# Ethics in Estate and Trust Administrations
# The Obvious and the Oblivious

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## I. Introduction - Sources of the Rules

A. The Model Rules of Professional Conduct ("MRPC") were adopted by the ABA in 1983. Florida subsequently embraced the Model Rules in Chapter 4 of the Rules Regulating the Florida Bar. That chapter specifically defines and discusses the Rules of Professional Conduct ("RPC") required of lawyers in Florida. Many of the Rules and much of the accompanying commentary are directed to the ethical dilemmas and conflicts confronted by the trial lawyers or those involved in pursuing or defending criminal matters. There appears to be less focus on the applicability of the Rules to the practices of the estate planner and the estate administrator.

B. The American College of Trust and Estate Counsel ("ACTEC") adopted in 1993 the ACTEC Commentaries on the Model Rules of Professional Conduct ("the Commentaries"). A Fourth Edition of the Commentaries was adopted in 2006, expanding the annotations and providing guidance to trust and estate lawyers who are generally involved in non-adversarial and often multi party representations. (Copies of the ACTEC Commentaries are available at http://www.actec.org/public/commentariespublic.asp.)

C. Additionally, there are several other sources which define the duty and conduct of lawyers in the estate planning arena. Lawyers practicing in the estate tax law area are subject to the provisions of the Internal Revenue Code and accompanying rules found in Treasury Circular 230.

D. The duties of lawyers are also addressed in the Restatement (Third), Law Governing Lawyers published by the American Law Institute.

## II. Rules Applicable to Trust and Estate Lawyers

All of the rules regulating The Florida Bar are applicable to lawyers practicing in the area of trusts and estates. This section focuses on several rules which particularly impact the trust and estate practitioner.

### A. Competence

1. RPC 4-1.1

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

2. What is Competent Representation?

a. The lawyer has a duty to provide competent representation. For the trust and estate lawyer, that duty extends to all phases of the representation, including planning, counseling, preparation of tax returns, estate settlement and administration, and estate and trust litigation. Lawyers who are board certified or who hold themselves out to be specialists in estate or tax planning will generally be required to perform on a level that exceeds that of the nonspecialist.

b. Lawyers who do not have the reasonable expertise to handle a specific matter are expected to associate competent counsel. In all probability, the client's approval will be needed for such an association, since confidential information will have to be provided to the outside counsel.

c. Alternatively, lawyers may wish to seek outside legal assistance without revealing the action to the client. An ABA formal opinion addresses the use of "hypothetical and anonymous consultations". That opinion sets forth specific steps that might be taken by the attorney to minimize potential risk to clients. (ABA Formal Op. 1998-411, August 30, 1998). If client consent is not obtained, care must be taken to protect client confidentiality.

3. Lack of Competence - Malpractice Liability

a. A lawyer's lack of competence may be manifested in simple drafting errors, failure to discern typographical or other clerical errors, or more serious failures to understand the substantive issues necessary to competently represent a client.

b. Though a lawyer's lack of privity with certain third party beneficiaries *may* insulate him or her from malpractice liability, the same lawyer may very well be subject to disciplinary action for failing to provide competent advice or representation.

## B. Scope of Representation

1. Defining the Scope of Representation

a. After the initial contact with a potential client, the lawyer must determine whether or not to accept or reject the representation. Most jurisdictions do not require a specific engagement letter, particularly in the area of trusts and estates. However, such a letter can effectively avoid

serious misunderstandings with the client and serve to define the scope of the representation. Equally important is a clear declination of representation in the event that the attorney determines not to aid the potential client.

2. Information Provided by the Client

a. Most estate planning lawyers use some type of a written data form to obtain information regarding the client's assets. Generally, the practitioner can accept the information provided by the client as truthful. IRS Circular 230 states that a practitioner "may rely in good faith, without verification, upon information furnished by the client". However, RPC 4-1.2 states:

> "(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but the 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."

b. An ABA Informal Ethics Opinion states that a lawyer has a duty to inquire regarding the source of client funds and whether those funds had been duly reported for federal income tax purposes if the funds are believed to have been fraudulently obtained. The Opinion states specifically that "... a lawyer should not participate in the transaction to effectuate a criminal or fraudulent escape of tax liability ..." (ABA Informal Op. 1470, July 16, 1981.) At a minimum, the lawyer has a duty to inquire further into the circumstances surrounding the receipt of the funds in order to prepare properly and to avoid aiding the client and perpetuating further fraudulent conduct.

c. The comment to RPC 4-1.2 distinguishes 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." It would be a serious breach of the lawyer's professional responsibility to assist a client to engage in criminal or fraudulent conduct, but the lawyer may discuss the consequences of a particular course of action.

## C. **Diligence**

1. RPC 4-1.3

"A lawyer shall act with reasonable diligence and promptness in representing the client."

2. Lack of Diligence – Malpractice and Disciplinary Action

a. Failure to promptly respond to client inquiries, telephone calls and other communications erodes the client's confidence in the lawyer and generates a significant number of bar grievances. More seriously, failure of the attorney to act promptly in the estate planning area can have serious tax consequences and negatively impact the client's dispositive plan. Failure to timely file tax returns and other documents may result in disciplinary action and malpractice action.

D. **Communication**

1. RPC 4-1.4

(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.

2. Communication v. Confidentiality

a. The lawyer's duty to communicate with the client can conflict with the lawyer's duty to maintain client confidences as required under RPC 4-1.6. This conflict is particularly sharp in situations in which the lawyer represents multiple clients, such as providing estate planning services to husbands and wives or counseling co-fiduciaries. The conflict between the two Rules is addressed specifically in Florida Bar Ethics Opinion 95-4, which finds that in the situation presented, the duty of confidentiality will take precedence over the duty of communication.

E. **Fees**

1. Reasonableness of Fee

a. RPC 4-1.5(b) sets forth the following factors to be considered in determining the reasonableness of a fee:

> (A) the time and labor required, the novelty, complexity, and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
> (B) the likelihood that the acceptance of the particular employment will preclude other employment by the lawyer;
> (C) the fee, or rate of fee, customarily charged in the locality for legal services of a comparable or similar nature;
> (D) the significance of, or amount involved in, the subject matter of the representation, the responsibility involved in the representation, and the results obtained;
> (E) the time limitations imposed by the client or by the circumstances and, as between attorney and client, any additional or special time demands or requests of the attorney by the client;
> (F) the nature and length of the professional relationship with the client;
> (G) the experience, reputation, diligence, and ability of the lawyer or lawyers performing the service and the skill, expertise, or efficiency of effort reflected in the actual providing of such services; and
> (H) whether the fee is fixed or contingent, and, if fixed as to amount or rate, then whether the client's ability to pay rested to any significant degree on the outcome of the representation."

b. RPC 4-1.5(e) states, "[w]hen the lawyer has not regularly represented the client, the basis or rate of the fee and costs shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation." Some states, such as California, require that if the lawyer's fee exceeds a specified amount, then the lawyer must enter into a written contract for services, specifying the hourly rate and other charges.

c. A lawyer may not charge a client for overhead expenses associated with properly maintaining an office. The lawyer may recoup expenses reasonably incurred in connection with a client's matter, such a photocopying, long distance, computer research, and overtime (ABA Formal Op. 93-379, December 6, 1993).

2. Fee Splitting

a. According to RPC 4-5.4(a), lawyers are prohibited from splitting fees with non-lawyers.

b. Additionally, a lawyer cannot accept payment from other

professionals to whom a lawyer refers clients. Even disclosing the rebate arrangement to the client and obtaining the client's consent may not lift the prohibition. Price, 801 T.M., Conflicts, Confidentiality and Other Ethical Considerations in Estate Planning.

F. **Confidentiality of Information**

1. The duty of confidentiality is central to the lawyer-client relationship allowing the client to freely disclose all necessary factual information to the lawyer.

2. RPC 4-1.6(a) provides, "[a] lawyer must not reveal information related to representation of a client…unless the client gives informed consent" or unless one of the following exception applies:

> (b) When Lawyer Must Reveal Information. A lawyer must reveal such information to the extent the lawyer reasonably believes necessary:
>
> (1) to prevent a client from committing a crime; or
>
> (2) to prevent a death or substantial bodily harm to another.
>
> (c) When Lawyer May Reveal Information. A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:
>
> (1) to serve the client's interest unless it is information the client specifically requires not to be disclosed;
>
> (2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and client;
>
> (3) to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved;
>
> (4) to respond to allegations in any proceeding concerning the lawyer's representation of the client; or
>
> (5) to comply with the Rules Regulating the Florida Bar.
>
> (d) Exhaustion of Appellate Remedies. When required by a tribunal to reveal such information, a lawyer may first exhaust all appellate remedies.

3. The comments to RPC 4-1.6 state, "[a] lawyer is *impliedly authorized* to make disclosures about a client when appropriate in carrying out the representation, except to the extent that the client's instructions or special circumstances limit that authority." [Emphasis added.]

4. The attorney's duty to maintain the client's confidence begins with the initial interview and continues after the representation has been terminated.

5. Evidentiary privilege - Fla. Stat. § 90.502

a. The duty of confidentiality is related to, but distinct from, the attorney-client evidentiary privilege set forth in Fla. Stat. § 90.502, which states that communication between a lawyer and a client is "confidential" if it is "not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of legal services to the client ..."

(F.S. § 90.502 (1)(c)).

b. The attorney-client privilege under Fla. Stat. § 90.502 is much narrower than RPC 4-1.6, as it only applies when a lawyer is required by a court to produce client-related information as evidence.

## III. Issues in Estate Planning

### A. Joint Representation

1. Maintaining Client Confidences

a. The representation of multiple clients, whether it is a husband and wife in an estate planning context, co-fiduciaries during the administration of a trust or estate, or parents and children in a multi-generational business plan, presents the lawyer with potentially conflicting ethical duties. The lawyer's duty to maintain the confidentiality of all information relating to the representation of the client may conflict with the lawyer's duty to communicate to a client information that is relevant to the representation under RPC 4-1.4.

b. Florida Bar Ethics Opinion 95-4 (May 30, 1997)

i. The Estate Planning, Probate and Trust Law Professionalism Committee of the Real Property, Probate and Trust Law Section requested a formal advisory opinion, with facts identical to those in Scenario #1, from The Professional Ethics Committee of The Florida Bar.

ii. The Opinion recognizes the tension between the two ethical obligations: that of communicating with the client pursuant to RPC 4-1.4 and maintaining the client's confidence as required under RPC 4-1.6, however, that the lawyer's duty of confidentiality must remain paramount.

iii. The Opinion states that, "a lawyer is prohibited from voluntarily revealing any information relating to the representation of a client without the client's consent". Citing the comment to RPC 4-1.6, the Opinion further states that, "the duty of confidentiality applies not merely to matters communicated in confidence by the client, but also to all information relating to the representation, whatever its source and continues after the client- lawyer relationship is terminated".

iv. The attorney is *not* required to discuss issues regarding confidentiality at the outset of the representation, but may address confidentiality issues in an engagement letter.

However, if a conflict situation subsequently develops and the attorney is provided with confidential information from one of the parties, the attorney must abide by his or her duty of confidentiality and protect that confidence.

v. The Opinion specifically rejects the argument that in a joint representation situation, a lawyer who receives information from the communicating client which is relevant to the non-communicating client may disclose that information. The Opinion further rejects the argument that joint clients have an expectation that everything that is communicated by one spouse or client to the joint lawyer will be shared by the lawyer with the other client.

vi. The attorney's only remedy (absent either the initial consent of the client or the subsequent consent) is to withdraw from the representation of both the husband and wife.

B. **Request for Estate Planning Documents and Client Information**

1. Confidentiality Analysis

a. Estate planning lawyers are sometimes requested to voluntarily surrender a copy of a client's will after the client's death, or alternatively to reveal memos and notes regarding the circumstances regarding the execution of the document.

b. The ACTEC commentaries state that "a lawyer may be impliedly authorized to make appropriate disclosure of confidential client information that would promote the client's estate plan, forestall litigation, preserve assets, and further family understanding of the decedent's intentions. Disclosures should ordinarily be limited to information that the lawyer would be required to reveal as a witness." The rationale of the commentary would allow the lawyer to disclose information that would, in all probability have to be revealed, in a will contest, in order to avoid or perhaps minimize litigation costs surrounding a potential challenge to the decedent's will.

c. Florida Bar Ethics Opinion 10-3 (February 1, 2011)

i. The Florida Bar Board of Governors requested a formal advisory opinion from the Florida Bar on the issue of the ethical obligations of a lawyer when the personal representative, beneficiaries, or heirs-at-law of a decedent's estate request confidential information regarding a decedent.

ii. The Florida Bar found that the analysis depends on the individual facts and circumstances of each different situation and

may differ, depending on who is making the request for information and why.

iii. RPC 4-1.6(a) provides, that all "information relating to representation of a client" is confidential and may not be voluntarily disclosed by the lawyer without either the client's consent or an exception to the confidentiality rule. According to the comments to RPC 4-1.6, "[t]he duty of confidentiality continues after the client-lawyer relationship has terminated."

iv. The most applicable exception to the confidentiality rule is set forth in RPC 4-1.6(c)(1), which provides that a lawyer may disclose confidential information "to serve the client's interest unless it is information the client specifically requires not to be disclosed."

v. Relying on this exception, Opinion 10-3 provides that if lawyer believes that disclosure would "aid in the proper distribution of the decedent's estate according to the decedent's wishes, the lawyer may properly disclose the information to the personal representative, unless the decedent specifically required that the information be kept confidential."

d. Florida Bar Staff Opinion 20749 (March 9, 1998)

i. The rule in Florida appears to differ where the request involves *former* estate planning documents of a decedent.

ii. An attorney who possesses a copy of a prior will should not reveal a copy of the old will pursuant to Rule 4.1-6, since the attorney owes a duty of confidentiality to the client, and no exceptions to RPC 4.1-6 apply.

iii. Opinion 20749 appears to be contrary to the ACTEC position, as it does not consider that, if the contestant received the same devise under the former will as under the most recent will, furnishing a copy of the will may obviate the need for litigation.

2. Attorney Client Privilege – Fla. Stat. § 90.502

a. Fla. Stats. § 90.502(3)(c) and § 90.502(3)(e) provide that the personal representative or the client's attorney may claim the attorney-client privilege on behalf of the decedent.

b. The Comment to RPC 4-1.6 states that the attorney has an ethical obligation to assert the privilege on a client's behalf "when is it

applicable."

c. The Testamentary Exception - Fla. Stat. § 90.502(4)(b)

i. There is no attorney-client evidentiary privilege with respect to communications that are "relevant to an issue between parties who claim through the same deceased client."

d. The Execution and Attestation Exception - Fla. Stat. § 90.502(4)(d)

i. Where the estate planning attorney is an attesting witness to a will and is required to testify regarding the execution of the will, there is no attorney-client evidentiary privilege with respect to information regarding the execution.

e. The Common Interest Exception - Fla. Stat. § 90.502(4)(e)

i. There is no attorney-client evidentiary privilege where an attorney represented both the decedent and the surviving spouse, and litigation involving the estate is brought by the surviving spouse.

f. *Compton v. West Volusia Hospital Authority*, 727 So.2d 379, 391 (Fla 5th DCA 1999).

i. In this case, involving a medical malpractice action, the defense sought the contents of the plaintiff's will. The court stated that "communications with an attorney concerning preparation and drafting a will and the will itself is as privileged as any other attorney-client communications," and therefore, "because the will and its contents have not been revealed to others beyond what was required to properly execute it, the attorney- client privilege remains intact."

g. *Swidler & Berlin v. United States*, 524 U.S. 399; 118 S.Ct. 2081 (1998)

i. The United States Supreme Court, quoting *United States v. Osborn*, 561 F.2d 1334, 1340 (9th Cir. 1997), held that confidential communications are privileged during the testator's lifetime and "also after the testator's death unless sought to be disclosed in litigation between the testator's heirs."

h. *Barker v. Barker*, 909 So.2d 333 (Fla 2nd DCA 2005)

i. The result in *Compton* may differ where the estate planning documents are in the possession of an individual who is neither the client nor the attorney.

ii. The court held that a trust beneficiary's estate planning documents in the possession of the *beneficiary's son* were discoverable in an action by contingent beneficiaries because the son had no privacy interest in the beneficiary's estate planning documents, and the beneficiary could not assert the attorney-client privilege as to documents in his son's possession.

C. **Drafting Lawyer as Fiduciary**

1. Drafting Attorney as Fiduciary

a. The increase in minimum fees charged by corporate fiduciaries has left many clients of modest means with few realistic options. But if the drafting attorney is to be considered as the fiduciary, he or she must do so with caution, with full disclosure to the client, and with appropriate support systems in place to provide competent asset management, compliance with the Prudent Investor Act and the avoidance of charging overlapping fees for services as attorney and as fiduciary.

b. Former EC5-6 of the Florida Bar Code of Professional Responsibility stated: "A lawyer should not consciously influence a client to name him as executor, trustee, or lawyer in an instrument. In those cases where a client wishes to name his lawyer as such, care should be taken by the lawyer to avoid even the appearance of impropriety."

c. The naming of the drafting lawyer as the fiduciary is subject to RPC 4-1.7, addressing conflicts of interest.

d. In Florida, while statutes provide authorization to attorneys to act as trustee or personal representative, the practice has come under strict scrutiny. Basic Estate Planning in Florida § 12.22 (Fla. Bar CLE 7th ed. 2012). The attorney appointed as a fiduciary is subject to enhanced ethical standards of care, and therefore risks increased exposure to ethical and malpractice claims. *Id.* at § 13.12.

e. In some jurisdictions, the attorney may be appointed as a fiduciary only if certain criteria are met.

i. A Washington ethics opinion allows a lawyer to draft a document for an unrelated client appointing him or herself as the fiduciary only if the lawyer has fully informed the client regarding the alternatives and costs and the client is advised that the client is free to consult independent counsel. (Washington Informal Op. 86-1)

ii. In other instances, it appears that the practice is banned in all cases except when the lawyer is related to the client. *State v. Gulbankian*, 196 NW 2nd 733 (Wisconsin 1972).

2. Guidelines for Attorneys Serving as Fiduciaries

a. The following assistive guidelines, applying to attorneys serving in dual fiduciary capacities, were developed by the authors of Basic Estate Planning in Florida § 13.13, and can help avoid ethical and malpractice issues:

i. The attorney acting as an executor, trustee, or other fiduciary should carry a fiduciary bond or liability insurance in the proper amount.

ii. If no bond is held, the assets should be placed with a responsible institution under a custodial arrangement.

iii. Any attorney offering or providing services as an executor, trustee, or other fiduciary must be competent to do so.

iv. Attorneys offering fiduciary services should have adequate personnel and services available, either with the firm or from outside sources.

v. An independent audit or adequate internal control procedures should be made of trusts, estates, or other accounts administered by attorneys.

vi. Instruments drafted should generally not include any exculpatory or other administrative provisions that would lower the standard of responsibility for attorneys acting as fiduciaries.

vii. The attorney who becomes a fiduciary must become financially sophisticated regarding investments and alternatives.

viii. The attorney fiduciary should comply with fee principles laid out by the American Bar Association Section on Real Property, Probate and Trust Law.

ix. It is the responsibility of the lawyer to guide the client into capable and caring hands, while performing an advocacy role to protect the client from those who may not be competent.

3. General Requirement for Reasonable Fees

a. RPC 4-1.1 delineates the factors to be considered in determining the reasonableness of an attorney's fee, including the time and

labor required; the likelihood that the employment will preclude other employment by the lawyer; the fee customarily charged in the locality; the amount involved and the results obtained; time limitations imposed by the client; the length of the professional relationship with the client; and the experience, reputation and ability of the lawyer.

b. If possible, the fee or the means of calculating the fee in estate planning matters should be addressed in an engagement letter with the client.

4. Fees for an Attorney Acting as a Fiduciary

a. Fla. Stat. § 733.617 and Fla. Stat. § 736.0708 allow an attorney acting as a fiduciary to take a fee for those services in addition to those fees related to legal representation.

i. Fla. Stat. § 733.617(6) provides, "[i]f the personal representative is a member of The Florida Bar and has rendered legal services in connection with the administration of the estate, then in addition to a fee as personal representative, there also shall be allowed a fee for the legal services rendered."

ii. Fla. Stat. § 736.0708(3) provides, "[i]f the trustee has rendered other services in connection with the administration of the trust, the trustee shall also be allowed reasonable compensation for the other services rendered in addition to reasonable compensation as trustee."

b. Fla. Stat. § 733.612(19) provides, "[a]ny fees and compensation paid to a person who is the same as, associated with, or employed by the personal representative shall be taken into consideration in determining the personal representative's compensation." This provision recognizes that, although an attorney who is also serving as a personal representative acquires additional responsibilities, the payment of both fees to the same person may be excessive. Practice Under the Florida Probate Code § 15.52 (Fla. Bar CLE 2012).

c. Ethical issues arise when the drafting attorney is also nominated as the fiduciary under the estate plan. The ethical problem arises because of the possibility of dual compensation for overlapping services.

d. Fees charged to an estate or trust by the attorney also acting as a fiduciary may be subject to question, as the attorney is acting as his or her own client and accountability is reduced. *See* Administration of Trusts in Florida § 2.75 (Fla. Bar CLE 8th ed. 2012).

5. Fiduciary Selection Procedures

a. In *Rand v. Giller*, 489 So. 2d 796 (Fla 3d DCA 1986)

i. The lawyer who prepared a decedent's will named himself as a co-personal representative, however he failed to confirm in writing the nature of the discussion concerning the selection of a fiduciary. A beneficiary and co-personal representative of the estate filed an action to remove the lawyer as co-personal representative.

ii. The court noted, "[f]or the benefit of the bar, we strongly suggest that attorneys establish procedures for such cases which allow for evidence, other than the self-serving testimony of the attorney involved, of the care taken to avoid the appearance of impropriety."

b. Many commentators have argued that our Florida Statutes permit the lack of disclosures made to the client to be considered in setting a fee for a lawyer who serves in the dual roles as a fiduciary and attorney for the fiduciary. *See* Practice Under the Florida Probate Code § 15.52 (Fla. Bar CLE 2012).

6. Proposed Legislation Regarding Disclosure

a. New legislation was recently proposed by the Ad Hoc Committee on Estate Planning Conflict of Interest of the Real Property Probate and Trust Litigation (RPPTL) Section of The Florida Bar in support of amendments to Fla. Sta. § 733.617 and Fla. Stat. § 736.0708. The amendments provide that a lawyer, or certain people related to or affiliated with the lawyer, will not be entitled to receive compensation for serving as a fiduciary if the lawyer prepares the instrument making the appointment unless:

(1) The lawyer or person appointed is related to the client; or
(2) The lawyer makes the following disclosures to the client in writing before the will or trust is signed:
(a) Subject to certain statutory limitations, most family members regardless of their residence, any other persons who are residents of Florida, including friends, and corporate fiduciaries are all eligible to serve as a personal representative;
(b) Any person, including an attorney, who serves as a fiduciary is entitled to receive reasonable compensation; and
(c) Compensation payable to the fiduciary is in addition to any attorneys' fees payable to the attorney or the attorney's firm for legal services.

D. **Duties to Beneficiaries**

1. Practitioners should be aware that a lack of privity may not protect an estate planning attorney from malpractice claims by beneficiaries.

2. *Dingle v. Dellinger*, 134 So. 3d 484 (Fla 5th DCA 2014)

a. The suit involved the failure of the estate planning lawyer to properly draft documents gifting property to the beneficiaries. The Fifth District held that to assert a third-party beneficiary claim, the complaint must allege: (1) a contract; (2) an intent that the contract primarily and directly benefit the third party; (3) breach; and (4) damages. Further, the court held that the plaintiff must show that the testator attempted to put his donative wishes into effect and was thwarted by the negligence of the lawyer.

b. The court held that the beneficiaries' claim for malpractice against the drafting lawyer was sufficient.

## IV. Estate and Trust Administration

A. **Representing the Fiduciary**

1. Who is the Client?

a. The settlement of an estate or a trust requires that the attorney interact with multiple parties, including the personal representative or trustee as fiduciary, the estate beneficiaries and creditors. The attorney might represent the fiduciary generally, advising and guiding the fiduciary regarding the steps of administration; or the attorney might represent the fiduciary individually as in a fee dispute or defense of a surcharge action.

b. In the context of general estate administration, under Florida law, the personal representative is the client rather than the beneficiaries of the estate.

i. The Comment to RPC 4-1.7 Conflict of Interest, states, "[i]n estate administration the identity of the client may be unclear under the law of some jurisdictions. In Florida the personal representative is the client rather than the estate or the beneficiaries."

c. *Estate of Gory*, 570 So.2d 1381 (Fla. 4th DCA 1990)

i. *Estate of Gory* involved a compensation dispute between the personal representative and the beneficiaries. The beneficiaries filed a motion to disqualify the law firm representing the personal representative in the estate administration on grounds that the

law firm owed a fiduciary duty to both the personal representative and the beneficiaries to ensure that excessive compensation was not paid from the assets of the estate.

ii. The court held that the attorney was not disqualified from representing the personal representative in the fee dispute because, although the attorney had a duty to the beneficiaries to preserve the assets of the estate, the beneficiaries were not the attorney's clients. The court pointed out that if a conflict occurred any time a beneficiary took a contrary position to that of the personal representative, the efficient and economic administration of the decedent's estate would be seriously impeded.

2. Scope of the Representation.

a. Clarification of Scope

i. When an attorney represents the personal representative or trustee in the administration of the entity, then the lawyer is representing the client in the client's fiduciary capacity.

ii. The lawyer who represents the fiduciary generally in the administration of the entity is distinguished from the lawyer who represents the personal representative or trustee individually, in a compensation dispute or surcharge action.

iii. The ACTEC Commentary to MRPC 1.7 states that the lawyer should make clear to the estate beneficiaries that the lawyer's client is the personal representative and not the individual or collective interests of the beneficiary.

iv. The initiation of this discussion should probably begin at the estate planning conference. The drafter of the will or trust should explain to the client the function of the personal representative and trustee, and the role the lawyer will play, as well as the duties to the beneficiaries and creditors.

b. Advising the Fiduciary Regarding Administration.

i. MRPC 1.4 requires the lawyer to keep the personal representative-client reasonably informed "about the status of the matter and to promptly comply with reasonable requests for information."

ii. The ACTEC Commentary on MRPC 1.4 provides that the personal representative's lawyer should help the fiduciary in making decisions regarding matters affecting the representation, such as the timing and composition of distributions and the making of available tax elections.

3. Disclosure of Information

a. An attorney representing the fiduciary in the general or representative capacity may be authorized to disclose relevant information to the beneficiaries; whereas, a lawyer representing a fiduciary individually would have no duty to disclose information to non-client beneficiaries.

b. A lawyer is prohibited from making false or misleading statements in dealing with third parties. RPC 4-4.1.

i. The ACTEC Commentary MRPC 1.2 indicates that this requirement of truthfulness extends to accountings prepared by or approved by the lawyer as well as other documents that the lawyer may prepare for the fiduciary.

c. The lawyer for the fiduciary is required to deal candidly in relations with the court. MRPC 3.3. The ACTEC Commentary to MRPC 4.1 states that the same candor is required when representing the fiduciary and communicating with the beneficiaries.

d. The ACTEC Commentary to MRPC 1.2 points out that in some jurisdictions a lawyer who represents a fiduciary "may disclose to the court or to beneficiaries acts or omissions by the fiduciary that might constitute a breach of fiduciary duty."

i. This obligation does not appear to be well defined under Florida law. Although *Estate of Gory* takes the view that counsel for the personal representative owes fiduciary duties to the beneficiaries, that case certainly does not appear to define the duty in terms of affirmative disclosures of the fiduciary's omissions.

e. The ACTEC Commentary to MRPC 1.2 suggests that the lawyer and fiduciary client may agree that the representation and the lawyer's specific duty of confidentiality will not prevent the lawyer from disclosing actions of fiduciary misconduct. It is suggested that this arrangement ensures that the testator's intent toward the beneficiaries will be carried out.

i. Such a requirement allowing disclosure could be placed in the testamentary instrument–conditioning the appointment or the acceptance of the fiduciary upon the lawyer's ability to disclose any wrongdoing to the court or the beneficiary.

4. Representation of the Fiduciary in Both a Representative and Individual Capacity

a. The lawyer may be called upon to represent the personal representative of an estate who is also one of several estate beneficiaries.

b. The ACTEC Commentaries suggest that such dual representation may be appropriate if certain conditions are met.

i. The lawyer must explain to the fiduciary that there is a duty of impartiality toward the beneficiaries

ii. The lawyer must explain to beneficiaries the nature of the dual representation and advise that the beneficiary may obtain personal legal representation at his or her own expense.

iii. The lawyer must keep separate records as to the services rendered.

iv. The lawyer may properly counsel the beneficiary-client as to the client's rights as beneficiary but may not assert those rights in a way that would conflict with the client's duties and fiduciary.

v. If conflicts develop which materially limit the lawyer's ability to function in both capacities, the lawyer must withdraw.

## B. Duties to the Beneficiaries

1. Nature and Scope

a. While it is clear under Florida law that the lawyer for the personal representative does not occupy an attorney-client relationship with the beneficiaries, the personal representative's attorney, nonetheless, does owe certain duties to the beneficiaries of the estate.

b. The extent of the duties owed to the beneficiaries depends in large part on the scope of the representation of a fiduciary.

c. If the lawyer represents the fiduciary individually, the lawyer may owe few duties to the beneficiaries.

d. If the beneficiary is represented by separate legal counsel, then the responsibility of the lawyer for the fiduciary, as well as the nature of the lawyer's communication with that beneficiary, may be altered.

e. RPC 4-4.2 provides that if a beneficiary is represented by counsel, a lawyer shall not communicate directly with the beneficiary without the consent of the other lawyer.

f. RPC 4-4.2 would not prevent direct contact as allowed or contemplated in order to meet the notice requirements of any statute. Though a copy of such communication "shall be provided to the adverse party's attorney."

g. According to RPC 4-4.3, when dealing with an unrepresented beneficiary, a "lawyer shall not state or imply that the lawyer is disinterested."

h. The Comment to the RPC 4-4.3 warns that an unrepresented and unsophisticated party may assume that the lawyer is disinterested. In the estate context, it is not unreasonable that beneficiaries may assume that the lawyer for the fiduciary represents them.

i. The fiduciary's lawyer should guard against giving advice to an unrepresented beneficiary other than the advice to obtain counsel.

2. Duty to Keep Beneficiaries Informed

a. Unless a beneficiary is proceeding with an action which is adverse to the fiduciary, the attorney for the fiduciary is obligated to keep beneficiaries reasonably informed regarding the progress of an estate proceeding with respect to expected distributions. Practice Under the Florida Probate Code § 20.7 (Fla Bar CLE 2012).

b. In order to keep qualified trust beneficiaries reasonably informed of the existence and administration of a trust, the following are required by Fla. Stat. § 736.0813(1)(a)-(e):

> (a) Within 60 days after acceptance of the trust, the trustee shall give notice to the qualified beneficiaries of the acceptance of the trust, the full name and address of the trustee, and that the fiduciary lawyer-client privilege in s. 90.5021 applies with respect to the trustee and any attorney employed by the trustee.
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> (b) Within 60 days after the date the trustee acquires knowledge of the creation of an irrevocable trust, or the date the trustee acquires knowledge that a formerly revocable trust has become irrevocable, whether by the death of the settlor or otherwise, the trustee shall give notice to the qualified beneficiaries of the trust's existence, the identity of the settlor or settlors, the right to request a copy of the trust instrument, the

right to accountings under this section, and that the fiduciary lawyer-client privilege in s. 90.5021 applies with respect to the trustee and any attorney employed by the trustee.

(c) Upon reasonable request, the trustee shall provide a qualified beneficiary with a complete copy of the trust instrument.

(d) A trustee of an irrevocable trust shall provide a trust accounting, as set forth in s. 736.08135, from the date of the last accounting or, if none, from the date on which the trustee became accountable, to each qualified beneficiary at least annually and on termination of the trust or on change of the trustee.

(e) Upon reasonable request, the trustee shall provide a qualified beneficiary with relevant information about the assets and liabilities of the trust and the particulars relating to administration.

Paragraphs (a) and (b) do not apply to an irrevocable trust created before the effective date of this code, or to a revocable trust that becomes irrevocable before the effective date of this code. Paragraph (a) does not apply to a trustee who accepts a trusteeship before the effective date of this code.

c. Pursuant to Fla. Stat. § 736.0813(4), a trustee's duties under Fla. Stat. § 736.0813 extend only to the settlor while the trust is revocable.

3. Duty of Truthfulness

a. RPC 4-4.1 requires that in the course of representing a client a lawyer shall not knowingly:

i. Make a false statement of material fact and law to a third person; or

ii. Fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client.

b. The lawyer's duty of truthfulness to third parties, presumably beneficiaries and creditors in an estate administration, is limited by the lawyer's duty of confidentiality under RPC 4-1.6 to his fiduciary client.

c. Generally, the lawyer's duty of confidentiality would prohibit the lawyer from revealing information relating to representation without the client's consent. This general bar, however, is removed if the lawyer reasonably believes that the information must be revealed to prevent

the client from committing a crime.

d. More often, the fiduciary may be guilty of inattention or perhaps mistakes of judgment. But if the lawyer's services will be used by the client in a manner that furthers fraudulent conduct, the lawyer must withdraw as stated in RPC 4-1.16(a)(1).

4. Duties to the Surviving Spouse in Estate Administration

a. Florida Bar Ethics Opinion 76-16 (April 4, 1977) makes clear that the personal representative's attorney has the right to advise the surviving spouse regarding the existence of statutory benefits, such as elective share, family allowance, and exempt property, however, "[t]his is to be distinguished from counseling or giving legal advice."

b. In advising the surviving spouse regarding the existence of statutory rights, the attorney should make clear that the personal representative is the client and that the surviving spouse should seek independent counsel to determine whether and how to exercise these rights. This practice should be applied even where the surviving spouse is represented by the attorney in a fiduciary capacity. Florida Practice Under the Probate Code § 1.43 (Fla. Bar CLE 2012).

c. Florida Bar Ethics Opinion 76-16 (April 4, 1977) also holds that, where the surviving spouse is acting as the personal representative and asserts spousal statutory rights, the surviving spouse is not acting in conflict with his or her duties as personal representative.

5. Conflicts of Interest as a Fiduciary

a. Duty of Impartiality

i. A trustee has a general fiduciary obligation to deal impartially with the beneficiaries and to administer a trust "giving due regard to the beneficiaries' respective interests." Fla. Stat. § 736.0803.

ii. However, in derogation of this statutory duty, the governing document may allow the trustee to favor one class of beneficiaries over another. Administration of Trusts in Florida § 2.5 (Fla. Bar CLE 2012).

b. Avoiding Self-Dealing as a Fiduciary

i. The ACTEC Commentary to MRPC 1.2 states that an attorney is prohibited from taking advantage of his position to the detriment of the beneficiaries.

ii. In *The Florida Bar v. Dougherty*, 541 So.2d 610 (Fla. 1989), where the attorney acting as trustee invested trust funds in ventures in which he had conflicting interests, without disclosing those investments to the beneficiaries, the court held that discipline was warranted.

iii. In *Brigham v. Brigham*, 11 So.3d 374 (Fla. 3d DCA 2009), where the trustee, who was the grantor's attorney, made a gift of real estate to himself without prior court approval, the court stated, "[a]n attorney in dealings with his client must exercise a much higher standard of good faith than is required in ordinary business dealings or arm's length transactions."

b. Attorney-Client Privilege.

i. Disputes often occur when the beneficiaries seek information involving communications between the fiduciary and the fiduciary's attorney related to administration matters. As a result, in estate administrations, Fla. Stat. § 733.212(2)(b) now requires that the Notice of Administration disclose that the lawyer-client privilege in Fla. Stat. § 90.5021 applies with respect to the personal representative and any attorney hired by the personal representative.

ii. According to the Comment to RPC 4-1.6, the attorney- client privilege "applies in judicial or other proceedings in which the lawyer may be called as a witness". The confidentiality rule applies not merely to "matters communicated in confidence by the client but also to all information in relation to the representation..."

iii. Florida appears to reject the theory that the fiduciary's attorney also represents the beneficiaries. *In re Estate of Gory*, 570 So.2d 1381 (Fla. 4th DCA 1990).

iv. In *Barnett Bank v. Compson*, 639 So. 2d 849 (Fla. 2nd DCA1993), the surviving spouse sought to discover communication between the trustee and the trustee's attorney, and the court held that such communication was not discoverable.

## C. Duty to Creditors

1. Nature and Scope of Duty

a. While the lawyer for the fiduciary has no attorney-client relationship with the estate's creditors, the responsibility of the attorney is to assist the personal representative in the proper administration of the estate, including the payment of creditors' claims.

b. As when dealing with any third party, the lawyer may not knowingly make a false statement of material fact or law. RPC 4-4.1.

c. The lawyer's responsibility to deal impartially and truthfully with the creditors does not imply a lawyer-client relationship. It is doubtful whether professional fees for any services rendered to the creditors by the personal representative's attorney may be charged to the estate.

2. The personal representative has the duty to serve the notice of administration on all known or reasonably ascertainable creditors. *Tulsa Professional Collection Services, Inc., v. Pope*, 485 U.S. 478, 108 S.Ct. 1340, 99 L.Ed 565 (1988).

a. Actions by the Personal Representative

i. A personal representative may be estopped from asserting the statute of non claim when his conduct caused the failure of the claimant to file within the claims period. *Barnett Bank of Palm Beach v. Estate of Read,* 493 So.2d 447 (Fla.1986). See also*, In re Sale's Estate,* 227 So.2d 199 (Fla. 1969).

ii. When the personal representative lulls a creditor into a false sense of security, the court may find good cause for an extension. *In re Estate of Matchett*, 394 So.2d 437 (Fla. 5th DCA 1981).

**D. Representing Multiple Fiduciaries**

1. A lawyer may represent co-fiduciaries subject to RPC 4-1.7 and RPC 4-2.2.

2. Explanation to Clients

a. Absent a dispute between the co-fiduciaries, the representation of joint clients in the context of estate or trust administration places the same responsibilities and limitations on the attorney as the representation of a single fiduciary.

b. Realistically, however, co-fiduciaries often represent inherently conflicting interests, such as the second spouse and the child of a first marriage; or a corporate fiduciary who proposes to establish its compensation pursuant to its currently published percentage schedule and one of the testator's children who is also a beneficiary of the estate.

c. The RPC 4-1.7 (c) states that if such representation is undertaken, it shall be pursued only after consultation which includes an explanation of the "implications of the common representation and the advantages and risks involved."

3. Fighting Fiduciaries

a. If the co-fiduciaries become adversaries, the attorney may continue the representation only with the consent and waiver of both.

b. Importantly, the lawyer must reasonably believe that the representation will not "adversely affect the lawyer's responsibility" to either of the co-fiduciaries. RPC 4-1.7(a).

c. Issues may arise when a co-fiduciary refuses to act. With respect to co-trustees, pursuant to common law, co-trustees were required to act unanimously, unless the trust instrument provided otherwise. Administration of Trusts in Florida § 2.128 (Fla. Bar CLE 2012).

4. Withdrawal

a. If the lawyer recognizes an "impermissible conflict" before undertaking the representation, the lawyer should decline the engagement.

b. If the conflict develops after undertaking the representation and the lawyer is unable to obtain the necessary consents and waivers, the lawyer must withdraw.

5. Lawyer as Intermediary

a. Though the representation of multiple fiduciaries does not generally involve intermediation, there are instances in which a lawyer may act as an informal arbitrator.

b. RPC 4-2.2 allows the lawyer to act as an intermediary if the lawyer consults with each client regarding the nature of the common representation and the effect of the attorney-client privilege and obtains consents of each party.

c. The lawyer acting in this capacity must believe that the matter can be resolved on terms compatible with clients' best interests and there is little risk of material prejudice to the interest of either client.

6. Confidentiality

a. In a common representation, the lawyer is required to keep all clients adequately informed and maintain confidentiality relating to representation.

b. However, the Comment to RPC 4-2.2, states that attorney client privilege does not attach to commonly represented clients. The result would be that if litigation later developed between clients, communications would not be protected.