

## 2015 FLORIDA PROFESSIONAL CONDUCT ESSAY CHECKLIST

### I. REGULATORY CONTROLS

#### a. General Sources of Regulation

- i. State Regulations – FL BAR – “**integrated**” – REQUIRES all attorneys who practice in FL to join; Inherent Authority vested in FL Supreme Court; regulated by courts, legislature, and FL Bar
- ii. Federal Regulations – admission requires membership in state bar; allows for “*pro hac vice*” appearances;
- iii. ABA – voluntary organization – Model Rules (MR) have been adopted with changes by FL Bar;

#### b. Admission Requirements (FL Board of Bar Examiners)

- i. Graduation from accredited law school, accreditation w/in 12 months, or 10 years of prior practice & good standing
- ii. Pass Bar Exam – (MBE, FL Portion, MPRE)
- iii. Pass Character and Fitness – “good moral character”
- iv. New Admissions – Practicing with Professionalism Course (12months before – 12 months after admission); 3 Basic Skills Review Courses – may defer; and CLE 30 hours/3 years); State Residency Requirement

#### c. Disciplinary Process – every attorney charged with knowledge of the rules

- i. General Prohibitions – Assisting or violating the MR; commit a criminal act or “*intentionally*” (*deliberate and knowingly*) engage in any conduct involving *honesty, trustworthiness or fitness*; attempt or imply ability to improperly influence gov’t officials; engage in conduct prejudicial to the administration of justice; assist judiciary in violating rules; knowingly or through callous indifference disparage humiliate or discriminate against legal professionals on basis of protected status; fail to participate in disciplinary proceedings; failure to pay child support; and sexual relations with clients.
- ii. Procedure– Complaint filed within 6 years; Grievance Committee Hearing; Procedural Protections: right to counsel; cross; against self-incrimination; Probable Cause Found – formal complaint with Bar filed; No PC – can be revisited
- iii. Sanctions – Disbarment; Suspension; Public Reprimand Or Admonishment; Probation; Enhancement Programs

#### d. Unauthorized Practice of Law – IF NOT ADMITTED TO PRACTICE, may NOT 1) establish office/regular presence for purpose of practicing law; 2) falsely represent/advertise admission status; 3) make court appearances, unless authorized by court rules. Also, judges may not practice; no “specialized” attorneys, unless certified; nonlawyers may not own firms, share attorney fees, or influence attorney’s independent judgment; work delegated to nonlawyers must be supervised.

### II. THE LAW FIRM/PRACTICE

- #### a. Law Firm: 3 categories of Practitioners: Partners –responsible/liable, Associates – limited liability, Attorneys “Of Counsel”;
- i. “General Counsel” – firm devotes substantial amount of time to client’s representation
  - ii. Naming the Firm: not false or misleading; trade name not in connection with gov’t agency/employee

#### b. Supervising and Subordinate Attorneys

- i. Supervising Attorneys must ensure “firm has in effect measures” that all attorneys comply with RPC. A “*direct*” supervising attorney must ensure compliance of subordinates. Direct instruction to violate rules or ratification of actions creates liability for misconduct.
- ii. Subordinate Attorney – generally liable for own actions unless instructed by supervisor and *arguably* not a violation of the rules

#### c. NO Contractual Restrictions on Right to Practice – unless it concerns retirement benefits or settlement of client controversy

#### d. Sale and Purchase of Law Practice – allowed with 30 day written notice to client to obtain consent; pending litigation requires court approval; existing fee arrangement binding

### III. ADVERTISING AND SOLICITATION – applies to public media or written communications intended to elicit business from/in FL

#### a. Advertising – communication with the public at large; Commercial Speech protected by 1<sup>st</sup> and 14<sup>th</sup> Amendments

- i. Prohibitions and Limitations: Commercial Speech prohibit only if “*false, misleading, deceptive, or use of testimonial*”, but may limit by regulations that (1) serve a “*substantial gov’t interest*”, 2) “*directly and materially advance*” that interest, and (3) are “*narrowly tailored*” to serve the substantial interest.
- ii. Basic Rule: Statements may NOT include:
  1. Material representation of law or fact- False, misleading, unsubstantiated in fact or deceptive, including by omission of material information
  2. References to past successes or results obtained
  3. Promises of results or improper methods to receive certain results that violate the RPC
  4. Comparisons to other lawyer services, unless factually substantiated.
  5. Testimonials

#### iii. Content for Advertisements AND Unsolicited Written Communications

1. REQUIRED CONTENT – Name of at least one lawyer in firm or lawyer referral service and location of office.
2. PERMISSIVE CONTENT – specific information that if sole content of communication will exempt attorney from filing and evaluation requirement: (1) Lawyer’s name, Office location and Telephone number; (2) Date of Bar Admission; (3) Professional licenses and educational degrees; (4) Foreign language ability (5) Fields of law

practiced, (6) Fee schedules; (7) military service; (8) participation in prepaid legal services; (9) Credit card accepted; (10) firm member as PSA rep; (11) scales of justice; and (12) common salutory and punctuation.

3. **Additional Rules for ADVERTISEMENTS ONLY**

- a. NO statement contending “approved by the FL Bar”; describing quality of services; or advertising in areas of law not currently practicing;
- b. May contain illustrations, visual or verbal descriptions, depictions, portrayals, as long as not deceptive, misleading or confusing;
- c. May not contain the voice or image of a publically recognizable spokesperson/celebrity (same if non-attorney spokesperson for lawyer referral services);
- d. IF going to be referred to another attorney, must specifically state in ad.
- e. Annual published adds with fees must be honored one year from publication, all others 90 days, unless different expiration date specified

4. **Internet Communications** – websites must disclose ALL (1) jurisdictions lawyer(s) licensed to practice; (2) office locations; and (3) subject to advertising rules. Emails must comply with above requirements and Subject MUST state “LEGAL ADVERTISEMENT”

5. **Evaluation of Advertisements** – must file a copy of the add with the FL Bar 20 days prior to first dissemination if TV or Radio; or prior to or concurrently with first dissemination of all other mediums. Exemptions from filing requirement include: permissive content only (see above); PSAs that identify a charitable contribution; professional announcements; Internet Communications (see above); publication listings; communications mailed to existing or former clients, or other lawyers only

6. **Payment** – no payment for REFERRALS and no payment for another lawyer’s advertisement not within same firm

b. **Solicitation** – individual contact with the intent to entice the person to hire you; compliance by attorney or agent

- i. **Prohibited** – solicitation to prospective clients with no prior relationship and significant motive is pecuniary gain
- ii. **Permitted** – WRITTEN communications that is (1) marked “ADVERTISEMENT” IN RED INK on envelope & first page, and sent via REGULAR US MAIL, (2) no coercion, duress, fraud, overreaching, harassment, intimidation or undue influence, (3) recipient not already represented, (4) lawyer not previously advised not to send communication, (5) lawyer is unaware of recipients mental health status in exercising reasonable judgment in selecting a lawyer; (6) minimum of 30 days since litigious incident occurred, (7) does not resemble a pleading or legal document; and (8) sent by US mail only.
- iii. **REFERRAL SERVICES (RS)** – lawyer may accept referral from RS only if: (1) RS complies with communication rules of FL bar; (2) RS receives no fee that constitutes fee sharing; (3) referrals made only to those permitted to practice; (4) carries or requires each lawyer to carry minimum of \$100K malpractice insurance per claim/occurrence; (5) Furnishes FL Bar quarterly updates of all participating lawyers and FBNs and those authorized to act on behalf of RS; (6) Responds to FL bar inquiries regarding misconduct within 15 days; (7) no representation of “approved by FL Bar”; (7) uses legal or fictitious name in all communications; and (9) affirmatively states in ads “Lawyer Referral Service”.

c. **Certifications** – FL certification standards met & “Board Certified [area] Lawyer,” “Specialist in [area]”, or “B.C.S. [area]”

IV. **ATTORNEY-CLIENT RELATIONSHIP**- Lawyer has a “*fiduciary duty*” to client. This duty includes a duty of loyalty, confidentiality, diligence, communication, and competence in representation. An attorney must always act in the best interest of his client; duty to render public interest legal service; report & aspire to 20 annual pro bono hours or \$350 to legal aid;

a. **ACCEPTING REPRESENTATION** – must not avoid appointments unless good cause shown; may not refuse to represent indigent appointment; disabled clients are treated normally but may appoint a guardian if reasonable believe client cannot adequately act in own interest. May not avoid appointment unless violates law, unreasonable financial burden, repugnant

b. **SCOPE of REPRESENTATION** – may be contractually limited. Client-Made Decisions: Sue, Settle (must tell client of all offers), Testify, Plea, Jury/Bench Trial, Appeal. Attorney-Made Decisions – Procedural and Tactical: Court, Depositions, Discovery, Continuances, Exceptions: (attorney must defer to client): Money – too much money to proceed,

c. **CONFLICTS OF INTEREST** – must avoid relationships that will adversely affect his ability to exercise independent and professional judgment.

- i. **Adverse Interests** – A lawyer may NOT undertake representation if representing one client would be directly adverse to another or if there is a substantial risk that such representation will materially limit the lawyers responsibilities to another client. Exceptions: 1) reasonable belief in ability to provide competent and diligent representation to each client; 2) representations are not prohibited by law; 3) does not involve asserting position adverse to another client; and 4) each client consents.

ii. **Other Prohibited Transactions**

1. **Ownership and Financial Interest Adverse to Client** – must be “*fair, reasonable, and fully disclosed*” to client; client given “*reasonable opportunity to seek advice of independent counsel*” & gives written “*informed consent*”
2. **Proprietary Interests in COA** – only liens for attorney costs/fees or reasonable contingency fee in civil cases
3. **Use of Adverse Client Information** – only with client’s consent

4. Beneficiary Designation – no solicitation ANY gifts, unless close familial relationship and NO preparation of instrument conveying such a gift
  5. Literary or Media Rights – permitted AFTER the conclusion of representation with client consent
  6. Financial Assistance to Client – only to pay/advance court costs and expenses
  7. 3<sup>rd</sup> Party Compensation – only if client gives informed consent, no interference with independent and professional judgment; client’s information still protected.
  8. Aggregate Settlements Prohibited – unless client consents
  9. Limiting Malpractice Liability PROHIBITED – unless allowable by law and client has independent representation
  10. Settling Malpractice Claims with UNREPRESENTED Clients PROHIBITED – unless explicitly informed of representation rights in writing
  11. Insured Clients – representation of insured at insurance companies expense for PI, property damage must provide Statement of Insured Client’s Rights at commencement and keep signed copy for 6 years
  12. Local Gov’t Attorneys – may not solicit/accept gifts to influence official act; corruptly use position for personal gain; disclose confidential information for personal or another’s gain; represent client before branch served.
- iii. **FORMER Clients** – must consent to new client representation where clients’ interests are materially adverse, and lawyer may not use information gained from former client to his detriment or for the benefit of new client, unless the information in question is “*generally known*” to the public.
  - iv. **Prospective Clients** – same as former clients. Exception: Representation by DQ attorney’s firm permissible if:
    1. Both affected and prospective clients consent in writing OR DQ attorney took reasonable measures to avoid exposure to more information than reasonably necessary, AND
    2. DQ attorney is timely *screened* from participation and receives no fee, AND
    3. Written notice promptly given to prospective client.
  - v. **Mediators** – 3<sup>rd</sup> party neutrals – must explain NO representation and explain differences in roles
  - vi. **Attorney Testimony** – no client representation where the lawyer is likely to be a necessary witness. However, a lawyer can ethically testify at a client’s trial regarding: uncontested matters; matters of formality; nature and value of legal services; and if testimony is necessary and withdrawal would create a substantial hardship to the client.
  - vii. **Corporate Representation** – represents organization, not individual members, but may represent individuals on other non-conflicting matters; may resign if highest authority requesting action that violates law
  - viii. **IMPUTED DISQUALIFICATION** – If one attorney in firm DQ → all attorneys in firm DQ; including former clients of new associate; and firm may represent after conflict attorney is terminated, but not the same or substantially related matter and no remaining attorney may retain protected information
  - ix. **GOV’T Attorneys** – Gov’t agencies must give consent before former gov’t attorney may privately represent client in matter where attorney participated in as public official; NOT imputed to private firm if DQ Gov’t Attorney SCREENED & WRITTEN NOTICE to agency.
- d. **FEES AND COSTS** – MUST BE **REASONABLE** – Reasonableness Factors: time and labor involved; novelty and difficulty of questions involved; requisite skill; interference with other employment by the lawyer; local customary fee for similar work; amount involved and the end result obtained; nature and length of relationship between parties; experience, ability, and reputation of attorney; time limitations by client or circumstances, and fixed vs. contingent fee.
- i. **Contingency Fees** - RPCs set out detailed guidelines for contingent fees. Unethical and prohibited in family law and criminal cases. A fee in excess of the guidelines (b/w 15% →40%) is presumed excessive, but the presumption can be rebutted. Allowable fee amounts depend on whether the case is settled before or after the answer is filed, the trial is on damages only, or a notice of appeal is filed. The fee amount also turns on the amount received. MUST BE IN WRITING and STATE METHOD OF FEE DETERMINATION.
  - ii. **Referral fees** - unethical and prohibited.
  - iii. The client should always receive a statement of the client’s rights.
  - iv. **Mandatory Arbitration of Fee Disputes** – advise client of right to consult independent lawyer before signing and explicitly waives any right to go to court and resolve fee disputes.
  - v. Duty to communicate fee, preferably in writing, but non-refundable MUST be in writing.
  - vi. MAY accept property as fee if not a conflict of interest in business transaction or improper proprietary interest.
- e. **RESPONSIBILITIES TO CLIENT**
- i. **Competence** –legal knowledge, skill, thoroughness, & preparation; prompt actions that keep client reasonably informed.
  - ii. **Confidentiality** – Attorney-Client Privilege (ACP) – confidential communications by client or prospective client seeking legal advice. ACP continues indefinitely, even past death of client.
    1. Corporate Clients – ACP covers communications b/w lawyer and high-ranking official; possibly with employee if: subject is w/n scope of employee’s duties; communication is at direction of employees superior; assists corporation is obtaining legal advice.

2. Disclosure of Confidential Information – MUST NOT disclose ANY information RELATED TO REPRESENTATION, regardless of when or where information acquired. Duty continues even after termination of A-C relationship
    - a. Exceptions: CONSENT or
      - i. Permissive Disclosure: lawyer MAY reveal information reasonably believed necessary to (1) serve clients best interest; (2) establish a claim or defense in controversy bw lawyer and client.
      - ii. Mandatory Disclosure: lawyer MUST reveal information reasonable believed necessary to prevent client from committing a crime or prevent death/substantial bodily harm to another.
    3. Prospective Clients – duties are same as to former clients with regards to confidentiality in consultation.
  - iii. Trust Accounts – (TA)
    1. Funds must be kept **SEPARATE** TA, clearly labeled TRUST, except for funds necessary to cover TA charges
    2. Lawyer MUST: 1) notify client/3<sup>rd</sup> party when client/3<sup>rd</sup> party entitled funds or property are received, 2) deliver funds or property to client/3<sup>rd</sup> party, and 3) render an accounting regarding funds or property when requested by client/3<sup>rd</sup> party.
    3. TA records must be preserved for 6 years
    4. Interest or Dividend Bearing Accounts – nominal client funds kept for a short time MUST be placed in IOTAs for FL Bar Foundation. Other funds may be kept in IOTAs if benefits client or 3<sup>rd</sup> party.
    5. DISBURSEMENT – OVER DRAFT PROTECTION PROHIBITED. Only disburse COLLECTED funds (6 exceptions) – if lawyer knows of insufficient funds and personally secures funds for other clients → NO MISCONDUCT
    6. SANCTION – theft from client TA is DISBARMENT
  - f. DUTIES DURING REPRESENTATION – must be honest, fair, and not undertake frivolous claims or defenses
    - i. 3<sup>rd</sup> Parties – no actions that embarrass, delay or burden, violate legal rights;
      1. Represented Parties - Lawyer prohibited from communicating with represented person about subject of litigation, unless that person's counsel grants consents.
      2. Unrepresented Parties – permitted and requires lawyers to (1) not represent she is disinterested; (2) clearly inform of her role; and (3) no legal advice except to obtain counsel.
      3. Inadvertent Communications: Docs inadvertently received by lawyer requires prompt notification to sender.
      4. Candor Toward Tribunal – MUST NOT: 1) make false statements; 2) fail to disclose material facts; 3) fail to disclose controlling legal authority; or 4) offer false evidence.
      5. Fairness to Opposing Counsel: MUST NOT 1) obstruct access to evidence or alter/destroy evidence; 2) fabricate evidence; 3) knowingly disobey an obligation; 4) make frivolous discovery requests; 5) allude to any matter not supported by admissible evidence; 6) request a person to refrain from voluntarily giving relevant info unless relative, agent or client or person will be adversely affected by disclosure, OR 6) present criminal or disciplinary charges solely to obtain advantage in criminal matter.
      6. No improper contact with Jury; NO extrajudicial statements (trial publicity) that would materially prejudice pending proceedings
    - g. TERMINATION – protections must continue past termination
      - i. MANDATORY – 1) violation of RPCs; 2) lawyer's physical or mental incapacity; 3) discharged; or 4) client persists in or used lawyer's services to perpetrate crime or fraud actions, unless client agrees to disclose and rectify crime or fraud.
      - ii. PERMISSIVE – may w/d if NO adverse material effect on client: 1) client objective is repugnant or imprudent and lawyer fundamentally disagrees; 2) client fails substantially to fulfill obligation to lawyer; 3) unreasonable financial burden on lawyer; OR 4) other Good Cause Shown.
      - iii. PROHIBITED – when continued representation court-ordered notwithstanding other good cause.
- V. RESPONSIBILITIES TO THE LEGAL PROFESSION
- a. Non-Legal Services Performed – if connected to Legal Services → RPC applies to both; if not connected → RPC only if client believed non-legal services fell under ACP and lawyer did not take steps to resolve misunderstanding
  - b. Judicial or Legal Officials – No known false or defamatory statements about others; Code of Judicial Conduct
  - c. Prosecutors – must not: 1) file charge without probable cause; seek waiver of pretrial rights from unrepresented defendant; 3) make timely discovery disclosures of all evidence
  - d. REPORTING MISCONDUCT – mandatory if conduct raises a substantial question to lawyer's honesty or fitness. Applies to Judges with Code of Judicial Conduct.
  - e. DISSOLUTION OF FIRMS – No unilateral contact by ANY lawyer of firm, unless after bona fide negotiations with firm, unable to agree on method of notice to clients, which must allow client to choose representation by anyone in or outside firm, and explain fee implications.
  - f. LAWYERS LEAVING FIRMS – No unilateral contact by lawyer leaving firm, unless after bona fide negotiations with firm, unable to agree on method of notice to clients, which must allow client to choose remain at the firm, choose departing lawyer or outside firm; and notice must explain fee implications. Nonresponsive clients remain with attorney who initiated representation.