

CONFIDENTIALITY OF ATTORNEY-CLIENT COMMUNICATIONS (FROM THE PROBATE LAWYER'S PERSPECTIVE)

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I. ETHICAL DUTY OF CONFIDENTIALITY vs. EVIDENTIARY PRIVILEGE

There is a definite distinction between the ethical duty to keep client information confidential and the rule of evidence making lawyer-client communications privileged.¹ R. Regulating Fla. Bar 4-1.6 (“ethical rule”) is much broader than the evidentiary privilege and applies not only to matters communicated in confidence by the client, but to all information relating to the representation, whatever its source, and applies irrespective of litigation. Refer to the Comments to Rule 4-1.6.

In contrast, §90.502, Fla. Stat. (“evidentiary privilege”) protects against compelling disclosure of a confidential client communication in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The evidentiary privilege applies only after litigation has begun, i.e. where evidence is sought from the lawyer through compulsion of law. Refer to the Comments to Rule 4-1.6.

The evidentiary privilege includes not only written and oral communication between lawyer and client concerning the preparation and drafting of a will or trust, but also the will or trust itself. *Compton v. West Volusia Hospital Auth.*, 727 So.2d 379 (Fla. 5th DCA 1999).

II. THE LAWYER'S DUTY OF CONFIDENTIALITY SURVIVES THE CLIENT'S DEATH

The Commentary on Model Rule of Professional Conduct 1.6 by the American College of Trust and Estate Counsel (“ACTEC Commentary”) states: “Obligation After Death of Client. In general, the lawyer's duty of confidentiality continues after the death of a client. Accordingly, a lawyer ordinarily should not disclose confidential information [i.e., any information relating to the representation] following a client's death.”

Additionally, in *Swindler vs. United States*, 524 U.S. 399; 118 S. Ct. 2081(1998), the U.S. Supreme Court held that the lawyer's duty of confidentiality continues after the death of a client.

In *Swindler*, the Government, represented by the Office of Independent Counsel, as part of an investigation of the dismissal of employees from the White House Travel Office, sought the notes petitioner attorney had made during an interview of his client, the Deputy White House Counsel, prior to the client committing suicide. Petitioner filed a motion to quash, arguing that the notes were protected by the attorney client privilege and by the work product privilege.

The lower appellate court reversed the trial court which had found the notes were protected from disclosure by the attorney client privilege and the work product privilege. The U.S. Supreme Court reversed finding that the general rule with respect to confidential communications was that such communications were privileged during a testator's lifetime and, also, after the testator's death. The court reasoned in part: “[k]nowing that communications will remain confidential even after death

encourages the client to communicate fully and frankly with counsel. While the fear of disclosure, and the consequent withholding of information from counsel, may be reduced if disclosure is limited to posthumous disclosure in a criminal context, it seems unreasonable to assume that it vanishes altogether. Clients may be concerned about reputation, civil liability, or possible harm to friends or family. Posthumous disclosure of such communications may be as feared as disclosure during the client's lifetime."

III. **III. IT IS NOT AN ETHICAL VIOLATION FOR THE LAWYER TO REVEAL CONFIDENTIAL INFORMATION THAT SERVES THE CLIENT'S INTEREST**

1. PRE-LITIGATION: Rule 4-1.6(c)(1) provides that a lawyer may reveal confidential information "to serve the client's interest" as long as the client has not expressly forbidden disclosure. Clearly, it serves the client's interest, both during and after death, to disclose confidential information (estate planning documents, financial records, etc.) to the client's fiduciary, i.e., guardian, personal representative, and trustee.

Additionally, the ACTEC Commentary suggests that "[a] lawyer may be impliedly authorized to make appropriate disclosure of client confidential information that would promote the client's estate plan, forestall litigation, preserve assets, and further family understanding of the decedent's intention."

The easy question is whether to disclose privileged information to the client's fiduciary. The harder question is whether to disclose to the non-fiduciary's attorney who wants to obtain pre-litigation discovery. Would it forestall litigation by furnishing a copy of your deceased's client's estate planning documents? Would it further the family's understanding of the decedent's intention? According to the ACTEC Commentary, a good-faith disclosure of the prior will to a non-fiduciary under such circumstances would be permitted under Rule 4-1.6(c)(1).

Regardless, it is important to recognize that a lawyer should not be subject to discipline if he or she exercises professional discretion to disclose a deceased client's confidential communication pursuant to Rule 4-1.6(c)(1). As the preamble to Ch. 4 of the R. Regulating Fla. Bar makes clear, rules cast in terms of "may" are rules in which a lawyer has professional discretion, and "no disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of such discretion." Rule 4-1.6(c) is a rule cast in terms of "may." Therefore, a good faith exercise of discretion under that rule should not result in disciplinary action.

2. POST-LITIGATION: In Florida Bar Staff Opinion 20749 (March 9, 1998) [see Appendix 3], a request was made on the decedent's former attorney for a copy of the decedent's prior will. The decedent's former attorney asked the Florida Bar the following question: "If the attorney contesting the new will wants the file copy of the old will, in the hopes of having it reinstated, what are the rules regarding my revealing this "secret" of the now deceased client?"

In response, the Florida Bar apparently took the position that the will contest had already been filed and therefore, the evidentiary privilege applied. The Opinion reads in relevant part:

If the attorney is subpoenaed to produce documents that are confidential under Rule 4-1.6, the attorney must make a good faith determination whether the requested information falls within the scope of the

statutory [evidentiary] privilege. Whether particular information is protected by this statutory [evidentiary] privilege is a question of law, beyond the scope of an ethics opinion. Any doubts about whether the information is privileged should be resolved in favor of nondisclosure.

If the attorney believes the information sought is protected by the privilege, the attorney should assert the privilege when questioned. The comment to Rule 4-1.6 states in part: "If a lawyer is called as a witness to give testimony concerning a client, absent waiver by the client rule 4-1.6(a) requires the lawyer to invoke the privilege where it is applicable."

If the court orders disclosure, the attorney ethically may comply with the court's order. The attorney may appeal the court's order, although such an appeal is not mandatory.

In summary, after the petition to revoke probate is filed, the lawyer should not voluntary disclosure (i.e., without a subpoena) the prior will of a deceased client to a **non-fiduciary**. If the responding attorney believes that the information is protected under the evidentiary privilege (i.e., the exceptions under §90.502(4) are inapplicable), then he must assert the privilege pending a court order compelling disclosure.

There appears to be bright line between disclosure to a fiduciary and a non-fiduciary. A lawyer should always be entitled to disclose confidential information to the client's **fiduciary** (i.e., guardian, personal representative, and trustee), irrespective of whether litigation has been initiated. The fiduciary needs the information to administer the client's estate or trust. Whether or not litigation has been initiated is irrelevant. It would not be in the client's best interest to require a subpoena prior to producing the confidential information.

IV. **IV. WHO CAN CLAIM (AS OPPOSED TO WAIVE) THE EVIDENTIARY PRIVILEGE?**

Section 90.502(3) states that the privilege may be claimed by:

- (a) The client.
- (b) A guardian or conservator of the client.
- (c) The personal representative of a deceased client.
- (d) A successor, assignee, trustee in dissolution, or any similar representative of an organization, corporation, or association or other entity, either public or private, whether or not in existence.
- (e) 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.

Any doubt about whether the information is privileged should be resolved in favor of nondisclosure and assertion of the privilege. Fla. Bar Staff Op. 20749 (March 9, 1998). Whether particular information is protected by the evidentiary privilege is a question of law, not ethics, and is therefore a matter to be ruled upon by a court. *Id.*

It is not clear whether the right to “claim” the privilege gives the claimant the corresponding right to “waive” the privilege. Clearly, the privilege has greater protection when multiple individuals are allowed to “claim” the privilege, as opposed to “waive” the privilege.

If you have the right to claim the privilege and you fail to do so, have you waived the privilege? Possibly. Sec.90.507, Fla. Stat. reads: “A person who has a privilege against the disclosure of a confidential matter or communication waives the privilege if the person, or the person's predecessor while holder of the privilege, voluntarily discloses or makes the communication when he or she does not have a reasonable expectation of privacy, or consents to disclosure of, any significant part of the matter or communication. This section is not applicable when the disclosure is itself a privileged communication.” Cf. *Hughes v. Schatzberg*, 872 So. 2d 996 (Fla. 4th DCA 2004), wherein the court found that a psychotherapist, who by statute could claim the psychotherapist-patient privilege on behalf of his patient, waived the privilege by failing to assert the privilege prior to testifying.²

V. EXCEPTIONS TO THE EVIDENTIARY PRIVILEGE

There are five exceptions to the lawyer-client privilege. If one of the exceptions applies, there is **no attorney-client privilege** on that issue and the attorney is free to discuss **relevant** privileged communications with the interested persons.

The exceptions to the attorney-client privilege only apply to **post-litigation** proceedings! Therefore, the exceptions should not be used as the basis for voluntary disclosure of client information before litigation is instituted. In other words, the lawyer should not fall for the non-fiduciary lawyer's seductive argument that the information should be produced prior to his filing the lawsuit because it is not privileged under the statute and will be admissible in evidence at trial. Remember, before litigation is instituted, the only consideration is whether disclosure would “serve the client’s interest”; the Evidence Code does not apply. If you have already provided the fiduciary’s attorney with the privileged information, you should consider directing the requesting party to the fiduciary’s attorney.

After litigation is instituted, the lawyer must still be cautious when disclosing confidential information to a **non-fiduciary**. It is not always sufficient to conclude, based solely on the face of the petition or complaint, that the litigation falls under one of the exceptions to the evidentiary privilege. The lawyer is not expected to know all of the facts and legal issues raised in the litigation. As a result, prior to disclosing confidential information to a non-fiduciary, the lawyer should always demand a subpoena. This procedure gives the fiduciary’s attorney an opportunity to argue against production and raise certain procedural issues that the objecting attorney may not be aware of. For example, if the moving party does not have standing to challenge the testamentary documents, is he entitled to your client’s privileged documents merely because he filed a petition to revoke probate? Probably not. Until the procedural issues are resolved, the requesting party may not be entitled to the privileged information even if one or more of the exceptions facially applies. Therefore, wait for the subpoena and any objections to production by the fiduciary. If the fiduciary does not object to the production, you must decide whether one or more of the exceptions to the evidentiary privilege apply. If necessary, object to the subpoena and let the court decide.

The five exceptions to the lawyer-client privilege are as follows:

1. CRIME/FRAUD EXCEPTION: Pursuant to §90.502(4)(a), there is no attorney-client privilege when the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew was a crime or fraud.

The "crime-fraud exception to the attorney-client privilege . . . assures that the 'seal of secrecy,' . . . between lawyer and client does not extend to communications 'made for the purpose of getting advice for the commission of a fraud' or crime." *American Tobacco Company v. State*, 697 So. 2d 1249, 1253 (Fla. 4th DCA 1997) (quoting *United States v. Zolin*, 491 U.S. 554, 563, 105 L. Ed. 2d 469, 109 S. Ct. 2619 (1989)).

In *First Union National Bank vs. Turney*, 824 So. 2d 172 (Fla. 1st DCA 2001), the trustee's predecessor bank allowed a mortgage held by the trust to be subordinated to one held by an affiliated bank. The beneficiary was not told of any conflict of interest. The mortgagee later borrowed funds from a third bank, whose mortgage was taken over by the Federal Deposit Insurance Corporation (FDIC) after this bank failed. As the FDIC's mortgage had priority over the trusts, there were insufficient funds to pay off the latter when the security was liquidated. The predecessor hired counsel to represent the trust in its dealings with the FDIC and the mortgagee, and to explore the predecessor's defenses against the beneficiary.

The court found that the crime-fraud exception applied because: (1) the bank acted fraudulently when it sought to obtain a general release from the beneficiary, in exchange for a loan to the trusts to finance purchasing the FDIC's interest in the marina property, without making full disclosure of all material facts; and (2) the bank's lawyers, on behalf of the trustee, took steps designed to set up a defense under the statute of limitations to defeat the beneficiary's potential claims for breach of fiduciary duty by giving the beneficiary an accounting while concealing material facts about the bank's breaches of fiduciary duty.

The court concluded that a "trustee's communications with the trustee's attorneys are confidential. But when, with the help of an attorney, a trustee deliberately sets out to defeat the rights of a beneficiary, by withholding material information in violation of the trustee's fiduciary duty, communications to that end between the trustee and the trustee's attorney fall within the crime-fraud exception to the attorney-client privilege, and lose their confidential character."

2. TESTAMENTARY EXCEPTION: Pursuant to §90.502(4)(b), there is no lawyer-client privilege when a communication is relevant to an issue between parties who claim through the same deceased client. The rationale for such disclosure is that it furthers the client's intent. *Swindler vs. United States*, 524 U.S. 399; 118 S. Ct. 2081(1998).

Additionally, this section authorizes the introduction of an attorney's testimony regarding evidence of the decedent's intent when two claimants are claiming the same bank accounts through the decedent who was the attorney's client. *Caputo v. Nouskhajian*, 871 So. 2d 266 (Fla. 5th DCA 2004).

3. BREACH OF DUTY: Pursuant to §90.502(4)(c), there is no lawyer-client privilege when a communication is relevant to an issue of breach of duty by the lawyer to the client or by the client to the lawyer, arising from the lawyer-client relationship.

4. INTENTION OR COMPETENCE OF A CLIENT: Pursuant to §90.502(4)(d), there is no lawyer-client privilege when the communication is relevant to an issue concerning the intention or competence of a client executing an attested document to which the lawyer is an attesting witness, or concerning the execution or attestation of the document.

Thus, an estate planning lawyer who is an attesting witness to a will or trust instrument may, pursuant to subpoena, testify with respect to the circumstances surrounding execution of the instrument, including opinions on the issue of the client's competence at the time. The Law Revision Council note to this subsection makes it clear that the exception is limited to communications "relevant to the attestation," and that all other communications concerning the documents remain privileged. Under this exception, testimony "concerning the intention" of a client is limited to the client's intention to execute the document, and does not extend to the client's communications of intent in regard to the disposition of the estate or having the document drafted. *In Re Guardianship of Muller*, 650 So. 2d 698 (Fla. 4th DCA 1995).

Irrespective of this exception, certain observations by the attorney are not confidential and are fair game for the probate litigator. Wigmore says: "[T]hose data which would have come to the attorney's notice in any event, by mere observation, without any action on the client's part - such as the color of his hat or the pattern of his shoe - and those data which become known by such acts as the client would ordinarily have done in any event, without any purpose of communicating them to the attorney as his adviser - such as the style of his handwriting or the amount of money in the roll of bills from which he pays his retainer - these are not any part of the communications of the client. . . ." 8 Wigmore, Evidence § 2306 (McNaughton rev. 1961). See: *Anderson v. State*, 297 So. 2d 871 (Fla. 2nd DCA 1974)

5. COMMON INTEREST EXCEPTION: Pursuant to §90.502(4)(e), there is no lawyer-client privilege when a communication is relevant to a matter of common interest between two or more clients, or their successors in interest, if the communication was made by any of them to a lawyer retained or consulted in common when offered in a civil action between the clients or their successors in interest.

This statutory exception is based on "a matter" of common interest. The concept of "a matter" is a flexible concept and typically involves "one transaction, event, or occurrence". Additionally, the common interest exception applies only to communications to an attorney "retained or consulted in common." *Cone v. Culverhouse*, 687 So.2d 888 (Fla. 2d DCA 1997). A typical example: Both the husband and wife retain an attorney to prepare their estate planning documents. In litigation between the decedent's estate and the surviving spouse, the prior communications between the lawyer and the surviving spouse are not privileged.

VI. THE ATTORNEY-FIDUCIARY PRIVILEGE

An attorney retained to represent a trust represents the trustee, not the beneficiaries. *Barnett Banks Trust Co. v. Compson*, 629 So. 2d 849, 851 (Fla. 2d DCA 1993). Even though the lawyer's fees are paid with trust moneys that would otherwise go to trust beneficiaries, the trustee is the client. *Barnett Banks Trust Co.*, 629 So. 2d at 851. *But see Talbot v. Marshfield*, 62 Eng. Rep. 165 (Ch. 1865). A lawyer retained by a trustee to protect trust assets from third parties is employed by and works for the trustee. The ethical prohibition against simultaneously representing different parties with adverse interests does not therefore apply. Cf. R. Regulating Fla. Bar 4-1.7(a) (barring a lawyer from representing adverse

interests unless the lawyer reasonably believes that representation will not adversely affect the interests of both clients and the clients consent after consultation). As a trust's lawyer, an attorney represents a single client, the trustee. *See: First Union National Bank vs. Turney*, 824 So. 2d 172 (Fla. 1st DCA 2001).

In some circumstances, the **beneficiary** of a trust may be the person who will ultimately benefit from the legal work the trustee has instructed the attorney to perform. In that situation, the beneficiary may be considered the attorney's "real client" and would be the holder of the lawyer-client privilege.

For example, in *Jacob v. Barton*, 877 So. 2d 935 (Fla. 2nd DCA 2004), the Trustee filed suit seeking construction of the trust and direction from the court as to its administration. One of the trust beneficiaries filed a counterclaim to remove the Trustee, claiming she has mismanaged the trust by placing her personal interests above her fiduciary duties and by making improper payments to the trustees' attorneys in excess of One Million dollars. He sought discovery of the attorneys' records of their billings to the trust. The Trustee objected to the request for production, claiming that the billing records were protected by the lawyer-client privilege and the work product doctrine. The court quashed the order permitting unlimited discovery of the trust's attorneys' billing records, and remanded with directions to the circuit court to conduct an in camera review to determine whether any of the explanatory entries on the bills would be protected under either the lawyer-client privilege or the work product doctrine.

In attempting to resolve the issue of whether the beneficiary may compel discovery of documents that contain privileged information related to the litigation between the parties, the court reasoned:

Thus, when confronted with the issue at hand here, a court must decide whose interests the attorneys represent – the trustee's or the beneficiary's. *First Union Nat'l Bank of Fla. v. Whitener*, 715 So. 2d 979, 982 (Fla. 5th DCA 1998). Usually, a lawyer retained by a trust represents the trustee, not the beneficiary, even though the fees are paid with trust funds that would otherwise go to the beneficiary. *First Union Nat'l Bank v. Turney*, 824 So. 2d 172, 185-186 (Fla. 1st DCA 2001); see also *Compson*, 629 So. 2d at 851. If the attorney represents the trustee, the trustee holds the lawyer-client privilege. See § 90.502(2), (3)(a), Fla. Stat. (2001); *Whitener*, 715 So. 2d at 982; *Compson*, 629 So.2d at 851. In some circumstances, however, the beneficiary may be the person who will ultimately benefit from the legal work the trustee has instructed the attorney to perform. See, e.g., *Riggs Nat'l Bank of Washington, D.C. v. Zimmer*, 355 A.2d 709, 711 (Del. Ct. Ch. 1976) (noting that legal memorandum concerning trust tax issues, written before beneficiaries' litigation against trustee began, was prepared for the benefit of the trust beneficiaries) (cited in *Compson*, 629 So. 2d at 850). In that situation, the beneficiary may be considered the attorney's "real client" and would be the holder of the lawyer-client privilege. *Whitener*, 715 So. 2d at 982. But if the "real client" is the trustee, the beneficiary would have to prove the existence of some exception to overcome the privilege. *Id.*

...To the extent that the lawyers' work concerns the dispute with James [the trust beneficiary], their client is the trustee, not the beneficiary.

VII. PROCEDURE FOR ASSERTING PRIVILEGE

How, as a practical matter, does the estate planning lawyer assert the evidentiary attorney-client privilege? 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, or as otherwise provided in Fla. R. Civ. P. 1.410(e). In response to a subpoena duces tecum without deposition, the estate planning attorney should assert the privilege by giving written notice to the attorney issuing or requesting issuance of the subpoena at any time before production of the requested documents is due. See Fla. R. Civ. P. 1.351(c).

VIII. **RULES OF THUMB FOR LAWYER'S EXERCISE OF DUTY OF CONFIDENTIALITY**³

The following are rules of thumb for the exercise of the lawyer's ethical duty of confidentiality to a deceased client:

1) As a general principle, on the basis of the ethical confidentiality rule the estate planning lawyer should refuse to voluntarily disclose to third parties, other than perhaps the deceased client's personal representative when there is no conflict of interest, any "information relating to representation" of the client, including the estate planning file notes, communications with the client, unexecuted drafts of documents, copies of prior executed documents, and the like.

2) A lawyer may voluntarily disclose circumstances surrounding the execution or attestation of a deceased client's last will, trust, or other attested document. Although no information relating to representation of the decedent, whatever its source, can be revealed unless the client has consented, a deceased client's consent to disclosure of circumstances surrounding execution of an attested document is implied. The purpose of attesting witnesses is to provide testimony as to the proper execution of the document.

3) Notwithstanding rule of thumb No. 1 above, it is not a breach of responsibility for a lawyer to voluntarily disclose information relating to representation of a deceased client to third parties, including third parties other than the decedent's personal representative, if, in the exercise of the lawyer's discretion and best judgment under the exception in Rule 4-1.6(c)(1), disclosure would "serve the client's interest," and the client has not specifically prohibited disclosure of the information. This will usually be a tough call, and the lawyer cannot be fairly criticized for taking the safe route and refusing to voluntarily disclose information under any circumstances, even when it seems that it might serve the deceased client's interest. The Preamble to the Rules of Professional Conduct states: "The lawyer's exercise of discretion not to disclose information under Rule 4-1.6 should not be subject to reexamination."

4) Information derived through representation of a deceased client during the client's lifetime should not be voluntarily disclosed to a third party solely on the ground that it "is relevant to an issue between parties who claim through the [same] deceased client." There is no "issue" and no "claim" until litigation has commenced, or at least until a subpoena has been issued, and this exception applies only to the evidentiary privilege. The confidentiality rule of 4-1.6(a) is absolute, except for the exceptions stated in the rule itself, unless a court orders disclosure.

5) The estate planning lawyer has an ethical duty to assert the evidentiary privilege against compelled disclosure when subpoenaed to testify or produce documents with respect to any "information relating to representation of a [deceased] client" if the lawyer believes the information is privileged under §§ 90.502 of the Florida Evidence Code (i.e., "not intended to be disclosed to third persons") or is uncertain whether the privilege applies. However, if the lawyer is certain that one of the exceptions in §§ 90.502(4) of the Florida Evidence Code applies, the evidentiary privilege does not exist, and disclosure may be made pursuant to subpoena. However, if the lawyer knows that the deceased client did not want specific information disclosed, it is probably wise to assert the privilege even though one of the exceptions may apply. Let the court tell you, the lawyer, to answer or produce documents because the privilege does not exist under the circumstances. Naturally, if the personal representative asserts the privilege, the disclosure should not be made pending a ruling of the court.

Appendix 1

Rule 4-1.6. Confidentiality of Information

(a) **Consent Required to Reveal Information.** A lawyer shall not reveal information relating to representation of a client except as stated in subdivisions (b), (c), and (d), unless the client consents after disclosure to the client.

(b) **When Lawyer Must Reveal Information.** A lawyer shall 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 of Professional Conduct.

(d) **Exhaustion of Appellate Remedies.** When required by a tribunal to reveal such information, a lawyer may first exhaust all appellate remedies.

(e) Limitation on Amount of Disclosure. When disclosure is mandated or permitted, the lawyer shall disclose no more information than is required to meet the requirements or accomplish the purposes of this rule.

Appendix 2

§§ 90.502. Lawyer-client privilege

(1) For purposes of this section:

(a) A "lawyer" is a person authorized, or reasonably believed by the client to be authorized, to practice law in any state or nation.

(b) A "client" is any person, public officer, corporation, association, or other organization or entity, either public or private, who consults a lawyer with the purpose of obtaining legal services or who is rendered legal services by a lawyer.

(c) A communication between lawyer and client is "confidential" if it is not intended to be disclosed to third persons other than:

1. Those to whom disclosure is in furtherance of the rendition of legal services to the client.
2. Those reasonably necessary for the transmission of the communication.

(2) A client has a privilege to refuse to disclose, and to prevent any other person from disclosing, the contents of confidential communications when such other person learned of the communications because they were made in the rendition of legal services to the client.

(3) The privilege may be claimed by:

(a) The client.

(b) A guardian or conservator of the client.

(c) The personal representative of a deceased client.

(d) A successor, assignee, trustee in dissolution, or any similar representative of an organization, corporation, or association or other entity, either public or private, whether or not in existence.

(e) 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.

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

- (a) The services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew was a crime or fraud.
- (b) A communication is relevant to an issue between parties who claim through the same deceased client.
- (c) A communication is relevant to an issue of breach of duty by the lawyer to the client or by the client to the lawyer, arising from the lawyer-client relationship.
- (d) A communication is relevant to an issue concerning the intention or competence of a client executing an attested document to which the lawyer is an attesting witness, or concerning the execution or attestation of the document.
- (e) A communication is relevant to a matter of common interest between two or more clients, or their successors in interest, if the communication was made by any of them to a lawyer retained or consulted in common when offered in a civil action between the clients or their successors in interest.
- (5) Communications made by a person who seeks or receives services from the Department of Revenue under the child support enforcement program to the attorney representing the department shall be confidential and privileged as provided for in this section. Such communications shall not be disclosed to anyone other than the agency except as provided for in this section. Such disclosures shall be protected as if there were an attorney-client relationship between the attorney for the agency and the person who seeks services from the department.
- (6) A discussion or activity that is not a meeting for purposes of s. 286.011 shall not be construed to waive the attorney-client privilege established in this section. This shall not be construed to constitute an exemption to either s. 119.07 or s. 286.011.

Appendix 3

March 9, 1998

Florida Bar ethics counsel are authorized by the Board of Governors of The Florida Bar to issue informal advisory ethics opinions to Florida Bar members who inquire regarding their own contemplated conduct. Opinions are not rendered regarding past conduct, questions of law, hypothetical questions or the conduct of an attorney other than the inquirer. Advisory opinions necessarily are based on the facts as provided by the inquiring attorney. Advisory opinions are intended to provide guidance to the inquiring attorney; the advisory opinion process is not designed to be a substitute for a judge's decision or the decision of a grievance committee. The Florida Bar Procedures for Ruling on Questions of Ethics are printed at p. 836 of The Florida Bar Journal September 2002 ed.

A member of The Florida Bar has requested an advisory ethics opinion. The operative facts as presented in the inquiring attorney's letter are as follows.

A former client of the inquiring attorney died in February 1998. The attorney has a copy of a will executed in 1996. Until January 1998, the attorney also had the original. However, in January, the former client asked for the original to be sent to her and it was done. Apparently, in January, the client made out a new will which may be contested.

Specifically, the attorney states the following:

If the attorney contesting the new will wants the file copy of the old will, in the hopes of having it reinstated, what are the rules regarding my revealing this "secret" of the now deceased client?

Do I insist on a subpoena? Do I file the file copy with the probate court? Does F.S. §§ 732.901 control?

Pursuant to the confidentiality rule, Rule 4-1.6 of the Rules Regulating The Florida Bar, an attorney may not voluntarily reveal information relating to the representation of a client without the client's consent. Rule 4-1.6(a). The confidentiality rule, which is very broad, applies "to all information relating to the representation, whatever its source." Comment, Rule 4-1.6. Additionally, the comment states that the duty of confidentiality "continues after the client-lawyer relationship has terminated."

There are times, however, when an attorney is required or, alternatively, permitted to reveal otherwise confidential information. Section (b) of Rule 4-1.6, for example, requires such disclosure to prevent a client from committing a crime or to prevent a death or substantial bodily harm to another. Section (c) of the rule sets forth certain situations when an attorney, may, but is not required to, reveal information relating to the representation of a client. None of the exceptions to the confidentiality rule appear to be implicated in the instant matter.

While an attorney's ethical obligation of confidentiality prohibits voluntary disclosure of confidential information, the evidentiary attorney-client privilege protects certain confidential information from compelled disclosure by other parties. In Florida, the attorney-client privilege is a statutory one set forth in Florida Statutes §§ 90.502. Whether particular information is protected by this statutory privilege is a question of law, beyond the scope of an ethics opinion. Furthermore, whether Florida Statute §§ 732.901 requires the attorney to file a copy of a will when the attorney does not have the original is also a legal question, beyond the scope of an ethics opinion.

If the attorney is subpoenaed to produce documents that are confidential under Rule 4-1.6, the attorney must make a good faith determination whether the requested information falls within the scope of the statutory privilege. Whether particular information is protected by this statutory privilege is a question of law, beyond the scope of an ethics opinion. Any doubts about whether the information is privileged should be resolved in favor of nondisclosure.

If the attorney believes the information sought is protected by the privilege, the attorney should assert the privilege when questioned. The comment to Rule 4-1.6 states in part: "If a lawyer is called as a witness to give testimony concerning a client, absent waiver by the client rule 4-1.6(a) requires the lawyer to invoke the privilege where it is applicable."

If the court orders disclosure, the attorney ethically may comply with the court's order. The attorney may appeal the court's order, although such an appeal is not mandatory. See Rule 4-1.6(d).

