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Professional Responsibility

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Professional Responsibility Law in Florida: The Year in Review, 1995

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I. INTRODUCTION

The past year[1] saw a number of interesting and innovative developments in Florida's professional responsibility jurisprudence. This article reviews significant Florida court decisions, ethics rules, and advisory ethics opinions handed down during the year that are likely to affect Florida lawyers as they attempt to represent their clients zealously while complying with the letter, if not always the spirit, of the *Florida Rules of Professional Conduct* ("RPC").[2]

Today's lawyer may act in many different capacities, at times assuming the role of advocate, advisor, counselor, fiduciary, intermediary, businessperson, or marketer. The lawyer must adhere to a host of sometimes-

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1. This article surveys professional responsibility developments in Florida from July 15, 1994, through July 14, 1995.

2. The RPC are found in Chapter 4, *Rules Regulating The Florida Bar.* Although the bulk of this article focuses on decisions concerning the RPC, it does mention an important addition to Chapter 3, "Rules of Discipline," in the *Rules Regulating The Florida Bar. See infra* notes 196-98 and accompanying text.

overlapping ethical obligations while operating within the framework of these varied relationships. Using a functional approach, this article analyzes effects that the cited authorities may have upon a lawyer's ethical duties in several key relationships. After this introduction, Part II begins by looking at some professional responsibility developments that can affect the lawyer-client relationship. Specific areas reviewed include client identity, communication with clients, business transactions with clients, and fees. Next, Part III focuses on a lawyer's role as an officer of the justice system and his or her relationships with, and duties to, that system. Part IV then examines ethical duties attendant to a lawyer's relationships with various third parties: prospective clients; opponents; other lawyers; and partners, employers, and employees. Finally, Part V covers developments relevant to the lawyer's relationship with the Supreme Court of Florida, The Florida Bar, and Florida's lawyer disciplinary system, and reviews some significant disciplinary cases handed down in the past year.[3]

II. PROFESSIONAL RESPONSIBILITY AND THE LAWYER-CLIENT RELATIONSHIP

Most observers would agree that, of the many professional relationships in which a lawyer may be engaged, the relationship between client and lawyer remains paramount. In 1995 a number of cases, rules, and ethics opinions addressed aspects of this most important relationship. Before a lawyer can determine the substantive duties owed to a client by virtue of the lawyer-client relationship, the lawyer must first be certain that he or she has accurately identified the client. While one might assume that it is unnecessary to even address this basic point, a surprising number of callers to the Florida Bar's "ethics hotline"[4] present scenarios that boil down to this essential question: "Who is my client?" Echoing this theme, several 1995 court decisions revolved around client identity issues.

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3. Key disciplinary cases are analyzed where appropriate in other sections of the article, but the remainder are collected in Part V for the convenience of the reader.

4. Since 1985, the Ethics Department of the Florida Bar has operated a toll-free telephone "hotline" for bar members. A Florida lawyer may call the Bar's Tallahassee office at 1-800-235-8619 and obtain an informal oral advisory opinion concerning the calling lawyer's own contemplated conduct. In 1995, Ethics Department lawyers answered about 17,000 calls. Timothy P. Chinaris (1995) (unpublished statistics on file with author, Tallahassee, Florida). Rules governing the advisory opinion process are found in *Florida Bar Procedures for Ruling on Questions of Ethics*, FLA. B.J., Sept. 1994, at 652-53. During his tenure with the Bar, the author has talked to hundreds of lawyers facing client identity dilemmas.

Brennan v. Ruffner[5] concerned a legal malpractice suit brought by Dr. Brennan, a disgruntled minority shareholder of a closely held corporation, against lawyer Ruffner. Brennan had practiced in a three-doctor medical group operated as a professional service corporation. Ruffner had prepared the shareholder's agreement. Several years later, Brennan was ousted from the corporation by the other two shareholders. In suing the others for breach of contract and fraud, Brennan alleged that he had not been represented by counsel in negotiating the shareholder's agreement. After settling that suit, however, Brennan then sued Ruffner for legal malpractice, alleging that Ruffner had represented both him individually and the corporation.

Ruffner defended by denying the existence of a lawyer-client relationship with Brennan.[6] The undisputed facts showed that Ruffner had represented the corporation and that there had been no privity of contract between Brennan and Ruffner.[7] Nevertheless, Brennan argued that Ruffner owed a duty to him as a shareholder by virtue of Ruffner's representation of the closely held corporation. Rejecting this contention, the court stated:

> [W]e hold that where an attorney represents a closely held corporation, the attorney is not in privity with and therefore owes no separate duty of diligence and care to an individual shareholder absent special circumstances or an agreement to also represent the shareholder individually. . . . [A]n attorney representing a corporation does not become the attorney for the individual stockholders merely because the attorney's actions on behalf of the corporation may also benefit the stockholders.[8]

It may be noted that, although RPC 4-1.13(a)[9] expresses the client

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5. 640 So. 2d 143 (Fla. 4th Dist. Ct. App. 1994).

6. The three elements to a legal malpractice action in Florida are: the lawyer's employment; the lawyer's neglect of a reasonable duty; and that the lawyer's breach of that duty was the proximate cause of damages suffered by the plaintiff. Riccio v. Stein, 559 So. 2d 1207 (Fla. 3d Dist. Ct. App.), *review dismissed*, 567 So. 2d 436 (Fla. 1990).

7. *Brennan*, 640 So. 2d at 145.

8. *Id.* at 145-46.

9. RPC 4-1.13, "Organization as Client," provides in pertinent part:

> (a) Representation of Organization. A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.
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> . . . .
>
> (d) Identification of Client. In dealing with an organization's directors, officers, employees, members, shareholders, or other constituents, a lawyer shall

identity principle actually applied in the case, the court did not cite this rule in reaching its decision. Under RPC 4-1.13(a), the client of a lawyer who represents an organization is deemed to be the entity rather than the entity's individual constituents (e.g., officers, directors, shareholders).

Client identity was also determinative in the disciplinary case of *Florida Bar v. Nesmith*.[10] In *Nesmith*, a lawyer borrowed money from the owner of a corporation that the lawyer was representing. The lawyer did not comply with the provisions of RPC 4-1.8(a),[11] which govern lawyer-client business transactions. The supreme court, however, found the lawyer not guilty of unethical conduct because the loan was entered into by the owner in his individual capacity.[12] Without citing RPC 4-1.13, the court appeared to strictly apply the rule's basic principle (i.e., that the lawyer represents the entity rather than its individual constituents). Some courts in other jurisdictions have been reluctant to automatically apply the general rule of RPC 4-1.13(a) in representations involving closely held corporations.[13]

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explain the identity of the client when it is apparent that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(e) Representing Directors, Officers, Employees, Members, Shareholders, or Other Constituents of Organization. A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders, or other constituents, subject to the provisions of rule 4-1.7. If the organization's consent to the dual representation is required by rule 4-1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

R. REGULATING FLA. BAR 4-1.13.

10. 642 So. 2d 1357 (Fla. 1994).

11. Subdivision (a) of RPC 4-1.8, "Conflict of Interest; Prohibited Transactions," provides:

(a) Business Transactions With or Acquiring Interest Adverse to Client. A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client, except a lien granted by law to secure a lawyer's fee or expenses, unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner that can be reasonably understood by the client;

(2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and

(3) the client consents in writing thereto.

R. REGULATING FLA. BAR 4-1.8(a).

12. *Nesmith*, 642 So. 2d at 1359.

13. *See, e.g.*, Rosman v. Shapiro, 653 F. Supp. 1441, 1445 (S.D.N.Y. 1987); *In re* Brownstein, 602 P.2d 655, 657 (Or. 1979); *In re* Banks, 584 P.2d 284, 289-90 (Or. 1978);

These courts instead have examined the underlying circumstances, including the reasonable expectations of the entity's constituents regarding the existence of a lawyer-client relationship. In *Nesmith*, the Supreme Court of Florida did not adopt this more expansive approach to client identity in representations involving closely held corporations.

RPC 4-1.13(a) was directly addressed and applied, however, by the United States District Court for the Middle District of Florida in *Hilton v. Barnett Banks, Inc.*[14] In *Hilton*, a Florida law firm represented one Barnett entity ("Barnett Pinellas") in one matter, then sued the Barnett holding company (Barnett Pinellas' parent) and some of the holding company's other subsidiaries in an unrelated matter. Responding to a motion to disqualify, the firm asserted that, under RPC 4-1.13, the defendants were not its "clients." The court agreed with the firm's RPC 4-1.13 analysis, but disqualified the firm due to conflict of interest reasons because the firm's pleadings sought relief against the holding company's affiliated banks and other subsidiaries (which, of course, included Barnett Pinellas).[15]

After identifying one's client, a lawyer must be mindful that it is the client, rather than the lawyer, who sets the ultimate objectives of the representation. The disciplinary case of *Florida Bar v. Glant*[16] underscored this precept, which is codified in RPC 4-1.2(a).[17] In *Glant*, the supreme court reprimanded a lawyer who, without the client's authority or knowledge, filed a motion requesting that the client be given custody of four children when the client wanted custody of only two of the children, and wrote to a state agency and the governor requesting that the case be investigated.[18]

Margulies v. Upchurch, 696 P.2d 1195, 1200-01 (Utah 1985).

14. No. 94-1036CIV-T24(A), 1994 WL 776971, (M.D. Fla. Dec. 30, 1994).

15. *Id.* at *3-4.

16. 645 So. 2d 962 (Fla. 1994).

17. Subdivision (a) of RPC 4-1.2, "Scope of Representation," provides:

> (a) Lawyer to Abide by Client's Decisions. A lawyer shall abide by a client's decisions concerning the objectives of representation, subject to subdivisions (c), (d), and (e), and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision whether to make or accept an offer of settlement of a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial, and whether the client will testify.

R. REGULATING FLA. BAR 4-1.2(a).

18. *Glant*, 645 So. 2d at 965.

Communication is a primary aspect of the lawyer-client relationship, as recognized in RPC 4-1.4.[19] The crucial importance of unfettered lawyer-client communication, however, was not properly acknowledged by the court in *Taylor v. Searcy, Denney, Scarola, Barnhart & Shipley, P.A.*[20] In *Searcy*, a lawyer left a law firm, and some clients who had substantial contingent fee cases wished to follow him. The lawyer and the firm wrestled over several attractive cases, and a trial court granted the firm's motion to enjoin the lawyer from "communicating with persons alleged to be clients of the firm."[21] After the lawyer engaged in some prohibited communication, the trial court found him guilty of civil contempt and fined him $1,700,000 for violating the injunction.[22]

The Fourth District Court of Appeal reversed and remanded, setting aside the finding of contempt and the fine on a procedural ground.[23] The court went on to emphasize that the $1,700,000 fine was excessive. Citing to two disciplinary cases,[24] the majority viewed the large fine as a penalty that could preclude the client from effectively exercising her right to choose her own counsel.[25] Such a penalty would clearly violate public policy in Florida.[26] Senior Judge Mager, concurring in part and dissenting in part, was quite disturbed that the majority failed to decide the case based on the injunction's detrimental impact on "the fundamental first amendment right of an individual to *communicate* with the attorney of that individual's choice, whether it be for the purposes of retention, continued representation,

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19. RPC 4-1.4, "Communication," provides:

(a) Informing Client of Status of Representation. A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

(b) Duty to Explain Matters to Client. A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

R. REGULATING FLA. BAR 4-1.4.

20. 651 So. 2d 97 (Fla. 4th Dist. Ct. App. 1994).

21. *Id.* at 100.

22. *Id.* at 98.

23. *Id.* at 99. The appeals court noted that the contempt hearing had been held after a motion to substitute the lawyer for the firm in the case had been granted. Consequently, at that point "the injunction was no longer effective and thus the purpose of the motion could only have been punitive . . . ." *Id.* at 98. The trial court therefore should have treated the matter as one of indirect criminal contempt, rather than civil contempt.

24. Florida Bar v. Hollander, 607 So. 2d 412 (Fla. 1992); Florida Bar v. Doe, 550 So. 2d 1111 (Fla. 1989).

25. *Searcy*, 651 So. 2d at 99.

26. *Id.*

or termination."[27] He insisted that an injunction purporting to bar communications of the type at issue in the case was simply beyond the power and authority of the court.[28]

In 1995, the Florida Bar Professional Ethics Committee also ventured into the area of lawyer-client communication in the context of lawyers leaving firms. At issue in Florida Ethics Opinion 93-4[29] was the ethical propriety of an employment agreement between a law firm and one of its associates. The employment agreement prohibited the departing associate from "seeking, directly or indirectly, any of the [firm]'s clients." The committee decided, and the Bar's Board of Governors agreed, that this prohibition on "indirect" solicitation would be unethical if it could be read to limit a lawyer's duty, imposed by RPC 4-1.4,[30] to notify clients of the lawyer's departure from the firm.[31]

The client-lawyer relationship is a fiduciary one of trust and confidence, and for this reason lawyers must follow special rules when they undertake to transact business with their clients. The ethical standards applicable in this area are set forth in RPC 4-1.8(a).[32] In *Florida Bar v. Reed*,[33] the supreme court reprimanded a lawyer who became embroiled in a real estate transaction gone awry and did not follow RPC 4-1.8(a). The lawyer acted as the buyers' lawyer and realtor, represented the sellers to a limited extent, acted as closing agent, and served as escrow agent. Problems arose, including bounced checks and trust accounting problems. The court imposed a six-month suspension, frowning on the lawyer's multiple representation and failure to follow the business transaction rule.[34]

Even absent evidence of client harm, failure to follow RPC 4-1.8(a) when transacting business dealings with clients can result in discipline. In

27. *Searcy*, 651 So. 2d at 103 (Mager, S.J., concurring in part and dissenting in part).

28. *Id.* at 106.

29. FLA. B. NEWS, Mar. 1, 1995, at 21. *See infra* notes 131-34 and accompanying text.

30. *See supra* note 19.

31. FLA. B. NEWS, Mar. 1, 1995, at 21.

32. *See supra* note 11. Florida case law also imposes requirements upon lawyer-client business transactions. *See, e.g.*, Jordan v. Growney, 416 So. 2d 24, 25 (Fla. 4th Dist. Ct. App. 1982) (noting that "an attorney who self-deals with a client must demonstrate that the transaction was as beneficial to the client as if conducted at arm's length between strangers"); Abstract & Title Corp. of Fla. v. Cochran, 414 So. 2d 284, 285 (Fla. 4th Dist. Ct. App. 1982) (noting that, when challenged, the burden is on the lawyer to show, by clear and convincing evidence, the fairness of the transaction).

33. 644 So. 2d 1355 (Fla. 1994).

34. *Id.* at 1358.

Florida Bar v. Rue,[35] a lawyer was found guilty of selling automobiles to clients without the written disclosures and consents required by the rule.[36]

A related issue concerns a lawyer's provision of financial assistance to clients during the course of representation. Traditionally, the rules of ethics, as well as the legal doctrines of champerty and maintenance, have permitted lawyers to assist clients financially only by advancing costs or expenses of the litigation itself; payment of, or even advancement of, non-litigation expenses has been strictly prohibited. This standard is expressed today in RPC 4-1.8(e).[37] The supreme court, however, in the disciplinary case of *Florida Bar v. Taylor*,[38] appears to have carved out a limited "humanitarian" exception to this time-honored prohibition. In this case, the lawyer and his firm provided an apparently needy client with some used clothing and a $200 check, drawn on the firm's account, for basic necessities. The referee[39] assigned to the disciplinary case found the lawyer not guilty of violating RPC 4-1.8(e), and the supreme court accepted this finding.[40] The court emphasized that this financial assistance was "essentially an act of humanitarianism," was not given to induce the client to hire the lawyer or continue the representation, and that there was no "expectation of repayment" on the part of the lawyer.[41]

Although the court was placed in a very difficult position because of the facts involved, *Taylor* seems to be based on unrealistic assumptions and presents a strained application of the ethics rules. First, once a humanitarianism exception to RPC 4-1.8(e) has been recognized, it will inexorably expand. If $200 was a permissible gift, how about $500, or $1000? Furthermore, the *Taylor* court stressed that the gifts in question were not

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35. 643 So. 2d 1080 (Fla. 1994).

36. *Id.* at 1081-82.

37. Subdivision (e) of RPC 4-1.8, "Conflict of Interest; Prohibited Transactions," provides:

> (e) Financial Assistance to Client. A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:
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> (1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and
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> (2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

R. REGULATING FLA. BAR 4-1.8(e).

38. 648 So. 2d 1190 (Fla. 1994).

39. The Supreme Court of Florida appoints a county or circuit judge to sit as "referee" in the trial of disciplinary cases. R. REGULATING FLA. BAR 3-7.6(a).

40. *Taylor*, 648 So. 2d at 1191-92.

41. *Id.* at 1192.

made for the purpose of establishing or maintaining the lawyer's employment.[42] Perhaps that was true for the initial payment, but human nature teaches that a client who has received one such gift may expect more. At the very least, the recipient is likely to tell others of her good fortune and thus create expectations in the minds of those potential clients—expectations that, to those persons, may act as an inducement to hire that lawyer. Finally, there is no basis in RPC 4-1.8(e) for carving out a "humanitarian" exception. A more forthright, and easier approach to apply would be to change the rule to spell out the precise boundaries of the exception. Overlooking the plain language of the rule merely breeds disrespect for this and other rules.

While the court did not apply RPC 4-1.8(e) to bar the gift in *Taylor*, it is clear that *advances* of living expenses are still considered unethical. In *Florida Bar v. Rue*,[43] a lawyer received a ninety-one day suspension for this and other misconduct.[44]

In the lawyer-client relationship, few areas are of greater interest to both sides than the matter of fees. The supreme court resolved a conflict among district courts of appeal by announcing the proper standard to be used for determining the quantum meruit recovery of a lawyer discharged without cause prior to resolution of a client's contingent fee case. In *Searcy, Denney, Scarola, Barnhart & Shipley, P.A. v. Poletz*,[45] the court held that the "lodestar" method[46] of calculating fees should not be applied in this context.[47] The "lodestar" method is to be used in cases where the fee will be paid by someone other than the client who received the services. This method is deficient for determining the quantum meruit award to be paid to the discharged lawyer by the client (or contracting party) because, in contravention of *Rosenberg v. Levin*,[48] it does not allow for consideration of "the totality of the circumstances."[49] All relevant factors, including

42. *Id.*

43. 643 So. 2d at 1080.

44. *Id.* at 1083. The lawyer was found guilty of: "sharing fees with non-lawyers; providing [improper] financial assistance to clients; engaging in business transactions with clients without the required disclosures; and seeking and collecting prohibited fees." *Id.* at 1082.

45. 652 So. 2d 366 (Fla. 1995).

46. *See* Florida Patient's Compensation Fund v. Rowe, 472 So. 2d 1145 (Fla. 1985), *as modified by* Standard Guar. Ins. Co. v. Quanstrom, 555 So. 2d 828 (Fla. 1990).

47. *Poletz*, 652 So. 2d at 368.

48. 409 So. 2d 1016 (Fla. 1982).

49. *See id.* at 1022.

those set forth in RPC 4-1.5(b),[50] must be considered by the court in fixing the actual value of the services rendered to the client. The supreme court identified the following as examples of additional factors that could be considered by the trial court in the exercise of its sound discretion: "the fee [agreement] itself, the reason the attorney was discharged, actions taken by the lawyer or client before or after discharge, and the benefit actually conferred on the client."[51] In a footnote, the supreme court expressly recognized that the refusal of a discharged lawyer or law firm to make its file available to successor counsel could affect the valuation of the discharged lawyer's services.[52] *Poletz* is significant because it sends a message to trial courts that a quantum meruit determination should be based on the totality of the relevant circumstances in each case, not simply a mechanistic application of an hours-based formula.

In the disciplinary arena, the court in *Rue*[53] reiterated its position, earlier expressed in cases such as *Florida Bar v. Gentry*,[54] that the rule

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50. Subdivision (b) of RPC 4-1.5, "Fees for Legal Services," provides:

(b) Factors to Be Considered in Determining Reasonable Fee. Factors to be considered as guides in determining a reasonable fee include:

(1) the time and labor required, the novelty, complexity, and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee, or rate of fee, customarily charged in the locality for legal services of a comparable or similar nature;

(4) the significance of, or amount involved in, the subject matter of the representation, the responsibility involved in the representation, and the results obtained;

(5) the time limitations imposed by the client or by the circumstances and, as between attorney and client, any additional or special time demands or requests of the attorney by the client;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, diligence, and ability of the lawyer or lawyers performing the service and the skill, expertise, or efficiency of effort reflected in the actual providing of such services; and

(8) whether the fee is fixed or contingent, and, if fixed as to amount or rate, then whether the client's ability to pay rested to any significant degree on the outcome of the representation.

R. REGULATING FLA. BAR 4-1.5(b).

51. *Poletz*, 652 So. 2d at 369.

52. *Id.* at 369 n.5.

53. *See* text accompanying notes 35, 43-44.

54. 475 So. 2d 678, 679 (Fla. 1985).

against excessive fees[55] will be strictly applied when lawyers charge for recovery of personal injury protection ("PIP") benefits in accident cases.

Applicability of the lawyer-client confidentiality rule[56] to lawyers' trust accounting records was again recognized by the Professional Ethics Committee in Florida Ethics Opinion 93-5.[57] Consistent with its prior

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55. Subdivision (a) of RPC 4-1.5, "Fees for Legal Services," provides:

(a) Illegal, Prohibited, or Clearly Excessive Fees. An attorney shall not enter into an agreement for, charge, or collect an illegal, prohibited, or clearly excessive fee or a fee generated by employment that was obtained through advertising or solicitation not in compliance with the Rules Regulating The Florida Bar. A fee is clearly excessive when:

(1) after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee exceeds a reasonable fee for services provided to such a degree as to constitute clear overreaching or an unconscionable demand by the attorney; or

(2) the fee is sought or secured by the attorney by means of intentional misrepresentation or fraud upon the client, a nonclient party, or any court, as to either entitlement to, or amount of, the fee.

R. REGULATING FLA. BAR 4-1.5(a).

56. RPC 4-1.6, "Confidentiality of Information," provides:

(a) Consent Required to Reveal Information. 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) When Lawyer Must Reveal Information. A lawyer shall reveal such information to the extent the lawyer reasonably believes necessary:

(1) to prevent a client from committing a crime; or

(2) to prevent a death or substantial bodily harm to another.

(c) When Lawyer May Reveal Information. A lawyer may reveal such information to the extent the lawyer reasonably 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.

(d) Exhaustion of Appellate Remedies. When required by a tribunal to reveal such information, a lawyer may first exhaust all appellate remedies.

(e) Limitation on Amount of Disclosure. When disclosure is mandated or permitted, the lawyer shall disclose no more information than is required to meet the requirements or accomplish the purposes of this rule.

Id. 4-1.6.

57. FLA. B. NEWS, Oct. 1, 1994, at 40.

opinions,[58] the committee concluded that a lawyer "who is an agent for a title insurance company may not permit the title insurer to audit the attorney's general trust account without consent of the affected clients."[59] The opinion went on to state, however, that the "attorney . . . need not obtain client consent before permitting the insurer to audit a special trust account used exclusively for transactions in which the attorney acts as the title or real estate settlement agent."[60] Authorization for permitting access to the records of this special trust account was found in subdivision (c)(1) of RPC 4-1.6, which allows a lawyer to disclose confidential information "to serve the client's interest unless it is information the client specifically requires not to be disclosed."[61]

Finally, *Florida Bar v. Niles*[62] underscored the importance of trust in the lawyer-client relationship. There, a lawyer represented a defendant in a high-profile murder case. The lawyer, unbeknownst to the client, was paid $5000 by a television program to arrange for a videotaped interview with the incarcerated client. The lawyer used deception to secure admittance of himself and the camera crew to the prison. An incriminating interview was obtained—and broadcast—without the client's authorization. The supreme court reluctantly accepted the referee's recommendation that the lawyer be suspended for just one year, but stated that its decision "is not to be read as an indication that similar conduct will receive any discipline less than disbarment."[63]

III. PROFESSIONAL RESPONSIBILITY IN THE TRIAL SETTING

A lawyer's duty to zealously represent clients is not unrestrained. A lawyer is an officer of the court, and this relationship of the lawyer to the justice system imposes certain obligations and constraints upon the lawyer's advocacy, particularly in the trial setting. Perhaps the paramount duty owed to the justice system is that of candor toward the tribunal. False or misleading statements by a lawyer to a court undermine the integrity of the entire legal system and are dealt with harshly when discovered. For example, in *Florida Bar v. Kleinfeld*,[64] a forum-shopping lawyer was suspended for three years and placed on probation for another two years as

58. *See* Fla. Ethics Op. 72-3; *see also* Fla. Ethics Op. 77-25, 62-24.
59. Fla. Ethics Op. 93-5, FLA. B. NEWS, Oct. 1, 1994, at 40.
60. *Id.*
61. *Id.*
62. 644 So. 2d 504 (Fla. 1994).
63. *Id.* at 507.
64. 648 So. 2d 698 (Fla. 1994).

a result of falsely alleging in a sworn motion to disqualify a judge that the judge had threatened and attempted to intimidate her counsel.[65]

Motions to disqualify lawyers from representing their clients at trial remained popular in 1995. On a procedural note, in *Arthur v. Gibson*[66] the Fifth District Court of Appeal made it clear that a trial court must conduct a hearing before ruling on such a motion.[67]

Turning to the substantive issues, most of the reported lawyer disqualification cases were filed in connection with the "lawyer-as-witness rule," RPC 4-3.7.[68] In *Swensen's Ice Cream Co. v. Voto, Inc.*,[69] the appellate court quashed a trial court's order disqualifying a lawyer and his firm from representing their client, Swensen's.[70] The lawyer had been hired by Swensen's in a prior matter to help an assignee of a Swensen's franchise in a dispute with the assignor. The lawyer wrote two letters stating that the assignor had breached the franchise agreement. In the present case, the lawyer and his firm represented Swensen's in a separate matter in which Swensen's was adverse to the assignee. The assignee moved to disqualify the lawyer and his firm, alleging that the lawyer would be called as a witness due to his involvement in the prior suit. The trial court granted the motion.

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65. *Id.* at 701.
66. 654 So. 2d 983 (Fla. 5th Dist. Ct. App. 1995).
67. *Id.* at 984.
68. RPC 4-3.7, "Lawyer as Witness," provides:

> (a) When Lawyer May Testify. A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness on behalf of the client except where:
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> (1) the testimony relates to an uncontested issue;
>
> (2) the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony;
>
> (3) the testimony relates to the nature and value of legal services rendered in the case; or
>
> (4) disqualification of the lawyer would work substantial hardship on the client.
>
> (b) Other Members of Law Firm as Witnesses. A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by rule 4-1.7 or 4-1.9 [concerning conflicts of interest].

R. REGULATING FLA. BAR 4-3.7.
69. 652 So. 2d 961 (Fla. 4th Dist. Ct. App. 1995).
70. *Id.*

Reversing the order of disqualification, the Fourth District Court of Appeal carefully analyzed each element of RPC 4-3.7. Because subdivision (a) of the rule disqualified only a trial advocate who will also be a "necessary witness on behalf of" a client, the court pointed out that the lawyer "will not be testifying either against or on behalf of Swensen's."[71] The two letters (and any testimony from the lawyer concerning them) were not necessarily material to Swensen's case, nor would they prejudice it. Moreover, the court stated that any factual information possessed by the lawyer was also known to the assignee's principals with whom the lawyer had dealt. Thus, the lawyer's testimony "would be cumulative at best."[72] In short, the movant failed to show that the lawyer would be a necessary witness on his client's behalf.[73] Nor did the assignee show that the lawyer's testimony would be adverse to his client's position. Finally, citing subdivision (b) of RPC 4-1.7, the court noted that the disqualification imposed by subdivision (a) of the rule is a personal one—it can extend beyond a testifying lawyer to reach the lawyer's law firm only if the lawyer was disqualified because his or her testimony was adverse to, and thus in conflict with, the client's interests.[74]

In *City of Lauderdale Lakes v. Enterprise Leasing Co.*,[75] the Fourth District Court of Appeal again relied upon RPC 4-3.7(b) in ruling that a trial court departed from the essential requirements of law by disqualifying an entire law firm where only one lawyer in the firm was to be called as a

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71. *Id.* at 962.

72. *Id.* Florida case law and ethics opinions have long held that the "lawyer-as-witness rule" is not to be used by opposing counsel as a tactical weapon when a lawyer's testimony would be immaterial or cumulative. *See, e.g.*, Devins v. Peitzer, 622 So. 2d 558 (Fla. 3d Dist. Ct. App. 1993); Arcara v. Philip M. Warren, P.A., 574 So. 2d 325 (Fla. 4th Dist. Ct. App. 1991); Banco de Comercio v. Sun Banks, Inc., 488 So. 2d 870 (Fla. 3d Dist. Ct. App. 1986); Williams v. Wood, 475 So. 2d 289 (Fla. 5th Dist. Ct. App. 1985); Cazares v. Church of Scientology of Cal., Inc. 429 So. 2d 348 (Fla. 5th Dist. Ct. App.), *review denied*, 438 So. 2d 831 (Fla. 1983); Hill v. Douglass, 248 So. 2d 182 (Fla. 1st Dist. Ct. App. 1971), *quashed on other grounds*, 271 So. 2d 1 (Fla. 1972); *see also* Fla. Ethics Op. 74-36, 72-2, 64-39.

73. *See* Allstate Ins. Co. v. English, 588 So. 2d 294, 295 (Fla. 2d Dist. Ct. App. 1991).

74. *Swenson's*, 652 So. 2d at 962; *see In re* Estate of Gory, 570 So. 2d 1381, 1383 (Fla. 4th Dist. Ct. App. 1990). This concept of a testimonial disqualification being personal to the lawyer and not imputed to the lawyer's firm was first adopted when the RPC superseded the old *Code of Professional Responsibility* effective January 1, 1987. Under the prior *Code of Professional Responsibility*, a testimonial disqualification did extend to the testifying lawyer's firm. Calls to the Florida Bar ethics "hotline" indicate that many Florida lawyers and judges remain unaware of this substantial change in the "lawyer-as-witness rule."

75. 654 So. 2d 645 (Fla. 4th Dist. Ct. App. 1995).

witness and there was no showing that the lawyer's testimony would be adverse to the client's position.[76]

An interesting case concerning application of RPC 4-3.7 when a lawyer is a party to the suit was *Springtree Country Club Plaza, Ltd. v. Blaut.*[77] The lawyer represented his wife in a slip and fall action, and represented himself on the accompanying loss of consortium claim. Reversing the lower court's denial of a motion to disqualify the lawyer and his firm, the appellate court stated that the lawyer's position as a party in interest, as well as a party seeking damages, "could constitute a violation of Rule 4-3.7."[78] In view of the RPC 4-3.7 problem, as well as the fact that the lawyer's partner had previously formed the opponent's partnership, the trial court was directed to disqualify the lawyer and his firm from any representation in the case.[79]

Kusch v. Ballard[80] was a disqualification case concerning the difficult and controversial issue of *inadvertent disclosure* of confidential documents in litigation. A defendant's lawyer prepared a letter addressed to his client. The lawyer's secretary, however, inadvertently faxed the document to plaintiff's counsel. Plaintiff's counsel began reading the letter, realized that it had been mistakenly transmitted to him, and returned it to defense counsel. Plaintiff's counsel then sought production of the document, alleging waiver of any privilege. Defense counsel responded by moving to disqualify plaintiff's counsel. The trial court determined that the document was privileged, that the privilege had not been waived, and that, apparently on the authority of *General Accident Insurance Co. v. Borg-Warner Acceptance Corp.*,[81] lawyers for both plaintiff and defendant must be disqualified.[82] Predictably, writs for certiorari followed.[83]

The Fourth District Court of Appeal rendered its decision in a one-sentence per curiam reversal of the trial court's order.[84] What is most notable about this case is the fact that all three of the judges on the panel wrote an opinion.[85] This exemplifies the depth of disagreement over how

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76. *Id.* at 646.
77. 642 So. 2d 27 (Fla. 4th Dist. Ct. App. 1994).
78. *Id.* at 28.
79. *Id.*
80. 645 So. 2d 1035 (Fla. 4th Dist. Ct. App. 1994).
81. 483 So. 2d 505 (Fla. 4th Dist. Ct. App. 1986).
82. *Kusch*, 645 So. 2d at 1038.
83. *Id.* at 1035.
84. *See id.*
85. Judge Glickstein concurred specially, Judge Farmer concurred, and Judge Stevenson concurred in part and dissented in part.

to handle the inadvertent disclosure problem,[86] which undoubtedly will be occurring more frequently due to fax machines, e-mail, and other new forms of transmitting information. The only certainty in this area is that more litigation can be expected.

One development to which trial lawyers must take heed is the trend toward strict enforcement of rules against improper jury argument. Appellate courts, particularly the Fourth District Court of Appeal, seem more inclined to handle egregious violations by reversal—sometimes even in the absence of objections.

Relying on RPC 4-3.4(e),[87] the Fourth District Court of Appeal reversed based on improper argument in *Bellsouth Human Resources v. Colatarci*.[88] The court's forceful opinion was intended to send a message to both lawyers and trial judges.[89] Arguments that violated RPC 4-3.4(e) included statements by counsel regarding "[w]hat other lawyers have done, what has occurred in other law suits, and what other corporations have done."[90]

The Fourth District Court of Appeal again reversed a case on the basis of grounds that included argument outside the bounds of RPC 4-3.4(e) in *Dutcher v. Allstate Insurance Co.*[91] Trial counsel had disparagingly commented regarding his personal opinion of chiropractors and made a

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86. The Florida Bar Professional Ethics Committee intensely debated the inadvertent disclosure issue at its meetings for over a year, but simply could not agree on the ethically proper course of conduct to be followed. Finally the committee issued a short advisory opinion, Fla. Ethics Op. 93-3, concluding only that a lawyer who receives an inadvertent disclosure of documents containing confidential information about an opponent is ethically obligated to notify opposing counsel of the fact of receipt, but leaving any further action up to the lawyers involved.

87. Subdivision (e) of RPC 4-3.4, "Fairness of Opposing Party and Counsel," provides that a lawyer shall not:

> (e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant, or the guilt or innocence of an accused.

R. REGULATING FLA. BAR 4-3.4(e).

88. 641 So. 2d 427 (Fla. 4th Dist. Ct. App. 1994).

89. "It is exasperating that, no matter how many times appellate courts cite this well-known rule [RPC 4-3.4(e)], trial counsel and trial judges do not seem to get the message." *Id.* at 430.

90. *Id.*

91. 655 So. 2d 1217 (Fla. 4th Dist. Ct. App. 1995).

statement, not supported by evidence, as to what other chiropractors have done.[92]

The First District Court of Appeal weighed in with its decision in *Sacred Heart Hospital of Pensacola v. Stone*.[93] The court reversed on the basis of repeated argument in violation of RPC 4-3.4(e) and remanded for a new trial, despite the fact that most of the improper argument had not been objected to at trial.[94] Improper comments included statements of personal opinion by plaintiff's counsel (e.g., that the defense's theory of fault was "ridiculous" and that one defendant presented "ridiculous" testimony), references to matters outside the record (e.g., a comment concerning alleged lying by an expert witness), and an invitation by plaintiff's counsel in closing argument to deal harshly with defendants.[95]

Finally, during the past year the supreme court promulgated two rules affecting a lawyer's ethical obligations in the trial setting. In amending RPC 4-3.4(b), the court specified the types of payments that ethically may be made by counsel to witnesses.[96] Lawyers may reasonably compensate witnesses for expenses actually incurred, or compensation actually lost, by virtue of appearing as a witness in a proceeding. The second rule amendment concerned what a lawyer permissibly may say about the lawyer's pending case in public, extrajudicial statements. Not inspired by the Simpson debacle, this change to RPC 4-3.6[97] actually resulted from the

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92. *Id.* at 1219.

93. 650 So. 2d 676 (Fla. 1st Dist. Ct. App.), *review denied*, 659 So. 2d 1089 (1995).

94. *Id.* at 681.

95. *Id.* at 680.

96. Amended subdivision (b) of RPC 4-3.4, "Fairness of Opposing Party and Counsel," provides that a lawyer shall not:

> (b) fabricate evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness, except a lawyer may pay a witness reasonable expenses incurred by the witness in attending or testifying at proceedings; a reasonable, noncontingent fee for the professional services of an expert witness; and reasonable compensation to reimburse a witness for the loss of compensation incurred by reason of preparing for, attending, or testifying at proceedings.

R. REGULATING FLA. BAR 4-3.4(b).

97. Amended RPC 4-3.6, "Trial Publicity," provides:

> (a) Prejudicial Extrajudicial Statements Prohibited. A lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding due to its creation of an imminent and substantial detrimental effect on that proceeding.

decision of the Supreme Court of the United States in *Gentile v. State Bar of Nevada*.[98] Although intended to delete the "safe harbor" language in the prior version of the rule that was held to be unconstitutionally vague in *Gentile*,[99] the amended version of RPC 4-3.6 still provides only the most general guidance to a lawyer searching for the limits of what he or she may say publicly about a pending case. Lawyers, however, may take some comfort in the fact that there have been no reported Florida cases in which a bar member was disciplined for violating the trial publicity rule.

IV. PROFESSIONAL RESPONSIBILITY AND THE LAWYER'S RELATIONSHIP WITH THIRD PARTIES

A lawyer's professional relationships, of course, extend beyond dealing with clients and courts. The RPC interpose minimum ethical standards into many of a lawyer's relationships with third parties. During the past year, a number of decisions affected lawyers' relationships with persons and entities such as prospective clients, opposing parties, other lawyers, employers, employees, and the legal system.

The most significant lawyer advertising and solicitation decision in years was rendered by the Supreme Court of the United States in *Florida Bar v. Went For It, Inc.*[100] A lawyer and a for-profit lawyer referral service challenged Florida's RPC 4-7.4(b)(1)(A),[101] which requires that

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(b) Statements of Third Parties. A lawyer shall not counsel or assist another person to make such a statement. Counsel shall exercise reasonable care to prevent investigators, employees, or other persons assisting in or associated with a case from making extrajudicial statements that are prohibited under this rule.

R. REGULATING FLA. BAR 4-3.6.

98. 501 U.S. 1030, 1047 (1991).

99. Florida Bar *re* Amendments to Rules Regulating The Florida Bar, 644 So. 2d 282, 283 (Fla. 1994).

100. 115 S. Ct. 2371 (1995).

101. Subdivision (b)(1)(A) of RPC 4-7.4, "Direct Contact with Prospective Clients," provides:

(b) Written Communication.

(1) A lawyer shall not send, or knowingly permit to be sent, on the lawyer's behalf or on behalf of the lawyer's firm or partner, an associate, or any other lawyer affiliated with the lawyer or the lawyer's firm, a written communication to a prospective client for the purpose of obtaining professional employment if:

(A) the written communication concerns an action for personal injury or wrongful death or otherwise relates to an accident or disaster involving the person to whom the communication is addressed or a relative of that person, unless the accident or disaster occurred more than 30 days prior to the mailing

Florida lawyers wait for at least thirty days following an accident or disaster before sending targeted direct mail solicitation letters concerning personal injury, wrongful death, or other actions relating to the accident or disaster to accident victims or their families. This prohibition extends to lawyer referral services under RPC 4-7.8(a)(1).[102]

The court upheld the thirty-day waiting period rule after analyzing it under the three-prong commercial speech test[103] articulated in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York.*[104] First, the Court agreed that the Florida Bar has "substantial interest in protecting the privacy and tranquility" of potential recipients against invasive, unsolicited contact by lawyers and in preventing the erosion of public confidence in the legal profession that such conduct engenders.[105] Second, the Bar effectively demonstrated that the challenged rule advances these interests in a direct and material way.[106] The Bar presented unrebutted evidence, both empirical and anecdotal, showing that both targeted harms are real. Third, the Court concluded that the thirty-day waiting period was a restriction "reasonably well-tailored" to achieve the desired objectives.[107] *Went For It, Inc.* was the first case since commercial speech protection was extended to lawyer advertising in *Bates v. State Bar of Arizona*[108] to uphold a state's restrictions on lawyer advertising. Undoubtedly this decision will inspire bar organizations around the country to reexamine lawyer advertising and advertising regulations within their jurisdictions.

Virtually all lawyers are aware that RPC 4-4.2[109] prohibits them from

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of the communication.

R. REGULATING FLA. BAR 4-7.4(b)(1)(A).

102. Subdivision (a)(1) of RPC 4-7.8, "Lawyer Referral Services," provides:

(a) When Lawyers May Accept Referrals. A lawyer shall not accept referrals from a lawyer referral service unless the service:

(1) engages in no communication with the public and in no direct contact with prospective clients in a manner that would violate the Rules of Professional Conduct if the communication or contact were made by the lawyer.

R. REGULATING FLA. BAR 4-7.8(a)(1).

103. *Went For It, Inc.*, 115 S. Ct. at 2381.

104. 447 U.S. 557, 568-71 (1980).

105. *Went For It, Inc.*, 115 S. Ct. at 2376.

106. *Id.* at 2378.

107. *Id.* at 2380.

108. 433 U.S. 350 (1977).

109. RPC 4-4.2, "Communication with Person Represented by Counsel," provides:

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another

communicating with a represented person concerning the subject of the representation, unless the other person's lawyer consents. Difficulties often arise, however, when a lawyer who represents a client against a corporate entity attempts to apply this rule to possible contacts with current or former employees of the opposing entity. The Professional Ethics Committee concluded, in Florida Ethics Opinion 88-14, that it is not unethical for a lawyer to contact former employees of a represented opponent, provided the lawyer does not inquire into matters protected by the attorney-client privilege.[110] But Florida lawyers must be aware that courts, both state and federal, are moving to limit the broad range of action otherwise afforded by Opinion 88-14.

In *Barfuss v. Diversicare Corp. of America*,[111] a lawyer represented a person who allegedly suffered damages while staying in a nursing home operated by the defendant corporation. Upon motion by the defendant, the trial court entered an order forbidding plaintiff's counsel from any ex parte communication with former employees of the nursing home who cared for or treated the plaintiff. The Second District Court of Appeal affirmed this order, taking care to note that the order was limited in scope—it did not bar ex parte contact with all former employees, but only contact with "the very

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> lawyer in the matter, unless the lawyer has the consent of the other lawyer. Notwithstanding the foregoing, an attorney may, without such prior consent, communicate with another's client in order to meet the requirements of any statute or contract requiring notice or service of process directly on an adverse party, in which event the communication shall be strictly restricted to that required by statute or contract, and a copy shall be provided to the adverse party's attorney.

R. REGULATING FLA. BAR 4-4.2. The Comment to RPC 4-4.2 goes on to explain, in pertinent part:

> In the case of an organization, this rule prohibits communications by a lawyer for 1 party concerning the matter in representation with persons having a managerial responsibility on behalf of the organization and with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization. If an agent or employee of the organization is represented in the matter by the agent's or employee's own counsel, the consent by that counsel to a communication will be sufficient for purposes of this rule.

Id. 4-4.2 cmt.

110. Fla. Ethics Op. 88-14, *reprinted in* PROFESSIONAL ETHICS OF THE FLA. BAR (2d ed.) at 1302. This opinion was approved by the Florida Bar Board of Governors on March 7, 1989. *Id.* at 1299.

111. 656 So. 2d 486 (Fla. 2d Dist. Ct. App. 1995).

persons whose actions or inactions form the basis for the complaint."[112] Therefore, the order precluded contact with former nursing home employees who cared for or treated the plaintiff, since their actions or inactions form the basis of the defendant's alleged liability. In a footnote, the court specified that "there is no restriction on contact with former employees who were merely witnesses to the care of [the plaintiff]."[113]

A federal court sitting in Florida also rendered a decision concerning ex parte contact with former employees of an organizational opponent. In *United States v. Florida Cities Water Co.*,[114] lawyers for the government sought an order allowing them ex parte contacts with the defendant corporation's former employees. The court denied the motion, concluding that the corporation's demonstrated interest in protecting privileged information required the government to provide the corporation's counsel with notice and opportunity to attend the government's interviews of former corporate employees.[115]

Both *Barfuss* and *Florida Cities Water Co.* must be considered by Florida lawyers contemplating ex parte contacts with former employees of an opposing party. It may be noted, however, that these cases rely upon the debatable decision handed down by the Middle District in *Rentclub v. Transamerica Rental Finance Corp.*[116] In *Rentclub*, a law firm that hired the former chief financial officer of a division of the opposing corporation as a paid "trial consultant" was disqualified from further participation in the case based upon the "consultant's" possession of privileged information about the corporate opponent and upon the appearance of impropriety. The court defined organizational party for purposes of the communication rule as including: "1) managerial employees, 2) any other persons whose acts or omissions in connection with the matter at issue may be imputed to the corporation for liability, and 3) persons whose statements constitute admissions by the corporation."[117] Cases following *Rentclub* may be building upon a shaky premise, however, because it is quite clear from a close reading of both the trial court and appellate court opinions that the

112. *Id.* at 488-89.
113. *Id.* at 489 n.5.
114. No. 93-281-CIV-FTM-21, 1995 WL 340980 (M.D. Fla. Apr. 26, 1995).
115. *Id.* at *3.
116. 811 F. Supp. 651 (M.D. Fla. 1992), *aff'd*, 43 F.3d 1439 (11th Cir. 1995).
117. *Id.* at 657.

decisions were greatly influenced by the fact that the former employee received a substantial sum as payment for his work as a "consultant."[118]

Contact with *un*represented opposing parties was the subject of Florida Ethics Opinion 94-4.[119] The Professional Ethics Committee concluded "that [o]pposing counsel may communicate with an individual who is litigating *pro se* concerning that litigation even though [a lawyer] is representing the individual in a related matter. Opposing counsel, however, may not communicate with the individual about the subject matter of the [lawyer]'s representation without the [lawyer]'s consent."[120]

Much of a lawyer's time is spent dealing with other lawyers, and several 1995 Professional Ethics Committee opinions addressed ethical issues arising in these relationships. Florida Ethics Opinion 94-7[121] provided the answer to the long-open question of whether lawyers who are "of counsel"[122] to one another are considered to be in the same firm, or different firms, for purposes of the fee division rules (RPC 4-1.5(g) and RPC 4-1.5(f)(4)(D)).[123] This question became especially pressing after the

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118. The penultimate paragraph of the Eleventh Circuit's opinion states:

> The district court found that the payment to Canales made it appear that Trenam, Simmons had both induced Canales to disclose confidential matters relating to Transamerica, in violation of Rules 4-1.6, 4-4.2 & 4-8.4(d) of the Rules Regulating The Florida Bar, as well as paid him for his factual testimony rather than his work as a "trial consultant," in violation of Rules 4-8.4(c) & 4-8.4(d). *Rentclub*, 811 F. Supp. at 654. *We conclude that the district court did not abuse its discretion in finding that there was the appearance of impropriety in the payment* to Canales. Accordingly, we AFFIRM the district court's order.

Rentclub, 43 F.3d at 1440 (emphasis by italics added; emphasis by capitals in original).

119. FLA. B. NEWS, Apr. 30, 1995, at 2.

120. *Id.*

121. *Id.*

122. The term "of counsel" may be used to describe a lawyer who maintains a close, continuing relationship with another lawyer or law firm in a capacity other than that of a partner or an associate. Fla. Ethics Op. 94-7, 75-41, 71-49. The relationship must be more than a mere referral arrangement. Fla. Ethics Op. 72-29.

123. Subdivision (g) of RPC 4-1.5, "Fees for Legal Services," provides:

> (g) Division of Fees Between Lawyers in Different Firms. 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

Supreme Court of Florida capped the amount of referral fee which a referring lawyer could receive in a personal injury matter without prior circuit court approval.[124] The committee decided that a lawyer "who is 'of counsel' to a law firm is considered to be a member of that firm for purposes of the fee-division rules *only* if that lawyer practices through that firm exclusively."[125]

Regarding another fee division issue, in *Barwick, Dillian & Lambert, P.A. v. Ewing*[126] the court held that the fee division provisions of the ethics code did not apply in a situation in which an associate lawyer and the employer law firm had agreed, during the associate's employment with the

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(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.

R. REGULATING FLA. BAR 4-1.5(g). Subdivision (f)(4)(D) of RPC 4-1.5 provides:

(D) As to lawyers not in the same firm, a division of any fee within subdivision (f)(4) [governing contingent fee personal injury matters] shall be on the following basis:

(i) To the lawyer assuming primary responsibility for the legal services on behalf of the client, a minimum of 75% of the total fee.

(ii) To the lawyer assuming secondary responsibility for the legal services on behalf of the client, a maximum of 25% of the total fee. Any fee in excess of 25% shall be presumed to be clearly excessive.

(iii) The 25% limitation shall not apply to those cases in which 2 or more lawyers or firms accept substantially equal active participation in the providing of legal services. In such circumstances counsel shall apply for circuit court authorization of the fee division in excess of 25%, based upon a sworn petition signed by all counsel that shall disclose in detail those services to be performed. The application for authorization of such a contract may be filed as a separate proceeding before suit or simultaneously with the filing of a complaint. Proceedings thereon may occur before service of process on any party and this aspect of the file may be sealed. Authorization of such contract shall not bar subsequent inquiry as to whether the fee actually claimed or charged is clearly excessive. An application under this subdivision shall contain a certificate showing service on the client and The Florida Bar. Counsel may proceed with representation of the client pending court approval.

(iv) The percentages required by this subdivision shall be applicable after deduction of any fee payable to separate counsel retained especially for appellate purposes.

R. REGULATING FLA. BAR 4-1.5(f)(4)(D).

124. This limitation, which restricts the share of the "secondary lawyer" to 25% of the total fee, was adopted for all contracts entered into on or after January 1, 1988. Florida Bar *re* Amendments to Rules Regulating The Florida Bar, 519 So. 2d 971, 973 (Fla. 1987). The limitation is currently set forth in subdivision (f)(4)(D) of RPC 4-1.5, "Fees for Legal Services." *See* R. REGULATING FLA. BAR 4-1.5(f)(4)(D).

125. Fla. Ethics Op. 94-7 (emphasis added).

126. 646 So. 2d 776 (Fla. 3d Dist. Ct. App. 1994).

firm, that the associate would receive a certain percentage of the fees from cases brought to the firm by the associate.[127] However, the case in question was not concluded (and thus the fee was not received) by the firm until after the associate's employment with the firm ended. Accordingly, the court stated that, "[w]here, as here, [the associate's] sole claim is for services rendered at the [employer] firm, we do not believe that a new, post-departure set of agreements needed to be entered in order for [the associate] to assert her claim."[128]

The rationale of *Barwick* was followed in Florida Ethics Opinion 94-1.[129] In this opinion, the Professional Ethics Committee decided that an agreement between a law firm and an associate lawyer employed by the firm "concerning division of the fee from a case brought to the firm by the [associate was] not subject to the rules governing fee divisions between [lawyers] in different firms when the [associate] leaves the firm before the case is concluded."[130]

In contrast to the agreement at issue in Opinion 94-1, the fee division provisions in the associate-law firm employment agreement under scrutiny in hotly-contested[131] Florida Ethics Opinion 93-4[132] were to be triggered only if the associate left the firm and thereafter continued to work on matters for "the Employer's clients." In addition to a requirement that the departing associate pay the former firm "the greater of fifty percent (50%) of any fee received from said client or the Firm's quantum meruit," the agreement barred the associate from "seeking, directly or indirectly, any of the Employer's clients" and from "inducing, either directly or indirectly, any employee to quit or abandon the Employer."[133] The Committee concluded that, when read as a whole, the employment agreement violated RPC 4-5.6(a),[134] which prohibits a lawyer from offering or making a partnership or employment agreement that restricts a lawyer's right to practice after

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127. *Id.* at 779.

128. *Id.*

129. FLA. B. NEWS, July 15, 1994, at 2.

130. *Id.*

131. *See, e.g.*, Mark D. Killian, *Board Approves Employment-Agreement Ethics Opinion*, FLA. B. NEWS, Mar. 1, 1995, at 3.

132. *Id.* at 21.

133. *Id.*

134. Subdivision (a) of RPC 4-5.6, "Restrictions on Right to Practice," provides that 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[.]" R. REGULATING FLA. BAR 4-5.6(a).

termination of the relationship. The Committee opined that the offending provisions created a substantial "financial disincentive" that would operate to "preclude the departing [associate] from accepting representation of [firm] clients," and would impermissibly restrict the right of association among lawyers.[135]

RPC 4-5.6 is not the only ethical standard governing the relationship between a law firm and its lawyer employees. A lawyer is obligated to deal honestly with the firm that employs him or her. In *Florida Bar v. Cox*,[136] a lawyer was suspended for thirty days for engaging in unauthorized outside employment against firm policy, willfully deceiving the firm about the "moonlighting," and diverting some fees paid in these matters from the firm to himself.[137]

A lawyer's relationship with his or her nonlawyer employees could be affected by an amendment to RPC 4-5.4,[138] concerning division of legal fees with nonlawyers. This revision clarifies the circumstances under which

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135. Fla. Ethics Op. 93-4.

136. 655 So. 2d 1122 (Fla. 1995). Specifically, the lawyer was found guilty of violating RPC 4-1.7(b) ("Conflict of Interest; General Rule"), RPC 4-4.1 ("Truthfulness in Statements to Others"), and RPC 4-8.4(c) ("Misconduct"). *Id.* at 1122 n.1.

137. *Id.* at 1123.

138. Subdivisions (a) and (b) of RPC 4-5.4, "Professional Independence of a Lawyer," provide:

> (a) Sharing Fees with Nonlawyers. A lawyer or law firm shall not share legal fees with a nonlawyer, except that:
>
> (1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to 1 or more specified persons;
>
> (2) a lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that proportion of the total compensation that fairly represents the services rendered by the deceased lawyer;
>
> (3) a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, in accordance with the provisions of rule 4-1.17, pay to the estate or other legally authorized representative of that lawyer the agreed upon purchase price; and
>
> (4) bonuses may be paid to nonlawyer employees based on their extraordinary efforts on a particular case or over a specified time period, provided that the payment is not based on the generation of clients or business and is not calculated as a percentage of legal fees received by the lawyer or law firm.
>
> (b) Qualified Pension Plans. A lawyer or law firm may include nonlawyer employees in a qualified pension, profit-sharing, or retirement plan, even though the lawyer's or law firm's contribution to the plan is based in whole or in part on a profit-sharing arrangement.

R. REGULATING FLA. BAR 4-5.4(a)-(b).

a lawyer may pay a bonus to these employees. A bonus may be based on the nonlawyer's "extraordinary efforts on a particular case or over a specified time period, provided that the payment is not based on the generation of clients or business and is not calculated as a percentage of legal fees received by the lawyer or law firm."[139] The supreme court thus reaffirmed the principle that nonlawyers may not ethically be paid for bringing in cases.[140]

Whether dealing with another lawyer over fees or other matters, a lawyer may come to believe that a fellow lawyer has engaged in unethical behavior. Regardless of the validity of this belief, however, the Professional Ethics Committee stated in Florida Ethics Opinion 94-5[141] that it ordinarily is unethical to *threaten* to file a disciplinary complaint against another lawyer. The committee reasoned that a lawyer is obligated under RPC 4-8.3[142] to report serious misconduct on the part of other lawyers and, accordingly, that to threaten not to file a report when otherwise required by this rule would itself be unethical. Furthermore, even in situations in which reporting is not required by RPC 4-8.3, the committee believed that threatening to file a grievance complaint in order to obtain an advantage from the other lawyer could be extortionate (thereby violating RPC 4-

139. *Id.* 4-5.4(a)(4).

140. *See also* RPC 4-7.2(q), "Advertising," which provides:

> Payment for Recommendations; Lawyer Referral Services Fees. A lawyer shall not give anything of value to a person for recommending the lawyer's services, except that a lawyer may pay the reasonable cost of advertising or written or recorded communication permitted by these rules, may pay the usual charges of a lawyer referral service or other legal service organization, and may purchase a law practice in accordance with rule 4-1.17.

Id. 4-7.2(q).

141. FLA. B. NEWS, Apr. 30, 1995, at 2.

142. RPC 4-8.3, "Reporting Professional Misconduct," provides in pertinent part:

> (a) Reporting Misconduct of Other Lawyers. A lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects shall inform the appropriate professional authority.
>
> . . . .
>
> (c) Confidences Preserved. This rule does not require disclosure of information otherwise protected by rule 4-1.6.

R. REGULATING FLA. BAR 4-8.3.

8.4(b))[143] or would constitute "conduct . . . prejudicial to the administration of justice" (in violation of RPC 4-8.4(d)).[144]

It follows that falsely accusing another lawyer of misconduct is unethical. In *Florida Bar v. Adams*,[145] the supreme court so held and suspended the lawyer for ninety days.[146] Finally, in two instances involving child support obligations the supreme court addressed the matter of a lawyer's relationship with his or her children, and presumably with society (in the event the failure to pay support implicates the state's public assistance machinery). First, in *Florida Bar v. Taylor*,[147] the court declined to discipline a lawyer who had been held in contempt of a New Hampshire court for failing to pay substantial child support arrearages.[148] The supreme court took great care to distinguish between criminal contempt and civil contempt, stating that under its then-existing rules it could discipline lawyers for the former but, absent fraudulent or dishonest conduct, had no authority to impose discipline for the latter.[149] Then, just a few weeks after the *Taylor* decision, the court on its own motion promulgated new RPC 4-8.4(h), making it unethical for a lawyer to "willfully refuse, as determined by a court of competent jurisdiction, to timely pay a child support obligation."[150]

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143. Subdivision (b) of RPC 4-8.4, "Misconduct," provides that a lawyer shall not "(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects[.]" *Id.* 4-8.4(b).

144. Subdivision (d) of RPC 4-8.4, "Misconduct," provides that a lawyer shall not:

> (d) engage in conduct in connection with the practice of law that is prejudicial to the administration of justice, including to knowingly, or through callous indifference, disparage, humiliate, or discriminate against litigants, jurors, witnesses, court personnel, or other lawyers on any basis, including, but not limited to, on account of race, ethnicity, gender, religion, national origin, disability, marital status, sexual orientation, age, socioeconomic status, employment, or physical characteristic.

Id. 4-8.4(d).

145. 641 So. 2d 399 (Fla. 1994).

146. *Id.* at 399.

147. 648 So. 2d 709 (Fla. 1995).

148. *Id.* at 709.

149. *Id.* at 711.

150. The Comment to new RPC 4-8.4(h) expresses the court's view of the purpose behind the rule and its intended application:

> Subdivision (h) of this rule was added to make consistent the treatment of attorneys who fail to pay child support with the treatment of other professionals who fail to pay child support, in accordance with the provisions of section 61.13015, *Florida Statutes* (1993). That section provides for the suspension or denial of a professional license due to delinquent child support payments after

V. PROFESSIONAL RESPONSIBILITY IN THE DISCIPLINARY CONTEXT

Looking at the bigger picture, it is apparent that the position in society held by lawyers—trusted fiduciaries who are not only officers of the court, but who in the minds of many personify our system of justice[151]—justifies the imposition of ethical obligations commensurate with this position. In 1995, the Supreme Court of Florida, the ultimate authority over the admission to and practice of law in our state,[152] imposed disciplinary sanctions on a number of lawyers for a variety of offenses. This section of the article briefly reviews some significant disciplinary cases not previously discussed in parts II, III, or IV.

Initially, Florida lawyers should realize that, even in the absence of a substantive rules violation, they are obligated to respond in writing to accusations that are being investigated by the Florida Bar. Two rules, RPC 4-8.1[153] and RPC 4-8.4(g),[154] impose this duty. In *Florida Bar v. Grigs-*

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all other available remedies for the collection of child support have been exhausted. Likewise, subdivision (h) of this rule should not be used as the primary means for collecting child support, but should be used only after all other available remedies for the collection of child support have been exhausted. Before a grievance may be filed or a grievance procedure initiated under this subdivision, the court that entered the child support order must first make a finding of willful refusal to pay. The child support obligation at issue under this rule includes both domestic (Florida) and out-of-state (URESA) child support obligations, as well as arrearages.

R. REGULATING FLA. BAR 4-8.4(h) cmt.

151. *See generally Went For It, Inc.*, 115 S. Ct. 2371 (1995).

152. FLA. CONST. art. V, § 15.

153. Subdivision (b) of RPC 4-8.1, "Bar Admission and Disciplinary Matters," provides:

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.

R. REGULATING FLA. BAR 4-8.1(b).

154. Subdivision (g) of RPC 4-8.4, "Misconduct," provides that a lawyer shall not "(g) fail to respond, in writing, to any inquiry by a disciplinary agency when such agency is conducting an investigation into the lawyer's conduct." *Id.* 4-8.4(g). The pertinent portion of the Comment to RPC 4-8.4 explains:

A lawyer's obligation to respond to an inquiry by a disciplinary agency is stated in subdivision (g) and rules 3-4.8 and 3-7.6(g)(2). While response is mandatory,

by,[155] a lawyer was publicly reprimanded and placed on three years' probation for failing to respond to the Bar's investigative inquiries.[156] In mitigation, it was noted that the lawyer had been suffering from clinical depression.[157] Such a mitigating factor apparently was not present in *Florida Bar v. Grosso*,[158] because in that case a similar violation resulted in a ten-day suspension.[159]

Similarly, a lawyer who willfully evades the Bar's attempts at service faces disciplinary problems. In *Florida Bar v. Hawkins*,[160] a lawyer whom the court allowed to resign in lieu of disciplinary action was later investigated for violating the terms of the resignation order. The lawyer avoided service of an order to show cause, but nevertheless was disbarred for five years for violating the resignation order as well as avoiding service.[161]

In the view of the supreme court, perhaps the two most serious offenses are lying to a court and misappropriation of client funds. Both were present in *Florida Bar v. de la Puente*.[162] In *de la Puente*, a lawyer who repeatedly used client trust funds for his own purposes, forged signatures on checks in order to gain access to the funds, misrepresented information to a court in a probate proceeding, fabricated evidence in the disciplinary proceeding, and instructed a witness to lie, was disbarred for a minimum of ten years. The court noted that, "[s]everal of these actions, when considered alone, create a presumption that disbarment is the appropriate penalty."[163]

Another disciplinary case involving trust accounting violations is *Florida Bar v. Condon*.[164] In *Condon*, garden variety theft of client funds resulted in a three-year suspension to be followed by a probationary

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> the lawyer may deny the charges or assert any available privilege or immunity or interpose any disability that prevents disclosure of certain matter. A response containing a proper invocation thereof is sufficient under the Rules Regulating The Florida Bar. This obligation is necessary to ensure the proper and efficient operation of the disciplinary system.

Id. 4-8.4(g) cmt.

155. 641 So. 2d 1341 (Fla. 1994).
156. *Id.* at 1343.
157. *Id.* at 1342.
158. 647 So. 2d 840 (Fla. 1994).
159. *Id.* at 841.
160. 643 So. 2d 1074 (Fla. 1994).
161. *Id.* at 1075.
162. 658 So. 2d 65 (Fla. 1995).
163. *Id.* at 69.
164. 647 So. 2d 823 (Fla. 1994).

period.[165] In *Florida Bar v. Cramer*,[166] a lawyer violated trust accounting rules when he used his trust account in an apparent attempt to hide his own funds from the Internal Revenue Service.[167] Although no client funds were misappropriated, the court found that this attempt to mislead the IRS amounted to conduct involving "dishonesty, deceit, or misrepresentation," and imposed a ninety-day suspension.[168] In *Florida Bar v. Mitchell*,[169] commingling and other trust accounting violations netted a lawyer a ninety-day suspension, followed by a one-year probation.[170] There appeared to be no loss of any client funds, but among other violations, the supreme court found the lawyer guilty of failing to remit interest earned on his trust account to the Florida Bar Foundation as required under the Interest on Trust Accounts ("IOTA") program rules.[171] Also of interest in this case was the court's rejection of the lawyer's minority status as a mitigating factor.[172] Finally, trust accounting violations coupled with the charging of an excessive fee in a probate matter led to a ninety-day suspension in *Florida Bar v. Forrester*.[173] No theft occurred, but the lawyer moved funds from her trust account to her operating account before they were earned. In this case the court "expressly note[d] that we consider the maintenance of contemporary and accurate trust account records to be essential to public confidence that members of The Florida Bar are maintaining these accounts pursuant to their fiduciary and ethical obligations."[174]

As in other years, 1995 saw no shortage of disciplinary actions as a result of lawyers' involvement in criminal activity. In *Florida Bar v. Smith*,[175] the court suspended a former Congressman for three years as a result of felony convictions arising from income tax under-reporting and violation of federal election laws.[176] The presence of a number of mitigating factors helped the lawyer avoid disbarment,[177] the usual penalty for

165. *Id.* at 824.
166. 643 So. 2d 1069 (Fla. 1994).
167. *Id.* at 1070.
168. *Id.* at 1070-71.
169. 645 So. 2d 414 (Fla. 1994).
170. *Id.* at 416.
171. *Id.* at 415; *see* R. REGULATING FLA. BAR 5-1.1(e).
172. *Id.* at 416.
173. 656 So. 2d 1273, 1276 (Fla. 1995).
174. *Id.*
175. 650 So. 2d 980 (Fla. 1995).
176. *Id.* at 982.
177. *Id.* at 981.

such conduct. Disbarment did result from a lawyer's out-of-state criminal convictions for grand larceny and conspiracy in *Florida Bar v. Wilson*.[178]

A lawyer's involvement in criminal activity, even if he or she is not convicted of a crime, can still result in discipline. For example, the court disbarred a former circuit court judge caught in the Dade County "Operation Courtbroom" investigation, for his participation in bribery and misconduct while on the bench, in *Florida Bar v. Davis*.[179] Discipline was imposed despite the fact that the lawyer had been acquitted of federal criminal charges. It may be noted that the "clear and convincing" standard of proof used in disciplinary proceedings is lower, and thus easier to meet, than the "beyond a reasonable doubt" standard applied in criminal cases.[180] In *Florida Bar v. Wheeler*,[181] the supreme court disbarred a lawyer involved in the "Operation Courtbroom" probe for his misconduct, even though he avoided prosecution by testifying against fellow conspirators in exchange for immunity.[182] In *Florida Bar v. Marable*,[183] a lawyer expressed interest in obtaining the fruits of what a law enforcement informant led him to believe was a burglary.[184] In reality, the informant fabricated the story. The court rejected the referee's finding that the lawyer had committed the crime of solicitation of a burglary, but suspended the lawyer for sixty days for his "unethical behavior in involving himself and his client with the products of what he believed to be criminal activity."[185]

Neglect of client matters continued to be a cause for disciplinary action. In *Florida Bar v. Daniel*,[186] a lawyer earned a suspension of ninety-one days, and thereafter until rehabilitation was proved, for repeatedly neglecting client matters.[187] In *Florida Bar v. Robinson*,[188] however, mitigating factors helped a lawyer receive a reprimand rather than suspension.[189]

178. 643 So. 2d 1063, 1065 (Fla. 1994).
179. 657 So. 2d 1135 (Fla. 1995).
180. *See, e.g.*, Florida Bar v. Rayman, 238 So. 2d 594, 596-97 (Fla. 1970).
181. 653 So. 2d 391 (Fla. 1995).
182. *Id.* at 392.
183. 645 So. 2d 438 (Fla. 1994).
184. *Id.* at 440
185. *Id.* at 443.
186. 641 So. 2d 1331 (Fla. 1994).
187. *Id.* at 1332. RPC 3-5.1(e), "Types of Discipline," provides that: "A suspension of 90 days or less shall not require proof of rehabilitation or passage of the Florida bar examination. A suspension of more than 90 days shall require proof of rehabilitation and may require passage of all or part of the Florida bar examination." R. REGULATING FLA. BAR 3-5.1(e).
188. 654 So. 2d 554 (Fla. 1995).
189. *Id.* at 555-56.

Interestingly, the referee had recommended that the lawyer be ordered to notify his clients of the reprimand. The supreme court declined to impose this requirement.[190]

A case of note in the area of fees is *Florida Bar v. Garland*.[191] In *Garland*, the lawyer was charged with collecting an excessive fee in a probate case, along with other misconduct such as trust accounting violations and falsification of records. He paid himself almost $33,000 in fees, while expert testimony in the case indicated that a reasonable fee would have been between $15,000 and $18,000. Sometime *after* this occurred, legislative amendments to the probate code concerning calculation of reasonable fees to the personal representative and attorney of an estate became effective. Surprisingly, the supreme court found the lawyer not guilty of the excessive fee charge because "if the fee charged in this case were charged today it likely would be considered reasonable under the new statutory provisions."[192] Thus, it appears that, if a lawyer has the good fortune to do something that is improper under one rule and that rule is later changed, the lawyer may escape discipline. This seems like an incongruous result in view of the fact that lawyers are expected to conform their conduct to the rules and laws in existence when the conduct occurs.

Knowingly providing a false affidavit to a bank to help a relative secure a loan resulted in a sixty-day suspension for the lawyer in *Florida Bar v. Johnson*.[193] The court stated that it "will not condone attorneys making affidavits for submission to a lender or to any other person or entity which are in fact not true and correct as to the statements therein."[194]

In the past year, the court has also reaffirmed its willingness to impose what may be termed "reciprocal discipline" upon Florida lawyers who are disciplined by other jurisdictions in which they are admitted to practice law. In *Florida Bar v. Friedman*,[195] a member of the Florida Bar was suspended from practice in another state.[196] Based on the suspension order from the other state, the Supreme Court of Florida suspended the lawyer from practice in Florida.[197] The lawyer argued that Florida should not accept

190. *Id.* at 556.

191. 651 So. 2d 1182 (Fla. 1995).

192. *Id.* at 1184. Though not guilty of the excessive fee charge, the lawyer was found guilty of other misconduct and suspended for two years. *Id.*

193. 648 So. 2d 680, 682 (Fla. 1994).

194. *Id.* at 682.

195. 646 So. 2d 188 (Fla. 1994), *cert. denied*, 115 S. Ct. 1707 (1995).

196. *Id.* at 189.

197. *Id.* at 190.

the other state's suspension order because the other state's finding of guilt was premised on a "preponderance of the evidence" standard, rather than the "clear and convincing" test used in Florida. The supreme court rejected this argument.[198]

A final noteworthy development in the disciplinary area was the supreme court's adoption of a "Practice and Professionalism Enhancement Program," commonly referred to as an "ethics school."[199] This program is intended to divert from the disciplinary system lawyers who have committed minor transgressions and whose conduct, it is believed, could be improved through education in basic ethics rules, law office management, and interpersonal skills. No case in which the misconduct rises above the level of minor misconduct[200] is eligible for diversion, and a lawyer who has been the subject of a prior diversion within the past seven years is not eligible.[201]

VI. CONCLUSION

Professional responsibility has become almost a "growth industry" in recent years. Legal malpractice suits are becoming more common, grievance complaints are being filed at record rates, and motions to disqualify lawyers from trial representation have mushroomed. In fact, this increased attention on the legal ethics field has led to the formation of a national group for lawyers whose practices are concentrated in this area, the Association of Professional Responsibility Lawyers ("APRL"). Decisions rendered during the past year by Florida courts and ethics committees addressed a wide range of professional responsibility issues and must be given careful consideration by the practicing lawyer. Failure to adhere to the professional responsibility standards set forth in these decisions can have serious consequences.

198. *Id.*

199. The new rule 3-5.3 was adopted in Florida Bar *re* Amendments to Rules Regulating The Florida Bar, 644 So. 2d 282, 289-90 (Fla. 1994).

200. *See* R. REGULATING FLA. BAR 3-5.1(b).

201. *Id.* 3-5.1(c).