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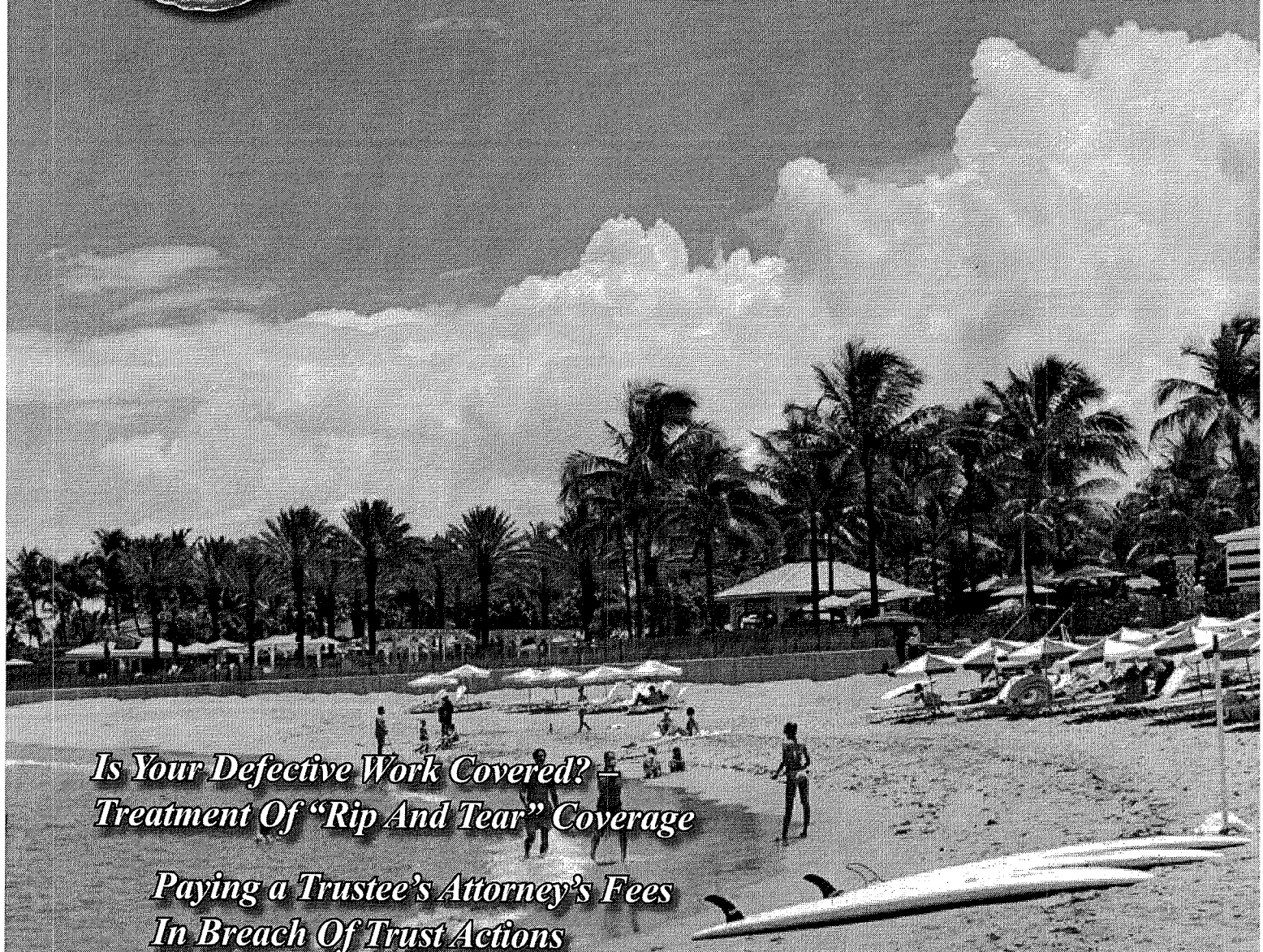

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Vol. XXXVIII, No. 2 www.rpptl.org Winter 2017

The Florida Digital Assets Act – Ethical Issues In Representing Spouses In The Brave New Digital World

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Digital Assets - What They Are and Why They Are Relevant to Planners

"Digital assets" are electronic records in which an individual has a right or interest. They are transmitted or stored on digital devices such as smartphones and computers. Digital assets can include items such as domain names; websites such as blogs, email accounts, documents, social media accounts, online financial and vendor accounts, business information, digital currency; and artistic content such as photographs. The most common and relevant digital assets to most people are their email communications with others.

Digital assets have both financial and sentimental value and that value can be lost. According to a 2013 survey from McAfee, Americans valued their digital assets, on average, between $35,000 and $55,000. This number is certainly much higher today in 2016.

Estate Planning for Digital Assets

While estate planners, fiduciaries, and fiduciary counsel have perfected techniques used to transfer long-established types of property, most attorneys and fiduciaries have not yet determined how to address the disposition of digital assets. In addition, few owners of digital assets consider the fate of their online accounts or information once they are no longer able to manage these assets.

During the estate planning process, clients can be advised to plan ahead. Such planning includes advice to clients to do the following: (1) make an estate plan that includes documents with digital asset provisions; (2) back up their electronic information and data; (3) take advantage of any so-called online tool provided by an internet service provider (such as Google's Inactive Account Manager) of the client; and (4) create a digital inventory for use by the client's future fiduciary.

The client's estate planning documents should be drafted to include language aimed at the administration of digital assets and information. Digital assets should be defined in the document and fiduciary powers over digital assets should be set forth in the documents.

Some typical language that might be included in a digital assets powers clause is: "Except as otherwise specifically provided herein, I authorize any person or entity that possesses, has custody of, or controls any digital assets of mine, including but not limited to online accounts or electronically stored information, to divulge to my Personal Representative any electronically stored information of mine; the contents of any electronic communications sent or received by me; and any records pertaining to me and maintained by that person or entity." The quoted language is very useful for fiduciaries in obtaining access to digital assets; but it may lead to some quandaries for estate planning attorneys.

Fiduciary Access to Email Accounts

The newly enacted Florida Fiduciary Access to Digital Assets Act (the "Act")[1] establishes a new chapter of the Florida Statutes - Chapter 740.

The problem the Act addresses is lack of a defined right of access for fiduciaries to digital assets. The Florida Probate Code and Trust Code do not mention digital assets, do not define these assets, and do not contain clearly applicable rules governing access to them by fiduciaries. These issues have now been addressed by the Act.

Prior to the passage of the Act, access to digital assets created a minefield where fiduciaries could unknowingly violate both federal and state criminal law regarding hacking and privacy. Fiduciaries also could run afoul of contract law by unwittingly violating terms-of-service provisions with individual account providers in attempting to access digital assets.

The Act generally takes a three-tiered approach to fiduciary access. The three-tiered approach is as follows:

1. A user's direction using an online tool prevails over an offline direction and over the terms-of-service, if the direction can be modified or deleted at all times by the user.

2. A user's direction in a will, trust, power of attorney, or other record prevails over the boilerplate terms-of-service.

3. If a user provides no direction, the terms-of-service control, or other law controls if the terms-of-service are silent on fiduciary access.[2]

The Act only governs access to digital assets. The underlying ownership and title of assets is not changed by the Act.

Perhaps the most important thing to remember about the Act is that it is "opt-in" with regard to the contents of email communications. What that means is that a client's estate planning documents must authorize the content of electronic communications to be turned over to a fiduciary in order for the fiduciary to have access to that information. Without express authorization to access content of communications, a fiduciary can only access what is known as "catalog" of the communications. A "catalog" for emails would be information

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regarding senders, receivers, dates, and subject lines. It would not include the underlying text of the emails themselves.

The opt-in nature of access to the content of email communications leads to at least two large planning issues. First, it creates the need for both estate planning documents with digital assets provisions and for specific language in the planning documents themselves referring to the content of electronic communications.[3] Second, a planner now needs to determine the client's goals and desires regarding whether their email communications should be accessible by a fiduciary.

While many, or even most, couples may think that having this power is convenient and would not think twice about granting such power to the other spouse, often, perhaps more often than most admit, this power presents considerable ethical dilemmas for the practitioner.

Representing married couples in an estate planning practice is already a challenge. In a time where pre-nuptial agreements are commonplace, failure to discuss the need for a pre-nuptial agreement or potential for a spouse to choose a pretermitted or elective share could certainly lead to the attorney being subject to a future malpractice claim. In addition to the common perils of representing both spouses, a seasoned practitioner can often sense when the joint representation of a husband and wife would be inappropriate because the attorney can foresee that the representation will ultimately result in the resignation or disqualification of the attorney.

Applicable Law Regarding Multiple Representation

Under the Rules Regulating the Florida Bar (the "RRFB") on conflicts of interest, a lawyer must not represent a client if the representation of one client will be directly adverse to the interests of another client, or if there is a substantial risk that the representation of a client will be materially limited by the lawyer's responsibilities to another client, a former client or a third person, or by a personal interest of the lawyer.[4] Notwithstanding those conflicts, a lawyer may represent a client if: (a) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; (b) the representation is not prohibited by law; (c) the representation does not involve the assertion of a position adverse to another client when the lawyer represents both clients in the same proceeding before a tribunal; and (d) each affected client gives informed consent, confirmed in writing or clearly stated on the record at a hearing.[5]

The RRFB further provide that when representation of multiple clients in a single matter is undertaken, the consultation must include an explanation of the implications of the common representation and the advantages and risks involved.[6] The following excerpt is the only comment in the RRFB which provides advice specific to estate planning: "[c]onflict 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."[7]

The rules merely provide a succinct statement that conflicts of interest may result when an attorney represents more than one member in a family. It does not provide specific advice as to how to correct the conflict.

With respect to Florida's rules on confidentiality, a lawyer must reveal confidential information to the extent the lawyer reasonably believes necessary either to prevent a client from committing a crime or to prevent a death or substantial bodily harm to another.[8] A lawyer may reveal confidential information to the extent the lawyer reasonably believes necessary to serve the client's interest unless disclosure is required by the RRFB or the client specifically instructs such information may not be disclosed.[9]

The RRFB are modeled from the Model Rules of Professional Conduct (the "MRPC"). The MRPC rule relating to confidentiality states that a lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary in seven different cases including to prevent substantial injury to the financial interests of another that is reasonably certain to result from the client's commission of a crime in furtherance of which the client has used the lawyer's services.[10]

The MRPC's rule relating to conflict of interest states that a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: (1) the representation of one client will be directly adverse to another client; or (2) there is significant risk the representation of one or more clients will be materially limited by the lawyer's responsibility to another client, a former client or a third person, or by a personal interest of the lawyer. However, if there is a concurrent conflict of interest as listed above, the attorney may continue to represent a client if: (1) the lawyer reasonably believes the lawyer will be able to provide competent and diligent representation to each affected client; (2) the representation is not prohibited by law; (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and (4) each affected client gives informed consent, confirmed in writing.[11]

The MRPC does not include any examples in its Comments specifically referencing estate planning conflicts. Further, unlike the RRFB, the rule relating to confidentiality in the MRPC leaves more to the discretion of the attorney. For instance, when following the Model Rules, the attorney may reveal information to prevent reasonably certain substantial bodily harm. Under the Florida rules, there is no discretion; the attorney must reveal that information.

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Advisory Opinion 95-4[12]

The sparse direction regarding joint representation under the RRFB and the lack of applicable case law resulted in confusion, and practitioners sought advice from the Probate and Trust Law ("RPPTL") Section of the Florida Bar. In response, a committee selected by the Section requested and received from the Professional Ethics Committee of The Florida Bar Advisory Opinion 95-4 (the "Opinion"), which contains a general fact pattern to elucidate the ethical issues. A summary of the fact pattern presented by RPPTL follows:

> A practitioner had been representing a husband and wife for some time in different areas. He had drafted numerous testamentary documents for each, both of which contained identical dispositive provisions. The practitioner, husband, and wife had always shared relevant information. After executing the most recent wills, the husband approaches the practitioner and tells him that he had gone to a different law firm and executed a codicil to his will making a large disposition to a woman with whom the husband had been having a secret affair. The husband asks the practitioner about the wife's elective share, should she be the survivor of the two. The practitioner tells the husband that he cannot provide guidance; that he will have to consider his ethical duties; that he may have to withdraw from representation of both husband and wife; and that the practitioner may disclose to the wife the substance of the conversation if the husband does not do so himself.

The Opinion discusses the two duties of attorneys which are at odds in this scenario: (i) the duty of confidentiality, that a lawyer is ethically obligated to maintain in confidence all information relating to the representation of the client[13] and (ii) the duty of communication, that the lawyer must communicate information that is relevant to the representation. Under the hypothetical facts, the attorney's duty of confidentiality to the husband directly conflicted with the attorney's duty to communicate to the wife. The Opinion's synopsis states:

> In a joint representation between husband and wife in estate planning, an attorney is not required to discuss issues regarding confidentiality at the outset of representation. The attorney may not reveal confidential information to the wife when the husband tells the attorney that he wishes to provide for a beneficiary that is unknown to the wife. The attorney must withdraw from the representation of both husband and wife because of the conflict presented when the attorney must maintain the husband's separate confidences regarding the joint representation.

The Opinion addresses (and rejects) the view that the "usual rule of lawyer-client confidentiality does not apply in joint representation and the lawyer should have the discretion to determine whether the lawyer should disclose the separate confidence to the non-communicating client."[14] This view is favored by the Restatement Section 112, comment and the American College of Trust and Estates in its Commentaries on

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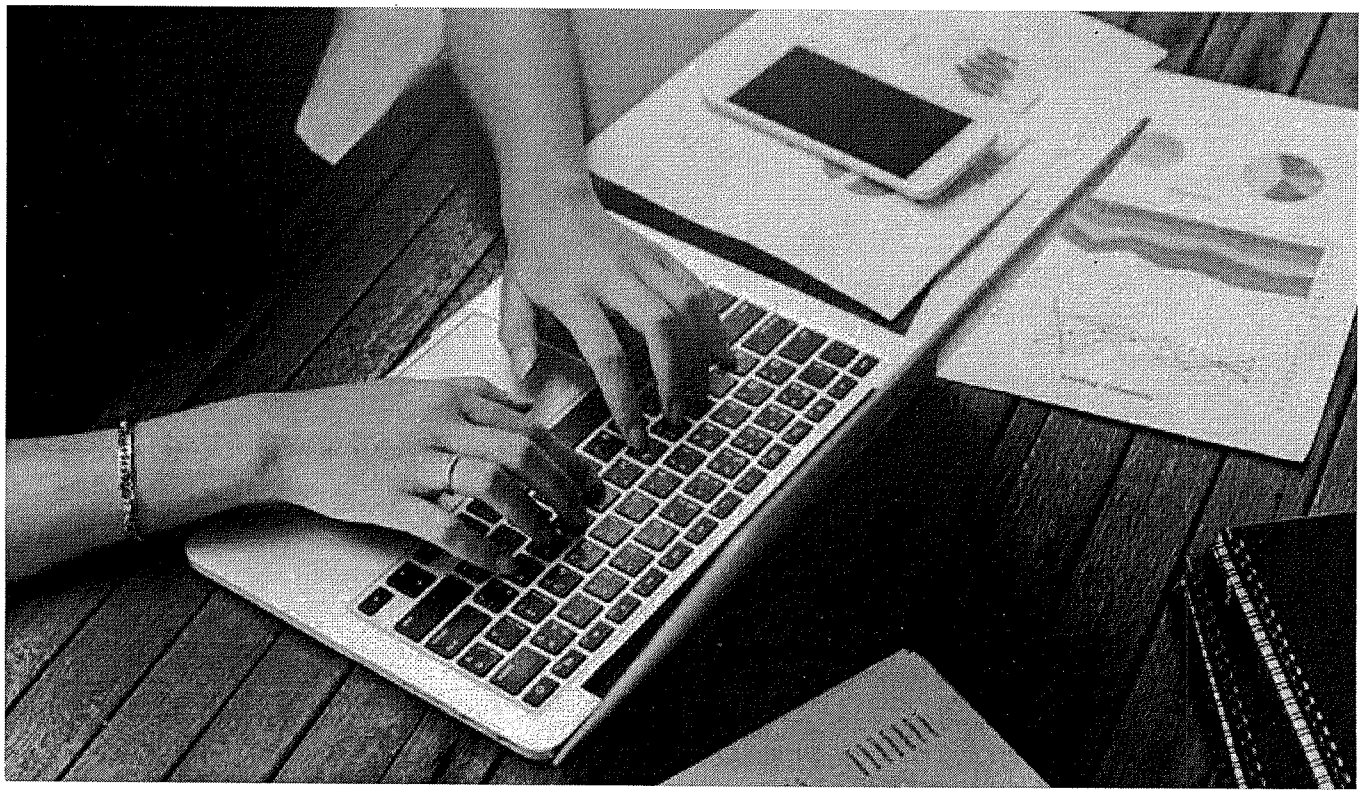

the Model Rules of Professional Conduct (2d ed. 1995) (the "ACTEC Commentaries"). While the Restatement notes that no case law supports the discretionary approach, the ACTEC Commentaries simply omit any mention of case law either for or against the discretionary approach.

Florida's rule seems to be unambiguous – a "[l]awyer owes duties of confidentiality both to [h]usband and [w]ife, regardless of whether they are being represented jointly."[15] Therefore, in the scenario discussed in the Opinion, an attorney is forbidden to disclose the husband's codicil to the wife.

The committee drafting the Opinion concludes that the lawyer must withdraw from the joint representation. The Opinion points out that while many conflicts can be cured by obtaining the informed consent of the clients, some are of a nature such that the lawyer cannot reasonably request consent to continue representation. The committee found the conflict in the Opinion's hypothetical was of a "personal and, quite likely, emotionally-charged nature. Lawyer's continued representation of both Husband and Wife in estate planning matters presumably would no longer be tenable." Therefore, the lawyer would have had to withdraw from representing the husband and the wife.[16]

As mentioned earlier, the ACTEC Commentaries on the MPRC leave more discretion to the attorney. In a situation where a spouse shares information with the attorney that is not shared with the other spouse, the ACTEC Commentaries to the Model Rule of MPRC 1.6 recommend three possible courses of action: (1) if the matter is trivial, to take no action; (2) encourage the spouse to tell the other spouse the confidential information;[17] and (3) to withdraw from representation.[18] If the situation involves "such adversity," ACTEC recommends withdrawal.

Another possible solution is representation of both the husband and wife as separate clients, with full consent of both.[19] This would guarantee ultimate confidentiality between the attorney and each spouse. While most practitioners have negative views of this possibility, ACTEC has recognized that "several sophisticated, experienced, and ethical practitioners follow this practice."[20]

The passage of the Act further complicates joint representation. Estate planning for a married couple generally requires that each spouse be honest with one another. Because the Act is an affirmative act, meaning that each of the powers set forth in the Act is granted to the fiduciary (whether it is under a Power of Attorney or as Personal Representative), the appointee (for purposes of our discussion we are assuming the appointee is the spouse) is automatically vested with all of the powers under the Act, meaning that if one spouse does not want their spouse to have the authority to access that spouse's digital assets, that spouse has to either affirmatively specify in his or her estate planning documents and durable power of attorney, that they do **not** want their spouse to have such authority. While numerous spouses have very clear desires that the other spouse not have access to their digital assets, the "conversation" to deliver that message is littered with landmines.

The following scenario is likely to occur more often than practitioners would like to admit:

> Walter and Heather Clanton arrive at the office of their estate planning attorney, Elgin Sneeden. Walter and Heather have been married for over 30 years. Sneeden explains the Act to them. Heather agrees to give Walter access. Walter gives Heather access but looks very uncomfortable. Jointly they tell Sneeden that the Durable Power of Attorney and estate planning documents should grant each other full access as contemplated by the Act. Two days later, Walter calls Sneeden and tells him that he does not want Heather to have access to his digital assets, specifically confiding that he has fathered at least one child out of wedlock and that the passcodes to the bank account that he has set up for that child, Bassand, are all on his computer. Walter asks Sneeden to advise him how to protect his digital assets specifically so Heather doesn't find out.

On one hand, the Opinion makes it fairly clear that Sneeden may not tell Heather anything. The duty of confidentiality outweighs the duty of loyalty and Sneeden must not share Walter's revelations. However, according to the Opinion, Sneeden needs to use his best effort to persuade Walter to tell Heather his secrets. If Sneeden cannot convince Walter, the Opinion suggests that Sneeden must then withdraw from representation. This could raise Heather's suspicions, especially when Sneeden informs Walter and Heather that they should obtain separate counsel. It is possible that the attorney's withdrawal from representation will cause damage to the marriage. In this case, continuing to represent both Walter and Heater would be directly adverse to Heather. Thus, according to the Opinion, Sneeden must withdraw. However, this result is deeply dissatisfying to Sneeden who believes that he could be an equal advocate for both spouses, and worse yet, worries if he will start having to regularly counsel couples to seek separate counsel.

With the increasing reliance on the Internet to conduct business and provide entertainment, it is safe to assume that many clients have digital assets stored which they do not want a spouse to discover through the use of a valid Florida Durable Power of Attorney or after their demise. What if Heather had suspicions of Walter's conduct and immediately took the Durable Power of Attorney which indicated in the "super powers" provisions that she was specifically granted unlimited access to all of Walter's digital assets and began accessing all of Walter's digital information? Does Walter have an action against Sneeden? If Sneeden hid the information from Heather who later suffered damages that she could

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have avoided "if she knew," does Heather now have an action against Sneeden? Is the only choice to withdraw as soon as every conversation gets uncomfortable? Exactly what can Sneeden say to Walter, and then to Heather? What duty does an attorney owe to each spouse if the attorney is informed of such in a joint representation setting?

Additionally, even if a spouse does not want the other spouse to access his or her digital assets, in some cases access to digital assets must occur. For instance, some digital accounts are programmed to autopay bills and more commonly are the only footprint of the decedent's investment accounts. The decedent's assets may be unnecessarily compromised if the spouse/Personal Representative is not able to access autopay and investment accounts. Even if access is "refused," provisions should be made for that information which must be accessed even for the client who does not want anyone to have access to his or her digital assets upon the client's incapacity or death.

What is the answer? Obviously, it is impractical to advise against spouses serving as agent under a Power of Attorney or as Personal Representative for the other's estate. Most couples likely do not care if the other spouse has unlimited access to his or her digital assets and information. A far too significant number of couples, however, who would answer, "No" to the question of unrestricted access (especially if asked in private) will walk through your doors.

The logical extension of this quandary begs the larger question which is "Should the joint representation of spouses be stopped altogether?" On its face, the query sounds absurd, but is it? ACTEC specifically mentions in its commentaries on the Model Rules that "[i]n some instances the clients may actually be better served by such a [joint] representation, which can result in more economical and better coordinated estate plans prepared by counsel who has a better overall understanding of all of the relevant family and property considerations."[21] The benefits of joint representation should not be taken away from the spouses who do not have any hidden skeletons. But how can an attorney tell when joint representation is the best solution and when it is not?

Most practitioners recommend a series of steps to minimize the possibility of conflicts and, candidly, to protect the attorney. First, the attorney should require the prospective clients to sign a "written waiver of confidentiality as to each other, so that any information provided to the lawyer by either spouse must be revealed to the other spouse."[22] Any reluctance by one of the parties will demonstrate the need at the beginning of representation for separate counsel. Second, the attorney should give the prospective clients a document which states that their interests may conflict in areas such as the plan for the disposition of the assets or the appointed fiduciaries.[23] The attorney should have the prospective clients sign this document allowing the attorney to use his best efforts to avoid any conflict. Next, the clients' fee agreement should allow the attorney to withdraw if he or she decides that there is a non-waivable conflict of interest. Finally, the attorney should mandate that both spouses be present whenever either spouse changes his or her estate planning documents.[24]

Once the attorney has "informed consent," or the approval of both spouses in writing to joint representation, the attorney should have protection from the beginning of the representation.[25] The clients will know at the start that the lawyer will share confidences between the spouses. Additionally, if one spouse individually calls the attorney, the attorney can begin the conversation with a brief statement summarizing the consequences of joint representation and reminding the client that the attorney will share confidences.

The steps suggested seem to protect the attorney in a very general manner. However, these steps do not address the bigger problem of fleshing out the issue to the clients. Perhaps the correct course of action is to have a general joint conversation with the clients about digital assets and tell them that they should discuss this issue before the documents are signed. The attorney can also clearly tell the clients, in each other's presence, that they can supersede their estate planning documents by making direct designations with their digitals providers, such as AOL, Facebook, etc., to disallow access to that specific account notwithstanding the designation in the Durable Power of Attorney or the Will (the designation with the provider appears to prevail under the Act). Further, if there is digital information that is extremely sensitive, perhaps they should give someone else (other than the attorney) the password or access with instructions of what to do with that information upon disability or death. Finally, the attorney can confidently also counsel the clients that if access causes them discomfort that they should not give anyone access, and that in such a case the information is likely to be lost forever (which, in some cases, would be the best result).

The Opinion, drafted in 1995 during the infancy of the Internet, may not be completely instructive for an attorney faced with the disposition of digital assets of one spouse in a multi-party representation. Florida follows an unambiguous rule – a lawyer owes a duty to both the husband and wife to withdraw in a conflict of "such adversity." Perhaps it is time to revisit the usual rule and allow the attorney to exercise discretion in such complex situations.

Indeed, the Opinion itself mentions the usual rule that client confidentiality does not apply in joint representation: the lawyer should have the ability to decide whether he or she may disclose the separate confidence to the non-communicating client. A rigid rule on confidentiality in multi-party representation in an era where people's lives and assets are increasingly linked to digital media and the Internet at least merits a closer look, if not thorough reconsideration.

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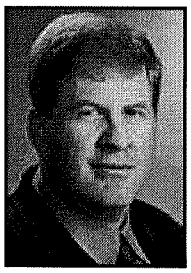
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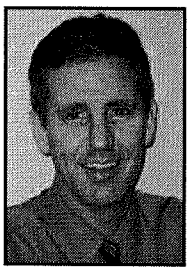
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Endnotes

1 The Florida Fiduciary Access to Digital Assets Act was passed by the Florida Legislature and signed by the Governor in March 2016. The Act has an effective date of July 1, 2016.

2 An extensive discussion of the Digital Assets Act can be found in a recent article in the November 2016 edition of The Florida Bar Journal entitled "Access to Digital Assets – Florida's New Law For Fiduciaries: What are Digital Assets and Why are They Relevant?" By S. Dresden Brunner, p. 34 (Florida Bar Journal, November 2016).

3 For example, "to divulge to my Agent ... the contents of any electronic communications sent or received by me..."

4 R. Regulating Fla. Bar 4-1.7(a).

5 R. Regulating Fla. Bar 4.1-7(b).

6 R. Regulating Fla. Bar 4.1-7(c).

7 R. Regulating Fla. Bar 4.1-7 cmt.

8 R. Regulating Fla. Bar 4.1-6(b).

9 R. Regulating Fla. Bar 4-1.6(c). For an interesting case on this issue highlighting the interaction of the rules of evidence and the rules of professional conduct, *see Vasallo v. Bean, et al.*, No. 3D16-1862, 2016 WL 6249157, at *1 (Fla. Dist. Ct. App. Oct. 26, 2016).

10 Model Rules of Prof'l Conduct R. 1.7(b) (2014).

11 Model Rules of Prof'l Conduct R. 2.7(b) (2014).

12 The final text of Advisory Opinion 95-4 is published in the Florida Bar News, July 1, 1997, at p. 6.

13 R. Regulating Fla. Bar 4-1.6

14 Opinion 95-4.

15 Opinion 95-4.

16 Opinion 95-4, citing R. Regulating Fla. Bar 4-1.16.

17 "The lawyer needs to communicate with the client who refuses to share the confidences, explaining the lawyer's obligation to the joint client as well as the possible legal consequences for the joint clients and the attorney in regards to a disciplinary or malpractice suit." Richardson, Catherine Houston, *A "Rest in Peace" Guide of Estate Planning Ethics*, 28 J. Legal Prof. 217, 224 (2003-04).

18 Commentaries on the Model Rules of Professional Conduct, at 76-77 (2d ed. March 1995, American College of Trusts and Estates Counsel) (the "ACTEC Commentaries").

19 ACTEC Commentaries, cmt on 1.6.

20 Ross, Bruce S., *Ethical Issues in Practice: Important Fiduciary Litigation*, ALI-ABA Estate Course Materials Journal 15.

21 ACTEC Commentaries, cmt on MRPC 1.7, 'General Nonadversary Character of Estates and Trusts Practice; Representation of Multiple Clients.'

22 Zaritsky, Howard M., 34 Est. Plan. 56 (2007).

23 Zaritsky, Howard M., 34 Est. Plan. 56 (2007). *See also* Kleinfeld, Denis A., AT FL-CLE 1-1, The Florida Bar, 8th ed. (2014).

24 Zaritsky, Howard M., 34 Est. Plan. 56 (2007).

25 Beasley, Teresa M., *Joint Representation of Spouses*, 19 No. 5 GPSolo 18, 20 (2002) ("One key to protecting yourself when representing married couples is ensuring that each client clearly consents to the joint representation after consultation ('informed consent'). Informed consent is imperative for joint representation in estate planning and always should be confirmed in writing. Using conflict waiver letters in the most practical way to guarantee consent from clients who will be represented jointly.").