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Professional Responsibility

Timothy P. Chinaris*

Elizabeth Clark Tarbert†

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Professional Responsibility: 1997 Survey of Florida Law

Timothy P. Chinaris*
Elizabeth Clark Tarbert**

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I. INTRODUCTION

Professional responsibility law in Florida continued to expand in 1997.¹ Case law, rules,² and ethics opinions amplified and, in some areas, extended the duties that lawyers assume as officers of the judicial branch of government. This article examines professional responsibility decisions that are likely to affect the **relationships** that lawyers have with clients, former clients, judges, third parties, and The Florida Bar.³

Part II looks at developments affecting the most important relationship that lawyers establish and operate within: the **relationship between lawyer and client**. Part III reviews developments of significance to the lawyer's **relationship to the court and the judicial system**. Part IV examines decisions that could impact the lawyer's **relationship with third parties**,

* Director, Library and Technology Center and Assistant Professor of Law, Florida Coastal School of Law, Jacksonville, Florida. B.S., 1977, Florida State University; J.D., 1984, University of Texas at Austin; M.L.S., 1996, Florida State University. The authors gratefully acknowledge the valuable research assistance of Kelly J. Wright.

** Florida Bar Ethics Director, Tallahassee, Florida. B.A., 1987, University of Florida; J.D., 1990, University of Florida.

1. This article surveys professional responsibility developments in Florida from July 15, 1996, through July 14, 1997.

2. Of primary interest here are changes to the Florida Rules of Professional Conduct ("RPC"), which comprise Chapter 4 of the Rules Regulating The Florida Bar.

3. Cases and ethics opinions are discussed in the section to which they have the most significant connection, rather than in every section to which they might possibly relate.

such as opposing parties, other attorneys, expert witnesses, potential clients, employers, and creditors. Part V explores the lawyer's relationship with **The Florida Bar** and other disciplinary authorities and reviews a number of disciplinary actions taken against Florida lawyers for widely varying conduct.⁴

II. THE LAWYER'S RELATIONSHIP WITH CLIENTS

For most lawyers, the attorney-client relationship is the professional relationship that commands the majority of their attention and effort. Ethical issues can arise at any point in the attorney-client relationship, from the initial consultation through termination of the matter. Recent decisions have addressed questions of **establishing an attorney-client relationship, conflicts of interest, confidentiality, communication, fees, fiduciary duties, competent representation, diligence, and withdrawal.**

In *Goldfarb v. Daitch*,⁵ the Third District Court of Appeal reaffirmed the basic concepts that the attorney-client relationship is a consensual one, and that an attorney cannot act on behalf of someone unless the attorney has been properly authorized to do so.⁶ Daitch was the defendant in a mortgage foreclosure suit.⁷ A final judgment of foreclosure was entered, and the property was sold at a clerk's sale. On the day that the certificate of sale was issued, attorney Goldfarb filed a motion seeking disbursement of surplus funds that were held in the court's registry. Pursuant to the court's order, funds were disbursed to various parties, including to "Goldfarb, as attorney for Marilyn Daitch."⁸

A few weeks later Daitch, through another lawyer, filed an emergency motion to vacate the disbursement order. Daitch alleged that she had never met Goldfarb, and that Goldfarb had no authority to represent her in the foreclosure matter. At the hearing on the motion, Daitch testified that she was unrepresented in the foreclosure case; indeed, a default had been entered against her. After the sale, Daitch was approached at her home by two men who claimed to have purchased the house at the sale and needed to talk to her about the sale. Intimidated, Daitch signed a blank document and the men left. Two nights later the men returned with a check for the "surplus funds less 1/3 fee for collection."⁹ Daitch claimed that she first learned of Goldfarb's

4. Important disciplinary cases are analyzed where appropriate throughout the article, but most are collected in part V for the convenience of the reader.

5. 696 So. 2d 1199 (Fla. 3d Dist. Ct. App. 1997).

6. *Id.* at 1199.

7. *Id.* at 1200.

8. *Id.*

9. *Id.* at 1201.

involvement when she signed a receipt for the check. The receipt reflected a \$2000 legal fee.¹⁰

Testimony of Daitch and others showed that the document Daitch had signed was a power of attorney giving two individuals authority to employ an attorney to represent her in the foreclosure and authority to deduct, “as a non-refundable option” one-third of any funds due Daitch.¹¹ Goldfarb testified that he had not met Daitch at the time he was allegedly retained, but filed the motion for the surplus funds based on the document alone. Although Goldfarb did not know Daitch, he did know the individuals who held the power of attorney, having represented them on prior occasions.¹²

The trial judge vacated the disbursement order, finding that Goldfarb had no authority to represent Daitch and that “there existed no valid attorney/client relationship by and between’ Goldfarb and Daitch.”¹³ The court’s order is not remarkable. It simply reflects that the attorney-client relationship is grounded in agency principles, one of the most fundamental of which is that an agent can act only when properly authorized by the principal. Unfortunately, this basic point of law is sometimes ignored or misunderstood by practicing lawyers.¹⁴

Goldfarb is noteworthy for another reason. Both the trial court and the Third District Court of Appeal expressed concern about a **conflict of interest** on attorney Goldfarb’s part.¹⁵ The appellate court noted that Goldfarb effectively acknowledged the existence of “a patent conflict of interest” when he replied, after being questioned by the trial judge about a possible conflict of interest, that “I don’t see anything wrong in *representing investors* in these type of deals.”¹⁶

Business transactions in which a lawyer is a party often result in conflict of interest problems, especially transactions that involve the lawyer’s client. The obvious potential for conflict is recognized in RPC 4-1.8(a),¹⁷ which

10. *Goldfarb*, 696 So. 2d at 1201.

11. *Id.*

12. *Id.* at 1202.

13. *Id.* at 1203.

14. *See, e.g.*, Florida Bar v. Glant, 645 So. 2d 962 (Fla. 1994), *cert. denied*, 514 U.S. 1086 (1995); Florida Bar v. Jasperson, 625 So. 2d 459 (Fla. 1993); Smith v. Perry, 635 So. 2d 1019 (Fla. 1st Dist. Ct. App. 1994).

15. *Goldfarb*, 696 So. 2d at 1199.

16. *Id.* at 1205 (emphasis added by appellate court) (quoting the Plaintiff, Goldfarb).

17. 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

regulates these types of transactions as an ethical matter. In *Florida Bar v. Laing*,¹⁸ the lawyer stepped into a client's business deal that had gone bad and turned it to his own advantage.¹⁹ In imposing a ninety-one day suspension for this and other violations,²⁰ the Supreme Court of Florida noted that entering into a business transaction with his client required the lawyer to comply with the provisions of RPC 4-1.8(a).²¹

A lawyer who represents multiple parties in business matters also must be alert to conflict of interest concerns. Such representation is not strictly prohibited,²² but a lawyer who undertakes to represent parties whose interests appear to be aligned at the outset, takes the risk that those interests could diverge at some point during the deal. If that happens, the lawyer usually will

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.

RPC 4-1.8(a).

18. 695 So. 2d 299 (Fla. 1997).

19. *Id.* at 301.

20. *Id.* at 304.

21. *See supra* note 17.

22. Subdivisions (a) and (b) of RPC 4-1.7, "CONFLICT OF INTEREST; GENERAL RULE," provide:

(a) Representing Adverse Interests. A lawyer shall not represent a client if the representation of that client will be directly adverse to the interests of another client, unless:

- (1) the lawyer reasonably believes the representation will not adversely affect the lawyer's responsibilities to and relationship with the other client; and
- (2) each client consents after consultation.

(b) Duty to Avoid Limitation on Independent Professional Judgment. A lawyer shall not represent a client if the lawyer's exercise of independent professional judgment in the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person or by the lawyer's own interest, unless:

- (1) the lawyer reasonably believes the representation will not be adversely affected; and
- (2) the client consents after consultation.

be ethically obligated to withdraw from the entire matter.²³ A lawyer who failed to recognize the warning signs of a serious conflict ended up with disciplinary problems in *Florida Bar v. Joy*.²⁴ The lawyer represented three individuals, including a father and son, who were shareholders in a corporation that invested in real estate. When an apartment building owned by the corporation burned, the insurer suspected arson and refused to pay the claim. The corporation retained the lawyer to pursue its claim for insurance proceeds. Sometime during this course of events, however, the lawyer began to distrust the father and son and secretly started providing the third shareholder with blind copies of his correspondence with the father and son. To make matters worse, the lawyer attempted to protect the third shareholder's interest by obtaining an assignment of his shares in the corporation. This was done without the knowledge of either the father or son. A substantial settlement was reached with the insurer, but the situation deteriorated further when the lawyer removed some of the settlement proceeds from this trust account without authorization and deposited them into an account bearing his wife's name. The final chapter in this sad saga was a physical altercation between the lawyer and the son. This conflict-ridden conduct netted the lawyer a ninety-one day suspension.²⁵

In contrast, a lawyer was held to be *not* guilty of conflict violations in *Florida Bar v. Norvell*.²⁶ The lawyer had served a disciplinary suspension and had been readmitted to practice. Prior to his readmission, the lawyer was involved with a builder in the builder's suit against a construction corporation. The lawyer then attempted to represent the corporation in its bankruptcy proceeding, misrepresenting to the bankruptcy court that he was a "disinterested person."²⁷ The bankruptcy judge, however, declined to allow

RPC 4-1.7(a)-(b).

23. Subdivisions (a) and (b) of RPC 4-1.9, "CONFLICT OF INTEREST; FORMER CLIENT," provide:

A lawyer who has formerly represented a client in a matter shall not thereafter:

(a) represent another person in the same or a substantially related matter in which that person's interests 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 the information has become generally known.

RPC 4-1.9.

24. 679 So. 2d 1165 (Fla. 1996).

25. *Id.* at 1168.

26. 685 So. 2d 1296 (Fla. 1996).

27. *Id.* at 1297.

the lawyer into the case.²⁸ The lawyer next entered into an agreement to acquire ownership of the corporation and, after doing so, reapplied to represent the corporation in the bankruptcy case. Unlike the prior application, however, at this time the lawyer did disclose to the court his prospective ownership interest in the debtor corporation. Despite this series of events, the lawyer was found *not* to have violated the conflict of interest rules, specifically RPC 4-1.7(b).²⁹ The Supreme Court of Florida noted that most of the conflict-related information was known to all principals.³⁰

Sometimes conflicts are apparent at the inception of a representation, as was the case in *Goldfarb*.³¹ Often, however, an actual or potential conflict problem arises during a representation. Decisions concerning both types of conflicts in the criminal defense context were handed down in the past year. Regarding conflict issues to be confronted at the beginning of a matter, The Florida Bar Board of Governors published Florida Ethics Opinion 96-2³² to address an issue that had not been reviewed in a formal ethics opinion since 1978: the extent, if any, to which a law firm that represents local law enforcement agencies may engage in criminal defense work in that same county.³³

Overruling portions of prior opinions,³⁴ Opinion 96-2 concluded that a law firm that represents local law enforcement agencies on civil and administrative matters is *not* per se precluded from engaging in criminal defense work within the same county.³⁵ Instead, whether such dual representation is ethically permissible depends on application of the conflict rules, particularly RPC 4-1.7(b),³⁶ to the specific facts and circumstances involved. The opinion spoke to several general scenarios. First, it noted that where the firm's law enforcement clients are completely uninvolved in a criminal matter, no potential conflict of interest exists and the firm may defend the accused without triggering the conflict provisions of the *Rules of Professional Conduct*.³⁷ Second, if the firm's law enforcement clients are in some way involved in a criminal matter, the firm may represent the accused

28. *Id.*

29. *See supra* note 22.

30. *Norvell*, 685 So. 2d at 1298.

31. *Goldfarb*, 696 So. 2d at 1199; *see also supra* notes 5-16 and accompanying text.

32. Fla. Bar. Comm. on Professional Ethics, Op. 96-2 (1996).

33. *Id.*

34. Opinion 96-2 states that Florida Ethics Opinions 74-37, 74-37 (Reconsideration), and 78-8 were "overly broad" and overruled those opinions "to the extent that they conflict with" the conclusions reached in Opinion 96-2. *Id.*

35. *Id.*

36. *See supra* note 22 and accompanying text.

37. Fla. Bar. Comm. on Professional Ethics, Op. 96-2 (1996).

only if it complies with the provisions of RPC 4-1.7(b), including obtaining the informed consent of both clients.³⁸ Third, where a law enforcement client of the firm is involved in a criminal matter “in a direct and material way,” the firm is ethically precluded from representing the criminal defendant.³⁹ Significantly, the opinion recognizes that attacking an employee of a client agency on cross-examination presents an unwaivable conflict of interest in this context.⁴⁰

Both the Third and Fourth District Courts of Appeal addressed conflicts, or alleged conflicts, that arose or became apparent *after* a representation had commenced. In *Rodriguez v. State*,⁴¹ the defendant’s trial counsel was a former assistant state attorney.⁴² While with the State Attorney’s Office years before, counsel had substituted for the assigned prosecutor at a hearing in a previous and totally unrelated case against the defendant. Counsel did not even remember this prior matter until, just before sentencing in the present case, he was shown certified copies of the defendant’s prior convictions. Under these facts, the court stated curtly that “no conflict exists.”⁴³

Two Fourth District Court of Appeal cases dealt with the not uncommon situation of a criminal defendant who becomes dissatisfied with appointed counsel during the case and then moves to discharge that counsel. In *Cunningham v. State*,⁴⁴ defendant Cunningham had pled guilty to certain charges.⁴⁵ After the plea hearing but before sentencing, he filed an unsworn motion to vacate his plea and to have new counsel appointed, citing alleged ineffective assistance of counsel. The trial court denied the motion following a hearing at which the court inquired into the basis of Cunningham’s motion to discharge his current counsel.⁴⁶ Affirming the trial court’s order, the appellate court distinguished another recent decision in this area, *Roberts v. State*.⁴⁷ Unlike the situation in *Roberts*, defendant Cunningham made no

38. *Id.*

39. *Id.*

40. *Id.* See also ABA Comm. on Ethics and Professional Responsibility, Formal Op. 92-367 (1992).

41. 684 So. 2d 833 (Fla. 3d Dist. Ct. App. 1996).

42. *Id.* at 833.

43. *Id.* See also *McCaskill v. State*, 638 So. 2d 567, 568 (Fla. 5th Dist. Ct. App. 1994) (claim of ineffective assistance properly denied where the defense attorney had been a state attorney who signed original information against defendant). In the instant case, defendant knowingly sought out and retained an attorney, and defendant was prosecuted based on amended information with which the attorney had no active involvement.

44. 677 So. 2d 929 (Fla. 4th Dist. Ct. App. 1996).

45. *Id.* at 930.

46. *Id.*

47. *Id.* (referring to *Roberts v. State*, 670 So. 2d 1042 (Fla. 4th Dist. Ct. App. 1996)). The *Roberts* court found that an actual conflict of interest was present because the very basis

specific allegations concerning his counsel's performance and counsel did not move to withdraw from the case. In fact, the court stated, "nor would we expect such a motion to be routinely filed under these facts."⁴⁸ Recognizing that *Roberts* turned on its particular facts,⁴⁹ the Fourth District Court of Appeal stated that "*Roberts* should not be read to establish a per se rule requiring a trial court to appoint new counsel to argue a motion to withdraw a plea upon the mere filing of a motion to discharge trial counsel."⁵⁰ *Cunningham* is notable because the court "[p]arenthetically" outlined what it termed a "preferable way" to handle a motion to discharge counsel and vacate plea based on complaints about counsel's performance.⁵¹ Providing advice that should be helpful to trial courts as well as practicing attorneys, the court suggested:

The motion to discharge should be addressed first and if, following a *Nelson* inquiry, the motion is denied as insufficient, the defendant could then be given the option of either proceeding with current counsel, hiring his or her own lawyer, or representing himself or herself on the motion to vacate the plea.⁵²

In a contrasting case, *Hope v. State*,⁵³ the Fourth District Court of Appeal relied upon *Roberts* in holding that a criminal defendant was denied effective assistance of counsel in connection with a motion to withdraw a guilty plea.⁵⁴ As the court was about to sentence him, Hope orally made a pro se motion to change his plea to not guilty and to discharge his counsel on the grounds that counsel had not investigated all of the allegations against him and had not interviewed all witnesses. Counsel responded by not only defending his performance but by going much further and offering the trial judge his

for the defendant's motion to withdraw his guilty plea was the alleged misconduct of defense counsel (coercing the defendant to accept the plea offer). *Roberts v. State*, 670 So. 2d 1042, 1044 (Fla. 4th Dist. Ct. App. 1996). The trial court's refusal to permit defense counsel to withdraw from the representation placed counsel in the untenable position of attempting to argue the motion to withdraw the plea on the grounds of his own alleged misconduct. *Id.* at 1045. This conflict between the personal interests of defense counsel and counsel's obligations to his client was a violation of RPC 4-1.7(b), and thus the trial court erred in not permitting counsel to withdraw. See Timothy P. Chinaris, *Professional Responsibility: 1996 Survey of Florida Law*, 21 NOVA L. REV. 231, 253-54 (Fall 1996) [hereinafter "Chinaris"].

48. *Cunningham*, 677 So. 2d at 930.

49. *Roberts*, 670 So. 2d at 1042.

50. *Cunningham*, 677 So. 2d at 930.

51. *Id.* at 931 n.1.

52. *Id.*

53. 682 So. 2d 1173 (Fla. 4th Dist. Ct. App. 1996).

54. *Id.* at 1174.

opinion that his client would not prevail at trial. This conflict-ridden scenario tainted counsel's representation of his client. In reversing and remanding for appointment of "conflict-free counsel" to argue Hope's motion to withdraw his guilty plea, the appellate court stated that "[c]learly, this is the type of adversarial situation contemplated in *Roberts*."⁵⁵

Confidentiality remains one of the most critical of the duties that is essential to a proper and effective attorney-client relationship. A lawyer's ethical obligations concerning confidentiality are set forth in RPC 4-1.6.⁵⁶ A significant case concerning both conflict and confidentiality issues was *In re Estate of Montanez*.⁵⁷ The Third District Court of Appeal reversed an order awarding attorneys' fees to a personal representative, which was a corporation that had served as guardian for the decedent/ward.⁵⁸ The circumstances of the decedent's death in a nursing home while the corporation was acting as guardian indicated the possibility of a negligence action against both the

55. *Id.*

56. Rule 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.

RPC 4-1.6.

57. 687 So. 2d 943 (Fla. 3d Dist. Ct. App. 1996).

58. *Id.* at 944.

nursing home and the guardian corporation. Yet, upon being appointed personal representative, the corporation, on behalf of the estate, paid the nursing home's bill and, incredibly, released the nursing home from any liability for no consideration. The appellate court correctly observed that the corporation's actions were "fatally tainted by conflicts of interest."⁵⁹ Regarding the duty of the personal representative's attorney, who apparently was fully aware of these circumstances, the court stated:

Lawyers are officers of the court and they are responsible to the judiciary for the propriety of their professional activities. When a lawyer knows or reasonably should know that a client expects assistance not permitted by the Rules of Professional Conduct or by the law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct. The attorneys should have recognized that [the personal representative] could not act objectively and neutrally in the settlement of the claim, *and with their client's consent advised the court and procured the appointment of an attorney ad litem* to make the investigation and file its report. Alternatively, under the facts herein, *if the attorneys were unable to persuade their client of the certitude of their advice, then the attorneys should have moved to withdraw on grounds of irreconcilable differences. Of course, in doing so, counsel would not reveal the client's secrets or breach their confidential relationship.*⁶⁰

Sometimes lawyers for a fiduciary, such as a personal representative, are unsure of where their loyalties lie. Florida law holds that a lawyer for a personal representative is exactly that, the lawyer for the personal representative, and not for the estate or the beneficiaries.⁶¹ *Montanez* emphasizes this point.⁶² The court's statements help clarify the duty of a personal representative's attorney when the attorney learns of improper activity on the part of the personal representative.⁶³ A personal representative's lawyer should treat this type of representation like any other; this means that the lawyer ordinarily should withdraw if the client/personal representative appears reasonably likely to engage in improper conduct

59. *Id.* at 946.

60. *Id.* at 947 (citations omitted) (emphasis added).

61. *In re Estate of Gory*, 570 So. 2d 1381, 1383 (Fla. 4th Dist. Ct. App. 1990).

62. *See In re Estate of Montanez*, 687 So. 2d 943, 946 (Fla. 3d Dist. Ct. App. 1996).

63. *Gory*, 570 So. 2d at 1383.

despite the lawyer's attempts to dissuade the client.⁶⁴ Absent a clear duty of disclosure under the RPC,⁶⁵ upon withdrawal the lawyer *must* maintain the confidentiality of all information relating to the representation. Any duties of

64. Subdivision (a) of RPC 4-1.16, "DECLINING OR TERMINATING REPRESENTATION," provides:

(a) When Lawyer Must Decline or Terminate Representation. Except as stated in subdivision (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the Rules of Professional Conduct or law.

RPC 4-1.16.

65. When representing a personal representative situation, the two most likely ways in which a mandatory duty to disclose confidences could arise are: (1) the personal representative has made false statements to, or false filings with, the court; or (2) the personal representative intends to commit a crime or cause substantial bodily harm to someone. RPC 4-1.16(a) (1993). Regarding the former situation, subdivisions (a) and (b) of RPC 4-3.3, "CANDOR TOWARD THE TRIBUNAL," provide:

(a) False Evidence; Duty to Disclose. A lawyer shall not knowingly:

(1) make a false statement of material fact or law to a tribunal;

(2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;

(3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

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

(b) Extent of Lawyer's Duties. The duties stated in subdivision (a) continue beyond the conclusion of the proceeding and apply even if compliance requires disclosure of information otherwise protected by rule 4-1.6.

RPC 4-3.3(a)-(b).

Regarding the latter situation, subdivision (b) of RPC 4-1.6, "CONFIDENTIALITY OF INFORMATION," provides:

(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.

RPC 4-1.6 (b).

disclosure are expressly established by the RPC and are not enlarged by the fact that a lawyer represents a fiduciary.⁶⁶

As evidenced by the court's statement in *Montanez*, the duty of confidentiality is not always easy to understand and apply.⁶⁷ In an important matter of first impression for Florida, as well as nationally, The Florida Bar Professional Ethics Committee and Board of Governors addressed the duties of a lawyer who, while representing a married couple in estate planning matters, was given information by the husband that the husband wished to keep hidden from the wife.⁶⁸ The information in question, of course, would be of significance to the wife. Florida Ethics Opinion 95-4⁶⁹ carefully analyzed the ethical obligations that govern the lawyer's conduct.⁷⁰ The opinion recognized the tension between the duty that a lawyer ordinarily has under RPC 4-1.4⁷¹ to transmit relevant information to a client and the duty to keep a client's confidence under RPC 4-1.6.⁷² In the situation presented, the lawyer faced an apparent conflict between the duty to inform the wife of the relevant information and the duty to honor the confidentiality obligation owed to the husband.⁷³

66. *Gory*, 579 So. 2d at 1383.

67. *Montanez*, 687 So. 2d at 946. The court addressed the distinction between the ethical duty of confidentiality and the evidentiary attorney-client privilege. See, e.g., *Kleinfeld v. State*, 568 So. 2d 937 (Fla. 4th Dist. Ct. App. 1990), *rev. denied*, 581 So. 2d 167 (Fla. 1991) (even if exception to ethical confidentiality rule permits or requires attorney to disclose certain confidential information, this does not affect whether the evidentiary attorney-client privilege applies to prevent such information from being admitted into evidence); *Buntrock v. Buntrock*, 419 So. 2d 402 (Fla. 4th Dist. Ct. App. 1982) (ethical confidentiality rule is broader than evidentiary attorney-client privilege, and applies even though the confidential information in question is discoverable from other sources); Fla. Bar Comm. on Professional Ethics, Op. 92-5 (1993) (ethical rule of confidentiality prevents attorney from voluntarily disclosing any information relating to representation, while evidentiary attorney-client privilege protects certain specified communications from compelled disclosure).

68. Fla. Bar Comm. on Professional Ethics, Op. 95-4 (1997).

69. *Id.*

70. *Id.*

71. Rule 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.

RPC 4-1.4 (a)-(b).

72. RPC 4-1.6(b).

73. *Buntrock v. Buntrock*, 419 So. 2d 402, 402 (Fla. 4th Dist. Ct. App. 1982).

Opinion 95-4 properly resolved the dilemma by concluding that the duty of confidentiality is paramount.⁷⁴ The general rule that applies in any client representation is that all information “relating to the representation” is confidential as an ethical matter.⁷⁵ There is no basis in the *Rules of Professional Conduct* for relaxing this rule when a lawyer jointly represents multiple clients (such as the husband and wife in the situation addressed in the opinion).⁷⁶ *Unless it is otherwise understood and agreed in advance by clients and lawyer*, all clients, “including those in a joint representation,” have a right to expect that this general rule of confidentiality will be honored by their lawyer.⁷⁷ No such “no-confidentiality” agreement was made in the joint representation case that was the subject of the opinion.⁷⁸

The opinion also persuasively rejected the argument that the *law* of attorney-client privilege should set the *ethical standard* of attorney-client confidentiality.⁷⁹ Although the information in question might not be protected by the evidentiary privilege in a future husband-wife suit,⁸⁰ that fact was irrelevant to any consideration of whether the lawyer was permitted or required, as a matter of professional ethics, to transmit the confidential information to the non-confiding spouse.⁸¹ As is the case when a lawyer represents two clients in separate matters and learns in confidence information from one client that would be relevant to the lawyer’s representation of the other client, Opinion 95-4 concluded that the duty of confidentiality was controlling and required the lawyer to withdraw without disclosing the confidence to the non-confiding spouse, here the wife.⁸²

While well reasoned in most respects, the opinion clearly missed the mark in one important respect. The opinion opened by concluding, with virtually no discussion or analysis, that the lawyer was under no duty to discuss potential conflict of interest and confidentiality issues with the husband and wife at the beginning of the joint representation.⁸³ This conclusion is both incorrect and illogical. Almost every multiple client representation presents at least a potential for a conflict of interests.

74. Fla. Bar Comm. on Professional Ethics, Op. 95-4 (1997).

75. *Id.*

76. *Id.*

77. *Id.* (emphasis added).

78. Fla. Bar Comm. on Professional Ethics, Op. 95-4 (1997). The opinion implies that the lawyer could have, and perhaps should have, prevented the dilemma by discussing the confidentiality issues with the clients at the outset of the representation.

79. *Id.*

80. *See, e.g.*, FLA. STAT. § 90.502(4)(e) (1995).

81. Fla. Bar Comm. on Professional Ethics, Op. 95-4 (1997).

82. *Id.*

83. *Id.*

Furthermore, should not the clients be afforded an opportunity to decide whether they wish to waive the rule of confidentiality that otherwise applies to their separate disclosures to the lawyer? Without a discussion of the issues at the outset of the case, the clients are denied the chance to make this decision. And, of course, the fact that an advisory opinion on this topic was requested by the Real Property, Probate and Trust Law Section of The Florida Bar⁸⁴ and that the Professional Ethics Committee and the Board of Governors of The Florida Bar saw the need to publish the opinion, underscores the fact that ethical problems of this type are not uncommon in this setting.⁸⁵

The significance of Opinion 95-4 was highlighted by a Second District Court of Appeal case, *Cone v. Culverhouse*.⁸⁶ This case concerned the applicability of the attorney-client and accountant-client privileges in two different suits. The scope and extent of the “common interest” exceptions to the privileges were disputed.⁸⁷ In language reminiscent of the situation addressed in Opinion 95-4, the court stated:

The exceptions to the professional privileges also require that the matter be one “of common interest.” . . . [T]he clients’ interests must be sufficiently compatible that a reasonable client would expect his or her communications concerning the matter to be accessible to the other client. *For example, a married couple creating an estate plan with interrelated documents probably have no reasonable expectation of confidentiality concerning the matter of the joint estate plan, but might still have such expectations concerning their individual, private discussions with their lawyer about the reasons for including or excluding specific bequests to third persons in their individual wills.*⁸⁸

The lawyer-client relationship necessarily involves questions of **communication** between the parties to that relationship. RPC 4-1.4⁸⁹ requires lawyers to communicate with clients about matters that the lawyer is handling for them. In *Florida Bar v. Glick*,⁹⁰ a lawyer who failed to convey to his clients the opposing party’s settlement offer, and then lied about this to

84. This group is the largest section of the Bar, with more than 7000 members. The section pursued this matter over a period of years.

85. Fla. Bar Comm. on Professional Ethics, Op. 95-4 (1997).

86. 687 So. 2d 888 (Fla. 2d Dist. Ct. App. 1997).

87. *Id.* at 891.

88. *Id.* at 893 (emphasis added).

89. *See supra* note 71 and accompanying text.

90. 693 So. 2d 550 (Fla. 1997).

The Florida Bar, was suspended from practice for ten days.⁹¹ Similarly, a lawyer's failure to keep a client informed about the status of the case, among other violations, resulted in a one month suspension in *Florida Bar v. Jordan*.⁹² Not informing the client that the lawyer has let the statute of limitations lapse is a violation of RPC 4-1.4.⁹³ A lawyer who committed this violation, among others, was suspended for ninety days in *Florida Bar v. Lecznar*.⁹⁴

Fees are another important aspect of the attorney-client relationship. As might be expected, fee related issues often are the subject of case law and ethics opinions. Over the past year, the Professional Ethics Committee published three opinions dealing with various fee and cost questions. Florida Ethics Opinion 95-3⁹⁵ responded to the inquiry of a law firm that wished to assign its delinquent accounts receivable⁹⁶ to a corporation that would be wholly-owned by the firm's partners. The corporation would then attempt to collect the receivables. If it became necessary to file suit to collect the accounts, the law firm would then represent the corporation in suing the firm's former clients for the delinquent fees.⁹⁷

The Professional Ethics Committee initially published a proposed advisory opinion⁹⁸ concluding that the conduct in question was unethical because it appeared to be an attempt to hide behind the wholly-owned corporation in order to avoid the publicity that could arise when a law firm sues its former clients over fees.⁹⁹ The committee believed that this scheme

91. *Id.* at 552.

92. 682 So. 2d 547, 548 (Fla. 1996).

93. Although not mentioned in the case, it may be noted that the Supreme Court of Florida has indicated that a lawyer ordinarily is obligated to inform a client when the lawyer commits legal malpractice. *Florida Bar v. Morse*, 587 So. 2d 1120, 1121 (Fla. 1991).

94. 690 So. 2d 1284, 1288 (Fla. 1997).

95. Fla. Bar Comm. on Professional Ethics, Op. 95-3 (1997).

96. The accounts receivable represented uncollected legal fees owed by former clients of the law firm. *Id.*

97. *Id.*

98. When it determines that a formal advisory opinion is needed on a particular issue or matter, the Professional Ethics Committee publishes a "proposed advisory opinion" in the *Florida Bar News* along with a notice inviting comments from any interested Bar members. If no comments are received within 30 days, the opinion becomes a final Florida Ethics Opinion. If comments are received, the committee considers those comments and decides whether to stand by its original opinion. If the committee adheres to its original opinion, any dissatisfied commenters may appeal to The Florida Bar Board of Governors. The Board's determination is final; there is no provision for appeal to the Supreme Court. These procedural rules appear in the *Florida Bar Procedures for Ruling on Questions of Ethics*, 70 FLA. B.J. 684, 864-85 (Sept. 1996).

99. Fla. Bar Comm. on Professional Ethics, Op. 95-3 (1996).

constituted a violation of RPC 4-8.4(c),¹⁰⁰ which prohibits lawyers from engaging in misrepresentation or deceitful conduct.

The committee's proposed conclusion was rejected by the Bar's Board of Governors, which revised Opinion 95-3 to permit the conduct in question.¹⁰¹ The Board's opinion traced the trend of ethics opinions issued since the 1970s to liberalize the guidelines governing lawyer conduct in the area of fee collection.¹⁰² Extending this trend, Opinion 95-3, as revised by the Board, concluded that the proposed assignment of receivables to the firm-owned collection corporation, with the firm representing the corporation in collection actions, violated neither RPC 4-8.4(c) nor RPC 4-1.9(a).¹⁰³ The Board viewed the proposed conduct as a legitimate collection technique for lawyers who were owed fees by former clients.¹⁰⁴

Whether RPC 4-8.4(c)¹⁰⁵ was intended to bar the conduct at issue is a question over which reasonable minds can differ. Thus, the matter boiled down to a policy question, which the Board answered in favor of law firms rather than their delinquent clients.¹⁰⁶ The opinion is disappointing, however, in the manner in which it evaded the reach of RPC 4-1.9(a). This rule precludes a lawyer¹⁰⁷ from representing "another person" in a matter that is the same as, or substantially related to, a matter in which the lawyer represented a former client.¹⁰⁸ As Opinion 95-3 conceded, the literal terms of this rule bar a law firm from representing anyone other than itself in matters substantially related to matters in which it represented its former clients.¹⁰⁹ Certainly, collection of a fee owed for representing a client in a matter is "substantially related" to the original matter; the opinion conceded this fact.¹¹⁰

Why, then, does RPC 4-1.9(a) not apply? The opinion essentially stated that the firm and the wholly-owned collection corporation were really the same entity, and therefore declined to apply RPC 4-1.9(a).¹¹¹ As a matter of convenience for fee collecting lawyers, the opinion thus ignored the basis for

100. Subdivision (c) of RPC 4-8.4, "MISCONDUCT," provides that a lawyer shall not "engage in conduct involving dishonesty, fraud, deceit, or misrepresentation." RPC 4-8.4(c).

101. Fla. Bar Comm. on Professional Ethics, Op. 95-3 (1997).

102. *Id.*

103. *Id.* See *supra* note 23 and accompanying text.

104. Fla. Bar. Comm. on Professional Ethics, Op. 95-3 (1997).

105. See *supra* note 100 and accompanying text.

106. Fla. Bar. Comm. on Professional Ethics, Op. 95-3 (1997).

107. All lawyers in a law firm are treated as one for purposes of RPC 4-1.9(a). RPC 4-1.10(a).

108. RPC 4-1.9(a).

109. Fla. Bar. Comm. on Professional Ethics, Op. 95-3 (1997).

110. *Id.*

111. *Id.*

a large part of the American legal structure—corporations are separate entities under law, distinct and apart from their owners. As a separate legal entity, the collection corporation should have been considered “another person” for purposes of applying RPC 4-1.9(a). It is important to note, however, that Opinion 95-3 expressly did not address two questions that should be of great interest to most law firms facing a fee collection problem: first, whether a law firm ethically may assign its delinquent fee receivables to a collection corporation *not* owned by the firm; and second, whether it is ethically permissible for a law firm to assign its accounts receivable as security for a loan.¹¹²

Two Professional Ethics Committee opinions attempted to clear up some ambiguities in the application of rules governing lawyers advancement, or payment, of costs on behalf of clients. Florida Ethics Opinion 96-1¹¹³ was issued to a lawyer who was preparing to submit a bid to a state agency that was seeking to hire lawyers for collection work.¹¹⁴ The lawyer asked the ethics committee whether it would be permissible for the bid to provide that the lawyer would be responsible for paying all expenses associated with the representation, even if the lawyer was successful in obtaining a recovery for the client agency.¹¹⁵ The committee concluded that, while RPC 4-1.8(e)¹¹⁶ permitted the lawyer to *advance* court costs and expenses of litigation, it forbade the lawyer from *paying* for those items.¹¹⁷ The proposed bid was

112. Most jurisdictions that have addressed this second issue prohibit the assignment or limit a law firm’s ability to assign its receivables for this purpose. *See, e.g.*, Arizona ethics opinion 92-4; Illinois ethics opinion 93-4; Kansas ethics opinion 94-08; Maryland ethics opinion 93-3; New York City ethics opinion 1993-1.

113. Fla. Bar Comm. on Professional Ethics, Op. 96-1 (1996).

114. *Id.*

115. *Id.*

116. 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:

(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

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

RPC 4-1.8(e).

117. Fla. Bar. Comm. on Professional Ethics, Op. 96-1 (1996). The opinion noted that RPC 4-1.8(e) contains an exception that allows lawyers to pay costs for indigent clients, but this exception was inapplicable because a state agency would not be considered indigent. *Id.*

declared unethical because it would make the lawyer unconditionally responsible for the costs of expenses of the collection matters.¹¹⁸

Florida Ethics Opinion 96-3¹¹⁹ arose in connection with the Florida offer of judgment statute.¹²⁰ A plaintiff's lawyer apparently was unhappy with the defendant's settlement offer and wanted his client to go to trial rather than accept the offer. The lawyer wished to guarantee his client that he, the lawyer, would pay any attorney's fees and costs assessed against the client if the client proceeded to trial and the defendant ultimately prevailed. The ethics committee opined that such a promise would defeat the purpose of the offer of judgment statute, which the committee believed was enacted to penalize litigants who did not accept bona fide settlement offers prior to trial.¹²¹ Accordingly, the committee concluded that the proposal was unethical as prejudicial to the administration of justice, in violation of RPC 4-8.4(d).¹²²

As usual, 1997 saw several cases handed down concerning lawyer-client fee issues. At issue in *Smith & Burnett, P.A. v. Faulk*¹²³ was a trial court order denying a law firm a charging lien and an award of attorneys' fees.¹²⁴ The law firm apparently had withdrawn from the case, rather than being discharged by its client. Referencing RPC 4-1.7(b),¹²⁵ the Second District Court of Appeal stated that, "[b]ased upon the record disclosing serious conflict between the law firm and [the client], we are persuaded that the law firm had no ethical choice but to terminate its relationship with [the

118. See Fla. Bar. Comm. on Professional Ethics, Op. 95-3 (1997).

119. Fla. Bar Comm. on Professional Ethics, Op. 96-3 (1997).

120. *Id.*

121. *Id.* The committee cited: *Goode v. Udhvani*, 648 So. 2d 247 (Fla. 4th Dist. Ct. App. 1995), and Florida Bar re: Amendment to Rules of Civil Procedure, 550 So. 2d 442 (Fla. 1989), in support of its view. *Id.*

122. *Id.* Subdivision (d) of RPC 4-8.4, "MISCONDUCT," provides that a lawyer may not

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.

RPC 4-8.4(d).

123. 677 So. 2d 404 (Fla. 2d Dist. Ct. App. 1996).

124. *Id.* at 404.

125. See *supra* note 22.

client].¹²⁶ Because the firm's termination of representation was required by the rules of ethics, the lower court erred in not permitting the firm to recover fees from the client.¹²⁷ Relying upon the leading case of *Faro v. Romani*,¹²⁸ the appellate court reversed and remanded the matter for determination of amount of fee to be awarded to firm.¹²⁹ Citing *Searcy, Denney, Scarola, Barnhart & Shipley, P.A. v. Poletz*,¹³⁰ the opinion noted that the fee was to be based upon *quantum meruit* but without a lodestar.¹³¹

The Fourth District Court of Appeal addressed the scope of an attorney's charging lien in *Len-Hal Realty, Inc. v. Wintter & Cummings*.¹³² A law firm had represented a plaintiff in obtaining certain real property through a mortgage foreclosure. Part of the firm's work included having a bankruptcy stay lifted for the plaintiff. Affirming the trial court, the appellate court held that the charging lien filed by the firm in the mortgage foreclosure case could include the fees relating to the work done by the law firm in the bankruptcy matter.¹³³ The work in the bankruptcy case was "directly related to" obtaining the property on which the charging lien was imposed.¹³⁴

*Noris v. Silver*¹³⁵ was a fee-related case with important implications for any lawyers who share fees from particular matters, whether in a referral context or otherwise.¹³⁶ Noris sued attorney Silver for legal malpractice and negligent referral. Noris alleged that he was injured while visiting another state. He then contacted attorney Silver, who referred him to attorney Falk. In the past, Silver had referred clients to Falk and had received one-third of Falk's fee. Noris then retained Falk to handle his injury claim. The Noris-Falk employment agreement did not make reference to Silver, and Silver and Falk did not execute a written fee-division agreement between themselves. Falk subsequently let the statute of limitations lapse without filing suit. Noris' action against Silver ensued.¹³⁷

The trial court entered an order of summary judgment for Silver on the legal malpractice claim, and ordered the negligent referral claim dismissed.¹³⁸

126. *Faulk*, 677 So. 2d at 404.

127. *Id.*

128. 641 So. 2d 69 (Fla. 1994).

129. *Faulk*, 677 So. 2d at 404.

130. 652 So. 2d 366 (Fla. 1995).

131. *Faulk*, 677 So. 2d at 404.

132. 689 So. 2d 1191 (Fla. 4th Dist. Ct. App. 1997).

133. *Id.* at 1191.

134. *Id.*

135. 21 Fla. L. Weekly D1859 (3d Dist. Ct. App. Aug. 14, 1996).

136. *Id.* at D1859.

137. *Id.*

138. *Id.*

The Third District Court of Appeal reversed the summary judgment order on the malpractice claim.¹³⁹ The court concluded that a genuine issue of material fact existed regarding whether Silver had retained a financial interest in Noris' case by expressly or impliedly agreeing to divide the legal fee with Falk.¹⁴⁰ The legal effect of such an agreement would be the creation of a joint venture, which would mean that Silver could be held legally liable for any malpractice committed by Falk.¹⁴¹

While the court rested its decision on joint venture principles, it noted that its conclusion was consistent with RPC 4-1.5(g)(2),¹⁴² which allows attorneys to split fees on the basis of a written agreement among each participating attorney and the client.¹⁴³ RPC 4-1.5(g)(2) is the rule that allows a lawyer to receive what is commonly called a "referral fee," a fee that one attorney receives for referring a client to another attorney. The fee is "earned" primarily as a result of the referral, rather than from any work performed on the case by the referring attorney.¹⁴⁴ *Noris* underscored what the plain language of RPC 4-1.5(g)(2) provides: by agreeing to receive a referral fee in a matter, an attorney becomes responsible for legal malpractice committed by the attorney to whom the matter has been referred.¹⁴⁵ Furthermore, it would appear that any attempt by a referring attorney to avoid such liability by means of an exculpatory or indemnification agreement would be unethical in

139. The order dismissing the negligent referral claim was affirmed. *Id.* The court noted that the negligent referral claim "did not allege that Silver had knowledge of any facts that would indicate that Falk would commit malpractice" and that Noris' counsel conceded this during oral argument. *Noris*, 21 Fla. L. Weekly at D1859.

140. *Id.*

141. *Id.*

142. Subdivision (g)(2) 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

(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.

RPC 4-1.5 (g)(2) (emphasis added).

143. *Noris*, 21 Fla. L. Weekly at D1859.

144. *Id.*

145. *Id.*

view of the clear command of RPC 4-1.5(g)(2)(A) that each attorney assume “joint legal responsibility” for the representation.¹⁴⁶

In the statutory fee-shifting context, the Eleventh Circuit Court of Appeals, in *Foodtown, Inc. of Jacksonville v. Argonaut Insurance Co.*,¹⁴⁷ ruled that an oral contingent fee agreement that did not comply with Florida’s ethics rules governing contingent fee contracts could not be considered by the trial court in determining fees to be awarded to the prevailing party under a Florida fee-shifting statute.¹⁴⁸ Relying on the authority of *Chandris, S.A. v. Yanakakis*,¹⁴⁹ the appellate court stated that, “[b]ecause the oral agreement between [the client] and the law firm violated the rule governing contingent fees, the district court properly refused to recognize it.”¹⁵⁰ The court went on to warn that a law firm that failed to have its contingent fee agreements in writing would be doing so “at its own risk.”¹⁵¹

A Fifth District Court of Appeal decision recognized that the fee-related aspects of the attorney-client relationship remain a primary factor in the degree of confidence that the public places in the judicial system.¹⁵² In *Elser v. Law Offices of James M. Russ, P.A.*,¹⁵³ a lawyer sued a former client for fees.¹⁵⁴ The trial court granted summary judgment in favor of the lawyer.¹⁵⁵ The appeals court reversed, finding that material issues of fact existed.¹⁵⁶ A

146. RPC 4-1.5(g)(2)(A). Additionally, because RPC 4-1.5(g)(2) requires that the client join in any fee-division agreement, any liability-limitation attempts by the referring attorney likely would violate subdivision (h) of RPC 4-1.8, “CONFLICT OF INTEREST; PROHIBITED TRANSACTIONS,” which provides:

(h) Limiting Liability for Malpractice. A lawyer shall not make an agreement prospectively limiting the lawyer’s liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement. A lawyer shall not settle a claim for such liability with an unrepresented client or former client without first advising that person in writing that independent representation is appropriate in connection therewith.

RPC 4-1.8(h).

147. 102 F.3d 483 (11th Cir. 1996).

148. *Id.* at 485.

149. 668 So. 2d 180 (Fla. 1995). *See* Chinaris, *supra* note 47, at 260-65.

150. *Foodtown*, 102 F.3d at 485.

151. *Id.*

152. *Elser v. Law Offices of James M. Russ, P.A.*, 679 So. 2d 309 (Fla. 5th Dist. Ct. App. 1996).

153. *Id.*

154. *Id.*

155. *Id.* at 311.

156. *Id.* at 312.

key fact issue concerned whether it was reasonably necessary for the lawyer to perform the amount of work completed on the case.¹⁵⁷ The court noted that “public policy demands” that a lawyer “only charge the client for those hours that are reasonably necessary to perform the legal services under the contract.”¹⁵⁸ Additionally, a troubling clause in the lawyer-client fee contract provided that the client would waive objection to the lawyer’s bills unless the client contested the bill within ten days from the date of billing. The court voided this provision, declaring it unconscionable and therefore unenforceable.¹⁵⁹ “To permit such an egregious clause to be enforceable in an attorneys’ fees contract would undermine the public confidence in the legal system.”¹⁶⁰

Another unconscionable clause in an attorney-client fee agreement was addressed in *Florida Bar v. Spann*.¹⁶¹ Lawyer and client entered into a contingent fee agreement, but the agreement further obligated the client to pay the lawyer based on an hourly rate schedule if the client discharged the lawyer from the case prior to settlement or final judgment. The Supreme Court of Florida held that this provision constituted a prohibited penalty on the client’s right to discharge the lawyer and, as such, was a violation of RPC 4-1.5(a).¹⁶²

This decision affirmed the special nature of the attorney-client relationship and the client’s absolute right to discharge his or her lawyer at any time, with or without cause.¹⁶³ The court has consistently refused to permit clauses in fee agreements that would penalize clients for exercising this right.¹⁶⁴

157. *Elser*, 679 So. 2d at 312.

158. *Id.*

159. *Id.*

160. *Id.* at 313.

161. 682 So. 2d 1070 (Fla. 1996).

162. *Id.* at 1072-73. 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.

RPC 4-1.5(a).

Charging a fee in excess of that permitted under RPC 4-1.5¹⁶⁵ resulted in a lawyer being publicly reprimanded by the Supreme Court of Florida.¹⁶⁶ In *Florida Bar v. Thomas*,¹⁶⁷ a lawyer who represented a personal injury client on a contingent fee basis in two separate matters paid a medical provider from \$5000 received in "med pay" funds.¹⁶⁸ The original bill was \$5000, which was reflected on the closing statement. The problem was that the lawyer forwarded only \$3100 of these funds to the doctor, keeping the remainder for himself.¹⁶⁹

As one might expect, fee issues can also implicate conflict of interest concerns. One segment of protracted litigation¹⁷⁰ dealt with an appeal of an order awarding attorneys' fees to several lawyers involved in a wrongful death matter.¹⁷¹ In *Moreno v. Allen*,¹⁷² the Third District Court of Appeal reversed the order, finding the conduct of the attorneys in seeking the fees to be highly questionable.¹⁷³ The court noted that one of the attorneys had a "severe conflict of interest" in pursuing a fee claim over the objection of his client that, if successful, would have substantially reduced the client's recovery.¹⁷⁴ Another of the attorneys was denied fees on conflicts grounds as well.¹⁷⁵

A lawyer, of course, is in a **fiduciary relationship** with a client. Annually, the case law reflects that some lawyers breach their fiduciary duties. Misuse of trust funds is perhaps the most egregious example of such a breach. Disbarment was the result of misappropriation of trust money and commingling in *Florida Bar v. Tillman*¹⁷⁶ and *Florida Bar v. Porter*.¹⁷⁷ A lesser sanction of six months suspension followed by two years

163. See also, e.g., *Rosenberg v. Levin*, 409 So. 2d 1016, 1017 (Fla. 1982); *Goodkind v. Wolkowsky*, 180 So. 538, 542 (Fla. 1938).

164. See *Florida Bar v. Hollander*, 607 So. 2d 412, 415 (Fla. 1992); *Florida Bar v. Doe*, 550 So. 2d 1111, 1113 (Fla. 1989).

165. The schedule setting forth the maximum contingent fee that ethically can be charged without specifically procuring court approval is found in subdivision (f)(4)(D) of RPC 4-1.5, "FEES FOR LEGAL SERVICES." RPC 4-1.5 (f)(4)(D).

166. *Florida Bar v. Thomas*, 698 So. 2d 530, 532 (Fla. 1997).

167. *Id.* at 530.

168. *Id.*

169. *Id.* at 531.

170. See, e.g., *Perez v. George, Hartz, Lundeen, Flagg & Fulmer*, 662 So. 2d 361 (Fla. 3d Dist. Ct. App. 1995).

171. *Id.* at 362.

172. 692 So. 2d 957 (Fla. 3d Dist. Ct. App. 1997).

173. *Id.* at 959.

174. *Id.* at 959 n.3.

175. *Id.* at 958-59.

176. 682 So. 2d 542 (Fla. 1996).

177. 684 So. 2d 810 (Fla. 1996).

probation was imposed for trust account irregularities in *Florida Bar v. Barbone*.¹⁷⁸

Competent representation is perhaps the core of the attorney-client relationship. It is no coincidence that the first RPC is entitled “[c]ompetence.”¹⁷⁹ Incompetent representation can lead not only to potential legal malpractice liability but to professional responsibility problems as well. In 1997, several lawyers were disciplined by the Supreme Court of Florida for various shades of incompetence. Cases involving sanctions for incompetence included *Florida Bar v. Horowitz*,¹⁸⁰ *Florida Bar v. Roberts*,¹⁸¹ and *Florida Bar v. Nunes*.¹⁸²

The ethical obligation of **diligence**, expressed in RPC 4-1.3,¹⁸³ follows closely from the duty of competence. In disciplinary parlance, grievance complaints accusing attorneys of lack of diligence are referred to as “neglect” cases.¹⁸⁴ More neglect complaints are filed with The Florida Bar than any other type of alleged violation. Inevitably, some of these complaints result in imposition of disciplinary sanctions.

A lawyer’s failure to promptly deliver funds held in trust, when coupled with other violations, led to a suspension of ninety-one days in *Florida Bar v. Laing*.¹⁸⁵ In *Florida Bar v. Jordan*,¹⁸⁶ the lawyer was suspended for ninety-one days for, among other things, a failure to file required documents that resulted in dismissal of a client’s appeal.¹⁸⁷ In *Florida Bar v. Barcus*,¹⁸⁸ the lawyer was publicly reprimanded for several instances of neglect, including failure to appear at a deposition and failure to file necessary motions.¹⁸⁹ The disciplinary sanction could have been greater, as the court noted: “[The lawyer] committed isolated acts of negligence, but we do not find a pattern of negligence which would require a suspension. We find this to be a case of an

178. 679 So. 2d 1179 (Fla. 1996).

179. Rule 4-1.1 provides: “A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.” RPC 4-1.1.

180. 697 So. 2d 78 (Fla. 1997).

181. 689 So. 2d 1049 (Fla. 1997).

182. 679 So. 2d 744 (Fla. 1996).

183. Rule 4-1.3, “DILIGENCE,” provides that “[a] lawyer shall act with reasonable diligence and promptness in representing a client.” RPC 4-1.3.

184. RPC 4-1.3.

185. 695 So. 2d 299, 304 (Fla. 1997).

186. 682 So. 2d 548 (Fla. 1996).

187. *Id.* at 549.

188. 697 So. 2d 71 (Fla. 1997).

189. *Id.* at 74-75.

attorney who ineptly handled a difficult situation.”¹⁹⁰ And, of course, missing a statute of limitations violates the duty of diligence, as was the case in *Florida Bar v. Lecznar*.¹⁹¹

A logical, but unfortunate, occasional consequence of a lack of diligence is the lawyer’s failure to follow the ethical rules that govern withdrawal from a representation. Simply walking away from a representation, even one that is not in litigation, is not sufficient. A withdrawing lawyer must comply with RPC 4-1.16,¹⁹² which requires, at a minimum, proper notice to the client and

190. *Id.* at 75. Two justices, however, would have imposed a thirty day suspension. *Id.* (Grimes, J., dissenting).

191. 690 So. 2d 1284, 1286 (Fla. 1997). See also *supra* text accompanying note 183.

192. Rule 4-1.16, “DECLINING OR TERMINATING REPRESENTATION,” provides:

(a) When Lawyer Must Decline or Terminate Representation. Except as stated in subdivision (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the Rules of Professional Conduct or law;

(2) the lawyer’s physical or mental condition materially impairs the lawyer’s ability to represent the client; or

(3) the lawyer is discharged.

(b) When Withdrawal Is Allowed. Except as stated in subdivision (c), a lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client, or if:

(1) the client persists in a course of action involving the lawyer’s services that the lawyer reasonably believes is criminal or fraudulent;

(2) the client has used the lawyer’s services to perpetrate a crime or fraud;

(3) a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent;

(4) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer’s services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(5) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(6) other good cause for withdrawal exists.

(c) Compliance With Order of Tribunal. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Protection of Client’s Interest. Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client’s interest, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which

an attempt by the lawyer to reasonably protect the client's interests upon withdrawal.¹⁹³ Failure to properly withdraw can be considered abandonment of the client, as was the case in *Florida Bar v. Brakefield*.¹⁹⁴ The lawyer's neglect and abandonment of several clients resulted in a six month suspension, along with probation and other sanctions.¹⁹⁵

III. THE LAWYER'S RELATIONSHIP TO THE JUDICIAL SYSTEM

Lawyers often are referred to as "officers of the court" and, as such, they have ethical responsibilities to the leading officers of the court, judges, and to the judicial system in general. This position as an integral part of our jurisprudential system has long required that lawyers comply with certain standards of conduct, as set forth in the RPC.¹⁹⁶ Florida case law in 1997 addressed a variety of issues in this area, such as a lawyer's duty of **candor to a court**, the extent to which a lawyer may **communicate with jurors** after a trial, grounds for a lawyer's **disqualification** from participating in litigation, and the **permissible scope of argument** before a jury.

The past year saw interest in the lawyer's status as an officer of the court and a member of a learned profession carried to a new level. The Supreme Court of Florida created a "Commission on Professionalism" consisting of judges, lawyers, legal educators, and public representatives and charged them with the responsibility of ensuring "that the fundamental ideals and values of the justice system and the legal profession are inculcated in all of those persons serving or seeking to serve in the system."¹⁹⁷ The Florida Bar pitched in, creating and funding a "Center for Professionalism."¹⁹⁸ The Continuing Legal Education ("CLE") Requirement rules were amended to mandate that

the client is entitled, and refunding any advance payment of fee that has not been earned. The lawyer may retain papers and other property relating to or belonging to the client to the extent permitted by law.

RPC 4-1.16.

193. *Id.*

194. 679 So. 2d 766, 769 (Fla. 1996). *See also* Florida Bar v. King, 664 So. 2d 925 (Fla. 1995); Florida Bar v. Hooper, 509 So. 2d 289 (Fla. 1987).

195. *Brakefield*, 679 So. 2d at 769-70.

196. *See supra* note 65 and accompanying text. Such obligations in the current Florida RPC often are based on ethics rules that existed in prior professional responsibility codes. *See, e.g., Code of Professional Responsibility*, 59 FLA. B.J. 439, 439 (Sept. 1985) (citing former rule DR 7-102(B) of *Florida Code of Professional Responsibility*).

197. *In re* Florida Supreme Court Commission on Professionalism, Fla. Admin. Order (Fla. July 19, 1996).

198. The Center will have a budget of almost \$300,000 annually. *See, e.g., Gary Blankenship, Board Okays 97-98 Budget*, FLA. B. NEWS, Apr. 1, 1997, at 1, 6; *The Florida Bar Proposed Budget for Fiscal 1997-98*, FLA. B. NEWS, Apr. 15, 1997, at 12.

lawyers complete at least five hours every three years of continuing education courses in some combination of ethics, professionalism, or substance abuse.¹⁹⁹

Despite the interest in Florida surrounding the issue of “professionalism,”²⁰⁰ it remains to be seen what effect, if any, these initiatives will have on the conduct of lawyers. “Professionalism” means different things to different people, so it will be hard to measure whether the behavior of lawyers becomes more “professional.” Although ethics education has been mandatory for years,²⁰¹ many Florida lawyers seemingly cannot grasp the most elemental notions of fiduciary duty.²⁰² If the threat of disciplinary sanctions for the violation of *mandatory* professional ethics rules has not transformed the behavior of lawyers, one might question how an *aspirational* “professionalism” program can be expected to achieve more favorable results.

Several cases addressed a variety of issues relating to a lawyer’s relationship with the judicial system, including lawyers’ ethical obligation of candor toward a tribunal. **Misrepresentation to a court** remains one of the most serious offenses that an attorney can commit.²⁰³ In *Florida Bar v. Kravitz*,²⁰⁴ a lawyer who made multiple misrepresentations to a judge was not only held in contempt but ultimately was suspended from the practice of law

199. The Florida Bar re: Amendments to Rules Regulating The Florida Bar, 697 So. 2d 115 (Fla. 1997). Ironically, the new rule actually allows a lawyer to escape entirely any CLE course in the ethics rules (the very rules to which compliance is mandatory) by taking five hours of courses in “professionalism” or substance abuse. *Id.* at 133. While these two subjects are important, it is unfortunate that the new requirement permits lawyers to evade basic ethics education.

200. See, e.g., *Hillsborough Takes Top Professionalism Award*, FLA. B. NEWS, Aug. 1, 1997, at 1; Mary Smith Judd, *Florida Professionalism Efforts May Be a Model for Others*, FLA. B. NEWS, May 15, 1997, at 9; Mary Smith Judd, *President Notes Progress on Professionalism Front*, FLA. B. NEWS, June 15, 1997, at 19; Mary Smith Judd, *Professional Commission Shares Passion for Profession*, FLA. B. NEWS, May 15, 1997, at 1; Mark D. Killian, *Frost Tells St. Thomas Students to Strive for Professionalism*, FLA. B. NEWS, June 1, 1997, at 11; *Workers’ Comp Section to Set Professionalism Standards*, FLA. B. NEWS, July 15, 1997, at 21.

201. In 1987 the Supreme Court of Florida adopted a “Continuing Legal Education Requirement,” whereby lawyers must take at least two hours of ethics education every three years. Florida Bar re Amendment to Rules Regulating The Florida Bar Continuing Legal Education, 510 So. 2d 585, 586 (Fla. 1987).

202. See Timothy P. Chinaris, *Professional Responsibility: 1996 Survey of Florida Law*, 21 NOVA L. REV. 231, 254-55, 274-76 (1996); Timothy P. Chinaris, *Professional Responsibility Law in Florida: The Year in Review*, 20 NOVA L. REV. 223, 229-30, 251-52 (1995).

203. See *supra* notes 65 and 100 and accompanying text.

204. 694 So. 2d 725 (Fla. 1997).

for thirty days.²⁰⁵ Among other offenses, the lawyer lied to the judge about a matter of which he had personal knowledge, and falsely represented to the judge that opposing counsel did not object to entry of a proposed “agreed” order.²⁰⁶ This conduct violated RPC 4-3.3(a)²⁰⁷ and 4-8.4(c).²⁰⁸

A lawyer who filed an affidavit in a bankruptcy case falsely stating that he had no connection with the debtor was suspended for ninety-one days in *Florida Bar v. Norvell*.²⁰⁹ Disbarment was the sanction imposed in *Florida Bar v. Catalano*,²¹⁰ after the lawyer made both written and oral misrepresentations to the court in a civil matter.²¹¹ In *Florida Bar v. Kaufman*,²¹² disbarment also resulted when a lawyer falsely testified in an attempt to evade discovery of his assets in a civil suit in which he was a party.²¹³

In our legal system, a constant source of tension is the conflict between a lawyer’s duty to effectively represent the client and the duty to be honest and forthright with the court. It seems, however, that in an adversarial system any legitimate doubts that a lawyer has should be resolved in favor of the client. A lawyer can have disclosure obligations to a court regarding both the facts and the law.²¹⁴ The extent of these obligations may be easier to determine with regard to the law.²¹⁵ In addition to general rules that prohibit a lawyer from making false or misleading statements to a court, a special rule, RPC 4-3.3(a)(3), imposes a duty to disclose to a court “legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel.”²¹⁶

This duty was addressed in *Dilallo v. Riding Safely, Inc.*²¹⁷ A trial court granted summary judgment, relying on a particular statute that apparently immunized the defendant from liability.²¹⁸ The problem with the court’s ruling, however, was that the statute had not become effective until *after* the date of the accident in question. Defense counsel had failed to disclose this

205. *Id.* at 725.

206. *Id.* at 726.

207. *See supra* note 65.

208. *See supra* note 100.

209. 685 So. 2d 1296 (Fla. 1996). The lawyer was guilty of other violations as well. *Id.* at 1296-97.

210. 685 So. 2d 1299 (Fla. 1996).

211. *Id.* at 1300.

212. 684 So. 2d 806 (Fla. 1996).

213. *Id.* at 807.

214. RPC 4-3.3(a).

215. *Id.*

216. RPC 4-3.3(a)(3).

217. 687 So. 2d 353 (Fla. 4th Dist. Ct. App. 1997).

218. *Id.* at 354-55.

fact to the court; on appeal, counsel conceded that he had not checked the effective date before arguing for summary judgment below. The Fourth District Court of Appeal considered RPC 4-3.3(a)(3) in conjunction with RPC 4-1.1,²¹⁹ which mandates competent representation, and stated that these rules “imply a duty to *know and disclose* to the court adverse legal authority.”²²⁰ Trial counsel is required by these rules “to provide full information to the trial court such that the court has all necessary information to determine the issue presented to it.”²²¹ Trial counsel’s failure to know and disclose the effective date had failed to meet these standards, and the judgment was reversed.²²²

In contrast to the clear requirement to disclose adverse *legal* authority, there is no corresponding duty to volunteer adverse *facts*.²²³ *Schlapper v. Mauer*²²⁴ was a medical malpractice case in which a defendant doctor was granted summary judgment dismissing him as a party.²²⁵ Plaintiff’s counsel had not opposed the motion for summary judgment because he was advised by the doctor’s lawyer that the doctor “had nothing to do with the treatment of” the plaintiff.²²⁶ After discovering that this statement was totally false, plaintiff’s counsel moved to vacate the summary judgment. Affirming the trial court’s order vacating the summary judgment, the Fifth District Court of Appeal concluded that defense counsel’s conduct violated the ethical prohibition against misrepresentations of fact that is imposed by RPC 4-4.1.²²⁷

The court explained:

Because of the attorney-client privilege, and the attorney’s fiduciary duty owed to a client, an attorney has no affirmative duty to inform an opposing party or attorney as to the existence of relevant facts. But misrepresentations about facts, as well as

219. *See supra* note 179 and accompanying text.

220. *Dilallo*, 687 So. 2d at 355 (emphasis added).

221. *Id.*

222. *Id.*

223. *Schlapper v. Mauer*, 687 So. 2d 982, 984 (Fla. 5th Dist. Ct. App. 1997).

224. *Id.* at 982.

225. *Id.* at 983.

226. *Id.* at 984.

227. *Id.* at 985. Rule 4-4.1, “TRUTHFULNESS IN STATEMENTS TO OTHERS,” provides:

In the course of representing a client a lawyer shall not knowingly:

- (a) make a false statement of material fact or law to a third person; or
- (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by rule 4-1.6.

RPC 4-4.1.

procedures and future conduct likewise is forbidden. . . . An attorney has the option of keeping silent, refusing to answer, changing the subject or referring counsel to the discovery process. But he or she cannot misstate the facts.²²⁸

A dissenting opinion in *Steinhorst v. State*²²⁹ contained interesting comments regarding the ethical obligations of a lawyer who was aware that the trial judge had a conflict of interest that, as a matter of judicial ethics, would require the judge's recusal from the case.²³⁰ The judge had recused himself in a co-defendant's case due to a conflict, but failed to recuse himself from this case despite the presence of the same conflict. The majority upheld the conviction, concluding that the judge's conflict could have been discovered by defense counsel with the exercise of due diligence.²³¹ Justice Anstead's dissent expressed the view that the prosecutor, as well as the judge, had the duty to disclose the judge's conflict to the defense.²³²

The ethical limitations on a lawyer's post-trial **communication with jurors** are set forth in RPC 4-3.5(d)(4).²³³ In *Kriston v. Webster*,²³⁴ a lawyer for the defendant interviewed jurors without following the procedure specified

228. *Schlapper*, 687 So. 2d at 985.

229. 695 So. 2d 1245 (Fla. 1997) (Anstead, J., dissenting).

230. *Id.* at 1251.

231. *Id.* at 1247.

232. *Id.* at 1251.

233. Subdivision (d)(4) of RPC 4-3.5, "IMPARTIALITY AND DECORUM OF THE TRIBUNAL," provides:

(d) Communication With Jurors. A lawyer shall not:

....

(4) after dismissal of the jury in a case with which the lawyer is connected, initiate communication with or cause another to initiate communication with any juror regarding the trial except to determine whether the verdict may be subject to legal challenge; provided, a lawyer may not interview jurors for this purpose unless the lawyer has reason to believe that grounds for such challenge may exist; and provided further, before conducting any such interview the lawyer must file in the cause a notice of intention to interview setting forth the name of the juror or jurors to be interviewed. A copy of the notice must be delivered to the trial judge and opposing counsel a reasonable time before such interview. The provisions of this rule do not prohibit a lawyer from communicating with members of the venire or jurors in the course of official proceedings or as authorized by court rule or written order of the court.

RPC 4-3.5 (d)(4).

234. 688 So. 2d 346 (Fla. 5th Dist. Ct. App. 1997).

by this rule.²³⁵ The trial court ultimately granted the defense's motion for a new trial, but in doing so expressly stated that it was ignoring the improper juror interviews and granting the new trial on other grounds.²³⁶ Regarding counsel's noncompliance with RPC 4-3.5(d)(4), the court stated:

Knowledge and observance of the rules regulating a lawyer's ethical conduct with respect to jury and court contacts is as important in the practice of the profession as knowing the substantive law. Ignorance or non-observance of those rules affects the reputation of the Bar and of the individual lawyer who violates them.²³⁷

In *Kriston*, the court referred to the procedures that are required as a matter of *attorney ethics* by RPC 4-3.4(d)(4),²³⁸ but made no reference to Rule 1.321(h) of the *Florida Rules of Civil Procedure*,²³⁹ which also outlines required juror-contact procedures.²⁴⁰ The relationship between the ethics rule and the rule of procedure was addressed, however, in a Third District Court of Appeal case, *Seymour v. Soloman*.²⁴¹ Following the trial in this case, plaintiff's counsel contacted three jurors. At that time counsel was aware of no grounds to challenge the verdict or to support a motion to interview the jurors. From one of these contacts, counsel learned that one of the jurors had known the defendant. Counsel moved for a new trial, and the court responded by setting an evidentiary hearing to interview the juror.²⁴² The appellate court

235. *Id.* at 347.

236. *Id.*

237. *Id.* at 348.

238. RPC 4-3.4(d)(4).

239. Florida Rule of Civil Procedure 1.431(h) provides:

Interview of a Juror. A party who believes that grounds for legal challenge to a verdict exists may move for an order permitting an interview of a juror or jurors to determine whether the verdict is subject to the challenge. The motion shall be served within 10 days after rendition of the verdict unless good cause is shown for the failure to make the motion within that time. The motion shall state the name and address of each juror to be interviewed and the grounds for challenge that the party believes may exist. After notice and hearing, the trial judge shall enter an order denying the motion or permitting the interview. If the interview is permitted, the court may prescribe the place, manner, conditions, and scope of the interview.

FLA. R. CIV. P. 1.431(h).

240. *Kriston*, 688 So. 2d at 347.

241. 683 So. 2d 167 (Fla. 3d Dist. Ct. App. 1996).

242. *Id.* at 168.

quashed the trial court's order, noting that counsel had violated Florida Rule Civil Procedure 1.431(h) by contacting jurors without filing a motion with the court, without notice and hearing, and without leave of court.²⁴³ In a footnote, the court recognized that RPC 4-3.5(d) "governs the propriety of attorneys' actions in relations to juror interviews."²⁴⁴ Citing the preamble to the RPC,²⁴⁵ however, the court stated that the ethics rules are "not intended to supplement court procedural rules."²⁴⁶

A trial judge's authority to **disqualify an attorney** from representing a client in a particular case is an important aspect of our court system. This authority allows the judge to prevent one party from being placed at an unfair disadvantage in litigation due to reasons such as improper access to confidential information, an attorney's failure to honor ethical obligations, or even the "appearance of impropriety."²⁴⁷ Two cases at the appellate level dealt with the issue of disqualification as a result of alleged access to confidential information.

The Third District Court of Appeal addressed the question of how the conflicts rules apply to a lawyer who may have been previously involved in a matter in a nonlawyer capacity. *Royal Caribbean Cruises, Ltd. v. Buenaagua*²⁴⁸ concerned a former adjuster for a cruise line's insurance claims manager who became a lawyer and opposed the cruise line in Jones Act cases.²⁴⁹ The cruise line's motions to disqualify the lawyer in four unrelated cases were denied. The appellate court denied certiorari, concluding that the current matters were not "substantially related" to matters on which the lawyer previously worked as an adjuster.²⁵⁰ The court noted the presence of four significant factors: 1) four years had passed since the lawyer left the claims manager; 2) the current matters arose after the lawyer left the claims manager; 3) the claims manager and the cruise line were no longer associated; and 4) the claims manager did not adjust the matters in question.²⁵¹ The

243. *Id.*

244. *Id.* at 168 n.1.

245. RPC, "PREAMBLE: A LAWYER'S RESONSIBILITIES."

246. *Seymour*, 683 So. 2d at 168 n.1 (citing Preamble to Rules Regulating The Florida Bar).

247. *State Farm Mut. Auto. Ins. Co. v. K.A.W.*, 575 So. 2d 630, 633 (Fla. 1991). Unlike the former Code of Professional Responsibility, Florida's current RPC no longer contains a rule against the "appearance of impropriety." *Id.* Nevertheless, judges may use an "appearance of impropriety" standard in ruling on motions to disqualify counsel. *Id.* at 634.

248. 685 So. 2d 8 (Fla. 3d Dist. Ct. App. 1996).

249. *Id.* at 8.

250. *Id.* at 10.

251. *Id.* at 8-10. In the court's view, these factors distinguished this case from its prior decision in *Tuazon v. Royal Caribbean Cruises, Ltd.*, 641 So. 2d 417 (Fla. 3d Dist. Ct. App.

cruise line failed to show that any information to which the lawyer, as adjuster, had access gave him an unfair advantage in the present matters.²⁵² The court further noted that information relevant to each case (e.g., “shipboard conditions, cleaning practices, maintenance procedures”) could be obtained through discovery.²⁵³ Citing the comment to RPC 4-1.9,²⁵⁴ the court concluded that a “changing of sides in the matter in question” by the lawyer had not occurred.²⁵⁵ The court further stated that the fact that all Jones Act cases are all similar to some degree was insufficient to warrant disqualification of the lawyer.²⁵⁶

Unfair access to confidential information as grounds for disqualification in a joint representation situation was at issue in *Double T Corp. v. Jalis Development, Inc.*²⁵⁷ Several co-defendants were jointly represented in the defense of a civil matter. Plaintiff’s counsel gained access to one co-defendant’s corporate files after that co-defendant filed for bankruptcy, and the bankruptcy trustee waived that co-defendant’s attorney-client privilege. The remaining co-defendants moved to disqualify plaintiff’s counsel, but the trial court denied the motion.²⁵⁸ The Fifth District Court of Appeal reversed and ordered disqualification.²⁵⁹ “As a result of the bankruptcy trustee’s

1994) (finding plaintiff’s attorney who previously worked as adjuster for defendant cruise line disqualified on grounds that he had access to confidential information in that capacity).

252. *Royal Caribbean*, 685 So. 2d at 11.

253. *Id.* at 10.

254. *Id.* The comment to RPC 4-1.9, “CONFLICT OF INTEREST; FORMER CLIENT,” provides in pertinent part:

The scope of a “matter” for purposes of rule 4-1.9(a) may depend on the facts of a particular situation or transaction. The lawyer’s involvement in a matter can also be a question of degree. When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests clearly is prohibited. On the other hand, a lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a wholly distinct problem of that type even though the subsequent representation involves a position adverse to the prior client. Similar considerations can apply to the reassignment of military lawyers between defense and prosecution functions within the same military jurisdiction. The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question.

RPC 4-1.9 cmt.

255. *Royal Caribbean*, 685 So. 2d at 10 (citing RPC 4-1.9 cmt. (1992)).

256. *Id.* at 11.

257. 682 So. 2d 1160, 1160 (Fla. 5th Dist. Ct. App. 1996).

258. *Id.* at 1161.

259. *Id.*

waiver of the attorney-client privilege, [plaintiff's] counsel has received an informational advantage over the defendants who agreed to joint representation, as [the bankrupt's] corporate files include attorney-client communications regarding the pending civil litigation.²⁶⁰

Disqualification as a means of preventing a lawyer from acting in the dual roles of advocate and witness at trial was the subject of several cases. With limited exceptions, RPC 4-3.7 ethically precludes a lawyer from representing a client at trial if that lawyer will be a "necessary witness on behalf of the client."²⁶¹ Disqualification under this rule is not warranted where the lawyer will not be a material witness.²⁶² In a domestic relations case, *Pascucci v. Pascucci*,²⁶³ opposing counsel moved to disqualify the wife's lawyer based on alleged communications with a psychologist who treated the wife and children, claiming those discussions made the lawyer a material witness.²⁶⁴ The trial court granted the motion, but the Fourth District Court of Appeal reversed the order.²⁶⁵ The record reflected no evidence that the wife's lawyer would be a material witness.

Even if counsel had gained information, this would not make counsel a material, necessary or essential witness because anything he could conceivably testify to would be inadmissible hearsay. Any possible argument that counsel could be a witness vanished

260. *Id.*

261. Rule 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:

- (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.

RPC 4-3.7.

262. *Id.*

263. 679 So. 2d 1311 (Fla. 4th Dist. Ct. App. 1996).

264. *Id.* at 1312.

265. *Id.* at 1313.

when the trial court denied former wife's motion for protective order and permitted the deposition [of the psychologist].²⁶⁶

On a related point, the appellate court noted that the conflict of interest rule, RPC 4-1.7(b),²⁶⁷ "does not require an attorney to withdraw when the opposing party has instituted collateral litigation against the attorney personally."²⁶⁸

Two other cases concerning applicability of RPC 4-3.7 have helped clear up uncertainty concerning the extent of the disqualification imposed under this rule. The rule on its face states that a disqualified lawyer-witness cannot "act as advocate *at a trial*."²⁶⁹ It does not, however, refer to possible pre-trial or post-trial representation. In *Fleitman v. McPherson*,²⁷⁰ the First District Court of Appeal ruled that the trial court had erred in not disqualifying a lawyer who was likely to be a "featured witness" at trial.²⁷¹ Significantly, the court went on to state that the lawyer "may participate in the representation *up until the trial and after the trial*, but may not participate as an attorney at trial."²⁷² The conclusion that RPC 4-3.7(a) does not bar pre-trial representation was also reached in *United States v. Abbell*,²⁷³ which concerned a criminal defendant's lawyer who was to be called as a government witness at trial to testify regarding his client's co-defendant.²⁷⁴ The court ruled that the lawyer was disqualified under RPC 4-3.7(a)²⁷⁵ from representing his client at trial, but was *not* disqualified from pre-trial representation.²⁷⁶

As in many areas of lawyering, delay in pursuing a motion to disqualify opposing counsel can be fatal. A federal court in Florida denied a motion for disqualification that was filed five months after suit was instituted and eight months after the filing of a related case.²⁷⁷ The court in *Concerned Parents of Jordan Park*²⁷⁸ held that the untimeliness in the filing of the disqualification motion acted as a waiver of the right to object.²⁷⁹

266. *Id.* at 1312.

267. RPC 4-1.7(b); *see supra* note 22.

268. *Pascucci*, 679 So. 2d at 1312.

269. RPC 4-3.7(a) (emphasis added); *see supra* note 261.

270. 691 So. 2d 37 (Fla. 1st Dist. Ct. App. 1997).

271. *Id.* at 38.

272. *Id.* (emphasis added).

273. 939 F. Supp. 860 (S.D. Fla. 1996).

274. *Id.* at 862.

275. RPC 4-3.7(a); *see supra* note 261.

276. *Abbell*, 939 F. Supp. at 864.

277. *Concerned Parents of Jordan Park v. Housing Auth. of St. Petersburg*, 934 F. Supp. 406, 408 (M.D. Fla. 1996).

278. *Id.* at 406.

279. *Id.* at 408.

The permissible scope of a lawyer's argument to a jury, and responses of the court and The Florida Bar when those bounds are exceeded, were addressed in a number of cases. District Courts of Appeal for each district, except the second, published decisions in this area. In *Winterberg v. Johnson*,²⁸⁰ the First District Court of Appeal expressed its position that argument that is unethical and improper under RPC 4-3.4(e)²⁸¹ "does not necessarily constitute fundamental or harmful error."²⁸² Rather, the court will focus on whether the misconduct could have been cured by a jury instruction from the trial court, and whether the argument was so egregious as to preclude the jury from fairly considering the case.²⁸³ The court noted that, while interested in the conduct of attorneys, its primary consideration was not attorney discipline, but the fairness of trial proceedings.²⁸⁴ Similar decisions were reached by the First District Court of Appeal in *City of Jacksonville v. Tresca*²⁸⁵ and *Hicks v. Yellow Freight Systems, Inc.*²⁸⁶

The Third District Court of Appeal, in *Hampton v. State*,²⁸⁷ concluded that an improper argument that was not objected to did not require reversal.²⁸⁸

The prosecution had agreed not to mention a certain tape to the jury. Despite this agreement, when the prosecutor began his closing argument, he brought up the tape. Defense counsel did not object, and this failure to object proved costly when the appellate court declined to find fundamental error.²⁸⁹

Also addressed by the Third District Court of Appeal was improper argument that was alleged to be "invited."²⁹⁰ Repeated expressions of the prosecutor's personal opinion were condemned by the court in *Fryer v.*

280. 692 So. 2d 254 (Fla. 1st Dist. Ct. App. 1997).

281. Rule 4-3.4(e), "FAIRNESS OF OPPOSING PARTY AND COUNSEL," provides that a lawyer may not

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.

RPC 4-3.4(e).

282. *Winterberg*, 692 So. 2d at 255.

283. *Id.*

284. *Id.*

285. 692 So. 2d 991, 992 (Fla. 1st Dist. Ct. App. 1997).

286. 694 So. 2d 869, 870 (Fla. 1st Dist. Ct. App. 1997).

287. 680 So. 2d 581 (Fla. 3d Dist. Ct. App. 1996).

288. *Id.* at 585.

289. *Id.*

290. *Fryer v. State*, 693 So. 2d 1046, 1048 (Fla. 3d Dist. Ct. App. 1997).

*State*²⁹¹ as “patently improper and violative of the rules of professional conduct.”²⁹² Defense counsel objected to some of the statements. The court reversed the conviction, ruling that an the prosecutor’s responses to defense counsel’s “inviting” comments went far beyond merely “righting the scale” and prejudiced the jury.²⁹³ A concurring opinion characterized the actions of both counsel as a “monumental display of attorney misconduct.”²⁹⁴

The Fourth District Court of Appeal affirmed per curiam the trial court’s judgment in *Donahue v. FPA Corp.*²⁹⁵ The concurring opinion in *Donahue* expressed the view that an unobjected-to closing argument that violated RPC 4-3.4(e)²⁹⁶ was not necessarily fundamental error.²⁹⁷ The concurrence distinguished the court’s prior holding in *Norman v. Gloria Farms, Inc.*²⁹⁸ The concurring opinion declared the author’s “hope that publishing unethical remarks and the name of the lawyer making them will serve as a deterrent.”²⁹⁹

In *American Chambers Life Insurance Co. v. Hall*,³⁰⁰ the Fourth District Court of Appeal concluded that isolated “send a message” and “conscience of the community” arguments, while clearly improper, are not always per se harmful.³⁰¹ Another improper argument case, *Grushoff v. Denny’s, Inc.*³⁰² concerned a “golden rule” argument.³⁰³ The argument in question had been objected to, and the objections were sustained. On the basis of the argument, the trial court granted a new trial. The appellate court reversed, holding that “golden rule” arguments were not per se reversible error but must be evaluated under the same standard as other improper argument: whether the subject argument was “highly prejudicial and inflammatory.”³⁰⁴ Here, the argument fell short of this standard.³⁰⁵

The voice of the Fifth District Court of Appeal was heard in the form of a lengthy dissent in *Schlotterlein v. State*.³⁰⁶ The dissenting opinion

291. *Id.* at 1046.

292. *Id.* at 1047.

293. *Id.* at 1048.

294. *Id.* at 1049 (Sorondo, J., concurring specially).

295. 677 So. 2d 882, 883 (Fla. 4th Dist. Ct. App. 1996).

296. RPC 4-3.4(e); *see supra* note 281.

297. *Donahue*, 677 So. 2d at 883-84 (Klein, J., concurring specially).

298. *Id.* (citing *Norman v. Gloria Farms, Inc.*, 668 So. 2d 1016 (Fla. 4th Dist. Ct. App. 1996)).

299. *Donahue*, 677 So. 2d at 883 (Klein, J., concurring specially).

300. 22 Fla. L. Weekly D1381 (4th Dist. Ct. App. June 4, 1997).

301. *Id.* at D1381.

302. 693 So. 2d 1068 (Fla. 4th Dist. Ct. App. 1997).

303. *Id.* at 1069.

304. *Id.*

305. *Id.*

306. 683 So. 2d 568 (Fla. 5th Dist. Ct. App. 1996) (Sharp, J., dissenting).

characterized the prosecutor's closing argument as containing statements bolstering the credibility of state's witnesses and vouching for their veracity,³⁰⁷ as well as expressions of personal opinion as to the guilt of the accused.³⁰⁸ The dissent would have reversed the conviction on the grounds of this improper argument, which the author believed violated RPC 4-3.4(e) "in multiple regards."³⁰⁹ It is interesting to note, despite the numerous reported cases dealing with various aspects of improper and unprofessional argument, there appear to have been no reported instances of disciplinary sanctions being assessed against the perpetrators.

IV. THE LAWYER'S RELATIONSHIP WITH THIRD PARTIES

A lawyer's ethical obligations extend beyond dealings with his or her client. *Florida Rules of Professional Conduct* impose minimum requirements in a lawyer's dealings with third parties. These duties include whether and how an attorney can communicate with third parties, and honesty and fairness in dealing with third parties and others. This section discusses cases which have impacted these areas.

Perhaps the area of the most court activity has been the propriety of lawyers' communications with others. The Supreme Court of Florida settled the question of communications with the former employees of a defendant corporation³¹⁰ in the case of *H.B.A. Management, Inc. v. Estate of Schwartz*.³¹¹ The court found that under RPC 4-4.2, *ex parte* contact with former employees of a defendant corporation is permissible.³¹² The court upheld the Fourth District Court of Appeal, and disapproved of the position taken by the Second District Court of Appeal in *Barfuss v. Diversicare Corp.*

307. *Id.* at 568.

308. *Id.* at 571.

309. *Id.*

310. *See, e.g.*, in support of the proposition that such conduct is permissible, Fla. Bar Comm. on Professional Ethics, Op. 88-14 (1989); *Manor Care of Dunedin, Inc. v. Keiser*, 611 So. 2d 1305, 1308 (Fla. 2d Dist. Ct. App. 1992). *But see, e.g.*, *United States v. Florida Cities Water Co.*, No. 93-281-CIV-FTM-21, 1995 WL 340980, *1 (M.D. Fla. Apr. 26, 1995); *Rentclub, Inc. v. Transamerica Rental Finance Corp.*, 811 F. Supp. 651, 657 (M.D. Fla. 1992), *aff'd*, 43 F.3d 1439, 1440 (11th Cir. 1995); *Barfuss v. Diversicare Corp. of Am.*, 656 So. 2d 486, 488 (Fla. 2d Dist. Ct. App. 1995).

311. 693 So. 2d 541 (Fla. 1997).

312. *H.B.A. Management*, 693 So. 2d at 544. Rule 4-4.2 provides in pertinent part: "In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer." RPC 4-4.2.

of America.³¹³ Adopting the position taken by Florida Ethics Opinion 88-14,³¹⁴ the court stated:

An employee's departure terminates the agency or respondeat superior connection that had previously permitted that employee to create liability for her employer or to bind or make admissions for that employer. Hence, the underlying concerns and purpose of rule 4-4.2 is simply no longer served by restricting contacts with former employees.³¹⁵

Following the *Schwartz* case, the Second District Court of Appeal quashed a trial court order which prohibited plaintiff's counsel from communicating with former employees of a nursing center.³¹⁶ Plaintiff's counsel wished to contact former employees of a nursing home who, while employed there, had cared for the now-deceased patient whose estate was suing the nursing home.³¹⁷ The court relied on the Supreme Court of Florida's decision in *Schwartz* in quashing the lower court order and permitting such contact.³¹⁸

Regarding communication between a prosecutor and a criminal defendant who was represented by counsel, the Supreme Court of Florida found that the presence of the prosecutor at the jail while police investigators spoke with the inmate was not improper in *Rolling v. State of Florida*.³¹⁹ Danny Rolling was accused of serial killings and incarcerated in the Alachua County jail awaiting trial. During the course of his imprisonment, another inmate, Bobby Lewis, sought to obtain an advantage in his own case by becoming an informant against Rolling. Lewis repeatedly contacted investigators regarding information he claimed to have about the murders, while investigators refused to offer him any benefit for revealing such information. Lewis then enlisted the help of Rolling in his plan to obtain a better deal for himself, in which Rolling, through Lewis, requested to speak with homicide investigators. Upon being told by police investigators that his lawyers would be opposed to such contact, Rolling terminated the interview. Lewis continued to attempt to contact police to make a deal for himself. Ultimately, Rolling requested another interview with the police, at which

313. *Id.* at 546 (citing *Barfuss v. Diversicare Corp. of Am.*, 656 So. 2d 486 (Fla. 2d Dist. Ct. App. 1995)).

314. Fla. Bar of Professional Ethics Comm., Op. 88-14 (1989).

315. *H.B.A. Management*, 693 So. 2d at 546.

316. *Henry v. Nat'l Health Care Affiliates, Inc.*, 696 So. 2d 1223, 1223 (Fla. 2d Dist. Ct. App. 1997).

317. *Id.*

318. *Id.*

319. 695 So. 2d 278, 292 (Fla. 1997).

Lewis would also be present to speak for Rolling. The prosecutor in the case came to the jail to be present while investigators spoke with Rolling, so that he would be available to answer questions posed by the investigators interviewing Rolling. Rolling subsequently plead guilty to the murders and was sentenced to death.³²⁰

Rolling appealed his sentence on several grounds, including that his statements to investigators should be suppressed based on alleged violations by the prosecutor of RPC 4-4.2³²¹ and 4-5.3.³²² Rolling contended that the prosecutor not only participated in the interview by being present, but also directed the course of the interview, thereby violating RPC 4-4.2 and 4-5.3. The trial court made a specific finding that the prosecutor did not violate the rules:

As legal advisor to the law enforcement officers, he [Nilon] made himself available to render such advice as was appropriate under the circumstances. Mr. Nilon was careful to insure that he did not participate in any of the interviews with the Defendant, but was available to advise law enforcement officers should such advice be sought. The fact that Mr. Nilon was in geographic proximity to the site of the interview, rather than merely being available to render

320. *Id.* at 282.

321. *See supra* note 312 and accompanying text.

322. Rule 4-5.3 states:

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) a partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

RPC 4-5.3.

advice by telephone, does not rise to the level of violation of the Code of Professional Responsibility.³²³

The Supreme Court affirmed the court's denial of the motion to suppress "[b]ecause the evidence in the record and inferences derived therefrom support the trial court's finding that the prosecutor's presence at the prison to render advice if needed did not violate the Rules of Professional Conduct."³²⁴

It is important to note that the conduct complained of appeared in the context of a motion to suppress evidence.³²⁵ The court upheld the trial court on the motion to suppress by failing to disturb the lower court's finding.³²⁶ Since there was evidence to support the lower court's finding that no violation of the rules occurred, the Supreme Court of Florida refused to overturn the trial court's ruling on the motion to suppress.³²⁷ The court also emphasized that the evidence did not support a conclusion that the prosecutor participated in the interview between the police and the accused which was instigated at the request of the accused.³²⁸ Attorneys should not assume that they can infer from this case that it is permissible to participate in any way in discussions between their clients or others and persons who have counsel.³²⁹ Additionally, attorneys should not assume that they may be present at discussions between their clients or others and persons represented by counsel, since the court specifically found that the prosecutor's role in this instance was to "ensure that Rolling's constitutional rights were not violated by any conduct of Task Force investigators."³³⁰

The case of *Jackson v. Motel 6 Multi-Purposes, Inc.*³³¹ determines the permissible extent of communications with actual and potential members of a class prior to class certification.³³² Plaintiffs' attorneys had sought leave to depart from rule 4.04(e),³³³ and be permitted to communicate with actual and potential class members, which were potentially numerous. The magistrate allowed such departure in an order which permitted the following: 1) communication through an 800 number for persons to reach the plaintiff's

323. *Rolling*, 695 So. 2d at 292.

324. *Id.*

325. *Id.*

326. *Id.*

327. *Id.*

328. *Rolling*, 695 So. 2d at 292.

329. Participation would include, e.g., drafting questions or documents for presentation to the opposing party, and the like.

330. *Rolling*, 695 So. 2d at 292.

331. 10 Fla. L. Weekly Fed. D500 (M.D. Feb. 24, 1997).

332. *Id.* at D501.

333. LOCAL R. M.D. FLA. 4.04.

attorneys; 2) publication of notices, response to requests for information by parties or class members, except for management or supervisory employees; and 3) letters through the mail so long as there was no solicitation to become plaintiffs, and the communications identified the attorney, the litigation, and the purpose of the communication.³³⁴ The order was appealed, and the court found that the order was appropriate with certain modifications.³³⁵ The court added the following: 1) mailings could not be directed to persons with managerial or supervisory positions in Motel 6; 2) plaintiffs' counsel could not solicit for payment of fees or expenses; 3) no ex parte communication could be made to persons with managerial and/or supervisory positions in Motel 6; 4) ex parte communication must be preceded by identification of the plaintiff or attorney, identification of the litigation and its status, identification of the purpose of the communication to discuss potential discriminatory practices of Motel 6, a statement that the person could refuse to participate in the communication, and a statement that the allegations had not yet been proven; and 5) the communications must comply with any applicable rules of court, evidence, or The Florida Bar.³³⁶ Most significantly, for the purpose of this article, is the statement that any communication must comply with Florida Bar Rules.³³⁷ Potentially, in addition to the rules regulating communication with persons represented by counsel³³⁸ and persons not represented by counsel,³³⁹ the rules regulating attorney advertising may apply.³⁴⁰

Finally, regarding commercial communications by an attorney to potential clients, *Babkes v. Satz*³⁴¹ struck down a statute prohibiting the commercial use of names and addresses of persons who have received traffic tickets.³⁴² Section 316.650(11) of the *Florida Statutes* provides that information in traffic citations "shall not be used for commercial solicitation

334. *Jackson*, 10 Fla. L. Weekly Fed. at D501.

335. *Id.* at D503.

336. *Id.*

337. *Id.*

338. *See supra* note 312 and accompanying text.

339. Rule 4-4.3 states the following:

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

RPC 4-4.3.

340. *See* RPC 4-7.

341. 944 F. Supp. 909 (S.D. Fla. 1996).

342. *Id.* at 914.

purposes.”³⁴³ Florida attorney Babkes challenged the constitutionality of the statute, stating that it restricted his First Amendment right to free speech. The court, in using the *Central Hudson*³⁴⁴ four-pronged test, found that the speech is commercial speech under the First Amendment and that the State of Florida has a substantial interest in preserving privacy and restricting abuse of solicitation.³⁴⁵ However, the State of Florida failed to prove that the statute directly advances the government interest under the test.³⁴⁶ Further, the court found that the State of Florida failed to show that “a ‘more limited speech regulation would be ineffective.’”³⁴⁷ The court then granted a permanent injunction against enforcement of the statute.³⁴⁸

The court will scrutinize not only whether communications may be made, but also the content of such communications. The court found in *Florida Bar v. Roth*,³⁴⁹ that an attorney may not threaten criminal prosecution to gain an advantage in a civil case.³⁵⁰ Roth, in negotiating a settlement in a trust case, indicated that he could prosecute the opposing party’s husband in a molestation case based on an alleged incident many years ago as there is no statute of limitations on child molestation cases. The court found that the mere mention of the sexual molestation allegations in the conversation was a threat for the purpose of settling the civil matter, in violation of RPC 4-4.4³⁵¹ and 4-8.4(d),³⁵² which warranted a public reprimand.³⁵³

A lawyer has an obligation of fair and honest dealings with third parties. The Supreme Court of Florida in *Florida Bar v. Bosse*³⁵⁴ reprimanded an attorney for avoiding his obligation to pay an expert witness fee.³⁵⁵ The attorney had hired the expert for his defense in a prior grievance matter, in

343. FLA. STAT. § 316.650(11) (1995).

344. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n of N.Y.*, 447 U.S. 557 (1980).

345. *Babkes*, 944 F. Supp. at 912.

346. *Id.*

347. *Id.* at 913 (quoting *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n of N.Y.*, 447 U.S. 557, 571 (1980)).

348. *Id.* at 914.

349. 693 So. 2d 969 (Fla. 1997).

350. *Id.* at 972.

351. Rule 4-4.4 provides: “In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person or knowingly use methods of obtaining evidence that violate the legal rights of such a person.” RPC 4-4.4.

352. The rule states that an attorney shall not “engage in conduct in connection with the practice of law that is prejudicial to the administration of justice.” RPC 4-8.4(d).

353. *Roth*, 693 So. 2d at 971.

354. 689 So. 2d 268 (Fla. 1997).

355. *Id.* at 268.

which the attorney was awarded costs against the Bar after winning the case. The Bar sent a check for the costs to the attorney, which was deposited in his personal joint checking account by his wife. Bosse neither paid the expert witness with the funds, nor notified the expert that the funds had been received. In defending his actions to the court, Bosse stated that the funds had been deposited and spent, and that he therefore had not willfully failed to pay the expert witness fee. However, the records indicated that Bosse had sufficient funds in the account to pay the amount of the expert's fee during the time period in which he claimed it was spent.³⁵⁶ The court found that he violated Rule of Discipline 3-4.3 of the Rules Regulating The Florida Bar³⁵⁷ and RPC 4-8.4(c)³⁵⁸ in failing to use the cost award to pay the witness' fee and in misrepresenting his finances to avoid payment of his debt.³⁵⁹

Lawyers also have obligations in dealing with potential creditors as evidenced by *Florida Bar v. Cramer*.³⁶⁰ Cramer used the name of a third person, who had a substantial net worth, on his application to a financial institution for credit in purchasing computer equipment. Cramer had previously been turned down for credit when applying in his own name. Ultimately, Cramer stopped making payments on the leases. Cramer raised as a defense that the third party knew that he was using his name and that an officer of the financial institution ratified the use of the third party's name. The court found that regardless of third party contact or authorization of the fraud, Cramer was guilty of fraud and misrepresentation.³⁶¹ The court disbarred Cramer, taking into consideration his past discipline which also included "subterfuge in money matters."³⁶²

356. *Id.* at 269.

357. Rule of Discipline 3-4.3 provides that: "The commission by a lawyer of any act that is unlawful or contrary to honesty and justice . . . may constitute a cause for discipline." RULES OF DISCIPLINE 3-4.3.

358. Rule 4-8.4(c) provides that: "A lawyer shall not . . . engage in conduct involving dishonesty, fraud, deceit, or misrepresentation." RPC 4-8.4(c).

359. *Bosse*, 689 So. 2d at 269.

360. 678 So. 2d 1278 (Fla. 1996).

361. The court found that Cramer specifically violated the following rules:

3-4.3 (committing an act that is unlawful or contrary to honesty and justice); 4-4.1(a) (making a false statement of material fact or law to a third person in the course of representing a client); 4-8.4(b) (committing a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer); and 4-8.4(c) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation).

Id. at 1281.

362. *Cramer*, 678 So. 2d at 1281.

In addition to fair dealing with an attorney's own witnesses or creditors, an attorney also may owe an obligation of honesty to potential employers. The Supreme Court of Florida reprimanded an attorney for an intentional misrepresentation on an employment application in *Florida Bar v. Glant*.³⁶³ The case stemmed from an earlier disciplinary case³⁶⁴ in which Glant, while employed at Central Florida Legal Services, sent a letter to Health and Rehabilitative Services ("HRS") enclosing an unfiled request for modifying custody against the wishes of her client, whose husband Glant thought should be investigated for child abuse. Glant was reprimanded and placed on probation in that case.³⁶⁵ In the later case, Glant left Central Florida Legal Services and applied for a position with HRS. In her application and resume, Glant failed to disclose her prior employment with Central Florida Legal Services. The application signed by Glant stated that it was "true, correct, and made in good faith."³⁶⁶ Additionally, at her hearing before the referee "Glant admitted that her failure to disclose her employment with Central Florida Legal Services was intentional."³⁶⁷

The court upheld the referee's finding that an attorney "may be disciplined for an intentional misrepresentation on an application for a position as a lawyer" in violation of RPC 4-8.4(c) and ordered that she be publicly reprimanded.³⁶⁸ Although it may surprise some that the court would find a violation for the failure to include information on a job application, it should be noted that the court emphasized in its opinion Glant's signature as to the application's veracity, as well as her admission that the omission was intentional.³⁶⁹

A lawyer, in matters not involving fraud or misrepresentation, may limit his or her personal liability to third parties. The court found in *Porlick, Poliquin, Samara, Inc. v. Compton*³⁷⁰ that firms organized under the Professional Service Corporation Act may limit the personal liability of their members in discharging firm debts.³⁷¹ Compton, a member of the firm, signed an agreement as president of the firm with a consulting engineer to investigate and possibly testify as an expert in a case. Porlick and his

363. 684 So. 2d 723, 725 (Fla. 1996).

364. *Florida Bar v. Glant*, 645 So. 2d 962 (Fla. 1994). For discussion of this case, see generally, Timothy P. Chinaris, *Professional Responsibility Law in Florida: The Year in Review, 1995*, 20 NOVA L. REV. 223, 227 (1995).

365. *Glant*, 645 So. 2d at 964.

366. *Glant*, 684 So. 2d at 725.

367. *Id.*

368. *Id.*

369. *Id.*

370. 683 So. 2d 545 (Fla. 3d Dist. Ct. App. 1996).

371. *Id.* at 548.

engineering firm sued Compton in his individual capacity, alleging that Compton and the firm failed to pay the agreed fee for services performed and that Compton was individually liable since he signed the contract. The law firm had been organized under the Professional Service Corporation Act³⁷² and RPC 4-8.6(a).³⁷³ The Act provides that shareholders acting in their capacity as shareholders have no personal liability outside the provision of legal services.³⁷⁴ The court concluded that the Act “relieves professional service corporation shareholders of personal liability for the ordinary business debts of the professional service corporation.”³⁷⁵ Compton’s addition of “Pres.” after his name indicated that he was acting as a shareholder, thus relieving him of responsibility for the debt.³⁷⁶

However, acting as a shareholder has both benefits and detriments. Contingent fee contracts signed by a shareholder, even the sole shareholder of a P.A., inure to the benefit of the P.A. as in the case of *In Re Nelson*.³⁷⁷ Nelson, as a member of his P.A., signed a contingent fee contract as a referring lawyer which provided for a division of fees between his P.A. and another law firm.³⁷⁸ Prior to the referral, Nelson’s P.A. had done

372. FLA. STAT. § 621.07 (1995).

373. Rule 4-8.6(a) provides in part that: “Lawyers may practice law in the form of professional service corporations, professional limited liability companies, or registered limited liability partnerships organized or qualified under applicable law.” RPC 4-8.6(a).

374. FLA. STAT. § 621.07 (1995).

375. *Porlick*, 683 So. 2d at 548-49.

376. *Id.* at 546-47.

377. 203 B.R. 756, 761 (M.D. Fla. 1996).

378. See RPC 4-1.5(f)(4)(D), which states the following:

(D) As to lawyers not in the same firm, a division of any fee within subdivision (f)(4) 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

significant work on the case. Before the conclusion of the case, Nelson P.A. and Nelson personally filed for bankruptcy under Chapters 11 and 7. Nelson was suspended shortly after the petitions were filed, then resigned in lieu of disciplinary proceedings, and the P.A.'s bankruptcy was converted to a Chapter 7. Subsequently, the contingent fee case was settled, and a district court approved the fee division between Nelson P.A. and the other law firm, which petitioned to determine to whom the fee should be paid.³⁷⁹

The court rejected Nelson's argument that he had any personal interest in the money, concluding that the contract was signed by him in his role as shareholder in Nelson, P.A.³⁸⁰ The court also indicated that since Nelson was suspended and then resigned, any fee was based on the value of legal services performed prior to the suspension, rejecting Nelson's argument that he was entitled to fees because he performed work on the case after the bankruptcy was filed and after the suspension.³⁸¹ The court therefore concluded that any fee was the property of the Nelson P.A. bankruptcy estate and should properly be paid to the estate.³⁸²

Regarding dealings with the IRS, attorneys may not deposit client refund checks into their trust account.³⁸³ In *Ollinger v. Internal Revenue Service*,³⁸⁴

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.

RPC 4-1.5(f)(4)(D). *See also* RPC 4-1.5(g), which provides that:

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

(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.

RPC 4-1.5(g).

379. *Nelson*, 203 B.R. at 758-60.

380. *Id.* at 762.

381. *Id.*

382. *Id.* at 764.

383. *Ollinger v. Internal Revenue Serv.*, 78 A.F.T.R. 2d (R.I.A.) 96-6567 (M.D. Fla. 1996).

an attorney appealed fines assessed against him by the IRS for such conduct.³⁸⁵ With the client's consent, the attorney deposited two refund checks into his trust account and disbursed the checks to the client and the attorney. Federal law prohibits negotiation of any refund check to a tax payer by a preparer of tax documents.³⁸⁶

Finally, an attorney may not assist in the unlicensed practice of law.³⁸⁷ The court found in *Florida Bar v. American Senior Citizens Alliance, Inc.*,³⁸⁸ that a corporation owned and managed by nonattorneys for the purpose of selling legal documents was engaged in the unlicensed practice of law.³⁸⁹ Specifically, the court found that nonlawyer employees gave legal advice to buyers regarding the appropriateness of estate planning documents which would be prepared by nonlawyer employees of the corporation then reviewed by an employee who was an attorney.³⁹⁰ The nonlawyer determined which type of estate planning the buyer should use and what documents were required to fulfill the estate plan, while other nonlawyer employees drafted the documents. Such conduct went well beyond "gathering [the] necessary information"³⁹¹ required to complete estate documents which the court had previously found to be permissible.³⁹² The referee found that "a lawyer participating in these same activities would be subject to sanction by The Florida Bar," citing to RPC 4-5.5.³⁹³

V. THE LAWYER'S RELATIONSHIP WITH THE FLORIDA BAR

This section discusses the interaction of attorneys with The Florida Bar, the disciplinary arm of the Supreme Court of Florida. Some notable disciplinary cases not discussed in prior sections will be reviewed here. Additionally, rule changes which are not specific to other sections will be briefly discussed.

384. *Id.* at 96-6567.

385. *Id.*

386. 26 U.S.C. § 6695(f) (1994).

387. RPC 4-5.5(b) provides that: "A lawyer shall not assist a person who is not a member of the bar in the performance of activity that constitutes the unlicensed practice of law." RPC 4-5.5(b).

388. 689 So. 2d 255 (Fla. 1997).

389. *Id.* at 256.

390. *Id.* at 257.

391. *Id.* at 258 (quoting Florida Bar re Advisory Opinion—Nonlawyer Preparation of Living Trusts, 613 So. 2d 426, 427 (Fla. 1992)).

392. *See generally*, Florida Bar re Advisory Opinion—Nonlawyer Preparation of Living Trusts, 613 So. 2d 426 (Fla. 1992).

393. *Id.* at 257. *See also* RPC 4-5.5.

The area in which the court continues to impose the most severe discipline is that of false statements. The requirement of honesty is particularly important in reinstatement proceedings, as evidenced by *Florida Bar v. Orta*.³⁹⁴ Orta had been suspended for three years after being convicted of income tax evasion. Orta applied for reinstatement, but did not disclose the existence of foreign property when asked to by Florida Bar investigators. The referee found that Orta did not disclose the property until he was exposed by Florida Bar investigators and counsel.³⁹⁵ The pattern of dishonesty while on suspension for income tax evasion, another form of dishonesty, warranted disbarment.³⁹⁶

Misrepresentation to a foreign disciplinary authority also warrants disbarment, as demonstrated by *Florida Bar v. Budnitz*.³⁹⁷ Budnitz was disbarred by New Hampshire after he testified to a grand jury that a document had been notarized at his office on a particular date when, in fact, it had been notarized at his home and backdated.³⁹⁸ In answering a query from the New Hampshire Bar, he reiterated that the testimony was true, and was later disbarred in New Hampshire.³⁹⁹ The Supreme Court of Florida disbarred Budnitz as well noting that, although he raised several procedural defects, he neither denied the conduct or, in the alternative, expressed remorse for it.⁴⁰⁰

Perhaps because misrepresentation and dishonesty generally warrant the harshest punishment, the court scrutinizes these cases carefully. The court confirmed that “[i]n order to find that an attorney acted with dishonesty, misrepresentation, deceit, or fraud, the Bar must show the necessary element of intent” in *Florida Bar v. Lanford*.⁴⁰¹ Similarly, the court refused to overturn a referee’s finding of rehabilitation in an attorney who had checks returned for insufficient funds in her personal account during the period of her suspension in *Florida Bar v. Hernandez-Yanks*.⁴⁰² While on suspension for misappropriation of client funds and trust account violations, Hernandez-Yanks had checks returned for insufficient funds in a joint account with her husband. The payees were subsequently paid. The referee found that Hernandez-Yanks lacked knowledge of the balance of her joint account at the time the checks were written and recommended reinstatement.⁴⁰³ Although

394. 689 So. 2d 270, 273 (Fla. 1997).

395. *Id.* at 272.

396. *Id.* at 271-72.

397. 690 So. 2d 1239, 1239 (Fla. 1997).

398. *Id.* at 1240.

399. *Id.* at 1239-40.

400. *Id.* at 1241.

401. 691 So. 2d 480, 480-81 (Fla. 1997).

402. 690 So. 2d 1270, 1272 (Fla. 1997).

403. *Id.* at 1271.

the Bar disagreed with the referee, the court refused to “second-guess the referee.”⁴⁰⁴ Perhaps Justice Wells had the better argument in his dissent, in which he stated that the basis of the suspension in conjunction with the bounced checks from her personal account indicated “that respondent, within three months of the referee’s report, was continuing the same conduct for which she was suspended. I cannot excuse the continued writing of overdrafts on the basis that she was unaware of the balance in the account.”⁴⁰⁵

While declining to discipline an attorney for conduct during his judicial term,⁴⁰⁶ the court publicly reprimanded an attorney for his behavior during the conduct of the Judicial Qualifications Committee hearings.⁴⁰⁷ The court found that Graham repeatedly objected to motions, intentionally delayed the proceedings, and disregarded the instructions of the presiding chair, as well as harassed another judge who was called as a witness in deposition.⁴⁰⁸ The court indicated that Graham’s actions were mitigated by his prior removal from the bench, his cooperation in the disciplinary process, and his good intentions.⁴⁰⁹ Based on the violations of RPC 4-3.4(e),⁴¹⁰ 4-3.5(c),⁴¹¹ 4-3.6(a),⁴¹² 4-4.4,⁴¹³ 4-8.2(a),⁴¹⁴ and 4-8.4(d),⁴¹⁵ the court reprimanded Graham as part of a consent judgment.

404. *Id.* at 1272.

405. *Id.* at 1273 (Wells, J., dissenting).

406. *See* Florida Bar v. Graham, 662 So. 2d 1242 (Fla. 1995) (dismissing several counts against Graham regarding conduct which resulted in Graham’s removal from the bench, but for which the court declined to discipline Graham).

407. *Id.* at 1245.

408. *Id.* at 1243 n.2.

409. *Id.* at 1244.

410. Rule 4-3.4(e), provides:

A lawyer shall not . . . 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.

RPC 4-3.4(e).

411. Rule 4-3.5(c) states that “[a] lawyer shall not engage in conduct intended to disrupt a tribunal.” RPC 4-3.5(c).

412. Rule 4-3.6(a) provides:

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.

The court also reiterated that it is impermissible to continue the practice of law while on suspension in *Florida Bar v. Rood*.⁴¹⁶ Rood, while on suspension for two years “failed to notify all his clients of his suspension and . . . continued to meet with, represent and advise clients, and continued to receive and disburse client funds from his bank accounts.”⁴¹⁷ Based on this evidence, the court disbarred Rood.⁴¹⁸

However, the Supreme Court of Florida’s direction of the profession is not limited to discipline; the year saw several amendments to rules of note. In the arena of lawyer advertising, the court raised the filing fee from \$50 to \$100 for advertisements which are required to be filed with and reviewed by the Standing Committee on Advertising.⁴¹⁹ In the same case, the court expanded the information which may be provided in advertisements that are exempt from the filing requirement to include “the office location and parking arrangements; disability accommodations; electronic mail addresses; a lawyer’s years of experience practicing law; official certification logos for the fields of law in which a lawyer practices; and common salutary language such

RPC 4-3.6(a).

413. Rule 4-4.4 states that “[i]n representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person or knowingly use methods of obtaining evidence that violate the legal rights of such a person.”

RPC 4-4.4.

414. Rule 4-8.2(a) provides:

A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, mediator, arbitrator, adjudicatory officer, public legal officer, juror or member of the venire, or candidate for election or appointment to judicial or legal office.

RPC 4-8.2(a).

415. Rule 4-8.4(d) prohibits a lawyer from:

[E]ngag[ing] 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.

RPC 4-8.4(d).

416. 678 So. 2d 1277, 1277 (Fla. 1996).

417. *Id.*

418. *Id.* at 1278.

419. Amendments to Rules Regulating The Florida Bar—Rules 4-7.2 & 4-7.5, 690 So. 2d 1256, 1257 (Fla. 1997).

as ‘best wishes,’ ‘good luck,’ ‘happy holidays,’ and ‘pleased to announce.’⁴²⁰ The court also amended the Interest on Trust Accounts (“IOTA”) Program rules to allow voluntary IOTA sweep accounts,⁴²¹ which would allow for greater interest on the IOTA account.⁴²²

Finally, the court denied a petition by The Florida Bar which would have eliminated the pro bono reporting requirement and substituted a voluntary report.⁴²³ In so doing, the court stated the following:

Lawyers have been granted a special boon by the State of Florida – they in effect have a monopoly on the public justice system. In return, lawyers are ethically bound to help the State’s poor gain access to that system. The mandatory reporting requirement is essential to guaranteeing that lawyers do their part to provide equal justice.⁴²⁴

Justices Harding and Wells each dissented in part; although they agreed with the obligation the majority imposes on lawyers’ services to the needy, they noted the difficulty in enforcement for The Florida Bar.⁴²⁵ Justice Grimes dissented entirely in the opinion; he approved the “aspirational goals”⁴²⁶ of the rule, but found mandatory reporting to be “coercion”⁴²⁷ and “counterproductive.”⁴²⁸

The Supreme Court of Florida also made significant changes to the rules on bar admissions in *Amendments to the Rules of the Supreme Court Relating*

420. *Id.* at 1256-57.

421. The court described sweep accounts as follows:

A sweep account is an existing cash management product used to generate higher yields on checking accounts. At the end of each business day after all deposits, checks, and charges have cleared against an account, the financial institution electronically transfers the excess funds out of the account into a higher yield investment. At the start of the next business day, the financial institution electronically returns the excess funds to the account and posts the interest earned.

Amendments to Rules Regulating The Florida Bar—Rule 5-1.1(e)—IOTA, 692 So. 2d 181, 182 n.1 (Fla. 1997).

422. *Id.* at 182.

423. Amendments to Rule 4-6.1 of the Rules Regulating The Florida Bar—Pro Bono Public Service, 696 So. 2d 734 (Fla. 1997).

424. *Id.* at 735.

425. *Id.* at 737 (Harding, J., & Wells, J., dissenting).

426. *Id.* at 738 (Grimes, J., dissenting).

427. *Id.*

428. *Amendments to Rule 4-6.1*, 696 So. 2d at 738.

to *Admissions to the Bar*.⁴²⁹ The changes reorganized and clarified the rules, and codified some long standing policies of the Board of Bar Examiners. The court considered comments filed by one Bar member who contested the rules regarding formal hearings and appeals from the Board, indicating that they have inadequate due process protections and provide an incomplete record for the court's review.⁴³⁰ The court indicated that the Board, in practice, gives such protections, but recommended that the Board review their rules to consider codifying their current practices.⁴³¹ The member also contested the requirement of a fee to applicants for whom the Board requires a formal hearing who are ultimately admitted to the Bar. The court adopted the rule change requiring the fee of all applicants who undergo a formal hearing, noting that the hearing was required whether the applicant was admitted or not and that the costs associated with the hearings are fairly placed on those whose applications required a greater expenditure of the Board's resources.⁴³²

VI. CONCLUSION

Cases, rules, and ethics opinions continue to define the role of lawyers in dealings with their clients, the justice system, and society as a whole. Interest in the area of professional responsibility has continued to expand in 1997. Lawyers have become more concerned with the image of the profession, and believe that ethics and professionalism must be focussed on to improve it. This article has examined a wide spectrum of topics within ethics and professionalism, of which lawyers should remain aware to practice responsibly and attain the high standards imposed on them.

429. 695 So. 2d 312 (Fla. 1997).

430. *Id.* at 313.

431. *Id.*

432. *Id.* at 314.