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## Ethics

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# Ethics: 1991 Survey of Florida Law

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## TABLE OF CONTENTS

I. INTRODUCTION .....	281
II. AMENDMENTS TO THE FLORIDA BAR'S GRIEVANCE PROCEDURES AND CONFIDENTIALITY RULES .....	281
A. <i>Grievance Procedure Changes</i> .....	281
B. <i>Confidentiality Rule Changes</i> .....	288
III. AMENDMENTS TO THE RULES REGULATING THE FLORIDA BAR REGARDING PERJURED TESTIMONY ..	294

### I. INTRODUCTION

The 1990 amendments to the Rules Regulating the Florida Bar ("the Rules") constitute significant changes in The Florida Bar's ("the Bar") disciplinary process.<sup>1</sup> This article addresses those changes which have effected the Bar's grievance procedures and confidentiality rules due to the substantial revision of these areas. The article goes on to discuss changes made to the rules concerning perjured testimony.

### II. AMENDMENTS TO THE FLORIDA BAR'S GRIEVANCE PROCEDURES AND CONFIDENTIALITY RULES

#### A. *Grievance Procedure Changes*

The first procedural change is that a formal complaint can now be filed by the Bar against a respondent attorney if: 1) a grievance com-

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1. The Fla. Bar re Amendments to the Rules Regulating the Fla. Bar (Grievance Procedures & Confidentiality), 558 So. 2d 1008 (Fla. 1990) (citing The Fla. Bar re Amendments to the Rules Regulating the Fla. Bar (Grievance Procedures & Confidentiality), (Fla. No. 74,570 filed February 15, 1990)) [hereinafter *Amendments*].

The Rules took effect on January 1, 1987. The Fla. Bar re Rules Regulating the Fla. Bar, 494 So. 2d 977 (Fla. 1986).

mittee or the board of governors of the Bar finds probable cause to believe that the respondent is guilty of misconduct justifying disciplinary action; 2) the member has been temporarily suspended for the same misconduct that is the subject matter of the formal complaint; 3) the respondent has been determined or adjudged to be guilty of committing a felony; or 4) the respondent has been disciplined by another entity having jurisdiction over the practice of law or, with the concurrence of the chairperson of the grievance committee, if the member has been charged with the commission of a felony under applicable law which warrants the imposition of discipline.<sup>2</sup>

The ability to file formal complaints based upon a temporary suspension or being charged with a felony are new in the 1990 amendments. Previously, a formal complaint could only be filed upon a finding of probable cause, a conviction or determination of a crime by a criminal court, or where the respondent had been disciplined by another entity having jurisdiction over the practice of law.<sup>3</sup>

Under the previous rule, even if the Bar had obtained a temporary suspension<sup>4</sup> from the Supreme Court of Florida based upon misappropriation of funds or other great public harm, the Bar continued to need a finding of probable cause prior to the filing of a formal complaint.<sup>5</sup>

Private reprimands<sup>6</sup> for minor misconduct have been renamed as "admonishments" in the 1990 amendments.<sup>7</sup> Additionally, within fifteen days after a finding of probable cause by a grievance committee, a respondent may tender a written admission of minor misconduct to bar

2. *Amendments*, 558 So. 2d at 1008; RULES REGULATING THE FLORIDA BAR Rule 3-3.2(a).

3. RULES REGULATING THE FLORIDA BAR Rule 3-3.2(a). Former Rule 3-3.2(a) provided:

Authority to file complaint. No formal complaint shall be filed by the Bar in disciplinary proceedings against a member of the bar unless either a grievance committee or the board shall first find probable cause exists to believe that the respondent is guilty of misconduct justifying disciplinary action or unless the respondent has been determined or adjudged to be guilty of the commission of a felony or unless the respondent has been disciplined by another entity having jurisdiction over the practice of law. The finding of probable cause shall be made by a grievance committee or by the board in accordance with these rules.

RULES REGULATING THE FLORIDA BAR Rule 3-3.2(a) (1989).

4. RULES REGULATING THE FLORIDA BAR Rule 3-5.1(g) (1989).

5. RULES REGULATING THE FLORIDA BAR Rule 3-3.2(a) (1989).

6. RULES REGULATING THE FLORIDA BAR Rule 3-5.1(a) (1989).

7. RULES REGULATING THE FLORIDA BAR Rule 3-5.1(a).

counsel or the grievance committee.<sup>8</sup> Under the prior rule, a respondent was able to tender an admission of minor misconduct after a finding of probable cause and before the filing of the *formal complaint*.<sup>9</sup> Under the current or prior rule, the grievance committee can accept or reject such a tender of minor misconduct.

Rule 3-5.1(d) now requires that the public reprimands be reported in the *Southern Reporter*. Also, the rule mandates that a respondent shall appear personally before the Supreme Court of Florida, the board of governors and a judge designated to administer the reprimand, or the referee if required.<sup>10</sup> The former rule did not require the public reprimand to be published in the *Southern Reporter*, and did not allow any judge to be designated. The previous rule allowed the Supreme court, the referee or the board of governors to administer the reprimand.

Another significant change in the 1990 amendments concerns Rule 3-6.1(c) of the Rules of Discipline regarding employment of certain disciplined attorneys. The former rule provided: "(c) client contact. No suspended or disbarred attorney shall have direct contact with any client or receive, disburse, or otherwise handle funds or property of a client."<sup>11</sup> Occasionally, when an attorney has disciplinary action pending, the attorney will decide to tender a petition for resignation.<sup>12</sup> The resignation must list all pending disciplinary actions and if granted, terminates the respondent's status as an attorney.

Prior to the 1990 amendments, a loophole existed regarding Rule 3-6.1(c) in that an attorney who resigned pending disciplinary action was not precluded from direct contact with any client and was not prohibited from handling trust funds. The 1990 amendments included attorneys who resign with suspended and disbarred attorneys, and prohibited all such disciplined or resigned attorneys from direct contact with clients and trust funds.<sup>13</sup>

Rule 3-7.3<sup>14</sup> is a new rule which separates complaints into inquir-

8. RULES REGULATING THE FLORIDA BAR Rule 3-5.1(b)(5).

9. RULES REGULATING THE FLORIDA BAR Rule 3-5.1(b)(5) (1989).

10. RULES REGULATING THE FLORIDA BAR Rule 3-5.1(d).

11. RULES REGULATING THE FLORIDA BAR Rule 3-6.1(c) (1989).

12. The petition to resign is considered pending disciplinary action and is filed pursuant to RULES REGULATING THE FLORIDA BAR Rule 3-7.11.

13. Rule 3-6.1(c) provides: "Client contact. No suspended, resigned or disbarred attorney shall have direct contact with any client or receive, disburse or otherwise handle trust funds or property." RULES REGULATING THE FLORIDA BAR Rule 3-6.1(c).

14. RULES REGULATING THE FLORIDA BAR Rule 3-7.3 provides:

ies and disciplinary files (complaints) and requires the complainant to be notified and given reasons for dismissal of the inquiry/complaint. If the bar counsel decides to pursue an inquiry, a disciplinary file shall be opened and the inquiry shall be considered as a complaint if the complaint is provided under oath.<sup>15</sup>

For the first time, pursuant to Rule 3-7.3(c), complaints, except those initiated by the Bar, must be in writing and under oath.<sup>16</sup> Most

a) Screening of inquiries. Prior to opening a disciplinary file, bar counsel shall review the inquiry made and determine whether the alleged conduct, if proven, would constitute a violation of the Rules warranting the imposition of discipline. If bar counsel determines that the facts, if proven, would not constitute a violation of the Rules warranting the imposition of discipline bar counsel may decline to pursue the inquiry. A decision by bar counsel not to pursue an inquiry shall not preclude further action or review under the Rules. The complainant shall be notified of a decision not to pursue an inquiry and shall be given the reasons therefor.

b) Complaint processing and bar counsel investigation. If bar counsel decides to pursue an inquiry, a disciplinary file shall be opened and the inquiry shall be considered as a complaint, if the form requirement of (c) is met. Bar counsel shall investigate the allegations contained in the complaint.

c) Form for complaints. All complaints, except those initiated by The Florida Bar, shall be in writing and under oath. The complaint shall contain a statement providing that: "Under penalty of perjury, I declare the foregoing facts are true, correct and complete."

d) Dismissal of disciplinary cases. Bar counsel may dismiss disciplinary cases if, after complete investigation, bar counsel determines that the facts show that the attorney did not violate the Rules Regulating the Florida Bar. Dismissal by bar counsel shall not preclude further action or review under the Rules Regulating The Florida Bar. Nothing in these rules shall preclude bar counsel from obtaining the concurrence of the grievance committee chairperson on the dismissal of a case. If a disciplinary case is dismissed, the complainant shall be notified of the dismissal and shall be given the reasons therefor.

e) Referral to grievance committees. Bar counsel may refer disciplinary cases to a grievance committee for its further investigation or action as authorized elsewhere in these rules. Bar counsel may recommend specific action on a case referred to a grievance committee.

f) Information concerning closed inquiries and complaints dismissed by staff. When bar counsel does not pursue an inquiry or dismisses a disciplinary case, such action shall be deemed a finding of no probable cause for further disciplinary proceedings and the matter shall become public information.

15. RULES REGULATING THE FLORIDA BAR Rule 3-7.3(b).

16. RULES REGULATING THE FLORIDA BAR Rule 3-7.3(c).

significantly, under the 1990 amendments, a complainant no longer has absolute immunity,<sup>17</sup> but now is subject to applicable Florida law which provides for a qualified privilege. When the law required an absolute immunity for a complainant arising out of making a grievance complaint, confidentiality rules existed which required summarily dismissed files, files closed with no probable cause findings and files resulting in private reprimands to remain confidential.<sup>18</sup> Further, during the pendency of a grievance case, most files were confidential prior to the filing of a formal complaint.<sup>19</sup> The changes made regarding confidentiality will be addressed later in this article.

The 1990 amendments changed portions of the grievance committee procedures.<sup>20</sup> Admonishments made after no probable cause findings are now called "letters of advice."<sup>21</sup> Previously, in order to have a quorum of the grievance committee, the chairperson, or vice-chairperson, another lawyer member and any other member were required to be present. Currently, three members of a grievance committee are required, two of whom must be lawyers.<sup>22</sup> Three-member panels can now determine matters.<sup>23</sup> The chairperson or vice-chairperson need not be a member of the panel.<sup>24</sup> Dividing a grievance committee into panels allows the committee to determine matters more expeditiously.

Another new requirement to the grievance committee procedures is that a lawyer grievance committee member may not vote on the disposition of any matter in which that member served as the investigating member of the committee.<sup>25</sup> However, nonlawyer grievance committee members can vote on matters they investigated. At least one-third of grievance committees are comprised of non-lawyer members.<sup>26</sup>

There have been significant changes regarding the rights and responsibilities of the respondent. Under the prior rule, a grievance committee could not find probable cause unless the respondent had been

17. Previously, a complaining party had absolute immunity when filing a complaint against an attorney with the Bar. *Stone v. Rosen*, 348 So. 2d 387 (Fla. 3d Dist. Ct. App. 1977).

18. RULES REGULATING THE FLORIDA BAR Rule 3-7.1 (1989).

19. *Id.*

20. RULES REGULATING THE FLORIDA BAR Rule 3-7.4.

21. RULES REGULATING THE FLORIDA BAR Rule 3-7.4(e).

22. RULES REGULATING THE FLORIDA BAR Rule 3-7.4(f).

23. *Id.*

24. *Id.*

25. *Id.*

26. RULES REGULATING THE FLORIDA BAR Rule 3-3.4(c).

granted the right to be present at any grievance committee hearing at which evidence was presented, to face the accuser, to call witnesses or present evidence and to cross-examine, subject to reasonable limitation.<sup>27</sup>

Under the 1990 amendments, a respondent no longer has the right to be present when evidence is presented to the grievance committee.<sup>28</sup> The grievance committee now has the option of holding an evidentiary hearing with the respondent and complainant present or determining the matter based upon a paper hearing consisting of documents.<sup>29</sup> If the grievance committee determines the matters based on documents without the respondent present, the respondent shall be provided with all materials considered by the committee and shall be given an opportunity to provide a written response for consideration by the grievance committee. In any event, the respondent has a right to be advised of the conduct which is being investigated and the rules which may have been violated before a hearing at which any finding of probable cause or minor misconduct is made.<sup>30</sup>

Providing the grievance committees with the option of holding open hearings should help to expedite probable cause determinations.<sup>31</sup> However, it is important to be reminded that the grievance committee determination is a decision regarding whether probable cause exists for further proceedings after a finding of probable cause is found. A *de novo* adversary hearing is held before a referee appointed by the Su-

27. RULES REGULATING THE FLORIDA BAR Rule 3-7.4(g) (1989).

28. RULES REGULATING THE FLORIDA BAR Rule 3-7.4(g).

29. *Id.* Rule 3-7.4(g) provides:

Rights and responsibilities of the respondent. The respondent may be required to testify and to produce evidence as any other witness unless the respondent claims a privilege or right properly available to the respondent under applicable federal or state law. The respondent may be accompanied by counsel. At a reasonable time before any finding of probable cause or minor misconduct is made the respondent shall be advised of the conduct which is being investigated and the rules which may have been violated. The respondent shall be provided with all materials considered by the committee and shall be given an opportunity to make a written statement sworn or unsworn, explaining, refuting, or admitting the alleged misconduct.

30. *Id.*

31. In a previous article written on the changes in the bar rules, the author expressed concern regarding the respondent's rights being changed at the grievance committee level. See Diane Marger Moore, "New" Grievance Procedures: A Summary and Analysis, FLA. B.J., Jan. 1991, at 35, 40.

preme Court of Florida.<sup>32</sup> A trial is held before the referee and the referee's findings and recommendations are forwarded to the Supreme court which issues its opinion or order in the matter.<sup>33</sup>

Similarly, the complainant is granted the right to be present at any grievance committee hearing when the respondent is present before the committee unless found to be impractical by the chairperson of the grievance committee due to unreasonable delay or other good cause.<sup>34</sup> Accordingly, both the complainant and the respondent have the same right to be present when the grievance committee determines their presence is appropriate.<sup>35</sup>

The new Rule 3-7.4(j) defines the record before the grievance committee as consisting of all reports, correspondence, papers and/or recordings furnished to or received from the respondent, and the transcript of grievance committee meetings or hearings if the proceedings were attended by a court reporter.<sup>36</sup>

Notice of the grievance committee's action is provided to the reviewer (the local member of the board of governors that oversees the actions of a particular grievance committee).<sup>37</sup> If the reviewer disagrees with the grievance committee's action, the designated reviewer shall make a report and recommendation to the disciplinary review committee.<sup>38</sup> If the designated reviewer does not make a report and recommendation within twenty-one days following the mailing date of the notice of grievance committee action, then the grievance committee action shall become final.<sup>39</sup>

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32. RULES REGULATING THE FLORIDA BAR Rule 3-7.6(b).

33. RULES REGULATING THE FLORIDA BAR Rule 3-7.7.

34. RULES REGULATING THE FLORIDA BAR Rule 3-7.4(h). Rule 3-7.4(h) provides:

Rights of the complaining witness. The complaining witness is not a party to the disciplinary proceeding. Unless found to be impractical by the chairman of the grievance committee due to unreasonable delay or other good cause, the complainant shall be granted the right to be present at any grievance committee hearing when the respondent is present before the committee. Neither unwillingness nor neglect of the complaining witness to cooperate, nor settlement, compromise, or restitution will excuse the completion of an investigation. The complaining witness shall have no right to appeal.

35. RULES REGULATING THE FLORIDA BAR Rule 3-7.4(g), (h).

36. See RULES REGULATING THE FLORIDA BAR Rule 3-7.4(j).

37. RULES REGULATING THE FLORIDA BAR Rule 3-7.5(b).

38. *Id.*

39. *Id.*



## B. Confidentiality Rule Changes

The 1990 amendments to the Rules extensively changed the confidentiality rule and definition of public records regarding disciplinary proceedings.<sup>40</sup> Rule 3-7.1, as amended, opened the grievance process to

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40. RULES REGULATING THE FLORIDA BAR Rule 3-7.1. Rule 3-7.1 provides:

Confidentiality. All matters including files, preliminary investigation reports, inter-office memoranda, records of investigations, and the records in trials and other proceedings under these rules, except those disciplinary matters conducted in circuit courts, are property of The Florida Bar. All of those matters shall be confidential and shall not be disclosed except as provided in these rules. When disclosure is permitted under these rules, it shall be limited to information concerning the status of the proceedings and any information which is part of the public record as defined in these rules.

(a) Public record. The public record shall consist of the record before a grievance committee, the record before a referee, the record before the Supreme Court of Florida and any reports, correspondence, papers, recordings and/or transcripts of hearings furnished to, served on or received from the respondent or the complainant.

(b) Circuit court proceeding. Proceedings under rule 3-3.5 shall be public information. Contempt proceedings authorized elsewhere in these rules shall be public information even though the underlying disciplinary matter is confidential as defined in these rules.

(c) Limitations on disclosure. Any material provided to the Florida Bar which is confidential under applicable law shall remain confidential and shall not be disclosed except as authorized by the applicable law. If this type of material is made a part of the public record, that portion of the public record may be sealed by the grievance committee chairman, the referee or the Supreme Court of Florida.

(d) Disclosure of information. Unless otherwise ordered by this Court or the referee in proceedings under this rule, nothing in these rules shall prohibit the complainant, respondent or any witness from disclosing the existence of proceedings under these rules or from disclosing any documents or correspondence served on or provided to those persons.

(e) Response to inquiry. Representatives of the Florida Bar, authorized by the board of governors, shall respond to specific inquiries, concerning matters which are in the public domain, but otherwise confidential under the rules, by acknowledging the status of the proceedings.

(f) Notice to law firms. When a disciplinary file is opened the respondent shall disclose to his or her current law firm and, if different, respondent's law firm at the time of the act(s) giving rise to the complaint, the fact that a disciplinary file has been opened. Disclosure shall be in writing and in the following form: "A complaint of unethical conduct against me has been filed with the Florida Bar. The nature of the allegations are [insert allegations]. This notice is provided pursuant to Rule 3-7.1(f) of the Rules

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**Regulating the Florida Bar.”**

The notice shall be provided within fifteen (15) days of notice that a disciplinary file has been opened and a copy of the above notice shall be served on the Florida Bar.

(g) Pending investigation. Disciplinary matters pending at the initial investigatory and grievance committee levels shall be treated as confidential by the Florida Bar, except as provided in rule 3-7.1(e).

(h) Minor misconduct cases. Any case in which a finding of minor misconduct has been entered, by action of the grievance committee or board, shall become public information.

(i) Probable cause cases. Any disciplinary case in which a finding of probable cause for further disciplinary proceedings has been entered shall be public information. For purposes of this paragraph a finding of probable cause shall be deemed to have been made in those cases authorized by rule 3-3.2(a), for the filing of a formal complaint without the prior necessity of a finding of probable cause.

(j) No probable cause cases. Any disciplinary case which has been concluded by a finding of no probable cause for further disciplinary proceedings shall become public information.

(k) Production of disciplinary records pursuant to subpoena. The Florida Bar, pursuant to a valid subpoena, issued by a regulatory agency, may provide any documents, which are a portion of the public record, even if the disciplinary proceeding is confidential under these rules. The Florida Bar may charge a reasonable fee for identification of and photocopying the documents.

(l) Notice to judges. Any judge of a court of record may be advised as to the status of a confidential disciplinary case and may be provided with a copy of the public record. The judge shall maintain the confidentiality of the matter.

(m) Evidence of crime. The confidential nature of these proceedings shall not preclude the giving of any information or testimony to authorities authorized to investigate alleged criminal activity.

(n) Alcohol and drug treatment. That an attorney has voluntarily sought, received, or accepted treatment for alcoholism or alcohol or drug abuse shall be confidential and shall not be admitted as evidence in disciplinary proceedings under these rules unless agreed to by the attorney who sought the treatment.

It is the purpose of this paragraph to encourage attorneys to voluntarily seek advice, counsel, and treatment available to attorneys, without fear that the fact it is sought or rendered, will or might cause embarrassment in any future disciplinary matter.

(o) Response to false or misleading statements. If public statements which are false or misleading are made about any otherwise confidential disciplinary case, the Florida Bar may disclose all information necessary to correct such false or misleading statements.

Disclosure by waiver of respondent. Upon written waiver executed by a respondent, the Florida Bar may disclose the status of otherwise confi-

public review.<sup>41</sup>

The confidentiality rule amendments pertain to any inquiry or complaint file received by the Bar on or after March 17, 1990, as the rules became effective March 17, 1990.<sup>42</sup> However, the removal of the gag rule was applied retroactively and applied to disciplinary files received prior to or subsequent to March 17, 1990.<sup>43</sup>

The gag rule concerned the previous requirement that a complainant or witness could not disclose the existence of a Florida Bar matter unless the matter reached a public level.<sup>44</sup> This rule has been eliminated by the 1990 amendments. Additionally, prior to the Florida Supreme Court issuing its opinion amending the confidentiality rules, the United States District Court for the Southern District of Florida found the gag rule unconstitutional.<sup>45</sup>

The Florida Supreme Court's March 16, 1990 amended opinion summarized the confidentiality rule changes as follows:

Rule 3-7.1, as amended, opens the grievance process to public review. Disclosure under the rule is limited to information concerning the status of the proceedings and information which is part of the public record. Paragraph (a) clarifies what constitutes the "public record." Paragraph (b), as amended, provides that proceedings under Rule 3-3.5 are public and contempt proceedings authorized under the rules are public, even if the underlying disciplinary matter is otherwise confidential. Consistent with this amendment, paragraph (f)(2) of former Rule 3-7.10 dealing with the preservation of confidentiality during contempt proceedings has been deleted. Likewise, paragraph (g) of Rule 3-7.11 (former Rule 3-7.10) has been amended to reflect this change. Paragraph (d) of the Rules 3-7.1 allows the complainant, respondent, or any witness to disclose the existence of disciplinary proceedings and any documents or corre-

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dential disciplinary proceedings and provide copies of the public record to:

- (1) The Florida Board of Bar Examiners or the comparable body in other jurisdictions for the purpose of evaluating the character and fitness of an applicant for admission to practice law in that jurisdiction; or
- (2) Florida judicial nominating commissions or the comparable body in other jurisdictions for the purpose of evaluating the character and fitness of a candidate for judicial office.

41. *Id.*

42. *See Amendments*, 558 So. 2d at 1011.

43. *Id.*

44. *See RULES REGULATING THE FLORIDA BAR* Rule 3-7.1 (1989).

45. *See Doe v. Gonzales*, 723 F. Supp. 690 (S.D. Fla. 1988), *aff'd*, 886 F.2d 1323 (11th Cir. 1989) (construing FLA. STAT. § 112.317(6) (1987)).

spondence served on or provided them. Consistent with this change, paragraph (e) of Rule 3-7.11 (former Rule 3-7.10) no longer prohibits witnesses from disclosing the existence of a disciplinary proceeding or the identity of the respondent. Paragraph (e) of Rule 3-7.1 allows authorized representatives of the Bar to respond to inquiries concerning matters in the public domain, but otherwise confidential, by acknowledging the status of the proceedings. Under paragraph (g) of that rule, disciplinary matters pending at the initial investigatory and grievance committee levels shall be treated as confidential by the Bar, except as provided in paragraph (e). Under paragraph (h) of Rule 3-7.1, disciplinary cases in which a finding of minor misconduct has been entered became public information. Similarly, upon a finding of probable cause or no probable cause disciplinary cases become public information, under paragraphs (i) and (j), respectively. Paragraph (i) also provides that for purposes of that paragraph a finding of probable cause shall be deemed to have been made in those cases authorized by Rule 3-3.2(a) for filing of a formal complaint without the prior necessity of a finding of probable cause. Paragraph (k) authorizes the Bar to provide information pursuant to subpoenas of regulatory agencies. Paragraph (l) provides that any judge may be advised as to the status of a confidential matter and provided with a copy of the public record. Paragraph (o), which is new, replaces paragraph 3-7.1(a)(1)(e) which allowed the Bar to disclose information necessary to correct a false or misleading statement made by a candidate for public office concerning a disciplinary action against the candidate. This paragraph authorizes the Bar to respond to false and misleading statements made by any person regarding disciplinary cases by disclosing all information necessary to correct the false or misleading statements. Paragraph ¶, which is also new, allows the Bar, upon written waiver by the respondent, to disclose the status of the proceeding and to provide copies of the public record to the Florida Board of Bar Examiners, the Florida judicial nominating commissions and comparable bodies in other jurisdictions.<sup>46</sup>

The “public record” is now defined as the public record before a grievance committee, referee, and the Supreme Court of Florida, and any reports, correspondence, papers, recordings and/or transcripts of hearings furnished to, served on, or received from the respondent or the complainant.<sup>47</sup>

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46. *See Amendments*, 558 So. 2d at 1010.

47. RULES REGULATING THE FLORIDA BAR Rule 3-7.1(a).

Any party other than the Bar can disclose the existence of a grievance at any time because the gag rule no longer exists. However, the Bar must maintain the confidential nature of its files regarding pending matters being reviewed by staff or a grievance committee. Once staff or a grievance committee closes a matter, the public record portion of the file is public and subject to public review.<sup>48</sup>

Any material provided to the Bar which is confidential under applicable law shall remain confidential and shall not be disclosed except as authorized by the applicable law and may be sealed in the proceedings.<sup>49</sup>

While a matter is pending with the Bar, representatives of the Bar shall respond to specific inquiries concerning matters which are in the public domain, but otherwise confidential under the rules by acknowledging the status of the proceedings.<sup>50</sup>

When a disciplinary file is opened, the respondent is required to disclose to his or her current law firm, and if different, respondent's law firm at the time of the acts giving rise to the complaint, the fact that a disciplinary file has been opened.<sup>51</sup>

Disciplinary matters pending at the initial investigatory and grievance committee levels shall be treated as confidential by the Bar except where a specific inquiry is made pursuant to Rule 3-7.1(e).<sup>52</sup>

A major distinction between the new and old rules concerns the fact that pursuant to the 1990 amendments, any case in which a finding of minor misconduct has been entered by action of the grievance

48. *Id.*

49. See RULES REGULATING THE FLORIDA BAR Rule 3-7.1(c).

50. See RULES REGULATING THE FLORIDA BAR Rule 3-7.1(e).

51. See RULES REGULATING THE FLORIDA BAR Rule 3-7.1(f). Rule 3-7.1(f) provides:

Notice to law firms. When a disciplinary file is opened the respondent shall disclose to his or her current law firm and, if different, respondent's law firm at the time of the act(s) giving rise to the complaint, the fact that a disciplinary file has been opened. Disclosure shall be in writing and in the following form: "A complaint of unethical conduct against me has been filed with the Florida Bar. The nature of the allegations are [insert allegations]. This notice is provided pursuant to rule 3-7.1(f) of the Rules Regulating the Florida Bar."

The notice shall be provided within fifteen (15) days of notice that a disciplinary file has been opened and a copy of the above notice shall be served on the Florida Bar.

52. See RULES REGULATING THE FLORIDA BAR Rule 3-7.1(g).

committee or board shall become public information.<sup>53</sup> Under the former rules, private reprimands for minor misconduct were treated as confidential.<sup>54</sup>

Once probable cause or no probable cause for further proceedings has been entered, the proceedings shall become public information.<sup>55</sup> Under the former rules, the proceedings were not public information until a formal complaint had been filed in the Supreme Court of Florida, and the proceedings were confidential upon findings of no probable cause.<sup>56</sup>

Rule 3-7.1(k)<sup>57</sup> now authorizes the Bar to provide documents which are a portion of the public record to regulatory agencies pursuant to a subpoena.

Judges may be advised in confidence as to the status of a confidential disciplinary case and may be provided with a copy of the public record.<sup>58</sup>

The confidential nature of the former and current rule both authorize the furnishing of information or testimony to authorities authorized to investigate alleged criminal activity.<sup>59</sup>

For the first time, the amended rules allow the Bar to disclose all information necessary to correct public statements which are false and misleading which are made about any otherwise confidential disciplinary case.<sup>60</sup>

Upon a respondent's written waiver, the Bar may disclose the status of otherwise confidential disciplinary proceedings and provide copies of the public record to the Florida Board of Bar Examiners or comparable body, or The Florida Judicial Nominating Committee or comparable body.<sup>61</sup>

53. *Id.*

54. RULES REGULATING THE FLORIDA BAR Rule 3-7.1 (1989).

55. RULES REGULATING THE FLORIDA BAR Rules 3-7.1(i), (j).

56. RULES REGULATING THE FLORIDA BAR Rules 3-7.1(1), (2) (1989).

57. RULES REGULATING THE FLORIDA BAR Rule 3-7.1(k) provides:

Production of disciplinary records pursuant to subpoena. The Florida Bar, pursuant to a valid subpoena, issued by a regulatory agency, may provide any documents which are a portion of the public record, even if the disciplinary proceeding is confidential under these rules. The Bar may charge a reasonable fee for identification of and photocopying the documents.

58. RULES REGULATING THE FLORIDA BAR Rule 3-7.1(l).

59. RULES REGULATING THE FLORIDA BAR Rule 3-7.1(m); RULES REGULATING THE FLORIDA BAR Rule 3-7.1(m) (1989).

60. RULES REGULATING THE FLORIDA BAR Rule 3-7.1(o).

61. RULES REGULATING THE FLORIDA BAR Rule 3-7.1(p).

The amended rules allow the Bar to charge for reproduction charges and a reasonable fee incident to a request to review disciplinary records or for research into the records of disciplinary proceedings and identification of documents to be reproduced.<sup>62</sup>

The Florida Supreme Court stated in its opinion amending the rules: "[W]e agree with the commission that public respect and confidence primarily in the self-operated lawyer disciplinary system can best be gained by allowing the public to determine for itself that the grievance system works efficiently, fairly and accurately."<sup>63</sup>

### III. AMENDMENTS TO THE RULES REGULATING THE FLORIDA BAR REGARDING PERJURED TESTIMONY

In 1990, The Florida Supreme Court also amended the Rules regarding an attorney's duties and obligations concerning a client who wishes to present or has presented perjured testimony.<sup>64</sup>

Rule 4-3.3 was amended to include the following:

(a) A lawyer shall not knowingly: . . . (4) permit any witness, including a criminal defendant to offer testimony or other evidence that the lawyer knows to be false. A lawyer may not offer testimony which he knows to be false in the form of a narrative unless so ordered by the tribunal. If a lawyer has offered material evidence and thereafter comes to know of its falsity, the lawyer shall take reasonable remedial measures.<sup>65</sup>

Previously, it was believed that it was acceptable for a lawyer to allow his client to testify in a narrative fashion if the client intended to testify falsely. The comment to Rule 4-3.3 explains that legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal.<sup>66</sup>

An attorney has the following obligations if he or she learns that a client is about to or has offered false testimony or evidence: 1) the lawyer should seek to persuade the client that the evidence should not be offered; 2) if it has been offered, that its false character should immedi-

62. See RULES REGULATING THE FLORIDA BAR Rule 3-7.6(n).

63. See *Amendments*, 558 So. 2d at 1009.

64. See *The Florida Bar re Amendments to the Rules Regulating The Florida Bar*, 557 So. 2d 1368 (Fla. 1990); RULES REGULATING THE FLORIDA BAR Rule 4-3.3.

65. See RULES REGULATING THE FLORIDA BAR Rule 4-3.3(a)(4).

66. RULES REGULATING THE FLORIDA BAR Rule 4-3.3(a)(4) cmt.

ately be disclosed; or 3) if the persuasion is ineffective, the lawyer must take reasonable remedial measures.<sup>67</sup>

A lawyer who knows that his client is about to testify falsely faces a great dilemma. Ethically, the lawyer cannot allow the client to testify falsely. However, to prevent the client from testifying falsely, the lawyer may have to disclose the existence of the client's deception to the court or opposing party.<sup>68</sup> Such a disclosure can cause severe consequences to the client.

The best alternative is to dissuade the client from testifying falsely or if the false testimony has already been given, the client should be persuaded to correct the false testimony. If the client is aware that the lawyer will disclose the intention to testify falsely or the fact that it has occurred, then the client should be motivated to correct the situation. However, the attorney-client relationship can certainly be affected by a client knowing that the lawyer has or will reveal information harmful to the client. The comment to Rule 4-3.3 has an excellent discussion of the lawyer's responsibilities and dilemmas when a client has or will testify falsely.<sup>69</sup>

Rule 4-3.3 was amended after the Bar's Special Committee on Perjured Testimony proposed the amendment to the Rules of Professional Conduct.<sup>70</sup> The Special Committee on Perjured Testimony was approved by Florida Bar President Ray Ferrero after a Florida attorney was held in contempt for refusing to continue representation of a criminal defendant who the lawyer implied intended to lie when testifying.<sup>71</sup>

Thus, 1990 amendments to Rule 4-3.3 clarified an attorney's obligation if and when the dilemma of a client intending to or testifying falsely arises.

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67. RULES REGULATING THE FLORIDA BAR Rule 4-3.3(a)(4).

68. RULES REGULATING THE FLORIDA BAR Rule 4-3.3(a)(4) cmt.

69. See RULES REGULATING THE FLORIDA BAR Rule 4-3.3 cmt.

70. See Randolph Braccialarghe, *Client Perjury: The Law in Florida*, 12 Nova L. Rev. 708, 709 (1988).

71. *Id.*