

TEN QUESTIONS TO ASK YOURSELF TO AVOID A DIVORCE (A/K/A GRIEVANCE OR MALPRACTICE) FROM A CLIENT

Presented By:

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I. HOW WELL DO I COMMUNICATE?

- A. In General: Discussion of Rule Reg. Bar 4-1.4 and comments to the Rule.
- B. Explanation to the Client: Explaining a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.
- C. Withholding Information: Circumstances where a lawyer may be justified in delaying transmission of information.

II. DO I CHARGE APPROPRIATELY?

- A. In General: Discussion of Rule Reg. Fla. Bar 4-1.5.
- B. Excessive Fees: Discussing case law, Florida Statutes and Florida Bar Rules regarding the excessiveness of a fee.
- C. Trustee's Attorneys' Fees: What constitutes reasonable compensation for ordinary services and how fees can be increased and decreased.
- D. Fee Agreements: The benefits of fee agreement and how and when it should be utilized.
- E. Splitting Fees Between Attorneys In Different Firms.

III. DO I UNDERSTAND THE SUBSTANTIVE AREA?

- A. In General: Rule Reg. Fla. Bar 4-1.1.
- B. Referral Networks: Rule Reg. Fla. Bar 4-5.4 specifically prohibits the sharing of fees between lawyers or law firms and non-lawyers.
- C. Scope Of Representation: To provide adequate representation to the client, the attorney must define the scope of the representation at the outset and advise the client in writing of those limits.

IV. DO I KNOW AND UNDERSTAND EXACTLY WHOM I AM REPRESENTING?

Conflict Of Interest: The most difficult ethical issue confronting the attorney serving as a fiduciary or serving as the attorney for the fiduciary, or both, is the potential for and likelihood of encountering conflicts of interest.

V. *DO I KEEP WHAT I LEARN FROM MY CLIENT CONFIDENTIAL?*

- A. In General: Rule Reg. Fla. Bar 4-1.6(a) provides that “[a] lawyer shall not reveal information relating to representation of a client . . . unless the client consents after disclosure to the client.”
- B. Confidentiality Of Information As To Deceased Clients:
 - 1. Distinction Between Privilege And Compelled Disclosure: Quandaries faced when a deceased client’s estate plan is challenged by an interested party.
 - 2. Ethical Duty Of Confidentiality: Discussing how Rule Reg. Fla. Bar 4-1.6(a) prevents voluntary disclosure to third parties regarding confidential information relating to a deceased client.
 - 3. Evidentiary Privilege Against Compelled Disclosure
- C. Confidentiality Of Information As To Members Of Same Family: Discussion on Rule Reg. Fla. Bar 4-1.6 and when multiple family members are represented by a single attorney, the attorney will receive confidential information from each family member.
- D. Confidentiality Of Information As To Online Communications.

VI. *DO I (OR CAN I) DETERMINE WHETHER MY CLIENT IS IMPAIRED?* Discussion of the ABA Committee on Ethics and Professional Responsibility issued Formal Ethics Opinion 96-404 on August 2, 1996.

VII. *DO I CHECK FOR A CONFLICT OF INTEREST?*

- A. In General: The most troublesome area of the estate planner’s practice.
- B. Gift To Attorney Or Attorney’s Relative: Rule Reg. Fla. Bar 4-1.8(c) prohibits an attorney from preparing an instrument giving the attorney or a person related to the attorney any “substantial gift” from a client, including a testamentary gifts.
- C. Compensation From Someone Other Than Client: Preparation of estate planning documents for elderly clients, many of whom consult with an attorney only after a child or other relative has made the initial contact.
- D. Recognition Of Potential Conflicts At Outset Of Representation: Rule Reg. Fla. Bar 4-1.7 purports to be the primary ethical rule dealing with conflicts of interest. Its principles are difficult to apply to an estate planning practice because a true estate planning practice is not adversarial.
- E. Conflicts Based On Attorney’s Self-Interest: In assessing potential conflicts in the representation of a particular client, the estate planning attorney must also turn the examination inward.
- F. Conflicts Between Former And New Clients: Rule Reg. Fla. Bar 4-1.9 differentiates the treatment of conflicts that arise between a former client and a new client by requiring disclosure to and the consent of only the former client.

- G. Attorney As Intermediary: Rule Reg. Fla. Bar 4-2.2 considers an attorney's actions as an intermediary between clients.
- H. Written Disclosure And Informed Consent: The attorney should make a practice of disclosing, in writing, both existing and potential conflicts to his or her estate planning clients.

VIII. UNDERSTANDING THE GRIEVANCE COMMITTEE PROCESS

- A. Filing the complaint to Attorney Consumer Assistance Program ("ACAP")
- B. Review of the complaint at ACAP/staff level
- C. Assignment to grievance committee
- D. Delegation to committee member by chair
- E. Investigation by committee member & discussion at committee level
- F. Notice of summary hearing & evidentiary hearing
- G. No probable cause options and when there is probable cause
- H. Return to Florida Bar
- I. Settlement or trial

IX. HOW DO I REDUCE MY RISK OF MALPRACTICE?

- A. Refer to a specialist matters that are out of the attorney's area of expertise.
- B. Keep current. Committing the time to regular review of developments, both tax and nontax related.
- C. Establish procedures, guidelines, and routines — and follow them.
- D. Proof-read all documents before they go out. Do not rely on word processing.
- E. Obtain independent reviews of all unusual drafts.
- F. Avoid rush jobs, but if necessary, inform the client.
- G. Document the file. Not only when a rush job creates a risk of error, but with respect to any aspect of the planning that might generate questions in the future.
- H. Impose an affirmative obligation on the client to inform the attorney about their situation.
- I. Be very wary of "mixing and matching" or "cutting and pasting" documents.
- J. Try not to be the first kid on the block to try any new gimmick.
- K. Be nice. To clients (and colleagues!)

X. HOW DO I DIVORCE A CLIENT PROPERLY?

- A. Begin the letter by firmly stating your position.
- B. Next, state the action taken to date.
- C. State any further action the client needs to take, pointing out upcoming statutes of limitation and including, when necessary, the suggestion to seek other counsel.
- D. State the reason for disengagement.
- E. Finally set forth and address outstanding fees and expenses and expectations about payment.