

*The Law Offices
of*
PETER M. FEAMAN, P.A.
Strategic Counselor. Proven Advocate."



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FACSIMILE

TO: Honorable Martin H. Colin

FAX NUMBER: 561-274-1418

DATE: Wednesday, February 19, 2014

RE: Estate of Simon Bernstein, Case NO. 502012CP004391 SB

FROM: PETER M. FEAMAN

MESSAGE: **Verified Motion to Disqualify Counsel (per your request)**

OF PAGES 7 (including cover sheet)
+ attachments

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IN THE CIRCUIT COURT OF THE FIFTEENTH
JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR
PALM BEACH COUNTY, FLORIDA

IN RE:

Case No.: 50 2012 CP 004391 SB
JUDGE MARTIN COLIN

ESTATE OF SIMON
BERNSTEIN,

Deceased.

Division: IY

VERIFIED MOTION TO DISQUALIFY COUNSEL

COMES NOW Petitioner, William E. Stansbury ("Stansbury"), a creditor and "Interested Person," pursuant to the §731.201(23) Fla. Stat. (2013) in the above-styled proceeding, by and through his undersigned counsel, and files this Verified Motion to Disqualify Counsel, John J. Pankauski, Esq., and the Pankauski Law Firm P.L.L.C., as counsel for Ted S. Bernstein, and in support thereof states:

1. On February 17, 2014, attorney John J. Pankauski of the Pankauski Law Firm filed a Notice of Appearance in this estate proceeding on behalf of Ted S. Bernstein.
2. The decedent, Simon Bernstein, is survived by five (5) children, who are all interested parties in the Estate of Simon Bernstein.
3. Ted S. Bernstein is a son of the decedent, Simon Bernstein.
4. Eliot Bernstein is also a son the decedent, Simon Bernstein.
5. The interests of Ted S. Bernstein and Eliot Bernstein in the administration of the estate and in the distribution of the assets of their father's estate are in conflict.
6. In the latter part of September 2013, Eliot Bernstein sought legal counsel to represent him in the above-styled estate proceeding.

7. In connection with his attempt to secure legal representation, Candice Bernstein, Eliot Bernstein's wife, called the office of John J. Pankauski, Esq., of the Pankauski Law Firm P.L.L.C. on or about September 19, 2013.

8. Candice Bernstein spoke with Mr. John J. Pankauski, Esq.'s intake assistant, Ms. Michelle Morley for more than one hour, and discussed with Ms. Morley the Simon Bernstein estate and the Shirley Bernstein estate, and the different positions being taken by Eliot Bernstein and Ted Bernstein in connection with those estates.

9. Thereafter, Ms. Morley, Mr. John J. Pankauski, Esq.'s assistant, sent an e-mail to Candice Bernstein confirming their telephone conversation, and requesting Candice Bernstein to send her the following documents: (1) original will/trust for Shirley Bernstein; (2) original will/trust for Simon Bernstein; (3) copies of revised will/trusts for Simon Bernstein; and (4) any documents with the admission of the forged notary, **"for John [Pankauski, Esq.] to review prior to his call with you this evening."** (emphasis added). See e-mail annexed hereto as Composite Exhibit "A."

10. Thereafter, Candice Bernstein sent Ms. Morley of the Pankauski law firm the requested documents and numerous other related documents for attorney John Pankauski's review. See e-mails annexed as Composite Exhibit "A."

11. Thereafter, attorney John Pankauski called Eliot and Candice Bernstein. They spoke for about one hour and discussed Eliot Bernstein's concerns regarding the Simon Bernstein and Shirley Bernstein estates, including Eliot's differences and conflict with his brother, Ted Bernstein and his counsel, relating to the administration and distribution of assets of those estates. Eliot and attorney John Pankauski also discussed together litigation strategies and documentation relevant to both estates.

12. Eliot asked attorney John Pankauski to represent him in the matters before this Court now, related to the Simon Bernstein estate and the different and adverse legal positions between Eliot and Ted. Eliot discussed his personal financial situation with attorney Pankauski.

13. Attorney Pankauski advised Eliot and Candice Bernstein that a substantial retainer deposit would be required for his legal representation of Eliot, which amount Eliot advised attorney Pankauski that he did not have at that time.

14. Attorney Pankauski called Eliot approximately some days later and discussed issues related to how funds for Mr. Pankauski could be obtained so that Eliot could retain Mr. Pankauski as his attorney in this matter. Eliot and Mr. Pankauski discussed other arrangements for making it possible for Eliot to retain Mr. Pankauski as his legal counsel. During this conversation, Eliot and Mr. Pankauski discussed additional case and litigation strategies related to Eliot's position in connection with the Simon Bernstein estate.

15. Unbeknownst to Eliot, while he was still contemplating finding a way to hire Mr. Pankauski as his lawyer, Mr. Pankauski filed a notice of appearance and began his representation of Ted Bernstein in this matter.

16. **Rule 4-1.18 (Duties to Prospective Client)** of the Florida Rules of Professional Conduct applies here and provides:

(a) Prospective Client. A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Confidentiality of Information. Even when no client-lawyer relationship ensues, a lawyer who has discussions with a prospective client shall not use or reveal information learned in the consultation...

17. In the present case, Eliot Bernstein believes that he discussed confidential case strategies with attorney John J. Pankauski and that Mr. Pankauski's representation of Ted Bernstein will be used to Eliot Bernstein's disadvantage because of the confidential nature of those discussions. *See Brent v. Smathers*, 529 So. 2d 1267 (Fla. 3d DCA 1988) (any doubt as to what disclosures may have been made must be resolved in favor of the presumption that confidential information was disclosed and therefore disqualification is warranted).

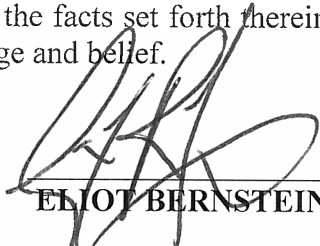
18. Having discussed confidential issues and case strategies with Eliot Bernstein précising related to this proceeding, attorney John Pankauski should be disqualified from representing Eliot's brother, Ted Bernstein, in this matter.

WHEREFORE, Movant requests this Honorable Court to grant this Motion and enter an Order disqualifying attorney John J. Pankauski and the Pankauski Law Firm from representing Ted Bernstein in the above-styled matter, and such other relief as this Court deems just and proper.

VERIFICATION

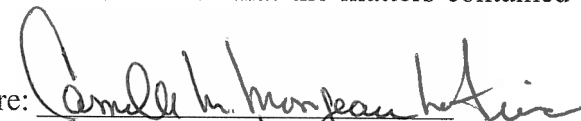
Under penalties of perjury, I, ELIOT BERNSTEIN, declare that I have read the foregoing Motion to Disqualify Counsel and the facts set forth therein, and I declare that the facts alleged are true, to the best of my knowledge and belief.

February 19, 2014

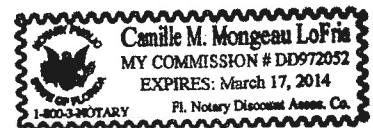


ELIOT BERNSTEIN

The foregoing instrument was acknowledged before me this 19th day of February, 2014 by ELIOT BERNSTEIN, who is _____ personally known to me or ☒ produced Drivers license as identification, and who did take an oath that the matters contained herein are true and correct.

Signature: 
Print name: Camille M. Mongeau LoFria
Notary Public, State of Florida

My commission expires:



VERIFICATION

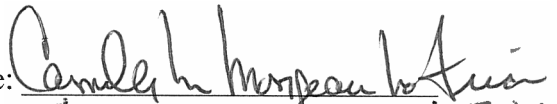
Under penalties of perjury, I, CANDICE BERNSTEIN, declare that I have read the foregoing Motion to Disqualify Counsel and the facts set forth therein, and I declare that the facts alleged are true, to the best of my knowledge and belief.

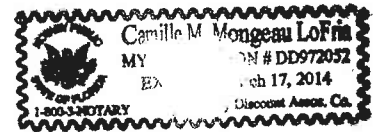
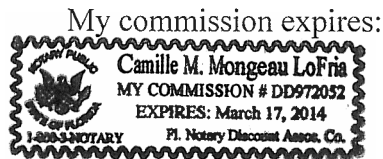
February 19, 2014



CANDICE BERNSTEIN

The foregoing instrument was acknowledged before me this 19th day of February, 2014 by CANDICE BERNSTEIN, who is _____ personally known to me or ✓ produced Drivers License as identification, and who did take an oath that the matters contained herein are true and correct.

Signature: 
Print name: Camille M. Mongeau Lofria
Notary Public, State of Florida



CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to parties listed on the attached Service list by U.S. Mail and via e-mail service at arosc@mrachek-law.com and mchandler@mrachek-law.com to Alan Rose, Esq., PAGE, MRACHEK, and at courtfilings@pankauskilawfirm.com to John J. Pankauski, Esq., PANKAUSKI LAW FIRM P.L.L.C., Attorneys for Defendants, Ted Bernstein, 505 So. Flagler Drive, Suite 600, West Palm Beach, FL 33401, and at courtfilings@pankauskilawfirm.com to John J. Pankauski, Esq., PANKAUSKI LAW FIRM, 120 South Olive Avenue, Suite 701, West Palm Beach, FL 33401,

on this 19th day of February, 2014.

PETER M. FEAMAN, P.A.
3615 W. Boynton Beach Blvd.
Boynton Beach, FL 33436
Tel: 561-734-5552
Fax: 561-734-5554
pfeaman@feamanlaw.com

By: _____

A handwritten signature in cursive script, appearing to read "Peter Feaman", written over a horizontal line.

Peter M. Feaman
Florida Bar No.: 0260347

Eliot Ivan Bernstein

From: Candice Bernstein <tourcandy@gmail.com>
Sent: Monday, February 10, 2014 12:29 PM
To: iviewit@gmail.com; iviewit@iviewit.tv
Subject: FW: Estate of Simon & Shirley Bernstein

From: Michelle Morley [mailto:Michelle@Pankauskilawfirm.com]
Sent: Thursday, September 19, 2013 2:57 PM
To: tourcandy@gmail.com
Subject: Estate of Simon & Shirley Bernstein

Thank you so much for speaking with me this afternoon. Just to recap when you have a moment, please send me the following documents for John to review prior to his call with you this evening:

1. Original will / trust for Shirley Bernstein
2. Original will/ trust for Simon Bernstein
3. Copies of revised wills / trusts for Simon Bernstein
4. Any documents with the admission of the forged notary

If you have any questions, please do not hesitate to contact me.

Michelle P. Morley | Pankauski Law Firm PLLC
Estate & Trust Litigation | 120 South Olive Avenue
7th Floor Guaranty Building | West Palm Beach, FL 33401
tel: (561) 514 - 0900

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Composite
EXHIBIT A

Eliot Ivan Bernstein

From: Candice Bernstein <tourcandy@gmail.com>
Sent: Monday, February 10, 2014 12:28 PM
To: iviewit@gmail.com; iviewit@iviewit.tv
Subject: FW: Estates of Shirley and Simon Bernstein
Attachments: Shirley Bernstein Trust 2008.pdf; Shirley Bernstein Will 2008.pdf; Simon Bernstein Amended Trust 2012.pdf; Simon Bernstein Will 2012.pdf; Waivers- un-notarized and notarized.pdf; 20130913 Transcripts part 2.docx; Bernstein Holdings, LLC 2008 last pages.pdf; Bernstein Holdings, LLC.pdf; Shirley Bernstein Petition for Discharge.pdf

-----Original Message-----

From: Candice Bernstein [mailto:tourcandy@gmail.com]
Sent: Friday, September 20, 2013 7:10 PM
To: 'Michelle@Pankauskilawfirm.com'
Subject: Estates of Shirley and Simon Bernstein

Hi Michelle, please find the attached files for your review. Thank you for your time, effort and consideration of these matters. We are available anytime this weekend or next week.

Best,

Candice Bernstein
(561) 886-7627 cell
(561) 245-8588 home

Shirley Bernstein Trust 2008
Shirley Bernstein Will 2008
Simon Bernstein Amended Trust 2012
Simon Bernstein Will 2012
Waivers- un-notarized and notarized
20130913 Transcripts part 2
Bernstein Holdings, LLC 2008 last pages
Bernstein Holdings, LLC
Shirley Bernstein Petition for Discharge

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rizing the substitution of counsel so that the purchaser may continue the representation. Preservation of client confidences requires that the petition for a court order be considered in camera. If, however, the court fails to grant substitution of counsel in a matter involving pending litigation, that matter shall not be included in the sale and the sale may be consummated without inclusion of that matter.

The rule provides that matters not involving pending litigation of clients who could not be served with written notice may not be included in the sale. This is because the clients' consent to disclosure of confidential information and to substitution of counsel cannot be obtained and because the alternative of court authorization ordinarily is not available in matters not involving pending litigation. Although such matters shall not be included in the sale, the sale may be consummated without inclusion of those matters.

If a client objects to the proposed substitution of counsel, the rule treats the seller as attempting to withdraw from representation of that client and, therefore, provides that the seller must comply with the provisions of rule 4-1.16 concerning withdrawal from representation. Additionally, the seller must comply with applicable requirements of law or rules of procedure.

All the elements of client autonomy, including the client's absolute right to discharge a lawyer and transfer the representation to another, survive the sale of the practice or an area of practice.

Fee arrangements between client and purchaser

The sale may not be financed by increases in fees charged the clients of the practice. Existing agreements between the seller and the client as to fees and the scope of the work must be honored by the purchaser. This obligation of the purchaser is a factor that can be taken into account by seller and purchaser when negotiating the sale price of the practice.

Other applicable ethical standards

Lawyers participating in the sale of a law practice or a practice area are subject to the ethical standards applicable to involving another lawyer in the representation of a client for all matters pending at the time of the sale. These include, for example, the seller's ethical obligation to exercise competence in identifying a purchaser qualified to assume the practice and the purchaser's obligation to undertake the representation competently (see rule 4-1.1); the obligation to avoid disqualifying conflicts, and to secure the client's informed consent for those conflicts that can be agreed to (see rule 4-1.7 regarding conflicts and see the terminology section of the preamble for the definition of informed consent); and the obligation to protect information relating to the representation (see rules 4-1.6, 4-1.8(b), and 4-1.9(b) and (c)). If the terms of the sale involve the division between purchaser and seller of fees from matters that arise subsequent to the sale, the fee-division provisions of rule 4-1.5 must be satisfied with respect to such fees. These provisions will not apply to the division of fees from matters pending at the time of sale.

If approval of the substitution of the purchasing attorney for the selling attorney is required by the rules of any tribunal in which a matter is pending, such approval must be obtained before the matter can be included in the sale (see rule 4-1.16).

Applicability of this rule

This rule applies, among other situations, to the sale of a law practice by representatives of a lawyer who is deceased, disabled, or has disappeared. It is possible that a nonlawyer, who is not subject to the Rules of Professional Conduct, might be involved in the sale. When the practice of a lawyer who is deceased, is disabled, or has disappeared is being sold, the notice required by subdivision (b) of this rule must be given by someone who is legally authorized to act on the selling lawyer's behalf, such as a personal representative or a guardian. This is because the sale of a practice and transfer of representation involve legal rights of the affected clients.

Bona fide admission to, withdrawal from, or retirement from a law partnership or professional association, retirement plans and similar arrangements, and a sale of tangible assets of a law practice, do not constitute a sale or purchase governed by this rule.

Rule 4-1.18. Duties to Prospective Client

(a) **Prospective Client.** A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) **Confidentiality of Information.** Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as rule 4-1.9 would permit with respect to information of a former client.

(c) **Subsequent Representation.** A lawyer subject to subdivision (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be used to the disadvantage of that person in the matter, except as provided in subdivision (d). If a lawyer is disqualified from representation under this rule, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in subdivision (d).

(d) **Permissible Representation.** When the lawyer has received disqualifying information as defined in subdivision (c), representation is permissible if:

(1) both the affected client and the prospective client have given informed consent, confirmed in writing; or

(2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and

(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(ii) written notice is promptly given to the prospective client.

Added March 23, 2006, effective May 22, 2006 (933 So.2d 417). Amended Nov. 19, 2009, effective Feb. 1, 2010 (24 So.3d 63).

Comment

Prospective clients, like clients, may disclose information to a lawyer, place documents or other property in the lawyer's custody, or rely on the lawyer's advice. A lawyer's discussions with a prospective client usually are limited in time and depth and leave both the prospective client and the lawyer free (and the lawyer sometimes required) to proceed no further. Hence, prospective clients should receive some but not all of the protection afforded clients.

Not all persons who communicate information to a lawyer are entitled to protection under this rule. A person who communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, is not a "prospective client" within the meaning of subdivision (a).

It is often necessary for a prospective client to reveal information to the lawyer during an initial consultation prior to the decision about formation of a client-lawyer relationship. The lawyer often must learn such information to determine whether there is a conflict of interest with an existing client and whether the matter is one that the lawyer is willing to undertake. Subdivision (b) prohibits the lawyer from using or revealing that information, except as permitted by rule 4-1.9, even if the client or lawyer decides not to proceed with the representation. The duty exists regardless of how brief the initial conference may be.

In order to avoid acquiring disqualifying information from a prospective client, a lawyer considering whether to undertake a new matter should limit the initial interview to only such information as reasonably appears necessary for that purpose. Where the information indicates that a conflict of interest or other reason for non-representation exists, the lawyer should so inform the prospective client or decline the representation. If the prospective client wishes to retain the lawyer, and if consent is possible under rule 4-1.7, then consent from all affected

present or former clients must be obtained before accepting the representation.

A lawyer may condition conversations with a prospective client on the person's informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter. See terminology for the definition of informed consent. If the agreement expressly so provides, the prospective client may also consent to the lawyer's subsequent use of information received from the prospective client.

Even in the absence of an agreement, under subdivision (c), the lawyer is not prohibited from representing a client with interests adverse to those of the prospective client in the same or a substantially related matter unless the lawyer has received from the prospective client information that could be used to the disadvantage of the prospective client in the matter.

Under subdivision (c), the prohibition in this rule is imputed to other lawyers as provided in rule 4-1.10, but, under subdivision (d)(1), the prohibition and its imputation may be avoided if the lawyer obtains the informed consent, confirmed in writing, of both the prospective and affected clients. In the alternative, the prohibition and its imputation may be avoided if the conditions of subdivision (d)(2) are met and all disqualified lawyers are timely screened and written notice is promptly given to the prospective client. See terminology (requirements for screening procedures). Subdivision (d)(2)(i) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

Notice, including a general description of the subject matter about which the lawyer was consulted, and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

The duties under this rule presume that the prospective client consults the lawyer in good faith. A person who consults a lawyer simply with the intent of disqualifying the lawyer from the matter, with no intent of possibly hiring the lawyer, has engaged in a sham and should not be able to invoke this rule to create a disqualification.

For the duty of competence of a lawyer who gives assistance on the merits of a matter to a prospective client, see rule 4-1.1. For a lawyer's duties when a prospective client entrusts valuables or papers to the lawyer's care, see chapter 5, Rules Regulating The Florida Bar.

4-2. COUNSELOR

Rule 4-2.1. Adviser

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social, and political factors that may be relevant to the client's situation.

Comment

Scope of advice

A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain

529 So.2d 1267, 13 Fla. L. Weekly 1975
(Cite as: 529 So.2d 1267)

H

District Court of Appeal of Florida,
Third District.

Maxine M. BRENT, Petitioner,
v.
George A. SMATHERS, Clovis A. McKenzie, Alicia
Lammerts and James F. Breuil, Jr., Respondents.
No. 88-1484.

Aug. 23, 1988.

Personal representative and cotrustee of estate moved to disqualify law firm that had previously represented her from defending cotrustee and beneficiaries in action alleging breach of fiduciary duty. The Circuit Court, Dade County, John Gale, J., denied motion. Petition was filed for certiorari review. The District Court of Appeal held that disqualification was warranted, as legitimate question of conflicting loyalty would be raised by that representation.

Certiorari granted; order on review quashed.

West Headnotes

[1] Attorney and Client 45 21

45 Attorney and Client

45I The Office of Attorney

45I(B) Privileges, Disabilities, and Liabilities

45k20 Representing Adverse Interests

45k21 k. Interests of Former Clients.

Most Cited Cases

Lawyer-client confidentiality is not the sole determining factor under rule governing conflicts of interest with former clients; that rule also imposes upon lawyer a duty of loyalty. West's F.S.A. Bar Rule 4-1.9.

[2] Attorney and Client 45 21.15

45 Attorney and Client

45I The Office of Attorney

45I(B) Privileges, Disabilities, and Liabilities

45k20 Representing Adverse Interests

45k21.15 k. Partners and Associates.

Most Cited Cases

Law firm that previously represented one cotrustee of estate was disqualified from defending the other cotrustee and beneficiaries in action alleging breach of fiduciary duty; appearance of impropriety was created in form of undermining of loyalty and trust upon which attorney-client relationship was based. West's F.S.A. Bar Rule 4-1.9.

*1268 McDermott, Will & Emery and Steven E. Siff, Miami, for petitioner.

Kelley, Drye & Warren including Smathers & Thompson and Gregory M. Cesarano and Jon Chassen, Miami, for respondents.

Before SCHWARTZ, C.J., and BASKIN and FERGUSON, JJ.

PER CURIAM.

Maxine Brent, the petitioner, and George Smathers, the respondent, were personal representatives for the estate of Brent's deceased husband, James F. Breuil, Sr. and were co-trustees of the Breuil Master Trust. The other respondents, Lammerts and James Breuil, Jr., are beneficiaries of the trust. Brent and Smathers, as personal representatives and co-trustees, were represented by Smathers' law firm, Smathers and Thompson.

Brent commenced this action against Smathers and McKenzie alleging that they breached a fiduciary duty by improperly administering the estate and trust, and that the breach resulted in an increase in distributions to beneficiaries Breuil and Lammerts and a decrease in distributions to Brent. Kelly Drye and Warren and Smathers and Thompson filed answers on behalf of the defendants Lammerts, Breuil and Smathers.^{FN1}

^{FN1} The firm of Kelly Drye and Warren are successors to the firm of Smathers and Thompson.

The case is before us on Brent's petition for certiorari review of the trial court's order denying her motion to disqualify the law firm. She contends that there is at the least an appearance of impropriety, as contem-

529 So.2d 1267, 13 Fla. L. Weekly 1975
(Cite as: 529 So.2d 1267)

plated by rule 4-1.9 of the Rules Regulating the Florida Bar, for the law firm which represented her as a co-trustee, to now represent the co-trustee along with the other trust beneficiaries with whom her interests are adverse, in her action against those parties.

In response the law firm makes three arguments: (1) Brent failed to establish that Smathers has a material interest adverse to her position; (2) the rule against changing sides was not designed to protect the plaintiffs in new actions; and (3) relevant rules regulating the Florida Bar were designed to protect client confidences but here, because of the nature of the co-trustee relationship and because rule 4-1.6 permits a lawyer to use confidential information to defend against a charge, the law firm should be permitted to use information relating to Brent's representation in defense of Brent's claim.

Rule 4-1.9 governing conflicts of interest with former clients provides:

A lawyer who has formerly represented a client in a matter shall not thereafter:

(a) Represent another person in the same or a substantially related matter in which that person's interest are materially adverse to the interests of the former client unless the former client consents after consultation; or

(b) Use information relating to the representation to the disadvantage of the former client except as rule 4-1.6 would permit with respect to a client or when the information has become generally known.

It is undisputed that Smathers and Thompson represented Brent in the administration of the estate and that they now represent co-administrator Smathers and the beneficiaries of that same trust and estate for which the firm represented Brent. The comment to rule 4-1.9 provides, *1269 "When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests clearly is prohibited." Here, the material adverse interest is all too obvious; Brent is suing Smathers for a money judgment based on a breach of a fiduciary duty. As to the law firm's second argument, the comment to rule 4-1.7 states that although questions involving conflicts of interest are primarily the responsibility of the lawyer undertaking the repre-

sentation, opposing counsel may properly raise the issue, as is the case here.

We disagree with the contention that the Rules Regulating the Florida Bar are inapplicable to the peculiar facts of this case. Because Brent and Smathers were co-trustees, argues the law firm, there is no confidential information to protect as between the co-trustees regarding the administration of the trust, and since there is no confidential information, there is no need for the law firm to withdraw from representation. The respondents further contend that rule 4-1.6 permits the use of information relating to the representation of a client to the extent necessary to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and client, and that the law firm intends to use information learned in its representation of Brent to defend her claim against Smathers.

[1] Although lawyer-client confidentiality is an important factor in determining the appropriateness of representation, nowhere do the rules reflect that it is the sole determining factor. The fact that the plaintiff may have no expectation of confidentiality as between co-trustees is not dispositive of the issue.^{FN2} Rule 4-1.9 also imposes upon the lawyer a duty of loyalty. See *Lawyers Manual of Professional Conduct* (BNA) § 51:202 (1987) (purpose of rule 4-1.9 is to prevent violations of lawyer's duty of loyalty as well as to prohibit the use of confidential information to the former client's disadvantage); Dobris, *Ethical Problems for Lawyers upon Trust Terminations: Conflicts of Interest*, 38 U.Miami L.Rev. 1, 31 (1983) ("The rule serves to preserve loyalty and avoid the misuse of confidential information."). "Loyalty is an essential element in the lawyer's relationship to a client." Rules Regulating the Florida Bar, rule 4-1.7 comment. "Common representation does not diminish the rights of each client in the lawyer-client relationship. Each has a right to loyal and diligent representation ... and the protection of rule 4-1.9...." Rules Regulating the Florida Bar, rule 4-2.2 comment.

FN2. The circumstances in this case are not as unique as the law firm contends. The general rule concerning common representation is that the lawyer must withdraw when conflicts between clients arise. See rule 4-2.2(c) governing the lawyer as intermediary. "Upon withdrawal, the lawyer shall not continue to represent any of the clients in the

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matter that was the subject of the intermediation.” The comment to rule 4-2.2 provides: “With regard to the attorney-client privilege, the prevailing rule is that as between commonly represented clients the privilege does not attach. Hence, it must be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications....”

[2] Commonly understood concepts of loyalty would seem at odds with permitting a law firm which previously represented one co-trustee, to defend the other co-trustee and beneficiaries in an action premised on a breach of confidence, and in the course of that defense to show that the complainant co-trustee acquiesced in the acts she now claims constituted the breach. A legitimate question of conflicting loyalty is raised by the law firm's representation of either Smathers or the other beneficiaries. The firm cannot justify its representation of the other beneficiaries under any ethical theory. ^{FN3}

FN3. Petitioners called to our attention at oral argument that the firm, indeed, has voluntarily withdrawn from representation of McKenzie, Lammerts and Breuil. The response to the petition for certiorari review is essentially an attempt to justify the continued representation of George Smathers.

As to the respondent Smathers we agree with the petitioners that rule 4-1.6, which permits a lawyer to reveal client confidences to establish a defense where the client *1270 claims wrongdoing by the lawyer, is not applicable because the law firm is not being accused of an impropriety. Although Mr. Smathers is a partner in the law firm, the firm both as an entity and in its function, is separate and distinct from Smathers, an individual co-trustee/co-personal representative. For the reason that there is clearly an appearance of impropriety-in the form of an undermining of the loyalty and trust upon which an attorney-client relationship is based-the respondent law firm is disqualified.

Certiorari is granted, and the order on review is quashed.

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