

UNIVERSITY OF MIAMI SCHOOL OF LAW
PROFESSIONAL RESPONSIBILITY & ETHICS PROGRAM



Legal Ethics & Technology for the Bankruptcy Lawyer
CLE PRESENTATION | September 18, 2020
Northern District of Florida Bankruptcy Bar Association

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- Fed. R. Bankr. P. 2016(b)
- 11 U.S.C. § 329
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RELATED MATERIALS

- *Fla. Bar v. Krapacs* (Feb. 27, 2019)
- *Fla. Bar v. Ratiner* (Fla. 2010)
- *In the Matter of Tsamis* (IL 2013)
- *People v. Lance Eldon Isaac* (CO 2016)
- *Blake v. Giustibelli* (Fla. 4th DCA 2016)
- *Saunders Hardware Five and Ten, Inc. v. Low* (Fla. 3d DCA 1974)
- *In re Hazlett* (Bankr. D. UT 2019)

FLORIDA RULES OF PROFESSIONAL CONDUCT

RULE 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.

COMMENT

Legal knowledge and skill

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. In many instances the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.

A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

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.

A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation.

Thoroughness and preparation

Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence. The lawyer should consult with the client about the degree of thoroughness and the level of preparation required as well as the estimated costs involved under the circumstances.

Maintaining competence

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.

RULE 4-1.2 OBJECTIVES AND SCOPE OF REPRESENTATION

(a) Lawyer to Abide by Client's Decisions. Subject to subdivisions (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation, and, as required by rule 4-1.4, shall reasonably consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial, and whether the client will testify.

(b) No Endorsement of Client's Views or Activities. A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social, or moral views or activities.

(c) Limitation of Objectives and Scope of Representation. If not prohibited by law or rule, a lawyer and client may agree to limit the objectives or scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent in writing. If the attorney and client agree to limit the scope of the representation, the lawyer shall advise the client regarding applicability of the rule prohibiting communication with a represented person.

(d) Criminal or Fraudulent Conduct. A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows or reasonably should know is criminal or fraudulent. However, a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of the law.

COMMENT

Allocation of authority between client and lawyer

Subdivision (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. Within those limits, a client also has a right to consult with the lawyer about the means to be used in pursuing those objectives.

With respect to the means by which the client's objectives are to be pursued, the lawyer shall consult with the client as required by rule 4-1.4(a)(2) and may take such action as is impliedly authorized to carry out the representation.

On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client's objectives. The lawyer should consult with the client and seek a mutually acceptable resolution of the disagreement.

Criminal, fraudulent, and prohibited transactions

A lawyer is required to give an honest opinion about the actual consequences that appear likely to result from a client's conduct. The fact that a client uses advice in a course of action that is criminal or fraudulent does not, of itself, make a lawyer a party to the course of action. However, a lawyer may not assist a client in conduct that the lawyer knows or reasonably should know to be criminal or fraudulent. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposed was legally proper but then discovers is criminal or fraudulent. The lawyer must, therefore, withdraw from the representation of the client in the matter. See rule 4-1.16(a). In some cases, withdrawal alone might be insufficient. It may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation, or the like. See rule 4-4.1.

RULE 4-1.3 DILIGENCE

A lawyer shall act with reasonable diligence and promptness in representing a client.

COMMENT

A lawyer should pursue a matter on behalf of a client despite opposition, obstruction, or personal inconvenience to the lawyer and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a

lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued. See rule 4-1.2. The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.

A lawyer's workload must be controlled so that each matter can be handled competently.

Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer. A lawyer's duty to act with reasonable promptness, however, does not preclude the lawyer from agreeing to a reasonable request for a postponement that will not prejudice the lawyer's client.

Unless the relationship is terminated as provided in rule 4-1.16, a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer's employment is limited to a specific matter, the relationship terminates when the matter has been resolved. If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is RRTFB – July 1, 2017 looking after the client's affairs when the lawyer has ceased to do so. For example, if a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client and the lawyer and the client have not agreed that the lawyer will handle the matter on appeal, the lawyer must consult with the client about the possibility of appeal before relinquishing responsibility for the matter. See rule 4-1.4(a)(2). Whether the lawyer is obligated to prosecute the appeal for the client depends on the scope of the representation the lawyer has agreed to provide to the client. See rule 4-1.2.

RULE 4-1.4: COMMUNICATION

(a) Informing Client of Status of Representation. A lawyer shall:

- (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in terminology, is required by these rules;
- (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
- (3) keep the client reasonably informed about the status of the matter;
- (4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows or reasonably should know that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) Duty to Explain Matters to Client. A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

COMMENT

Reasonable communication between the lawyer and the client is necessary for the client to effectively participate in the representation.

Communicating with client

If these rules require that a particular decision about the representation be made by the client, subdivision (a)(1) requires that the lawyer promptly consult with and secure the client's consent prior to taking action unless prior discussions with the client have resolved what action the client wants the lawyer to take. For example, a lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case must promptly inform the client of its substance unless the client has previously indicated that the

proposal will be acceptable or unacceptable or has authorized the lawyer to accept or to reject the offer. See rule 4-1.2(a).

Subdivision (a)(2) requires the lawyer to reasonably consult with the client about the means to be used to accomplish the client's objectives. In some situations – depending on both the importance of the action under consideration and the feasibility of consulting with the client – this duty will require consultation prior to taking action. In other circumstances, such as during a trial when an immediate decision must be made, the exigency of the situation may require the lawyer to act without prior consultation. In such cases the lawyer must nonetheless act reasonably to inform the client of actions the lawyer has taken on the client's behalf. Additionally, subdivision (a)(3) requires that the lawyer keep the client reasonably informed about the status of the matter, such as significant developments affecting the timing or the substance of the representation.

A lawyer's regular communication with clients will minimize the occasions on which a client will need to request information concerning the representation. When a client makes a reasonable request for information, however, subdivision (a)(4) requires prompt compliance with the request, or if a prompt response is not feasible, that the lawyer, or a member of the lawyer's staff, acknowledge receipt of the request and advise the client when a response may be expected.

Lawyers have particular responsibilities in communicating with clients regarding changes in firm composition. See Rule 4-5.8.

Explaining matters

The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so.

Adequacy of communication depends in part on the kind of advice or assistance that is involved. For example, when there is time to explain a proposal made in a negotiation, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that are likely to result in significant expense or to injure or coerce others. On the other hand, a lawyer ordinarily will not be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests and the client's overall requirements as to the character of representation. In certain circumstances, such as when a lawyer asks a client to consent to a representation affected by a conflict of interest, the client must give informed consent, as defined in terminology.

RULE 4-1.5 FEES AND COSTS FOR LEGAL SERVICES

(a) Illegal, Prohibited, or Clearly Excessive Fees and Costs. A lawyer must not enter into an agreement for, charge, or collect an illegal, prohibited, or clearly excessive fee or cost, or a fee generated by employment that was obtained through advertising or solicitation not in compliance with the Rules Regulating The Florida Bar. A fee or cost is clearly excessive when:

- (1) after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee or the cost exceeds a reasonable fee or cost for services provided to such a degree as to constitute clear overreaching or an unconscionable demand by the attorney; or
- (2) the fee or cost is sought or secured by the attorney by means of intentional misrepresentation or fraud upon the client, a nonclient party, or any court, as to either entitlement to, or amount of, the fee.

(b) Factors to Be Considered in Determining Reasonable Fees and Costs.

(1) Factors to be considered as guides in determining a reasonable fee include:

- (A) the time and labor required, the novelty, complexity, difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (B) the likelihood that the acceptance of the particular employment will preclude other employment by the lawyer;
- (C) the fee, or rate of fee, customarily charged in the locality for legal services of a comparable or similar nature;

(D) the significance of, or amount involved in, the subject matter of the representation, the responsibility involved in the representation, and the results obtained;

(E) the time limitations imposed by the client or by the circumstances and, as between attorney and client, any additional or special time demands or requests of the attorney by the client;

(F) the nature and length of the professional relationship with the client;

(G) the experience, reputation, diligence, and ability of the lawyer or lawyers performing the service and the skill, expertise, or efficiency of effort reflected in the actual providing of such services; and

(H) whether the fee is fixed or contingent, and, if fixed as to amount or rate, then whether the client's ability to pay rested to any significant degree on the outcome of the representation.

(2) Factors to be considered as guides in determining reasonable costs include:

(A) the nature and extent of the disclosure made to the client about the costs;

(B) whether a specific agreement exists between the lawyer and client as to the costs a client is expected to pay and how a cost is calculated that is charged to a client;

(C) the actual amount charged by third party providers of services to the attorney;

(D) whether specific costs can be identified and allocated to an individual client or a reasonable basis exists to estimate the costs charged;

(E) the reasonable charges for providing in-house service to a client if the cost is an in-house charge for services; and

(F) the relationship and past course of conduct between the lawyer and the client. All costs are subject to the test of reasonableness set forth in subdivision (a) above. When the parties have a written contract in which the method is established for charging costs, the costs charged under that contract will be presumed reasonable.

(c) Consideration of All Factors. In determining a reasonable fee, the time devoted to the representation and customary rate of fee need not be the sole or controlling factors. All factors set forth in this rule should be considered, and may be applied, in justification of a fee higher or lower than that which would result from application of only the time and rate factors.

(d) Enforceability of Fee Contracts. Contracts or agreements for attorney's fees between attorney and client will ordinarily be enforceable according to the terms of such contracts or agreements, unless found to be illegal, obtained through advertising or solicitation not in compliance with the Rules Regulating The Florida Bar, prohibited by this rule, or clearly excessive as defined by this rule.

(e) Duty to Communicate Basis or Rate of Fee or Costs to Client and Definitions.

(1) Duty to Communicate. When the lawyer has not regularly represented the client, the basis or rate of the fee and costs must be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation. A fee for legal services that is

nonrefundable in any part must be confirmed in writing and must explain the intent of the parties as to the nature and amount of the nonrefundable fee. The test of reasonableness found in subdivision (b), above, applies to all fees for legal services without regard to their characterization by the parties. The fact that a contract may not be in accord with these rules is an issue between the lawyer and client and a matter of professional ethics, but is not the proper basis for an action or defense by an opposing party when fee-shifting litigation is involved.

(2) Definitions.

[(A) Retainer. A retainer is a sum of money paid to a lawyer to guarantee the lawyer's future availability. A retainer is not payment for past legal services and is not payment for future services.

(B) Flat Fee. A flat fee is a sum of money paid to a lawyer for all legal services to be provided in the representation. A flat fee may be termed "non-refundable."

(C) Advance Fee. An advanced fee is a sum of money paid to the lawyer against which the lawyer will bill the client as legal services are provided.

(f) Contingent Fees. As to contingent fees:

(1) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by subdivision (f)(3) or by law. A contingent fee agreement must be in writing and must state the method by which the fee is to be determined, including the percentage or percentages that will accrue to the lawyer in the event of settlement, trial, or appeal; litigation and other expenses to be deducted from the recovery; and whether those expenses are to be deducted before or after the contingent fee is calculated. On conclusion of a contingent fee matter, the lawyer must provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

(2) Every lawyer who accepts a retainer or enters into an agreement, express or implied, for compensation for services rendered or to be rendered in any action, claim, or proceeding in which the lawyer's compensation is to be dependent or contingent in whole or in part on the successful prosecution or settlement must do so only where the fee arrangement is reduced to a written contract, signed by the client, and by a lawyer for the lawyer or for the law firm representing the client. No lawyer or firm may participate in the fee without the consent of the client in writing. Each participating lawyer or law firm must sign the contract with the client and must agree to assume joint legal responsibility to the client for the performance of the services in question as if each were partners of the other lawyer or law firm involved. The client must be furnished with a copy of the signed contract and any subsequent notices or consents. All provisions of this rule will apply to such fee contracts.

(3) A lawyer must not enter into an arrangement for, charge, or collect:

(A) any fee in a domestic relations matter, the payment or amount of which is contingent on the securing of a divorce or on the amount of alimony or support, or property settlement in lieu thereof;
or

(B) a contingent fee for representing a defendant in a criminal case.

(4) A lawyer who enters into an arrangement for, charges, or collects any fee in an action or claim for personal injury or for property damages or for death or loss of services resulting from personal injuries based on tortious conduct of another, including products liability claims, in which the compensation is to be dependent or contingent in whole or in part on the successful prosecution or settlement must do so only under the following requirements:

(A) The contract must contain the following provisions:

(i) “The undersigned client has, before signing this contract, received and read the statement of client’s rights and understands each of the rights set forth in it. The undersigned client has signed the statement and received a signed copy to refer to while being represented by the undersigned lawyer(s).”

(ii) “This contract may be cancelled by written notification to the lawyer at any time within 3 business days of the date the contract was signed, as shown below, and if cancelled the client is not be obligated to pay any fees to the attorney for the work performed during that time. If the lawyer has advanced funds to others in representation of the client, the lawyer is entitled to be reimbursed for amounts that the lawyer has reasonably advanced on behalf of the client.”

(B) The contract for representation of a client in a matter set forth in subdivision

(f)(4) may provide for a contingent fee arrangement as agreed on by the client and the lawyer, except as limited by the following provisions:

(i) Without prior court approval as specified below, any contingent fee that exceeds the following standards are presumed, unless rebutted, to be clearly excessive: a. Before the filing of an answer or the demand for appointment of arbitrators or, if no answer is filed or no demand for appointment of arbitrators is made, the expiration of the time period provided for such action: 1. 33 1/3% of any recovery up to \$1 million; plus 2. 30% of any portion of the recovery between \$1 million and \$2 million; plus 3. 20% of any portion of the recovery exceeding \$2 million

b. After the filing of an answer or the demand for appointment of arbitrators or, if no answer is filed or no demand for appointment of arbitrators is made, the expiration of the time period provided for such action, through the entry of judgment:

1. 40% of any recovery up to \$1 million; plus 2. 30% of any portion of the recovery between \$1 million and \$2 million; plus 3. 20% of any portion of the recovery exceeding \$2 million. c. If all defendants admit liability at the time of filing their answers and request a trial only on damages:

1. 33 1/3% of any recovery up to \$1 million; plus 2. 20% of any portion of the recovery between \$1 million and \$2 million; plus 3. 15% of any portion of the recovery exceeding \$2 million.

d. An additional 5% of any recovery after institution of any appellate proceeding or postjudgment relief or action is required for recovery on the judgment. (ii) If any client is unable to obtain a lawyer of the client’s choice because of the limitations set forth in subdivision (f)(4)(B)(i), the client may petition the court in which the matter would be filed, if litigation is necessary, or if that court will

not accept jurisdiction for the fee approval, the circuit court in which the cause of action arose, for approval of any fee contract between the client and a lawyer of the client's choosing. Authorization will be given if the court determines the client has a complete understanding of the client's rights and the terms of the proposed contract. The application for authorization of the contract can be filed as a separate proceeding before suit or simultaneously with the filing of a complaint. Proceedings on the petition may occur before service on the defendant and this aspect of the file may be sealed. A petition under this subdivision must contain a certificate showing service on the client and, if the petition is denied, a copy of the petition and order denying the petition must be served on The Florida Bar in Tallahassee by the member of the bar who filed the petition. Authorization of such a contract does not bar subsequent inquiry as to whether the fee actually claimed or charged is clearly excessive under subdivisions (a) and (b).

(iii) Subject to the provisions of 4-1.5(f)(4)(B)(i) and (ii), a lawyer who enters into an arrangement for, charges, or collects any fee in an action or claim for medical liability in which the compensation is dependent or contingent in whole or in part on the successful prosecution or settlement must provide the language of article I, section 26 of the Florida Constitution to the client in writing and must orally inform the client that:

a. Unless waived, in any medical liability claim involving a contingency fee, the claimant is entitled to receive no less than 70% of the first \$250,000 of all damages received by the claimant, exclusive of reasonable and customary costs, whether received by judgment, settlement, or otherwise, and regardless of the number of defendants. The claimant is entitled to 90% of all damages in excess of \$250,000, exclusive of reasonable and customary costs and regardless of the number of defendants.

b. If a lawyer chooses not to accept the representation of a client under the terms of article I, section 26 of the Florida Constitution, the lawyer must advise the client, both orally and in writing, of alternative terms, if any, under which the lawyer would accept the representation of the client, as well as the client's right to seek representation by another lawyer willing to accept the representation under the terms of article I, section 26 of the Florida Constitution, or a lawyer willing to accept the representation on a fee basis that is not contingent.

c. If any client desires to waive any rights under article I, section 26 of the Florida Constitution in order to obtain a lawyer of the client's choice, a client may do so by waiving such rights in writing, under oath, and in the form provided in this rule. The lawyer must provide each client a copy of the written waiver and must afford each client a full and complete opportunity to understand the rights being waived as set forth in the waiver. A copy of the waiver, signed by each client and lawyer, must be given to each client to retain, and the lawyer must keep a copy in the lawyer's file pertaining to the client. The waiver must be retained by the lawyer with the written fee contract and closing statement under the same conditions and requirements provided in 4- 1.5(f)(5).

RULE 4-1.6: CONFIDENTIALITY OF INFORMATION

(a) Consent Required to Reveal Information. A lawyer must not reveal information relating to representation of a client except as stated in subdivisions (b), (c), and (d), unless the client gives informed consent.

(b) When Lawyer Must Reveal Information. A lawyer must reveal confidential information to the extent the lawyer reasonably believes necessary:

- (1) to prevent a client from committing a crime; or
- (2) to prevent a death or substantial bodily harm to another.

(c) When Lawyer May Reveal Information. A lawyer may reveal confidential information to the extent the lawyer reasonably believes necessary:

- (1) to serve the client's interest unless it is information the client specifically requires not to be disclosed;
- (2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and client;
- (3) to establish a defense to a criminal charge or civil claim against the lawyer based on conduct in which the client was involved;
- (4) to respond to allegations in any proceeding concerning the lawyer's representation of the client;
- (5) to comply with the Rules Regulating The Florida Bar; or
- (6) to detect and resolve conflicts of interest between lawyers in different firms arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

(d) Exhaustion of Appellate Remedies. When required by a tribunal to reveal confidential information, a lawyer may first exhaust all appellate remedies.

(e) Inadvertent Disclosure of Information. A lawyer must make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

(f) Limitation on Amount of Disclosure. When disclosure is mandated or permitted, the lawyer must disclose no more information than is required to meet the requirements or accomplish the purposes of this rule.

RULE 4-3.5 IMPARTIALITY AND DECORUM OF THE TRIBUNAL

(a) Influencing Decision Maker. A lawyer shall not seek to influence a judge, juror, prospective juror, or other decision maker except as permitted by law or the rules of court.

(b) Communication with Judge or Official. In an adversary proceeding a lawyer shall not communicate or cause another to communicate as to the merits of the cause with a judge or an official before whom the proceeding is pending except:

- (1) in the course of the official proceeding in the cause;
- (2) in writing if the lawyer promptly delivers a copy of the writing to the opposing counsel or to the adverse party if not represented by a lawyer;
- (3) orally upon notice to opposing counsel or to the adverse party if not represented by a lawyer; or
- (4) as otherwise authorized by law.

(c) Disruption of Tribunal. A lawyer shall not engage in conduct intended to disrupt a tribunal.

(d) Communication With Jurors. A lawyer shall not:

- (1) before the trial of a case with which the lawyer is connected, communicate or cause another to communicate with anyone the lawyer knows to be a member of the venire from which the jury will be selected;
- (2) during the trial of a case with which the lawyer is connected, communicate or cause another to communicate with any member of the jury;
- (3) during the trial of a case with which the lawyer is not connected, communicate or cause another to communicate with a juror concerning the case;
- (4) after dismissal of the jury in a case with which the lawyer is connected, initiate communication with or cause another to initiate communication with any juror regarding the trial except to determine whether the verdict may be subject to legal challenge; provided, a lawyer may not interview jurors for this purpose unless the lawyer has reason to believe that grounds for such challenge may exist; and provided further, before conducting any such interview the lawyer must file in the cause a notice of intention to interview setting forth the name of the juror or jurors to be interviewed. A copy of the notice must be delivered to the trial judge and opposing counsel a reasonable time before such interview. The provisions of this rule do not prohibit a lawyer from communicating with members of the venire or jurors in the course of official proceedings or as authorized by court rule or written order of the court.

Comment

Many forms of improper influence upon a tribunal are proscribed by criminal law. Others are specified in Florida's Code of Judicial Conduct, with which an advocate should be familiar. A lawyer is required to avoid contributing to a violation of such provisions. The advocate's function is to present evidence and argument so that the cause may be decided according to law. Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review, and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.

RULE 4-8.4 MISCONDUCT

A lawyer shall not:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation, except that it shall not be professional misconduct for a lawyer for a criminal law enforcement agency or regulatory agency to advise others about or to supervise another in an undercover investigation, unless prohibited by law or rule, and it shall not be professional misconduct for a lawyer employed in a capacity other than as a lawyer by a criminal law enforcement agency or regulatory agency to participate in an undercover investigation, unless prohibited by law or rule;

(d) engage in conduct in connection with the practice of law that is prejudicial to the administration of justice, including to knowingly, or through callous indifference, disparage, humiliate, or discriminate against litigants, jurors, witnesses, court personnel, or other lawyers on any basis, including, but not limited to, on account of race, ethnicity, gender, religion, national origin, disability, marital status, sexual orientation, age, socioeconomic status, employment, or physical characteristic;

(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law;

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law;

(g) fail to respond, in writing, to any official inquiry by bar counsel or a disciplinary agency, as defined elsewhere in these rules, when bar counsel or the agency is conducting an investigation into the lawyer's conduct. A written response shall be made:

- (1) within 15 days of the date of the initial written investigative inquiry by bar counsel, grievance committee, or board of governors;
- (2) within 10 days of the date of any follow-up written investigative inquiries by bar counsel, grievance committee, or board of governors;
- (3) within the time stated in any subpoena issued under these Rules Regulating The Florida Bar (without additional time allowed for mailing);
- (4) as provided in the Florida Rules of Civil Procedure or order of the referee in matters assigned to a referee; and
- (5) as provided in the Florida Rules of Appellate Procedure or order of the Supreme Court of Florida for matters pending action by that court.

Except as stated otherwise herein or in the applicable rules, all times for response shall be calculated as provided elsewhere in these Rules Regulating The Florida Bar and may be extended or shortened by bar counsel or the disciplinary agency making the official inquiry upon good

cause shown.

Failure to respond to an official inquiry with no good cause shown may be a matter of contempt and processed in accordance with rule 3-7.11(f) of these Rules Regulating The Florida Bar.

(h) willfully refuse, as determined by a court of competent jurisdiction, to timely pay a child support obligation; or

(i) engage in sexual conduct with a client or a representative of a client that exploits or adversely affects the interests of the client or the lawyer-client relationship.

If the sexual conduct commenced after the lawyer-client relationship was formed it shall be presumed that the sexual conduct exploits or adversely affects the interests of the client or the lawyer-client relationship. A lawyer may rebut this presumption by proving by a preponderance of the evidence that the sexual conduct did not exploit or adversely affect the interests of the client or the lawyer-client relationship.

The prohibition and presumption stated in this rule do not apply to a lawyer in the same firm as another lawyer representing the client if the lawyer involved in the sexual conduct does not personally provide legal services to the client and is screened from access to the file concerning the legal representation.

ABA MODEL RULES OF PROFESSIONAL CONDUCT

ABA MODEL RULE 1.6 Confidentiality of Information, Comment 18

Acting Competently to Preserve Confidentiality

[18] Paragraph (c) requires a lawyer to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3. The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use). A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to forgo security measures that would otherwise be required by this Rule. Whether a lawyer may be required to take additional steps to safeguard a client's information in order to comply with other law, such as state and federal laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information, is beyond the scope of these Rules. For a lawyer's duties when sharing information with nonlawyers outside the lawyer's own firm, see Rule 5.3, Comments [3]-[4].

RULE 4-5.5 UNLICENSED PRACTICE OF LAW; MULTIJURISDICTIONAL PRACTICE OF LAW

(a) 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.

(b) Prohibited Conduct. A lawyer who is not admitted to practice in Florida may not: (1) except as authorized by other law, establish an office or other regular presence in

Florida for the practice of law;

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in Florida; or

(3) appear in court, before an administrative agency, or before any other tribunal unless authorized to do so by the court, administrative agency, or tribunal pursuant to the applicable rules of the court, administrative agency, or tribunal.

(c) Authorized Temporary Practice by Lawyer Admitted in Another United States Jurisdiction. A lawyer admitted and authorized to practice law in another United States jurisdiction who has been neither disbarred or suspended from practice in any jurisdiction, nor disciplined or held in contempt in Florida by reason of misconduct committed while engaged in the practice of law permitted pursuant to this rule, may provide legal services on a temporary basis in Florida that are:

(1) undertaken in association with a lawyer who is admitted to practice in Florida and who actively participates in the matter; or

(2) in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer is authorized by law or order to appear in the proceeding or reasonably expects to be so authorized; or

(3) in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, and the services are not services for which the forum requires pro hac vice admission:

(A) if the services are performed for a client who resides in or has an office in the lawyer's home state, or

(B) where the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice; or

(4) not within subdivisions (c)(2) or (c)(3), and

(A) are performed for a client who resides in or has an office in the jurisdiction in which the lawyer is authorized to practice, or

(B) arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

(d) Authorized Temporary Practice by Lawyer Admitted in a Non-United States Jurisdiction. A lawyer who is admitted only in a non-United States jurisdiction who is a member in good standing of a recognized legal profession in a foreign jurisdiction whose members are admitted to practice as lawyers or counselors at law or the equivalent and are subject to effective regulation and discipline by a duly constituted professional body or a public authority, and who has been neither disbarred or suspended from practice in any jurisdiction nor disciplined or held in contempt in Florida by reason of misconduct committed while engaged in the practice of law permitted pursuant to this rule does not engage in the unlicensed practice of law in Florida when on a temporary basis the lawyer performs services in Florida that are:

(1) undertaken in association with a lawyer who is admitted to practice in Florida and who actively participates in the matter; or

(2) in or reasonably related to a pending or potential proceeding before a tribunal held or to be held in a jurisdiction outside the United States if the lawyer, or a person the lawyer is assisting, is

authorized by law or by order of the tribunal to appear in the proceeding or reasonably expects to be so authorized; or

(3) in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding held or to be held in Florida or another jurisdiction and the services are not services for which the forum requires pro hac vice admission

(A) if the services are performed for a client who resides in or has an office in the jurisdiction in which the lawyer is admitted to practice, or

(B) where the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice; or

(4) not within subdivisions (d)(2) or (d)(3), and

(A) are performed for a client who resides or has an office in a jurisdiction in which the lawyer is authorized to practice to the extent of that authorization, or

(B) arise out of or are reasonably related to a matter that has a substantial connection to a jurisdiction in which the lawyer is authorized to practice to the extent of that authorization; or

(5) governed primarily by international law or the law of a non-United States jurisdiction in which the lawyer is a member.

Comment

Subdivision (a) applies to unlicensed practice of law by a lawyer, whether through the lawyer's direct action or by the lawyer assisting another person. A lawyer may practice law only in a jurisdiction in which the lawyer is authorized to practice. A lawyer may be admitted to practice law in a jurisdiction on a regular basis or may be authorized by court rule or order or by law to practice for a limited purpose or on a restricted basis. Regardless of whether the lawyer is admitted to practice law on a regular basis or is practicing as the result of an authorization granted by court rule or order or by the law, the lawyer must comply with the standards of ethical and professional conduct set forth in these Rules Regulating the Florida Bar.

The definition of the practice of law is established by law and varies from one jurisdiction to another. Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons. This rule does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work. See rule 4-5.3. Likewise, it does not prohibit lawyers from providing professional advice and instruction to nonlawyers whose employment requires knowledge of law; for example, claims adjusters, employees of financial or commercial institutions, social workers, accountants, and persons employed in government agencies. In addition, a lawyer may counsel nonlawyers who wish to proceed pro se.

Other than as authorized by law, a lawyer who is not admitted to practice in Florida violates subdivision (b) if the lawyer establishes an office or other regular presence in Florida for the practice

of law. This prohibition includes establishing an office or other regular presence in Florida for the practice of the law of the state where the lawyer is admitted to practice. For example, a lawyer licensed to practice law in New York could not establish an office or regular presence in Florida to practice New York law. Such activity would constitute the unlicensed practice of law. However, for purposes of this rule, a lawyer licensed in another jurisdiction who is in Florida for vacation or for a limited period of time, may provide services to their clients in the jurisdiction where admitted as this does not constitute a regular presence. The lawyer must not hold out to the public or otherwise represent that the lawyer is admitted to practice law in Florida. Presence may be regular even if the lawyer is not physically present here.

Subdivision (b) also prohibits a lawyer who is not admitted to practice in Florida from appearing in a Florida court, before an administrative agency, or before any other tribunal in Florida unless the lawyer has been granted permission to do so. In order to be granted the permission, the lawyer must follow the applicable rules of the court, agency, or tribunal including, without limitation, the Florida Rules of Judicial Administration governing appearance by foreign lawyers. While admission by the Florida court or administrative agency for the particular case authorizes the lawyer's appearance in the matter, it does not act as authorization to allow the establishment of an office in Florida for the practice of law. Therefore, a lawyer licensed in another jurisdiction admitted in a case in Florida may not establish an office in Florida while the case is pending and the lawyer is working on the case.

There are occasions in which a lawyer admitted and authorized to practice in another United States jurisdiction or in a non-United States jurisdiction may provide legal services on a temporary basis in Florida under circumstances that do not create an unreasonable risk to the interests of his or her clients, the public, or the courts. Subdivisions (c) and (d) identify these circumstances. As discussed with regard to subdivision (b) above, this rule does not authorize a lawyer to establish an office or other regular presence in Florida without being admitted to practice generally here. Furthermore, no lawyer is authorized to provide legal services pursuant to this rule if the lawyer is disbarred or suspended from practice in any jurisdiction or has been disciplined or held in contempt in Florida by reason of misconduct committed while engaged in the practice of law permitted pursuant to this rule. The contempt must be final and not reversed or abated.

There is no single test to determine whether a lawyer's services are provided on a "temporary basis" in Florida and may therefore be permissible under subdivision (c). Services may be "temporary" even though the lawyer provides services in Florida on a recurring basis or for an extended period of time, as when the lawyer is representing a client in a single lengthy negotiation or litigation.

Subdivision (c) applies to lawyers who are admitted to practice law in any United States jurisdiction, which includes the District of Columbia and any state, territory, or commonwealth of the United States. The word "admitted" in subdivision (c) contemplates that the lawyer is authorized to practice in the jurisdiction in which the lawyer is admitted and excludes a lawyer who while technically admitted is not authorized to practice because, for example, the lawyer is on inactive status. Subdivision (d) applies to lawyers who are admitted to practice law in a non-

United States jurisdiction if the lawyer is a member in good standing of a recognized legal profession in a foreign jurisdiction, the members of which are admitted to practice as lawyers or counselors at law or the equivalent and subject to effective regulation and discipline by a duly constituted professional body or a public authority. Due to the similarities between the subsections, they will be discussed together. Differences will be noted.

Subdivisions (c)(1) and (d)(1) recognize that the interests of clients and the public are protected if a lawyer admitted only in another jurisdiction associates with a lawyer licensed to practice in Florida. For these subdivisions to apply, the lawyer admitted to practice in Florida could not serve merely as a conduit for the out-of-state lawyer, but would have to share actual responsibility for the representation and actively participate in the representation. To the extent that a court rule or other law of Florida requires a lawyer who is not admitted to practice in Florida to obtain admission pro hac vice prior to appearing in court or before a tribunal or to obtain admission pursuant to applicable rule(s) prior to appearing before an administrative agency, this rule requires the lawyer to obtain that authority.

Lawyers not admitted to practice generally in Florida may be authorized by law or order of a tribunal or an administrative agency to appear before the tribunal or agency. This authority may be granted pursuant to formal rules governing admission pro hac vice or pursuant to formal rules of the agency. Under subdivision (c)(2), a lawyer does not violate this rule when the lawyer appears before a tribunal or agency pursuant to this authority. As with subdivisions (c)(1) and (d)(1), to the extent that a court rule or other law of Florida requires a lawyer who is not admitted to practice in Florida to obtain admission pro hac vice prior to appearing in court or before a tribunal or to obtain admission pursuant to applicable rule(s) prior to appearing before an administrative agency, this rule requires the lawyer to obtain that authority.

Subdivision (c)(2) also provides that a lawyer rendering services in Florida on a temporary basis does not violate this rule when the lawyer engages in conduct in anticipation of a proceeding or hearing in a jurisdiction in which the lawyer is authorized to practice law or in which the lawyer reasonably expects to be admitted pro hac vice. Examples of this conduct include meetings with the client, interviews of potential witnesses, and the review of documents. Similarly, a lawyer admitted only in another jurisdiction may engage in conduct temporarily in Florida in connection with pending litigation in another jurisdiction in which the lawyer is or reasonably expects to be authorized to appear, including taking depositions in Florida.

Subdivision (d)(2) is similar to subdivision (c)(2), however, the authorization in (d)(2) only applies to pending or potential proceedings before a tribunal to be held outside of the United States.

Subdivisions (c)(3) and (d)(3) permit a lawyer admitted to practice law in another jurisdiction to perform services on a temporary basis in Florida if those services are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services are performed for a client who resides in or has an office in the lawyer's home state, or if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice. The lawyer, however, must

obtain admission pro hac vice in the case of a court-annexed arbitration or mediation if court rules or law so require. The lawyer must file a verified

statement with The Florida Bar in arbitration proceedings as required by rule 1-3.11 unless the lawyer is appearing in an international arbitration as defined in the comment to that rule. A verified statement is not required if the lawyer first obtained the court's permission to appear pro hac vice and the court has retained jurisdiction over the matter. For the purposes of this rule, a lawyer who is not admitted to practice law in Florida who files more than 3 demands for arbitration or responses to arbitration in separate arbitration proceedings in a 365-day period is presumed to be providing legal services on a regular, not temporary, basis; however, this presumption does not apply to a lawyer appearing in international arbitrations as defined in the comment to rule 1-3.11.

Subdivision (c)(4) permits a lawyer admitted in another jurisdiction to provide certain legal services on a temporary basis in Florida that are performed for a client who resides or has an office in the jurisdiction in which the lawyer is authorized to practice or arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted but are not within subdivisions (c)(2) or (c)(3). These services include both legal services and services that nonlawyers may perform but that are considered the practice of law when performed by lawyers. When performing services which may be performed by nonlawyers, the lawyer remains subject to the Rules of Professional Conduct.

Subdivisions (c)(3), (d)(3), and (c)(4) require that the services arise out of or be reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted. A variety of factors evidence this relationship. The lawyer's client may have been previously represented by the lawyer, or may be resident in or have substantial contacts with the jurisdiction in which the lawyer is admitted. The matter, although involving other jurisdictions, may have a significant connection with that jurisdiction. In other cases, significant aspects of the lawyer's work might be conducted in that jurisdiction or a significant aspect of the matter may involve the law of that jurisdiction. The necessary relationship might arise when the client's activities or the legal issues involve multiple jurisdictions, for example when the officers of a multinational corporation survey potential business sites and seek the services of their lawyer in assessing the relative merits of each. In addition, the services may draw on the lawyer's recognized expertise developed through regular practice of law in a body of law that is applicable to the client's particular matter.

Subdivision (d)(4) permits a lawyer admitted in a non-United States jurisdiction to provide certain services on a temporary basis in Florida that are performed for a client who resides in or has an office in the jurisdiction where the lawyer is authorized to practice or arise out of or are reasonably related to a matter that has a substantial connection to a jurisdiction in which the lawyer is authorized to practice to the extent of that authorization but are not within subdivisions (d)(2) and (d)(3). The scope of the work the lawyer could perform under this provision would be limited to the services the lawyer may perform in the authorizing jurisdiction. For example, if a German lawyer came to the United States to negotiate on behalf of a client in Germany, the lawyer would be authorized to provide only those services that the lawyer is authorized to provide for that client in Germany. Subdivision (d)(5) permits a lawyer admitted in a non-United States jurisdiction to

provide services in Florida that are governed primarily by international law or the law of a non-United States jurisdiction in which the lawyer is a member.

A lawyer who practices law in Florida pursuant to subdivisions (c), (d), or otherwise is subject to the disciplinary authority of Florida. A lawyer who practices law in Florida pursuant to subdivision (c) must inform the client that the lawyer is not licensed to practice law in Florida.

The Supreme Court of Florida has determined that it constitutes the unlicensed practice of law for a lawyer admitted to practice law in a jurisdiction other than Florida to advertise to provide legal services in Florida which the lawyer is not authorized to provide. The rule was adopted in 820 So. 2d 210 (Fla. 2002). The court first stated the proposition in 762 So. 2d 392, 394 (Fla. 1999). Subdivisions (c) and (d) do not authorize advertising legal services in Florida by lawyers who are admitted to practice in jurisdictions other than Florida. Whether and how lawyers may communicate the availability of their services in Florida is governed by subchapter 4-7.

A lawyer who practices law in Florida is subject to the disciplinary authority of Florida.