

ESTATE PLANNING AND LEGAL ETHICS IN ANIMAL LAW

Presentation by

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EDUCATION

B.A., Magna Cum Laude, Baylor University 1978
J.D., Baylor Law School, 1981

PROFESSIONAL

Shareholder and President, Joel Hailey, P.C., 2000-current
Chair, State Bar of Texas Animal Law Section, 1999-2001
Vice-Chair, State Bar of Texas Council of Chairs, 2000-2001
Council Member, Animal Law Section, 1996-current

BIBLIOGRAPHY

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Animal Law Class, 2016
- “Ethical Considerations in Representation Concerning Animals”, State Bar of
Texas Annual Meeting, San Antonio, 2015
- “Will Provisions for Pets and Animal Charities”, University of Texas Law School,
Animal Law Class, 2014
- “Ethical Considerations in Estate Planning and Probate Concerning Animals”,
State Bar of Texas Annual Meeting, Dallas, 2013
- “Will Provisions for Pets and Animal Charities”, University of Texas Law School,
Animal Law Class, 2012
- “Will Provisions for Pets and Animal Charities”, State Bar of Texas Annual
Meeting, San Antonio, 2011
- “Will Provisions for Pets and Animal Charities”, Animal Law Institute, Austin,
2011
- “Will Provisions for Pets and Animal Charities”, University of Texas Law School,
Animal Law Class, 2011
- “The Miss Alabama Case--Lessons in Drafting Pet Trusts”, Frost Bank Plaza
Club, San Antonio, 2010

“Probate Court Seminar: Will Provisions for Pets and Animal Charities” and “Ethical Considerations in Estate Planning and Probate Concerning Animals”, Probate Court No. 2, San Antonio, 2009

“Will Provisions for Pets and Animal Charities”, “Ethical Considerations in Estate Planning and Probate Concerning Animals”, and “The Miss Alabama Case--Analyses of the New Animal Trust Law and Legal Ethics in Probate [revised]”, University of Texas Law School, Animal Law Class, 2009

“The Miss Alabama Case--Analyses of the New Animal Trust Law and Legal Ethics in Probate [revised]”, University of Texas Law School, Animal Law Class, 2008

“The Miss Alabama Case--Analyses of the New Animal Trust Law and Legal Ethics in Probate”, University of Texas Law School, Animal Law Class, 2007

“The Miss Alabama Case--Analyses of the New Animal Trust Law and Legal Ethics in Probate”, Animal Law Institute, Austin, 2007

“Spay-Neuter Laws in the No-Kill Plan: Successful Jurisdictions”, City of San Antonio Training Facility, 2007

“Ethical Considerations in Estate Planning and Probate Concerning Animals”, Animal Law Institute, Austin, 2005

“Estate Planning and Probate Concerning Animals”, Animal Law Institute, Austin, 2004

“Case Law Update”, Animal Law Institute, Dallas, 2001

“Case Law Update”, Animal Law Seminar, Austin, 2000

CIVIC

President and Board Member, The Hailey Foundation, a 501(c)(3) non-profit, 1986-current

Member, Ad Hoc Committee on Revision of Animal Code, City of San Antonio Animal Care Services Advisory Board, 2007

Member, Committee on Adoptions, City of San Antonio Animal Care Services Advisory Board, 2008

Member, Ordinance Subcommittee of Spay/Neuter Committee, City of San Antonio Animal Care Services Advisory Board, 2009

Advisory Board Member, Texas Humane Legislation Network, a 501(c)(4) non-profit, 2008-2009

Advisory Board Member, Wildlife Rescue & Rehabilitation, Inc., a 501(c)(3) non-profit, 2008-2009

Advisory Board Member, Spay-Neuter Assistance Program, Inc. (“SNAP”), a 501(c)(3) non-profit, 2007-2009

Honorary Board Member, San Antonio Feral Cat Coalition (“SAFCC”), a 501(c)(3) non-profit, 2008-2010

Joel Hailey has a private practice of probate and estate planning in San Antonio. He is actively involved in local and state animal causes, serving as Past Chair and current Council Member of the State Bar of Texas Animal Law Section, Vice Chair of the State Bar Council of Chairs, and member of committees to revise the San Antonio Animal Code. Over the years, Joel has written articles and made presentations at State Bar seminars and other seminars. He is founder and President of The Hailey Foundation, a 501(c)(3) non-profit that promotes saving animals.

ESTATE PLANNING AND LEGAL ETHICS IN ANIMAL LAW

What follows are certain situations that may arise in estate planning concerning animals. There will be a discussion of instrument drafting and substantive law as well as an analysis of the ethics rules involved. All references to “Rules” mean the Texas Disciplinary Rules of Professional Conduct.

SITUATION 1

Lawyer represents both Husband and Wife who own their pets as community property. Wife says she has a daughter from a previous marriage, and Husband says he has no children. They request Lawyer (who has prepared simple wills before) to prepare identical wills leaving all their pets and assets to the survivor, and upon the survivor’s death, all pets and assets to Wife’s daughter. May Lawyer represent both spouses and prepare such wills?

CONSIDERATIONS: Rules 1.01(a), 2.01, and 1.06(b)-(c) and Comment #15 (“competence”, “independent professional judgment”, “adverse”, “adversely limited”, consent, depends on circumstances, clarify relationship). Also, see the “Joint Consent of Spouses” form below.

Rule 1.01(a). Competent and Diligent Representation

(a) A lawyer shall not accept or continue employment in a legal matter which the lawyer knows or should know is beyond the lawyer’s competence, unless...

(1) another lawyer who is competent to handle the matter is, with the prior informed consent of the client, associated in the matter; or

(2) the advice or assistance of the lawyer is reasonably required in an emergency....

FIRST, KNOW TO IDENTIFY PETS:

“As of the date of this Will, I am married to _____ (“my spouse” below in this Will); my only children living are _____ (“my children” below in this Will) [or e.g. *I am single / a widow, I have no children living...*]; and my only companion animals living are _____ [*describe with microchip or identifying marks, e.g. Max, (a dog, poodle breed, Microchip #8544332211) and Sam (a cat, Siamese breed with white spot above her eye)*], although I may acquire more animals in the future. Under this Will, I am providing for my children and lineal descendants in the manner and to the extent I desire, including any children and lineal descendants born or adopted after the date hereof; and I am

providing for all of my companion animals living at the time of my death (“my Animals” below in this Will), including any companion animals acquired after the date hereof.”

SECOND, KNOW HOW TO PHRASE THE BEQUEST:

“I give all of my animals living at the time of my death to _____, my _____ [identify relationship]”, or “I give all of my animals living at the time of my death to _____, a Texas non-profit corporation, federal taxpayer identification number _____, which currently is located at _____, and which currently has a mailing address of _____.”

Rule 2.01. Advisor

In advising or otherwise representing a client, a lawyer shall exercise independent professional judgment and render candid advice.

Rule 1.06. Conflict of Interest: General Rule

(a) A lawyer shall not represent opposing parties to the same litigation.
(b) In other situations and except to the extent permitted by paragraph (c), a lawyer shall not represent a person if the representation of that person:

(1) involves a substantially related matter in which that person’s interests are materially and directly adverse to the interests of another client of the lawyer or the lawyer’s firm; or

(2) reasonably appears to be or become adversely limited by the lawyer’s or law firm’s responsibilities to another client or to a third person or by the lawyer’s or law firm’s own interests.

(c) A lawyer may represent a client in the circumstances described in (b) if:

(1) the lawyer reasonably believes the representation of each client will not be materially affected; and

(2) each affected or potentially affected client consents to such representation after full disclosure of the existence, nature, implications, and possible adverse consequences of the common representation and the advantages involved, if any.

* * * * *

Comment #15: “Conflict questions may also arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may arise...The lawyer should make clear the relationship to the parties involved.”

**“JOINT CONSENT OF SPOUSES
FOR EMPLOYMENT OF ATTORNEY**

It is commonplace for spouses to engage the same lawyer for estate planning. However, when a lawyer represents both spouses with regard to common or related matters, certain conflicts of interest may arise within the ethical codes of the legal profession.

This is to confirm that _____ (the “Attorney”) is to be employed by you jointly as husband and wife. As such:

1) The Attorney will not maintain confidentiality between the two of you; the information the Attorney receives from either of you or from third parties will be shared with both of you. In order to assist you, the Attorney will need full disclosure of information.

2) Each of you waive any objection to the Attorney’s representation of the other of you regarding potential conflicts of interest between you (such as involving spousal rights of

election, property ownership and transfer matters, and trust as well as other asset arrangement matters).

3) Both of you represent that no conflicts exist between you. You have been informed that although no conflicts exist at this time, a conflict could arise if you eventually disagree on an estate plan or the disposition of your property, or if you separate or divorce. The Attorney may withdraw from representing either of you if he feels a conflict has arisen.

4) You have been encouraged by the Attorney to consult with another independent lawyer about the common representation and the terms in this Consent.

5) Both of you consent to representation by the Attorney after full disclosure to you of the existence, nature, implications, and possible adverse consequences of the common representation and the advantages involved, if any. You also acknowledge that the Attorney's representation of each of you will not be materially affected by the common representation.

Date: _____

HUSBAND

WIFE"

SITUATION 2

Same facts as Situation 1, except that \$20,000 will go to a testamentary trust for the caretaking of the pets with the daughter as trustee and a friend as beneficiary/caretaker, and when all pets have died, the trust residue to the daughter. Lawyer has never prepared such a trust before. May Lawyer prepare this?

CONSIDERATIONS: Rule 1.01(a) (competence).

Rule 1.01(a). Competent and Diligent Representation

(a) A lawyer shall not accept or continue employment in a legal matter which the lawyer knows or should know is beyond the lawyer's competence, unless...

(1) another lawyer who is competent to handle the matter is, with the prior informed consent of the client, associated in the matter; or

(2) the advice or assistance of the lawyer is reasonably required in an emergency....

FIRST, REVIEW TEXAS TRUST CODE §112.037: TRUST FOR CARE OF ANIMAL:

(a) A trust may be created to provide for the care of an animal alive during the settlor's lifetime. The trust terminates on the death of the animal or, if the trust is created to provide for the care of more than one animal alive during the settlor's lifetime, on the death of the last surviving animal.

(b) A trust authorized by this section may be enforced by a person appointed in the terms of the trust or, if a person is not appointed in the terms of the trust, by a person appointed by the court. A person having an interest in the welfare of an animal that is the subject of a trust authorized by this section may request the court to appoint a person to enforce the trust or to remove a person appointed to enforce the trust.

(c) Except as provided by Subsections (d) and (e), property of a trust authorized by this section may be applied only to the property's intended use under the trust.

(d) Property of a trust authorized by this section may be applied to a use other than the property's intended use under the trust to the extent the court determines that the value of the trust property exceeds the amount required for the intended use.

(e) Except as otherwise provided by the terms of the trust, property not required for the trust's intended use must be distributed to:

(1) if the settlor is living at the time the trust property is distributed, the settlor; or

(2) if the settlor is not living at the time the trust property is distributed:

(A) if the settlor has a will, beneficiaries under the settlor's will; or

(B) in the absence of an effective provision in a will, the settlor's heirs.

(f) For purposes of Section 112.036, the lives in being used to determine the maximum duration of a trust authorized by this section are:

(1) the individual beneficiaries of the trust;

(2) the individuals named in the instrument creating the trust; and

(3) if the settlor or settlors are living at the time the trust becomes irrevocable, the settlor or settlors of the trust or, if the settlor or settlors are not living at the time the trust becomes irrevocable, the individuals who would inherit the settlor or settlors' property under the law of this state had the settlor or settlors died intestate at the time the trust becomes irrevocable."

Added by Acts 2005, 79th Leg., ch. 148, § 6, eff. Jan. 1, 2006.*

*Section 31 of Acts 2005, 79th Leg., ch. 148 provides:

"(a) Except as otherwise provided by a will, the terms of a trust, or this Act, the changes in law made by this Act apply to: (1) a trust existing or created on or after January 1, 2006; (2) the estate of a decedent who dies before January 1, 2006, if the probate or administration of the estate is pending on or after January 1, 2006; and (3) the estate of a decedent who dies on or after January 1, 2006."

SECOND, BECOME FAMILIAR WITH SAMPLE PET TRUST PROVISIONS:

"I give all of my animals living at the time of my death (my "Animals") and the sum of _____ Dollars (\$_____), for animal care and trust administration expenses, to the trustee, in trust, under the terms of the trust created under Article _____ of this Will. If none of my Animals survive me, this provision of my will shall have no effect.

ARTICLE _____

_____ [name of testator] ANIMALS TRUST

A. Conditions of Creation. This trust is to be created upon the conditions stated in this Article.

B. Governing Law. This trust is to be governed by Texas law unless this Article provides to the contrary.

C. Trustees. I appoint _____ as Trustee of this trust. If _____ is unwilling or unable to serve, I appoint _____ as trustee.

D. Bond. No bond shall be required of any trustee named in this Article.

E. Trustee Compensation. The trustee shall be entitled to reasonable compensation from the trust for services as trustee. [or "No trustee shall be entitled to compensation for services as trustee."] The trustee shall receive reimbursement for reasonable expenses incurred in performing those services.

F. Beneficiaries of Trust. My Animals are the primary beneficiaries of the trust. In addition, _____ ("Caretaker") is the caretaker beneficiary of this trust provided Caretaker receives each Animal into Caretaker's home and provides each Animal with proper care as defined in Section G of this Article. The trustee shall deliver each Animal into

Caretaker's possession after securing a written promise from Caretaker to provide each Animal with proper care. If Caretaker dies or at any time fails, refuses, or is unable to provide each Animal with proper care, then _____ (“Alternate Caretaker”) is the caretaker of this trust provided such caretaker provides each Animal with proper care. If at any time there is no qualified alternate caretaker, then the trustee may select an alternate caretaker, other than the trustee, or donate each Animal to an appropriate animal shelter or foster home.

G. Proper Care. Proper care means the amount of care necessary to maintain each Animal in good, healthy physical and emotional condition, including without limitation proper feeding, shelter, space, and regular veterinarian examination. The trustee shall visit Caretaker’s home randomly without notice at least quarterly to make certain each Animal is receiving proper care. If in the trustee’s sole discretion an Animal is not receiving proper care, trustee shall immediately remove each Animal from Caretaker’s possession and deliver the Animal to the respective alternate caretaker.

H. Distribution of Trust Property While An Animal is Alive. The trustee shall reimburse each caretaker for all reasonable expenses caretaker incurs in the proper care of each Animal as defined in Section G of this Article. Reasonable expenses include, but are not limited to, food, housing, grooming, medical care, and burial or cremation fees. [Optional: “*The trustee shall / may distribute \$_____ to the caretaker each month provided the caretaker is taking proper care of each Animal as defined in Section G of this Article.*”]

I. Termination of Trust. This trust terminates on the earlier of (a) 21 years after the death of the last survivor of all individual beneficiaries of the trust, all trustees and individuals named therein, and all individuals who would inherit my property had I died intestate; or (b) the date when all Animals under this trust are deceased.

J. Distribution of Property Upon Trust Termination. Upon the termination of this trust, all remaining trust property shall pass to _____ (“Remainder Beneficiary”) if such Remainder Beneficiary is alive at the time of trust termination. If Remainder Beneficiary is not alive at the time of trust termination, all remaining trust property shall pass to _____ (“Alternate Remainder Beneficiary”) if Alternate Remainder Beneficiary is alive at the time of trust termination.

K. Spendthrift Provision. This is a spendthrift trust, that is, to the fullest extent permitted by law, no interest in the income or principal of this trust may be voluntarily or involuntarily transferred by a beneficiary before payment or delivery of the interest by the trustee.

L. Principal and Income. The trustee shall have the discretion to credit a receipt or charge an expenditure to income or principal or partly to each in any manner which the trustee determines to be reasonable and equitable.

M. Trustee Powers. The trustee shall have all powers granted to trustees under Texas law. [Optional: “*In addition to such powers, the trustee shall have the following powers:*”

“*The trustee may use trust property to purchase liability insurance to protect the trust, the trustee, and the caretaker from damage caused by an Animal to property or persons.*”

“*No trustee or caretaker may have an Animal euthanized unless two veterinarians, independent of each other, agree that the Animal has a serious or terminal medical condition.*”

“Upon the death of an Animal, the Trustee may / shall have the Animal cremated / buried at a pet cemetery, or memorialized.”

“The trustee may require that an Animal be spayed or neutered.”

“The trustee may / shall not use trust property to reimburse the caretaker for expenses associated with any offspring of an Animal.”

List other powers: _____]

N. Exculpatory Clause. The trustee shall not be liable for any loss, cost, damage, or expense sustained through any error of judgment or in any other manner except for and as a result of a trustee’s own bad faith or gross negligence.”

SITUATION 3

Same facts as Situation 1. Afterwards, Husband calls Lawyer and says he actually has an estranged child from a previous marriage, but doesn’t want Wife to know, and still wants the pets and assets to eventually go to Wife’s daughter. Wife then calls Lawyer and says “I’m glad Husband has no children; that makes our wills simpler.” Must Lawyer tell Wife about Husband’s estranged child?

CONSIDERATIONS: Rules 1.05(c)-(d) and 1.03, and Rule of Evidence 503(d)
(consent, joint clients, duty to communicate).

Rule 1.05. Confidentiality of Information

(a) “Confidential information” includes both “privileged information” and “unprivileged client information.”

* * * * *

(c) A lawyer may reveal confidential information:

(1) When the lawyer has been expressly authorized to do so....

(2) When the client consents after consultation;

* * * * *

(4) When the lawyer has reason to believe it is necessary to do so in order to comply with a court order, a Texas Disciplinary Rules of Professional Conduct, or other law.

* * * * *

(7) When the lawyer has reason to believe it is necessary to do so in order to prevent the client from committing a criminal or fraudulent act.

* * * * *

(d) A lawyer may also reveal privileged client information:

(1) When impliedly authorized to do so....

(2) When the lawyer has reason to believe it is necessary to do so in order to... (i) carry out the representation effectively

* * * * *

Rule 1.03. Communication

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

Rule of Evidence 503. Lawyer-Client Privilege

* * * * *

(b)(1) General Rule: A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made to facilitate the rendition of professional legal services to the client....

* * * * *

(d) Exceptions: There is no privilege under this rule:... (5) Joint clients. As to a communication relevant to a matter of common interest between or among two or more clients....

SITUATION 4

Same facts as Situation 1, except Husband and Wife want to leave the pets to Lawyer's sister who is a friend of Husband and Wife. May Lawyer prepare such a will provision?

CONSIDERATIONS: Rule 1.08(b) and Texas Estates Code §254.003 (sibling of attorney, exceptions; compare these two rules).

Rule 1.08. Conflict of Interest: Prohibited Transactions

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

Section 254.003. Devises to Certain Attorneys and Other Persons

- (a) A devise of property in a will is void if the devise is made to:
- (1) an attorney who prepares or supervises the preparation of the will;
 - (2) a parent, descendant of a parent, or employee of the attorney described by Subdivision (1); or
 - (3) the spouse of a person described by Subdivision (1) or (2).
- (b) This section does not apply to:
- (1) a devise made to a person who:
 - (A) is the testator's spouse;
 - (B) is an ascendant or descendant of the testator; or
 - (C) is related within the third degree by consanguinity or affinity to the testator; or
 - (2) a bona fide purchaser for value from a devisee in a will.

SITUATION 5

Same facts as Situation 1, except Husband and Wife want to leave the pets to a humane organization in which Lawyer serves on the board of directors. May Lawyer prepare such a will provision?

CONSIDERATIONS: Rule 1.08(b) and Texas Estates Code §254.003.

SITUATION 6

Same facts as Situation 2. Afterwards but before Lawyer prepares the wills, Husband calls Lawyer and requests Lawyer to set up Husband's trust different from Wife's trust by appointing a different trustee. May Lawyer continue to represent both Husband and Wife in the preparation of their wills?

CONSIDERATIONS: Rules 1.06(b)-(c) and Comment #15, 2.01 and 1.15(a)(1) (“adverse”, “adversely limited”, consent, independent professional judgment, attorney withdrawal, clarify relationship).

Rule 1.15. Declining or Terminating Representation

(a) A lawyer shall decline to represent a client or, where representation has commenced, shall withdraw....if:

(1) the representation will result in violation of Rule 3.08, other applicable rules of professional conduct or other law;

* * * * *

Rule 1.06. Conflict of Interest: General Rule

* * * * *

(b) In other situations and except to the extent permitted by paragraph (c), a lawyer shall not represent a person if the representation of that person:

(1) involves a substantially related matter in which that person’s interests are materially and directly adverse to the interests of another client of the lawyer or the lawyer’s firm; or

(2) reasonably appears to be or become adversely limited by the lawyer’s or law firm’s responsibilities to another client or to a third person or by the lawyer’s or law firm’s own interests.

(c) A lawyer may represent a client in the circumstances described in (b) if:

(1) the lawyer reasonably believes the representation of each client will not be materially affected; and

(2) each affected or potentially affected client consents to such representation after full disclosure of the existence, nature, implications, and possible adverse consequences of the common representation and the advantages involved, if any.

* * * * *

Comment #15: “Conflict questions may also arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may arise....The lawyer should make clear the relationship to the parties involved.”

* * * * *

Rule 2.01. Advisor

In advising or otherwise representing a client, a lawyer shall exercise independent professional judgment and render candid advice.

SITUATION 7

Same facts as Situation 6, except Husband also asks Lawyer to persuade Wife to have her trust set up the same way as Husband’s. May Lawyer seek to persuade Wife? May Lawyer continue to represent both Husband and Wife in the preparation of their wills?

CONSIDERATIONS: Rules 1.07(a) and (c), 1.06, 2.01 and 1.15 (“intermediary”, “written consent”, attorney withdrawal).

Rule 1.07. Conflict of Interest: Intermediary

(a) A lawyer shall not act as intermediary between clients unless:

(1) the lawyer consults with each client concerning the implications of the common representation, including the advantages and risks involved, and the effect on the attorney-client privileges, and obtains each client’s written consent to the common representation;

* * * * *

(c) A lawyer shall withdraw as intermediary if any of the clients so request, or if any of the conditions stated in paragraph (a) is no longer satisfied. Upon withdrawal, the lawyer shall not continue to represent any of the clients in the matter that was the subject of the intermediation.

SITUATION 8

Same facts as Situation 1, except that before the wills are prepared, Wife calls Lawyer and informs that Husband and Wife have separated. May Lawyer continue to represent both Husband and Wife in the preparation of their wills?

CONSIDERATIONS: Rules 1.06, 1.06 Comment #15, 2.01 and 1.15.

SITUATION 9

Same facts as Situation 1. After the wills are prepared and executed, Wife's daughter sends Lawyer a check in payment of the wills. May Lawyer accept the check?

CONSIDERATIONS: Rule 1.08(e) and 1.06 Comment #12 (consent, no interference with professional judgment, independence and duty of loyalty, confidentiality protected).

Rule 1.08. Conflict of Interest: Prohibited Transactions

* * * * *

(e) A lawyer shall not accept compensation for representing a client from one other than the client unless:
(1) the client consents;
(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
(3) information relating to representation of a client is protected as required by Rule 105.

Rule 1.06. Conflict of Interest: General Rule

* * * * *

Comment #12: "A lawyer may be paid from a source other than the client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty to the client....if the client consents after consultation and the arrangement ensures the lawyer's professional independence."

SITUATION 10

Same facts as Situation 1. After the wills are executed, Wife calls Lawyer and says that she and Husband are separated. She also says Husband came to the house and while in a rage, kicked one of the pets who got in his way and accidentally injured it. Must Lawyer report this to a law enforcement agency? Does Lawyer still represent Husband or Wife?

CONSIDERATIONS: Rules 1.06 and 1.05(c)(7) (currently "client"?).

Rule 1.05. Confidentiality of Information

* * * * *

(c) A lawyer may reveal confidential information:...

* * * * *

(7) When the lawyer has reason to believe it is necessary to do so in order to prevent the client from committing a criminal or fraudulent act.

SITUATION 11

Same facts as Situation 10, except that Wife, fearing Husband will repeat his actions, takes the pets to Lawyer’s office and requests to temporarily leave them with Lawyer. May Lawyer accept the pets?

CONSIDERATIONS: Rules 1.14 (safekeeping, records, notification)

Rule 1.14. Safekeeping Property

* * * * *

(b) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person....a lawyer shall promptly deliver...any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

SITUATION 12

Same facts as Situation 10, except that Wife requests Lawyer to represent Wife in a divorce action against Husband, to make claim for veterinarian expenses she incurred in treating the pets that Husband injured, and to force Husband to pay “child support” for the pets who are like children to Wife. Wife also asks Lawyer to give a press conference detailing Husband’s animal abuse. May Lawyer file such a suit and give the press conference?

CONSIDERATIONS: Rules 1.09(a), 1.06(a)(b) and (d), 2.01, 1.15, 3.01 and 3.07 (confidentiality, substantially related matter, opposing parties, adversely limited, dispute arising out of prior matter, independent professional judgment, attorney declination, meritorious claims, trial publicity).

Rule 1.09. Conflict of Interest: Former Client

(a) Without prior consent, a lawyer who personally has formerly represented a client in a matter shall not thereafter represent another person in a matter adverse to the former client:

- (1) in which such other person questions the validity of the lawyer’s services or work product for the former client;
- (2) if the representation in reasonable probability will involve a violation of Rule 1.05; or
- (3) if it is the same or a substantially related matter.

* * * * *

Rule 2.01. Advisor

In advising or otherwise representing a client, a lawyer shall exercise independent professional judgment and render candid advice.

Rule 1.15. Declining or Terminating Representation

(a) A lawyer shall decline to represent a client or, where representation has commenced, shall withdraw....if:

- (1) the representation will result in violation of Rule 3.08, other applicable rules of professional conduct or other law;

* * * * *

Rule 3.07. Trial Publicity.

(a) In the course of representing a client, a lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicatory proceeding. A lawyer shall not counsel or assist another person to make such a statement.

(b) A lawyer ordinarily will violate paragraph (a), and the likelihood of a violation increases if the adjudication is ongoing or imminent, by making an extrajudicial statement of the type referred to in that paragraph when the statement refers to:

(1) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness; or the expected testimony of a party or witness;

(2) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense; the existence or contents of any confession, admission, or statement given by a defendant or suspect; or that person's refusal or failure to make a statement;

(3) the performance, refusal to perform, or results of any examination or test; the refusal or failure of a person to allow or submit to an examination or test; or the identity or nature of physical evidence expected to be presented;

(4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration; or

(5) information the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and would if disclosed create a substantial risk of prejudicing an impartial trial.

(c) A lawyer ordinarily will not violate paragraph (a) by making an extrajudicial statement of the type referred to in that paragraph when the lawyer merely states:

(1) the general nature of the claim or defense;

(2) the information contained in a public record;

(3) that an investigation of the matter is in progress, including the general scope of the investigation, the offense, claim or defense involved;

(4) except when prohibited by law, the identity of the persons involved in the matter;

(5) the scheduling or result of any step in litigation

(6) a request for assistance in obtaining evidence, and information necessary thereto;

(7) a warning of danger concerning the behavior of a person involved, when there is a reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

(8) if a criminal case:

(i) the identity, residence, occupation and family status of the accused;

(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;

(iii) the fact, time and place of arrest; and

(iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

SITUATION 13

Same facts as Situation 12, except that Lawyer has refused to represent Wife any longer because Husband was a long-time client of Lawyer. Husband calls Lawyer and says that he has gotten a job driving the truck for the humane organization in which Lawyer serves on the board of directors. Husband also says that in violation of a temporary restraining order, he went by Wife's house in the organization's truck and drove off with the pets. Must Lawyer report this information to either the organization or the relevant court?

CONSIDERATIONS: Rules 1.12(b), 1.05(c)(4), and 1.15 (permissible revelation of confidential information, "comply with a court order", representation of organization vs. service as director, "remedial action", "imputed", attorney withdrawal/declination).

Rule 1.12. Organization as a Client

* * * * *

(b) A lawyer representing an organization must take remedial actions whenever the lawyer learns or knows that:

(1) an officer, employee, or other person associated with the organization has committed or intends to commit a violation of a legal obligation to the organization or a violation of law which reasonably might be imputed to the organization;

(2) the violation is likely to result in substantial injury to the organization; and

(3) the violation is related to a matter within the scope of the lawyer's representation of the organization.

Rule 1.05. Confidentiality of Information

* * * * *

(c) A lawyer may reveal confidential information:

* * * * *

(4) When the lawyer has reason to believe it is necessary to do so in order to comply with a court order, a Texas Disciplinary Rules of Professional Conduct, or other law.

* * * * *

(7) When the lawyer has reason to believe it is necessary to do so in order to prevent the client from committing a criminal or fraudulent act.

* * * * *

Rule 1.15. Declining or Terminating Representation

(a) A lawyer shall decline to represent a client or, where representation has commenced, shall withdraw...if:

(1) the representation will result in violation of Rule 3.08, other applicable rules of professional conduct or other law;

* * * * *

SITUATION 14

Same facts as Situation 13. Afterwards, the organization's board calls a meeting to vote on what action should be taken against Husband. May Lawyer participate in the meeting?

CONSIDERATIONS: Rule 1.13 (attorney as director, participation in decisions affecting attorney's clients).

Rule 1.13. Conflicts: Public Interests Activities

A lawyer serving as a director, officer or member of a legal services, civic, charitable or law reform organization, apart from the law firm in which the lawyer practices, shall not knowingly participate in a decision or action of the organization:

(a) if participating in the decision would violate the lawyer's obligations to a client under Rule 1.06; or

(b) where the decision could have a material adverse effect on the representation of any client of the organization whose interests are adverse to a client of the lawyer.

SITUATION 15

Same facts as Situation 13, except that in attempting to race away with the pets, Husband crashed the truck and died (no animals died). Afterward, Husband's estranged child calls Lawyer and requests Lawyer to represent him in contesting Husband's will which Lawyer prepared. May Lawyer represent the estranged child in such a suit?

CONSIDERATIONS: Rules 1.09 Comment #3, and 3.08 ("work product", actions to overturn will, attorney employment, witness, essential fact).

Rule 1.09. Conflict of Interest: Former Client

(a) Without prior consent, a lawyer who personally has formerly represented a client in a matter shall not thereafter represent another person in a matter adverse to the former client:

(1) in which such other person questions the validity of the lawyer's services or work product for the former client;

(2) if the representation in reasonable probability will involve a violation of Rule 1.05; or

(3) if it is the same or a substantially related matter.

* * * * *

Comment 3.a lawyer who drew a will leaving a substantial portion of the testator's property to a designated beneficiary would violate paragraph (a) by representing the testator's heirs at law in an action seeking to overturn the will.

Rule 3.08. Lawyer as Witness

(a) A lawyer shall not accept or continue employment as an advocate before a tribunal in a contemplated or pending adjudicatory proceeding if the lawyer knows or believes that the lawyer is or may be a witness necessary to establish an essential fact on behalf of the lawyer's client, unless....