

**FLORIDA BAR CONSTRUCTION LAW  
CERTIFICATION REVIEW COURSE  
March 8-10, 2018**

**ETHICS**

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**Peckar & Abramson**

# THE OATH

**"I do solemnly swear:**

**"I will support the Constitution of the United States and the Constitution of the State of Florida;**

**"I will maintain the respect due to courts of justice and judicial officers;**

**"I will not counsel or maintain any suit or proceedings which shall appear to me to be unjust, nor any defense except such as I believe to be honestly debatable under the law of the land;**

**"I will employ for the purpose of maintaining the causes confided to me such means only as are consistent with truth and honor, and will never seek to mislead the judge or jury by any artifice or false statement of fact or law;**

**"I will maintain the confidence and preserve inviolate the secrets of my clients, and will accept no compensation in connection with their business except from them or with their knowledge and approval;**

**"To opposing parties and their counsel, I pledge fairness, integrity, and civility, not only in court, but also in all written and oral communications;**

**"I will abstain from all offensive personality and advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which I am charged;**

**"I will never reject, from any consideration personal to myself, the cause of the defenseless or oppressed, or delay anyone's cause for lucre or malice. So help me God."**

**"The profession of the practice of law requires lawyers to be honest, competent, and diligent in their dealings with clients, other lawyers, and courts." *The Florida Bar v. Varner*, 992 So. 2d 224, 231 (Fla. 2008).**

**"Practicing law is a privilege, not a right." *The Florida Bar re Jahn*, 559 So. 2d 1089, 1090 (Fla. 1990) (relying on *Petition of Wolf*, 257 So. 2d 547 (Fla. 1972)); and R. Regulating Fla. Bar 3-1.1. ("A license to practice law confers no vested right to the holder thereof but is a conditional privilege that is revocable for cause.").**

**"Lawyers are required to have high ethical standards because members of the public are asked to trust lawyers in their greatest hours of need; without such standards, the entire legal profession would be in jeopardy as public trust would dissipate." *The Florida Bar v. Valentine-Miller*, 974 So. 2d 333, 338 (Fla. 2008).**

# STANDARDS OF CONDUCT

## R. Regulating Fla. Bar 3-4.1.

"Every member of the Bar, and every attorney of another state or foreign country who provides or offers to provide any legal services in this state is within the jurisdiction and subject to the disciplinary authority of the Supreme Court of Florida and its agencies, and **is charged with notice and held to know the provisions of this rule and the standards of ethical and professional conduct prescribed by the court.** Jurisdiction over an attorney of another state who is not a member of the Florida Bar will be limited to conduct as an attorney in relation to the business for which the attorney was permitted to practice in Florida and the privilege in the future to practice law in Florida."

**The Rules Regulating the Florida Bar are designed to guide members of the bar in their day-to-day practice and to address attorney discipline, and do not form the basis for private rights of action. *In re Kane*, 470 B.R. 902 (Bankr. S.D. Fla. 2012).**

# TYPES OF DISCIPLINE

## **R. Regulating Fla. Bar 3-5.1 - Discipline**

The discipline that may be applied to a member found guilty of misconduct include: admonishment, probation, public reprimand, suspension, disbarment, disciplinary revocation, forfeiture of fees and restitution.

# TYPES OF DISCIPLINE

In determining the appropriate sanction for lawyer misconduct, the Florida Supreme Court considers not only case law but also the Florida Standards for Imposing Lawyer Sanctions. Under the Florida Standards for Imposing Lawyer Sanctions, in imposing a sanction after a finding of lawyer misconduct, a court should consider:

- **The duties violated;**
- **The lawyer's mental state;**
- **The potential or actual injury caused by the lawyer's misconduct; and**
- **The existence of aggravating or mitigating circumstances**

*The Florida Bar v. Forrester*, 818 So. 2d 477, 483 (Fla. 2002) (citing *Florida Bar v. Temmer*, 753 So. 2d 555, 558 (Fla. 1999)); and Fla. Stds. Imposing Law. Sancs. 3.0.

# PURPOSE OF DISCIPLINE

Sanctions imposed for unethical conduct by members of the Florida Bar must serve three (3) purposes:

(1) the judgment must be fair to society, both in terms of protecting the public from unethical conduct and at the same time not denying the public the services of a qualified lawyer as a result of undue harshness in imposing penalty;

(2) the judgment must be fair to the respondent, being sufficient to punish a breach of ethics and at the same time encourage reformation and rehabilitation; and

(3) the judgment must be severe enough to deter others who might be prone or tempted to become involved in like violations.

*The Florida Bar v. St. Louis*, 967 So. 2d 108 (Fla. 2007).

# A LAWYER'S RESPONSIBILITIES

## **R. Regulating Fla. Bar 4-1.1 – Competence:**

"A lawyer must provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation."



# COMPETENCE

In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include:

- **The relative complexity and specialized nature of the matter;**
- **The lawyer's general experience;**
- **The lawyer's training and experience in the field in question;**
- **The preparation and study the lawyer is able to give the matter; and**
- **Whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question.**

# COMPETENCE – ESI Implication

## Amendment to Comment to Rule 4-1.1 – Effective January 1, 2017

**"Competent representation may also involve the association or retention of a non-lawyer advisor of established technological competence in the field in question. Competent representation also involves safeguarding confidential information relating to the representation, including, but not limited to, electronic transmissions and communications."**

# COMPETENCE – ESI Implication

## Amendment to Comment to Rule 4-1.1 – Effective January 1, 2017

"To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, engage in continuing study and education, including an understanding of the benefits and risks associated with the use of technology, and comply with all continuing legal education requirements to which the lawyer is subject."

# CLIENT-LAWYER RELATIONSHIP

## R. Regulating Fla. Bar 4-1.2, 4-1.3, and 4-1.4 – Scope of Representation, Diligence and Communication:

A lawyer must abide by a client's decisions concerning the objectives of representation and must explain matters to the client to the extent reasonably necessary to permit the client to make informed decisions regarding the representation. In addition to the foregoing, a lawyer **must** act with reasonable diligence and promptness in representing the client.

# CLIENT COMMUNICATION

- **Client's level of technical sophistication? email, telephone, facsimile, letters, text messaging**
- **Client's role? In-house counsel, project managers, technical staff**
- **Client updates – keep the client up-to-date on the status of the case.**

# INITIAL CLAIMS ASSESSMENT

- Obtain information from the client – ask the right questions!
- **NO. 1 QUESTION: WHO ARE THE PARTIES?**
  - **POTENTIAL CONFLICTS**
- Obtain all the relevant documents, don't forget electronic records.
- Theories of liability
- Defenses
- Costs: experts, discovery, filing fees, etc.

# CONFLICT OF INTEREST

## R. Regulating Fla. Bar Rule 4-1.7. – Conflict of Interest; Current Clients:

**Representing Adverse Interests.** Except as provided in subdivision (b), a lawyer must not represent a client if:

- (1) the representation of one client will be directly adverse to another client; or
- (2) there is a substantial risk that the representation of one or more clients 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.

**(b) Informed Consent.** Notwithstanding the existence of a conflict of interest under subdivision (a), a lawyer may represent a client if:

- (1) the lawyer reasonably believes that 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 position adverse to another client when the lawyer represents both clients in the same proceeding before a tribunal; and
- (4) each affected client gives informed consent, confirmed in writing or clearly stated on the record at a hearing.

# CONFLICT OF INTEREST

## R. Regulating Fla. Bar Rule 4-1.9. – Conflict of Interest; Former Clients:

A lawyer who has formerly represented a client in a matter must not afterwards:

- (a) represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent;
- (b) use information relating to the representation to the disadvantage of the former client except as these rules would permit or require with respect to a client or when the information has become generally known; or
- (c) reveal information relating to the representation except as these rules would permit or require with respect to a client.



# CONFLICT OF INTEREST

R. Regulating Fla. Bar Rule 4-1.9. – Conflict of Interest; Former Clients:

## EXAMPLE

A lawyer who has previously represented a client in securing environmental permits to build a shopping center would be precluded from representing neighbors seeking to oppose rezoning of the property on the basis of environmental considerations; however, the lawyer would not be precluded, on the grounds of substantial relationship, from defending a tenant of the completed shopping center in resisting eviction for nonpayment of rent.

# CONFLICT OF INTEREST

## R. Regulating Fla. Bar Rule 4-1.7. – Conflict of Interest; Fee Disputes:

When a lawyer and client have become involved in a dispute over fees, the lawyer must assess whether the dispute creates a conflict of interest. R. Regulating Fla. Bar Rule 4-1.7(a)(2) states in relevant part that a lawyer shall not represent a client if the representation will be “materially limited . . . by a personal interest of the lawyer.” If the representation would be limited in such a way, a conflict exists. Unless the client's informed consent and waiver requirements of Rule 4-1.7(b) can be met, the lawyer must withdraw from representation. Notably, R. Regulating Fla. Bar Rule 4-1.7(b) requires that the lawyer reasonably believe that he or she “will be able to provide competent and diligent representation” to the client.

**Rather than bring suit against an active client, the lawyer may: (1) continue to advocate for the client until the representation is concluded if the fee dispute will not adversely affect the lawyer's continued representation; and/or (2) promptly attempt to withdraw “if the client's failure to comply with the fee agreement has adversely affected the attorney's ability to zealously represent the client.” R. Regulating Fla. Bar Rule 4-1.7(a)(2) and (b).**

# BUSINESS TRANSACTIONS WITH CLIENT

## **R. Regulating Fla. Bar Rule 4-1.8(a). – Business Transactions With or Acquiring Interest Adverse to Client:**

A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client, except a lien granted by law to secure a lawyer's fee or expenses, unless:

- (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner that can be reasonably understood by the client;**
- (2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and**
- (3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.**

# BUSINESS TRANSACTIONS WITH CLIENT

**RATIONALE:** The risk to a client is greatest when the client expects the lawyer to represent the client in the transaction itself or when the lawyer's financial interest otherwise poses a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's financial interest in the transaction. Official Comment to R. Regulating Fla. Bar 4-1.8.

# BUSINESS TRANSACTIONS WITH CLIENT

## HYPOTHETICAL

Developer client offers lawyer to become partner in future development project in exchange for legal services to purchase property. Ethical Violation?

**NO.** But . . .

# BUSINESS TRANSACTIONS WITH CLIENT

## WHAT SHOULD YOU DO?

The lawyer must disclose the risks associated with the lawyer's dual role as both legal adviser and participant in the transaction, such as the risk that the lawyer will structure the transaction or give legal advice in a way that favors the lawyer's interests at the expense of the client. Moreover, the lawyer must obtain the client's informed consent. In some cases, the lawyer's interest may be such that Rule 4-1.7 will preclude the lawyer from seeking the client's consent to the transaction.

If the client is independently represented in the transaction, subdivision (a)(2) of this rule is inapplicable, and the subdivision (a)(1) requirement for full disclosure is satisfied either by a written disclosure by the lawyer involved in the transaction or by the client's independent counsel. **The fact that the client was independently represented in the transaction is relevant in determining whether the agreement was fair and reasonable to the client as subdivision (a)(1) further requires.**

# SETTLEMENT OF CLAIMS FOR MULTIPLE CLIENTS

## R. Regulating Fla. Bar Rule 4-1.8(g). – Settlement of Claims for Multiple Clients:

"A lawyer who represents 2 or more clients is **prohibited from participating** in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure **must** include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement."

**NOTE: The clients' differences in the willingness to make or accept an offer of settlement are among the risks of common representation of multiple clients and is one of the risks that should be discussed before undertaking the representation of multiple clients. Official Comment to R. Regulating Fla. Bar 4-1.8(g).**

# SETTLEMENT OF CLAIMS FOR MULTIPLE CLIENTS

## HYPOTHETICAL

Lawyer represents two (2) subcontractors against ABC contractor. ABC contractor offers aggregate settlement of \$100,000.00. Lawyer only discloses ABC contractor settlement offer to one (1) subcontractor. Ethical Violation?

**YES.** The terms of the settlement agreement must be disclosed to each client and shall include:

- All the material terms of the settlement
- The existence and nature of all the claims or pleas involved
- The participation of each person in the settlement (e.g., what each client will receive)
- The process used in reaching the settlement, including the status of litigation, the lawyer's recommendations, and the client's right to accept or reject the proposed settlement
- **Prior to acceptance of settlement offer, lawyer MUST obtain informed consent by both clients**



# REPRESENTATION OF INSURED

## **R. Regulating Fla. Bar 4-1.7(e) – Representation of Insureds**

"Upon undertaking the representation of an insured client at the expense of the insurer, a lawyer has a duty to ascertain whether the lawyer will be representing both the insurer and the insured as clients, or only the insured, and to inform both the insured and the insurer regarding the scope of the representation. All other Rules Regulating The Florida Bar related to conflicts of interest apply to the representation as they would in any other situation."

# REPRESENTATION OF INSURED

**RATIONALE:** The unique tripartite relationship of insured, insurer, and lawyer can lead to ambiguity as to whom a lawyer represents. In a particular case, the lawyer may represent only the insured, with the insurer having the status of a non-client third party payor of the lawyer's fees. Alternatively, the lawyer may represent both as dual clients, in the absence of a disqualifying conflict of interest, upon compliance with applicable rules. Establishing clarity as to the role of the lawyer at the inception of the representation avoids misunderstanding that may ethically compromise the lawyer.

# JOINT DEFENSE AGREEMENTS

- The advantages to the joint defense agreement are: (1) pooled resources and knowledge; (2) expedited discovery; and (3) appearance of a united front. However, a risk associated with such an agreement is the disclosure of confidential information to a potentially adverse party.
- The joint defense privilege extends specifically to information and documents that relate directly to the joint defense.

**CAUTION: PARTIES TO A JOINT DEFENSE AGREEMENT CANNOT SHARE ANY AND ALL INFORMATION WITHOUT RISKING WAIVING THE PRIVILEGED (OR PROTECTED) NATURE OF THE INFORMATION.**

# LAWYER AS AN ADVOCATE

## R. Regulating Fla. Bar 4-3.1 – Meritorious Claims and Contentions:

"A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law. . . ."

**NOTE: "In determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change." Official Comment to R. Regulating Fla. Bar 4-3.**

# THREATENING LEGAL ACTION TO GAIN AN ADVANTAGE: DURESS OR NOT?

In addition to Rule 4-3, Rule 4-4.1 prohibits a lawyer from knowingly making a false statement of material fact or law to a third party. The Official Comments to R. Regulating Fla. Bar 4-4.1 clarify that while lawyers are required to be truthful when dealing with others, a lawyer generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur, however, if the lawyer incorporates or affirms the statement of another person that the lawyer knows is false. In addition, a misrepresentation could occur by a partially true but misleading statement or omission that is the equivalent of an affirmative false statement.

**Notwithstanding R. Regulating Fla. Bar Rule 4-3 and 4-4.1, Rule 4-3.4(g) of the Rules Regulating the Florida Bar also prohibits an attorney from presenting, participating in presenting, or threatening to present criminal charges solely to obtain an advantage in a civil matter. Similarly, R. Regulating Fla. Bar Rule 4-3.4(h) prohibits an attorney from presenting, participating in presenting, or threatening to present disciplinary charges under the Rules Regulating the Florida Bar to obtain an advantage in a civil matter.**

# DUTIES TO PROSPECTIVE CLIENTS

## **R. Regulating Fla. Bar 4-1.18 – Duties to Prospective Client:**

"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." R. Regulating Fla. Bar 4-1.18(b).

A prospective client is defined as: "[a] person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client." R. Regulating Fla. Bar 4-1.18(a).

# DUTIES TO PROSPECTIVE CLIENTS

## HYPOTHETICAL

Lawyer represents ABC contractor. Subcontractor calls lawyer seeking representation against ABC contractor for non-payment. What should you do?

# DUTIES TO PROSPECTIVE CLIENTS

## WHAT SHOULD YOU DO?

Official Comment to R. Regulating Fla. Bar 4-1.18 provides some guidance as to how an attorney may take steps to attempt to avoid a later challenge to representation of another party by a prospective client who does not end up retaining the attorney.

- **The lawyer should consider limiting the initial interview to only such information as reasonably necessary to determine whether to undertake the new matter;**
- **As soon as sufficient information has been received based on which the attorney may determine that she does not wish to represent the client, the interview should be concluded and no further information should be obtained from the prospective client;**
- **The lawyer may condition conversation 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.**

**NOTE: The lawyer is not prohibited from representing a client with interests to those adverse of the prospective client unless the lawyer has received from the prospective client information that could be used to the disadvantage of the prospective client in the matter.**



# INFORMATION ABOUT LEGAL SERVICES

## **R. Regulating Fla. Bar 6-24.1. - Specialization, Certification, and Communication of Practice Areas:**

"A lawyer who is a member in good standing of The Florida Bar and who meets the standards prescribed below may be issued an appropriate certificate identifying the lawyer as a "Board Certified Construction Lawyer." The purpose of the standards is to identify those lawyers who practice construction law and have the special knowledge, skills, and proficiency, as well as the character, ethics, and reputation for professionalism, to be properly identified to the public as certified construction lawyers."

# INFORMATION ABOUT LEGAL SERVICES

A lawyer is not permitted to state or imply that the lawyer is a specialist in a particular area unless the lawyer is "certified," a "specialist," or an "expert" in the actual area(s) of practice in which the lawyer is certified. To do so may be considered a misleading advertisement subject to discipline.

**NOTE: A lawyer may indicate that the lawyer concentrates in, focuses on, or limits the lawyer's practice to particular areas of practice as long as the statements are true. Official Comment to R. Regulating Fla. Bar 4-7.14**

# INFORMATION ABOUT LEGAL SERVICES

## HYPOTHETICAL

Lawyer obtains board certification in construction law. Lawyer advertises "Hard Hat Experts in Construction Law." Ethical Violation?

**YES.** Lawyer must state that she has been certified under the Florida Certification Plan as set forth in chapter 6 of the Rules Regulating the Florida Bar, must include the area of certification (construction law) and state that The Florida Bar is the certifying organization.

**NOTE:** In *The Florida Bar v. Doane*, 43 So. 3d 640 (Fla. 2010), Justice Pariente stated that the use of that trade name was misleading to the public while Justice Lewis objected to the labeling of lawyers as experts calling it a "nonsensical advertising farce."

# INFORMATION ABOUT LEGAL SERVICES

## **R. Regulating Fla. Bar 4-7.18 - Direct Contact with Prospective Clients:**

Generally, "a lawyer may not solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship, in person or otherwise, when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain."

The term "solicit" includes contact in person, by telephone, telegraph, or facsimile, or by other communication directed to a specific recipient and includes: (1) any written form of communication directed to a specific recipient and not meeting the requirements relating to written communication; and (2) any electronic mail communication directed to a specific recipient and not meeting the requirements relating to computer-accessed communications. R. Regulating Fla. Bar 4-7.18(a)(1).

# INFORMATION ABOUT LEGAL SERVICES

**Note:** Persons with whom the lawyer has a prior professional relationship are exempted from the general prohibition against direct, in-person solicitation. A "prior professional relationship" requires that the lawyer personally had a direct and continuing relationship with the person in the lawyer's capacity as a professional. Official Comment to R. Regulating Fla. Bar 4-7.18

# MULTIJURISDICTIONAL PRACTICE OF LAW

## **Rule 4-5.5. - Unlicensed Practice of Law; Multijurisdictional Practice of Law:**

"A lawyer shall not practice law in a jurisdiction other than the lawyer's home state, in violation of the regulation of the legal profession in that jurisdiction, or in violation of the regulation of the legal profession in the lawyer's home state or assist another in doing so." R. Regulating Fla. Bar 4-5.5(a).

In addition to R. Regulating Fla. Bar Rule 4-5.5, Florida Statute § 454.23 prohibits the unauthorized practice of law in the state of Florida. Specifically, Fla. Stat § 454.23 states in relevant part: "[a]ny person not licensed or otherwise authorized to practice law in this state who practices law in this state . . . commits a felony of the third degree."

# MULTIJURISDICTIONAL PRACTICE OF LAW

The term “practice of law” is not clearly defined and is not confined to the language found in Fla. Stat. § 454.23 but rather is shaped by the decisional law and court rules as well as common understanding and practices. *State v. Foster*, 674 So. 2d 747, 750-51 (Fla. 1st DCA 1996).

# MULTIJURISDICTIONAL PRACTICE OF LAW

The Florida Supreme Court in [\*The Florida Bar v. Savitt\*, 363 So. 2d 559 \(Fla. 1978\)](#), identified the following activities as constituting the unauthorized practice of law:

(1) allowing any member of the firm not admitted to the Florida Bar to engage in any professional activities in Florida, except for participation as co-counsel in court pursuant to rules of temporary admission, transitory activities incidental to out-of-state transactions, or "coordinating-supervisory" activities in essentially multistate transactions in which matters of Florida law are handled by members of the Florida bar;

(2) operating as an interstate law firm in Florida unless it remains a partnership that does not provide that profits and losses are shared among its members solely on the basis of the proportionate business either generated or handled by the Florida office;



# MULTIJURISDICTIONAL PRACTICE OF LAW

- (3) operating a Florida office without a partner of the firm who is a member of the Florida Bar assuming responsibility for its supervision;**
- (4) allowing a member of the firm who is not a member of the Florida Bar to supervise a member of the firm who is a member of the Florida Bar and who practices in Florida; and**
- (5) allowing an applicant for admission to the Florida Bar to operate in the Florida office in any manner other than the traditional "law clerk" role.**

# MULTIJURISDICTIONAL PRACTICE OF LAW

**Florida's safe harbor: out-of-state attorneys may temporarily practice in the state under a limited basis by filing a motion for *Pro Hac Vice* Admission.**

- Rule 1-3.10 of the Rule Regulating the Florida Bar permits out-of-state attorneys (in good standing and currently eligible to practice) to make three (3) appearances in a one-year time period.
- The lawyer must first file a verified motion with the Court in the form provided in the Rule.
- Rule 1-3.11 allows the appearance by a non-Florida lawyer in up to 3 arbitrations within a one-year period. The lawyer must first file a verified statement with the Florida Bar (and serve it on opposing counsel) for leave to appear.



**RESULTS FIRST**