Legal Ethics 2018

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Statistically, do you need to be concerned about being reported or sanctioned by the Florida Bar?

Florida Bar Discipline Statistics 2016-2017

Bar Members:	104,676	
Bar Files Opened:	4,479	(4.27% of the Bar in one year)
Cases:	533	
Discipline Orders:	316	(59% of cases result in discipline)
Disbarments	46	
Suspensions:	179	

NB: Hearsay is admissible in disciplinary proceedings….

https://www.floridabar.org/wp-content/uploads/2017/04/16-17-Statistics-for-Web.pdf
"How the Bar Investigates Disciplinary Complaints," Fl. Bar News 3/15/16 http://bit.ly/2pfXZ6u

Question #1

Can a lawyer maintain an IOTA account at both a credit union or bank?

A. No, only at a bank.

B. Yes to both.

Answer #1

- **ANSWER: B, yes to both**. As of February 1, 2018, the Rule changed. The amendment is as follows:

- "All funds, including advances for fees, costs, and expenses, must be kept in a separate federally insured bank, credit union or savings and loan association…"

- The "eligible institution" must be authorized by federal or state law to do business in Florida and be insured by FDIC or National Credit Union Share Insurance Fund.

CITATION: Rule 5-1.1. This was amended in In Re: Amendments to the Rules Regulating the Florida Bar (Biennial Petition)(Nov. 9, 2017) and is effective February 1, 2018. *See* http://bit.ly/FL_Bar_Amendments_2017

Question #2

Is there a statute of limitation period for a complainant to make a written inquiry to the Bar (a/k/a “Bar complaint”) or for the Bar to open, on its own, an investigation of lawyer conduct?

A. No deadline, you can always be “Bar-complainted”
B. Two years
C. Four years.
D. Six years.
E. Seven years.

Answer #2

ANSWER: D, Six years. The time period for a "Bar Complaint" or Bar Investigation is six years from the time a matter is discovered or should have been discovered.

- Exception #1: No limit on the time to present, reopen, or bring a matter alleging **theft or conviction of a felony** per Rule 3-17.16(b).
- Exception #2: The time limitation is tolled where it can be shown that **fraud, concealment, or intentional misrepresentation** of fact prevented the discovery of the matter giving rise to the inquiry or complaint per Rule 3-17.16(c).
- Of note, if a complainant raises the issue, it is called an "Initial Complaint." If the Bar raises the issue, it is called an "Investigation."
- Also, a **deferred case** is not time barred if the grievance committee finds probable cause and the Bar files its complaint within one year after the basis for deferral is concluded (usually civil/criminal proceeding). A **closed** case can be timely re-opened within one year of its closing. Rule 3-7.16(a)(2) and (a)(3).

CITATION: Rule 3-7.16. This was amended in In Re: Amendments to the Rules Regulating the Florida Bar (Biennial Petition)(Nov. 9, 2017) and is effective February 1, 2018. *See* http://bit.ly/FL_Bar_Amendments_2017

Question #3

Can a lawyer:

(a) solicit <u>any</u> gift from a client; **and/or**

(b) prepare an instrument that gives the lawyer or member of the lawyer's family <u>any</u> gift?

[assume the lawyer and client are not married]

A. Yes to both.
B. Yes to a, No to b.
C. No to a, yes to b.
D. No to both.
E. Not if the gift is "substantial."

Answer #3

ANSWER: D. Yes to both. As of February 1, 2018, the rule was changed. It used to be a prohibition on "any substantial gift." Now it is "any gift."

- That said, per the Comment, a lawyer may accept a gift from a client, if the transaction meets **general standards of fairness** and if the lawyer does not prepare the instrument bestowing the gift. For example, a simple gift such as "a present given at a holiday or as a token of appreciation is permitted."

- Also according to the Comment, a lawyer can accept a "**more substantial gift**" but it is voidable under the doctrine of undue influence which treats client gifts as presumptively fraudulent.

- Finally, if the lawyer and client are related, a lawyer could "suggest" that a gift be made to the lawyer or for the lawyer's benefit.

http://www.floridasupremecourt.org/decisions/2017/sc16-1961.pdf and see Bar Rule 4-1.8(c).

Question #4

Under Rule 4-5.8 and associated case law, a lawyer who leaves a law firm has no right nor expectation to take client files without an agreement with the law firm to do so (assuming the law firm remains available to continue the representation).

After attempting to negotiate a joint notice, the departing lawyer or the law firm is allowed to unilaterally give notice that the lawyer is leaving and that the client has options. **When** should actual notice be given to the client?

A. Immediately after the lawyer gives notice of leaving the firm.

B. A reasonable period of time after the lawyer gives notice of leaving the firm.

C. A reasonable period of time after the lawyer and law firm fail at negotiating a joint notice.

D. A reasonable period of time before a deadline in the matter so that the client is not prejudiced.

Answer #4

ANSWER: C. A reasonable period of time after the lawyer and law firm **fail at negotiating a joint notice.**

- Lawyers and firms should **engage in bona fide, good faith negotiations within a reasonable period** of time following their knowledge of either the anticipated change in firm composition or, if the anticipated change is unknown, within a reasonable period of time after the change in firm composition.

- The **actual notification to clients should also occur within a reasonable period of time**.

- What is "reasonable" will depend on the circumstances, including the nature of the matters in which the lawyer represented the clients and whether the affected clients have deadlines that need to be met within a short period of time.

There's more....

[Rule 4-5.8 Procedures for Lawyers Leaving Law Firms]

- Clients who should be notified of the change in firm composition include current clients for whom the departing lawyer has provided significant legal services with direct client contact. Clients need not be notified of the departure of a lawyer with whom the client has had no direct contact.

- Clients whose files are closed need not be notified unless the former client contacts the firm, at which point the firm should notify the former client of the departure of any lawyer who performed significant legal services for that former client and had direct contact with that former client.

- Although contact by telephone is not prohibited under this Rule, proof of compliance with the requirements of this rule may be difficult unless the notification is in writing.

[still more…]

[Rule 4-5.8 Procedures for Lawyers Leaving Law Firms]

- In order to comply with the requirements of this Rule, both departing lawyers and the law firm should be given access to the names and contact information of all clients for whom the departing lawyer has provided significant legal services and with whom the lawyer has had direct contact.

- Any obligation to give the client reasonable notice, protect the client's interests on withdrawal, and seek permission of a court to withdraw may apply to both the departing lawyer and lawyers remaining in the firm.

http://www.floridasupremecourt.org/decisions/2017/sc16-1961.pdf and see Bar Rule 4-5.8. Of note, the Rule did not substantially change however the above-mentioned Comment is effective as of **February 1, 2018**.

Question #5

A lawyer is an escrow agent and represents a party to a transaction involving the escrowed funds. To whom does the lawyer owe a fiduciary duty for the escrowed funds?

A. All parties.
B. Only client.
C. To client first and a secondary duty to all parties.
D. Only to the client as long as the funds are in a separate escrow account (not the firm's).

Answer #5

ANSWER: A. According to the recently-amended Comment to Rule 5-1.1, "...the Supreme Court of Florida has held that lawyers acting as escrow agents have a fiduciary duty to protect the interests of **all parties** having an interest in escrowed funds whether the funds are in a lawyer's trust account or a separate escrow account. The Florida Bar v. Golden, 566 So. 2d 1286 (Fla. 1990); *see also* The Florida Bar v. Hines, 39 So. 3d 1196 (Fla. 2010); The Florida Bar v. Marrero, 157 So. 3d 1020 (Fla. 2015)."

- Keep in mind, "[e]ach lawyer is required to be familiar with and comply with the Rules Regulating Trust Accounts as adopted by the Supreme Court of Florida."

Question #6

Can a lawyer ethically appear before a judge when the lawyer and judge are Facebook friends?

A. Yes.
B. No.
C. This has not yet been decided.

Answer #6

ANSWER: Likely C. This could be a trick question since this issue has not yet been decided.

Do not rule out B or that some duty rests with the lawyer.

There’s more…

Answer #6

First, the prohibition is in JEAC Op. 2009-20 (Nov.17, 2009) states: "Listing lawyers who may appear before the judge as 'friends' on a judge's social networking page reasonably conveys to others the impression that these lawyer 'friends' are in a special position to influence the judge."

This applies to judges as this is from the Judicial Ethics Advisory Opinion. The Fourth DCA has relied upon this opinion in Domville v. State, 103 So. 3d 184 (Fla. 4th DCA 2012); on the other hand, the Fifth DCA held that mere Facebook friendship would be legally insufficient for disqualification. Chace v. Loisel, 170 So.3d 802 (Fla.5th DCA 2014).

There's more…

Answer #6

- Second, the “appearance of impropriety” standard applies to judges.

There’s still more…

- The pending case of Law Offices of Herssein and Herssein, P.A. et al. v. USAA, Case No. SC17-1848, may resolve this issue for lawyers and judges.

- However, keep in mind that Facebook has different security settings and some communication could be deemed *ex parte* and potentially relating to the pending case.

Question #7

A legal ethics question arises and you recall that you previously downloaded an app which has the Florida Rules Regulating the Florida Bar. You look up the Rule on the app and act appropriately. An legal issues?

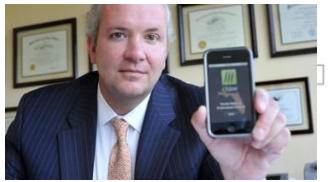
A. Yes, that's not enough.
B. No, that's fine.

Answer #7

ANSWER: A. It is not enough. You may not know whether the app is reliable, accurate, and up-to-date. Some developers abandon their apps over time while (non-lawyer) developers may not be aware of out-of-cycle Rule changes.

There's more…

Lawyer Christopher Hopkins' iPhone app references legal rules on the go



NEWS By John Nelander - Special to the Daily News

Updated: 5:03 p.m. Sunday, April 25, 2010 | Posted: 4:54 p.m. Sunday, April 25, 2010

None — Technology is changing the practice of law like every other profession. So Palm Beach attorney Christopher Hopkins reached into cyberspace and came up with a new way to give lawyers instant access to information on professional codes of ethics.

His iPhone application — downloadable free at iTunes — lets judges, attorneys, paralegals and law students punch up state and local rules of professional conduct whether they're in court or having lunch at the corner deli.

About the Author

JOHN NELANDER

Answer #7

As of January 1, 2017, the Comment section to Rule 4-1.1 (Competence) was amended to state:

"... 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…"

Question #8

Lawyer “X” is the Client’s estate planning attorney who drafted for the Client several wills, including one which disinherited several of the Client’s children. Suit arose over the validity of the wills.

Can Lawyer “X” be compelled to testify about the Client’s reasons for disinheriting some of Client’s children?

A. Yes.
B. No.
C. The lawyer can testify once compelled by court order.

Answer #8

ANSWER: A, yes.

This is permitted **both** by statute and ethics rules.

According to F.S. 90.502(4)(b), there is no lawyer-client privilege when a "communication is relevant to an issue between parties who claim through the same deceased client."

There's more…

Answer #8

The Comment section to Rule 4-1.6 (confidentiality) confirms that this is appropriate:

"The attorney-client privilege [section 90.502] applies in judicial and other proceedings in which a lawyer may be called as a witness... The rule of client-lawyer confidentiality [rule 4-1.6] applies in situations other than those where evidence is sought from the lawyer through compulsion of law."

See also Vasallo v. Bean, 210 So.3d 679 (Fla. 3d DCA 2016).

Question #9

Can you threaten another lawyer with a Bar Complaint?

Answer #9

1. Not to gain an advantage. Twenty years ago the Florida Supreme Court amended Rule 4-3.4(h) to expressly prohibit such conduct.
2. Rule 4-8.3 states an attorney is obligated to report another's misconduct that raises substantial question as to offending lawyer's honesty, trustworthiness, or fitness.
3. "If an attorney is obligated to report another's attorney's professional misconduct, the attorney must report it rather than threaten to do so." Opin 94-5

Question #10

Lawyer X is begin investigated by the Bar. During a series of emails with Bar officers, Lawyer X concludes:

> Thanks so much for the back up [sic]. Look personally between me and you GO F**K YOURSELF!!!!!!!!!!!!!!!!!!!!

Is this an ethical violation?

Answer #10

ANSWER: Yes (even in New Jersey).

- Oath of Admission – pledge of "fairness, integrity, and civility" to opponents, not only in court, but "in all written and oral communications."
- In the NJ case, the court wrote that the respondent had used "emotive language in a challenging tone… which evidenced a clear lack of civility and courtesy…"

In the Matter of Michael Rychel (NJ Sup. Ct. April 10, 2017)

In Re: Oath of Admission to the Florida Bar (Fla. 2011)

Question #11

In Tyson's Corner, VA, a lawyer attends a full day video replay CLE on serving as guardians ad litem for children. He falls asleep and snores during the morning session. In the afternoon, he complains loudly about the video. Another attendee smells alcohol and notes the lawyer is unsteady on his feet. Someone else sees a near-empty liquor bottle in the lawyer's briefcase.

Speaking to a bar investigator, the lawyer denies sleeping, being unsteady, drinking or possessing alcohol at the CLE. He reports he had a bottle of water provided by the CLE company and admits responding aloud to the video. Later speaking to Bar counsel, he admits to being intoxicated but refutes that he possessed alcohol at the CLE.

Did the Virginia Bar find any ethical problems?

Answer #11

ANSWER: Yes. But probably not what you think.

- In connection with a disciplinary matter, the failure to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter is a Bar violation. Rule 4-8.1

  In the Matter of Wayne R. Hartke (VA State Bar Disc. Board, 4/15/15)

- Rule 3-4.3 Misconduct or Minor Misconduct "standards of professional conduct… not limited to observance of the rules… not all inclusive"
- 4-3.3 Candor to Tribunal… criminal or fraudulent conduct
- CLE requirements met?

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