ETHICAL CONSIDERATIONS IN REAL ESTATE TRANSACTIONS

I. Introduction

II. Trust Account Issues

A. Trust Account Plan. See R. Regulating Fla. Bar 5-1.2(c) which reads as follows:

> (c) Responsibility of Lawyers for Firm Trust Accounts and Reporting.
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> (1) Every law firm with more than 1 lawyer must have a written plan in place for supervision and compliance with this rule for each of the firm's trust account(s), which plan must be disseminated to each lawyer in the firm. The written plan must include the name(s) of the lawyer(s) who sign trust account checks for the law firm, the name(s) of the lawyer(s) who are responsible for reconciliation of the law firm's trust account(s) monthly and annually and the name(s) of the lawyer(s) who are responsible for answering any questions that lawyers in the firm may have about the firm's trust account(s). This written plan must be updated and re-issued to each lawyer in the firm whenever there are material changes to the plan, such as a change in the lawyer(s) signing trust account checks and/or reconciliation of the firm's trust account(s).
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> (2) Every lawyer is responsible for that lawyer's own actions regarding trust account funds subject to the requirements of chapter 4 of these rules. Any lawyer who has actual knowledge that the firm's trust account(s) or trust accounting procedures are not in compliance with chapter 5 may report the noncompliance to the managing partner or shareholder of the lawyer's firm. If the noncompliance is not corrected within a reasonable time, the lawyer must report the noncompliance to staff counsel for the bar if required to do so pursuant to the reporting requirements of chapter 4.

B. Who signs the checks?

> The Florida Bar v. Hines, 39 So.3d 1196 (Fla. 2010): The Supreme Court held that attorney's conduct in allowing a nonlawyer, whom the attorney neither employed, supervised, nor controlled, to have signatory authority over an escrow account the attorney opened to handle real estate closings, resulting in misappropriation of funds held in trust in the escrow account, violated the attorney professional conduct rule providing that a lawyer must make reasonable efforts

to ensure that the conduct of a nonlawyer associated with the lawyer is compatible with the professional obligations of the lawyer.

C. Risk of bookkeeping delegation.

The Florida Bar v. Riggs, 944 So.2d 167 (Fla. 2006): The Supreme Court held that: (1) evidence that attorney knowingly assigned his trust account responsibilities to his paralegal and then failed to manage her activities was sufficient to demonstrate that attorney had requisite intent and, thus, violated rule providing that a lawyer shall not engage in conduct involving dishonesty or misrepresentation, and (2) three-year suspension was appropriate sanction.

D. Theft of funds

The Florida Bar v. Rousso, 117 So.3d 756 (Fla. 2013): The Supreme Court held that:(1) embezzlement of trust account funds by non-attorney employee of law firm did not relieve attorneys of responsibility for safekeeping of trust account funds;(2) attorneys' abandonment of their professional duty to safeguard client funds warranted disbarment; and Attorneys' breach of affirmative duty to disclose conditions giving rise to conflicts of interest and to advise their clients to seek informed consent violated bar rule proscribing conduct involving dishonesty, fraud, deceit, or misrepresentation; attorneys' actions in continuing to represent clients, and to take clients' money and deposit it into trust account, at a time they were aware account was seriously underfunded, gave clients false impression that law firm's financial matters were stable.

E. Restitution: See Rousso and new rule .

III. Fiduciary Obligations – Breach of Escrow

The Florida Bar v. Watson, 76 So.3d 915 (2011): Attorney's disbursement of funds investor invested in client's development project from his trust account, despite having assured investor that he would maintain the funds in his trust account violated rule of professional conduct prohibiting lawyers from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation, as well as rule requiring that money or other property entrusted to an attorney for a specific purpose be held in trust and applied only to that purpose.

IV. Misrepresentations

The Florida Bar v. Bennett, 276 So.2d 481 (Fla 1973): Failure to promptly pay taxes, for which principals in business transactions send money, while handling details on behalf of group as trustee, and misrepresentation to principals that parking lot is not included in sale of portion of property when in fact it is included warrants one-year suspension from practice of law with requirement for showing of rehabilitation before reinstatement.

The Florida Bar v. Charnock, 661 So.2d 1207 (Fla. 1995): Thirty-day suspension was warranted by attorney's action to procure tenant for sole purpose of delaying foreclosure proceedings on client's property, and by attorney's attempt to shift blame to another attorney by testifying untruthfully that other attorney advised him to procure tenant.

The Florida Bar v. Draughon, 94 So.3d 566 Fla. 2012): Suspension of one year was warranted for attorney who transferred without consideration real property to himself, leaving purchaser, an organization in which he was the sole shareholder, without sufficient assets to satisfy its obligations to vendor.

The Florida Bar v. Borns, 306 So.2d 486 (Fla. 1975): Alteration of endorsement on tax certificates covering property belonging to client and failure to inform client of balloon and acceleration provisions in mortgages to be assumed would warrant public reprimand.

The Florida Bar v. Fitzgerald, 491 So.2d 547 (Fla. 1986): Attorney's knowingly misrepresenting status of title on title policy, by representing to buyer at closing that attorney was in possession of sufficient funds to pay off certain outstanding encumbrances on property, in violation of disciplinary rules prohibiting conduct involving dishonesty, fraud, deceit or misrepresentation, and prohibiting knowing misstatement of law or fact, warrants public reprimand, where buyer is aware of financial difficulties of project, and attorney satisfies encumbrances so buyer is not harmed economically.

V. Conflicts

The Florida Bar v. Bern, 425 So.2d 526 (Fla. 1982): Entering into partnership arrangement with client and, at the same time, acting as attorney for partnership, and not providing client with accounting of the fees received nor returning to client money owed her from proceeds of property sales warrants suspension for a period of three months and one day.

The Florida Bar v. Israel, 327 So.2d 12 (Fla. 1975): Entering into business transaction with client who had differing interests therein, by advancing money to client to allow client to bring mortgage payments up to date and receiving in return quitclaim deed for client's property as security for fees and advances, and subsequently filing complaint in ejectment against client, warrants public reprimand.

VI. Neglect

The Florida Bar v. Greene, 463 So.2d 213 (Fla. 1985):Failing to correct property description in deeds, failing to prorate client's tax bill for several conveyed lots, and overcharging client for services warrants public reprimand and one year of probation with quarterly caseload reports, and refund and compensation to client.

The Florida Bar v. Glick, 383 So.2d 642 (Fla. 1980): Improper handling of quiet title and breach of warranty suits warrants a public reprimand and a one-year period of probation conditioned on refraining from representation of clients in real estate matters, except for drawing of routine instruments, until completion of 30 hours of approved continuing legal education courses in real property.

The Florida Bar v. Cimbler, 840 So.2d 955 (Fla. 2002): Attorney's conduct in failing to record warranty deed and pay real estate taxes out of funds held in attorney's trust account upon sale of client's real property, failing to appear at hearing on opposing party's motion to dismiss suit for specific performance of real estate sales contract and failing to promptly make restitution to client, failing to notify clients that they were to appear for deposition, which resulted in final judgment in favor of defendants in civil lawsuit arising out of lease dispute, failing to maintain Florida Bar address or public phone number, and making deliberate efforts to make himself unavailable and difficult to contact warranted one-year suspension, despite attorney's showing of remorse and significant evidence of mitigation found by referee, in light of seriousness of acts of neglect,

cumulative nature of misconduct, and attorney's previous disciplinary history; misconduct involved three clients and occurred over four-year period, and attorney had previously received 90-day suspension followed by three-year probationary period for client neglect arising from similar emotional problems and mental health impairments.

VII. Communication

The Florida Bar v. Beneke, 464 So.2d 548 (Fla. 1985): Conduct of failing to inform mortgagee of reduction in purchase price of property which would be subject to mortgage, with result that mortgage was issued in amount exceeding actual negotiated purchase price of property, warrants public reprimand, notwithstanding absence of any complaint by mortgagee as to satisfactory performance of obligation to it.

VIII. Ancillary Businesses

R. Regulating Fla. Bar 4-5.7 RESPONSIBILITIES REGARDING NONLEGAL SERVICES

(a) Services Not Distinct From Legal Services. A lawyer who provides nonlegal services to a recipient that are not distinct from legal services provided to that recipient is subject to the Rules Regulating The Florida Bar with respect to the provision of both legal and nonlegal services.

(b) Services Distinct From Legal Services. A lawyer who provides nonlegal services to a recipient that are distinct from any legal services provided to the recipient is subject to the Rules Regulating The Florida Bar with respect to the nonlegal services if the lawyer knows or reasonably should know that the recipient might believe that the recipient is receiving the protection of a client-lawyer relationship.

(c) Services by Nonlegal Entity. A lawyer who is an owner, controlling party, employee, agent, or otherwise is affiliated with an entity providing nonlegal services to a recipient is subject to the Rules Regulating The Florida Bar with respect to the nonlegal services if the lawyer knows or reasonably should know that the recipient might believe that the recipient is receiving the protection of a client-lawyer relationship.

(d) Effect of Disclosure of Nature of Service. Subdivision (b) or (c)

> does not apply if the lawyer makes reasonable efforts to avoid any misunderstanding by the recipient receiving nonlegal services. Those efforts must include advising the recipient, preferably in writing, that the services are not legal services and that the protection of a client-lawyer relationship does not exist with respect to the provision of nonlegal services to the recipient.

IX. Questions/Answers