Fundamental Understanding Of Ethics And Trusts

Submitted by J. Mark Fisher

- Confidentiality In Respect To Third Parties

- Handling A Client Request For Use Of Questionable Asset Protection Techniques

- What To Do When The Competency Of The Client Is In Question.

- Protecting Yourself Against Malpractice Actions - How To Withdraw As Counsel

IV. Fundamental Understanding of Ethics and Trusts

A. Confidentiality in Respect to Third Parties

The usual estate planning meeting consists of either a single person, a widowed person, or a married couple. Routinely, if the parents are elderly, they are accompanied by one or more children. Determining who your client is with a single client is relatively easy. However, when your office is filled with mom, dad and two or three children, it can sometimes become a bit more difficult. Even the single clients can pose problems when their children call and ask for information about mom or dad explaining their parent is ill or suffers from lack of mental capacity. As a practical matter, the confidentiality rules are divided into two parts. The first part deals with issues related to your client while living and the second part deals with legal issues related to a deceased client.

1. The Living Client

If the client is living, the rule is fairly straightforward: do not disclose information unless your client gives you permission. Florida Bar Rule 4–1.6(a) states, "A lawyer shall not reveal information relating to representation of a client except as stated in subdivisions (b), (c), and (d), unless the client gives informed consent." The waters become a bit murkier when the client's child tells you the client is suffering from senile dementia or Alzheimer's. Our office procedure is to make a determination about the status of our client. We call our client's house or sometimes a client's hospital room to talk with them. If we feel reasonably satisfied the child is being truthful, we start a dialogue with the child. We review our file to determine who our client selected as successor Trustee. If the child calling our office is indeed the successor Trustee, we will conduct a telephone conference or office conference to determine how we can offer assistance. The bar rule provides permissive disclosure when the attorney believes the disclosure is reasonably necessary to serve the interest of the client. Florida Bar Rule 4–1.6(c) states:

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 of Professional Conduct.

Occasionally, the child calling our office will be the one that was not selected as successor Trustee or was left out of the Trust completely. It is important to make a determination who your client selected as the successor Trustee. During an office conference with the successor Trustee, I explain their duties including the all-important fiduciary duty to the Trust estate. I explain the duty to keep their parent's confidences and how I will provide advice to them about their role as successor Trustee, but my ultimate duty is to their parent.

Ninety-nine percent of the time, my client pays his or her own bill. However, there are occasions when a child may pay the parent's estate planning bill. For example, the children may pay for a Living Trust to avoid probate for mom or dad. At such a meeting, I make it very clear the parent is my client, and even though the children are paying, my allegiance is solely to the parent. Florida Bar Rule 4-1.8(f), states:

A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client gives informed consent;

(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship;

(3) information relating to representation of a client is protected as required by rule 4-1.6.

The rule strongly suggests that the attorney obtain the client's written consent before the attorney fee is paid by another.

In my practice, I tend to encourage estate planning as a family affair. In my opinion, the more the children know, the less likely they are to have a misunderstanding, be surprised and hire separate legal counsel. Most such meetings are relatively straightforward with mom and dad sitting across my conference table and the children scattered in chairs surrounding us. I make it very clear that mom and dad are my clients. But at the same time, I also ask mom and dad for permission to discuss estate issues with the children during the meeting and after the meeting, if necessary.

If my clients are in a second marriage and the children are step-brothers and sisters, I would consider using a joint representation and waiver agreement. Pursuant to Florida Bar Rule 4-1.7(c), the attorney should have a discussion regarding separate confidences; "When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved." The attorney should only undertake multiple client representation when all clients agree to the sharing of information, to the joint representation, and sign the waiver and joint representation agreement. As a practical matter, once all information is shared, there is no real need for protecting confidential information because everything has been disclosed and the entire estate process is transparent.

2. The Deceased Client

After the client's death, an attorney's duty of confidentiality continues. The attorney owes a continuing duty to protect confidential information regarding the client's probate and Trust estate. All documents I draft name the same person, or corporate

entity, as the personal representative and successor Trustee. Therefore, my duty of confidentiality passes to the personal representative, or the successor Trustee, but also stays with the decedent. Section 90.502(3)(c) of the Florida evidence code provides that the privilege may be claimed by "the personal representative of a deceased client." Section 90.502(3)(e) provides that the privilege may also be claimed by "the lawyer, but only on behalf of the client. The lawyer's authority to claim the privilege is presumed in the absence of contrary evidence." When the attorney attempts to assert the privilege, the rules become less clear if the attorney does not represent the personal representative or if no personal representative has yet been appointed. Florida Bar Rule 4-1.6 requires information relating to representation of the client be kept confidential; "A lawyer shall not reveal information relating to representation of a client except as stated in subdivisions (b), (c), and (d), unless the client gives informed consent." The Comment to Rule 4-1.6 suggests an attorney has an ethical obligation to assert the evidentiary privilege on the client's behalf when it is applicable. That obligation was applied in the case of a deceased client in Florida Bar Staff Opinion 20749 (March 9, 1998). The opinion states the attorney should assert the privilege on behalf of the deceased client if he or she believes that the information requested was intended by the client to be kept confidential within the scope of the statutory privilege.

Certain information may be disclosed, however, pursuant to Florida Bar Rule 4–1.6(c)(1), where the attorney determines that such disclosure of information would "serve the client's interest unless it is information the client specifically requires not to be disclosed." I would argue this rule allows an attorney to make appropriate disclosure of client confidential information that would promote the client's estate plan, forestall litigation, preserve assets, and further any family understanding of the decedent's intention.

3. Exceptions to the Duty to Claim the Evidentiary Privilege

The testamentary exception is codified in section 90.502(4)(b) of the Florida Evidence Code:

"(4) There is no attorney-client privilege under this section when:

(b) A communication is relevant to an issue between parties who claim through the same deceased client."

If the "testamentary exception" to the evidentiary privilege applies, there is no privilege and the decedent's attorney need not invoke it when subpoenaed, although any doubt about whether the information is privileged should be resolved in favor of nondisclosure and assertion of the privilege. Whether particular information is protected by evidentiary privilege is a question of law, not ethics, and is therefore a matter to be ruled upon by a court.

Practice Pointer: In response to a subpoena duces tecum for deposition, the estate planning attorney should assert the evidentiary privilege by filing an objection to the subpoena within 10 days. (See Rule 1.410(e), Fla.R.Civ.P.)

B. Handling a Client Request for Use of Questionable Asset Protection Techniques

Florida Rules of Professional Conduct 4-1.2(d) provides:

> [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.

The majority of clients an estate planning attorney encounters seek legal advice regarding the avoidance of probate, the disposition of estate assets at death, and the use of various legal documents related to estate planning. Some client requests concern the preservation of assets. Certain estate tax planning techniques, such as gifting and the use of an A/B Trust, may be used. Other clients have concerns about protecting their assets while they are still living. Many articles have been written about our "sue happy society," and naturally, clients are concerned about frivolous lawsuits and excessive jury awards.

There are many valid, as well as improper, reasons to engage in asset protection planning. The valid reasons include:

- providing economic diversification for a client;
- presentation of a low profile to disguise wealth;
- income or estate tax planning;
- avoidance of forced disposition of assets;
- a change in domicile; or
- marital planning.

It is this author's opinion that attorney assisted asset protection planning for future unknown creditors is proper. Conversely, assisting a client to avoid the payment of known or reasonably ascertainable creditors is improper. However, note that Medicaid attorneys counsel clients on how to avoid paying nursing home bills and how to prevent the State Medicaid office from collecting once the client is dead.

Much of the questionable asset protection discussion relates to ethical violations and encompasses the term, "fraudulent." Fraudulent is defined as "based on fraud; proceeding from or characterized by fraud…" *Black's Law Dictionary, 5th Edition*. The definition of fraud includes terms like "intentional perversion of truth, false representation, misleading allegations, deceitful practice, surprise and trick." Much of the Florida case law related to ethical violations concern the distinction between the terms "fraud" and "fraudulent transfer."

Freeman v. First Union National Bank, 865 So.2d 1272 (Fla. 2004), addressed the following question of Florida law certified by the United States Court of Appeals for the Eleventh Circuit:

> "Under Florida law, is there a cause of action for aiding and abetting a fraudulent transfer when the alleged aider-abettor is not a transferee?"

First Union National Bank provided banking services for Unique Gems. Unique Gems was convicted of creating a Ponzi scheme to defraud investors. Freeman was appointed receiver for Unique Gems and filed suit against First Union for its role in allowing Unique Gems to transfer money to Liechtenstein. First Union allowed Unique Gems to transfer $6.6 million even after, and with knowledge of, a pending lawsuit filed against the company. Furthermore, First Union failed to close the account for more than four months after the injunction was issued, allowing an additional $2 million to be wire-transferred to Liechtenstein.

The Florida Supreme Court rejected the argument that Section.726.108(1)(c)(3), Florida Statutes allows for the expansion of Florida's Uniform Fraudulent Transfer Act

(FUFTA) to include liability against non-transferees because this section was designed "to facilitate the use of the other remedies provided in the statute, rather than creating new and independent causes of action such as aider-abettor liability…" Thus, an action under FUFTA is a creditor's equitable remedy, and it gives creditors no cause of action in tort against non-transferees for aiding and abetting or civil conspiracy.

Based on this case, it can be argued that since a fraudulent transfer is not equivalent to a common law fraud, it is not unethical to assist a client in a transaction that later is deemed to have been a fraudulent transfer.

An article in the Florida Bar Journal titled *Analysis of Asset Protection Plans for Physician Practice Groups,* highlights an important point estate attorneys should remember. The authors state, "asset protection planning for physician practice groups is complex because it requires extensive knowledge of taxation, employment benefits, corporate law, and fraudulent conveyance law." The "fraudulent conveyance law" element is the important factor that concerns Florida attorneys and ethics violations. It appears that if appropriate goals for asset protection planning are in place, then the ethical issues should not surface. For example, in this particular article, the goal of asset protection for physician practice groups are to:

> a) avoid any disruptions to cash flow derived from accounts receivable by the actions of a judgment creditor; b) ensure that the cash generated from these receivables is available to pay retirement income and make stock repurchase payments to retiring physician shareholders; and c) if necessary, fund start-up costs of a new physician practice group if the prior group becomes liable for a significant medical malpractice judgment and has to cease doing business.

Those are legitimate goals; however, is not the legal effect of this planning to "hinder, delay or defraud" a future creditor? (See Florida Bar Journal, March 2004, p. 39-

43). Certainly one could argue that this asset protection planning hinders a future creditor from collecting on a judgment against the physician practice group. Thankfully, Florida courts have made a distinction between future creditors and current creditors. Asset protection planning for future creditors is permissible and hiding or concealing assets from current creditors is not.

C. **What to Do When the Competency of the Client is in Question**.

The Living Revocable Trust is a Will substitute. This Trust instrument is required to be executed with the same formalities as that of a Will. F.S. 736.0403(1)(b). Likewise, the capacity required to create, amend or revoke a Trust is the same as that required to make a Will. F.S. 736.0601. "Any person who is of sound mind and who is either 18 or more years of age or an emancipated minor may make a Will." F.S. 732.501. The obvious issue is to determine if your client is of "sound mind." The less obvious issue is to determine if you, as the drafting attorney, have a legal or ethical duty to determine a client's capacity or "sound mind."

The term, "sound mind" means the ability of the testator "to mentally understand in a general way the nature and extent of the property to be disposed of, and the testator's relation to those who would naturally claim a substantial benefit from a Will, as well as a general understanding of the practical effect of the Will as executed." *In re: Wilmott's Estate*, 66 So.2d 465 (Fla. 1953).

As a matter of routine office practice, I ask my Will and Trust clients about their assets. I then discuss their family and the heirs who might naturally inherit. Lastly, I ask the client if they understand that by making this Will or Trust their assets will be transferred to those named in their document. Although I have satisfied the basic test for determining "sound mind" pursuant to *Wilmott*, there is no easy way to know if the client understands the practical effect of the Will or Trust.

Complicating matters, Florida Bar Rule 4-1.14 places the responsibility of determining the client's capacity with the attorney drafting the Will or Trust instrument. Pursuant to this rule, the attorney must determine whether it is reasonably possible to maintain a normal attorney-client relationship. This Rule suggests the attorney should make a determination if the client is capable of making decisions about important matters. This is an ethical obligation. There is no legal obligation in Florida placed upon

attorneys to determine a client's capacity to execute documents. Likewise, there is no legal test to determine capacity set forth under the Rules regulating the Florida Bar.

The American College of Trust and Estate Counsel (ACTEC) offers ethical guidance to Trust and estate attorneys. The comment to MPRC 1.14 "Client Under a Disability" offers, in part:

> Testamentary Capacity. If the testamentary capacity of a client is uncertain, the lawyer should exercise particular caution in assisting the client to modify his or her plan. The lawyer generally should not prepare a Will or other dispositive instrument for a client who the lawyer reasonably believes lacks the requisite capacity. On the other hand, because of the importance of testamentary freedom, the lawyer may properly assist clients whose testamentary capacity appears to be borderline. In any such case the lawyer should take steps to preserve evidence regarding the client's testamentary capacity.

Florida attorney, Rohan Kelley, the father of estate planning in my opinion, authored an outstanding article titled *Estate Planning for the Potentially Impaired or Influenced Client.* Rohan, Kelley 1995, 2004. He analyzes the ACTEC comment above and states:

> While the commentary is clear that "[t]he lawyer generally should not prepare a Will or other dispositive instrument for a client who the lawyer reasonably believes lacks the requisite capacity," it suggests flexibility in cases of marginal capacity, in the name of "testamentary freedom." The golden nugget of advice there, however, is the direction that "the lawyer should take steps to preserve evidence regarding the client's testamentary capacity."

> Note also that the San Diego County opinion admonishes the attorney to "keep a detailed and complete record of that interview." This is the most important advice that the reader should glean from this monograph. In the opinion of the author, if it is not ethically culpable to fail to document the observed situation fully, it should be. While we are not trained to, or typically capable of making the determination of capacity, and that is best left to the proper court at the proper time, we can at least aid in that determination by collecting and preserving all available evidence. We are often the only independent legally trained person on the scene who is in a position to do so. The practical side to this advice is that it will probably avoid any claim of collusion or conspiracy between the attorney and the beneficiary.

The 1949 Florida Supreme Court case of *Vignes v. Weiskopf*, 42 So.2d 84 (Fla. 1949), focuses strictly on the issue of the attorney's duty to a client when capacity is in question. The elderly gentleman was dying, in pain and heavily medicated. His secretary of 20 years attended his bedside, and he gave her instructions regarding changes to his Will. Along with leaving her a gift of $30,000 he left another individual a sum of money. Apparently, there was a third person to receive the sum of $100,000 but he could not remember who that person was. The secretary contacted the gentleman's attorney who came to the client's home to have a codicil executed reflecting these changes. The attorney offered to read the Will aloud but the testator declined, saying he would read it later, but he did not do so. The codicil was then signed and witnessed. Testimony offered at trial by those with direct knowledge that the testator "probably did not comprehend what he was doing or had done."

At the same time the Will and the codicil were offered for probate, the witnesses and the drafting attorney made unsolicited written oaths, to the probate judge, "that they

verily [believed] that the testator did not know the contents of what he was signing nor did he at the time of the signing thereof have testamentary capacity." The opinion recites: "Patently the purpose of this affidavit was to apprise the court at the first opportunity precisely what happened in the sickroom when the codicil was executed." The Court further held:

> We are convinced that the attorney should have complied as nearly as he could with the testator's request, should have exposed the true situation to the court, which he did, and should have then left the matter to that tribunal to decide whether, in view of all facts surrounding the execution of the codicil, it should be admitted to probate.
> Had the attorney arrogated to himself the power and responsibility of determining the capacity of the testator, decided he was incapacitated, and departed, he would indeed have been subjected to severe criticism when, after the testator's death, it was discovered that because of his presumptuousness the last-minute effort of a dying man to change his Will had been thwarted. (*id*, at page 86.)

Conclusion: An estate attorney should do his best to comply with his client's wishes. However, there is an ethical obligation to determine if his client has capacity and can maintain a normal "attorney-client relationship." It might be prudent in questionable cases to request that the client have a psychological evaluation done prior to executing important testamentary documents. This outside objective evidence could certainly relieve the attorney from being the sole judge of mental capacity.

D. Protecting Yourself Against Malpractice Actions - How to Withdraw as Counsel

Estate planning attorneys face many ethical challenges. Some of the ethical challenges may be overcome by having the parties agree to sign waivers, but some conflicts are so significant, they require the attorney to withdraw as counsel. The following is a list of ethical issues faced by estate planning attorneys:

1. Who is the client? An elderly person arrives at your office with family members or friends. Sometimes, a family member or friend does most of the talking for the elderly client. The attorney should make it clear at the outset who their client is and the ground rules for the attorney's representation. This may be done through their Will representation, but the preferred course of action would be through an engagement letter.
2. Conflicts of interest. Florida Bar Rule 4-1.7, prohibits attorneys from representing a client if the representation will be directly adverse to another client's interest. If the attorney has a reasonable belief that the representation will not adversely affect his responsibilities to, as well as his relationship with, the first client, and both clients consent after consultation, the dual representation would be permitted (See attached Exhibit "A").
3. Confidentiality. A lengthy discussion regarding confidential communication issues have been provided in the previous section IV. FUNDAMENTAL UNDERSTANDING OF ETHICS IN TRUSTS, A. Confidentiality in Respect to Third Parties.
4. Who pays the bill? Occasionally, a child will pay the bill for one of my elderly clients. Florida bar rule 4-1.8(f):

> Prohibits an attorney from accepting payment from one other than the client unless the client consents after consultation, there is no interference with either the client-attorney relationship or the attorney's exercise of

> independence of professional judgment, and client confidentiality is preserved.

A typical scenario I see in my law practice is where the son pays to have a Living Trust prepared for mom so that probate is avoided. The prior Will leaves everything to the son as does the new Living Trust. The sole purpose for creating the Living Trust is to benefit the son by avoiding probate. I ask the client for permission to have the son present during the consultation and execution meetings, as well as her permission to talk directly with the son if he calls my office and requests additional information.

5. Multiple clients. A typical multiple client scenario may include either preparing husband and wife estate planning documents, representing an estate with more than one personal representative, or representing a child after the client has lost capacity. See Florida Bar Rule 4-1.7, regarding conflicts of interest, Rule 4-1.16, regarding confidential information, and Rule 4-1.14, regarding an incapacitated client. The comments to Rule 4-1.14 note that when a client is incapacitated, disclosure of the client's condition may have an adverse impact on the client's case. In such cases, the comments state an attorney may seek guidance from an appropriate diagnostician. That comment implies authorization of limited disclosure to an expert who could assist with the client's disability is appropriate.
6. Withdrawing as Counsel. When representing more than one client, conflicts sometimes occur. Most conflicts, however, are waivable by the parties and do not present significant legal problems. Occasionally, there are non-waivable conflicts that arise between the parties. Florida Bar Ethics Opinion 95-4, issued in 1997, provides guidance on the issue of multiple client representation. In this opinion, the Real Property, Probate and Trust Law section of the Florida Bar posed the following hypothetical:

> Several months after the execution of new Wills by long-time clients, husband tells attorney that he recently signed a codicil (prepared by another firm) in which husband makes a substantial bequest to his long-standing mistress. Wife has no knowledge about the codicil or the mistress.

Husband asked attorney to give advice about wife's rights of election if she survives husband. Attorney tells husband that attorney cannot advise husband and attorney has to consider ethical duties, with the possible result of deciding to withdraw from representing husband and wife, and determining to disclose this information to wife if husband does not do so.

The issues considered in the opinion:

1. Prior to husband's recent disclosure, did attorney owe any ethical duty to counsel husband and wife concerning any separate confidence which either husband or wife might wish for lawyer to withhold from the other?
2. Assuming that husband does not make disclosure of the information referred to in issue one, to wife:
    a. Is attorney required to reveal voluntarily the information to wife?
    b. May attorney in attorney's discretion determine whether or not to reveal the information to the wife? If so, what are the relevant factors which lawyer may or should consider?
    c. If attorney does not reveal the information to wife, is attorney required to withdraw from the representation? If so, what explanation, if any, should lawyer give to wife?
3. May attorney continue to represent husband alone if attorney notifies wife that attorney is withdrawing from the joint representation and will no longer represent wife? If so, is disclosure to wife

necessary in order to obtain her informed consent to attorney's continued representation of husband?

4. Assuming that adequate disclosure is made to wife, may attorney continue to represent both husband and wife if they both wish for attorney to do so?

The opinion concluded that, because of the prior representation where there was no evidence of divergent interests, the attorney was not bound to the disclosure and consent requirements of Rule 4-1.7, nor was he obligated to have a discussion regarding separate confidences, although if that had occurred, the situation may have been avoided. Further, the attorney could no longer represent either party in any estate planning matter, should advise each to retain separate counsel, and could not disclose the information about the codicil and mistress to the wife. The committee opinion acknowledged that the sudden withdrawal may raise a red flag to the wife, but the attorney may not reveal the information without the husband's consent.

EXHIBIT "A"

October 16, 2008

JOHN L. DOE
JANE L. DOE
123 Any Street
Any City, Florida 32000

RE: Engagement Letter for Estate Planning Services

Dear John and Jane:

You have each asked me to prepare Trust documents for your estate planning. I have agreed to do this work and will bill for it on the following basis: Set fee for each Trust package and additional office conferences will be billed at my hourly rate (currently $275/hour.) If I am asked to perform tasks not described in this letter, an additional engagement letter may be required for that work.

It is common for a husband and wife to employ the same lawyer to assist them in planning their estates. You have taken this approach by asking me to represent both of you in the preparation of new Trust documents. However, each of you wants to maintain your right to confidentiality and the ability to meet separately with me. I have agreed to do this work on this basis and will bill for it as outlined above.

I will represent each of you separately and will not discuss with either one of you what your spouse has disclosed to me. Each of you releases me from the obligation to reveal to you any information I may have received from the other that is material and adverse to your interest. Furthermore, I will not use any information I obtain from one of you in preparing the other's plan, even if the result is that the two plans are incompatible or one plan is detrimental to the interests of the other spouse. In short, the representation will be structured so that each of you will have the same relationship with me as if each of you had gone to a separate lawyer for assistance in your planning.

While I have agreed to undertake this representation on a separate and confidential basis, you should be aware that there might be disputes between you now or in the future as to your respective property rights and interests, or as to other issues that may arise between you. Should this occur, I would not be able to represent either of you in resolving any such dispute, and each of you would have to obtain your own representation.

After considering the foregoing, if each of you consents to my representation of each of you separately, I request that each of you sign and return the enclosed copy of

this letter. If you have any questions about anything discussed in this letter, please contact my office. In addition, you should feel free to consult with another lawyer about the effect of signing this letter.

Sincerely,

J. Mark Fisher

CONSENT

We have read the foregoing letter and understand its contents. We consent to having you represent each of us on the terms and conditions set forth.

Executed: _____

_____
JOHN L. DOE

Executed: _____

_____
JANE L. DOE