Peckar & Abramson, P.C.

RESULTS FIRST

FLORIDA BAR CONSTRUCTION LAW CERTIFICATION REVIEW COURSE
March 7-9, 2019

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 Florida Bar, and every lawyer 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 under this rule 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 Supreme Court of Florida]**. Jurisdiction over a lawyer of another state who is not a member of The Florida Bar is limited to conduct as a lawyer in relation to the business for which the lawyer was permitted to practice in [Florida] and the privilege in the future to practice law in the state of 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 <u>do not form the basis for private rights of action</u>. *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, taxing of costs, probation, public reprimand, suspension, disbarment, disciplinary revocation, forfeiture of fees, and/or restitution.

TYPES OF DISCIPLINE

In determining the appropriate sanction for lawyer misconduct, the Supreme Court of Florida considers not only case law but also Florida's Standards for Imposing Lawyer Sanctions. Under Florida's 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?**
  - **E-mail, 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.**

CONFLICTS OF INTEREST

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

(a) 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.

CONFLICTS 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.

CONFLICTS 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.

CONFLICTS 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 4-1.7(a)(2) provides 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 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); R. Regulating Fla. Bar 4-1.16(a).

BUSINESS TRANSACTIONS WITH CLIENT

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

A lawyer is prohibited from entering into a business transaction with a client or knowingly acquiring 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 (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 (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 INSUREDS

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 INSUREDS

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 misunderstandings that may ethically compromise the lawyer.**

JOINT DEFENSE AGREEMENTS

- The advantages to a joint defense agreement are: (1) pooled resources and knowledge; (2) expedited discovery; and (3) appearance of a united front. However, one 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 learned information from a prospective client may not use or reveal that information, 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 consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter . . ." 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 adverse to those 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 meets the standards prescribed . . . may be issued an appropriate certificate identifying the lawyer as “Board Certified in Construction Law.” 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 board certified in construction law."

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 in person, or permit employees or agents of the lawyer to solicit in person on the lawyer's behalf, professional employment from a prospective client with whom the lawyer has no family or prior professional relationship 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, by electronic means that include real-time communication face-to-face such as video telephone or video conference, or by other communication directed to a specific recipient that does not meet the requirements of subdivision (b) of this rule and rules 4-7.11 through 4-7.17 of these rules." 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 may 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 Statutes § 454.23 prohibits the unauthorized practice of law in the state of Florida. Specifically, Fla. Stat. § 454.23 provides 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 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

In *The Florida Bar v. Savitt*, 363 So. 2d 559 (Fla. 1978), the Supreme Court of Florida 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; or

(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 permits out-of-state attorneys (in good standing and currently eligible to practice) to make 3 such appearances in a one-year 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) requesting leave to appear.

YEAR 2018 DEVELOPMENTS

Amendment to R. Regulating Fla. Bar 4-1.8, effective February 1, 2018:

- R. Regulating Fla. Bar 4-1.8 now prohibits a lawyer from soliciting **any** gift from a client or preparing an instrument with **any** gift for the client. R. Regulating Fla. Bar 4-1.8(c).

- The previous version of the Rule prohibited lawyers from soliciting or accepting a "**substantial**" gift from a client or preparing a testamentary instrument giving the lawyer or a person related to the lawyer a "**substantial**" gift.

YEAR 2018 DEVELOPMENTS

Amendment to Official Comment to R. Regulating Fla. Bar 4-1.8:

- . . . A lawyer may prepare a document that appoints the lawyer or a person related to the lawyer to a fiduciary office **if the client is properly informed**, the appointment **does not violate rule 4-1.7**, the appointment is **not the product of undue influence or improper solicitation** by the lawyer, and **the client gives informed consent, confirmed in writing**. In obtaining the client's informed consent to the conflict, the lawyer should **advise the client in writing** concerning who is eligible to serve as a fiduciary, **that a person who serves as a fiduciary is entitled to compensation**, and that the lawyer may be eligible to receive compensation for serving as a fiduciary **in addition to any attorney's fees that the lawyer or the lawyer's firm may earn for serving as a lawyer** for the fiduciary.

YEAR 2018 DEVELOPMENTS

ABA Standing Committee on Ethics and Professional Responsibility – Formal Opinion 480 (March 6, 2018):

- Lawyers who blog or engage in other public commentary may not reveal information relating to a representation that is protected by ABA Rule 1.6(a), including information contained in a public record, unless disclosure is authorized under the ABA Model Rules.

- Scope of protection afforded by ABA Rule 1.6 "is far broader than attorney-client privileged information"
  - Client identity is generally protected.
  - Information about a client's representation contained in a Court Order is not exempt from the lawyer's duty of confidentiality.
  - A violation is not avoided by describing as a "hypothetical" if there is a reasonable likelihood that a third party may ascertain the identity or situation of the client.

YEAR 2018 DEVELOPMENTS

ABA Standing Committee on Ethics and Professional Responsibility – Formal Opinion 481 (April 17, 2018):

- The ABA Model Rules **require a lawyer to inform a current client if the lawyer believes that he or she may have materially erred in the client's representation**.

- An error is **material** if a disinterested lawyer would conclude that it is (a) **reasonably likely to harm or prejudice a client**; or (b) of such a nature that **it would reasonably cause a client to consider terminating the representation even in the absence of harm or prejudice**.

- The lawyer must inform the client promptly under the circumstances; whether notification is prompt is a case- and fact-specific inquiry.

- **NOTE:** No similar duty of disclosure exists under the Model Rules where the lawyer discovers **after the termination of the attorney-client relationship** that the lawyer made a material error in the **former client's representation**.

RESULTS FIRST