# De Novo Review Writing Samples

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# Memoranda

**1. Memorandum: Amending a Complaint to Cure Lack of Standing (Civil Procedure)**

# MEMORANDUM

**To:**
**From:** DNR (prepared by Ben G. J.D, reviewed by Genny C.)
**Subject:** Right to Amend Lack of Standing
**Date:**

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## I. Questions Presented

A. Can a Plaintiff amend a lawsuit to change her last name when a Motion to Dismiss for lack of standing is pending?

B. Does a Motion to Dismiss on standing require a Motion for Leave to Amend?

**C.** Does the rule in *Boca Burger, Inc. v. Forum*, 912 So.2d 561, 567 (Fla. 2005) that says a Plaintiff has an absolute right to amend once without a motion apply even when there is a pending Motion to Dismiss for lack of standing?

## II. Short Answer

A Plaintiff may amend a lawsuit to change her last name when a Motion to Dismiss for lack of standing is pending as long as it is her first amendment to the Complaint and no responsive pleading has been served. Florida Rule of Civil Procedure 1.190, titled "Amended and Supplemental Pleadings," provides that "[a] party may amend a pleading once as a matter of course at any time before a responsive pleading is served." Fla. R. Civ. P. 1.190(a). In *Boca Burger, Inc. v. Forum*, 912 So.2d 561, 563 (Fla. 2005), the Florida Supreme Court held that the right of a plaintiff under rule 1.190(a) to amend a complaint once before the service of a responsive pleading is absolute, and a trial court has no discretion to deny such an amendment. *See also id.* at 567 ("A judge's discretion to deny amendment of a complaint arises only after the defendant files an answer or if the plaintiff already has exercised the right to amend once."); *Ruble v. Rinker Materials Corp.*, 116 So. 3d 378, 380 (Fla. 2013).

A pending Motion to Dismiss on standing does not require the Plaintiff to file a Motion for Leave to Amend, as long as the Plaintiff has not already amended the Complaint. A motion to dismiss, whether for lack of standing or otherwise, is not considered a responsive pleading and does not eliminate the opportunity to amend a complaint once without a motion. *See Boca Burger, 912 at 567* ("Moreover, a motion to dismiss is not a 'responsive pleading' because it is not a 'pleading' under the rules.") (*citing* Fla. R. Civ. P. 1.100(a)).

The rule in *Boca Burger, Inc. v. Forum*, 912 So.2d 561, 567 (Fla. 2005) that says a Plaintiff has an absolute right to amend once without a motion *does* apply even when there is a pending Motion to Dismiss for lack of standing. There is no apparent reason why the rule would not apply in this case. Indeed, the right to amend a complaint to cure lack of standing has been long affirmed. *See Krantzler v. Bd. of Cnty. Comm'rs of Dade Cnty*., 354 So. 2d 126, 128 (Fla. 3d DCA 1978) (affirming right to amend complaint to cure lack of standing); *Warth v. Seldin*, 422 U.S. 490, 501 (1975) (noting that the trial court may allow the plaintiff to amend its complaint to supply more particularized allegations of fact to support its claim of standing).

# Memoranda

## 2. Memorandum: Contesting a Will (Property Law)

**MEMORANDUM**

**To:** De Novo Review
**From:** BG. (reviewed by Genny C.)
**Subject:** Contesting a Will Provision
**Date:**

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## I. Questions Presented

A. What grounds exist for disinheriting a named beneficiary of a will?

B. If a named beneficiary is disinherited, where does the property that would have gone to the disinherited individual go?

C. Can equitable estoppel be used to prevent someone from benefiting from a will?

## II. Facts

A. On September 26, 2012, Testatrix executed her last will and testament (Will) in the presence of two witnesses. All three signed the Will.

B. On September 26, 2013, the Testatrix and the same two witnesses signed the Will again in the presence of a notary.

C. The Will devised the Testatrix's estate to the following three people:

1. Godson (the Testatrix's godson)
2. Friend I (the Testatrix's friend)
3. Friend II (the Testatrix's friend)

D. The Will designated Godson as personal representative.

E. The Will does not have a residuary provision.

## III. Short Answers

### A. What grounds exist for disinheriting a named beneficiary of a will?

In order to invalidate the provision of a will with regard to a particular named beneficiary, one must seek to contest or revoke the will in part or in whole. This process is not called disinheritance. Rather, disinheritance is the "act by which an owner of an estate deprives a would-be heir of the expectancy to inherit the estate." DISINHERITANCE, Black's Law Dictionary (10th ed. 2014). Thus, a named beneficiary of a will cannot be disinherited. Rather, the portion of the will that names a particular beneficiary must be contested.

Only "interested parties" have standing to contest the probate of a will. In Florida, interested parties include creditors, or others having a property right or claim against the estate being administered, including heirs, distributees, legatees, and devisees. *See In re Dana's Estate*, 138 Fla. 676, 190 So. 52 (1939); *State ex rel. Ashby v. Haddock*, 140 So. 2d 631 (Fla. 1st DCA, 1962), order rev'd on other grounds, 149 So. 2d 552 (Fla. 1962).

The burden of establishing whether the party contesting the will is actually qualified to do so is on the party seeking to contest the will. *See Wehrheim v. Golden Pond Assisted Living Facility*, 905 So. 2d 1002 (Fla. 5th DCA, 2005).

The first general basis on which to contest a will is on the technical grounds of its execution or qualification. This includes such thing as testamentary age and other statutory formalities, such as whether the will is in writing, signed and attested by two witnesses in the presence of the testator, and whether the testator has testamentary capacity. *See Fla. Stat.* 732.501-504.

The second general basis on which to contest a will is on the grounds that the will was procured by fraud, duress, undue influence or mistake. *See Fla. Stat.* 732.5165.

Out of all of these, lack of capacity and undue influence are the basis of contesting a will that are most likely to succeed. Undue influence exists if the testator's mind was so controlled by

persuasion, pressure, and outside influences that she did not act voluntarily, but was subject to the will of another when execution took place. *In re Starr's Estate,* 125 Fla. 536, 170 So. 620 (1936).

The burden of proving undue influence is on the person contesting the will. *In re Estate of Duke,* 219 So.2d 124 (Fla. 2d DCA 1969). The most important element in establishing undue influence is the establishment of a presumption of undue influence. In general, this presumption is created by showing that one having a substantial benefit under the will, possessed a confidential relationship with the decedent and was active in the procurement of the will. *In re Estate of Carpenter*, 253 So.2d 697 (Fla. 1971).

In *Carpenter*, a presumption of undue influence was established where evidence showed that testatrix expressed to beneficiary a desire to have a will drawn leaving entire estate to her daughter, that beneficiary secured attorney and instructed him as to what will was to contain, that beneficiary was present part of the time during which attorney questioned testatrix concerning will, that beneficiary's relationship with testatrix was very close and that testatrix relied upon beneficiary and permitted her to make all arrangements regarding her hospitalization. *Id. at* 702.

Once a will contestant establishes the presumption of undue influence, the burden of proof shifts to the proponent of the will to establish by a preponderance of the evidence that undue influence does not exist. *RBC Ministries v. Tompkins,* 974 So. 2d 569 (Fla. 2d DCA 2008) (presumption of undue influence established where evidence showed that personal representative was present when decedent expressed a desire to make will and when will was executed, and personal representative drafted will on her home computer, secured witnesses to will, and had possession of will after its execution); *Diaz v. Ashworth*, 963 So. 2d 731 (Fla. 3d DCA 2007) (presumption of undue influence established where sole beneficiary was present at signing of will, sole beneficiary recommended that his attorney draft will, sole beneficiary was aware of contents

of will before it was signed, sole beneficiary brought testator to attorney's office to sign will, and sole beneficiary and his wife were active in caring for testator after will was signed).

Here, assuming the will was validly created, and there is no showing of fraud or duress or the only way to contest Friend I's devise would be to show undue influence. The presumption of undue influence would be established if it were possible to show that Friend I benefitted substantially under the will, possessed a confidential relationship with the decedent and was active in the procurement of the will.

**B. If a named beneficiary is disinherited, where does the property that would have gone to the disinherited individual go?**

As noted earlier, we are not actually discussing disinheritance, but rather a portion of a will that has been contested and has failed.

Where an attempted devise fails and there is no residuary clause, the subject matter of the attempted gift must descend by intestacy. *Elmore v. Elmore*, 99 So. 2d 265 (Fla. 1957) (land passed by intestacy where there was no residuary clause and devise failed because testatrix did not have full rights to land); *In re Levy's Estate*, 196 So. 2d 225 (Fla. 3d DCA 1967) (land passed by intestacy where there was no residuary clause and where devise failed because devisee predeceased testator).

Property that was conveyed improperly to a beneficiary should, upon cancellation of the transfer, revert to the estate and be administered under the terms of the will. *In re Vettese's Estate*, 421 So. 2d 737 (Fla. 4th DCA 1982). Thus, in the case where there is no residuary clause, if a particular beneficiary's devise is successfully contested, the devise will descend according to the principles of intestacy.

Here, if it were possible to successfully contest Friend I's devise under the will, the devise would then pass through intestacy to Testatrix's heirs.

**C. Can equitable estoppel be used to prevent someone from benefiting from a will?**

Equitable estoppel can be used to prevent someone who has benefitted from a will from contesting the will or attacking its validity. *See Pournelle v. Baxter*, 151 Fla. 32, 36 (1942) (It is "well settled that a beneficiary under a will who desires to contest that will must first divest himself of any beneficial interest which he has under the will.")

However, equitable estoppel is not used to prevent a beneficiary who is not contesting the will from benefitting under the will. Here, Friend I is not contesting the will. Therefore, equitable estoppel would not apply as a means to prevent her from taking under the will.

# Memoranda

## 3. Memorandum: Causes of Action for Theft of Roofing Tiles (Civil Litigation)

**MEMORANDUM**

To:
From: De Novo Review Josiane A. (reviewed by Genny A. Castellanos)
Regarding: Available Causes of Action for Theft of Roofing Tiles

Date:

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**ISSUE**

Determine what causes of actions may be available to the Roofing Company Against the Competitor for Competitor's appropriation of Roofing Company's roofing tiles and claims that the tiles are not up to code.

**SHORT ANSWER**

Subject to certain conditions, discussed below, the Roofing Company may file claims for defamation (slander), interference with an advantageous business relationship, civil theft, and conversion.

## A. BACKGROUND FACTS

Your Client, a Roofing Company, has been working on a job using roof tiles or shingles hand-made specifically for your Client. A Competitor has been taking tiles from the site and having them tested and is claiming that the tiles are not up to code. Your Client wants to know what causes of action and/or remedies are available to him under Florida law.

## B. AVAILABLE CAUSES OF ACTION

Florida law may allow your client to seek legal recourse and compensation under the following causes of action:

### 1. DEFAMATION

The tort of defamation refers to a false statement, spoken ("slander") or written ("libel") that injures someone's reputation.

The elements of a cause of action for defamation include: 1) a false and defamatory statement; 2) an unprivileged publication of that statement to a third party; 3) fault or negligence on the part of the publisher; and 4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication. *Wagner, Nugent, Johnson, Roth, Romano, Erikson & Kupfer, P.A. v. Flanagan*, 629 So. 2d 113 (Fla., 1993) (citing Restatement (Second) of Torts Sec. 558 (1977)).

Certain statements are considered inherently damaging and constitute defamation per se which does not require a showing of special damages.

> It is established in most jurisdictions that an oral communication is actionable per se is, without a showing of special damage--if it imputes to another (a) a criminal

> offense amounting to a felony, or (b) a presently existing venereal or other loathsome and communicable disease, or (c) conduct, characteristics, or a condition incompatible with the proper exercise of his lawful business, trade, profession, or office, or (d) the other being a woman, acts of unchastify. See Restatement, Torts, Section 570.

*Campbell v. Jacksonville Kennel Club*, 66 So. 2d 495, 497 (Fla. 1953). Accordingly, a statement by the Competitor that your Client is providing and installing defective roofing tiles constitutes conduct incompatible with the proper conduct of your Client's business, trade, or profession and is considered defamation per se.

In this case, there does not appear to be any qualified privilege in the statement's publication by the Competitor. A statement is qualifiedly privileged if it is "made by one who has a duty or interest in the subject matter to another who has a corresponding duty or interest." *Teare v. Local Union No. 295, of the United Association of Journeymen and Apprentices of the Plumbers and Pipe Fitters Industry of the United States and Canada*, 98 So. 2d 79, 83 (Fla. 1957) (finding no qualified privilege because the person making the defamatory statements and the person to whom the statements were made did not have mutual interests). It does not appear that Competitor was under any duty regarding the roofing tiles at issue. Moreover, it is unlikely that there would be a mutuality of interest between the Competitor and any party to whom the statements were published.

Publication of a defamatory matter is nothing more that its communication intentionally or by a negligent act to one other than the person defamed. *Doe v. America Online, Inc.*, 783 So. 2d 1010 (Fla. 2001) (citing Restatement (Second) of Tort § 577). Therefore, by making the statements to a third party, either verbally or in writing, the Competitor published the statement. Accordingly, if the Competitor only made the statements at issue to your Client, there is no cause of action for defamation.

Damages which may be awarded in defamation per se, include: 1) general damages compensating for past and future harm to reputation and for mental or emotional anguish and personal humiliation; 2) special damages compensating for specific economic loss, including the loss of profits or of a job; 3) nominal damages where no serious harm has been done; and 4) punitive damages meant to punish or set an example for willful or malicious actions.

Lastly, however, truth of the statements is an absolute defense to defamation per se. Accordingly, even if a statement is per se defamatory, if the statement is true, it is not actionable. Therefore, if the tiles were in fact defective, your Client would not have a claim for defamation.

**II. Tortious Interference with an Advantageous Business Relationship:**

The elements of tortious interference with an advantageous business relationship include: (1) existence of a business relationship under which a plaintiff has legal rights; (2) knowledge of the relationship on the part of the defendant; (3) intentional and unjustified interference with the relationship by the defendant; and (3) damage to the plaintiff resulting from the breach. *Tamiami*

*Trail Tours, Inc. v. Cotton*, 432 So. 2d 148 (Fla. 1st DCA 1983). One who interferes with the existing and prospective business relationship of another by inducing a third person not to enter into or continue a business relation with or by preventing a third person from continuing a business relation with another is liable for tortious interference of a business relationship. *Smith v. Ocean State Bank*, 335 So. 2d 641 (Fla. 1st DCA 1976).

Florida Jury Civil Instruction 408.6 identifies the specific issues on a claim of interference with business relationships:

> The issues for you to decide on (claimant's) claim against (defendant) are whether (defendant) improperly and intentionally interfered with business relations between (claimant) and (name); and if so, whether such interference was the legal cause of [loss] [injury] [or] [damage] to (claimant).

*In Re Standard Jury Instructions Civil Cases*, 35 So. 3d 366, 748 (Fla. 2010).

1. Existence of a Business Relationship

In establishing the existence of a business relationship for purposes of this tort, the plaintiff must be able to identify the entity/entities in the relationship and show some identifiable legal rights under that relationship. An actual business relationship, "evidenced by actual and identifiable understanding or agreement which in all probability would have been completed if the defendant had not interfered" is required. *Ethan Allen, Inc. v. Georgetown Manor, Inc.*, 647 So. 2d 812, 814 (Fla. 1995) (finding that Georgetown's tortious interference claim failed because Georgetown could not establish the existence of a business relationship with its 89,000 past customers because there was no identifiable agreement that the customers would return to Georgetown to purchase furniture in the future—the relationship was merely speculative). While there is no cause of action for tortious interference with a business's relationship to the community at large, however, the plaintiff may satisfy this element of the tort by citing to ongoing relationships with past customers. Restatement (Second) of Torts § 766B cmt. c (1977) (Tortious interference of a business relationship also includes "interference with a continuing business or other customary relationship not amounting to a formal contract.") There is no specific requirement that the past customers have an obligation to continue the relationship. *Tamiami Trail Tours, Inc. v. Cotton*, 463 So. 2d 1126, 1127-28 (Fla. 1985) (affirming the trial court's finding that a business relationship existed even though there was no apparent obligation to continue the relationship). Accordingly, in order to meet the pleading requirements for tortious interference of a business relationship, the plaintiff must identify a specific relationship at issue and cannot rely on general allegations of interference with future or speculative relationships.

In order to properly state a claim, the complaint must allege the existence of and identify the specific business relationship with which the Competitor interfered. *Water & Sewer Utility Const., Inc. v. Mandarin Utilities, Inc.*, 440 So. 2d 428 (Fla. 1st DCA 1983) (finding that plaintiff failed to state a claim for tortious interference with a business relationship because the plaintiff did not allege any business relationships under which it had legal rights). Although the customer whose business relationship has been interfered with must be specifically identified in the

complaint, your Client may also include past customers with whom it has an ongoing and customary relationship (i.e. returning customers with a history of using your Client for their roofing work over the years, etc.)

2. Defendant's Knowledge of the Business Relationship

In addition to the existence of an advantageous business relationship, in order to state a claim for tortious interference of a business relationship, your Client will also need to include allegations that the Competitor knew of the existence of the relationship. In this case, there can be no doubt that the Competitor knew of the relationship between your Client and the customer since the roofing tiles were taken from the job site.

3. Intentional and Unjustified Interference

Interference includes inducing or otherwise causing the entity not to enter into a business relationship with the plaintiff, not to continue doing business with the plaintiff, or to terminate or bring to an end a business relationship. *In Re Standard Jury Instructions Civil Cases*, 35 So. 3d at 748. Interference is considered to be intentional if the person interfering knows of the business relationship with which he is interfering, knows he is interfering with that relationship, and desires to interfere or knows that interference is substantially certain to occur as a result of his action. *In Re Standard Jury Instructions Civil Cases*, 35 So. 3d at 749.

In addition to being intentional, the interference must also be "unjustified." Unjustified interference occurs when the business competitor acts with an improper motive such as out of spite or greed and makes misrepresentations about the plaintiff's business, threatens physical violence, or indulges in other illegal conduct such as fraud or deception to steal the plaintiff's customers. However, in order to state a claim for tortious interference, the plaintiff only needs to allege that the interference was unjustified. *Greenberg v. Mount Sinai Medical Center of Greater Miami, Inc.*, 629 So. 2d 252, 256 (Fla. 3d DCA 1993). Whether the interference was unjustified remains a question to be resolved by the trier of facts. *Weisfeld v. Peterseil School Corp*., 623 So. 2d 515 (Fla. 3d DCA 1993) (whether the privilege defense exists is a question of fact which must be resolved at trial).

4. Damage Caused by the Interference

Interference with a business relationship is a cause of damage if it produces or contributes substantially to producing such damage so that it can reasonably be said that, "but for the interference" with the business relationship, the damage would not have occurred. *In Re Standard Jury Instructions Civil Cases*, 35 So. 3d at 749.

In this case, your Client will have to allege that the Competitor's actions of taking the tiles and having them tested: 1) caused the customer (and any other identifiable customers) to end or not enter into a business relationship with your Client; 2) the Competitor knew that these business

relationships existed; 3) the Competitor intentionally and for improper motive engaged in this conduct; and 4) that your Client sustained damages as a direct result of the Competitor's interference

**III. Civil Theft**

Florida Statute 772.11 provides a cause of action for criminal conduct involving theft of property. The statute does provide for "threefold the actual damages sustained and, in any such action, … to minimum damages in the amount of $200, and reasonable attorney's fees and court costs in the trial and appellate courts." Fla. Stat. 772.11. Punitive damages, however, are not available for civil theft causes of action. *Id.*

Before filing the action for damages under 772.11, however, the person claiming injury from the theft must make a written demand for $200 or the treble damage amount from the accused. The accused upon which demand is made has 30 days in which to comply with this request. If the accused complies, then the person making the demand will have to issue a written statement releasing the accused from any civil liability for the specific act of theft for which demand was made.

Of note, however, is that the statute protects the defendant against unfounded and legally unsupported claims by allowing the defendant to collect attorneys' fees and court costs. Fla. Stat. 772.11(1) ("The defendant is entitled to recover reasonable attorney's fees and court costs in the trial and appellate courts upon a finding that the claimant raised a claim that was without substantial fact or legal support.")

The statute provides in part:

772.11 Civil remedy for theft or exploitation.—

> (1) Any person who proves by clear and convincing evidence that he or she has been injured in any fashion by reason of any violation of ss. 812.012-812.037 or s. 825.103(1) has a cause of action for threefold the actual damages sustained and, in any such action, is entitled to minimum damages in the amount of $200, and reasonable attorney's fees and court costs in the trial and appellate courts. Before filing an action for damages under this section, the person claiming injury must make a written demand for $200 or the treble damage amount of the person liable for damages under this section. If the person to whom a written demand is made complies with such demand within 30 days after receipt of the demand, that person shall be given a written release from further civil liability for the specific act of theft or exploitation by the person making the written demand. Any person who has a cause of action under this section may recover the damages allowed under this section from the parents or legal guardian of any unemancipated minor who lives with his or her parents or legal guardian and who is liable for damages under this section. Punitive damages may not be awarded under this section. The defendant is entitled to recover reasonable attorney's fees and court costs in the trial and appellate courts upon a finding that the claimant raised a claim that was without

> substantial fact or legal support. In awarding attorney's fees and costs under this section, the court may not consider the ability of the opposing party to pay such fees and costs.

Fla. Stat. 772.11(1).

Based on the foregoing, your Client should not include a claim for civil theft unless he has complied with the conditions precedent by making a written demand to which your Competitor has not complied within thirty days and the claim is supported by substantial facts.

## IV. Conversion

Your Client may also make a claim for conversion. A conversion is an unauthorized act, which deprives another of his property either permanently or temporarily. *Senfeld v. Bank of Nova Scotia Trust Co. (Cayman) Ltd.*, 450 So. 2d 1157, 1161 (Fla. 3d DCA 1984). The essential element of conversion is the "wrongful deprivation of property to the owner." *Id.* ("Thus, the essence of conversion is not the possession of property by the wrongdoer, but rather such possession in conjunction with a present intent on the part of the wrongdoer to deprive the person entitled to possession of the property, which intent may be, but is not always, shown by demand and refusal.")

Therefore, unlike a claim for civil theft, there is no condition precedent requiring your Client to make a demand for return of the property or its value. *Id.* ("But while a demand and refusal constitute evidence that a conversion has occurred, it is unnecessary to prove a demand and refusal where the conversion can be otherwise shown.")

## C. Conclusion

Given the limited facts at my disposal, these appear to be the available causes of actions that your Client may file against the Competitor.