

# 34<sup>TH</sup> ANNUAL ESTATE PLANNING SEMINAR

sponsored by the Paul M. Hebert Law Center,  
Louisiana State University

## ESTATE PLANNING AND ETHICS<sup>®</sup>

presented by Elizabeth A. Alston<sup>1</sup>

Baton Rouge, September 17, 2004

---

### TABLE OF CONTENTS

This paper discusses Louisiana disciplinary decisions applicable to estate planners in the following areas:

	<u>Page</u>
Conflicts of interest in estate planning	1
Negligence/lack of due diligence	7
Notary violations	8
Excessive fees	10

#### Conflicts of interest in estate planning

*In re Blair*, 2002-2164 (La. 2/25/03), 840 So. 2d 1191.

It is important to understand the cast of characters in this disciplinary proceeding in order to understand its holding and implications. A diagram of the facts is attached to this paper.

---

1

**Elizabeth A. Alston**  
**Robert M. Contois, Jr.**

**Alston Law Firm, LLC**  
**www.LawyerRisk.com**

**Counselors, Litigators, and Expert Witnesses in the  
Fields of Legal Ethics and Professional Responsibility**

Voice: (985) 727-2877      Fax: (985) 727-3544      New Orleans Direct: 566-7311

This document is produced for informational purposes only and does not constitute legal advice.

Mr. Blair was charged with failing to communicate with one of his clients, Dr. Thompson, regarding the execution of the will and his conflict of interest in preparing a will which granted large bequests to his family members, under Rules 1.4, 1.7, and 1.8.<sup>2</sup> Blair

---

<sup>2</sup>This case predated the changes to the Louisiana Rules of Professional Conduct which became effective on March 1, 2004. Rule 1.4 previously stated:

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

(b) The lawyer shall give the client sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so.

Rule 1.7 stated at the time:

Loyalty is an essential element in the lawyer's relationship to a client. Therefore:

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

(1) The lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) Each client consents after consultation.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless;

(1) The lawyer reasonably believes the representation will not be adversely affected; and

(2) The client consents after consultation. 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.

Rule 1.8(c) provided:

A lawyer shall not prepare an instrument giving the lawyer or a person related to the lawyer as parent, child, sibling, or spouse any substantial gift from a client, including a testamentary gift, except where the client is related to the donee.

admitted violating Rule 1.8(c)(preparing an instrument for a client giving a member of his immediate family a testamentary gift), claimed it was unintentional, and denied the charges of failure to communicate and conflict of interest. He claimed that Ms. Casanave expressly directed him to keep the existence and the contents of the will confidential. Blair argued that his retention by Dr. Thompson was contingent upon the filing of an interdiction proceeding regarding Ms. Casanave, which he prepared but which was never filed.

Unpersuaded by Blair's arguments to the contrary, the Supreme Court held that he indeed represented Dr. Thompson. It also found that Blair violated Rule 1.8(c) and Rule 1.7(b).<sup>3</sup> With respect to the latter violation, the Court stated:

Having represented Ms. Casanave and Dr. Thompson simultaneously, it is obvious that an irreconcilable conflict existed when Ms. Casanave asked respondent to prepare a will that adversely affected Dr. Thompson's rights. That conflict was exacerbated when respondent represented the executrix of Ms. Casanave's will in connection with Dr. Thompson's suit challenging the validity of the will. These actions plainly violate Rule 1.7(b).

While the Court's conclusion certainly can broke no disagreement, the rationale is perhaps faulty. Dr. Thompson had no entitlement, or "right," to Ms. Casanave's estate. However, as a client of Blair's, she was entitled to expect that he would diligently represent her interests, which would exclude his participation in Ms. Casanave's apparent desire to will the major portion of her estate to his wife's family.

The hearing committee had recommended the sanction of a six-month suspension, with all but one month deferred. The Disciplinary Board also recommended this sanction, and added to its recommendation that Blair be placed on supervised probation for six months following the active portion of his suspension and attend the L.S.B.A. ethics school. The Supreme Court ordered a three-month suspension for Mr. Blair, none of it deferred, with no further conditions. The Court noted as significant mitigating factors Blair's lack of a prior disciplinary record, relative inexperience in the practice of law at the time of the offense (six years), demonstration of sincere remorse for his actions, and negligent

---

<sup>3</sup>The Court declined to find that Blair violated Rule 1.4 by failing to communicate the terms of Ms. Casanave's will to his other client, Dr. Thompson. It found that he was obligated by the instructions of Ms. Casanave to keep the existence and terms of the will confidential.

violation of the Rules of Professional Conduct rather than intentional.<sup>4</sup>

Where did Mr. Blair go wrong? Conflicts of interest pose some of the greatest disciplinary and malpractice risks in an estate planning practice. The best insurance against those risks is a systemized effort to clearly identify the answer to the question, “who is the client?” Blair’s initial dual engagement placed him at risk of a later-developing conflict. He should have realized that there may have come a point when Ms. Casanave’s and Dr. Thompson’s interests might diverge, and made appropriate provisions in his initial engagement letters. This is always a good idea, and a sample paragraph in such an engagement letter might read:

You have asked that I represent both you and Dr. Thompson, and have assured me that your interests are not adverse or potentially adverse. Should future developments create a conflict of interest between you, I will not be able to continue representing both of you. Under some circumstances, it may be possible for me to continue representing one of you if the other waives the conflict. If I receive a confidential communication from one of you that gives rise to a conflict, I will not be able to repeat that communication to the other and will have to withdraw from representation of you both. [Alternative last sentence: You understand and agree that all communications I receive from either of you will be shared with the other.]

Was it even advisable or *possible* for Blair’s two clients to waive any conflict on Blair’s part at the inception of these engagements? He was hired to protect Ms. Casanave’s interests, as her lawyer, and was also hired by Dr. Thompson to interdict Ms. Casanave, should that become a desired goal. But a desired goal on behalf of whom? On behalf of Ms. Casanave, who purportedly did not want her cousin to own her house? Or on behalf of Dr. Thompson, who stood to inherit in the event the quitclaim deed was invalidated and an intestate succession resulted?

A.B.A. Formal Ethics Op. 96-404 (1996), attached, states:

---

<sup>4</sup>The hearing committee found that Blair’s “‘willful blindness’ of the potential conflicts of interest suggest[ed] a heightened potential for risk to the public if unchecked.” 6, 1195. Conflicts of interest do indeed act as “blindness” for the involved lawyer, who is unable to properly represent the interests of a client due to the competing interests of another client or the lawyer’s own interests. Here, Mr. Blair had two sets of blinders occasioned by the dual representation of clients whose interests converged, and his wife’s potential and significant inheritance.

A lawyer who reasonably determines that his client has become incompetent to handle his own affairs may take protective action on behalf of the client, including petitioning for the appointment of a guardian. Withdrawal is appropriate only if it can be accomplished without prejudice to the client. The protective action should be the least restrictive under the circumstances. The appointment of a guardian is a serious deprivation of the client's rights and ought not be undertaken if other, less drastic, solutions are available. With proper disclosure to the court of the lawyer's self-interest, the lawyer may recommend or support the appointment of a guardian who the lawyer reasonably believes would be a fit guardian, even if the lawyer anticipates that the recommended guardian will hire the lawyer to handle the legal matters of the guardianship estate. **However, a lawyer with a disabled client should not attempt to represent a third party petitioning for a guardianship over the lawyer's client.**

Thus, under the rationale and recommendations of this Formal Opinion, Blair could not have represented Dr. Thompson if she had petitioned to interdict Ms. Casanave and become her curator.

Having failed to implement risk prevention efforts initially, what could Blair have done "down the road" to protect himself and his law license? His second opportunity to prevent disaster occurred when the purported purpose for his engagement by Dr. Thompson, the interdiction of Ms. Casanave, was abandoned. At that time it would have been quite simple to send Dr. Thompson a termination letter – or better yet, a non-engagement letter. Such letters could have read:

Dear Dr. Thompson:

Thank you for executing our attorney-client agreement, which we entered into for the purpose of potential interdiction proceedings regarding your aunt, Ms. Casanave. It appears that it will not be necessary to seek her interdiction at this time. Therefore, I am closing my file and hereby terminate our attorney-client relationship. Thank you for placing your trust in me in this important family matter.

What was the resulting harm of Blair's conflicts? If Ms. Casanave indeed wished to will her estate to his wife's family, her intent was subverted by his inattention to the conflicts posed. A year's worth of litigation ensued, and the resulting settlement (whereby Ms. Strong received Ms. Casanave's house pursuant to the quitclaim deed) may not have been in accordance with the decedent's wishes.

*In re Grevemberg*, 2002-2721 (La. 2/25/03), 838 So. 2d 1283.

This case was decided on the same day the Court issued its opinion in the *Blair* case. Mr. Grevemberg also violated Rule 1.8(c) by preparing a will for a client which named himself as the residual legatee. The will contained a clause indicating in the event the bequests to Grevemberg were prohibited, his wife would become the residual legatee. A suit was filed by the nephews of the decedent, contesting the last will prepared by Grevemberg and seeking to recover under a previous will naming them as beneficiaries.

In the will contest litigation, Rule 1.8(c) was called to Grevemberg's attention. He maintained the position that although he might be disciplined for his violation of the rule, the rule should not affect his inheritance rights. He lost this argument in the trial court and on appeal to the First Circuit. *Succession of Parham*, 98-1660 (La. App. 1<sup>st</sup> Cir. 9/24/99), 755 So. 2d 265. He also applied for writs to the Supreme Court, which were denied.

Mr. Grevemberg was suspended for one year. The Supreme Court distinguished *Grevemberg* at footnote 8 of the *Blair* decision as follows:

A greater sanction was justified in [*Grevemberg*] because we found the attorney knowingly disregarded his ethical obligations under Rule 1.8(c) by continuing litigation at a time when he was clearly aware he was in violation of the rule. By contrast, respondent's violations of the rules in the instant case were more negligent than intentional.

*In re Pardue*, 2002-0169 (La. 4/12/02), 814 So. 2d 1249.

Mr. Pardue was suspended from the practice of law for six months because while serving as the lawyer for the Succession of Lloyd Schenk, he advised the heir of the succession to oppose his client, the administratrix. He also signed pleadings filed into the record in opposition to the position of the administratrix. He admitted a violation of Rule 1.7 by his conflict of interest in doing so.

Negligence/lack of due diligence

*In re Decker*, 2001-1968 (La. 6/22/01), 790 So. 2d 617.

Mr. Decker failed to complete a simple succession, falsely informed his clients that the case was proceeding, failed to render an accounting to clients for the fees he was paid, and failed to refund the unearned portion of the fee after his clients terminated his representation. The Supreme Court suspended him for a year and a day, and ordered that he make restitution to the clients of his unearned fee.

*In re Cunningham*, 2003-1608 (La. 12/3/03), 861 So. 2d 135.

Mr. Cunningham neglected his client's representation in litigation involving her late husband's estate. When the client terminated his services, Mr. Cunningham failed to provide the client with her file materials. Pursuant to subpoena issued by the Office of Disciplinary Counsel, Mr. Cunningham admitted that he had lost his client's file, which contained original canceled checks and other documents pertinent to the succession litigation. The Supreme Court suspended him for a period of six months, to be followed by a two-year period of probation with certain conditions.

*In re Wilkinson*, 2001-2310 (La. 1/15/02), 805 So. 2d 142.

Mr. Wilkinson introduced a new client in a succession matter to his law clerk, who had not been admitted to practice. The law clerk wrote the client, indicating the firm would be handling the succession. Mr. Wilkinson thereafter failed to supervise the law clerk, who attempted to handle the succession matter before and after he was admitted to the bar. When this employee left Mr. Wilkinson's office and advised that he was not going to handle the succession matter following his departure, the matter was neglected by Mr. Wilkinson for several months. The Supreme Court suspended Mr. Wilkinson for sixty days.

### Notary violations

*In re Smith*, 01-DB-114 (1/15/04).

Ms. Smith notarized the purported signature of her client. Handwriting experts agreed that the signature was a forgery, but that Ms. Smith did not commit the forgery. The hearing committee who heard the evidence, and the Disciplinary Board which reviewed it, agreed that there was no proof that Ms. Smith knew or suspected the signature was a forgery at the time she notarized it.

By notarizing a document which was not signed in front of her, and then filing it into the court record, Ms. Smith was found to have to have falsely represented to the court that it was signed in her presence, in violation of Rule of Professional Conduct 3.3(a)(1)(2)(4) and (d), as well as 4.1, 8.4(a)(c) and (d).<sup>5</sup> The Disciplinary Board issued a public

---

<sup>5</sup>At the time, these rules provided:

Rule 3.3:

(a) A lawyer shall not knowingly:

- (1) Make a false statement of material fact or law to a tribunal;
- (2) Conceal or knowingly fail to disclose that which he is required by law to  
(continued...)

reprimand to Ms. Smith, and neither she nor the Office of Disciplinary Counsel appealed the decision. *See also In re Guillory*, DB-047 (11/19/02)(respondent notarized Act of Exchange when all parties did not sign in his presence; reasonably believed that the signatures were genuine; public reprimand by the Board; not appealed to the Supreme Court.

*In re Hartley*, 2003-2828 (La. 4/2/04), 869 So. 2d 799.

Mr. Hartley directed another lawyer to notarize a document which falsely stated that the affiant and one witness had personally appeared before the notary. The hearing committee dismissed the charges, and the Disciplinary Board imposed a reprimand upon Mr. Hartley, who appealed to the Supreme Court. The Court found:

We agree that respondent's actions constitute a minor violation of the Rules of Professional Conduct. However, we find his actions were not the product of an evil or dishonest motive nor did they cause any actual harm. Respondent has been a practicing attorney since 1971 and has an unblemished disciplinary record. Under the totality of the circumstances, we do not find formal discipline is warranted by this court. *See, e.g., In re: Marullo*, 96-2222 (La. 4/8/97), 692 So. 2d 1019. Accordingly, while we in no way condone respondent's actions and caution him to refrain from similar professional lapses in the future, we decline to impose formal discipline in this matter, and therefore dismiss the charges.

---

<sup>5</sup>(...continued)

reveal; however, if a lawyer discovers that his client has perpetrated a fraud on a tribunal, he shall promptly call on his client to rectify same and, if the client shall refuse to do so or be unable to do so, the lawyer shall reveal the fraud to the affected person or tribunal;

...

(4) Offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.

...

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

## Excessive fees

*In re Levingston*, 2000-0161 (La. 2/25/00), 755 So. 2d 874.

Mr. Levingston handled a simple succession which required no administration. He charged a legal fee of \$47,221.49 in the matter. The gross estate (including the surviving spouse's community interest) was valued at more than \$1.14 million. Mr. Levingston calculated his fee by charging a flat 5% of the value of the gross estate and subtracting a \$10,000 "professional discount."

Mr. Levingston and the Office of Disciplinary Counsel proposed consent discipline to the Supreme Court that stipulated that the fee was excessive, and that Mr. Levingston would be suspended from practice for three years. His reinstatement to practice was to be conditioned upon the payment of full restitution to the client of the excessive fee. The Supreme Court accepted the proposed discipline.