Nova Law Review

Volume 11, *Issue* 4 1987 *Article* 8

Legal Ethics

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Abstract

The most important event in legal ethics in the past year was the adoption of Florida's Rules of Professional Conduct (hereinafter referred to as the "Florida Rules" or "Rules").

KEYWORDS: code, ethics, law

Legal Ethics

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I. Introduction

The most important event in legal ethics in the past year was the adoption of Florida's Rules of Professional Conduct[1](hereinafter referred to as the "Florida Rules" or "Rules"). The Florida Rules, which were reviewed in their entirety in last year's Annual Survey,[2] took effect on January 1, 1987. Although these Rules were reviewed in the 1985 survey, some sections depart significantly from Florida's prior Code. Therefore, these unique sections will receive special consideration in the following paragraphs.[3]

II. Florida's Rules of Professional Conduct: Sections which Differ Significantly from Florida's Prior Code of Professional Responsibility

A. *Advertising and Solicitation*

The New Rules' sections on advertising[4] are similar in many respects to that of Florida's prior Code sections.[5] However, the Rules merely provide general guidance instead of the Code's specific laundry list[6] of shalls and shall nots.

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1. FLORIDA'S RULES OF PROFESSIONAL CONDUCT (1986) [hereinafter cited as FLORIDA'S RULES].

2. *See* Messing, *Professional Responsibility: 1985 Survey of Florida Law*, 10 NOVA L.J. 1107 (1986).

3. The author acknowledges reference to Pat Allen's outstanding unpublished work, Comparison of the Rules of Professional Conduct to the Code of Professional Responsibility, in preparation of this section of the author's article.

4. FLORIDA'S RULES Rules 4-7.1, 4-7.2 and 4-7.3 (1986).

5. FLORIDA'S CODE OF PROFESSIONAL RESPONSIBILITY EC 2-1, EC 2-2, EC 2-3, EC 2-4, EC 2-5 and DR 2-101 (1970) [hereinafter cited as FLORIDA'S CODE].

6. DR 2-101 Publicity.

(A) A lawyer shall not, on behalf of himself, his partner, associate or any other lawyer affiliated with him or his firm, use or participate in the use of any form of public communication containing a false, fraudulent, misleading, deceptive, self-laudatory or unfair statement or claim.

(B) In order to facilitate the process of informed selection of a lawyer by potential consumers of legal services, a lawyer may publish or broad-

The most significant change in this area involves the solicitation of

cast, subject to DR 2-103, the following information in print media distributed or over television or radio broadcast in the geographic area or areas in which the lawyer resides or maintains offices or in which a significant part of the lawyer's clientele resides, provided that the information disclosed by the lawyer in such publication or broadcast complies with DR 2-101(A), and is presented in a dignified manner:

(1) Name, including name of law firm and names of professional associates; addresses and telephone numbers;

(2) One or more fields of law in which the lawyer or law firm practices, a statement that practice is limited to one or more fields of law, or a statement that the lawyer or law firm specializes in a particular field of law practice, to the extent authorized under DR 2-105;

(3) Date and place of birth;

(4) Date and place of admission to the bar of state and federal courts;

(5) Schools attended, with dates of graduation, degrees and other scholastic distinctions;

(6) Public or quasi-public offices;

(7) Military service;

(8) Legal authorships;

(9) Legal teaching positions;

(10) Memberships, offices, and committee assignments, in bar associations;

(11) Membership and offices in legal fraternities and legal societies;

(12) Technical and professional licenses;

(13) Memberships in scientific, technical and professional associations and societies;

(14) Foreign language ability;

(15) Names and addresses of bank references;

(16) With their written consent, names of clients regularly represented;

(17) Prepaid or group legal services programs in which the lawyer participates;

(18) Whether credit cards or other credit arrangements are accepted;

(19) Office and telephone answering service hours;

(20) Fee for an initial consultation;

(21) Availability upon request of a written schedule of fees and/or an estimate of the fee to be charged for specific services;

(22) Contingent fee rates subject to DR 2-106(C), provided that the statement discloses whether percentages are computed before or after deduction of costs;

(23) Range of fees for services, provided that the statement discloses that the specific fee within the range which will be charged will vary depending upon the particular matter to be handled for each client and the client is entitled without obligation to an estimate of the fee within the

clients.[7] Although in-person solicitation for pecuniary gain[8] is still prohibited, the Rules expand the possibilities for the communication of the availability of legal services. Only a few years ago, Dade Commissioner Barry Schreiber had to fight for the right to send general untargeted "informational" letters by mail.[9] Now, a Florida attorney is permitted to mail targeted solicitations.[10] This expansion of an attorney's right to communicate is in accord with a series of recent court decisions.[11] Most notable is the New York State Court of Appeals decision, *In re Von*

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range likely to be charged, in print size equivalent to the largest print used in setting forth the fee information;

(24) Hourly rate, provided that the statement discloses that the total fee charged will depend upon the number of hours which must be devoted to the particular matter to be handled for each client and the client is entitled to (without obligation) an estimate of the fee likely to be charged, in print size at least equivalent to the largest print used in setting forth the fee information;

(25) Fixed fees for specific legal services,* the description of which would not be misunderstood or be deceptive, provided that the statement discloses that the quoted fee will be available only to clients whose matters fall into the services described and that the client is entitled without obligation to a specific estimate of the fee likely to be charged in print size at least equivalent to the largest print used in setting forth the fee information.

*The agency having jurisdiction under state law may desire to issue appropriate guidelines defining "specific legal services."

7. *See* Messing, *The Latest Word on Solicitation*, FLA. B.J., May 1986, at 17.

8. *See* Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978); *In re* Primus, 436 U.S. 412 (1978)

9. *See* Florida Bar v. Schreiber, 407 So. 2d 595 (Fla. 1981), *vacated*, 420 So. 2d 599 (Fla. 1982). Barry Schreiber mailed the following inelegant letter to international trade firms seeking employment for his firm:

It is noticed that possibly your company dealing in International Trade would at times find yourselves confronted with Immigration problems. Should such a problem occur and should you wish the services of reputable Immigration attorneys specializing in Immigration and Naturalization Law, please feel free to contact the undersigned. It would be our pleasure to be of service to you.

Additionally should you wish a copy of our outline on Immigration policy we will be pleased to send you a copy.

Id. at 596 n.1.

10. FLORIDA'S RULES Rule 4-7.3(b) (1986). The dividing line between advertisement and solicitation is not absolutely clear. Often the terms are misused interchangeably. However, the two terms appear to meet at targeted direct mail solicitation/advertising.

11. *See* cases cited *infra* note 17.

Wiegen.[12] In *Von Wiegen*, the court chose to distinguish between in-person solicitation and direct mail.[13] The court's analysis provides a compelling argument in support of the right of attorneys to send targeted direct mail advertisements. The Rules[14] allow letters to be sent to individuals in need of legal services, such as airplane accident victims, criminal defendants, or other persons known to be in present need of legal services. In the past, strangely enough, advertisements or solicitations could only be mailed to individuals who were not known to be in need of an attorneys services.[15] When the Florida Supreme Court reviewed the proposed Rules, it rejected the Florida Bar's proposal to continue the ban on targeted mailings.[16] Apparently, the court agreed with the growing judicial trend[17] which recognizes an attorney's com-

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12. 63 N.Y.2d 163, 481 N.Y.S.2d 40, 470 N.E.2d 838 (1984), *cert. den.*, 105 S. Ct. 2701 (1985). A New York attorney, Eric Von Wiegen, wrote to victims and families of those injured when a skywalk collapsed in 1981 at the Hyatt Regency Hotel in Kansas City, Missouri. Von Wiegen's former secretary signed the letters. She claimed to be the coordinator of a nonexistent litigation committee which had been formed to assist victims and their families. The "bogus" committee solicited additional clients at a "reduced" contingency fee rate. Despite this outrageous conduct the New York court recognized that attorneys have the constitutional right to send truthful direct mail solicitations.

13. *Id.* at 166, 481 N.Y.S.2d at 43, 470 N.E.2d at 841.

14. *See* FLORIDA RULES Rules 4-7.1, 4-7.2 and 4-7.3 (1986).

15. *See* FLORIDA'S CODE 2-103. *See also Schreiber*, 407 So. 2d at 595.

16. *See* REPORT OF THE SPECIAL STUDY COMMITTEE ON THE MODEL RULES OF PROFESSIONAL CONDUCT 159-61 (The Florida Bar ed. 1984). Subsection (e) of Rule 4-7.3 was rejected by the Florida Supreme Court.

Rule 4-7.3 Direct Contact with Prospective Clients

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(B) Written Communication

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

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(e)The Communication is prompted by a specific occurrence affecting the person to whom the communication is directed, or a member of his family, in a manner distinct from the effect on the general public.

17. *See, e.g., Von Wiegan*, 63 N.Y.2d at 163, 481 N.Y.S.2d at 40, 470 N.E.2d at 838; Adams v. Attorney Registration and Disciplinary Comm'n, 617 F. Supp. 449 (N.D. Ill. 1985); and Leoni v. State Bar of California, 39 Cal. App. 3d 609, 704 P.2d 183 (Cal. 1985). *See also* Spencer v. Honorable Justices of the Supreme Court of Pennsylvania, 579 F. Supp. 880 (E.D. Pa. 1984); Bishop v. Committee on Professional

mercial speech rights and accepted the importance in providing information about the availability of legal services to persons in need.[18] The necessity for such information, it seems, outweighs this relatively minor intrusion in times of crisis.

Hedging the bet a bit, this rule[19] makes targeted mailings subject to high sounding limitations that are quite apparently unenforceable. These limitations include the prohibition of contact with prospective clients when "the lawyer knows or reasonably should know that the physical, emotional or mental state of the person makes it unlikely that the person would exercise reasonable judgment in employing a lawyer."[20] Solicitation is also prohibited if: the lawyer has reason to know the potential client is represented by a lawyer in a particular matter;[21] the lawyer is aware that the potential client does not wish to receive such communication;[22] or the solicitation involves coercion, duress, fraud, overreaching, graft, intimidation, undue influence or contains a false, fraudulent, misleading or deceptive statement.[23]

Ethics and Conduct, 521 F. Supp. 1219 (S.D. Iowa 1981), *vacated and remanded on other grounds*, 686 F.2d 1278 (8th Cir. 1982); Koffler v. Joint Bar Ass'n, 51 N.Y.2d 140, 432 N.Y.S.2d 872, 412 N.E.2d 927 (1980); and Kentucky Bar Ass'n v. Stuart, 568 S.W.2d 933 (Ky. 1978).

18. In fact, the Florida Supreme Court pointed out that in a crisis situation, this valuable information may be needed more than ever. *See* FLORIDA'S RULES 4-7.2 comment.

19. *See* FLORIDA'S RULES Rules 4-7.3 (B)(1)(a) and (B)(1)(b).
Rule 4-7.3

(B) Written communication

(1) Written communications to prospective clients for the purpose of obtaining professional employment are subject to the following requirements:

(a) Such written communications shall be plainly marked "advertisement" on the face of the envelope and at the top of each page of the written communication in type one size larger than the largest type used in the written communication.

(b) A copy of each such written communication shall be sent to staff counsel at bar headquarters and another copy shall be retained by the lawyer for three years. If written communications identical in content are sent to two or more prospective clients, the lawyer may comply with this requirement by retaining a single copy together with a list of the names and addresses of persons to whom the written communication was sent.

20. *See* FLORIDA'S RULES Rule 4-7.3 (B)2(e).
21. *Id.* at Rule 4-7.3(B)(2)(a).
22. *Id.* at Rule 4-7.3(B)(2)(b).
23. *Id.* at Rules 4-7.3(B)(2)(c) and 4-7.3(B)(2)(d).

The Rules' new provisions on advertising also contain specific technical requirements which will surely lead to many inadvertent violations of the Rules and to many complaints to the Bar. Among these new requirements is a specific directive in Rule 4-7.2 which requires all advertisements to include the name of at least one lawyer responsible for its contents.[24] An advertising attorney is also required to keep a copy of every advertisement or direct mail solicitation for three years.[25] Furthermore, an attorney must maintain a list of each person who has received a direct mail solicitation[26] or the name(s) of the publication(s) in which an advertisement ran.[27] The Florida Supreme Court also requires that direct mail advertisements be sent to the Florida Bar headquarters along with a list of individuals receiving the mailing.[28] This requirement suggests that the court is still uncomfortable with the concept of direct mail solicitation.

Finally, the new Rules allow law firms to use trade names.[29] Such conduct was previously prohibited by the Code,[30] although permitted in a limited way by case law.[31]

B. *Specialties*

In a major departure from past regulations[32] the Rules now permit lawyers to specify their areas of practice.[33] Lawyers may now state their practice is "limited to" a given field or fields of law.[34] Also specifically permitted is the use of the titles "patent attorney" or "proctor in

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24. *Id.* at Rule 4-7.2(D).
25. *Id.* at Rules 4-7.2(B), and 4-7.3(B)(1)(b).
26. *Id.* at Rule 4-7.3(B)(1)(b).
27. *Id.* at Rule 4-7.2(B).
28. *Id.* at Rule 4-7.3(B)(1)(b).
29. *Id.* at Rule 4-7.5(a). This rule states, "A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization . . . [and it is not misleading]."
30. *See* FLORIDA'S CODE DR 2-102(B).
31. Florida Bar v. Fetterman, 439 So. 2d 835 (Fla. 1983).
32. *See* FLORIDA'S CODE DR 2-105.
33. *See* FLORIDA'S RULES Rule 4-7.4, which states, "A lawyer may communicate the fact that the lawyer does or does not participate in particular fields of law. A lawyer shall not state or imply that the lawyer is a specialist except . . . [for using the following titles: patent attorney, admiralty or proctor in admiralty, and appropriate certification and designation]."
34. This is in accord with *In re* R.M.J., 455 U.S. 191 (1982), which first permitted the truthful use of these recently approved specialties.

admiralty" as well as communication of certification or designation by The Florida Bar or national lawyer groups.[35]

In the future, it is quite likely that attorneys will win the right through case decisions or rule changes to state that they "specialize" in a given area of law. The current distinction between "limited to" and "specialize" makes little sense and cannot be said to advance a compelling state interest.

C. *Fees*

The Rules have several significant changes from the prior Code affecting the use of contingent fee agreements.[36] The Florida Supreme Court grafted several requirements to the Bar's proposed Rule 4-1.5.[37]

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35. *See* FLORIDA'S RULES Rule 4-7.4(a)-(d).
36. *See* FLORIDA'S CODE DR 2-106.
37. Before the Florida Supreme Court grafted several requirements to Rule 4-1.5 the Bar's proposed Rule 4-1.5 read as follows:

Bar's Proposed Rule 4-1.5 Fees

(a) A lawyer shall not enter into an agreement for charge, or collect an illegal or clearly excessive fee.

(b) A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. Factors to be considered as guides in determining the reasonableness of a fee include the following:

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

(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) The fee customarily charged in the locality for similar legal services;

(4) The amount involved and the results obtained;

(5) The time limitations imposed by the client or by the circumstances;

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

(7) The experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

(c) When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.

(d) As to contingent fees:

Maximum contingency fees are now specified[38] for personal injury, property damage or wrongful death cases.[39] Furthermore, in these actions, strict new rules must be followed. Each client who enters into a contingency fee arrangement must sign a written fee agreement[40] and be provided with a "Statement of Client's Rights."[41] A potential client

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all the lawyers involved; and

(3) The total fee is reasonable.

(f) Charges made by any lawyer or law firm under an approved credit plan shall be only for services actually rendered or cash actually paid on behalf of the client. No higher fee shall be charged and no additional charge shall be imposed by reason of a lawyer's or law firm's participation in an approved credit plan.

38. *See* FLORIDA'S RULES Rule 4-1.5 (D)(4)(b), which reads as follows:

(b) The contract for representation of a client in a matter set forth in paragraph (D)(4) may provide for a contingent fee arrangement as agreed upon by the client and the lawyer, except as limited by the following provisions:

(1) Without prior court approval as specified below, any contingent fee which exceeds the following standards shall be presumed, unless rebutted, to be clearly excessive:

(a) 33⅓% of any recovery up to $1 million through the time of filing of an answer or the demand for appointment of arbitrators;

(b) 40% of any recovery up to $1 million through the trial of the case;

(c) 30% of any recovery between $1 and 2 million;

(d) 20% of any recovery in excess of $2 million;

(e) If all defendants admit liability at the time of filing their answers and request a trial only on damages;

(i) 33⅓% of any recovery up to $1 million through trial;

(ii) 20% of any recovery between $1 and 2 million;

(iii) 15% of any recovery in excess of $2 million;

(f) An additional 5% of any recovery after notice of appeal is filed or post-judgment relief or action is required for recovery on the judgment.

39. *Id.* at Rule 4-1.5 (D)(4).

40. *Id.* at Rule 4-1.5 (D)(2).

41. *Id.* at Rule 4-1.5 (D)(4)(c). The statement which must be supplied to clients is following:

STATEMENT OF CLIENT'S RIGHTS

Before you, the prospective client, arrange a contingent fee agreement with a lawyer, you should understand this Statement of your rights as a client. This statement is not a part of the actual contract between you and your lawyer, but, as a prospective client, you should be aware of these rights:

1. There is no legal requirement that a lawyer charge a client a set fee or a percentage of money recovered in a case. You, the client, have the right to talk with your lawyer about the proposed fee and to bargain about

has the right to cancel the contingency fee agreement, with limited ob-

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the rate or percentage as in any other contract. If you do not reach an agreement with one lawyer you may talk with other lawyers.

2. Any contingency fee contract must be in writing and you have three (3) business days to reconsider the contract. You may cancel the contract without any reason if you notify your lawyer in writing within three (3) business days of signing the contract. If you withdraw from the contract within the first three (3) business days you do not owe the lawyer a fee although you may be responsible for the lawyer's actual costs during that time. If your lawyer begins to represent you, your lawyer may not withdraw from the case without giving you notice, delivering necessary papers to you, and allowing you time to employ another lawyer. Often, your lawyer must obtain court approval before withdrawing from a case. If you discharge your lawyer without good cause after the three-day period, you may have to pay a fee for work the lawyer has done.

3. Before hiring a lawyer, you, the client, have the right to know about the lawyer's education, training and experience. If you ask, the lawyer should tell you specifically about his or her actual experience dealing with cases similar to yours. If you ask, the lawyer should provide information about special training or knowledge and give you this information in writing if you request it.

4. Before signing a contingent fee contract with you, a lawyer must advise you whether he or she intends to handle your case alone or whether other lawyers will be helping with the case. If your lawyer intends to refer the case to other lawyers he or she should tell you what kind of fee sharing arrangement will be made with the other lawyers. If lawyers from different law firms will represent you, at least one lawyer from each law firm must sign the contingency fee contract.

5. If your lawyer intends to refer your case to another lawyer or counsel with other lawyers, your lawyer should tell you about that at the beginning. If your lawyer takes the case and later decides to refer it to another lawyer or to associate with other lawyers, you should sign a new contract which includes the new lawyers. You, the client, also have the right to consult with each lawyer working on your case and each lawyer is legally responsible to represent your interests and is legally responsible for the acts of the other lawyers involved in the case.

6. You, the client, have the right to know in advance how you will need to pay the expenses and the legal fees at the end of the case. If you pay a deposit in advance for costs, you may ask reasonable questions about how the money will be or has been spend and how much of it remains unspent. Your lawyer should give a reasonable estimate about future necessary costs. If your lawyer agrees to lend or advance you money to prepare or research the case, you have the right to know periodically how much money your lawyer has spent on your behalf. You also have the right to decide, after consulting with your lawyer, how much money is to be spent to prepare a case. If you pay the expenses, you have the right to

ligation, within a three-day cooling off period.[42] The Statement of Client's Rights is, in essence, a mini-*Miranda* for these contingent fee cases.

The new Rules also allow attorneys to advance client costs contingent upon the outcome of litigation.[43] This is especially true for indigent clients but applies to non-indigent clients as well. No longer must an attorney maintain the fiction that his or her client will "someday" repay costs in an unsuccessful contingency fee case.[44]

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decide how much to spend. Your lawyer should also inform you whether the fee will be based on the gross amount recovered or on the amount recovered minus the costs.

7. You, the client, have the right to be told by your lawyer about possible adverse consequences if you lose the case. Those adverse consequences might include money which you might have to pay to your lawyer for costs, and liability you might have for attorney's fees on the other side.

8. You, the client, have the right to receive and approve a closing agreement at the end of the case before you pay any money. The statement must list all of the financial details of the entire case, including the amount recovered, all expenses, and a precise statement of your lawyer's fee. Until you approve the closing statement you need not pay any money to anyone, including your lawyer. You also have the right to have every lawyer or law firm working on your case to sign this closing statement.

9. You, the client, have the right to ask your lawyer at reasonable intervals how the case is progressing and to have these questions answered to the best of your lawyer's ability.

10. You, the client, have the right to make the final decision regarding settlement of a case. Your lawyer must notify you of all offers of settlement before and after the trial. Offers during the trial must be immediately communicated and you should consult with your lawyer regarding whether to accept a settlement. However, you must make the final decision to accept or reject a settlement.

11. If at any time, you, the client, believe that your lawyer has charged an excessive fee, you, the client, have the right to report the matter to The Florida Bar, the agency that oversees the practice and behavior of all lawyers in Florida. For information on how to reach The Florida Bar, call 904-222-5286, or contact the local bar association. Any disagreement between you and your lawyer about a fee can be taken to court and you may wish to hire another lawyer to help you resolve this disagreement. Usually fee disputes must be handled in a separate lawsuit.

CLIENT SIGNATURE ATTORNEY SIGNATURE

DATE DATE

42. *Id.* at Rule 4-1.5(D)(4)(a)(2).
43. *Id.* at Rule 4-1.8(e)(1).
44. This was previously required by FLORIDA'S CODE DR 5-103(B)(1970).

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D. *Referral Fees*

Perhaps the most important policy change in the Florida Rules, at least in terms of its effect on the real world practice of law, is the effective legalizing of referral fees. In many quarters, referral fees have been a standard, albeit unethical, practice.[45] No longer must a fee be divided only in proportion to the work completed by each attorney. A fee may now be split if joint responsibility is assumed for the client's case.[46] A client must consent to this fee splitting. However, the actual division of a fee is a matter of negotiation between the several attorneys only. Naturally, the total fee must be fair to the client.

E. *Candor to the Tribunal and Lawyer-Client Confidentiality*

Another area which differs somewhat from prior Code sections[47] is the interrelationship of an attorney as an officer of the Court and as representative of his or her client. The Florida Rules require more extensive disclosure to the tribunal[48] despite the fact that these rules expand the net covered by the attorney-client relationship.[49]

The Rules now require disclosure to the tribunal of perjured testimony or false evidence. Past conduct of this nature must also be disclosed.[50] Although similar to earlier parallel Code sections,[51] the new commentary section of Rule 4-3.3 provides a more extensive and thoughtful discussion of the requirements for such disclosure. Rule 4-1.6, confidentiality, is specifically waived by 4-3.3 in appropriate instances.[52]

Disclosure is even required by the confidentiality rule 4-1.6.[53] This

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45. These fees were prohibited by FLORIDA'S CODE DR 2-107(A), which allowed fees to be divided only in proportion to the work done.

46. *See* FLORIDA'S RULES Rule 4-1.5(e), which permits fee division "in proportion to the services performed" and if "each lawyer assumes joint responsibility" (liability). The total fee must be reasonable and the attorneys must receive a written agreement from the client.

47. *See* FLORIDA'S CODE DR 4-101 (1970).

48. *See* FLORIDA'S RULES Rules 4-3.3 and 4-8.4 .

49. *Id.* at Rule 4-1.6. Lawyer client confidentiality now covers any information relating to the representation of a client significantly expanding the Code's DR 4-101 protection of secrets and confidences.

50. *Id.* at Rule 4-3.3(a) and (b).

51. *See* FLORIDA'S CODE DR 7-102(b) (1970).

52. *See* FLORIDA'S RULES Rule 4-3.3(b).

53. *Id.* at Rule 4-1.6.

rule requires an attorney to disclose a client's confidential statements if doing so will prevent the client from committing a crime.[54] Disclosure is also required to prevent the continuing consequences of a past act which would result in death or great bodily harm.[55]

To compensate for these considerable disclosure requirements, matters covered by attorney-client privilege as previously mentioned have been expanded by the new Rules to cover any information relating to the representation of a client.[56]

F. *Limiting Malpractice Liability*

The Rules apparently permit an attorney to limit his or her malpractice liability with the client's agreement.[57] If only as policy, this represents a significant change from prior Code sections which specifically prohibited an attorney's limitation of malpractice liability.[58] However, Rule 4-1.8 has strict limiting language which requires independent legal advice before a client signs such an agreement.[59] This requirement alone may negate its effect.[60]

III. 1986 Case Law Interpreting the Rules

In addition to these new or revised rules, several 1986 cases merit review because of the significance of their holding, their novel or interesting facts or their instructional value. These cases follow.

A. *Rubin v. State*[61]

Arguably, the most interesting and disappointing case of the past

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54. *Id.* at Rule 4-1.6(b)(1).
55. *Id.* at Rule 4-1.6(b)(2).
56. *Id.* at Rule 4-1.6.
57. *Id.* at Rule 4-1.8(h), which states in part: "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."
58. *See* FLORIDA'S CODE DR 6-102 (1970).
59. *See* FLORIDA'S RULES Rule 4-1.8(h).
60. It is difficult to believe an informed and cautious independent attorney would recommend such prospective waiver of liability.
61. 490 So. 2d 1001 (Fla. 3d Dist. Ct. App. 1986), *review denied*, 501 So. 2d 1283 (Fla. 1986), *habeas corpus denied sub nom.*, Rubin v. Crawford, 501 So. 2d 1283 (Fla. 1987). *See also* Messing, *Representing a Criminal Defendant Who Intends To*

year was one involving media-master Ellis Rubin's refusal to represent a client who intended to lie on the witness stand. In *Sanborn v. State*[62] Miami attorney Ellis Rubin was the fourth attorney to represent Sanborn on murder charges. Shortly before trial, Rubin apparently discovered that Sanborn intended to take the stand and lie. Rubin petitioned the court for permission to withdraw from the case. The court was concerned that this would further delay an already much delayed trial and requested Rubin to state the reason for his withdrawal. Rubin quite correctly asserted lawyer/client privilege as his reason for failing to respond. The court then ordered Rubin to remain as Sanborn's legal representative.[63]

Rubin appealed to the Third District Court of Appeal.[64] Unfortunately, the appellate court upheld the lower court's decision. The court suggested that if Rubin was unable to dissuade his client from lying, he should merely seek a narrative answer when his client testified.[65] The Third District Court of Appeal also directed Rubin to refrain from commenting on his client's testimony during closing argument.[66]

Despite the opinion of the Third District Court of Appeal and a further direct order from the trial court judge, Rubin still refused to proceed to trial. The trial judge held Rubin in contempt, sentenced him to 30 days in jail and removed him from the case.[67] A new attorney was appointed for Sanborn and the new attorney proceeded to trial without objection. Sanborn was ultimately found guilty on the murder charge.[68]

The Third District Court of Appeal subsequently upheld the trial court's contempt ruling and Rubin was sent to jail.[69] He was released within a few hours, however, as the Florida Supreme Court considered

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Lie, FLA. B.J., Apr. 1987, at 26.

62. 474 So. 2d 309 (Fla. 3d Dist. Ct. App. 1985)

63. *Id.* at 314.

64. *Id.*

65. In practice, an attorney following the Third District's advice would put their client on the stand—ask the client's name and perhaps a few other preliminary questions and then say to the client, "Tell the jury your story."

66. *See Rubin*, 490 So. 2d at 1003.

67. *Id.*

68. One wonders (although it is perhaps unanswerable) if Sanborn told his next attorney of his intent to lie and if so, didn't this counselor view this as an ethical problem? Perhaps, Sanborn, now educated in the ways of justice, simply lied to his next attorney.

69. *Rubin*, 490 So. 2d at 1002.

his appeal of the trial court's contempt citation.[70] In February 1987, the Florida Supreme Court also upheld the contempt ruling and Rubin began serving his thirty day contempt sentence.[71]

Although the courts and the organized Bar have suggested that this is a simple matter of contempt, it is really much more than that. The issue is, should an attorney be required to permit his client to lie? Despite the potential for inconvenience to our court system, Rubin's refusal to permit client perjury, even unassisted perjury, should be applauded. Rubin should be honored for his courage in standing up for his convictions at considerable personal expense.

B. *Bar Discipline*

A case which threatens to have a revolutionary effect on Florida's disciplinary system is *DeBock v. State*.[72] In this case Christopher DeBock, a former Broward Assistant State Attorney, was subpoenaed to testify in an attempted bribery case.[73] DeBock allegedly was offered a bribe to influence the outcome of a drug case for a defendant represented by Richard Rendina. Rendina is a Fort Lauderdale attorney and also a former Broward prosecutor. DeBock allegedly refused this offer but failed to report it to his superiors. The alleged offer was later disclosed by Rendina's client and DeBock was subpoenaed to testify before a grand jury.

DeBock was granted immunity under section 914.04 of the Florida

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70. *See* Rubin v. State, 501 So. 2d 1283 (Fla. 1986).

71. Mr. Rubin began serving his thirty day contempt of court sentence on February 9, 1987. Rubin's attorney had unsuccessfully attempted to obtain a stay from the United States Supreme Court. When Rubin entered the Dade County jail, many of his well-known clients were there to lend him moral support. Among the well-wishers were Liberty City merchant Prentice Rasheed, Yahweh religious group members and Frank Sturgis of Watergate fame. *See* Ft. Lauderdale News/Sun Sentinel, Feb. 11, 1987, at 87, col. 1. During his incarceration Rubin was hospitalized for several days for pneumonia (which did not count towards his thirty days) and ultimately emerged from jail with a new beard and a new commitment to take on the system of injustice. *See* Miami Herald Feb. 22, 1987, at B4, col. 3.

72. 11 Fla. L. Weekly 550 (Fla. Oct. 31, 1986).

73. State v. Rendina, 467 So. 2d 734 (Fla 4th Dist. Ct. App. 1985). Allegedly in the 1984 case, Rendina offered a $10,000 payoff to secure a sentence of probation for his client Thomas Bono. After Bono turned state's evidence, he was subsequently sentenced to probation for his cooperation in the Rendina case. It is reported that Rendina is also facing similar accusations of attempted bribery. *See* Miami Herald, Feb. 6, 1987, at 4BR, col. 1.

Statutes.[74] However, he refused to testify because he argued that this limited immunity would not extend to subsequent Bar disciplinary proceedings arising from this matter.

The Fourth District Court of Appeal agreed with the State of Florida's argument that any potential disciplinary proceeding would be remedial in nature and not, therefore, a matter for the extension of immunity.[75] The Florida Supreme Court's majority opinion, authored by Justice James C. Adkins, rejected this somewhat incredible argument.[76] Adkins correctly noted that losing one's livelihood was clearly penal in nature. The state's highest appellate court held that it had the authority to grant immunity for these Bar disciplinary proceedings as well.[77]

Justice Adkins declared that if the State wished to grant Bar disciplinary proceeding immunity to a witness such as DeBock, the State itself must seek this immunity from the court.[78] He further held that it would place an unfair and unnecessary burden upon such attorneys to compel them to petition the court for this immunity.[79]

The dissenting opinion, authored by Justice Raymond Ehrlich, looked back with nostalgia to the era when lawyers were "officers and gentlemen."[80] He declared that "inquiries into an attorney's fitness to practice law exist for the protection of the public and the integrity of the court, not to punish a lawyer."[81] The Florida Bar, aware of the enormous potential effect of this decision on its disciplinary procedures, successfully petitioned for a rehearing in this case.[82]

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74. FLA. STAT. § 914.04 (1986).
75. State v. Rendina, 467 So. 2d 734, 737 (Fla. 4th Dist. Ct. App. 1985)
76. *DeBock*, 11 Fla. L. Weekly at 551.
77. *Id.* at 551.
78. *Id.*
79. *Id.*
80. *Id.* at 551. (Ehrlich, J., dissenting).
81. *Id.* at 552.
82. The Florida Bar filed a motion to appear as *amicus* in the *DeBock* case. On December 1, 1986, the Bar stated that it had no knowledge of the issues pending before the court until it received the court's order of October 30, 1986. The Bar stated further that "The issues presented in this matter are of great concern to the Florida Bar in its role as the prosecutorial agency in lawyer disciplinary cases. . . ." The Bar went on to suggest that it was concerned about the issues in this case because it represented the "voice of Florida lawyers." Interestingly, in a motion in opposition, Fort Lauderdale lawyer Alexander Siegel stated that he had spoken to numerous attorneys in Broward County and he was unable to find one who agreed with the position being taken by the Bar in this matter. *See* Motion In Opposition To Appearance of the Florida Bar as

C. *Neglect*

The potential range of venality in human conduct was sadly illustrated by numerous 1986 Bar discipline cases. Lawyers were disciplined for many types of neglect[83] and abandonment of cases.[84] Perhaps, the most interesting attorney neglect of a client case in 1986 was the case of *Florida Bar v. Jackson*.[85] Attorney Steven Jackson was hired to re-

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Amicus Curiae and the Position Taken by the Florida Bar in this Matter and Motion to Strike, *DeBock*, 11 Fla. L. Weekly at 550 (No. 67,207) (filed Dec. 31, 1986). DeBock through counsel also argued against the Bar's right to appear as *amicus*. The Bar's request had come too late in the proceeding, argued DeBock. "To permit an *amicus* to reopen the merits of a case on rehearing would unduly delay the termination of this litigation and, we submit, set a dangerous precedent." *See* Petitioner's Opposition To Motion For Leave To Appear As Amicus, *DeBock*, 11 Fla. L. Weekly at 550 (No. 67,207) (filed Nov. 21, 1986). The Bar in its motion for rehearing filed on November 14, 1986, argued that the court apparently overlooked the Florida Bar Integration Rule, Art. XI, Rule 11.02, which holds that the right to practice law is a conditional privilege revocable for cause. The Bar went on to allege that the court "misapprehended the purpose and nature of disciplinary action in that while it had a penal aspect, it is remedial in nature. . . ." *See* Motion for Rehearing, *DeBock*, 11 Fla. L. Weekly at 550 (No. 67,207) (filed Nov. 14, 1986). The Bar in its memorandum of law in support of its motion for rehearing rather testily agreed with the court that attorneys have the fifth amendment right to silence in criminal cases. (This should come as no great surprise.) However, the Bar stated that it "differs with this court regarding the nature of disciplinary proceedings and how the fifth amendment right to silence applies in such proceedings." *Id.* The court in late January, 1987, granted a rehearing despite a dissent by Justices McDonald, Overton and Ehrlich. At the time of this writing it is impossible to affirmatively determine what course the new court will take regarding this area. Former Justice Adkins remarked in the Florida Bar News, "It means the Bar just won another one. Ordinarily an outsider can't get a rehearing, but the Bar will have an easier time now." *See Court Grants Bar Rehearing in DeBock*, Fla. Bar News, Feb. 15, 1987, at 1, col. 4.

83. Some cases dealing with neglect include: Florida Bar v. Stein, 484 So. 2d 1233 (Fla. 1986) (A public reprimand and three years of probation were given for failure to appear and adequately represent the client at a zoning hearing.); Florida Bar v. Bowles, 480 So. 2d 636 (Fla. 1985) (The court disbarred Bowles for a period of ten years for neglect and lack of preparation in adoption hearing.); and Florida Bar v. Baxter, 488 So. 2d 826 (Fla. 1986) (A three-year disbarment was imposed where neglect in two cases and failure to pay bar dues led to practicing without being a member of the Florida Bar.).

84. Abandonment cases included: Florida Bar v. Downing, 487 So. 2d 1067 (Fla. 1986) (Where Downing was out of state for extended periods of time caring for his ill parents and therefore unable to practice, he was permitted to resign from the Florida Bar.), and Florida Bar v. MacKenzie, 485 So. 2d 424 (Fla. 1986) (Abandonment of practice led to ten years of disbarment.).

85. 494 So. 2d 206 (Fla. 1986).

present one of nine defendants in a multi-count federal trial.[86] In a pre-trial conference the parties estimated that the trial would take several weeks and agreed upon a trial date in April which was satisfactory to all parties. Jackson specifically agreed to appear on April 16, 1984, for this trial.[87]

Two days before the trial, Jackson's brother attended a final pre-trial hearing. He advised the court that Steven Jackson was ready for trial but would not be available for a few days during the following week and the week afterwards due to the Passover holiday. The trial judge agreed to recess the trial before sundown to assist Jackson in his religious observation. However, as the trial was about to begin, Jackson filed a written motion to stay proceedings on the grounds that he was religiously observant and the four days of Passover were among the highest holy days of the year. The court repeated its offer of an early recess to Jackson. The trial judge also offered Jackson's client the opportunity of representation by one of the other defendants' lawyers on the days when Jackson was unable to attend trial.[88]

At first, the client agreed with this temporary substitution of counsel. However, after the client consulted with Jackson the court was informed that only Jackson could adequately represent his client.[89]

The court then offered Jackson the opportunity to receive a daily transcript each morning for the previous day he missed. This offer was also refused by Jackson. Jackson was given several more opportunities to solve this dilemma, all of which he refused. He was finally advised that if he failed to appear in court the following day, the court would view his conduct as direct contempt.[90]

Jackson pledged his respect for the court and replied that he was compelled by a "higher authority."[91] He did not appear for trial the next day. Jury selection and ultimately the trial continued without Jackson. The absent attorney was held in contempt by the trial court on two occasions. The trial judge did not question Jackson's convictions but held simply that this was a matter of an attorney's neglect of his obligation to a client. Jackson's conduct resulted in a contempt of court

86. *Id.* at 206.
87. *Id.* at 207.
88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.*

ruling.[92] Another lawyer was found to substitute for Jackson at the last moment.[93]

The Florida Supreme Court adopted the recommendation of its referee and found that Jackson had violated DR 7-102(A)(2)[94] and DR 7-101(A)(3).[95] DR 7-102(A)(2) mandates that an attorney "shall not intentionally fail to carry out a contract or plan that has been entered into with a client for professional services."[96] DR 7-101(A)(3) declares that an attorney "shall not intentionally prejudice or damage his client during the course of this professional relationship."[97] Jackson was also found to have violated several other disciplinary regulations regarding the administration of justice.[98]

All tribunals reviewing this case have noted Jackson's right to his sincere religious convictions. However, all have found his unyielding conduct to have clearly been contempt of court. The district court offered Jackson many outs all of which he rigidly refused resulting in his contempt and subsequent discipline.[99]

D. *Other Attorney Misconduct*

Many other Florida lawyers were disciplined for use and abuse of trust funds and the co-mingling of funds.[100] In one of these cases, *Florida Bar v. Aaron*,[101] the attorney in question, Aaron, was also disciplined for threatening criminal prosecution. The threat of criminal

92. *Id.* at 208.
93. *Id.*
94. *Id.*
95. *Id.*
96. FLORIDA CODE DR 7-102(A)(2).
97. *Id.* at DR 7-101(A)(3).
98. *Id.* at DR 1-102(A)(1), 1-102(A)(5), 1-102(A)(6) and 7-106(A).
99. *Jackson*, 494 So. 2d at 207-08.
100. Co-mingling and misuse of trust fund cases included Florida Bar v. Kent, 484 So. 2d 1230 (Fla. 1986) (Misuse and co-mingling of funds and totally inadequate trust accounting records led to a three-year suspension to be followed by a three-year probation after successfully passing the professional ethics exam. In a strongly worded dissent, Justice Ehrlich called the Supreme Court "a toothless tiger" for not disbarring the attorney, Kent); Florida Bar v. Neely, 488 So. 2d 535 (Fla. 1986) (An unintentional but negligent trust accounting led to a sixty-day suspension to be followed by two years of probation.) and Florida Bar v. Mitchell, 493 So. 2d 1018 (Fla. 1986) (Co-mingling and inadequate trust accounting led to a public reprimand and probation despite the referee's original suggestion of a private reprimand.).
101. 490 So. 2d 941 (Fla. 1986).

prosecution to gain advantage in a civil case was prohibited by the Code[102] but is now permitted by the Rules.[103]

Attorneys were also disciplined for attempted bribery of a jail warden,[104] as well as for the use, abuse, and sale of illegal drugs.[105] Although a relatively rare occurrence, an attorney was also disciplined for charging clearly excessive fees.[106] However, discipline for excessive fees

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102. *See* FLORIDA'S CODE at DR 7-105.

103. Presently, there is no reference in the Florida Rules to prohibit such conduct.

104. *See* Florida Bar v. Cruz, 490 So. 2d 48 (Fla. 1986). Cruz was a former United States Marshall for the Southern District of Florida convicted of multiple counts of bribery and was disbarred for this conduct.

105. *See* Florida Bar v. Knowles, 500 So. 2d 140 (Fla. 1986). Knowles was convicted of eight counts of grand theft and sentenced to two years probation and a $14,000 fine. An alcoholic, Knowles had stolen from his trust fund a total of $197,900. After his plea of no contest on criminal charges, the referee found Knowles guilty of violating a variety of disciplinary rules and recommended disbarment for a minimum period of three years. Knowles argued rehabilitation and that he had been suspended since 1983; a three-year disbarment coupled with the suspension would total seven years although he had stopped drinking in August of 1983. The Supreme Court of Florida (Justice Barkett) found that although "alcoholism was the underlying cause of [his] misconduct, it cannot constitute a mitigating factor sufficient to reverse the referee's recommendation to disbar. . . ." *Id.* at 142. However, as his alcoholism was under control, full restitution was made to clients, and Knowles had no prior disciplinary record, the court ran Knowles' disbarment from the date of his original suspension, allowing him leave to reapply to the Bar when he successfully completed his criminal probation. *Id. But see*, Florida Bar v. Rosen, 495 So. 2d 180 (Fla. 1986). Rosen was convicted on federal felony charges of possessing with intent to distribute cocaine. Rosen was suspended by the court for three years despite the Florida Bar's urging that he be disbarred. Justice James C. Adkins, writing the majority opinion, held "the case illustrat[es] yet another tragedy related to cocaine abuse." *Id.* at 181. Adkins went on to state that the fact that he wound up his law practice without damaging clients before becoming severely addicted to cocaine was no doubt significant to the court's decision. *Id.* In a partially concurring opinion Justices Ehrlich and McDonald suggested that Rosen be required to retake the Florida Bar examination at the end of the probationary period. *Id.* at 182. Rosen's suspension would have added to his time out of practice and would have been in excess of five years. Justices Ehrlich and McDonald also stated that they would support disbarment absent a strong mitigating factor such as existed in this case. *Id. See also* Florida Bar v. Marks, 492 So. 2d 1327 (Fla. 1986) (disbarment for importation of marijuana); Florida Bar v. Chase, 492 So. 2d 1321 (Fla. 1986) (a three-year suspension for possession of cocaine); Florida Bar v. Anderson, 482 So. 2d 1 (Fla. 1986) (five years disbarment for importing twenty kilograms of cocaine).

106. *See* Florida Bar v. Mirabole, 498 So. 2d 428 (Fla. 1986). In *Mirabole*, a Florida lawyer who billed a client over $24,000 for representing her in a $3,000

may become more prevalent in the future with the new specific limits on certain contingency fee agreements.[107]

E. *Solicitation of Clients*

Bar discipline was also invoked in the area of attorney solicitation of clients.[108] As was noted earlier in this article, this is a rapidly expanding area of the law.[109] The Florida Rules extend the limits of permissible solicitation to targeted direct mailings while prohibitions remain on traditional, in-person solicitation.[110] This prohibition against in-person solicitation is exemplified by the case, *Florida Bar v. Vannier*.[111] *Vannier* is a "Church of Scientology strikes back" case.

Vannier, a Florida attorney, served as an undercover agent for the Church of Scientology in an attempt to prejudice the interests of Clear-

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mechanic's lien action was publicly reprimanded for charging an excessive fee and was assessed the costs of the disciplinary proceeding.

107. *See* FLORIDA'S RULES Rule 4-1.5(A) and (B). Discipline for excessive fees will always be difficult to prove, however, because the standard for reasonable fees leaves a truck-size interpretive loophole. Rule 4-1.5 states in relevant part:

> (A) A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee.
>
> (B) A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. Factors to be considered as guides in determining the reasonableness of a fee include the following:
>
> (1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.
>
> (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.
>
> (3) The fee customarily charged in the locality for similar legal services.
>
> (4) The amount involved and the results obtained.
>
> (5) The time limitations imposed by the client or by the circumstances.
>
> (6) The nature and length of the professional relationship with the client.
>
> (7) The experience, reputation, and ability of the lawyer or lawyers performing the services; and
>
> (8) Whether the fee is fixed or contingent.

108. *See, e.g.*, Messing, *supra* note 7.

109. *See supra* text accompanying notes 4 to 31.

110. FLORIDA'S RULES Rule 4-7.2.

111. 498 So. 2d 896 (Fla. 1986).

water Mayor Gabriel Cezares.[112] Cezares was a chief opponent of the church. Vannier, a member of the Covert Intelligence operations division of the Church, was assigned to infiltrate the mayor's office and to obtain information on Mayor Cezares. Vannier's wife worked as a volunteer in the mayor's reelection campaign and introduced him to the mayor. Vannier on repeated occasions aggressively solicited the mayor, offering his services as an attorney in the mayor's lawsuit against the Church of Scientology. He was finally hired by the mayor to assist in the suit. In his capacity as legal counsel, he obtained access to all information on the mayor's lawsuit against the church and to other private files of the mayor. Shortly thereafter, Vannier disappeared without leaving a forwarding address.

The Florida Supreme Court rejected Vannier's argument that he was being persecuted for his religious beliefs.[113] The court upheld its referee's finding that Vannier was guilty of solicitation.[114]

While it is undoubtedly true that Vannier was guilty of solicitation, Vannier's conflict of interest with his client is clearly a more compelling ground for his discipline. Certainly, this conflict of interest alone would have supported the court's verdict.

F. *Attorney Fraud*

The last of the Bar discipline cases, *Florida Bar v. Jennings*,[115] may leave a reader with mixed emotions. Clearly, the actions of Jennings are to be condemned on one level. However, the fact that Jennings lied to two sets of in-laws will, for some, no doubt mitigate if not justify his conduct.

Jennings was found to have violated DR 1-102(A)(4), which deals with conduct involving dishonesty, fraud, deceit, or misrepresentation, in that he took money under false pretenses.[116] Jennings allegedly took $30,000 from each of two sets of in-laws.[117] Jennings secured each loan by a note. However, each note merely encumbered the same parcel of property. Neither in-law knew about the mortgage to the other. Furthermore, the property allegedly encumbered by the note already had a

112. *Id.* at 897.
113. *Id.* at 898.
114. *Id.*
115. 482 So. 2d 1365 (Fla. 1986).
116. *Id.*
117. *Id.* at 1366 (Ehrlich, J., concurring in part and dissenting in part).

loan on it currently in foreclosure. Although there was no formal attorney/client relationship, Jennings was found to have abused his position as an attorney.[118] He received a public reprimand for his misconduct.

In a compelling dissent, Justice Raymond Ehrlich stated that he found this punishment to be totally inadequate. He argued that the fact that the misconduct took place in a non-lawyer client setting is no defense, and that the victims were in-laws "can hardly be a mitigating factor."[119] Justice Ehrlich went on to note that the in-laws trusted Jennings and "[h]e committed fraud and deceit from the outset. He betrayed their trust throughout. His conduct was utterly reprehensible."[120] The justice then suggested that a ninety-one day suspension should have been the minimum punishment assessed in this case.[121]

G. *Attorney Malpractice*

Two interesting cases stand out in the area of attorney malpractice. The first, *Hatcher v. Roberts*,[122] developed the standards to be applied by Florida courts to determine if a malpractice case exists. The second, *Richards Enterprises, Inc. v. Swofford*,[123] considered the proper computation of time for the statute of limitations in attorney malpractice actions. In *Hatcher*, the First District Court of Appeal held that legal malpractice has three elements: "the attorney's employment and his neglect of a reasonable duty, which is the proximate cause of loss to the client."[124] This dispute involved a mortgage foreclosure proceeding on the remains of a hurricane-struck Panama City Beach property. The action of attorney John S. Miller in withdrawing an affirmative defense to this foreclosure proceeding was alleged to be malpractice by plaintiff, Hatcher. When threatened with this malpractice action by his client, Miller responded by seeking $25,000 in fees for prior representation. In a series of actions spanning ten years, suits followed countersuits and claims followed counterclaims. Attorney Miller emerged victorious at every major stage of litigation including the instant case. The First District Court of Appeal applied its three-

118. *Id.* at 1366.
119. *Id.* (citations omitted).
120. *Id.*
121. *Id.* at 1367.
122. 478 So. 2d 1083 (Fla. 1st Dist. Ct. App. 1985).
123. 495 So. 2d 1210 (Fla. 5th Dist. Ct. App. 1986), *review denied*, 488 So. 2d 68 (Fla. 1986).
124. *Hatcher*, 478 So. 2d at 1087.

part malpractice standard and concluded that although there was no dispute as to the attorney's employment by the plaintiff, and while it was unclear if there had been a neglect of reasonable duty, it was quite clear that any neglect that might exist was not the proximate cause of loss to the client.[125] The *Hatcher* court reviewed case law cited by both parties and found no basis to believe the attorney's action had in any way damaged plaintiff Hatcher.[126]

In *Swofford*, the Fifth District Court of Appeal reversed a trial court decision.[127] The *Swofford* court held that the two-year statute of limitations on a legal malpractice action did not begin running until the underlying action had been appealed and decided by an appellate court.[128] The court rejected the more traditional standard that this cause of action begins when it has been discovered or should have been discovered with the exercise of due diligence. The Fifth District Court of Appeal noted that had the lower court's ruling been reversed by an appellate court, the client would not have had a cause of action for malpractice on that ground.[129]

H. *Safekeeping of Funds*

The Florida Rules depart from the traditional requirement that client funds must be safeguarded in an escrow account.[130] Attorneys are permitted to safeguard a client's funds and other objects in any place mutually agreeable with consent of the client.[131]

In *Florida Bar v. Fitzgerald*,[132] the Florida Supreme Court anticipated and no doubt influenced this development. In *Fitzgerald*, a Florida attorney was hired by Mr. and Mrs. Molina after their employer was arrested by DEA agents on drug charges. The Molinas were concerned that they would be the next to be arrested and retained Fitzgerald to represent them. They gave Fitzgerald $18,000 in cash for safekeeping. Fitzgerald without contradiction stated that the Molinas had specifically directed him not to place the funds in an identifiable account. Instead they preferred that he retain this money in his safe.

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125. *Id.* at 1091.
126. *Id.*
127. *Swofford*, 495 So. 2d at 1210.
128. *Id.* at 1211.
129. *Id.*
130. FLORIDA RULES Rule 4-1.15(a).
131. *Id.*
132. 491 So. 2d 547 (Fla. 1986).

Fitzgerald successfully negotiated immunity for his clients whereupon, in gratitude, they filed a bar grievance and charged him with overcharging for his representation. The Florida Bar expanded the scope of its investigation and alleged that in addition to the claim of overcharging the Molinas, Fitzgerald had mishandled the $18,000 by not placing it in a bank or a savings and loan account.[133]

Justice Barkett writing for the court found "no impropriety in the safekeeping of a client's funds or private property in other than an identifiable account, if the client so directs."[134] Nonetheless, Justice Barkett went on to state in *dicta*, "[w]e do, however, strongly urge that any agreement between the attorney and client regarding such safekeeping be reduced to writing."[135]

One wonders how the present U.S. Department of Justice would view Fitzgerald's conduct. If the $18,000 were the proceeds of an illegal drug transaction it could have been confiscated by the government under RICO provisions.[136]

I. *Attorney-Client Duties and Responsibilities*

The roles of attorneys and clients and their mutual responsibilities are matters of much concern and debate. The Rules guarantee to clients the right to be fully informed by their attorneys about the facts and progress of their case.[137] However, clients may choose to delegate substantial responsibilities to their attorney for business purposes, infirmity or many other reasons. The Florida Rules attempt to discuss this division of responsibilities and the many levels of relationship that may develop between the attorney and client.[138] Four 1986 cases—*Tesini v. Zawistowski*,[139] *Jorgensen v. Grand Union Co.*,[140] *Dixie Operating Co. v. Exxon*;[141] and *Brereton v. Clewiston*,[142]—discussed various aspects of these relationships.

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133. *Id.* at 548.
134. *Id.*
135. *Id.* at n.*.
136. 18 U.S.C. § 1963 (1982 & Supp. II 1984); 21 U.S.C. §§ 848, 853 (1982 & Supp. 1985). *See also* United States v. Harvey, No. 86-5025 (4th Cir. Mar. 6, 1987).
137. *See* FLORIDA'S RULES Rule 4-1.4.
138. *Id.* comments (1), (2), (3) and (4).
139. 479 So. 2d 775 (Fla. 4th Dist. Ct. App. 1985).
140. 490 So. 2d 214 (Fla. 4th Dist. Ct. App. 1986).
141. 493 So. 2d 61 (Fla. 1st Dist. Ct. App. 1986).
142. 490 So. 2d 1075 (Fla. 4th Dist. Ct. App. 1986).

In *Tesini*, the court held that it was within an attorney's power to grant a one-day extension on the date of a real estate closing to avoid a holiday.[143] This grant of an extension by the attorney was held to bind the attorney's client as well.[144] Citing *Benson v. Seestrom*,[145] the court declared that an attorney cannot "play fast and loose with the terms of a written agreement and always bind his client."[146] For example, an attorney could hardly be permitted to reduce the purchase price of property by 50%. Nonetheless, postponement for a few hours or for one day is certainly within the scope of any lawyer's apparent authority.[147]

The other three cases consider an attorney's authority to settle a case. The *Jorgensen* court held that "a client's express authority given to his attorney to settle his cause of action must be clear and unequivocal."[148] Finding the record lacking in any testimony to support the granting of authority to settle, the court went on to caution that "[t]his case points out how we lawyers and judges, by focusing on our verbiage and customs, can isolate ourselves from the frames of reference, language, thought processes and expectations of clients, and the problems that can arise by that isolation."[149]

In a somewhat confusing opinion, the First District Court of Appeal, in *Dixie Operating*, held that "[i]t is well-settled in Florida that a settlement agreement entered into by an attorney is enforceable only when it has been determined that the attorney was given 'clear and unequivocal' authority by the client to compromise a claim."[150] The court rejected the suggestion that an attorney's authority to settle could be based upon the attorney's "good faith belief" in that authority.[151] Instead, the First District found that there were insufficient facts for a determination in this particular case and remanded it to the trial court for further testimony.[152]

Finally in *Brereton*, a Florida attorney attempted to enforce a settlement he had entered into on behalf of his client. The attorney thought he had the authority to settle a personal injury case for the

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143. *Tesini*, 479 So. 2d at 776.
144. *Id.*
145. 409 So. 2d 172 (Fla. 2d Dist. Ct. App. 1982).
146. *Tesini*, 479 So. 2d at 776.
147. *Id.*
148. *Jorgensen*, 490 So. 2d at 215.
149. *Id.*
150. *Dixie Operating*, 493 So. 2d at 63.
151. *Id.*
152. *Id.* at 64.

client. However, after the attorney negotiated a settlement the client rejected it and subsequently discharged him. The attorney then sued his client to enforce the settlement agreement. The Fourth District Court of Appeal held, however, that the attorney had no standing to sue.[153] Instead, they concluded that his only recourse would be to place a lien on the eventual settlement.[154]

J. *Attorney-Client Conflict*

The Rules generally restate the many potentials for conflict in relationships between attorney and clients, and between new and former clients.[155] There are, however, a few significant departures in the Rules from the old Code.[156] It is a truism, although occasionally a difficult one to apply, that an attorney's interests must never be contrary to those of his or her client without informed client consent. An attorney surely cannot serve his or her own interests while serving the contrary or potentially contrary interests of a client. In 1986, this principle was illustrated by the following cases: *Florida Bar v. Hotaling*,[157] *Florida Bar v. Katz*,[158] and *Florida Bar v. Wagner*.[159]

In *Hotaling*, the defendant attorney was found by the Florida Supreme Court to have represented a condominium association despite an obvious and real conflict.[160] Hotaling represented a condominium association in its defense of a lawsuit for attorneys' fees by Hotaling's "partner"/office mate. Hotaling never notified her client, the condominium association, of this conflict nor did she ever attempt to get their consent to this relationship. Furthermore, she took no action on the condominium association's behalf. When a judgment was entered against her clients she used privileged information to assist her office mate in perfecting his judgment. Not surprisingly, the supreme court was shocked by this conduct and ordered disbarment on this count and

153. *Brereton*, 490 So. 2d at 1076.
154. *Id.*
155. FLORIDA'S RULES 4-1.6-4-1.9.
156. *Compare* Rule 4-1.8 *with* DR 5-103(B). The new rule permits an attorney to advance costs contingent upon the outcome of the matter. DR 5-103(B) required that the attorney remain ultimately liable for such expenses.
157. 485 So. 2d 821 (Fla. 1986).
158. 491 So. 2d 1101 (Fla. 1986).
159. 497 So. 2d 238 (Fla. 1986).
160. *Hotaling*, 485 So. 2d at 823.

several others.[161]

In *Katz*, representation of an ex-client's husband against the former marriage dissolution client in an attempt to reduce child support payments, coupled with coercion and misrepresentation and a prior reprimand, warranted disbarment.[162] The former client's consent was not sought nor would it have been given, according to the facts proffered by the Bar. The danger of divulging his former client's secrets or this outrageous conflict alone justified disbarment.

The *Wagner* case involved a conflict between an attorney's interest and that of his client. The dispute involved a series of highly complex transactions. In each transaction, the attorney's interest was contrary or potentially contrary to that of his client. Furthermore, in each instance his clients were uninformed of the attorney's potential conflict of interest.[163] For this conduct attorney Wagner was suspended by the Florida Supreme Court.[164]

K. *Confidentiality*

As discussed earlier in this article,[165] the Florida Rules extend the scope of material covered by lawyer/client confidentiality. There are, however, several specific instances when confidentiality must give way to even more valued interests. For example, candor to the tribunal is ultimately viewed as a more important "good" than the much protected lawyer/client confidential relationship.

Even within Rule 4-1.6, which defines confidentiality, there is a laundry list of exceptions to such a privilege. In addition to those mandatory exceptions previously mentioned, attorneys may also choose to disclose client confidences: when they believe it to be in the best interests of the client;[166] with the client's permission;[167] to comply with the Rules of Professional Conduct;[168] to defend themselves;[169] or to collect a fee.[170]

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161. *Id.* at 825.
162. *Katz*, 491 So. 2d at 1104.
163. *Wagner*, 497 So. 2d at 238-39.
164. *Id.* at 239.
165. *See supra* notes 47 to 56 and accompanying text.
166. *See* FLORIDA'S RULES Rule 4-1.6(C)(1).
167. *Id.* Rule 4-1.6(C)(1)(a)
168. *Id.* Rule 4-1.6(C)(5).
169. *Id.* Rule 4-1.6(C)(3).
170. *Id.* Rule 4-1.6(C)(2).

An interesting 1986 case which discusses the permissive waiver of confidentiality at the request of a client is *Groover v. State*.[171] Tommy Groover was convicted of three counts of first degree murder and was sentenced to death on two counts and to life imprisonment on the remaining count. On appeal, the Florida Supreme Court held that Groover's defense attorney did not breach the responsibility of confidentiality for his client when the attorney testified at a pre-trial suppression hearing.[172] Groover's original attorney testified at the state's insistence regarding Groover's claim that the state and the testifying attorney had "threatened" him with the death penalty if he did not accept the plea agreement he had been offered. Although there was no specific waiver by Groover of attorney-client confidentiality, the court held, "[t]he record unequivocally shows that appellant wanted his original counsel to testify at the hearing, and the appellant explicitly waived his attorney-client privilege as to certain discussions appellant wished presented."[173] This finding is in accord with Rule 4-1.6 which permits an attorney to testify either in his client's best interest, or to defend the attorney from charges brought by the client.

L. *Bar Admission*

The Florida Board of Bar Examiners, after lengthy negotiation with the Florida Bar, petitioned the Florida Supreme Court in 1986 for adoption of a new and troubling rule permitting provisional admission to the bar.[174] The Board of Bar Examiners, having consulted with substance abuse advisors, apparently decided that there was a high probability of danger in admitting past or present substance abusers. These admittees are typically evaluated by for-profit programs selected by the Board of Bar Examiners.[175] Upon the Florida Supreme Court's approval of these "substance abuser" candidates, provisional admittance is granted subject to supervision for a stated period of time. Typically the supervision period is two or three years. Timely reporting requirements are attached to this provisional admission in addition to tailored special conditions for each candidate.

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171. 489 So. 2d 15 (Fla. 1986).
172. *Id.* at 17.
173. *Id.*
174. *See In re* Petition of Fla. Bd. of Bar Examiners, 498 So. 2d 914 (Fla. 1986).
175. At present, two program sites are available: Mount Sinai Medical Center, Miami Beach, Florida, and Ridge View Institute, Smyrna, Georgia.

The use of a provisional admission is troubling because it relies upon mere speculation about future conduct. Often such speculation is based upon past conduct which is quite remote. Current substance abuse theory is controversial and may not be so exact as to justify singling out these individuals for special treatment.[176] The use of private, for-profit, designated evaluation programs also presents a potential for conflict.[177] In any event, every attorney admitted in Florida is subject to the Florida Bar's disciplinary processes should such intervention become appropriate. With this option in mind it is difficult to perceive any real need for this second-class Bar citizenship.

In re the Application of VMF For Admission to the Florida Bar[178] involved an applicant for admission to the Florida Bar who had two ten-year-old drug arrests in Michigan. The applicant, VMF, did not list these convictions on his application filed with the Board of Bar Examiners on the advice of his counsel.[179] The Florida Board of Bar Examiners refused to admit VMF, citing his lack of candor and the prior drug arrests.[180] The Florida Supreme Court reversed the Board, and found the applicant's explanation for his failure to report the drug arrests a satisfactory one.[181] The court further noted that the remoteness of VMF's conduct and his exemplary life since his arrests made him an acceptable applicant for admission to the Florida Bar.[182]

IV. Where to Go for More Information

The Florida Rules have been in effect for only a few months and are as yet untested. It is probable that even the most diligent practitioner in Florida will need to seek advice on the meaning and application of specific rules. Advice is available by telephone from local Bar

176. Recently, the *Nova Law Review* published an outstanding symposium issue on drug testing. Many of the medical experts challenge current testing procedures. *See, e.g.*, Dubowski, *Drug-Use Testing: Scientific Perspectives*, 11 NOVA L. REV. 415 (1987).

177. One must at least question the appearance of impropriety of a program which may gain financially from a negative evaluation of a "substance abuser" candidate.

178. 491 So. 2d 1104 (Fla. 1986).

179. *Id.* at 1105. The petitioner's attorney was also his father.

180. *Id.* at 1107.

181. *Id.*

182. *Id.*

offices[183] as well as from the Florida Bar toll-free: 1-800-235-8619. For more formal opinions, attorneys should request a staff opinion from the Office of the Florida Bar Ethics Counsel. In cases of considerable controversy or where the requesting attorney disagrees with a staff opinion, a formal ethics opinion may be requested from the Florida Bar Professional Ethics Committee. Note, however, that the drafting of formal opinions is a rather lengthy process.

The Florida Rules should be viewed by attorneys as a living document, subject to constant reevaluation and change. Even during the adoption process, two major rules, those regarding targeted mail solicitation[184] and contingency fee agreements,[185] were significantly amended. Further amendment[186] is likely and all lawyers can have meaningful input into this process by writing the Bar Ethics Counsel; the Chairperson of a local Bar Grievance Committee; or by contacting their local member of the Board of Governors of the Florida Bar.

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183. Bar offices are located in Tallahassee, Tampa, Miami, Fort Lauderdale and Orlando.

184. FLORIDA'S RULES Rule 4-7.2.

185. *Id.* Rule 4-1.5(D).

186. In 1987, The Florida Bar has proposed amending the following ethical rules: 4-1.5(Fees) — strict limits on referral fees in contingency cases; 4-3.8(Special responsibilities of a prosecutor) — a rule which would require a prosecutor to seek prior judicial approval to testify before a grand jury regarding the attorney's client; 4-7.3(solicitation) — in contingency fee cases an attorney would be required to provide potential clients with factual information regarding the attorney's expertise, background and training.