4. Finally, the seminar also covers questions raised regarding abiding by a client's desire to settle and how to ethically effectuate such a settlement by discussing Rules Regulating the Florida Bar 4-1.2 and 4-3.4 and the ethical rules of Mediators since many Mediators are members of the Florida Bar. The rules covered include the misrepresentation, confidentiality and responsibilities of the Mediator to the parties under Florida Rules of Mediation 10.300, 10.310, and 10.360. At the conclusion of the presentation, there will be a question and answer session.

Description

6:00 p.m. – 6:10 p.m.

Opening Remarks

Amy Fischer, Esq.

6:10 p.m. – 6:30 p.m.

Ethics and Professionalism in the Context of Personal Injury Litigation

6:30 p.m. – 6:50 p.m.

Ethics and Professionalism in the Context of Family Law Litigation

6:50 p.m. – 7:00 p.m.

Questions and Answers

Inns of Court - Gray's Inn
Final DRAFT Script - Personal Injury Mediation

Moderator: This first scene is a mediation of a personal injury case. Because the theme is "Shades of Gray", some of the issues are subtle, so pay attention - we will ask you questions throughout the skit. You may want to take notes.

SCENE 1

*{**Open in main mediation room – all parties present at one table**}*

M: Good morning everyone, I am mediator Brian Denny. Today we are in what is called a mediation. As you are all aware, we are attempting to resolve a lawsuit between Ms. Milia and Palm Beach Bungee Jumping related to neck injuries Ms. Milia says she recently suffered. I'm here as a neutral party to allow each side to vocalize their arguments and to facilitate fair communications between you so that we can bring this dispute to a swift and fair resolution. In that regard, any information you share with me will be shared with the opposing side. Now I'm going to ask everyone to introduce themselves so we are all familiar with one another. Michael, why don't you start us off as this is your very first time in mediation.

PA: Hello. I'm Michael Schwebel. We're here today because my client, Ms. Milia was very seriously hurt in a bungee jumping accident while she was using the equipment offered by the Defendant on April 1, 2010. In short, her medical evaluations reveal that she is suffered from a herniated disc in her neck, and she has been recommended for a cervical fusion surgery. She has also been unable to dance, which she did both as a lifetime hobby and as a part-time job while she finishes law school. These injuries have also negatively impacted her ability to study and complete her coursework. As a result, we are asking for substantial damages in this case.

Ms. Milia, you may introduce yourself

P: Hello, I'm Karen Milia. I have not been the same since my April 1, 2010, accident. I'm just hoping to be able to put this all behind me.

DA: Well let's just jump right into it then. This might be your first mediation, Mike, but I can tell you it isn't mine. In fact, today marks my 500th mediation, and on account of that occasion, I need to tell you that I'm not planning to recommend settling this case for very much money. I'm not going to dance around the issue. The fact is, Ms. Milia, we know you're not actually hurt like you say you are. Not only do I know a fake when I see one, but we have surveillance video of you dancing at your cousin's wedding. Once a jury sees that, your case is going to fall apart. If you had been smart enough to retain a lawyer who wasn't in the minor leagues, then you may have already taken the money we offered several months ago and put this behind you. But here you are greedily looking for a handout and trying to reach into the pocket of a small business owner. Besides you waived your rights goodbye when you signed a waiver.

Ms. Lolange, why don't you tell them a little about yourself.

D: Hello, I'm Farah Lolange, and I am founder and president of Palm Beach Bungee Jumping. Ms. Milia, I'd like to say that I'm very sorry for what happened to you, but I do not think your injuries had anything to do with our equipment.

DA: Mr. Noble, our adjuster from Ms. Lolange's carrier is here. Mr. Noble, would you like to say anything?

A: {shakes head while looking at phone}

DA: We'd like to begin with an offer of \$10,000.00.

M: Well how about I begin a caucus with the Defendant.

{**PA and P move to other table**}

M Caucus with D/DA/A:

DA: Okay, well first things first. That video may not be as damaging as I made it out to be.

M: What do you mean? She's not dancing?

DA: Well she technically is. Have a look.

{**DA and M look at laptop screen; audience can't see screen**}

M: Well, she's not really dancing is she? She's pretty much just standing there.

DA: But she *is* on a dance floor.

M: Okay, let me see what I can do with the Plaintiff.

{**mediator moves to other table**}

M Caucus with P/PA:

M: Hey guys, I just saw the Defendant's video. It's not good. You may want to seriously consider taking their offer of \$10,000.

DISCUSSION

QUESTION #1: DID ANYONE SEE ANYTHING WRONG WITH THE COMMENTS OF THE DEFENSE ATTORNEY?

(Ask Inner Temple)

To solicit comments:

- what about his attempts to bully the plaintiff and her lawyer?
- obnoxious comments and mocking the plaintiff?
- misrepresentation regarding what is shown on the surveillance video?

Answers to #1:

R. Reg. Fla. Bar 4-8.4 “Misconduct”, subsection (d) : “A lawyer shall not engage in conduct in connection with the practice of law that is prejudicial to the administration of justice, including to knowingly, . . . , disparage, humiliate, or discriminate against litigants, jurors, witnesses, court personnel, or other lawyers on any basis, including, . . . , on account of race, ethnicity, gender, religion, national origin, disability, marital status, sexual orientation, age, socioeconomic status, employment, or physical characteristic.”

In *The Florida Bar v. Martocci*, 791 So. 2d 1074 (Fla. 2001), the Florida Supreme Court found that the attorney engaged in misconduct when he made remarks to belittle and humiliate the opposing party and counsel in divorce proceedings. He called the opposing party a “nut case” and called her attorney a “bush leaguer” and that depositions are not conducted under “girl’s rules”. He received a public reprimand and two-year probation.

R. Reg. Fla. Bar 4-4.1, “Truthfulness in Statements to Others”, “In the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person”.

R. Reg. Fla. Bar 4-3.3, “Candor Toward the Tribunal”, (a) “A lawyer shall not knowingly: (1) make a false statement of material fact or law to a tribunal”.

Both Rule 4-4.1 Rule 4-3.3 both require that in addressing a court or tribunal, a lawyer shall not lie about material facts, and holds lawyers to this same standard in negotiations and mediations.

However, the comment to Rule 4.4.1 indicates that the rule is not absolute, as it refers to statements of fact. Whether a statement is considered “factual” depends on the circumstances. Some statements are generally not regarded as facts, and estimates or outright misrepresentations as to price or value, a party’s intentions as to settlement, or even who you represent in the negotiations may be permissible. But, it is gray, and vary from lawyer to lawyer and region to region, say, Miami or Ocala.

QUESTION #2: DID THE MEDIATOR DO ANYTHING IMPROPER?

(Ask Middle Temple)

(Ask Carbohc Smokeball, “do you agree or disagree?”)

To solicit comments:

- did he say anything wrong in his introductory comments?
- what about his comment that any information shared with him would be shared with the other side?
- was there anything wrong with the mediator’s comments to the Plaintiff and her attorney about the surveillance video?
 - would your answer be different if the mediator didn’t watch the video

Answers to #2:

Fla. R. Med. 10.310 “Self–Determination” : subsection (c) “Misrepresentation Prohibited” : “A mediator shall not intentionally or knowingly misrepresent any material fact or circumstance in the course of conducting a mediation.”

Fla. R. Med. 10.300 “Mediator’s Responsibility to the Parties” : “The purpose of mediation is to provide a forum for consensual dispute resolution by the parties. It is not an adjudicatory procedure. A mediator’s responsibility to the parties includes honoring their right of self-determination; acting with impartiality; and avoiding coercion, improper influence, and conflicts of interest.

A mediator is also responsible for maintaining an appropriate demeanor, preserving confidentiality, and promoting the awareness by the parties of the interests of non-participating persons. A mediator’s business practices should reflect fairness, integrity and impartiality.

SCENE 2

PA: May I have a minute alone with Ms. Milia?

M: Of course {**mediator leaves**}

PA: Dancing at your cousin's wedding?!?! I told you to be careful because there would be private investigators following you! How could you be so stupid!

P: I barely stepped on the dance floor at my cousin's wedding! I can barely get out of bed in the morning! I can't even look down at my feet! It's constant pain all the time. I just need \$100,000 to help me get by. I don't want to go to trial. I just want to finish school and get ready for the bar exam.

PA: I can't believe you have been lying to me this whole time!

DISCUSSION

QUESTION #3: IF A LAWYER BELIEVES THAT HIS CLIENT HAS BEEN UNTRUTHFUL, SHOULD THE LAWYER WITHDRAW FROM THE CASE?

(Ask Carbolec Smokeball)

Answers to #3:

R. Reg. Fla. Bar 4-3.3, "Candor Toward the Tribunal", (a) "False Evidence; Duty to Disclose". "A lawyer shall not knowingly: (4) offer evidence that the lawyer knows to be false.

- How does this apply in mediation?
- Has the lawyer offered testimony he knows to be false?
- If it turns out the client has lied about her injuries, how long can the Plaintiff's attorney remain in the case?
 - through mediation?
 - what about trial? can he put her on the stand to testify if he knows she's lied about her injuries?

A lawyer may not offer testimony that the lawyer knows to be false in the form of a narrative unless so ordered by the tribunal.

If a the lawyer's client or a witness called by the lawyer has offered material evidence and the lawyer learns that it is false, the lawyer shall take reasonable remedial measures including, if necessary, disclosure to the tribunal.

Comments to the Rule state, “The prohibition against offering false evidence only applies if the lawyer knows that the evidence is false. A lawyer’s reasonable belief that evidence is false does not preclude its presentation to the trier of fact.”

R. Reg. Fla. Bar 4-1.16 (a) (1), states, “the Lawyer must withdraw from the case if the lawyer’s services will be used by the client in materially furthering a course of criminal or fraudulent conduct.”

Here, the lawyer does not know for sure that the plaintiff has provided false information and evidence, so it is a gray as to what the lawyer should do here.

SCENE 3

*{**Mediator re-enters room**}*

M: well?

PA: Tell them we would want \$500,000. Also, I want to see this video.

*{**Mediator leaves but does not go to the defense table yet**}*

D/DA/A (prior to M in room):

*{Adjuster is standing off to the side; occupied on phone}
{D and DA are seated at the table}*

D: By the way, whose attorney are you? Mine or the insurance company’s?

DA: Yours, why?

D: Well, this accident happened in 2010, but the Complaint says it happened in 2009. I had coverage in 2009, but not 2010. Am I okay? I cannot afford any of this without my insurance. I’m barely making my bills as it is.

*{**Adjuster gets off phone and walks back to where D/DA are sitting**}*

A: By the way, back there during the Plaintiff’s presentation, what year did she say she hurt her neck?

DA: {stammers} Umm, I don’t recall

*{**Mediator re-enters room**}*

A: {talking to Mediator} Get me out of here for \$200,000. I need to get this done.

M: Plaintiff wants \$500,000, and her lawyer wants to watch the video

DA: I'm not sure that's a good idea...

M: It'll be fine. You brought it up so it will look odd if you don't show it to him now.

DA: Okay, I'll offer \$15,000. Tell him that he can see the video, but that we also have a strong case in addition to the video, especially since his client signed a waiver.

DISCUSSION

QUESTION #4: WHAT IS THE ETHICAL OBLIGATION OF THE DEFENSE ATTORNEY TO CORRECT THE MISREPRESENTATION OF FACTS REGARDING THE DATE OF THE ACCIDENT?

- By a show of hands, how many think that there is a duty?
- Who is the duty owed to?
- What is the basis of that duty? (*Ask 1 person*)
- Is the defendant committing insurance fraud
 - Is her lawyer helping her?
- Does the lawyer have an obligation to correct the record to prevent his client from committing insurance fraud?
 - What if he allows the insurance company to pay on a claim when he knows there is no insurance?

Answers to #4:

Duty not to Misrepresent v. Duty of Loyalty/ Confidentiality

R. Reg. Fla. Bar 4-8.4(c), "Misconduct", "A lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation."

Florida Bar v. Fredericks, 731 So. 2d 1249 (Fla. 1999), requires a showing of intent. "In order to satisfy the element of intent it must only be shown that the conduct was deliberate or knowing."

BUT... a lawyer usually can't disclose his client's fraud or misrepresentaion:

R. Reg. Fla. Bar 4-1.6 "Confidentiality of Information", subsection (a), "Consent Required to Reveal Information : A lawyer shall not reveal information relating to representation of a client absent informed consent, unless the following apply:

The lawyer shall reveal the information to the extent the lawyer believes necessary (1) to prevent a client from committing a crime; or (2) to prevent a death or substantial bodily harm to another. Rule 4-1.6(b)

Disclosure is also allowed to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and client; to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved; or to respond to allegations in any proceeding concerning the lawyer's representation of the client. Rule 4-1.6(c)

If a tribunal orders the lawyer to reveal confidential information, the lawyer has the right to first exhaust all appellate remedies. Rule 4-1.6(d)

Here, the defense attorney's primary duty is to the insured - not the insurance company. *See, Fla. St. Bar Assn., FL. Eth. Op. 97-1 (1997)*, which stated, "An attorney who has been hired by an insurance company to represent an insured owed his primary duty to the insured."

SCENE 4

*{**Mediator returns to table with PA/P and brings the DA's laptop - all three stare at screen**}*

P: See! I'm barely moving!

*{**PA storms off to the Defense table -- M follows**}*

{scene shifts to DA/D/A table}

PA: {yelling at DA} I'm telling the bar about the stunt you pulled here today. This is outrageous.

{turns to the Mediator} You too! You lied about what was on that video!

DA: That's ridiculous, I've done nothing wrong.

PA: I'm going to file bar grievances against both of you. Unless.... I tell you what: I'll forget about this whole thing if you tender the \$500,000.00 policy limits right now.

DA: Look, I may have overstated the video, but your client's injuries are still relatively minor. I've seen her medical records, her pain levels are minimal, and she's probably not even going to get that surgery. You will never get the policy limits. The best offer I can make is \$100,000. If you reject it, we're done, and you're not going to see that money again. I promise you that.

*{**Moderator pulls PA aside**}*

M: That's what your client wants, take it and get this case resolved

PA: I think he's still bluffing. I know I can get more.

{to DA} No deal. My client will not take less than \$300,000 and she's prepared to go to trial.

{**PA leaves and returns to table with P; Mediator stays at D/DA/A table**}

PA: they only offered \$50,000. I demanded \$300,000.

P: can you get them up to \$100,000? That's all I need and I don't want to go to trial

PA: Not sure, but you should be prepared to go to trial

{**Mediator joins P/PA at their table**}

M: {to Plaintiff} Did your lawyer share the good news: the Defense offered \$100,000 -- but the adjuster told me that he would go as high as \$200,000 to settle the case?

DISCUSSION

QUESTION #5: COULD THE MEDIATOR HAVE REVEALED THAT THE ADJUSTER WAS PREPARED TO OFFER \$200,000.00 OF AUTHORITY EVEN THOUGH THE DEFENSE ATTORNEY ONLY OFFERED \$100,000.00?

(Ask Lincoln Inn)

- Did the adjuster's comment in the mediator's presence that he would offer \$200,000 to get this over with give the mediator authority to reveal that to the Plaintiff
- Who is the mediator required to take instructions from at a mediation
 - what if it is not clear who's driving the train?

Answer #5:

Fla. R. Med. 10.360 "Confidentiality", subsection (b) "Caucus", provides that "Information obtained during caucus may not be revealed by the mediator to any other mediation participant without the consent of the disclosing party."

QUESTION #6: CAN AN ATTORNEY IGNORE HIS CLIENT'S INSTRUCTIONS REGARDING SETTLEMENT?

(Ask Inner Temple)

- By rejecting the offer of \$100,000, the plaintiff's attorney not only ignored his client's directions to settle, but he then lied to his client and said the defense only offered \$50,000

Answer #6:

R. Reg. Fla. Bar 4-1.2, "Objectives and Scope of Representation", subsection (a), "Lawyer to Abide by Client's Decisions. Subject to subdivisions (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation, and , as required by rule 4-1.4, shall reasonably consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive a jury trial, and whether the client will testify."

QUESTION #7: IS IT PROPER TO THREATEN A BAR COMPLAINT IN THIS CONTEXT?

(Ask Middle Temple)

- Did the conduct of the defense lawyer in misrepresenting what was on the video rise to the level of a bar complaint?
- what about the conduct of the mediator?

Answer #7:

R. Reg. Fla. Bar 4-3.4(h), "A lawyer shall not present, participate in presenting, or threaten to present disciplinary charges under these rules solely to obtain an advantage in a civil matter."

~FIN~

Final Draft FAMILY LAW SCRIPT- Gray's Inn

Background

MC: We are about to begin a court ordered mediation for a dissolution of marriage. The parties present include the H, John Gotti, accompanied by his lawyer Janie Cochran, his Wife, Crystal, accompanied by her lawyer, Marcia Clark. Also present is Bobbie Black, a partner of one of the H's businesses who happens to be the Crystal's new love interest. The mediator, Miley Fairness, is also a practicing family law attorney.

The H, who has many different business interests, is mainly known for owning and running RAQUEL'S a local steak house/strip club. Mr. Gotti met his wife, as she was a former stripper at the Club. She is now and has been the bookkeeper for Raquel's for the past 6 months.

Among the H's other businesses is an adult book store of which Bobbie Black is his partner. Bobbie Black is now having an affair with John's Wife Crystal, and he is present at the mediation without objection of the H.

The parties have decided to begin the mediation together, all in the same room.

Scene 1

MED: Hello everyone. As you know I am your mediator and my name is Miley Fairness. Everything said here remains confidential within the mediation and you've already been explained the rules of mediation. Now I understand this is a mediation concerning divorce in an 18 month marriage, there are no children, and we are discussing the division of assets, liabilities, and alimony. Is that correct? And apparently there is no objection to Mr. Black sitting in during the mediation...is that correct? Let's caucus... I think that will be better for both sides for now.

WA: My client just wants a fair and equitable share of the assets. And alimony enough to last her a lifetime where she can live in the standard of living she has grown accustomed to.

MED: Crystal, how long have you two been married?

W: Well, it feels like forever...it's coming up on almost 18 months.

MED: I understand you are the bookkeeper for Raquel's?

W: Yes, I was promoted from dancer because I was so used to handling small bills and can add cash easily in my head. I know where all of the cash is hidden! As a matter of fact I

can prove it. I removed the books and some papers my H's office safe and copied them all. Here's just a few of them. (wife dumps piles of documents on the desk).

WA: (reads through some of the documents and aside to the Wife) Let me see those. We'll just keep these for now, they'll probably be useful later.

MED: (to the Wife's attorney) Do you think that's a good idea? After all, it is likely that they may have been prepared by his lawyer for this mediation?

MR. B: Let him prove it...we'll keep them for now.

MC: **QUESTION #1: WHAT ARE THE OBLIGATIONS, IF ANY, OF THE WIFE'S ATTORNEY WITH REGARD TO THE DOCUMENTS?**

(PROMPTING): DID SHE HAVE A DUTY TO DISCLOSE? A DUTY TO RETURN? WHAT ABOUT THE DUTY OF CONFIDENTIALITY TO HIS CLIENT?

Answers to #1: A lawyer whose client has provided the lawyer with documents that were wrongfully obtained by the client may need to consult with a criminal defense lawyer to determine if the client has committed a crime. The lawyers must advise the client that he materials cannot be retained, reviewed or used without informing the opposing party that the inquiring attorney and client have the documents at issue. If the client refuses to consent to disclosure, the inquiring attorney must withdraw from the representation.

See, R. Reg. Fla. Bar 4-3.4, "Fairness to Opposing Party and Counsel", subsection (a), which provides, "A lawyer shall not: unlawfully obstruct another party's access to evidence or otherwise unlawfully alter, destroy, or conceal a document or other material that the lawyer knows or reasonably should know is relevant to a pending or a reasonably foreseeable proceeding; nor counsel or assist another person to do any such act."

R. Reg. Fla. Bar 4-4.4, "Respect for Rights of Third Persons", subsection (a), states, "In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay or burden a third person or knowingly use methods of obtaining evidence that violate the legal rights of such a person." Subsection (b) goes on to state, "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 following Rule 4-4.4 points out, "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... 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.”

A lawyer would likely have to produce the documents in response to a valid discovery request for the documents. *See, Florida Bar v. Hmielewski*, 702 So.2d 218 (Fla. 1997). *See also, Quinones v. State*, 766 So. 2d 1165, 1172 n. 8 (Fla. 3d DCA 2000)(held that the lawyer may have an obligation to turn over the documents if they were stolen property).

QUESTION #2: WOULD THE DOCUMENTS HAVE TO BE DISCLOSED IN RESPONSE TO A DISCOVERY REQUEST FROM THE H’S LAWYER?

Answer #2: Yes. R. Reg. Fla. Bar 4-3.4(d), prohibits intentional failure to comply with legally proper discovery requests.

QUESTION #3: WHAT IS LIKELY TO HAPPEN IF THE WIFE’S LAWYER ACTUALLY REVIEWS THE PRIVILEGED MATERIAL?

Answer #3: She could be disqualified per R. Reg. Fla. Bar 4-4.4, “Respect for Rights of Third Persons” as stated in Answer to #1.

Scene 2

H: Look, I don’t want her to have a damn thing. In fact I want the engagement ring back. I should have taken care of her when I had the chance. She’s a bad dancer and even a worse bookkeeper.

HA: Let’s offer her something to go away and put this behind us.

H: (phone rings – Husband picks up the phone and is speaking)

Yeah...yeah...great...thanks. Hey, you won’t believe this, my Wife’s Attorney apparently is a big customer at one of our Pain Clinics. Her name came up as a regular customer...she’s buys oxy’s all the time with scripts from numerous docs. (to the mediator) You tell her, if she doesn’t come around and tell my wife to do the right thing, she’s going down. I’ll have her bar card for sure.

HA: Yeah, if the pill fits, you cannot acquit!

MED: I’ll see what I can do.

(MEDIATOR MOVES INTO WIFE’S CONFERENCE ROOM)

Look, your Husband is coming on pretty strong. What's the least you'll take to settle this now?

W: Look that sonnaofabitch has been hiding cash from the IRS for years. I know it and he knows it and I can prove it. I have the bank account numbers in Belize. You tell him to give me everything I want or he can deal with the IRS. And don't forget, I'm the innocent spouse!

WA: (VIGOROUSLY NODS IN AGREEMENT AS WIFE IS SPEAKING).

QUESTION #4: DO THE WIFE'S STATEMENTS TO THE MEDIATOR AND HER LAWYER'S APPARENT ASSENT IMPLICATE ANY ETHICAL ISSUES?

Answer #4: Yes. The Wife and the Wife's Lawyer are apparently looking to extort the Husband- and that is impermissibly attempting to gain a financial advantage in a mediation settlement. *See*, Fla. Stat. §836.05. *See also*, *McKee v. State*, 715 So.2d 1010 (Fla. 5th DCA 1998) and William H. Stolberg and David L. Hirschberg, *Extortion: What Your Client Wants*, 83-JUN Fla. B. J. 109 (2009).

QUESTION #5: IF A SETTLEMENT IS OBTAINED BY VIRTUE OF THE ABOVE THREAT, IS IT VOID OR VOIDABLE?

Answer #5: Yes. It can be set aside under Fla.R.Civ.P. 1.540, "Relief From Judgment, Decrees, or Orders", subsection (b), "Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud; etc.", "On motion and upon such terms as are just the court may relieve a party or a party's legal representative from a final judgment, decree, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial or rehearing (3) fraud, misrepresentation, or other misconduct of an adverse party; (4) that the judgment decree upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment or decree should have prospective application...."

Scene 3

MED: Well, what are you two looking for?

WA: Let's check out these documents. Look, I really don't have any idea what to ask for. Unfortunately, I haven't been feeling too well, I have a medical issue due to a car accident I was in. I didn't review the H's discovery very well. However, based on these notes we have from the Husband to his attorney, I see he is willing to pay Crystal here

\$250,000 to go away. Let's ask for \$500,000 and see what happens. (WIFE'S ATTORNEY TURNS TO THE MEDIATOR) What do you think?

MED: I think it's hard to guess when you don't have any idea what the assets really are. How about the alimony?

W: I need at least \$30K a month for the rest of my life, and that's the BARE MINIMUM!

Mr. B: Yeah, we have a lifestyle and high standard of living that we need to maintain.

W: Shut up honey...yeah that's true, I've grown accustomed to a very high standard of living.

MED: How are you arriving at that figure?

WA: Look, I didn't review his discovery...but half a mill plus \$30K a month seems reasonable for 18 months of marriage.

W: He can afford it...he moves at least \$50K per month to Belize. I know it...I send the cash via FEDEX.

MC: QUESTION # 6: DID THE WIFE'S ATTORNEY SUBJECT HERSELF TO ANY POTENTIAL ETHICAL VIOLATION IN THE PRECEDING SCENARIO?

Answer #6: Yes. **R. Reg. Fla. Bar 4-1.3, "Diligence"**, requires that "A lawyer shall act with reasonable diligence and promptness in representing a client." *See also, Florida Bar v. Kinney, 606 So.2d 367 (Fla. 1992)*(an attorney is under an obligation to discover the law applicable to the case at hand).

Scene 4

HA: You know of course I represented that creep Bobbie Black. I defended him against a little child pornography charge. I also defended him against a little IRS problem as well. I can tell you this for sure...Bobbie Black has been stealing from your little bookstore. I know this for a fact cause he paid me cash to defend him in the child porno case. I also gave him some great advice in hiding cash from the IRS. He also mentioned once to me he was thinking about cooperating with the feds, so I'd watch out for him.

H: You've got to be kidding. Why didn't you tell me this before?

HA: Well there's this privilege thing but since I don't represent him anymore, I figured I'd let you in on it.

H: Why that little worm...it's not enough he's stealing my Crystal...he's also taking my money! I think he's in line for a dirt nap.

HA: (TO MEDIATOR) Look, you tell that creep that if he doesn't convince her to settle on our terms, I'm going to make sure Mr. Gotti here takes away his entire share of the book store business.

MED: I'll pass it along.

MC: QUESTION # 7: UPON LEARNING THAT THE HUSBAND'S ATTORNEY REPRESENTED MR. BLACK, THE WIFE DIRECTS HER LAWYER TO GET "RID" OF THE HUSBAND'S ATTORNEY. THE NEXT DAY, THE WIFE'S ATTORNEY FILES A VERIFIED MOTION PURSUANT TO R. Reg. Fla. Bar 4-1.7 AND 4-1.9 SEEKING THE RECUSAL OF THE HUSBAND'S ATTORNEY. IN HER MOTION SHE ALLEGES THAT: 1) AN ATTORNEY/ CLIENT RELATIONSHIP EXISTED; AND 2) THAT MATTER IS ADVERSE TO INTERESTS OF THE FORMER CLIENT (MR. BLACK) AND AS SUCH IS SEEKING DISQUALIFICATION.

WILL THE MATTER BE:

A. Granted or Denied by the Court on the Motion on an Ex Parte Basis.

B. The Court will rule on the Motion based on affidavits submitted and argument of counsel.

C. The matter must be set for evidentiary hearing.

Answers to #7: The Answer is C.

R. Reg. Fla. Bar 4-1.7, "Conflict of Interest; Current Clients", subsection (a), "Representing Adverse Interests", provides, "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.”

R. Reg. Fla. Bar 4-1.9, “Conflict of Interest; Former Client”, provides, “A lawyer who has formerly represented a client in a matter shall not thereafter: (a) represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent; (b) use information relating to the representation to the disadvantage of the former client except as these rules would permit or require with respect to a client or when the information has become generally known; or (c) reveal information relating to the representation except as these rules would permit or require with respect to a client.

See also, Anderson Trucking Service, Inc. v. Gibson, 844 So.2d 1046 (Fla. 5th DCA 2004)(Party seeking disqualification of attorney on basis of conflict of interest must show that: (1) attorney/client relationship existed; and (2) attorney represents another client regarding a matter, or substantially related matter, that is adverse to interests of the former client seeking disqualification.) and *Holland v. Tenenbaum*, 360 So.2d 493 (Fla. 4th DCA 1978)(Removal of counsel for one of the parties is a serious matter which should be done only after an adequate hearing. The affidavits filed by the parties do not agree on the issue presented, thus necessitating an evidentiary hearing.)

MC: (FOLLOW UP QUESTION)

QUESTION #8: WILL THE COURT FIND THIS TO BE A MATTER SUBSTANTIALLY RELATED TO THE CLIENT SEEKING DISQUALIFICATION?

Answer #8: Maybe. In *Waldrep v. Waldrep*, 985 So.2d 700 (Fla. 4th DCA 2008), The trial Court in a mother’s action against son, daughter-in-law and family corporation, could not disqualify corporation’s long time attorney from representing son, daughter-in-law and corporation absent evidence that attorney’s prior representation of mother, and of corporation when she was a shareholder of it, was substantially related to the matters that were the subject of her lawsuit.

Scene 5

MED: Mrs. Gotti...are you all right? Your H is offering \$500K and \$30K per month for as long as you live. (WIFE’S HEAD IS DOWN ON THE TABLE).

Mr. B: She just partied a little bit too much last night.

W: (MUMBLING AND SLURRED) Well truthfully I had a couple of drinks just before this mediation...never really went to bed last night. Also took my meds...maybe wasn't the best idea....

WA: Nonsense...I take Oxy's all the time (I have a bad back from the accident), and they never interfere with my work. Here, these will calm you down.

Mr. B: Don't worry. She's fine...she's always like this by the end of the day.

W: Shut up...

WA: Look Crystal...this is a great deal. You need to take this deal!

W: Oh..oh..whatever you think...

WA: Do you want to accept it or not?

W: You decide...whatever is best for me....

MR. B:She'll take it! When do we, I mean when does she get the cash?

WA: She's taking the deal! I want to get paid too!

MC: **QUESTION # 9: CAN AN ATTORNEY MAKE THE DECISION TO SETTLE A CASE ON BEHALF OF HER CLIENT WHICH APPEARS TO BE IMPAIRED AT THE TIME OF SETTLEMENT?**

Answers to #9: Yes. Counsel may make the decision to settle a case on behalf of her client which appears to be mentally impaired at the time of mediation and settlement of a dissolution if the attorney believes that the settlement is in the best interest of her client.

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

The comment following the rule points out that "[i]f the person has no guardian or legal representative, the lawyer often must act as de facto guardian." Also, where the client's interests would best be served by appointment of a guardian, the comment would encourage the attorney to seek such an appointment. However, the comment recognizes that appointment of a legal representative may be traumatic for a client. It states that "[e]valuation of these considerations is a matter of professional judgment on the lawyer's part."

Scene 6

HA: I've been listening to all of these negotiations and this sounds like a great idea for a book. Listen Gotti, I'd like to make you an offer. I'll reduce my fee if you sign over all of your rights to a book deal. I'd also like to tape this for authenticity. Any problem with that?

H: No problem. The only thing is you gotta make me look good and that Wife of mine...as bad as you can. Also if there's a movie I want to pick the actor who plays me...probably DeNiro.

HA: Yeah, and if there's any profits I'll take care of you on the back end.

H: OK, you're on.

MC: **QUESTION # 10: WHAT OBLIGATION DOES AN ATTORNEY HAVE WITH RESPECT TO CONDUCTING A TRANSACTION WITH HIS/HER OWN CLIENT?**

Answer #10: Pursuant to R. Reg. Fla. Bar 4-1.8, "Conflict of Interest; Prohibited and Other Transactions", subsection (a), "Business Transactions with or Acquiring Interest Adverse to Client", provides, "A lawyer is prohibited from entering into a business transaction with a client, except a lien granted by law to secure a lawyer's fee or expenses, unless the transaction is fair and reasonable to the client and is fully disclosed in writing to the client in a manner that can be reasonably understood by the client; the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and the client gives informed consent."

MC: (PROMPTING) (Assuming the Audience understands the above, ask:)

QUESTION #11: WOULD IT HAVE BEEN OK IF THE DEAL HAD BEEN FAIR, DISCLOSED IN WRITING, ADVISED THE CLIENT TO GET

OTHER REPRESENTATION, AND THE CLIENT GAVE INFORMED CONSENT?

Answer #11: No. The litigation must be concluded first pursuant to R. Reg. Fla. Bar 4-1.8, “Conflict of Interest; Prohibited and Other Transactions”, subsection (d), “Acquiring Media Rights”, states, “Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.”

Scene 7

WA: Thank god we settled this. This Agreement gives you everything you wanted and pays me a nice bonus as well. Now you’ll need to initial each page and sign the last page.

W: (HER HEAD DOWN ON THE TABLE) Don’t you think I should read this first?

WA: You don’t need to read all that mumbo jumbo. You’ll never understand it anyway...it’s just a bunch of legalese.

W: OK, but can you explain it me first?

MR. B:Don’t worry honey...we got the money!

W: Shut up!

WA: Look, I’ll go over it with you later. Let’s just get it signed while the going is good before your Husband changes his mind. OK? Here, let me help you sign it. (WIFE’S ATTORNEY HELPS HER BY HOLDING THE PEN).

MC: **QUESTION #12: DID THE WIFE’S ATTORNEY ADEQUATELY EXPLAIN THE MATTER TO THE WIFE?**

- A. No, because the attorney didn’t explain anything when the Wife asked her to.
- B. No, but the Wife was too intoxicated to have understood anyway.
- C. Yes, because the attorney was going to explain things after the mediation.
- D. Yes, so long as the Wife’s level of intoxication impaired her mental abilities, the attorney was acting to safeguard the interests of the Wife, and the attorney was not acting to serve her own self-interest.

Answers to #12: The Answer is D.

R. Reg. Fla. Bar 4-1.4, “Communication”, subsection (b), “Duty to Explain Matters to Client”, provides, “A lawyer shall explain a matter to the extent reasonably necessary to

permit the client to make informed decisions regarding the representation.”); Rule 4-1.14(a)(“ When a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability, or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.”); Rule 1-1.14(b)(“A lawyer may seek the appointment of a guardian or take other protective action with respect to a client only when the lawyer reasonably believes that the client cannot adequately act in the client's own interest.”

Additionally, Fla. St. Bar Assn., FL. Eth. Op. 85-4 (1985) provides, “The inquiring attorney does not have to abandon her client by withdrawing. The attorney should do what she can to safeguard the interests of her client, including making prudent decisions in (sic) behalf of the client. If the attorney believes the settlement between Husband and Wife to be fair, the attorney may help Wife to exercise her rights in the dissolution. If the attorney believes that Wife cannot adequately act in her own interest, and that a guardian may be necessary to safeguard Wife's interests, the attorney may seek appointment of a legal guardian for Wife, even over Wife's objection, if absolutely necessary. The inquiring attorney is in the best position to decide the proper course of action from the suggestions above. In proceeding, the attorney should be careful to respect the rights of her client, to act in the client's best interests, and to avoid overreaching.”

MC: (FOLLOW UP): A FINAL QUESTION TO PONDER, WOULD YOUR ANSWER CHANGE IF THE ATTORNEY FOR THE IMPAIRED CLIENT WAS ALSO IMPAIRED?

Think about R. Reg. Fla. Bar 4-4.1 “Competence”

The End