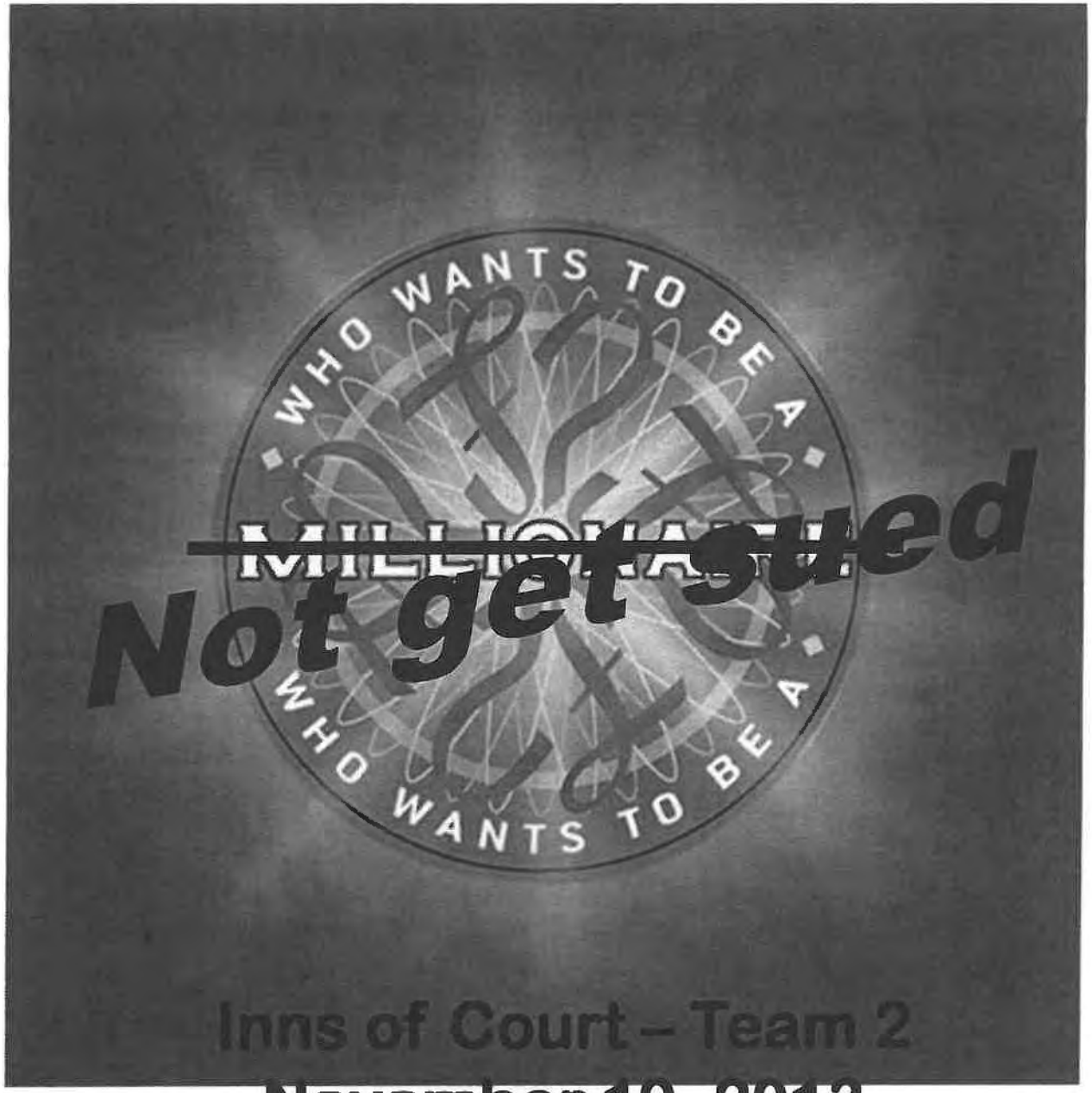


Inns of Court – Team 2

November 19, 2013

**Your client lives in Hong Kong, but has begun spending considerable time in Florida. Since coming to Florida, your client has made many friends, including lawyers from Florida and a lawyer from France. You have no evidence to prove it, but you suspect that your client is getting a cheap second opinion from her lawyer friends based on the sophisticated terminology she is using in her communications, especially given the fact that she has never been involved in litigation.**

**What should you do?**


A. Your client is entitled to obtain a Second opinion, pursuant to Ethics Opinion 02-5.

B. Nothing. There is no harm to your client, because your client is obtaining a second opinion from sources that are required to keep their communications with your client confidential.

C. Terminate your services, pursuant to Rule 4-1.16(b)(2) since your client has "insisted upon taking action you consider repugnant, imprudent, or with which you have a fundamental disagreement."

D. Advise your client of your concerns and explain the consequences of her actions so that your client can make an informed decision regarding her communications with outside parties.

**Answer: D**

*Advise your client of your concerns and explain the consequences of her actions so that your client can make an informed decision*

*regarding her communications with outside parties.*

**Rule 4-2.1 requires a lawyer to exercise independent professional judgment and render candid advice, and Rule 4-1.4 requires a lawyer to explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.**

RULE 4-2.1 ADVISER

4 RULES OF PROFESSIONAL CONDUCT
4-2 COUNSELOR

# *RULE 4-2.1 ADVISER*

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social, and political factors that may be relevant to the client's situation.

## Comment

### Scope of advice

A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.

Advice couched in narrowly legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral adviser as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.

A client may expressly or impliedly ask the lawyer for purely technical advice. When such a request is made by a client experienced in legal matters, the lawyer may accept it at face value. When such a request is made by a client inexperienced in legal matters, however, the lawyer's responsibility as adviser may include indicating that more may be involved than strictly legal considerations.

Matters that go beyond strictly legal questions may also be in the domain of another profession. Family matters can involve problems within the professional competence of psychiatry, clinical psychology, or social work; business matters can involve problems within

the competence of the accounting profession or of financial specialists. Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation. At the same time, a lawyer's advice at its best often consists of recommending a course of action in the face of conflicting recommendations of experts.

**Offering advice**

In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, the lawyer's duty to the client under rule 4-1.4 may require that the lawyer offer advice if the client's course of action is related to the representation. Similarly, when a matter is likely to involve litigation, it may be necessary under rule 4-1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation. A lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.

*[Revised: 05/22/2006]*

RULE 4-1.4 COMMUNICATION

4 RULES OF PROFESSIONAL CONDUCT
4-1 CLIENT-LAWYER RELATIONSHIP

# *RULE 4-1.4 COMMUNICATION*

**(a) Informing Client of Status of Representation.** A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in terminology, is required by these rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows or reasonably should know that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

**(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.

**Comment**

Reasonable communication between the lawyer and the client is necessary for the client to effectively participate in the representation.

**Communicating with client**

If these rules require that a particular decision about the representation be made by the client, subdivision (a)(1) requires that the lawyer promptly consult with and secure the client's consent prior to taking action unless prior discussions with the client have resolved what action the client wants the lawyer to take. For example, a lawyer who receives from opposing

counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case must promptly inform the client of its substance unless the client has previously indicated that the proposal will be acceptable or unacceptable or has authorized the lawyer to accept or to reject the offer. See rule 4-1.2(a).

Subdivision (a)(2) requires the lawyer to reasonably consult with the client about the means to be used to accomplish the client's objectives. In some situations – depending on both the importance of the action under consideration and the feasibility of consulting with the client – this duty will require consultation prior to taking action. In other circumstances, such as during a trial when an immediate decision must be made, the exigency of the situation may require the lawyer to act without prior consultation. In such cases the lawyer must nonetheless act reasonably to inform the client of actions the lawyer has taken on the client's behalf. Additionally, subdivision (a)(3) requires that the lawyer keep the client reasonably informed about the status of the matter, such as significant developments affecting the timing or the substance of the representation.

A lawyer's regular communication with clients will minimize the occasions on which a client will need to request information concerning the representation. When a client makes a reasonable request for information, however, subdivision (a)(4) requires prompt compliance with the request, or if a prompt response is not feasible, that the lawyer, or a member of the lawyer's staff, acknowledge receipt of the request and advise the client when a response may be expected.

**Explaining matters**

The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so.

Adequacy of communication depends in part on the kind of advice or assistance that is involved. For example, when there is time to explain a proposal made in a negotiation, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that are likely to result in significant expense or to injure or coerce others. On the other hand, a lawyer ordinarily will not be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests and the client's overall requirements as to the character of

representation. In certain circumstances, such as when a lawyer asks a client to consent to a representation affected by a conflict of interest, the client must give informed consent, as defined in terminology.

Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from mental disability. See rule 4-1.14. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization. See rule 4-1.13. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client.

**Withholding information**

In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer's own interest or convenience or the interests or convenience of another person. Rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client. Rule 4-3.4(c) directs compliance with such rules or orders.

*[Revised: 05/22/2006]*

Opposing counsel learns that you contacted the manager of Kwik-E-Mart, a key witness in the slip and fall case filed by Ms. Ban A. Peel against his client, Kwik-E-Mart. Opposing counsel has threatened to report you to the Florida Bar and to file a motion to disqualify your firm from the case because of the fact that you called the manager to get his statement. The manager moved to Springfield shortly after the accident and now works for a man named Moe at the local tavern. You confirmed the manager was not represented by opposing counsel and only asked questions about what the manager observed at the time of the accident, making sure the manager knew and understood that you represented Ms. Ban A. Peel. What should you do?


A. Run home to be sure you don't miss the next episode of The Simpsons.

B. Inform Ms. Ban A. Peel of your wrong actions and help her find new counsel.

C. Reach an agreement with opposing counsel on withdrawing from the case and destroying the manager's statement.

D. Provide a copy of the manager's statement to opposing counsel and contact your E&O carrier.

**Answer: A**

*Run home to be sure you don't miss the next episode of The Simpsons.*

**An attorney may communicate with former managers and former employees of the adverse party corporation without seeking and obtaining consent of the corporation's attorney. Ethics Opinion 88-14. It is ethically permissible for the inquiring attorney to contact former managers and other former employees of the opposing party without obtaining permission from the corporation's attorney unless those former employees are in fact represented by the corporation's attorney. The inquiring attorney should not inquire into matter that are within the corporation's attorney/client privilege (e.g., asking a former manager to relate what he had told the corporation's attorney concerning the subject matter of the representation).**

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**OPINION 88-14**
**(March 7, 1989)**

A plaintiff's attorney may communicate with former managers and former employees of a defendant corporation without seeking and obtaining consent of corporation's attorney.

Note: This opinion was approved by the Board of Governors at its March 1989 meeting. While opinion 88-14 permits certain direct contacts with former employees of a represented corporation, it does not purport to address the possibility of disqualification in litigation. See H.B.A. Management, Inc. v. Estate of Schwartz , 693 So.2d 541 (Fla. 1997). But see, Rentclub v. Transamerica , 811 F.Supp. 651 (M.D. Fla. 1992), aff'd 43 F.3d 1439 (11th Cir. 1995).

**RPC:** 44.2; ABA Model 4.2

**CPR:** DR 7104(A)(1)

**Opinions:** Alaska 883, Colorado 69, Illinois 8512, Los Angeles Co. 369, Maryland 8613, Massachusetts 827, Michigan CI597, N.Y. City 8046, N.Y. County 528, Virginia 533, Wisconsin E8210

**Case:** *Wright v. Group Health Hospital* , 691 P.2d 564 (Wash. 1984)

**Statutes:** *F.S.* 90.803(18)(e); Florida Evidence Code

**Misc:** Fed.R.Evid. 801(d)(2)(D)

The inquiring attorney's law firm represents the plaintiffs in a civil action against a corporation. The attorneys wish to have ex parte interviews with former employees of the defendant corporation who were employed by the corporation during the period when the actions or decisions on which the suit is based occurred. The former employees may include some who had managerial responsibilities and some whose acts or omissions during their employment might be imputed to the corporation for purposes of civil liability. As is usually the case, the defendant corporation objects to ex parte contacts with its former employees.

The issue is whether Rule 44.2, Rules Regulating The Florida Bar, proscribes the plaintiffs' attorneys from contacting former managers and other former employees of the defendant corporation except with the permission of the corporation's attorneys. As regards former managers and other former employees who have not maintained any ties with the corporation-who are no longer part of the corporate entity - and who have not sought or consented to be represented in the matter by the corporation's attorneys, the answer must be in the negative.

Rule 44.2 is substantially the same as its predecessors in the Code of Professional Responsibility (DR 7104(A)(1)) and the earlier Canons of Professional Ethics (Canon 9). (The American Bar Association's "code comparison" for Model Rule 4.2 states that the rule is "substantially identical" to DR 7104(A)(1).)

The rule forbids a lawyer to communicate about the subject of the representation with a person the lawyer knows to be represented in the matter unless the lawyer obtains the permission of the person's counsel. The comment to the rule states that in the case of organizations (including corporations), the rule prohibits ex parte communications with "persons having a managerial responsibility on behalf of the organization and with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal

liability or whose statement may constitute an admission on the part of the organization." The comment further states that if an agent or employee of the organization is represented by his or her own counsel in the matter, then it is the consent of that lawyer-not the organization's lawyer-that must be obtained.

Nothing in Rule 44.2 or the comment states whether the rule applies to communications with former managers and other former employees. To the extent that the comment implies that the rule does apply to these individuals, it is contrary to ethics committees' interpretation of the rule.

Rule 44.2 cannot reasonably be construed as requiring a lawyer to obtain permission of a corporate party's attorney in order to communicate with former managers or other former employees of the corporation unless such individuals have in fact consented to or requested representation by the corporation's attorney. A former manager or other employee who has not maintained ties to the corporation (as a litigation consultant, for example) is no longer part of the corporate entity and therefore is not subject to the control or authority of the corporation's attorney. In many cases it may be true that the interests of the former manager or employee are not allied with the interests of the corporation. In such cases the conflict of interests would preclude the corporation's attorney from actually representing the individual and therefore would preclude the corporation's attorney from controlling access to the individual. As the comment indicates with regard to current employees, if a former manager or former employee is represented in the matter by his personal attorney, permission of that attorney must be obtained for ex parte contacts, including contacts by the corporation's attorney.

A former manager or employee is no longer in a position to speak for the corporation. Further, under both the federal and the Florida rules of evidence, statements that might be made by a former manager or other former employee during an ex parte interview would not be admissible against the corporation. Both Rule 801(d)(2)(D), Federal Rules of Evidence, and Section 90.803(18)(e), Florida Evidence Code, provide that a statement by an agent or servant of a party is admissible against the party if it concerns a matter within the scope of the agency or employment and is *made during the existence of the agency or employment relationship* .

This Committee has not previously had occasion to issue an opinion on the question of communicating with former managers and employees but, as indicated above, bar ethics committees in a number of states have done so. The clear consensus is that former managers and other former employees are not within the scope of the rule against ex parte contacts. Alaska Bar Opinion 883 (6/7/88) (Former employees are no longer part of corporate entity and no longer can act or speak on behalf of corporation; opposing lawyer therefore may contact former employees, including former members of corporation's control group who dealt with subject matter of litigation, but may not inquire into privileged communications); Colorado Bar Opinion 69 (Revised) (6/20/87) (Former employee cannot bind corporation as matter of law; lawyer may interview opposing party's former employees with regard to all matters except communications within corporation's attorneyclient privilege); Illinois Bar Opinion 8512 (4/4/86 ) (Former employees, including those who were part of corporation's control group, may be contacted without permission of corporate counsel; direct communications with former control group employees may elicit information adverse to corporation, but that direct contact no more deprives corporation of benefit of counsel than does direct communication with any potential witness); Los Angeles County, Calif., Bar Opinion 369 (11/23/77) (Although ethical dangers may be posed if rule prohibiting ex parte contacts is not extended to former controlling employees, no authority is found to support such extension); Maryland Bar Opinion 8613 (8/30/85) (Lawyer may communicate with former employee of adverse corporate party if former employee is not represented by counsel).

Also, Massachusetts Bar Opinion 827 (6/23/82) (Lawyer may communicate with former employees of

corporate defendant regarding matters within scope of their employment; former employees enjoy no current agency relationship that is being served by corporate counsel's representation); Michigan Bar Opinion CI597 (12/22/80) (Plaintiff's attorney may communicate with prospective witness, who is former employee of corporate defendant, on subject matter of representation if employee is unrepresented); New York City Bar Opinion 8046 (Former employees are no longer part of corporate entity and may be contacted ex parte); New York County Bar Opinion 528 (1965) (Although direct communication with any current manager or employee of defendant corporation is improper, restriction does not apply to communications with former employees); Virginia Bar Opinion 533 (12/16/83) (Lawyer may communicate directly with former officers, directors and employees of adversary corporation on subject of pending lit igation unless lawyer has reason to know those witnesses are represented by counsel); Wisconsin Bar Opinion E8210 (12/82) (Lawyer may contact former employee of opposing party to obtain material information even though former employee was managing agent, if former employee has severed all ties with corporation and therefore is not in position to commit corporation).

See *Wright v. Group Health Hospital* , 691 P.2d 564 (Wash. 1984). In *Wright* , the Washington Supreme Court ruled that because former employees cannot possibly speak for a defendant corporation, the rule against communicating with adverse parties does not apply. The court found no reason to distinguish between former employees who witnessed an event and those whose act or omission caused the event. The court said the purpose of the communication rule is not to protect a corporate party from revelation of prejudicial facts, but rather to preclude interviewing of employees who have authority to bind the corporation.

As stated above, it is ethically permissible for the inquiring attorney to contact former managers and other former employees of the opposing party without obtaining permission from the corporation's attorney unless those former employees are in fact represented by the corporation's attorney. But as indicated by some of the ethics committees cited above, the attorney should not inquire into matters that are within the corporation's attorneyclient privilege (e.g., asking a former manager to relate what he had told the corporation's attorney concerning the subject matter of the representation).

*[Revised: 08-24-2011]*

Pat Paralegal is a real star. Without Pat Paralegal, Attorney Squarepants would be lost at sea. Attorney Squarepants is concerned about losing his trusted paralegal, so, as an incentive, Attorney Squarepants is considering providing Pat Paralegal with a bonus based on the number of billable hours Pat Paralegal works on every case that Attorney Squarepants handles for Kris T. Krab, who is constantly involved in litigation against his nemesis, P. Lankton.

Should Attorney Squarepants provide the bonus?


A. Yes, because Attorney Squarepants is not sharing a portion of his attorney fee with Pat.

B. Yes, because the Florida Bar does not regulate payments that may or may not be made to staff and paralegals.

C. No, Pat Paralegal is luck to have a job in this economy.

D. No, Attorney Squarepants cannot give a bonus based solely on the number of hours worked by Pat Paralegal.

Answer: D

***No, Attorney Squarepants cannot give a bonus based solely on the number of hours worked by Pat Paralegal.***

**Ethics Opinion 02-1. Rule 4-5.4(a) provides that a lawyer shall not share legal fees with a nonlawyer. Bonuses may be paid to a nonlawyer employee based on their extraordinary efforts on a particular case or over a specified period. Unless every single hour incurred by the legal assistant was truly extraordinary effort, it would be impermissible for the inquiring attorney to pay a bonus to his legal assistant calculated by the hour. However, the number of hours incurred by the legal assistant on the particular matter or over a specified time period may be considered by the lawyer as one of the factors in determining the legal assistant's bonus.**

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# ETHICS, OPINION 02-1

**PROFESSIONAL ETHICS OF THE FLORIDA BAR**
**OPINION 02-1**
**January 11, 2002**

An attorney may not give a bonus to a nonlawyer employee solely based on the number of hours worked by the employee.

**RPC:** 4-5.4

A member of The Florida Bar has requested an advisory ethics opinion. The operative facts as presented in the inquiring attorney's letter and telephone call are as follows. Specifically, the attorney inquires:

May I bonus a non-lawyer employee based on the number of hours the non-lawyer employee has worked on a case for a particular client?

As a family law attorney I do virtually nothing at a flat rate and certainly no work is done by percentage. I bill my time and the time of my legal assistant at separate hourly rates which are itemized on the client's bill and described in the written fee agreement with the client. I would like to bonus my employees based on their own productivity. I would not be utilizing any portion of the fees received by me for that purpose.

Although the attorney did not specifically state it in the written request, during the hotline call the attorney proposed the following: If the legal assistant works ten hours on a case and the attorney bills the client ten hours of legal assistant time, may the attorney pay a bonus to the legal assistant based on a certain rate times ten hours?

Rule 4-5.4(a), Florida Rules of Professional Conduct, provides that a lawyer or law firm "shall not share legal fees with a nonlawyer." Rule 4-5.4(a)(4), specifically deals with the issue of "bonus" payments to nonlawyer personnel in a law firm. The rule provides as follows:

**(a) Sharing Fees with Nonlawyers.** A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

* * * * *

(4) bonuses may be paid to nonlawyer employees based on their extraordinary efforts on a particular case or over a specified time period, provided that the

payment is not based on the generation of clients or business and is not calculated as a percentage of legal fees received by the lawyer or law firm.

Pursuant to Rule 4-5.4(a)(4), the inquirer may pay the firm's legal assistant a bonus, but that bonus cannot be based in any way upon a percentage of fees generated by the legal assistant or the firm and cannot be based upon generating clients for the firm. Bonuses to non-lawyer employees cannot be calculated as a percentage of the firm's fees or of the gross recovery in cases on which the non-lawyer worked. *See* Florida Ethics Opinion 89-4 (law firm cannot pay to firm marketing manager a bonus based upon percentage of business she generates for the firm). Rule 4-7.2(c)(8), Florida Rules of Professional Conduct, further prohibits attorneys from giving "anything of value to a person for recommending the lawyer's services. . . . "

Based on the rules and opinion, the inquiring attorney may pay the legal assistant a bonus based on the legal assistant's extraordinary efforts on a particular case or over a specific period of time. While the number of hours the legal assistant works on a particular case or over a specific period of time is one of several factors that can be considered in determining a bonus for the legal assistant, it is not the sole factor to be considered. It must be remembered that the rule allows a bonus to be paid to a nonlawyer based on "extraordinary efforts" either in a particular case or over a specific time period. A bonus which is solely calculated on the number of hours incurred by the legal assistant on the matter is tantamount to a finding that every single hour incurred was an "extraordinary effort", and such a finding is very unlikely to be true. Therefore, unless every single hour incurred by the legal assistant was a truly extraordinary effort, it would be impermissible for the inquiring attorney to pay a bonus to his legal assistant calculated in the manner the inquiring attorney has proposed. However, the number of hours incurred by the legal assistant on the particular matter or over a specified time period may be considered by the lawyer as one of the factors in determining the legal assistant's bonus.

*[Revised: 08-24-2011]*

4 RULES OF PROFESSIONAL CONDUCT
4-5 LAW FIRMS AND ASSOCIATIONS

# *RULE 4-5.4 PROFESSIONAL INDEPENDENCE OF A LAWYER*

**(a) Sharing Fees with Nonlawyers.** A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

(1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to 1 or more specified persons;

(2) a lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that proportion of the total compensation that fairly represents the services rendered by the deceased lawyer;

(3) a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, in accordance with the provisions of rule 4-1.17, pay to the estate or other legally authorized representative of that lawyer the agreed upon purchase price;

(4) bonuses may be paid to nonlawyer employees for work performed, and may be based on their extraordinary efforts on a particular case or over a specified time period. Bonus payments shall not be based on cases or clients brought to the lawyer or law firm by the actions of the nonlawyer. A lawyer shall not provide a bonus payment that is calculated as a percentage of legal fees received by the lawyer or law firm; and

(5) a lawyer may share court-awarded fees with a nonprofit, pro bono legal services organization that employed, retained, or recommended employment of the lawyer in the matter.

**(b) Qualified Pension Plans.** A lawyer or law firm may include nonlawyer employees in a qualified pension, profit-sharing, or retirement plan, even though the lawyer's or law firm's contribution to the plan is based in whole or in part on a profit-sharing arrangement.

**(c) Partnership with Nonlawyer.** A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

**(d) Exercise of Independent Professional Judgment**. A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

**(e) Nonlawyer Ownership of Authorized Business Entity**. A lawyer shall not practice with or in the form of a business entity authorized to practice law for a profit if:

(1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration; or

(2) a nonlawyer is a corporate director or officer thereof or occupies the position of similar responsibility in any form of association other than a corporation; or

(3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

## Comment

The provisions of this rule express traditional limitations on sharing fees. These limitations are to protect the lawyer's professional independence of judgment. Where someone other than the client pays the lawyer's fee or salary, or recommends employment of the lawyer, that arrangement does not modify the lawyer's obligation to the client. As stated in subdivision (d), such arrangements should not interfere with the lawyer's professional judgment.

This rule also expresses traditional limitations on permitting a third party to direct or regulate the lawyer's professional judgment in rendering legal services to another. See also rule 4-1.8(f) (lawyer may accept compensation from a third party as long as there is no interference with the lawyer's independent professional judgment and the client gives informed consent).

The prohibition against sharing legal fees with nonlawyer employees is not intended to prohibit profit-sharing arrangements that are part of a qualified pension, profit-sharing, or retirement plan. Compensation plans, as opposed to retirement plans, may not be based on legal fees.

*[Revised: 05/22/2006]*

**A prospective client wants to retain your services to take over as lead counsel on a case that has been pending in Collier County for several months. The prospective client has demanded a complete case strategy and analysis within 24 hours of providing you with a copy of the complaint. You respond, asking for more time and more information on the case. The prospective client tells you that your inquiry is unprofessional and that, if you are not able to respond within 24 hours, they will contact the Florida Bar hotline, since you are making it impossible for them to win their case. Do you:**


A. Pull whatever documents you can find online and provide an analysis with the proper caveats within 24 hours since, after all, the prospective client has shared confidential information.

B. Tell the prospective client to go to Mercury or some other hot destination.

C. Tell the prospective client that his demands are unreasonable and promptly send a non-engagement letter.

D. Provide the case strategy and analysis letter as soon as you are able to do so.

**Answer: C**

***Tell the prospective client that his demands are unreasonable and promptly send a non-engagement letter.***

**Rules Regulating the Florida Bar, 4-1.16 and 4-1.18. Rule 4-1.18 discusses the duties to a prospective client. The Florida Bar advises that "[I]f you decide to decline representation after research or investigation, you should protect yourself and your client by (1) promptly advising the client in writing of your decision not to take the case or matter; (2) be certain to inform the client of his or her right to contact another lawyer for a second opinion; and (3) inform the client that time lines may bar a claim and that his or her prompt attention is required. Disengagement and non-engagement letters are especially critical when a lawyer decides not to continue past a specific stage in the case."**

RULE 4-1.16 DECLINING OR TERMINATING REPRESENTATION

## 4 RULES OF PROFESSIONAL CONDUCT
## 4-1 CLIENT-LAWYER RELATIONSHIP

# *RULE 4-1.16 DECLINING OR TERMINATING REPRESENTATION*

**(a) When Lawyer Must Decline or Terminate Representation.** Except as stated in subdivision (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the Rules of Professional Conduct or law;

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client;

(3) the lawyer is discharged;

(4) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent, unless the client agrees to disclose and rectify the crime or fraud; or

(5) the client has used the lawyer's services to perpetrate a crime or fraud, unless the client agrees to disclose and rectify the crime or fraud.

**(b) When Withdrawal Is Allowed.** Except as stated in subdivision (c), a lawyer may withdraw from representing a client if:

(1) withdrawal can be accomplished without material adverse effect on the interests of the client;

(2) the client insists upon taking action that the lawyer considers repugnant, imprudent, or with which the lawyer has a fundamental disagreement;

(3) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(4) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(5) other good cause for withdrawal exists.

**(c) Compliance With Order of Tribunal.** A lawyer must comply with applicable law requiring notice or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

**(d) Protection of Client's Interest.** Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interest, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled, and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers and other property relating to or belonging to the client to the extent permitted by law.

**Comment**

A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest, and to completion. Ordinarily, a representation in a matter is completed when the agreed-upon assistance has been concluded. See rule 4-1.2, and the comment to rule 4-1.3.

**Mandatory withdrawal**

A lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that is illegal or violates the Rules of Professional Conduct or law. The lawyer is not obliged to decline or withdraw simply because the client suggests such a course of conduct; a client may make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation. Withdrawal is also mandatory if the client persists in a course of action that the lawyer reasonably believes is criminal or fraudulent, unless the client agrees to disclose and rectify the crime or fraud. Withdrawal is also required if the lawyer's services were misused in the past even if that would materially prejudice the client.

When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority. See also rule 4-6.2. Similarly, court approval or notice to the court is often required by applicable law before a lawyer withdraws from pending litigation. Difficulty may be encountered if withdrawal is based on the client's demand that the

lawyer engage in unprofessional conduct. The court may request an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient. Lawyers should be mindful of their obligations to both clients and the court under rules 4-1.6 and 4-3.3.

**Discharge**

A client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services. Where future dispute about the withdrawal may be anticipated, it may be advisable to prepare a written statement reciting the circumstances.

Whether a client can discharge appointed counsel may depend on applicable law. A client seeking to do so should be given a full explanation of the consequences. These consequences may include a decision by the appointing authority that appointment of successor counsel is unjustified, thus requiring the client to be self-represented.

If the client is mentally incompetent, the client may lack the legal capacity to discharge the lawyer, and in any event the discharge may be seriously adverse to the client's interests. The lawyer should make special effort to help the client consider the consequences and may take reasonably necessary protective action as provided in rule 4-1.14.

**Optional withdrawal**

A lawyer may withdraw from representation in some circumstances. The lawyer has the option to withdraw if it can be accomplished without material adverse effect on the client's interests. The lawyer also may withdraw where the client insists on taking action that the lawyer considers repugnant, imprudent, or with which the lawyer has a fundamental disagreement.

A lawyer may withdraw if the client refuses to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees or court costs or an agreement limiting the objectives of the representation.

**Assisting the client upon withdrawal**

Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client. The lawyer may retain papers and other property as security for a fee only to the extent permitted by law.

**Refunding advance payment of unearned fee**

Upon termination of representation, a lawyer should refund to the client any advance payment of a fee that has not been earned. This does not preclude a lawyer from retaining any reasonable nonrefundable fee that the client agreed would be deemed earned when the lawyer commenced the client's representation. See also rule 4-1.5.

*[Revised: 05/22/2006]*

RULE 4-1.18 DUTIES TO PROSPECTIVE CLIENT

4 RULES OF PROFESSIONAL CONDUCT
4-1 CLIENT-LAWYER RELATIONSHIP

# *RULE 4-1.18 DUTIES TO PROSPECTIVE CLIENT*

**(a) Prospective Client.** A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

**(b) Confidentiality of Information.** Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as rule 4-1.9 would permit with respect to information of a former client.

**(c) Subsequent Representation.** A lawyer subject to subdivision (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be used to the disadvantage of that person in the matter, except as provided in subdivision (d). If a lawyer is disqualified from representation under this rule, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in subdivision (d).

**(d) Permissible Representation.** When the lawyer has received disqualifying information as defined in subdivision (c), representation is permissible if:

(1) both the affected client and the prospective client have given informed consent, confirmed in writing; or

(2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and

(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(ii) written notice is promptly given to the prospective client.

## Comment

Prospective clients, like clients, may disclose information to a lawyer, place documents or other property in the lawyer's custody, or rely on the lawyer's advice. A lawyer's discussions with a prospective client usually are limited in time and depth and leave both the prospective client and the lawyer free (and the lawyer sometimes required) to proceed no further. Hence, prospective clients should receive some but not all of the protection afforded clients.

Not all persons who communicate information to a lawyer are entitled to protection under this rule. A person who communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, is not a "prospective client" within the meaning of subdivision (a).

It is often necessary for a prospective client to reveal information to the lawyer during an initial consultation prior to the decision about formation of a client-lawyer relationship. The lawyer often must learn such information to determine whether there is a conflict of interest with an existing client and whether the matter is one that the lawyer is willing to undertake. Subdivision (b) prohibits the lawyer from using or revealing that information, except as permitted by rule 4-1.9, even if the client or lawyer decides not to proceed with the representation. The duty exists regardless of how brief the initial conference may be.

In order to avoid acquiring disqualifying information from a prospective client, a lawyer considering whether to undertake a new matter should limit the initial interview to only such information as reasonably appears necessary for that purpose. Where the information indicates that a conflict of interest or other reason for non-representation exists, the lawyer should so inform the prospective client or decline the representation. If the prospective client wishes to retain the lawyer, and if consent is possible under rule 4-1.7, then consent from all affected present or former clients must be obtained before accepting the representation.

A lawyer may condition conversations with a prospective client on the person's informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter. See terminology for the definition of informed consent. If the agreement expressly so provides, the prospective client may also consent to the lawyer's subsequent use of information received from the prospective client.

Even in the absence of an agreement, under subdivision (c), the lawyer is not prohibited from representing a client with interests adverse to those of the prospective client in the same or a substantially related matter unless the lawyer has received from the prospective client

information that could be used to the disadvantage of the prospective client in the matter.

Under subdivision (c), the prohibition in this rule is imputed to other lawyers as provided in rule 4-1.10, but, under subdivision (d)(1), the prohibition and its imputation may be avoided if the lawyer obtains the informed consent, confirmed in writing, of both the prospective and affected clients. In the alternative, the prohibition and its imputation may be avoided if the conditions of subdivision (d)(2) are met and all disqualified lawyers are timely screened and written notice is promptly given to the prospective client. See terminology (requirements for screening procedures). Subdivision (d)(2)(i) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

Notice, including a general description of the subject matter about which the lawyer was consulted, and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

The duties under this rule presume that the prospective client consults the lawyer in good faith. A person who consults a lawyer simply with the intent of disqualifying the lawyer from the matter, with no intent of possibly hiring the lawyer, has engaged in a sham and should not be able to invoke this rule to create a disqualification.

For the duty of competence of a lawyer who gives assistance on the merits of a matter to a prospective client, see rule 4-1.1. For a lawyer's duties when a prospective client entrusts valuables or papers to the lawyer's care, see chapter 5, Rules Regulating The Florida Bar.

*[Revised: 02/01/2010]*

A client comes to your office to talk about a case. In your conference room his chair collapses, due to a defective joint, he falls to the ground, injures his back and sues you.

Which is correct?


A. His claim is barred because what occurs between a client and his attorney is privileged.

B. His claim is barred because there was no previous problems with the chair and therefore no notice of any defect.

C. His claim is barred because the chair was purchased new and was used without incident for five years.

D. His claim is not barred because an inspection of the chair would have revealed the defect.

**Answer: D**

***His claim is not barred because an inspection of the chair would have revealed the defect.***

***Friedrich v. Fetterman and Associates*** **, 38 Fla. L. Weekly S. 768a, 2013 WL 5745617 (Fla. 2013)**

# The Appellate Strategist : Appellate Lawyers & Attorneys for Updates on Trial Consultations, Amicus Briefs & Punitive Damage Awards

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## Florida High Court Reinstates $1.2 million Judgment Against Law Firm of Prospective Client

Posted on November 8, 2013 by Robert C. Weill

On October 24, 2013, the Florida Supreme Court reinstated a $1.2 million final judgment awarded to a prospective client of a personal injury law firm who sat in a chair that collapsed during a consultation at the firm. *See Friedrich v. Fetterman & Assocs., P.A.*, No. SC11-2188, 2013 WL 5745617 (Fla. Oct. 24, 2013) (to read the slip opinion, click here). The issue in the case centered around whether plaintiff's expert's testimony was legally sufficient to establish causation. In finding that it was legally sufficient, the supreme court quashed the Fourth District Court of Appeal's decision vacating the judgment.

The facts are straightforward. Following a car accident, Robert Friedrich met with an attorney at the personal injury firm of Fetterman & Associates, P.A. regarding possible legal representation. The conference room chair Friedrich was sitting on collapsed, causing Friedrich injuries. Friedrich in turn sued Fetterman for negligently failing to warn him of the chair's dangerous condition.

At trial, it was undisputed that the chair had a defect that was not visible to the naked eye and that none of the chairs in the conference room had any prior problems. Plaintiff's expert testified that he inspects his own chairs every six months by performing a "flex test." He also testified that it was possible to inspect a chair today, find no problem, and have it fail tomorrow. As for the chair in question, he testified that a hands-on inspection of it before the accident *would have found* the defect. Fetterman's expert, on the other hand, testified that the best test for a chair is to sit on it and that a reasonable inspection, including a flex test, would *not* have revealed the defect in the subject chair.

The trial court denied Fetterman's multiple motions for a directed verdict and the jury returned a verdict in favor of Friedrich. On appeal, the Fourth District reversed the trial court and ordered that a directed verdict be entered in favor of Fetterman. The supreme court quashed the Fourth District's decision, concluding that it "impermissibly reweighed the evidence and substituted its own evaluation of the evidence in place of that of the jury." The Court concluded that there was sufficient proof to support the jury's finding that the defendant's negligence "probably caused" the plaintiff's injury.

Chief Justice Polston dissented with an opinion and Justice Canady concurred in the dissent. As a

threshold issue, Justice Polston believed that there was no basis for the Court to exercise conflict jurisdiction over the case. He next stated that the majority failed to mention two critical aspects of the testimony of plaintiff's expert that he believed supported the directed verdict: (1) he testified that he had no opinion as to how quickly the failure in the chair occurred and that the weakened condition could have manifested in seconds, minutes, hours, days, or weeks before the accident; and (2) he conceded that the defect may not have been detectable by an inspection until just before the collapse and offered "no time frame concerning *how long* before the accident such testing would have been effective."

The Court's decision will not be final until the time to file a motion for rehearing expires or until the Court decides any filed motions for hearing. To check on the current status of this case, please click here.

Tags: Florida, Florida

**Comments (0)** Read through and enter the discussion with the form at the end

**Section 626.8743(8), Fla. Stat., requires an attorney who serves as a title or real estate settlement agent to maintain all funds related to such transactions in a trust account. The attorney must allow title insurers to audit that account. John Doe, Esq. has such an account, which contains funds connected to multiple clients involving numerous title insurers. He is concerned that allowing an audit would expose confidential client information to title insurers that have no connection to the particular client.**

**What should he do?**


A. Allow the audit because the statute trumps Florida Bar rules.

B. Refuse to allow the audit to protect client confidentiality.

C. Allow the audit because the client has consented.

D. Refuse the audit because, even though the client in question has provided consent, you do not have the informed consent of every client that has funds in the account.

## Answer: D

*Refuse the audit because, even though the client in question has provided consent, you do not have the informed consent of every client that has funds in the account.*

### Proposed Advisory Opinion 12-4 (August 21, 2013)

**Rule 4-1.6 (a) would require that a lawyer obtain each client's informed consent before permitting multiple title insurers to audit a single trust account, even if that separate trust account was devoted exclusively to holding funds for clients' real estate and title transactions, unless the lawyer reasonably concludes that the audits are necessary to serve the interests of the affected clients and the affected clients have not specifically prohibited disclosure of the information.**

**...**

**If the lawyer concludes that permitting the audits by multiple title insurers is not necessary to serve affected clients' interests or if affected clients have instructed the lawyer not to disclose the information, the lawyer should consider maintaining: 1) a separate trust account for each different title insurer used by that lawyer or law firm, or 2) one separate trust account and obtain each client's informed consent to disclose information regarding their transactions to multiple title insurers for their audits, or 3) one separate trust account and obtain consent from the various title insurers to audit only the information related to transactions that the title insurer is underwriting. With respect to number 2 in the preceding sentence, the lawyer may obtain the client's informed consent in the sales contract or in a separate document executed by the client prior to or at the closing.**

**PROFESSIONAL ETHICS OF THE FLORIDA BAR**
**Proposed Advisory Opinion 12-4**
**(August 21, 2013)**

A member of The Florida Bar has requested an advisory ethics opinion. The legislature adopted section 626.8473 (8), Florida Statutes, effective July 1, 2012, which states:

> An attorney shall deposit and maintain all funds received in connection with transactions in which the attorney is serving as a title or real estate settlement agent into a separate trust account that is maintained exclusively for funds received in connection with such transactions and permit the account to be audited by its title insurers, unless maintaining funds in the separate account for a particular client would violate applicable rules of The Florida Bar.

The inquirer asks for guidance regarding compliance with both the statute and the applicable Rules Regulating The Florida Bar.[1] The inquirer's firm employs numerous attorneys who handle real estate transactions and work with multiple title insurers. Some real estate transactions involve no title insurance. The inquirer asks two questions which will be addressed in turn:

> **Question 1: Is an attorney permitted to allow a title insurance company to audit the firm's special trust account used exclusively for real estate and title transactions without the informed consent of the clients who have no involvement with that particular title insurance company?**

As explained below, a lawyer is not permitted to allow a title insurance company to audit the special trust account used exclusively for real estate and title transactions if the special trust account holds funds for client transactions that are unrelated to the title insurer requesting the audit, unless the affected clients give informed consent or an exception to the confidentiality rule applies.

Rule 4-1.6 (a), Rules Regulating The Florida Bar, prohibits a lawyer from voluntarily disclosing any information regarding a representation without a client's informed consent, unless one of the exceptions to the rule applies, and states:

> ***Rule 4-1.6 Confidentiality of Information***
>
> **(a) Consent Required to Reveal Information.** A lawyer shall not reveal information relating to representation of a client except as stated in subdivisions (b), (c), and (d), unless the client gives *informed consent.*

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[1] Trust accounts established pursuant to section 626.8473 (8), Florida Statutes (2012), must comply with the Interest on Trust Accounts (IOTA) Program, Rule 5-1.1 (g), Rules Regulating The Florida Bar. The rule requires that lawyers place short term or nominal funds in an IOTA trust account. Lawyers should place funds that are not short term or nominal in a separate trust account with interest accruing to the benefit of the client or third party who owns the funds.

Emphasis added.

The Preamble of the Rules of Professional Conduct defines *informed consent* as follows:

> "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

The comment to Rule 4-1.6 further explains that confidentiality is fundamental to the trust that is the hallmark of the attorney-client relationship and emphasizes the broad scope of the rule:

> 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.*

Emphasis added.

The confidentiality rule is limited by several exceptions that would permit a lawyer to voluntarily disclose a client's information without informed consent. The only exception relevant to the present inquiry is Rule 4-1.6 (c) (1), which permits a lawyer to disclose information without a client's informed consent if the lawyer reasonably concludes that the disclosure is necessary to serve the client's interest, unless the client has specifically instructed otherwise.

Florida Ethics Opinion 93-5 acknowledges that a lawyer must obtain a client's consent[2] to permit a title insurer to audit the lawyer's general trust account, but advises that if the lawyer uses a special trust account exclusively for transactions in which the lawyer acts as the title or real estate settlement agent on behalf of that insurer, the exception under Rule 4-1.6 (c) (1) may permit the audit without a client's informed consent. The committee recognized that a client's interest is served if the title insurer's audit ensures the safety of the funds held in the special trust account and facilitates a satisfactory conclusion for clients whose funds are held in the account:

> An attorney who is an agent for a title insurance company may not permit the title insurer to audit the attorney's general trust account without consent of the affected clients. *The attorney, however, need not obtain client consent before permitting the insurer to audit a special trust account used exclusively for transactions in which the attorney acts as the title or real estate settlement agent.*
> . . . .

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[2]Rule 4-1.6 (a), Rules Regulating The Florida Bar (1994), did not require *informed* consent, as is required by the current applicable rule, and states: "A lawyer shall not reveal information relating to a representation of a client except as stated in subdivisions (b), (c), and (d), *unless the client consents after disclosure* to the client." Emphasis added. The term "disclosure" was not defined in the 1994 Preamble.

> . . . Subdivision (c)(1) authorizes an attorney to disclose confidential information "to serve the client's interest unless it is information the client specifically requires not to be disclosed." *The committee recognizes that audits by title insurance underwriters are necessary to ensure the safety of the funds deposited in the special trust account and thus facilitate a satisfactory conclusion for those whose funds are placed in the account.* Consequently, if a special trust account is used exclusively for transactions in which the attorney is acting as the title or real estate settlement agent, the attorney ethically may permit the proposed audits unless the attorney has been specifically directed otherwise by the client.

Florida Ethics Opinion 93-5 (emphasis added).

The facts of the present inquiry are distinguishable from those addressed in Florida Ethics Opinion 93-5. The inquiry addressed in Opinion 93-5 was presented by a lawyer from the general counsel of a title insurance company asking on behalf of the company wanting to audit,[3] and therefore the opinion was written under the assumption that only transactions insured by that one title insurer would be included in the special trust account discussed in the opinion.

The inquirer's firm employs many lawyers who serve as title agents for different title insurers and who represent many different clients in unrelated transactions. Some clients' transactions involve no title insurer. The inquiry states that each title insurer wants to audit the trust account used by its own title agents. Even if the firm maintains a separate trust account exclusively for real estate and title transactions, the account will hold funds for different clients who are represented by different lawyers who are title agents for different title insurers, and some client funds will be held for transactions that involve no title insurer.

If the firm permits each title insurer to audit the separate trust account without clients' informed consent, each insurer will obtain information relating to the firm's representation of clients who are not involved in any transaction with that particular title insurer. The inquirer's affirmative duties to inform and explain under Rules 4-1.4 and 4-1.6 (a) would be triggered under such circumstances, unless the lawyer reasonably concludes that allowing all title insurers to audit the trust account is reasonably necessary to serve each affected client's interests or the affected clients have specifically prohibited the lawyer from disclosing the information.

Based on the foregoing, the answer to the inquirer's first question is no, an attorney is not permitted to allow a title insurance company to audit the special trust account used exclusively for real estate and title transactions if the special trust account holds funds for client transactions unrelated to the title insurer requesting the audit, unless the attorney obtains the affected clients' informed consent or the lawyer reasonably concludes that the audits are reasonably necessary to serve the affected client's interests and the affected clients have not prohibited the disclosure.

If, however, consistent with Florida Ethics Opinion 93-5, the special trust account is used exclusively for real estate and title transactions insured by a single title insurer, the inquirer may

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[3] Florida Ethics Opinion 93-5 was outside the scope of ethics opinions customarily issued by the Professional Ethics Committee.

allow that one title insurer to audit the special trust account without a client's informed consent.

> **Question 2: If an attorney is not ethically permitted to allow a title insurer to audit the special trust account without the clients' informed consent because the special trust account involves unrelated transactions, but new section 626.8473 (8), Florida Statutes, requires that attorney to allow the audit, does the attorney abide hy the ethics rules or the statute?**

The inquirer's second question arises from concerns regarding the interpretation of section 626.8473 (8), Florida Statutes, which became effective July 1, 2012, and states:

> (8) An attorney shall deposit and maintain all funds received in connection with transactions in which the attorney is serving as a title or real estate settlement agent into a separate trust account that is maintained exclusively for funds received in connection with such transactions and permit the account to be audited by its title insurers, unless maintaining funds in the separate account for a particular client would violate applicable rules of The Florida Bar.

Although questions of statutory interpretation are beyond the scope of an ethics opinion, pursuant to Procedure 2 (a) (1)(D), Florida Bar Procedures for Ruling on Questions of Ethics (2012), the committee offers the following general discussion to provide guidance to bar members.

The statute appears to mandate that lawyers maintain a separate trust account devoted exclusively to funds held in connection with transactions in which the lawyer serves as a title or real estate settlement agent. The statute appears to further require that the lawyer permit the separate trust account to be audited by multiple title insurers.

As discussed in the answer to the inquirer's first question, Rule 4-1.6 (a), Rules Regulating The Florida Bar would require that a lawyer obtain each client's informed consent before permitting multiple title insurers to audit a single trust account, even if that separate trust account was devoted exclusively to holding funds for clients' real estate and title transactions, unless the lawyer reasonably concludes that the audits are necessary to serve the interests of the affected clients and the affected clients have not specifically prohibited disclosure of the information. Consistent with Florida Ethics Opinion 93-5, a lawyer would not be required to obtain clients' informed consent to permit one title insurer to audit a separate trust account that is devoted exclusively to funds for clients' transactions that are insured by the one title insurer requesting the audit, because the audit would serve the clients' interests under Rule 4-1.6 (c) (1).

If the lawyer concludes that permitting the audits by multiple title insurers is not necessary to serve affected clients' interests or if affected clients have instructed the lawyer not to disclose the information, the lawyer should consider maintaining: 1) a separate trust account for each different title insurer used by that lawyer or law firm, or 2) one separate trust account and obtain each client's informed consent to disclose information regarding their transactions to multiple title insurers for their audits, or 3) one separate trust account and obtain consent from the various title insurers to audit only the information related to transactions that the title insurer

is underwriting. With respect to number 2 in the preceding sentence, the lawyer may obtain the client's informed consent in the sales contract or in a separate document executed by the client prior to or at the closing.

In sum, the inquirer may not permit multiple title insurance companies to audit a single trust account used exclusively for real estate and title transactions, unless the lawyer reasonably concludes that permitting the audits would serve the affected clients' interests and the affected clients have not prohibited disclosure of the information. The inquirer may permit a title insurer to audit a single trust account used exclusively for client transactions insured by the title insurer requesting the audit. The answer to the inquirer's second question offers three alternatives that may harmonize the inquirer's obligations under the applicable Rules Regulating The Florida Bar and the statute if the lawyer concludes that permitting the audits is not necessary to serve the affected clients' interests or if affected clients' have prohibited the lawyer from disclosing the information.

A law firm had millions of dollars pass through its trust account. The facts showed that the attorneys realized that there was a trust account imbalance of $4.5 million. The attorneys determined that their non-lawyer bookkeeper embezzled the money and fled to Argentina.

What actions should the attorneys take to keep the Bar from finding them guilty of misconduct?


A. Hire outside counsel and an outside accountant to conduct an informal audit.

B. Contact the police and cooperate with their investigation as well as explain the situation to the Bar via the "hotline."

C. Fund the trust deficit by borrowing from personal and family funds, as well as getting loans from other clients.

D. None of these actions are sufficient.

**Answer: D**

***None of these actions are sufficient to keep the attorneys from being found guilty of misconduct.***

***Florida Bar v. Rousso and Roth*, combined cases reported at 38 Fla. L. Weekly S 194, March 28, 2013**

**117 So. 3d 756 (Fla. 2013) "Too little, too late"**

INNS OF COURT





d probation are not insignificant sanctions, rehabilitative sanctions ve been imposed for conduct similar to that in the instant case. *See, e.g., Fla. Bar v. Gwynn*, 94 So. 3d 425, 433 (Fla. 2012) (imposing a ninety-one day suspension for violating, in pertinent part, rules regarding meritorious claims and contentions; candor toward the tribunal; conduct involving dishonesty, fraud, deceit, or misrepresentation; and conduct prejudicial to the administration of justice); *see also Fla. Bar v. Abramson*, 3 So. 3d 964, 967-69 (Fla. 2009) (imposing a ninety-one day suspension for violation of rule regarding making statements known to be false or with reckless disregard for the truth, rule prohibiting conduct prejudicial to the administration of justice, and several other rules).

In addition to precedent supporting a suspension in this case, the Florida Standards for Imposing Lawyer Sanctions also indicate that a suspension in this case would be appropriate. Standard 6.12 provides that "[s]uspension is appropriate when a lawyer knows that false statements or documents are being submitted to the court or that material information is improperly being withheld, and takes no remedial action." Respondent Tropp submitted his fourth motion knowingly omitting material information that would have clarified his misleading assertion that the trial judge met with his ex-wife's counsel without Tropp or, by omission, that his own co-counsel was present. Standard 7.2 provides that "[s]uspension 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."

In this case, respondent only succeeded in obtaining a recusal, ultimately in his fourth motion, due to his violation of the Rules egulating the Florida Bar. In so doing, he caused harm to the judicial ystem and unnecessary delays associated with reassignment to a new judge. These serious violations by respondent, committed in an effort to obtain some personal unfair advantage in the litigation, warrant a rehabilitative suspension. Thus, for the foregoing reasons, I dissent. (CANADY, J., concurs.)

* * *

**Attorneys—Discipline—Misconduct related to failure to properly monitor firm's non-lawyer bookkeeper, who, over time, embezzled 4.38 million dollars from firm's trust account and subsequently absconded to Argentina, after which attorneys attempted to correct the harm using personal funds and a loan from a client—Referee properly found attorneys violated rules regarding minimum standards of trust account management—Referee improperly recommended attorneys be found not guilty of commingling, as case law does not support the conclusion that attorneys' "sense of personal honor" to correct the theft of funds justified the commingling—Referee properly found attorneys had conflicts of interest in representing their clients stemming from their depositing of non-client money into trust account, and from the seeking of a loan from a client—Referee properly found attorneys engaged in conduct involving dishonesty, fraud, deceit or misrepresentation—No merit to attorneys' claim that their due process rights were violated because allegations of violations of rule 4-8.4(c) applied only to misappropriation—There is no requirement for the Bar to connect every alleged item of misconduct to a specific rule violation—Referee improperly awarded reduced costs to Bar based on inability to pay—Bar's full costs awarded—Recommended suspensions of twelve and fifteen months for the two attorneys are disapproved—Attorneys disbarred**

THE FLORIDA BAR, Complainant, v. MARK ENRIQUE ROUSSO, Respondent. Supreme Court of Florida. Case No. SC11-15. THE FLORIDA BAR, Complainant, v. LEONARDO ADRIAN ROTH, Respondent. Case No. SC11-16. March 28, 2013. Original Proceeding—The Florida Bar. Counsel: John F. Harkness, Jr., Executive Director and Kenneth Lawrence Marvin, Staff Counsel, The Florida Bar, Tallahassee, and Daniela Rosette, Bar Counsel, The Florida Bar, Miami, for Complainant. Andrew Scott Berman of Young, Berman, Karpf & Gonzalez, P.A., Miami, and Brian Lee Tannebaum of Tannebaum Weiss, LLP, Miami, for Respondents.

(PER CURIAM.) We have for review a referee's report recommending that Respondent Mark Enrique Rousso and Respondent Leonardo Adrian Roth be found guilty of professional misconduct. The referee recommended sanctions of a twelve-month suspension for Rousso and a fifteen-month suspension for Roth. We have jurisdiction. *See* art. V, § 15, Fla. Const. We approve the referee's findings of fact. We approve the referee's recommendations as to guilt, except we disapprove the referee's recommendation that Respondents be found not guilty of violating Rule Regulating the Florida Bar 5-1.1(a)(1) (Trust Account Required; Commingling Prohibited). For the reasons discussed herein, we disapprove the referee's recommended sanctions of suspension and, instead, impose disbarments. We also disapprove the referee's "equitable adjustment," which reduced the amount of costs awarded to The Florida Bar.

FACTS

On January 5, 2011, The Florida Bar filed separate complaints against Respondent Mark Enrique Rousso (Case No. SC11-15) and Respondent Leonardo Adrian Roth (Case No. SC11-16). On that same date, the Bar filed a motion for consolidation. The cases were referred to a referee, who granted the motion for consolidation. The referee held hearings and made the following findings and recommendations.

The referee found that "100's of millions of dollars passed through" the trust account of Respondents' firm. The parties agreed that by the end of 2008 the measure of trust account imbalance was roughly $4.38 million. Respondents claim that Fernando Horigian, the firm's non-lawyer bookkeeper ("Bookkeeper"), embezzled the $4.38 million. The referee found that no clear and convincing evidence established that Respondents misappropriated the $4.38 million or received any direct benefit from the disappearance of the funds. Further, the referee reported that when the deficiencies in the account were discovered, "Respondents endeavored to honor every known client liability for trust account funds."

Roth learned of the trust account deficiencies in April of 2008, but he did not fully comprehend the cause and scope of the problem until several months later. Rousso became aware of the trust account problem in December of 2008. From that point, Respondents took several actions to address the financial shortages, which included: (1) hiring outside counsel; (2) hiring an outside accountant and conducting an informal audit; (3) funding the trust account deficit from many sources; (4) contacting police and cooperating with the ensuing investigation; and (5) explaining the situation by telephone to the Bar via the ethics "hotline." The Florida Bar asserts that Respondents' actions were "too little, too late."

The trust account deficits were covered by the firm's malpractice insurer, credit lines, Respondents' personal funds, funds borrowed from family, and money borrowed from a client, Mr. Hattim Kais Yordi ("Yordi"). Roth solicited Yordi for a personal loan. Yordi traded a portion of his trust account credit for a "promissory note amounting to over $231 thousand." Although Rousso did not solicit this loan to cover the trust account shortfall, he did benefit by the exchange of the promissory note for the trust account liability. Respondents defaulted on the promissory note. The firm has disbanded and Respondents testified that they are insolvent.

*Minimum Standards, Rule 5-1.2.* The referee has recommended that this Court find Respondents guilty of violating Rules Regulating the Florida Bar 5-1.2(b) (Minimum Trust Accounting Records) and 5-1.2(c) (Minimum Trust Accounting Procedures), which set forth the required minimum standards for the maintenance of trust accounts. There is clear and convincing evidence that Respondents violated these rules by failing to: (1) examine endorsed checks to ensure against possible forgery; (2) prepare and maintain memoranda to

You have an hour-long conversation with your client, going over a specific legal issue and answering all of your client's questions. Your client advises you during the call that they intend to take action that you have advised them not to take. Regardless, your client is anxious to take this action, since your client believes it is the "right thing to do" and your client believes it will "prevent the adverse parties from filing a lawsuit." You spend another hour on the phone explaining to your client the ramifications of the action they are taking and the never failing legal theory that "no good deed goes unpunished." What should you do?


A. You have properly advised your client to the extent necessary to make an informed decision, so there is nothing further for you to do.

B. Depends on the course of conduct with your client as to what you should do next.

C. Depends on the level of experience your client has in dealing with such matters.

D. Regardless of your conversation and your client's level of experience, it would be prudent to confirm your client's decision and its ramifications in writing before proceedi

**Answer: D**

*Regardless of your conversation and your client's level of experience, it would be prudent to confirm your client's decision and its ramifications in writing before proceeding.*

**Rule 4-1.2 requires a lawyer to abide by a client's decisions concerning the objectives of representation, and is required to reasonably consult with a client pursuant to Rule 4-1.4. However, taking action that you believe will ultimately result in adverse consequences could call into question whether you were competent to provide the representation at all as required by Rule 4-1. As such, your client's decision should be confirmed in writing.**

RULE 4-1.2 OBJECTIVES AND SCOPE OF REPRESENTATION

4 RULES OF PROFESSIONAL CONDUCT
4-1 CLIENT-LAWYER RELATIONSHIP

# *RULE 4-1.2 OBJECTIVES AND SCOPE OF REPRESENTATION*

**(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 jury trial, and whether the client will testify.

**(b) No Endorsement of Client's Views or Activities.** A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social, or moral views or activities.

**(c) Limitation of Objectives and Scope of Representation.** If not prohibited by law or rule, a lawyer and client may agree to limit the objectives or scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent in writing. If the attorney and client agree to limit the scope of the representation, the lawyer shall advise the client regarding applicability of the rule prohibiting communication with a represented person.

**(d) Criminal or Fraudulent Conduct.** A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows or reasonably should know is criminal or fraudulent. However, a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of the law.

## Comment

**Allocation of authority between client and lawyer**

Subdivision (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. Within those limits, a client also has a right to consult with the lawyer about the means to be used in pursuing those objectives. At the same time, a lawyer is not required to pursue objectives or employ means simply because a client may wish that the lawyer do so. A clear distinction between objectives and means sometimes cannot be drawn, and in many cases the client-lawyer relationship partakes of a joint undertaking. In questions of means, the lawyer should assume responsibility for technical and legal tactical issues but should defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Law defining the lawyer's scope of authority in litigation varies among jurisdictions. The decisions specified in subdivision (a), such as whether to settle a civil matter, must also be made by the client. See rule 4-1.4(a)(1) for the lawyer's duty to communicate with the client about such decisions. With respect to the means by which the client's objectives are to be pursued, the lawyer shall consult with the client as required by rule 4-1.4(a)(2) and may take such action as is impliedly authorized to carry out the representation.

On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client's objectives. The lawyer should consult with the client and seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation. See rule 4-1.16(b)(4). Conversely, the client may resolve the disagreement by discharging the lawyer. See rule 4-1.16(a)(3).

At the outset of a representation, the client may authorize the lawyer to take specific action on the client's behalf without further consultation. Absent a material change in circumstances and subject to rule 4-1.4, a lawyer may rely on such an advance authorization. The client may, however, revoke such authority at any time.

In a case in which the client appears to be suffering mental disability, the lawyer's duty to abide by the client's decisions is to be guided by reference to rule 4-1.14.

**Independence from client's views or activities**

Legal representation should not be denied to people who are unable to afford legal services or whose cause is controversial or the subject of popular disapproval. By the same token representing a client does not constitute approval of the client's views or activities.

**Agreements limiting scope of representation**

The scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. When a lawyer has been retained by an insurer to represent an insured, for example, the representation may be limited to matters related to the insurance coverage. A limited representation may be appropriate because the client has limited objectives for the representation. In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives. Such limitations may exclude actions that the client thinks are too costly or that the lawyer regards as repugnant or imprudent, or which the client regards as financially impractical.

Although this rule affords the lawyer and client substantial latitude to limit the representation if not prohibited by law or rule, the limitation must be reasonable under the circumstances. If, for example, a client's objective is limited to securing general information about the law the client needs in order to handle a common and typically uncomplicated legal problem, the lawyer and client may agree that the lawyer's services will be limited to a brief consultation. Such a limitation, however, would not be reasonable if the time allotted was not sufficient to yield advice upon which the client could rely. In addition, a lawyer and client may agree that the representation will be limited to providing assistance out of court, including providing advice on the operation of the court system and drafting pleadings and responses. If the lawyer assists a pro se litigant by drafting any document to be submitted to a court, the lawyer is not obligated to sign the document. However, the lawyer must indicate "Prepared with the assistance of counsel" on the document to avoid misleading the court which otherwise might be under the impression that the person, who appears to be proceeding pro se, has received no assistance from a lawyer. If not prohibited by law or rule, a lawyer and client may agree that any in-court representation in a family law proceeding be limited as provided for in Family Law Rule of Procedure 12.040. For example, a lawyer and client may agree that the lawyer will represent the client at a hearing regarding child support and not at the final hearing or in any other hearings. For limited in-court representation in family law proceedings, the attorney shall communicate to the client the specific boundaries and limitations of the representation so that the client is able to give informed consent to the representation.

Regardless of the circumstances, a lawyer providing limited representation forms an attorney-client relationship with the litigant, and owes the client all attendant ethical obligations and duties imposed by the Rules Regulating The Florida Bar, including, but not limited to, duties of competence, communication, confidentiality and avoidance of conflicts of interest.

Although an agreement for limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. See rule 4-1.1.

An agreement concerning the scope of representation must accord with the Rules of Professional Conduct and law. For example, the client may not be asked to agree to representation so limited in scope as to violate rule 4-1.1 or to surrender the right to terminate the lawyer's services or the right to settle litigation that the lawyer might wish to continue.

**Criminal, fraudulent, and prohibited transactions**

A lawyer is required to give an honest opinion about the actual consequences that appear likely to result from a client's conduct. The fact that a client uses advice in a course of action that is criminal or fraudulent does not, of itself, make a lawyer a party to the course of action. However, a lawyer may not assist a client in conduct that the lawyer knows or reasonably should know to be criminal or fraudulent. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposed was legally proper but then discovers is criminal or fraudulent. The lawyer must, therefore, withdraw from the representation of the client in the matter. See rule 4-1.16(a). In some cases, withdrawal alone might be insufficient. It may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation, or the like. See rule 4-1.1.

Where the client is a fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary.

Subdivision (d) applies whether or not the defrauded party is a party to the transaction. For example, a lawyer must not participate in a transaction to effectuate criminal or fraudulent avoidance of tax liability. Subdivision (d) does not preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise. The last sentence of subdivision (d) recognizes that determining the validity or interpretation of a statute or

regulation may require a course of action involving disobedience of the statute or regulation or of the interpretation placed upon it by governmental authorities.

If a lawyer comes to know or reasonably should know that a client expects assistance not permitted by the Rules of Professional Conduct or other law or if the lawyer intends to act contrary to the client's instructions, the lawyer must consult with the client regarding the limitations on the lawyer's conduct. See rule 4-1.4(a)(5).

*[Revised: 05/22/2006]*

What conduct exposes an attorney to the most client complaints that are considered and addressed by the Grievance Committee?


A. Trust account discrepancies or violations.

B. Lack of adequate client communication.

C. Conflict of interest issues.

D. Losing a case.

Answer: B

***Lack of adequate client communication and/or failure to communicate with the client.***

You have a client that has a medical malpractice claim and a breach of contract claim - each claim could net the same so there is no economically superior claim. The client is insisting on a medical malpractice claim and is refusing to pursue the contract claim. The client is also insisting that you use a medical expert that is weak and that is not going to give strong enough testimony to support your client's claim. What should you do?


A. Do what your client wants. It's their money after all.

B. Consult with the client and seek a mutually acceptable resolution. If unsuccessful withdraw from the case.

C. Handle the case the way you want. You're the expert here.

D. Just withdraw from the case. Spare yourself the headache.

## Answer: B

*Consult with the client and seek a mutually acceptable resolution. If unsuccessful withdraw from the case.*


# Inns of Court – Team 2

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