Nova Law Review

Volume 18, *Issue* 1 1993 *Article* 18

Professional Ethics

Adele I. Stone*

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Professional Ethics: 1993 Leading Cases and Significant Developments in Florida Law

Adele I. Stone*

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I. INTRODUCTION

The Florida Supreme Court's adoption of amendments to the Rules of Professional Conduct from 1991 to date significantly impact the manner in which Florida lawyers practice the business of law. The scope of this article will address those amendments adopted by the Florida Supreme Court relating to chapter 4 of the Rules Regulating the Florida Bar, known as the Rules of Professional Conduct (the "Rules").

Reported cases during this same time period are replete with decisions imposing discipline on lawyers who deviate from these Rules. Because this article must be practically limited in its scope and length, it does not seek to review every appellate case affected by the Rules during the relevant time period. Rather, the author intends to review those cases that are particularly noteworthy for their unique (and sometimes outlandish) fact pattern, departure from historical interpretation of a particular Rule or, in some cases, for the precedent they set.

* Shareholder of Atkinson, Diner & Stone, P.A., Hollywood, Fla.; Board Certified Real Estate Lawyer; J.D., University of Miami, 1978; B.A., University of Florida, 1975; Adjunct Professor, Barry University Andreas School of Business; member and former Vice-Chairman of The Florida Bar Professional Ethics Committee; former Chairman of The Florida Bar Grievance Committee 17D. Ms. Stone was a recent lecturer at a seminar sponsored by The Florida Bar Professional Ethics Committee entitled "Avoiding Grievance and Malpractice Liability."

II. AMENDMENTS TO THE FLORIDA BAR RULES OF PROFESSIONAL CONDUCT: 1991-1993

In 1991, the Florida Supreme Court ruled on The Florida Bar's petition for an amendment to the Rules relating to professional advertising.[1] The court approved The Florida Bar's proposal to amend the Rules regulating advertising with some modifications.[2] The decision was based on the doctrine first espoused in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,[3] holding that commercial speech is protected by the First Amendment of the Constitution.[4] This doctrine was subsequently adopted and made applicable to the practice of law by the United States Supreme Court in *Bates v. State Bar.*[5] The Florida Supreme Court also adopted chapter 15 of the Rules, which created The Florida Bar's Standing Committee on Advertising.[6] Prior to the decision, issues of professional advertising were addressed by The Florida Bar's Professional Ethics Committee.

The Florida Bar re: Amendment to Rules Regulating the Florida Bar[7] approved a new rule, Rule 4-1.17, regarding the sale of a law practice. The supreme court adopted the Rule as proposed by The Florida Bar. The Rule delineates the procedures and restrictions for the sale of the practice.[8] In the decision, other Rules were also amended.[9]

In re Amendments to Rules Regulating The Florida Bar—1-3.1(a) and Rules of Judicial Administration—2.065 (Legal Aid)[10] is significant for its impact on members of The Florida Bar as well as for its giving substance to the message of Rule 4-6.1 Pro Bono Public Service. In this decision, the Supreme Court of Florida considered the recommendations contained in the *Report of the Florida Bar/Florida Bar Foundation Joint Commission on the*

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1. The Fla. Bar: Petition to Amend the Rules Regulating The Fla. Bar— Advertising Issues, 571 So. 2d 451 (Fla. 1990).

2. *Id.*

3. 425 U.S. 748 (1976).

4. *Id.* at 770.

5. 433 U.S. 350 (1977).

6. The Fla. Bar: Petition to Amend the Rules Regulating The Fla. Bar—Advertising Issues, 571 So. 2d at 455.

7. 605 So. 2d 252 (Fla. 1992).

8. *Id.* at 253, 342-44.

9. *Id.* at 253-54. Other rules that were amended include: Rule 4-5.4(a) Professional Independence of a Lawyer; Rule 4-5.6 Restrictions on Right to Practice; Rule 4-7.2(n) Advertising; Rule 4-7.5 Evaluation of Advertisements; and Rule 4-7.8 Lawyer Referral Services.

10. 598 So. 2d 41 (Fla. 1992).

Delivery of Legal Services to the Indigent in Florida ("Joint Commission"), filed March 21, 1991.[11] Although the Joint Commission made thirty-one recommendations, the one controversy and subject of the supreme court's ruling was Recommendation No. 24, entitled "Voluntary Pro Bono Legal Services."[12]

After a recitation of the importance of legal representation to the citizens of our state and the role of the lawyer in a free society as a vehicle for challenge to the constitution, the court recognized that to further this end, the under represented segments of our society must not only be represented by government paid lawyers, but by private lawyers as well.[13] The court went on to approve Recommendation No. 24 with modifications as set forth in the decision.[14] While the court in an earlier decision held that every lawyer in the State of Florida has an obligation to perform pro bono services,[15] the 1992 decision reaffirmed the court's reluctance to *mandate* pro bono services.[16] Several elements of Recommendation No. 24 also directly relate to amending Rule 4-6.1 to incorporate the voluntary pro bono plan in detail.[17]

As directed by the Florida Supreme Court,[18] the Florida Bar Commission proposed pro bono rules and, in *Amendments to Rules Regulating The Florida Bar—1-3.1(a) and Rules of Judicial Administration—2.065 (Legal Aid)*,[19] the proposed rules were adopted by the supreme court, with modifications.[20] Consistent with its previous ruling, the supreme court emphasized that "the rules are aspirational rather than mandatory, and the failure to meet the aspirational standards set forth in the rules will not constitute an offense subject to discipline."[21] However, an attorney's

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11. *Id.* at 41.
12. *Id.*
13. *Id.* at 43.
14. *Id.*
15. *In re* Amendments to Rules Regulating The Fla. Bar—1-3.1(a) and Rules of Judicial Admin.—2.065 (Legal Aid), 573 So. 2d 800, 801 (Fla. 1990).
16. *In re* Amendments to Rules Regulating The Fla. Bar—1-3.1(a) and Rules of Judicial Admin.—2.065 (Legal Aid), 598 So. 2d 41, 47 (Fla. 1992). Both Chief Justice Barkett and Justice Kogan dissented with opinions favoring mandatory pro bono service. Justice Kogan's dissent is especially noteworthy for its historical perspective. *See id.* at 55 (Kogan, J., dissenting).
17. *Id.* at 47.
18. *Id.* at 44.
19. 18 Fla. L. Weekly S348 (Fla. June 23, 1993).
20. *Id.*
21. *Id.*

failure to complete the report form provided for in the Rules will constitute an offense subject to discipline.[22] As a result of this decision, Rule 4-6.1 was deleted and the new Rule 4-6.1 Pro Bono Public Service was adopted in its place.[23] This decision also amended the Comments to Rule 4-6.2 and added Rule 4-6.5 Voluntary Pro Bono Plan.[24] The reader is urged to review this historic and controversial decision in detail.

In *The Florida Bar re: Amendments to Rules Regulating The Florida Bar*,[25] The Florida Bar and sixty individual practitioners petitioned the court to amend the Rules to include provisions relating to improper discrimination.[26] The basis for the petition was the study conducted by the Florida Supreme Court Racial and Ethnic Bias Study Commission and the Florida Supreme Court Gender Bias Study Commission (together or singularly the "Bias Study Commission").[27] The Bias Study Commission found numerous problems faced by minorities and women in the legal profession.[28] Based upon these findings, The Florida Bar and the individual petitioners jointly recommended to the court an amendment to Rule 4-8.4(d) to prohibit discriminatory practices by members of the Bar.[29] In adopting the amendment to Rule 4-8.4(d), the court recognized that the proscribed conduct must be limited to the lawyers' practice of law in order to "ensure that the First Amendment rights of lawyers are not unduly burdened."[30] The amendment to Rule 4-8.4(d) takes effect January 1, 1994.

The Florida Bar also petitioned for a new rule, Rule 4-8.7, and the individual petitioners submitted for consideration a new rule, Rule 4-8.4(h), the thrust of both such proposed rules being the prohibition of discriminato-

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22. *Id.* The court stated that "accurate reporting is essential for evaluating this program and for determining what services are being provided under the program." *Id.*

23. Amendments to Rules Regulating The Fla. Bar—1-3.1(a) and Rules of Judicial Administration—2.065 (Legal Aid), 18 Fla. L. Weekly at S351-52.

24. *Id.* at S352. Rule 4-6.5 authorizes and outlines the requirements and responsibilities in connection with the development of various Pro Bono Legal Service committees under Rule 4-6.5 of the Rules Regulating The Florida Bar. *See id.*; *see also* FLA. BAR R. PROF. CONDUCT 4-6.5 (1993).

25. 18 Fla. L. Weekly S393 (Fla. July 1, 1993).

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. The Fla. Bar re: Amendments to Rules Regulating The Fla. Bar, 18 Fla. L. Weekly at S394.

ry *employment* practices by the lawyer.[31] Both proposed rules were rejected by the supreme court on several grounds, including the court's lack of jurisdiction over the subject matter of employment practices and the fact that both federal and state laws already provide for adequate protections and procedures relating to employment discrimination.[32]

In *The Florida Bar re: Amendments to Rules Regulating The Florida Bar*,[33] the supreme court adopted a new rule, Rule 3-4.8, which requires a member of The Florida Bar to respond to grievance investigations, subject to assertion by the attorney of the doctrine of privilege, immunity or disability, as applicable.[34] The supreme court also approved a new rule, Rule 3-5.1(j), known as the Disciplinary Resignation Rule, which provides that an attorney may resign from The Florida Bar in lieu of defending against allegations of disciplinary violations.[35] Further amendments to chapter 3 were made to conform the Rules to the Disciplinary Resignation Rule.[36]

In the same decision, the supreme court adopted an amendment to Rule 4-7.2 Advertising with respect to disclosures to be contained within lawyer referral service advertisements.[37] Also, Rule 4-8.4(g) was created to conform to the new Rule 3-4.8 as the former defines misconduct as a lawyer's failure to respond in writing to disciplinary proceedings.[38]

III. OVERVIEW OF CASE LAW

The following review of cases is by no means an exhaustive account of every reported case dealing with an ethical violation or with the interplay between the Rules and civil causes of action. This review is intended, however, to discuss those decisions that provide Florida lawyers with guidance as to ethical issues that commonly confront them in daily practice.

In *Pressley v. Farley*,[39] the court affirmed previous decisions that held that a violation of the Rules of Professional Conduct does not create legal

31. *Id.* at S393.
32. *Id.* at S394.
33. 621 So. 2d 1032 (Fla. 1993) [hereinafter *1993 Bar Amendments*].
34. *Id.* at 1033-34. *See* FLA. BAR R. DISC. 3-4.8 (1993).
35. *1993 Bar Amendments*, 621 So. 2d at 1036; *see* FLA. BAR R. DISC. 3-5.1(j) (1993).
36. *1993 Bar Amendments*, 621 So. 2d at 1036-43.
37. *Id.*
38. *Id.* at 1032.
39. 579 So. 2d 160 (Fla. 1st Dist. Ct. App. 1991).

duties on lawyers nor do they constitute negligence per se.[40] The court did state, however, that a violation of the Rules of Professional Conduct can be used as evidence of negligence.[41] In another case involving the interplay between professional negligence and the Rules of Professional Conduct, *The Florida Bar v. Morse*,[42] the supreme court, in affirming a referee's recommended discipline against an attorney, stated that an attorney who participates in a scheme to hide his partner's malpractice from their client is guilty of an ethical violation.[43] In addition, the opinion cautions that when an attorney discovers there has been malpractice committed, a conflict of interest arises and accordingly, the attorney must advise the client to seek other legal counsel.[44] The decision further instructs the lawyer to advise a client that malpractice has been committed by the lawyer or one within the lawyer's firm.[45]

In *The Florida Bar v. Littman*,[46] the court based its holding on a premise that is the converse of *Pressley*. In *Littman*, a disciplinary case, the supreme court reversed its long-standing line of demarcation between negligent conduct serving as the basis for a malpractice cause of action and as a basis for a disciplinary action under the Rules.[47] The supreme court questioned its previous decision of *Littman* in *The Florida Bar v. Neale*,[48] "in light of present public policy and the black letter rules adopted in 1987," and found Littman guilty of a violation of Rule 4-1.1 based upon professional negligence.[49]

In the *Littman* case, the attorney's negligence was the failure to include an affidavit in his motion to change residential custody in a domestic

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40. *Id.* at 161; Oberon Invs., N.V. v. Angel, Cohen & Rogovin, 492 So. 2d 1113, 1114 n.2 (Fla. 3d Dist. Ct. App. 1986), *quashed on other grounds*, 512 So. 2d 192 (Fla. 1987).

41. *Pressley*, 579 So. 2d at 161.

42. 587 So. 2d 1120 (Fla. 1991).

43. *Id.* at 1121.

44. *Id.*

45. *Id.*

46. 612 So. 2d 582 (Fla. 1993).

47. *Id.*

48. 384 So. 2d 1264 (Fla. 1980). In *Neale*, the court drew a line between negligence and violation of the then Code of Professional Responsibility on the basis that disciplinary action could not be used as a substitute for a malpractice action. *Id.* at 1265.

49. *Littman*, 612 So. 2d at 582 n.3. The current version of Rule 4-1.1 states:

> A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.

FLA. BAR R. PROF. CONDUCT 4-1.1 (1993).

matter.[50] The client dismissed Littman, retained the services of another attorney, and obtained temporary custody of his daughter.[51] Accordingly, the court noted that the negligent actions of Littman did not result in any real damages to his client.[52] However, in finding that Littman was guilty of violating Rule 4-1.1, and given his prior disciplinary record,[53] the court affirmed the referee's recommendation of a public reprimand.[54] This case is especially noteworthy not only for its ruling, but also for the fact that the negligence of the attorney in question was minor in nature resulting in no real damage to the client,[55] whereas, the previous *Neale* case involved an attorney whose negligent conduct resulted in irreparable damage to his client.[56] While the *Littman* case was decided under different disciplinary guidelines than *Neale*,[57] the *Littman* case is stunning, nonetheless, for its strict interpretation of Rule 4-1.1 and its willingness to impose discipline for conduct that, in a malpractice action, may not even yield the client an award for damages.[58]

In *Halberg v. W.M. Chanfrau*,[59] the court provided an interesting analysis of the application of Rule 4-1.5, the Rule relating to division of fees between lawyers of different firms.[60] The court analyzed the language of a written fee referral agreement and provided insight into the enforceability of referral agreements based upon compliance with the Rule.[61]

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50. *Littman*, 612 So. 2d at 582.

51. *Id.*

52. *Id.* at 583.

53. In a separate matter, the attorney failed to send copies of documents to opposing counsel before sending them to the trial judge and misrepresented factual matters resulting in a report of minor misconduct. *Id.* at 582 n.2.

54. *Id.* at 583.

55. *Littman*, 612 So. 2d at 583.

56. *Neale*, 384 So. 2d at 1265. In *Neale*, the attorney, Neale, misinterpreted a statute of limitations to be longer than it was, took a voluntary non-suit, and thus foreclosed his client's ability to refile the action. As referred to previously, the supreme court, however, declined to characterize this act of negligence as a disciplinary violation. *Id.*

57. The *Neale* case was decided based upon the previous Code of Professional Responsibility, disciplinary Rules 6-101(A)(2) and 6-101(A)(3), which stated, "[a] lawyer shall not: . . . (2) Handle a legal matter without preparation adequate in the circumstances. (3) Neglect a legal matter entrusted to him." *Id.* at 1264 n.1. However, it may be argued that there is little substantive distinction between the Rules under the former Code of Professional Responsibility and Rule 4-1.1, as both seek to address incompetent representation by a lawyer. *See id.*

58. *Littman*, 612 So. 2d at 583.

59. 613 So. 2d 600 (Fla. 5th Dist. Ct. App. 1993).

60. *Id.*

61. *Id.* at 602.

In *Halberg*, the referring attorney brought an action against the receiving attorney to recover fees.[62] The circuit court granted summary judgment against the referring attorney.[63] The district court reversed and remanded based upon its interpretation of Rule 4-1.5(g).[64] The subject of the case was a written agreement that gave the referring attorney twenty-five percent (25%) and the receiving attorney seventy-five percent (75%) of the fees.[65] In the lower court, the decision turned on an interpretation of this provision in light of the language of Rule 4-1.5(g)(1).[66] Even though the attorneys' written agreement did not precisely track the language of Rule 4-1.5(g)(2)(a), the court decided that the referral agreement constituted a written agreement with the client where disclosure of the division of fees was made and that the language of the agreement was sufficient to prove that the referring attorney had assumed a legal responsibility for the representation of the client.[67] Therefore, because the agreement fell within the purview of Rule 4-1.5(g)(2)(a), there was no requirement that the referring lawyer actually perform compensable legal services.[68]

In *Lee v. Florida Department of Insurance & Treasurer*,[69] the court adopted the rationale found in *Pressley* that a violation of the Rules of

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62. *Id.* at 601.

63. *Id.* at 602.

64. *Halberg*, 613 So. 2d at 602. The current Rule 4-1.5(g) states:

> Subject to the provisions of subdivision (f)(4)(D), a division of fee between lawyers who are not in the same firm may be made only if the total fee is reasonable and:
>
> (1) the division is in proportion to the services performed by each lawyer; or
>
> (2) by written agreement with the client:
>
> (A) each lawyer assumes joint legal responsibility for the representation and agrees to be available for consultation with the client; and
>
> (B) the agreement fully discloses that a division of fees will be made and the basis upon which the division of fees will be made.

FLA. BAR R. PROF. CONDUCT 4-1.5 (1993).

65. *Halberg*, 613 So. 2d at 601.

66. The controversial language in the agreement was as follows: "Provided, however, that said fees '*may*' be readjusted between CHANFRAU & CHANFRAU and REFERRING ATTORNEY based upon the extent of time and services rendered or to be rendered to said client; . . ." *Id.* (emphasis added). The lower court interpreted the word "may" to mean "shall" and therefore concluded that the fee agreement was not enforceable because the evidence failed to establish that the referring attorney rendered any service to the client. *Id.* at 601-02.

67. *Id.*

68. *Id.*

69. 586 So. 2d 1185 (Fla. 1st Dist. Ct. App. 1991).

Professional Conduct does not create any civil cause of action.[70] In *Lee*, an appeal from an administrative order, the court disqualified an attorney representing the Florida Department of Insurance and Treasurer. This disqualification was based upon an agreement signed by the attorney's former law firm that set forth that the firm could not represent the Department of Insurance against the petitioner, Lee.[71]

The Department of Insurance argued that the restricting agreement was against public policy.[72] The hearing officer in the administrative proceeding cited Rule 4-5.6 in support of the decision to deny the motion to disqualify counsel. The court stated that neither Rule 4-5.6[73] nor any other Rule could be used as a basis for invalidating a private contractual provision.[74] The court determined that the ethical issue was whether the attorney, who was a former associate of the law firm restricted in its representation of the Department of Insurance, could ethically (and legally) represent the Department in light of the presumptively valid agreement which prevented the law firm from disclosing any confidences it had learned from its client.[75] This issue and its related concern is expressly recognized and supported by the Rules.[76]

In rendering its decision, the court moved the focus of its rationale from Rule 4-5.6 to Rules 4-1.7, 4-1.9 and 4-1.10, all of which deal with client confidences and the obligations regarding such being imputed to any employee of a law firm.[77] Accordingly, the court enforced the terms of the agreement based upon the clear intent of such agreement to prevent the use or disclosure of confidential information gained during the lawyer's previous employment.[78]

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70. *Id.* at 1188.
71. *Id.* at 1187.
72. *Id.*
73. Presently, Rule 4-5.6 states:

A lawyer shall not participate in offering or making:

(a) a partnership or employment agreement that restricts the rights of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement; or

(b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a controversy between private parties.

FLA. BAR R. PROF. CONDUCT 4-5.6 (1993).
74. *Lee*, 586 So. 2d at 1188.
75. *Id.*
76. *Id.* at 1189 nn.4-5 (citing FLA. BAR R. PROF. CONDUCT 4-1.6, 4-1.9 (1990)).
77. *Id.* at 1188-90.
78. *Id.* at 1190.

In *Dean v. Dean*,[79] the issue turned on whether an attorney-client relationship was established to permit the attorney to invoke the privilege provided by section 90.502 of the Florida Statutes.[80] Recognizing that both section 90.502 and Rule 4-1.6 codify the common law rule of privilege, the court also considered Rule 4-1.6 in its ruling.[81] Finding that an attorney-client relationship had been established, the court recited a historical review of the doctrine of privilege and the cases dealing with same.[82] The court concluded that, notwithstanding that a fee was not paid

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79. 607 So. 2d 494 (Fla. 4th Dist. Ct. App. 1992).

80. *Id.* at 497. See also section 90.502 of the Florida Statutes, which currently provides in pertinent part:

> (1) For purposes of this section:
>
> (a) A "lawyer" is a person authorized, or reasonably believed by the client to be authorized, to practice law in any state or nation.
>
> (b) A "client" is any person, public officer, corporation, association, or other organization or entity, either public or private, who consults a lawyer with the purpose of obtaining legal services or who is rendered legal services by a lawyer.
>
> (c) A "communication" between a lawyer and client is "confidential" if it is not intended to be disclosed to a third person other than:
>
> 1. Those to whom disclosure is in furtherance of the rendition of legal services to the client.
>
> 2. Those reasonably necessary for the transmission of the communication.

FLA. STAT. § 90.502 (1991).

81. *Dean*, 607 So. 2d at 497 n.4. Rule 4-1.6 now sets forth in pertinent part:

> (a) A lawyer shall not reveal information relating to representation of a client except as stated in subdivisions (b), (c), and (d), unless the client consents after disclosure to the client.
>
> (b) A lawyer shall reveal such information to the extent the lawyer believes necessary:
>
> (1) to prevent a client from committing a crime; or
>
> (2) to prevent a death or substantial bodily harm to another.
>
> (c) A lawyer may reveal such information to the extent the lawyer believes necessary:
>
> (1) to serve the client's interest unless it is information the client specifically requires not to be disclosed;
>
> (2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and client;
>
> (3) to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved;
>
> (4) to respond to allegations in any proceeding concerning the lawyer's representation of the client; or
>
> (5) to comply with the Rules of Professional Conduct.

FLA. BAR R. PROF. CONDUCT 4-1.6 (1993).

82. *Dean*, 607 So. 2d at 496-99.

and that the attorney in question did not use normal procedures in opening a client file, an attorney-client relationship had been established.[83] The existence of this relationship was based upon the evidence that the client sought out the attorney for legal advice and that the legal advice was sufficient to establish the relationship, regardless of whether there was a controversy or court proceeding.[84]

While most practitioners would not countenance an uncooperative nature in responding to a grievance complaint, at least one attorney in 1992 did so and was disciplined as a result. In *The Florida Bar v. Vaughn*,[85] Vaughn petitioned for a review of a referee's finding of guilt and sanctions against him.[86] It is interesting to note that the referee recommended that the attorney be found not guilty as to alleged violations of three substantive Rule violations, which were the initial subject of the disciplinary proceedings.[87] However, because of the attorney's lack of cooperation in the disciplinary proceedings, the referee found Vaughn guilty of a violation of Rule 4-8.1(b).[88] Vaughn argued that unless the referee found him guilty of the substantive Rule violations, the Bar could not issue sanctions against him because of his failure to cooperate.[89] Vaughn's failure to cooperate included failing to respond to the Bar's request to reply to the complaint, failing to appear at a hearing, failing to communicate with the Bar that he was involved in a criminal trial during the grievance hearing, and failing to appear in person for the Referee Trial.[90]

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83. *Id.*

84. *Id.* at 499-500.

85. 608 So. 2d 18 (Fla. 1992).

86. *Id.* at 18.

87. *Id.* at 19.

88. *Id.* Currently, Rule 4-8.1 states in pertinent part:

> An applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not:
>
> . . . .
>
> (b) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this rule does not require disclosure of information otherwise protected by Rule 4-1.6.

FLA. BAR R. PROF. CONDUCT 4-8.1 (1993).

89. *Vaughn*, 608 So. 2d at 19.

90. *Id.* at 20. However, Vaughn did attend the hearing by telephone after he was contacted by the referee. *Id.*

The *Vaughn* case was one of first impression as the court itself acknowledged.[91] The court held that, based upon the evidence of a continuing pattern of not cooperating or participating in the disciplinary proceedings, Vaughn was guilty of a violation of Rule 4-8.1(b).[92] The court did go on to note that the obligation to cooperate is subject to the guarantees of the Fifth Amendment of the United States Constitution, but if an attorney was going to use the Fifth Amendment as a reason for non-cooperation, then the attorney should do so by way of a response to the Bar's inquiries.[93] In expressing the opinion that an attorney has a "professional duty to respond courteously and to cooperate with a bar disciplinary proceeding," the court supports the position that the integrity of the disciplinary proceedings mandates cooperation by the professional, which in turn furthers the public's confidence in the self-regulation of the profession.[94] The court did, however, reduce the discipline recommended by the referee from a suspension to a public reprimand.[95]

Of course, Vaughn would have been cited for a violation of the new Rule 4-8.4(g) had the case been decided after the adoption of the new Rule on July 1, 1993. The adoption of the new Rule makes it unequivocal that failure to cooperate in disciplinary proceedings is a violation of the Rules.[96]

There is perhaps no more fertile ground for ethical violations than the conflict-of-interest Rules.[97] The temptation of representing more than one client in a transaction or more than one party in litigation is ever present for many practitioners and, then again, some practitioners are "knee-deep" in a conflict before it becomes apparent. The number of reported cases involving conflict issues bears out the fact that these issues are some of the most frequently litigated. These cases often deal with motions to disqualify opposing counsel, and may not invoke the Rules in the decision.[98]

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91. *Id.*

92. *Id.* at 21; *see also* FLA. BAR R. PROF. CONDUCT 4-8.1(b) (1993).

93. *Vaughn*, 608 So. 2d at 20.

94. *Id.* at 21.

95. *Id.*

96. *See* FLA. BAR R. PROF. CONDUCT 4-8.4(g) (1993).

97. *Id.* 4-1.7 to 4-1.10 (1993).

98. *See, e.g.*, Spinelli v. Rodes-Roper-Love Ins. Agency, Inc., 613 So. 2d 504 (Fla. 5th Dist. Ct. App. 1993) (deciding that the law firm that caused the conflict resulting in its disqualification would not charge a former client for contesting such disqualification because the law firm itself caused the conflict by hiring a lawyer who had previously worked on the case for the opposing party); Bartholomew v. Bartholomew, 611 So. 2d 85 (Fla. 2d Dist. Ct. App. 1992) (focusing on the issue of when an attorney-client relationship is established for purposes of disqualification); General Elec. Real Estate Corp. v. S.A. Weisberg, Inc., 605 So.

However, in another case involving a motion to disqualify a law firm, *Birdsall v. Crowngap, Ltd.*,[99] the court invoked Rule 4-1.10(b)[100] in its decision, quashing the trial court's order, which denied the petitioner's Motion to Disqualify the respondent's law firm.[101] The rationale of *Pressley v. Farley* is present in *Birdsall*, as the Rules were referred to for their guidance in the court's decision involving a civil action motion to disqualify an attorney.[102] The *Birdsall* case is also interesting to note because the disqualified attorney was in fact isolated from his new law firm's representation of the party opposing his previous client.[103] The court analyzed the "wall of isolation," also known as the "Chinese wall," exception contained in Rule 4-1.11(a),[104] which deals with government attorneys, and the justification for the distinction between Rule 4-1.11(a) and Rule 4-1.10(b).[105] The court, in following previous decisions, rejected the theory that the "Chinese wall" employed by the law firm in isolating the attorney from the action was adequate to prevent the disqualification.[106]

2d 955 (Fla. 4th Dist. Ct. App. 1992) (deciding that an attorney cannot be disqualified based merely on an opponent's subjective thoughts that the attorney's firm had been representing him).

99. 575 So. 2d 231 (Fla. 4th Dist. Ct. App. 1991).

100. Rule 4-1.10 currently provides:

> When a lawyer becomes associated with a firm, the firm may not knowingly represent a person in the same or a substantially related matter in which that lawyer, or a firm with which the lawyer was associated, had previously represented a client whose interests are materially adverse to that person and about whom the lawyer had acquired information protected by Rules 4-1.6 and 4-1.9(b) that is material to the matter.

FLA. BAR R. PROF. CONDUCT 4-1.10 (1993).

101. *Birdsall*, 575 So. 2d at 232.

102. *Id.*; *see* Pressley v. Farley, 579 So. 2d 160 (Fla. 1st Dist Ct. App. 1991).

103. *Birdsall*, 575 So. 2d at 232.

104. Rule 4-1.11 presently states:

> A lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency consents after consultation. No lawyer in a firm with which that lawyer is associated may knowingly undertake or continue to represent in such a matter unless:
>
> (1) the disqualified lawyer is screened from participation in the matter and is directly apportioned no part of the fee therefrom; and
>
> (2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this Rule.

FLA. BAR R. PROF. CONDUCT 4-1.11(a) (1993).

105. *Birdsall*, 575 So. 2d at 232.

106. *Id.*

The decision is also consistent with the comment to Rule 4-1.10, which indicates that application of the Rule must be based on a "functional analysis" involving issues of confidentiality and adverse positions.[107]

Another case in which the court analyzed whether a law firm acquired confidential information from a new attorney who represented an opposing party in the same case is *Nissan Motor Corp. v. Orozco*.[108] In *Nissan*, the appellate court denied the defendant's petition for certiorari and, in so doing, deferred to the circuit court's factual determination that the lawyer's firm did not acquire confidential information from his former law firm's client that would in turn be imputed to the balance of the lawyer's new firm.[109] After a careful analysis of the distinctions between Rule 4-1.9[110] and Rule 4-1.10,[111] the court concluded that the irrebuttable presumption that confidences are disclosed to an attorney during the course of the attorney-client relationship is applicable only to Rule 4-1.9 and is not applicable to Rule 4-1.10, which deals with imputed disqualification.[112] The analysis in *Nissan* is consistent with both *Birdsall* and the comment to Rule 4-1.10.[113]

In *The Florida Bar re Advisory Opinion—Nonlawyer Preparation of Living Trusts*,[114] the Florida Supreme Court addressed an unauthorized practice of law issue involving corporations and non-lawyers who draft

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107. FLA. BAR R. PROF. CONDUCT 4-1.10 cmt. (1993).

108. 595 So. 2d 240 (Fla. 4th Dist. Ct. App.), *review denied*, 605 So. 2d 1265 (Fla. 1992).

109. *Id.* at 241.

110. Rule 4-1.9 now provides:

> A lawyer who has formerly represented a client in a matter shall not thereafter:
>
> (a) represent another person in the same or substantially related matter in which that person's interest are materially adverse to the interests of the former client unless the former client consents after consultation; or
>
> (b) use information relating to the representation to the disadvantage of the former client except as Rule 4-1.6 would permit with respect to a client or when information has become generally known.

FLA. BAR R. PROF. CONDUCT 4-1.9 (1993).

111. In its present form, Rule 4-1.10 discusses the following topics: (a) "Imputed Disqualification of All Lawyers in Firm;" (b) "Former Clients of Newly Associated Lawyer;" (c) "Representing Interests Adverse to Clients of Formerly Associated Lawyer;" and (d) "Waiver of Conflict." FLA. BAR R. PROF. CONDUCT 4-1.10 (1993).

112. *Nissan Motor Corp.*, 595 So. 2d at 242.

113. The comment recognizes and dismisses a per se rule of disqualification of a law firm in the instances when lawyers move between firms, recognizing that the court must analyze the issues of imputed disqualification based upon the facts of each case. FLA. BAR R. PROF. CONDUCT 4-1.10 cmt. (1993)

114. 613 So. 2d 426 (Fla. 1992).

living trusts. The court recognized that a lawyer who works for the corporation selling the living trusts may have an inherent conflict of interest based on Rule 4-1.7(b) and Rule 4-1.8(f).[115] Accordingly, the court admonished that any lawyer who reviews, oversees the execution of, and funds a living trust document should be independent counsel paid by the client for whom the trust is prepared and not employed by the corporation seeking to sell the living trusts.[116]

In *The Florida Bar v. Kramer*,[117] The Florida Bar brought a disciplinary proceeding against an attorney who had loaned his client money to conclude a purchase at a foreclosure sale.[118] Rather than securing the loan with a note and mortgage on the property, the attorney had the client execute a deed. The attorney failed to advise the client of the nature of the transaction, the client possessed only a limited reading ability and, further, the client thought that he was giving his attorney a mortgage, not a deed. The court held that the attorney had violated Rules 4-1.7(b), 4-1.7(c) and 4-1.8(a) and issued a public reprimand.[119] *Kramer* is important for its lesson to practitioners that any business dealing between a lawyer and the lawyer's client is inherently subject to conflict-of-interest problems, notwithstanding the integrity and best intentions of the lawyer in dealing with the client.[120] A lawyer must be extraordinarily cautious in dealing with a client in such circumstances.

Perhaps the most telling example of a strict interpretation of the Rules is found in *The Florida Bar v. Belleville*.[121] In this case, Belleville was the only attorney in a business transaction between his client and another individual, Mr. Cowan, who was an elderly man with little education. Belleville's client retained him to close on an agreement for the purchase of property owned by Mr. Cowan. It was undisputed that the terms of the

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115. *Id.* at 428. The current version of Rule 4-1.7 proscribes the duty of lawyers to avoid limitations on their independent professional judgment. FLA. BAR R. PROF. CONDUCT 4-1.7(b) (1993). Rule 4-1.8 dictates the conditions under which a lawyer is permitted to accept compensation for one other than the client. *Id.* 4-1.8(f).

116. *The Fla. Bar re Advisory Opinion---Nonlawyer Preparation of Living Trusts*, 613 So. 2d at 428; *see also* Jenkins v. Harris Ins., Inc., 572 So. 2d 1011 (Fla. 1st Dist. Ct. App. 1991) (providing a basic analysis of Rule 4-1.9, the former client conflict of interest rule).

117. 593 So. 2d 1040 (Fla. 1992). *Kramer* provides illustrations of the results of a practitioner's entering into a business agreement with a client and the potential conflict of interest such an agreement produces.

118. *Id.* at 1040.

119. *Id.* at 1042.

120. *Id.* at 1041.

121. 591 So. 2d 170 (Fla. 1991).

agreement overwhelmingly favored Belleville's client. The documents prepared by Belleville provided for the sale of Mr. Cowan's residence, notwithstanding the fact that both Belleville's client and Mr. Cowan had negotiated only for the sale of an apartment building.[122]

Belleville is interesting because the trial court was undecided as to whether Belleville knowingly participated in the egregious actions of his client or merely followed his client's instructions without question.[123] Belleville drafted the documents and included Mr. Cowan's residence in the sale. The promissory note for payment received by Mr. Cowan of the purchase price was unsecured by a mortgage. The note also contained other favorable terms for Belleville's client. Furthermore, the facts substantiated that the significance of the documents were not explained to Cowan and that Belleville did not attend the closing, having sent a paralegal in his place. Subsequent to the closing, Belleville's client attempted to evict Mr. Cowan from his home.[124]

In the disciplinary proceedings, the referee recommended no discipline because Belleville was not the attorney for Mr. Cowan.[125] The Board of Governors of The Florida Bar appealed the decision of the referee.[126] In finding Belleville guilty of an ethical violation, the court made several analyses that should bode as a warning to all practitioners.[127] The court found that Belleville should have been suspicious about the documents because they were so one-sided and held that when an attorney is the only attorney in a transaction, the attorney must explain that he is representing the other party and must further explain the material terms of the documents that the attorney has drafted.[128] Specifically, the court stated that "[w]hen the transaction is as one-sided as that of the present case, counsel preparing the documents is under an ethical duty to make sure that an unrepresented party understands the possible detrimental effect of the transaction and the fact that the attorney's loyalty lies with the client alone."[129] The court concluded that Belleville's violations were especially serious in light of the

122. *Id.* at 171.
123. *Id.*
124. *Id.*
125. *Id.*
126. *Belleville*, 591 So. 2d at 171.
127. *Id.* at 172.
128. *Id.*
129. *Id.*

fact that he had previously been disciplined for an ethical violation and therefore the court suspended Belleville for thirty days.[130]

Practitioners may draw some small comfort in the footnote to *Belleville* that the court is limiting its decision to the facts of the case and does not intend to require an attorney who prepares closing documents to be present to explain documents to the parties.[131] In *Belleville*, because the documents were so favorable to the attorney's client, the court believed it necessary for the attorney to explain the legal ramifications of the documents.[132] However, *Belleville* offers little guidance to the sole practitioner in a transaction who, in explaining the "possible detrimental effect of the transaction" to the unrepresented party, may in fact be violating the attorney's duty of loyalty to his own client. At the very least, the *Belleville* case once again illustrates how imperative it is for the attorney to obtain a written acknowledgment by the unrepresented party that the attorney is only representing the attorney's own client and that the unrepresented party has the right to seek independent legal counsel.[133]

The foregoing overview of the cases since 1991 is not intended to be an exhaustive review of each and every case involving a violation of the Rules. Unfortunately, the published cases involving discipline of Florida practitioners are far too numerous. The reader is urged to periodically review the Rules and their comments and the practitioner is cautioned that when in doubt about one's own actions, guidance may further be delivered by The Florida Bar's Professional Ethics Committee and its capable counsel.

130. *Id.*
131. *Belleville*, 591 So. 2d at 172 n.2.
132. *Id.* at 172.
133. *See id.*