



ETHICS ISSUES FOR EDUCATION LAWYERS

EDUCATION LAW COMMITTEE

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Presented by Nick Cavallaro



Assistant Ethics Counsel, The Florida Bar

What is The Florida Bar?


- Arm of the Supreme Court of Florida
- Regulates the 110,000 plus lawyers admitted to practice in the state of Florida
- Main purpose is to protect the public
- Membership is mandatory
- Also provide services to Florida Bar members

Florida Bar Resources

- Ethics Hotline - 1-800-235-8619 (for Florida Bar members only)
- Unlicensed Practice of Law Department - (850) 561-5840
- Practice Resource Center/Legal Fuel - (850) 561-6718
- Attorney Consumer Assistance Program (ACAP) - (866) 411-5140
- Lawyers Advising Lawyers - (850) 561-5807
- Florida Lawyers Assistance, Inc. 1-800-282-8981




Who am I?

- Nick Cavallaro
 - Assistant Ethics Counsel
 - Ethics Hotline – oral and written advisory ethics opinions to members in good standing (800-235-8619)
 - Prior employment
 - GEICO
 - Polk County Public Defender
 - Gilbert Garcia, P.A.
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Presentation overview

- Cover topics including: identity of the client, duty to disclose, confidentiality and Sunshine Laws, duty of candor toward the tribunal, communicating with represented parties, and conflicts of interest
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What Makes an Attorney-Client Relationship?

- Reasonable, subjective belief of the person seeking legal advice or services
 - Whether an attorney-client relationship exists is a question of fact and law.
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Rule 4-1.13

- Represent organization through its authorized constituents
 - Do not inherently represent individual officers, employees, members
 - Duty to clarify role
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Rule 4-1.13

- May represent officers, employees, members where no conflict
 - If representing a constituent, need informed consent of the organization from someone other than the person to be represented
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When Government is Client

- Identity of client may be found by reference to:
 - Statute
 - Charter
 - Other governing document



Scottie Scholar

Scottie Scholar is counsel for the school board. Scottie suspects improprieties with the spending by a school board member, Milliard Moneybags. Scottie calls Milliard into his office to discuss where funds have gone to. Milliard starts the discussion by stating, "Mr. Scholar, we have been friends for a long time, so can I tell you something in confidence?"





What Should Scottie Scholar
Do?

Rule 4-1.6, Confidentiality

- Covers all information learned in representation, not just privilege
- Duty is to the organization, not individual constituents
- If an attorney-client relationship is created with a constituent, then duty of confidentiality to the constituent may create a conflict of interest with organization




Sunshine Laws

- Advisory Legal Opinion – AGO 97-61
- Advisory Legal Opinion – AGO 98-06
- “Restoring the Attorney-Client and Work Product Privileges for Government Entities”


The Florida Bar Journal





Advisory Legal Opinion – AGO 97-61 (excerpt)

Discussions regarding school business between individual school board members and the school board attorney are not attorney-client conversations and, therefore, are not privileged communications.



Advisory Legal Opinion – AGO 97-61 (excerpt) (continued)

A school board attorney may memorialize, in writing, any conversations with an individual school board member or the superintendent. These documents are public record subject to inspection and copying pursuant to section 119.07(1), Florida Statutes (1996 Supplement).

Advisory Legal Opinion – AGO 98-06 (excerpts)

Section 286.011(8), Florida Statutes, by its terms, is not expansive but is limited to particular individuals who are, in their official capacity, authorized to discuss limited subjects, i.e., litigation strategy or settlement negotiations. Nothing in the language of the statute authorizes the attendance of persons other than those officials who are designated to participate in these private strategy sessions.

Advisory Legal Opinion – AGO 98-06 (excerpts) (continued)


This act simply provides a government entity's attorney an opportunity to receive necessary direction and information from the government entity. No final decisions on litigation matters can be voted on during these private, attorney-client strategy meetings. The decision to settle a case, for a certain amount of money, under certain conditions is a decision which must be voted upon in a public meeting.



“Restoring the Attorney-Client and Work Product Privileges for Government Entities”

Only specifically designated persons may attend the session. Finally, and most significantly, these sessions must be transcribed by a certified court reporter, and the record is then made public after the conclusion of the litigation.

...



No matter how significant or imminent the threatened litigation, an attorney-client session cannot be held to discuss the claim or related strategies to avoid a lawsuit.

Rule 4-3.3, Duty of Candor to the Tribunal

- Tribunal:
 - Court
 - Arbitrator in binding arbitration
 - Legislative body, *administrative agency*, or other body acting in an adjudicative capacity:
 - Neutral official
 - Evidence OR legal argument presented
 - Binding judgment affecting party's interests

Rule 4-3.3, Duty of Candor to the Tribunal (cont.)

- Can't make a false statement of fact OR law or fail to correct prior statements
- Fail to disclose a material fact when necessary to avoid assisting in a crime or fraud by the client
- Fail to disclose known adverse controlling authority not disclosed by opposing party
- Offer false evidence


Rule 4-3.3, Duty of Candor to the Tribunal (cont.)

- If false evidence is provided by the lawyer, client, or witness, then must take reasonable remedial measures (see Rule Comment)
- (d) Duties continue beyond the conclusion of the proceeding and apply even if it requires disclosure of confidential information




Savvy Steve:

The school board allows superintendent, Savvy Steve, to use its attorney for any school-related matter to save costs. The superintendent then tells the attorney he thinks he may have crossed the line in sending flirtatious texts to a teacher. The superintendent says he could make up legitimate excuses for the texts, but that he was intending to flirt. The teacher then reports the superintendent's behavior to the board for review.





Savvy Steve (cont.):

- Can the attorney advise the school board in its review of the complaint against Savvy Steve?
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Rule 4-4.2, Communicating with Represented Person

- In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer.

Who Is Represented for Ex-parte Rule?

- Officers
- Directors
- Managing Agents
- Employees directly involved in the subject matter of the litigation or other legal matter
- Persons whose statements can bind the organization
- Persons whose acts or omissions can be imputed to the organization

Who Is Not Represented?

- Non-managerial employees whose acts/omissions can't be imputed
- Former employees
 - Florida Ethics Opinion 88-14
 - *H.B.A. Management Inc. v. Estate of Schwartz*, 693 So.2d 541 (Fla. 1997) (employee departure terminates agency/respondeat superior connection)

When is Someone Represented by Counsel?

- Florida Ethics Opinion 78-4. A person is represented by counsel when an attorney-client relationship is established regarding a particular matter, whether or not the matter is in litigation. If a corporation has general counsel for all legal matters, communications must be with that general counsel.



Speedy Sal

Speedy Sal represents a university student who is suing the university for discrimination by a professor. Sal has notified the university's counsel he will be including the university as a defendant. The university's counsel has notified Sal he will be handling this matter, but will be out of town for two weeks.

To more quickly obtain the professor's file, can Sal send in a request to the public records department?



Florida Ethics Opinion 87-2

Florida Ethics Opinion 87-2. When the opposing party is a government agency represented by counsel, an attorney may not communicate concerning the matter with the agency's management or any other employee whose act or omission in connection with the matter may be imputed to the agency or whose statement may constitute an admission on the part of the agency, unless consent of the agency's counsel is obtained.

Florida Ethics Opinion 09-1

- Approved by the Board of Governors December 10, 2011
- A lawyer may not communicate with officers, directors, or managers of State Agency, or State Agency employees who are directly involved in the matter, and other State Agency employees whose acts or omissions in connection with the matter can be imputed to State Agency about the subject matter of a specific controversy or matter on which a lawyer knows or has reason to know that a governmental lawyer is providing representation unless the agency's lawyer first consents to the communication. (Continued on next page)

Florida Ethics Opinion 09-1

- A lawyer may communicate with other agency employees who do not fall within the above categories and may communicate with employees who are considered represented by State Agency's lawyer on subjects unrelated to those matters in which the agency lawyer is known to be providing representation.
- (continued on next page)

Florida Ethics Opinion 09-1


- The lawyer may be required to identify himself or herself as a lawyer who is representing a party in making those contacts. Lawyers communicating with agency personnel are cautioned not to either purposefully or inadvertently circumvent the constraints imposed by Rule 4-4.2 and Rule 4-4.3 in their communications with government employees and officials. (continued)

Florida Ethics Opinion 09-1


- If a lawyer does not know or is in doubt as to whether State Agency is represented on a particular matter or whether particular State Agency's employees or officials are represented for purposes of the rule, the lawyer should ask State Agency's lawyer if the person is represented in the matter before making the communication. (continued)

Florida Ethics Opinion 09-1

- The fact that a State Agency has general counsel, in house counsel, or other continuously employed lawyers does not “bar all communications with government officials and employees” (continued)



What does that mean when representing a government entity?

- Counsel should notify other lawyers of the matters in which the government entity is represented
 - Counsel should notify employees of matters in which the government is represented and caution them against speaking with other lawyers about these matters
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Florida Bar Staff Opinion TE091001

- Affirmed by Professional Ethics Committee
- In pending litigation, public records requests relevant to the litigation should be made to the organization's lawyer unless:
 - The organization's lawyer consents; or
 - A statute, court rule, or contract requires service of process directly on the adverse party, in which case the request must be limited to the required notice, and a copy of the request must be given to the organization's lawyer




Florida Commission on Ethics

- 850-488-786
- Agency that serves as the guardian of conduct for the officers and employees of the state, counties, cities, and other political subdivisions of the State.



Rule 4-1.6, Confidentiality


Rule 4-1.6 – Lawyers are prohibited from disclosing any information relating to a client's representation without the client's informed consent, unless an exception applies





Ethics Opinion


ABA Ethics Opinion 480 (2018). Lawyers cannot blog about clients without client consent, even if only use information in public record, because that information is still confidential. If lawyer uses hypothetical, still needs client consent if client identity readily ascertainable.





Disciplinary Cases


Illinois Disciplinary Board v. Peshek, No. M.R. 23794 (Ill. May 18, 2010). Lawyer (assistant public defender) suspended for 60 days for blogging about her clients' cases, which was open to the public, including providing confidential information, some of which was detrimental to clients and some of which indicated that the lawyer may have knowingly failed to prevent a client from making misrepresentation to the court.





Friendly Fred

Friendly Fred is an assistant general counsel at a state agency who is excited to join Facebook. He starts friending every person he ever met in his life. As he searches Facebook, he realizes there are 2 administrative law judges that he practices before that are also on Facebook.





Should Friendly Fred


A – Immediately send friend requests to both judges – surely they want to keep up with his personal life

B – Leave the judges off his friend list






Authorities

- Florida Judicial Ethics Advisory Committee Opinion 2009-20. Judges cannot add attorneys who may appear before the judge as a "friend" on Facebook/social networking site nor may the judge allow such attorneys to add the judge as a friend on their Facebook/social networking site.
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Friendly Fred Part 2

Friendly Fred hits “send” and to his delight, 1 of the judges accepts his friend request! Fred then is appointed to several new cases assigned to his new Facebook friend. The opposing party in the case objects to the judge hearing the matter because the judge and Fred are Facebook friends.






The judge should

A – Immediately recuse


B – Issue a scathing order indicating that there clearly are no legal grounds for the judge to recuse



C – Carefully consider whether the relationship the judge has with Fred would affect the judge or the fair and impartial hearing of the case before ruling on the recusal



Authority

- *Domville v. State*, 103 So. 3d 184 (Fla. 4th DCA 2012). Fourth DCA held that recusal was required when a judge was a Facebook “friend” with the prosecutor based on Florida Judicial Ethics Advisory Opinion 2009-20.
 - *State v. Herssein & Herssein, P.A.*, No. 3D17-1421 (Aug. 23, 2017). Judge's Facebook friendship with lawyer who represents potential witness and potential party in litigation is not disqualifying for judge, as Facebook “friendship” as allegation of friendship alone is insufficient to disqualify a judge, particularly since a Facebook “friendship” does not necessarily mean there is a close relationship, as some people have thousands of Facebook “friends,” do not always remember everyone they are “friends” with, and that Facebook suggests “friends” via its technology.
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Friendly Fred Part 3

Fred is angry because one of the judges does not accept Fred's friend request. He becomes even angrier when the judge rules against him in a hearing. Fred posts on Facebook, "Judge McFair is an Evil Unfair Witch who is seemingly mentally ill – she has an ugly condescending attitude; she is clearly unfit for her position and knows not what it means to be a neutral arbiter." The judge files a bar complaint against Fred.



The Florida Bar should

A – Dismiss the complaint - Fred is within his first amendment rights


B – Prosecute Fred for his statement





Rule Regulating The Florida Bar

Rule 4-8.2 - A lawyer may not make statements that the lawyer knows to be false or with reckless disregard as to truth or falsity regarding the integrity or qualifications of a judge, mediator or other adjudicative officer




Disciplinary Case


A lawyer was publicly reprimanded for stating on a blog that a judge was: "Evil Unfair Witch; seemingly mentally ill; ugly condescending attitude; she is clearly unfit for her position and knows not what it means to be a neutral arbiter; and there is nothing honorable about that malcontent." - *The Florida Bar v. Conway*, SCo8-326




Florida Ethics Opinion 59-32

As a general rule, an attorney cannot properly accept employment to attack the validity of an instrument which he drew, and a law firm cannot properly accept any employment which one of its partners cannot properly accept.





Lawyers are encouraged to teach

- Florida Ethics Opinion – 75-10
 - An attorney teaching a course in mobile home owners' law at a junior college may accept employment from a mobile home tenants' association to which one of his or her students belong.
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Florida Ethics Opinion 75-36


- A lawyer may teach a course on general legal subjects to laymen at a local school so long as he does not emphasize his own professional experience and does not seek to give individual advice.

Florida Ethics Opinion 75-16

- A lawyer may prepare and contribute articles on legal subject to requesting newspapers. An attorney-author of such articles may be identified by name as an attorney.
- Be aware of distinction between publicity that is a normal by-product of able and effective service versus publicity artificially stimulated by the lawyer.


Potential conflicts when joining a labor union

- Board of Governors Advisory Ethics Opinion 77-15
- "...there is no violation of the Code of Professional Responsibility subjecting the government lawyer to disciplinary action simply by reason of his joining a union.
- BUT...



Board of Governors Ethics Opinion 77-15 (continued)


- If faced with a choice between following the Code of Professional Responsibility or following a union's wishes, it is clear that a government lawyer who is a member of the union must follow the Code and the Disciplinary Rules thereof as promulgated by the Supreme Court of Florida.



Rule 4-1.11 – Special Conflicts of Interest for Former and Current Government Officers and Employees


(b) When a lawyer is disqualified from representation under subdivision (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:

(1) The disqualified lawyer is timely screened from any participation in the matter and is directly apportioned no part of the fee therefrom ; and





Rule 4-1.11 (Continued)


- (2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule.
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4-1.11 (continued)

- (d) Limits on Participation of Public Officer or Employee. A lawyer currently serving as a public officer or employee:
 - (1) is subject to rules 4-1.7 and 4-1.9; and
 - (2) shall not:
 - (A) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless the appropriate government agency gives its informed consent; or



4-1.11 (continued)

- (B) negotiate for private employment with any person who is involved as a party or as attorney for a party in a matter in which the lawyer is participating personally and substantially.
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Questions?