ABA FORMAL OPTION 481

If material error is made, current clients must be told

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American Bar Association Formal Opinion 481 was recently published and addresses a lawyer's obligation to promptly inform a current client if the lawyer believes that he or she has made a material error.

The opinion states that ABA Model Rules of Professional Conduct Rule 1.4 governs a lawyer's duty of communication and requires lawyers to promptly inform clients of any decision or circumstance for which a client's informed consent is needed, reasonably consult with the client about the means of achieving the client's goals during representation and, keep the client reasonably informed about the progress of the case.

The opinion further observes that errors exist along a continuum, ranging from serious errors such missing a statute of limitations, which may significantly affect the client's legal rights, to minor typographical errors, or missing a deadline that causes delay and does not cause any prejudice.

"The Model Rules require a lawyer to inform a current client if the lawyer believes that he or she may have materially erred in the client's representation."

In addition, errors that could support "a colorable legal malpractice claim" must be communicated; however, these are not the only errors that must be revealed, since a lawyer's error can "impair a client's representation even if the client will never be able to prove all the elements of malpractice."

According to the opinion, the obligation to disclose an error to current clients is determined by the materiality of the error. The opinion states that an error is material if "a disinterested lawyer would conclude that it is (a) reasonably likely to harm or prejudice a client; or (b) of such a nature that it would reasonably cause a client to consider terminating the representation even in the absence of harm or prejudice" and if there has been such a material error, the attorney must inform the client promptly. Whether an attorney would be able correct the error before telling the client would depend upon the individual facts.

The opinion further states that there is no duty to inform former clients of a material error since "(n)owhere does Model Rule 1.4 impose on lawyers a duty to communicate with former clients (and)…(h)ad the drafters of the Model Rule intended Rule 1.4 to apply to former clients, they presumably would have referred to former clients in the language of the rule or in the comments to the rule."

The opinion concludes: "The Model Rules require a lawyer to inform a current client if the lawyer believes that he or she may have materially erred in the client's representation. Recognizing that errors occur along a continuum, an error is material if a disinterested

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PRIVILEGE

The fiduciary lawyer-client privilege: A long road to confidentiality

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As we are all undoubtedly aware, Florida Statutes Section 90.502 sets forth the ground rules for those communications protected by the lawyer-client privilege. Section 90.502(3) lists those individuals and entities who may claim the privilege. Clients, guardians of clients and personal representatives of deceased clients are among the list. However, it was not clear whether the fiduciaries themselves, such as trustees, personal representatives and guardians, could invoke the lawyer-client privilege to shield their communications with the lawyers representing them in their fiduciary capacities from disclosure.

The Florida Second District Court of Appeal touched upon this issue twice, once in 2004 and o*nce in 2006*. *See* Jacob v. Barton, 877 So. 2d 935 (Fla. 2d DCA 2004); see also Tripp v. Salkovitz, 919 So. 2d 716 (Fla. 2d DCA 2006). In *Jacob*, the Court reviewed a trial court order compelling the production of billing records maintained by a trustee's attorney. The Second District Court of Appeal overturned the trial court's order, and instructed the trial court to conduct an in camera inspection of the attorney's billing records to determine whether the trustee, or the beneficiary, was the "real client," and therefore the holder of the lawyer-client privilege. In Tripp, the Court used its holding in Jacob to justify a similar in camera inspection of communications between a guardian and his attorney.

In 2011, the Florida Legislature enacted Florida Statutes Section 90.5021, which finally made it clear that "[a] communication between a lawyer and a client acting as a fiduciary is privileged and protected from disclosure under s. 90.502 to the same extent as if the client were not acting as a fiduciary."

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The implementation of this statute meant that those individuals and entities serving as fiduciaries (trustees, personal representatives, guardians, etc.), could finally invoke the lawyer-client privilege to shield communications with their attorneys from unwarranted disclosure — or so we thought.

On July 10, 2014, the Supreme Court of Florida refused to adopt the Florida Bar Code and Rules of Evidence Committee's (CRE Committee) recommendation to adopt Section 90.5021 and amend the Florida Evidence Code. See *In re Amends. to Fla. Evidence Code*, 144 So. 3d 536, 537 (Fla. 2014). Instead, the Supreme Court held that it declined "to follow the Committee's recommendation to adopt the new provision of the [Evidence] Code because [it] question[ed] the need for the privilege to the extent that it is procedural." *Id*. This opinion baffled the legal community. Fiduciaries and

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their attorneys were once again left in limbo, with no guidance regarding whether the fiduciary lawyer-client privilege, as enacted by Section 90.5021, could be relied upon.

From December 2013 through early 2017, numerous scholars attempted to dissect the Supreme Court of Florida's rhetoric, and determine the status of the fiduciary lawyer-client privilege in Florida. Unfortunately, answers were few and questions were many. Then, on May 30, 2017, the CRE Committee, in conjunction with the Florida Bar Probate Rules Committee, filed an out-of-cycle report (Report) requesting that the Supreme Court of Florida again consider an amendment to the Florida Evidence Code consistent with Section 90.5021. The Report claimed that the Court's refusal to adopt the fiduciary lawyer-client privilege, to the extent it was procedural, led to confusion on the part of lawyers who represented fiduciaries, and trial court judges, across the state.

On January 25, 2018, the fiduciary lawyer-client privilege finally exited the long and winding road it had been traveling for nearly seven years. Having been swayed by the Report, the Supreme Court of Florida issued a second opinion, this time adopting Section 90.5021 to the extent it was procedural. *In re Amends. to Fla. Evidence Code*, 234 So. 3d 565 (Fla. 2018). The Court retroactively applied the adoption to June 21, 2011, the date that Section 90.5021 became law. See ch. 2011-183, § 14, Laws of Fla.

In the four months since the Court issued its opinion, there have been no reported appellate opinions addressing the fiduciary attorney-client privilege. However, with millions of dollars often at stake in probate, trust and guardianship cases, it is likely that some crafty litigators will seek to challenge to the scope of the privilege, or the retroactive application thereof. Only time will tell if the fiduciary lawyer-client privilege's extended road trip is over after all.

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lawyer would conclude that it is (a) reasonably likely to harm or prejudice a client; or (b) of such a nature that it would reasonably cause a client to consider terminating the representation even in the absence of harm or prejudice. The lawyer must so inform the client promptly under the circumstances. Whether notification is prompt is a case and fact specific inquiry.

No similar duty of disclosure exists under the Model Rules where the lawyer discovers after the termination of the attorney-client relationship that the lawyer made a material error in the former client's representation."

Bottom line: This ABA formal opinion may be the first to address a lawyer's affirmative obligation to advise a current client when he or she has made a material error, which the opinion states is one which is "(a) reasonably likely to harm or prejudice a client; or (b) of such a nature that it would reasonably cause a client to consider terminating the representation even in the absence of harm or prejudice."

Be careful out there.

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CLERK'S CORNER

Circuit issues order on firearm restrictions

All Floridians know the tragic shooting at the Stoneman Douglas High School left an undeniable mark on this state and spurred many into action to prevent such a terrible event from ever occurring again. On March 9, 2018, the Marjory Stoneman Douglas High School Public Safety Act was enacted. The enacting legislation states, in part, "The Legislature finds there is a need to comprehensively address the crisis of gun violence, including but not limited to, gun violence on school campuses. The Legislature intends to address this crisis by providing law enforcement and the courts with the tools to enhance public safety by temporarily restricting firearm possession by a person who is undergoing a mental health crisis and when there is evidence of a threat of violence, and by promoting school safety and enhanced coordination between education and law enforcement entities at the state and local level."

CLERK'S CORNER

Karen E. Rushing
Clerk of Court and County Comptroller

In addition to the many enhancements called for in this legislation, the area that most directly impacts the court system was the creation of section 790.401, Florida Statutes, "The Risk Protection Order Act." This act provides a mechanism for law enforcement to obtain a court order temporarily restricting a person's access to firearms or ammunition. For consistency reasons, and to establish procedures and a single set of forms, the Twelfth Circuit has issued an Administrative Order in regards to procedures for risk protection orders.

As we expect that risk protection orders may have overlapping matters handled in mental health, criminal and family court, attorneys practicing in those fields are encouraged to familiarize themselves with the process as it is enumerated in the statute and the Twelfth Judicial Circuit Administrative Order. Noted below are some of the critical elements in the risk protection process:

- Filing a Petition for a Risk Protection Order and Temporary Ex Parte Risk Protection Order (issued before a hearing and without notice to a respondent)
- Scheduling of Hearings
- Notice Requirements
- Issuance of Risk Protection Orders
- Service Requirements
- Termination and Extension of Risk Protection Orders
- Surrender/Return of Firearms and Ammunition
- Mandatory Reporting of Risk Protection Orders

The Clerk has partnered with the Judiciary and law enforcement to ensure that these cases have the utmost priority in processing. Although this is a difficult subject to address, the statute seeks to prevent what may otherwise result in a tragic outcome and this Clerk's office, along with other agencies, is working to keep our community safe.