ETHICAL CONSIDERATIONS

Submitted by J. Mark Fisher

XII. ETHICAL CONSIDERATIONS

A. Defining Who Your Client is from the Start:

Routinely, more than one person comes to sit down in the lawyer's office for an estate planning meeting. Two generations may be in front of you, the parent(s) and children. The parent(s) may simply wish to include their child in the process so they are better equipped when they are needed, or the children could be pressing their parents to do this type of planning because their spouse's parents just died and they had no plan and it was a "painful process," or, my favorite, the overprotective mother in the office with her son and directing him to get a pre-nuptial agreement and estate plan, and she will pay for it. In each of these cases, the attorney will be representing the party whom will be signing the documents, regardless of who is paying the attorney. In regard to the case where the parent(s) just wanted to include their kids in the process so they are informed, the attorney should make it clear that they are including the children because of their parent's direction to do so. At any time their parent(s) could change their mind and direct the attorney to no longer disclose or communicate any aspect of their plan to the children. (*See generally, See Fla. Bar Reg. R.* 4-1.6 and *Fla. Stat.* § 90.502).

Granted, picking out the client in the above examples is easy, but how much suggestion and direction do you take from the non-client participant? What if the client says, "My son knows what I want, he will tell you."

After figuring out who, are there one or two? You can start an engagement by representing just one individual, or you can represent a couple in a joint representation. The default rule is that when an attorney first meets with a husband and wife at an estate planning conference, a joint

representation exists, unless otherwise stated. *See* ACTEC, Commentaries on the Model Rules of Professional Conduct, 66 (2d ed. 1995).

Professional Ethics of the Fla. Bar, Advisory Opinion 95-4 (1997):

> "In a joint representation between a husband and wife in estate planning, an attorney is not required to discuss issues regarding confidentiality at the outset of the representation. The attorney may not reveal confidential information to the wife when the husband tells the attorney that he wishes to provide for a beneficiary that is unknown to the wife[43]. The attorney must withdraw from the representation of both husband and wife because of the conflict presented when the attorney must maintain the husband's separate confidences regarding the joint representation."

See also Joint Representation of Spouses in Estate Planning: The Saga of Advisory 95-4, 72 Fla. B. J. 39 (1998).

A husband and wife will not be the only joint representation an estate planning attorney will see. Other forms of joint representation are currently being seen in the form of LGBT couples.

It is important for the lawyer to clarify in writing who the client is and what the terms of the engagement are. This is the time to determine whether a conflict or a potential conflict exists, and if so, whether a waiver of conflict should be obtained, if it is even a waivable conflict. (*See sample Engagement Letter*).

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

[43] Or as we call her in my office, "the sweetie on the side."

related to your client while living and the second part deals with legal issues related to a deceased client.

CONFIDENTIALITY ISSUES WITH 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-l.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 by calling 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 Revocable 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- l .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-l.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.

CONFIDENTIALITY ISSUES WITH 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, the 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-l.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- l.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.

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 l.410(e), Fla.R.Civ.P.).

B. Handling Clients with Diminishing Mental Capacity:

The Revocable Living 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(l)(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 "the 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.

C. Lawyers Acting as Fiduciaries:

APPOINTMENT:

A lawyer can become a fiduciary such as a Personal Representative or Trustee by being appointed by a court order, a settlement agreement, or the Will or Trust instrument.

Effective October 1, 2013, we now have *Fla. Stat. §* 732.806, a new statute effectively codifying existing ethics Rule 4-1.8(c) as part of our probate code, and making a violation of this ethics rule an automatic basis for voiding any part of a Will, Trust or other written instrument making an improper client gift to the drafting lawyer or a person related to the lawyer. Like the existing ethics rule, the restrictions on gifts under the new statute do not affect a written instrument appointing a lawyer, or other person related to the lawyer, as a fiduciary.

Like the existing ethics rule, *Fla. Stat. §* 732.806 also contains a carve-out for Wills and Trusts in which the drafting lawyer is named as his client's Personal Representative or Trustee. However, the commentary to Rule 4-1.8(c) strongly hints there's a potential for conflict-of-

interest, and the drafting lawyer should obtain the client's "informed consent" to such appointment. (*See attached sample: Informed Consent Affidavit*).

Although the prospect of serving in the dual capacity of attorney for the estate and Personal Representative of the estate, or attorney for a Trust and Trustee of the Trust, might be attractive to an estate planner, these positions involve an enhanced ethical standard and thus increase an attorney's exposure to disciplinary proceedings and malpractice claims. See generally Krier, *The Attorney as Personal Representative or Trustee*, 65 Fla. Bar J. 69 (Jan. 1991); Haught, *Attorneys Take Fiduciary Roles*, 127 Trusts & Estates 10 (Feb. 1988); DeFuria, *A Matter of Ethics Ignored: The Attorney as Testamentary Fiduciary*, 36 Kan.L.Rev. 275 (1988). (*See also* The Florida Bar News dated October 1, 2014 disciplinary Actions, pp 18-19.)

Florida law specifically authorizes attorneys to render services as both attorney for an estate and Personal Representative. *Fla. Stat. § 733.612(19).*

FEES:

A lawyer can act as either the Personal Representative for an estate or the Trustee of a Trust. Both positions impute a fiduciary obligation on the attorney. Both positions have specific statues regarding the payment of their position.

Fla. Stat. § 733.617(6) specifically provides: "If 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." *Fla. Stat.* §§ 733.6171 and 733.617 lay out a schedule of the fee the Personal Representative and attorney for the Personal Representative should be charging. If the fiduciary stays within the enumerated schedule, then the fee will be "presumed reasonable." But, there are factors that can enhance or reduce the fee to the fiduciary.

A similar fee schedule is laid out in the Trust code at Fla. Stat. §§ 736.0708 and 736.1007. The Trust code references a fee that will be presumed reasonable at a rate of 75% of the schedule provided in *Fla. Stat*. § 733.6171.

Regardless of the fact there are specific statutes enumerating a presumed reasonable fee, scrutiny will be most intense on the issue. Attorneys should note that many probate judges have expressed concern that the amount of fees payable to an attorney who is serving both as attorney for the estate and as Personal Representative might be unreasonable for purposes of the Code of Professional Responsibility if the fees under *F.S. 733.6171 and 733.617* are aggregated.

CONFLICT OF INTEREST(S):

When the attorney is serving as the fiduciary, the attorney for the fiduciary, or both, he must determine the identity of the client. Determining the client should be the threshold inquiry for the attorney so he can determine whether a conflict or the potential for conflict exists.

The Comment to *Rule Reg. Fla. Bar 4-1.7* provides that, "in Florida, the Personal Representative is the client rather than the estate or the beneficiaries." Presumably, the same principle applies to Trust administration. Nonetheless, an attorney may also owe a duty to estate and Trust beneficiaries. In *In re Estate of Gory,* 570 So.2d 1381 (Fla. 4th DCA 1990), the court held that the attorney for the estate is not disqualified to represent the Personal Representatives in a fee dispute because, even though the attorney may have a duty to the beneficiaries of an estate to see that the estate assets are preserved and not wasted, the beneficiaries are not the attorney's clients. The court noted that "counsel for the Personal Representative of an estate owes fiduciary duties not only to the Personal Representative but also to the beneficiaries of the estate. . . This does not mean, however, that counsel and the beneficiaries occupy an attorney-client relationship. They do not." *Id. at 1383.*

D. Estate Status Updates for Clients - Why it Pays Off and How to do it Efficiently:

When does the representation terminate? The use of a disengagement letter should be used to let the client know this representation is completed, but the attorney is available for future representation. Another issue that should be addressed in the letter is whether or not the attorney is going to assume responsibility to keep the client apprised of future changes in the law which might necessitate a revision to the just concluded estate plan. The letter can say the attorney assumes no responsibility or in the alternative, will assume responsibility.

The American Bar Association's position is that the attorney not only has the right to notify the client of changes without concerns about solicitations, but may also have a duty to inform the client of changes of fact or law which may defeat the client's testamentary purpose. This duty will no longer exist if the attorney is cognizant of the fact the client has new counsel.

When the attorney does elect the ongoing responsibility of advising the client of changes in the law, a form letter to all estate planning clients is a useful tool. The attorney can give a yearly update to his clients reviewing recent changes and continuing to track the changes for the clients to be able to track the evolution of the law.

If the client is diligent and makes the necessary changes to their estate plan, the attorney is not only able to generate a fee for the work done, but if the attorney is involved in the administration of the estate plan, then it is also likely there will be a smooth transition for all parties. If it is less likely there is going to be an unforeseen disaster because of an outdated tax clause, beneficiary, or distribution provision, then the client and his family should also be able to save time and money. (*See attached sample: Yearly Client Letter*).

E. Practicing before the IRS:

After the death of a client, there are many loose ends including final tax returns. Your client's final income tax return must be filed for the last taxable year in which he was alive and

received taxable income. The normal 1040 tax return should be filed. Likewise, once the estate is open and a separate tax ID number has been obtained for the estate, a tax return should be filed for the estate if it receives income of at least $600. This tax return is filed on IRS form 1041, commonly referred to as the fiduciary tax return. If the estate is one where the assets exceed the current unified credit exemption, $5,340,000, then an estate tax return will also be due. This is filed on IRS form, 706.

Current legislation holds the tax preparer liable for an improper return. Unless you have an LLM designation as a tax expert, my advice is to hire a CPA firm to prepare all of the decedent's final income tax returns, fiduciary return and estate tax return. More than likely, the malpractice coverage carried by an attorney will not cover the liability associated with filing a tax return. The coverage carried by a CPA should cover any such liability.

Practice Pointer: My firm always uses a CPA to prepare all needed tax returns. If I can engage the CPA who has done the decedent's previous tax work, then I do so. If I have a question about the bookkeeper's ability or the client didn't have a CPA, then I hire my own to do any final tax returns.

F. Getting Paid: Billable/Non-Billable Hour and Retainer Agreements:

Generally, an attorney representing an individual or couple with an estate plan will be paid a reasonable fee based on the work performed. All fees an attorney charges or receives are subject to the ethical rule disallowing an attorney to charge an excessive fee. Estate planner's fee arrangements with their clients will greatly vary. Some attorneys will charge their fee up front, others will present a bill to the client after the work is completed. Some attorneys will charge a flat fee, others will charge hourly.

Regardless of the method of the fee, the agreement and basis of the fee should be enumerated in writing.

G. Preventing Unauthorized Practice of Law by Legal Staff:

Unlicensed Practice of Law: The unlicensed practice of law shall mean the practice of law, as prohibited by statute, court rule, and case law of the state of Florida. *Paralegal or Legal Assistant.* --A paralegal or legal assistant is a person qualified by education, training, or work experience, who works under the supervision of a member of The Florida Bar and who performs specifically delegated substantive legal work for which a member of The Florida Bar is responsible. A non-lawyer or a group of non-lawyers may not offer legal services directly to the public by employing a lawyer to provide the lawyer supervision required under this rule. It shall constitute the unlicensed practice of law for a person who does not meet the definition of paralegal or legal assistant to use the title paralegal, legal assistant, or other similar term in offering to provide or in providing services directly to the public. (*See Fla. Bar Reg*. R. 10-1.2).

The simple fact is, an assistant cannot be on the phone with a client and render independent legal advice, regardless of whether they heard the attorney advise the same thing in the same situation.

TABLE OF AUTHORITIES

XII. ETHICAL CONSIDERATIONS

Schedule of Attachments

1. Sample Engagement Letter
2. Disciplinary Actions Against Attorneys as Fiduciary
3. Sample Yearly Client Letter

December 9, 2014

Lester O. Sample and Leslie O. Sample
1234 Revocable Trust Lane
Pensacola, FL

RE: Engagement Letter for Estate Planning Services

Dear Mr. & Mrs. Sample:

You have asked me to prepare a Living Revocable Trust as part of your estate planning. I have agreed to do this work and will bill for it on the following basis: $_____ which includes: the initial consultation, preparation of a joint Trust Agreement, Pour-Over Wills, Designation of Health Care Surrogates, HIPAA Release Forms, Living Wills, Durable Family Power of Attorneys, Designation of Agent to Control Disposition of Remains Forms, one (1) Warranty Deed and the signing conference. The preparation of additional documents transferring real property, promissory notes or mortgages will be billed at $____ each. Additional office conferences, new documents, changes to existing documents, opinion letters, providing copies of documents to third parties and involvement by me after your death (including, but not limited to, appointments made by successor Trustee(s), depositions or court appearances for litigation) will be billed at my hourly rate (currently $___/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 attorney to assist them in planning their estates. You have taken this approach by asking me to represent both of you in your planning. It is important that you understand that, because I will be representing both of you, you are considered my client, collectively. Ethical considerations prohibit me from agreeing with either of you to withhold information from the other.

Accordingly, in agreeing to this form of representation, each of you is authorizing me to disclose to the other any matters related to the representation that one of you might discuss with me or that I might acquire from any other source. In this representation, I will not give legal advice to either of you or make any changes in any of your estate planning documents without mutual knowledge and consent. Of course, anything either of you discusses with me is privileged from disclosure to third parties, except (a) with your consent, (b) for communication with other advisors, or (c) as otherwise required or permitted by law or the rules governing professional conduct.

If a conflict of interest arises between you during the course of your planning or if the two of you have a difference of opinion concerning the proposed plan for disposition of your property or on any other subject, I can point out the pros and cons of your respective positions or differing opinions. However, ethical considerations prohibit me, as the attorney for both of you, from advocating one of your positions over the other.

Furthermore, I would not be able to advocate one of your positions versus the other if there is a dispute at any time as to your respective property rights or interests or as to other legal issues between you. If actual conflicts of interest do arise between you, of such a nature that in my judgment it is impossible for me to perform my ethical obligations to both of you, it would become necessary for me to cease acting as your joint attorney.

Once documentation is executed to put into place the planning that you have hired me to implement, my engagement will be concluded and our attorney-client relationship will terminate. If you need my services in the future, please feel free to contact me and renew our relationship. In the meantime, I will not take any further action with reference to your affairs unless and until I hear otherwise from you.

After considering the foregoing, if each of you consents to my representation of both of you jointly, I request that you sign and return the enclosed copy of this letter. If you have any questions about anything discussed in this letter, please let me know. In addition, you should feel free to consult with another attorney 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 above.

Executed: December 9, 2014

_____
LESTER O. SAMPLE

Executed: December 9, 2014

_____
LESLIE O. SAMPLE

Derek Michael Aronoff, 27 S.E. Ocean Blvd., **Stuart,** to be **publicly reprimanded** by publication in the *Southern Reporter* and further, directed to attend ethics school, following a June 19 court order. (Admitted to practice: 2001) After the death of a client, Aronoff attempted to provide legal services to her family when he was not competent to do so. Instead of advising the family of his late client that he was unsure how to proceed, he attempted to bring a civil action in the name of the decedent, when no probate proceeding was pending. Aronoff mistakenly believed that filing a civil action in the name of the decedent in the wrong county would initiate a probate proceeding. (Case No. SC14-1014)

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Yearly Letter/Estate Plan Update

Dear Clients:

Our office has been very busy this year. Along with new clients creating Wills and Trusts, we have assisted many existing clients with amendments to old Trusts and updating their old documents. Some clients have not been back to my office for more than 15 years! Many significant changes have occurred over the years. These changes have prompted me to recommend that my existing clients consider updating certain documents. The following is a list of those updates:

- 2002 - statutory change to the Living Will
- 2005 - HIPAA language inserted into the Designation of Health Care Surrogate
- 2005 - HIPAA language inserted into the General Durable Family Power of Attorney
- 2005 - creation and addition of a HIPAA Release form to the Trust package
- 2007 - creation and addition of the Agent to Control Disposition of Remains form to the Trust package

Many other minor changes in legal documents have occurred over the years as a result of case law, statutory law, and my attendance at continuing legal education workshops. As these minor changes occur, I amend and alter my documents. Generally, estate planning lawyers recommend a review of your documents at least every five years, or sooner, if a major family event has occurred. Examples of such events include, but are not limited to, marriage, death, health issues and financial issues.

The Living Revocable Trust is created to be a very quick and efficient means to distribute the estate assets once one or both parents have passed away. It sometimes helps the surviving parent to get the children involved and meet with me as a family. Once the surviving parent passes, I usually conduct a 45 minute to one hour meeting with the Successor Trustee and children. This meeting allows me to have one final review of the estate documents and point out any particular legal issues that may be present, as well as answer general tax questions. The meeting also allows me the opportunity to file the original Will as required under Florida Statute and file the Notice of Trust, Affidavit of No Florida Estate Tax Due, and place the Successor Trustee on the proper path to resolve the estate quickly and efficiently.

Every year in my newsletter, I like to make a list of general considerations for each client to evaluate along with reviewing their Trust book:

1. Our office does <u>not</u> keep signed copies of original Trust documents, only computer generated copies. Please make a copy of your Trust documents, give them to your Successor Trustee and advise the Successor Trustee where the original Trust book is located.
2. Insure your assets are titled to your Trust or payable to your Trust upon death. If this is not done, your assets may require probate.
3. Review property deeds to determine that your property(s) are titled to the Trust and that the legal description(s) are accurate.

4. Pen and ink changes made on your Trust and other documents are not valid. All changes must be done with witnesses and a notary.
5. Section 9 of your Trust book allows you to leave tangible items (furniture, jewelry, household items, cars, etc.) to your family members. Just describe the item, who it goes to and then sign and date the form. Keep the signed form in Section 9 of your Trust book.
6. At your death, distributions should be made to the beneficiaries as soon as possible unless the Will or Trust agreement provides for assets to be held in a continuing Trust.
7. The following information concerns clients who have an A/B Trust:
   A. Certain clients have an A/B Trust and now may not need to have the A/B Trust language because of recent changes in the law. I addressed this concern in last year's newsletter. With an A/B Trust, the death of one spouse creates a duty on the surviving spouse to add up the assets of the Trust estate and separate them into Trust A and Trust B. This is done in order to preserve the decedent's tax credit. If you have an A/B Trust and have questions on this issue, please contact our office.
   B. Under the 2001 Tax Act, the tax credit for 2009 was $3.5 million per person. A couple with a $900,000 estate may not need an A/B Trust because one credit ($3.5 million) shields the entire estate from inheritance taxes. The children of the surviving spouse would not benefit from the preservation of two inheritance tax credits, and therefore, the surviving spouse may not wish to maintain two separate Trusts. If you find yourself in this situation, it is very easy to convert your A/B Trust to a joint Trust (A/A), allowing the surviving spouse to receive the entire estate. The cost to do this conversion is $850.00 and includes an Amended and Restated Trust and all new updated supporting documents.
   C. If your estate is larger than $3.5 million, then maintaining these two separate accounts is a small inconvenience in relation to the hundreds of thousands of tax dollars that can be saved. However, if there is no tax due, then why bother? One reason to maintain the A/B Trust, even if there is no tax advantage, is to insure the decedent's beneficiary designations are honored. In a joint A/A Trust, when the first spouse dies, all the assets immediately belong to the surviving spouse. If he or she remarries, there are no restrictions preventing him or her from re-titling all the assets jointly with his or her new spouse, or leaving them all to his or her new spouse, and nothing to the original children. The A/B Trust preserves the first spouse's beneficiary selection.

ESTATE TAXES. Part of the reason my yearly letter has been delayed is because I have been waiting on Congress to decide the fate of the estate tax. The Kiplinger Tax Letter indicates the tax writers want to reinstate the estate tax retroactive to January 1, 2010, but cannot agree on where to set the levels. There is no indication from Congress that either Republicans or Democrats want the inheritance tax level to return to the $1 million exemption amount looming under the current sunset law. It appears the real issue is whether or not the exemption will stay at $3.5 million per person with a 45% tax rate or increase in steps from $3.5 million to $5 million per person and a lowering of the top rate from 45% to 35%.

If you wish to discuss your estate plan or have changes you wish to make, please contact my office. I look forward to being of assistance to you with your estate planning needs.

Sincerely,
J. Mark Fisher