GIFTS TO LAWYERS AND OTHER DISQUALIFIED PERSONS

§ 732.806, FLORIDA STATUTES

EFFECTIVE OCTOBER 1, 2013

PRESENTED FOR THE MANATEE ESTATE PLANNING COUNCIL

OCTOBER 24, 2013

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(Effective October 1, 2013)

The leadership of the Real Property, Probate and Trust Law Section of the Florida Bar, seeing instances of abuse by estate planning attorneys, appointed an *ad hoc* committee (The RPPTL *ad hoc* Study Committee on Estate Planning Attorney Conflicts of Interest) to draft legislation that would protect the public from those few individuals within the legal profession who disregard the ethical prohibition against lawyers drafting documents that included gifts to the lawyer, persons employed by the lawyer, or persons related to the lawyer. The committee began its work in September of 2010. The committee drafted Section 732.806, which was passed by the legislature and is effective October 1, 2013. The new law makes certain gifts void, adding "teeth" to the ethics rule that was enforceable only by disciplinary actions or causes of action such as fraud, duress and undue influence which only made the transaction "voidable."

A. Rule 4-1.8

Rule 4-1.8 of the Rules Regulating the Florida Bar provides:

> "A lawyer shall not solicit any substantial gift, or prepare on behalf of the client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client."

The RPPTL *ad hoc* Committee met with Florida Bar staff counsel and learned that (1) the problem is more prevalent than one might expect, and (2) the rule was sometimes difficult to enforce because the word "substantial" is not clear, and because the gift was still valid, even though the lawyer committed an ethical violation. One Florida appellate court recently considered Rule 4-1.8, but held that the ethical rule did not invalidate a gift to a lawyer. *Agee v. Brown*, 73 So. 3d 882 (Fla. 4th DCA 2011).

B. Recent Cases Highlighting the Problem

Two recent cases involving lawyers illustrate the inherent problems when a lawyer drafts a document that results in a gift or financial benefit to the lawyer or a close family member of the lawyer. In each of the cases discussed below, the attorney insisted that he had done nothing wrong.

1. The Estate of Virginia Murphy

The trial court opinion in *The Estate of Virginia Murphy* offers an excellent analysis of the issues faced by planners. An order dated August 1, 2008 was entered by Judge Lauren C. Laughlin, sustaining objections to the probate of a Ms. Murphy's will.

- The will was offered for probate by an attorney who drafted the will.

- The attorney stood to receive a substantial portion of a $12 million estate.

- The court first examined Rule 4-1.8 of the Rules Regulating the Florida Bar. Judge Laughlin noted that, "…a violation of a rule of professional conduct does not constitute *per se* proof of undue influence," but went on to consider other evidence.

- The attorney who drafted Ms. Murphy's will was not present when the will was signed, but the court found other compelling evidence of undue influence, including the attorney's long-standing relationship with the client, the client's declining capacity, and the attorney's involvement in arranging for the execution of the will.

- The attorney's legal assistant was equally involved and a beneficiary under the client's will.

Ultimately, the court found that the portion of the will that benefited the attorney and his legal assistant was void due to influence, but admitted the remainder of the will to probate. Judge Laughlin noted that the attorney may have taken a calculated risk by facing possible disbarment in return for a lucrative inheritance. On appeal, the Second District Court of Appeal affirmed Judge Laughlin's ruling in part, but remanded the case to the trial court to consider the application of the doctrine of dependent relative revocation. *Carey v. Rock*, 18 So. 3d 1266 (Fla. 2d DCA 2009). On September 14, 2010, the Florida Supreme Court disbarred the attorney who drafted Ms. Murphy's will because the attorney failed to avoid a significant conflict of interest.

2. Attorney and Financial Planner Disbarred

In Case Number SC10-332, the Florida Supreme Court disbarred an attorney who acted as attorney and financial advisor for an elderly couple. The attorney

- sold the clients annuities;

- advised the clients to utilize trusts in their planning;

- drafted the trusts;

- designated himself as trustee of those trusts; and

- included provisions in one trust to require the trustee (himself) to purchase more annuities with the trust assets upon the death of the clients.

The court found that the attorney failed to disclose the financial benefits that resulted from his planning and the resulting conflict of interest. The attorney was disbarred.

C. Adding "Teeth" to Solve a Problem - § 732.806

The attorneys on the RPPTL *ad hoc* Committee included estate planning attorneys, probate and trust administration attorneys, litigators, attorneys who represent trust companies, and attorneys who handle real estate closings. These diverse perspectives led to heated debates, but ultimately resulted in a statute that should produce fair, workable, and predictable results.

1. Void Gifts

The key provision of the new statute is subsection (1). It provides:

> (1) Any part of a written instrument which makes a gift to a lawyer or a person related to the lawyer is void if the lawyer prepared or supervised the execution of the written instrument, or solicited the gift, unless the lawyer or other recipient of the gift is related to the person making the gift.

This subsection is broader than the ethical rule and resolves some of the uncertainties reported by Florida Bar counsel based upon past disciplinary actions.

a. Written Instrument

Thinking like lawyers, the committee considered how a "bad apple" might try to sidestep the problem being addressed. Given the increased use of non-probate transfers, the committee wanted to define "written instrument" to include both lifetime transfers and transfers that took effect at death. Many of the attorneys on the committee have observed situations where documents other than wills and trusts allowed for the transfer of an individual's estate, often with none of the procedural protections afforded by the Florida Probate Code and the Florida Trust Code. Subsection (7)(a) defines "written instrument," listing specific examples, but is not limited to those instruments listed:

- a will;
- a trust;
- a deed;
- a document exercising a power of appointment;
- a beneficiary designation under a life insurance contract; or
- any other contractual arrangement that creates an ownership interest or permits the naming of a beneficiary.

Examples of Written Instruments

Document	Donee	Donee's Relation to Client	Preparer	Void?
Will or Codicil	Attorney's Mother	None	Attorney	Yes
Irrevocable Life Insurance Trust	Attorney's Nephew	Niece's husband	Attorney	Only if the attorney has a close relationship with the nephew
Exercise of a Testamentary Power of Appointment	Attorney exercises power in favor of his daughter	Niece	Attorney	Only if the client has a close family relationship with the attorney's daughter.
Bank account agreement with "pay on death" provisions	Attorney's Father	None	Bank employee	No
Ladybird Deed	Attorney's Spouse;	Niece's spouse	Attorney	Void unless the client has a close family relationship with the client's niece or the niece's spouse.
IRA Beneficiary Designation	Attorney's godchild	None	Client	No
Separate Writing	Attorney	None	Client	No

b. Gift

The committee carefully defined the term "gift" to distinguish between purely gratuitous transfers and those that were not. For example, a nomination of the attorney to serve as a fiduciary might involve financial benefits, but it also involves substantial duties, responsibilities, and potential liability. Subsection (7)(d) includes:

- an inter vivos gift;
- a testamentary transfer of real or personal property or any interest therein;
- the power to make such a transfer;
- regardless of whether the gift is outright or in trust;
- regardless of when the gift is to take effect; and
- regardless of whether the power is held in a fiduciary or non-fiduciary capacity.

c. Prepared by a Lawyer

The focus of the committee was the actions of a lawyer, who holds a special position of trust and confidence, when the lawyer either solicits, or is asked to prepare an instrument, making a gift from the client to the lawyer. Some attorneys, as in the case involving Virginia Murphy, thought it was sufficient for the lawyer to prepare the document, and then ask the client to sign someplace else. The committee felt this did not cure the problem. In some cases, the attorney defended his or her actions by claiming their paralegal prepared the document and they had nothing to do with the preparation or execution. The new statute addresses these concerns.

> (7)(a) A lawyer is deemed to have prepared, or supervised the execution of a written instrument if the preparation, or the supervision of the execution, of the written instrument was performed by an employee or lawyer employed by the same firm as the lawyer.

d. Persons Related to the Lawyer

Recognizing that some lawyers might try to side-step the ethics rules by drafting a will or other document making a gift to someone other than the lawyer, but closely related to the lawyer, the committee voted to apply the same definition of "related" to the lawyer's relationship to the beneficiary, and the client's relationship to the beneficiary.

e. Gift to a Related Person

The committee did not want to interfere with the situations where a lawyer prepares a will for a family member and the documents make gifts to persons who are related to the person making the will. For example, should it be o.k. for a lawyer to draft a will for his mother-in-law and father-in-law that makes gifts to the lawyer's spouse? The committee felt that such a situation might involve potential problems, but it should not be void *per se*. Subsection (7)(b) defines "related."

> (b) A person is "related" to an individual if, at the time the lawyer prepared or supervised the execution of the written instrument or solicited the gift, the person is:
>
> 1. A spouse of the individual;
>
> 2. A lineal ascendant or descendant of the individual;
>
> 3. A sibling of the individual;
>
> 4. A relative of the individual or of the individual's spouse with whom the lawyer maintains a close, familial relationship;
>
> 5. A spouse of a person described in subparagraph 2., subparagraph 3., or subparagraph 4.; or
>
> 6. A person who cohabitates with the individual.

A lot of time was spent debating the scope of the term "related." The committee's discussions included persons who were not married for purposes of Florida law[1], but declined to specifically include civil unions and domestic partnerships, opting instead for "cohabiting" as a description for the many close, but non-marital relationships involving Florida residents. Given Florida's Defense of Marriage Act, and Florida's non-recognition of same-sex marriages from other states, the term "cohabitant" seemed to be the best approach.

[1] Florida's Defense of Marriage Act is found in §741.212.

"Related" for purposes of Void Gifts

<table>
<tr><td>Great Great Uncle</td><td>Great Great Aunt</td><td>Paternal Great Grandfather</td><td>Paternal Great Grandmother</td><td>Paternal Great Grandfather</td><td>Paternal Great Grandmother</td><td>Maternal Great Grandfather</td><td>Maternal Great Grandmother</td><td>Maternal Great Grandfather</td><td>Maternal Great Grandmother</td></tr>
<tr><td>Great Uncle</td><td>Great Aunt</td><td colspan="2">Paternal Grandfather</td><td colspan="2">Paternal Grandmother</td><td colspan="2">Maternal Grandfather</td><td colspan="2">Maternal Grandmother</td></tr>
<tr><td>Aunt</td><td>Uncle</td><td colspan="4">Father</td><td colspan="4">Mother</td></tr>
<tr><td>Cousins</td><td>Sibling's Spouse</td><td colspan="3">Sibling</td><td colspan="3">Client</td><td colspan="2">Client's Spouse or Cohabitant</td></tr>
<tr><td>Cousin's Children</td><td>Cousin's Spouse</td><td colspan="3">Nieces and Nephews</td><td colspan="3">Client's Children</td><td colspan="2">Nieces and Nephews of Client's Spouse</td></tr>
<tr><td>Cousin's Grandchildren</td><td></td><td colspan="3"></td><td colspan="3">Client's Grandchildren</td><td colspan="2"></td></tr>
</table>

Client's spouse, cohabitant, lineal descendants and ascendants, siblings, and their spouses are related.

Relatives of the client with whom the client enjoys a close, familial relationship are treated as being related.

Applying "Related" to the Lawyer and the Donor

<table>
<tr><td colspan="5">The gift is VOID if the lawyer drafts the instrument for a gift from the client to person related to the lawyer:</td></tr>
<tr><td>The lawyer,
the lawyer's employee, or
another lawyer in the firm</td><td>A spouse or
Cohabitant of the lawyer</td><td>A lineal ascendant of the lawyer or
A lineal descendant of the lawyer,
or a spouse of such person</td><td>A sibling of the lawyer or
the spouse of the lawyer's sibling</td><td>A relative of the lawyer with whom the lawyer maintains a close relationship,
or the spouse of such person</td></tr>
<tr><td colspan="5">Unless the beneficiary of the gift is related to the client:</td></tr>
<tr><td></td><td>The client's spouse or cohabitant</td><td>A lineal ascendant of the client or
A lineal descendant of the client,
or a spouse of such person</td><td>A sibling of the client or
the spouse of the client's sibling</td><td>A relative of the client with whom the client maintains a close relationship, or the spouse of such person</td></tr>
</table>

D. Lawyers Nominated as Fiduciaries – A Gift?

A more subtle situation involves the drafting of a will or trust that designates the lawyer as trustee or personal representative. Subsection (2) excludes such an appointment from the definition of a gift. When serving as a fiduciary, the lawyer stands to gain both legal fees and fiduciary fees. The American College of Trust and Estate Counsel web site includes sample engagement letters and checklists to aid the estate planning attorney who has been asked to serve as a fiduciary. The web site address is: http://www.actec.org/public/EngagementLettersPublic.asp. The lawyer can serve as a fiduciary for a client, but proper disclosure and consent is required to meet the ethical requirements. An attorney should not solicit the appointment, but in some cases, the attorney could appropriately serve if the client makes an informed decision. The RPPTL committee is considering the disclosures that should be made to the client, as well as the appropriate compensation for an attorney/fiduciary appointed under a document drafted by the attorney. States such as New York have codified the ethical rule by reducing the fiduciary compensation if the lawyer does not make the required disclosures.

E. Preserving the Donor's Intent - Severability

A gift to a lawyer or other disqualified person does not prevent the gift from passing to the alternate or contingent beneficiary under the instrument. To the extent possible, the legislation preserves the settlor's intent. Florida's "slayer statute" and laws relating to the effects of a divorce on a testamentary document have the same effect. Subsection (6) provides that the unenforceable provisions are "severed" from the remainder of the document.

> (6) If a part of a written instrument is invalid by reason of this section, the invalid part is severable and may not affect any other part of the written instrument which can be given effect, including a term that makes an alternate or substitute gift. In the case of a power of appointment, this section does not affect the power to appoint in favor of persons other than the lawyer or a person related to the lawyer.

F. Enhanced Enforcement Provisions

The legislation attempts to address several concerns that arise in the litigation context. Because of the lawyer's position of trust and confidence, the committee felt that an attempted waiver should not be recognized. The committee also felt that costs and fees should be awarded against the wrongdoer, but should not be assessed against a person who in good faith asserts a claim. Finally, the committee did not want the law to be the exclusive remedy. Subsections (3), (5), and (8) address these concerns.

> (3) A provision in a written instrument purporting to waive the application of this section is unenforceable.
>
> (5) In all actions brought under this section, the court must award taxable costs as in chancery actions, including attorney fees. When awarding taxable costs and attorney fees under this section, the court may direct payment from a party's interest in the estate or trust, or enter a judgment that may be satisfied from other property of the party, or both. Attorney fees and costs may not be awarded against a party who, in good faith, initiates an action under this section to declare a gift void.
>
> (8) The rights and remedies granted in this section are in addition to any other rights or remedies a person may have at law or in equity.

G. Third Parties

The new law recognizes that the needs of third parties who might be unaware of the facts that would render a transfer void. Subsection (4) contains a provision to protect innocent third parties such as bona fide purchasers, banks, lending institutions, retirement plan administrators, insurance companies, and title companies.

> (4) If property distributed in kind, or a security interest in that property, is acquired by a purchaser or lender for value from a person who has received a gift in violation of this section, the purchaser or lender takes title free of any claims arising under this section and incurs no personal liability by reason of this section, whether or not the gift is void under this section.

H. Conclusion

The new law is effective October 1, 2013. The applicable ethical rule was in place prior to October 1, 2013. As in the Estate of Virginia Murphy, other causes of action could apply to render a gift void under instruments drafted prior to October 1, 2013. The purpose of the new legislation is to provide a framework to address the concerns raised by the trial judge in the Virginia Murphy case, to make it easier to assert a claim in such cases, and to improve the image of the court system and the legal profession. The *ad hoc* committee was presently surprised to see almost no opposition when the legislation was presented for a vote by the Executive Council of the Real Property, Probate and Trust Law section.

H. Appendix

1. Chapter 2013-172, Laws of Florida

2. Legislative Position Request Form and White Paper