Professional Responsibility

Timothy P. Chinaris*  Elizabeth Clark Tarbert†

I. INTRODUCTION

Continuing a trend, 1998 included a number of important developments in the area of professional responsibility law in Florida.1 Significant appellate court decisions, rule changes,2 and disciplinary actions potentially affect the practices of more than 58,000 members of The Florida Bar.3

This article reports and summarizes those developments by placing them in the framework of the various relationships in which lawyers typically operate.4 Part II looks at decisions affecting what must be viewed as the central relationship in this context: the relationship between lawyer and client. Part III examines developments pertaining to what may be the dominant relationship: the lawyer’s relationship with the court and the

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1. This article surveys professional responsibility developments in Florida from July 15, 1997, through July 14, 1998.
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. Florida has a unified bar. Therefore, in order to regularly practice law in the state, lawyers must be admitted to, and thus be members of, The Florida Bar. See RPC 1-3.1; Petition of Fla. State Bar Ass’n, 40 So. 2d 902 (Fla. 1949).
4. Cases and ethics opinions are discussed in the section to which they have the most significant connection.
judicial system. Part IV reviews the lawyer's relationship with third parties. Part V deals with the lawyer's relationship with disciplinary authorities, particularly The Florida Bar.

II. THE LAWYER'S RELATIONSHIP WITH CLIENTS

The relationship between lawyer and client contains a variety of ethical dimensions. These include: the 1) establishment of the relationship; 2) scope of authority and representation; 3) confidentiality; 4) handling of property relating to clients; 5) conflicts of interest; 6) fees; and 7) legal duties owed to clients as they relate to professional ethics. Decisions in 1998 addressed these issues.

A lawyer is a client's agent and advocate, but there are ethical limits on the scope of actions that lawyers may take on behalf of their clients. Exceeding these limits resulted in the dismissal of an appeal and an imposition of monetary sanctions on the lawyer in Wood-Cohan v. Prudential Insurance Co. of America. The trial court below granted a directed verdict to the plaintiff's claims, but the judgment was not final because the defendants' counterclaim was still pending. Nevertheless, plaintiff's counsel filed a notice of appeal. In error, the trial court signed the proposed final judgments submitted by the plaintiff. Plaintiff's counsel then filed the judgments with the appellate court. When the trial court rescinded the erroneous judgments, the lawyer failed to properly notify the appellate court. Furthermore, the lawyer vigorously opposed defendants' motion to dismiss the appeal. In granting the motion and sanctioning the lawyer, the Fourth District Court of Appeal declared that he had violated both RPC 4-3.1 and 4-3.2 of the Florida Rules of Professional Conduct.

5. 715 So. 2d 999, 1001 (Fla. 4th Dist. Ct. App. 1998).
6. Id. at 1000.
7. Id.
8. Id.
9. Id.
10. Wood-Cohan, 715 So. 2d at 1001.
11. Id. at 1001. RPC 4-3.1, “MERITORIOUS CLAIMS AND CONTENTIONS,” provides:

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

RPC 4-3.1.
In the lawyer-client relationship, it is axiomatic that lawyers, as agents, draw their authority from clients. This principle is reflected in the Florida Rules of Professional Conduct. The First District Court of Appeal considered this issue in Davis v. Meeks. Meeks sued Davis for injuries resulting from an auto accident and obtained a judgment of more than $1.8 million. Subsequently, Davis sued her insurer in a Georgia state court for bad faith. She was represented in the Georgia action, and in a malpractice claim against her counsel in the original case, by attorney Levin. In the Georgia proceedings, Levin authorized the insurer's counsel to move for relief from the $1.8 million judgment. Florida attorneys Henry M. Coxe and Michael I. Coulson filed the motion. The trial court denied the motion and Coxe and Coulson filed an appeal of that decision.

Levin noticed his appearance in the matter and filed a notice of voluntary dismissal of the appeal. Coxe and Coulson responded by moving to strike the notice of dismissal and to disqualify Levin. Levin's response included an affidavit from Davis indicating her wish to have Levin represent her interests. In denying the motions to strike the notice of voluntary dismissal and to disqualify Levin, the court reaffirmed the basic principles that lawyers act through the authorization of their clients and the clients decide who will represent them:

Under these circumstances, determining who best represents [the client's] interests in this case is not the province of this court, but rather of [the client] herself. . . . The wisdom of her choice is not

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RPC 4-3.2, "EXPEDITING LITIGATION," requires reasonable efforts to expedite litigation and provides that: "A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client." RPC 4-3.2.

12. Subdivisions (a) and (c) of RPC 4-1.2, "SCOPE OF REPRESENTATION," provide:

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

(c) Limitation of Objectives of Representation. A lawyer may limit the objectives of the representation if the client consents after consultation.

RPC 4-1.2(a), (c).


14. Id. at 184–85.
for us to decide, and the consequences of that choice present issues for resolution in another forum on another day.\(^\text{15}\)

The lawyer-client relationship is a unique one that is grounded on agency principles, as well as fiduciary and ethical principles. The Supreme Court of Florida recognized this in *Forgione v. Dennis Pirtle Agency, Inc.*\(^\text{16}\) In response to a certified question from the Eleventh Circuit, the supreme court held that a negligence claim by an insured against the insurance agent (for failure to obtain proper coverage) is assignable.\(^\text{17}\) In contrast, Florida law provides that a legal malpractice claim is *not* assignable.\(^\text{18}\) The court explained this contrast by reviewing what it considered to be significant distinctions between the insured-agent relationship and the lawyer-client relationship.\(^\text{19}\) Unlike the relationship between insured and insurance agent, the lawyer-client relationship is a confidential relationship,\(^\text{20}\) a "fiduciary

\(^{15}\) Id. at 185.
\(^{16}\) 701 So. 2d 557 (Fla. 1997).
\(^{17}\) Id. at 560.
\(^{18}\) Id. at 559.
\(^{19}\) Id. at 559–60.
\(^{20}\) RPC 4-1.6, "CONFIDENTIALITY OF INFORMATION," provides:

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.

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.
relation[ship] of the very highest character in which the lawyer owes a duty of undivided loyalty to the client, and under RPC 4-1.9, a personal relationship.


(1) For purposes of this section:
(a) A "lawyer" is a person authorized, or reasonably believed by the client to be authorized, to practice law in any state or nation.
(b) A "client" is any person, public officer, corporation, association, or other organization or entity, either public or private, who consults a lawyer with the purpose of obtaining legal services or who is rendered legal services by a lawyer.
(c) A communication between lawyer and client is "confidential" if it is not intended to be disclosed to third persons other than:
   1. Those to whom disclosure is in furtherance of the rendition of legal services to the client.
   2. Those reasonably necessary for the transmission of the communication.
(2) A client has a privilege to refuse to disclose, and to prevent any other person from disclosing, the contents of confidential communications when such other person learned of the communications because they were made in the rendition of legal services to the client.
(3) The privilege may be claimed by:
(a) The client.
(b) A guardian or conservator of the client.
(c) The personal representative of a deceased client.
(d) A successor, assignee, trustee in dissolution, or any similar representative of an organization, corporation, or association or other entity, either public or private, whether or not in existence.
(e) The lawyer, but only on behalf of the client. The lawyer's authority to claim the privilege is presumed in the absence of contrary evidence.
(4) There is no lawyer-client privilege under this section when:
(a) The services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew was a crime or fraud.
(b) A communication is relevant to an issue between parties who claim through the same deceased client.
(c) A communication is relevant to an issue of breach of duty by the lawyer to the client or by the client to the lawyer, arising from the lawyer-client relationship.
(d) A communication is relevant to an issue concerning the intention or competence of a client executing an attested document to which the lawyer is an attesting witness, or concerning the execution or attestation of the document.
(e) A communication is relevant to a matter of common interest between two or more clients, or their successors in interest, if the communication was made by any of them to a lawyer retained or consulted in common when offered in a civil action between the clients or their successors in interest.

(5) Communications made by a person who seeks or receives services from the Department of Revenue under the child support enforcement program to the attorney representing the department shall be confidential and privileged as provided for in this section. Such communications shall not be disclosed to anyone other than the agency except as provided for in this section. Such disclosures shall be protected as if there were an attorney-client relationship between the attorney for the agency and the person who seeks services from the department.

FLA. STAT. § 90.502 (1997).

22. Forgione, 701 So. 2d at 560. See RPC 4-1.7, “CONFLICT OF INTEREST; GENERAL RULE,” which provides:

(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.

(c) Explanation to Clients. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

(d) upon consent by the client after consultation regarding the relationship.

RPC 4-1.7. See also RPC 4-1.8, “CONFLICT OF INTEREST; PROHIBITED TRANSACTIONS,” which provides: Lawyers Related by Blood or Marriage. A lawyer related to another lawyer as parent, child, sibling, or spouse shall not represent a client in a representation directly adverse to a person who the lawyer knows is represented by the other lawyer except:

(a) Business Transactions With or Acquiring Interest Adverse to Client. A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client, except a lien granted by law to secure a lawyer’s fee or expenses, unless:
(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner that can be reasonably understood by the client;
(2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and
(3) the client consents in writing thereto.

(b) Using Information to Disadvantage of Client. A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client consents after consultation, except as permitted or required by rule 4-1.6.

c) Gifts to Lawyer or Lawyer's Family. A lawyer shall not prepare an instrument giving the lawyer or a person related to the lawyer as parent, child, sibling, or spouse any substantial gift from a client, including a testamentary gift, except where the client is related to the donee.

d) Acquiring Literary or Media Rights. Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

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.

(f) Compensation by Third Party. A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client consents after consultation;
(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
(3) information relating to representation of a client is protected as required by rule 4-1.6.

g) Settlement of Claims for Multiple Clients. A lawyer who represents 2 or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client consents after consultation, including disclosure of the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(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
One of the cornerstones of the lawyer-client relationship is the lawyers' duty of confidentiality concerning all information relating to the representation of their clients. This duty was discussed by the Supreme Court of Florida in the disciplinary case of Florida Bar v. Lange. The lawyer represented a defendant in a federal criminal case. The prosecution listed the lawyer's former client as a witness. The lawyer filed a "Motion to Notice Actual Potential Conflict of Interest" in which he disclosed confidential communications previously received from his former client, the witness. When later charged by The Florida Bar with violating the lawyer-client confidentiality under RPC 4-1.6, the lawyer defended by asserting that his actions were justified by the "crime-fraud" exception to the confidentiality rule. Rejecting this defense, the court explained the scope of this portion of the rule. While lawyers ordinarily are required to hold in confidence all "information relating to representation of a client," an exception to this rule requires disclosure of confidential information to prevent the client's commission of a crime. However, the disclosure by Lange related to crimes that had already occurred and, thus, was not authorized by the rule. In a footnote, the court noted how the distinction between the evidentiary lawyer-client privilege and the ethical duty of

advising that person in writing that independent representation is appropriate in connection therewith.

(i) Acquiring Proprietary Interest in Cause of Action. A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

(1) acquire a lien granted by law to secure the lawyer's fee or expenses; and

(2) contract with a client for a reasonable contingent fee.

RPC 4-1.8.

23. RPC 4-1.9, "Conflict of Interest; Former Client," provides:
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. 711 So. 2d 518 (Fla. 1998).
25. See supra note 20 and accompanying text.
26. Lange, 711 So. 2d at 519.
27. Id. at 519–20.
28. Id. at 519 (quoting RPC 4-1.6).
29. Id. at 520.
confidentiality related to this case: "Even if respondent believed that no attorney-client privilege existed under [Florida Statutes section] 90.502, his actions nevertheless were guided by [RPC] 4-1.6, which forbids attorneys to disclose client confidences unless disclosure is necessary to prevent a crime from occurring.”

A lawyer’s handling of property relating to the representation of a client can not only implicate the confidentiality rule, but other ethical principles as well. The disagreements between lawyers and their clients often arise in connection with a client’s request to review or obtain materials from case files, particularly after the parties terminate the representation. Florida reported two cases on this subject in 1998.

The Supreme Court of Florida reviewed the standards relating to a client’s access to file material in Long v. Dillinger. Although files maintained by lawyers on their clients’ cases are commonly referred to by the client’s name, the court endorsed the position, previously expressed in Florida case law and ethics opinions, that “such referral simply means that the file relates to a particular client; the file and its contents are the personal property of the attorney.” In Long, a former client of the public defender’s office was represented by the capital collateral representative (“CCR”). The former client sought possession of the public defender’s file on his case. The court concluded that a public defender’s file on a client is the property of the public defender. The court further concluded, however, that the public defender must allow CCR to view the file and must provide, “for adequate compensation, copies of all useful information contained in the file.” The supreme court echoed the Fifth District Court of Appeal’s view that “under certain circumstances, an ethical duty may exist to communicate information regarding a case to a successor counsel.”

30. Id. at 520 n. 2.
32. 701 So. 2d 1168 (Fla. 1997).
35. Long, 701 So. 2d at 1169 (citing Dowda & Fields v. Cobb, 452 So. 2d 1140, 1142 (Fla. 5th Dist. Ct. App. 1984)).
36. Id.
37. Id.
38. Id.
Finally, the court noted that any transcripts or records that the public defender prepared at the public’s expense should be surrendered to CCR for the former client at no charge.39

This latter proposition was central to the Fifth District Court of Appeal’s decision in McCaskill v. Dees.40 The former client of a court-appointed private lawyer sought a writ of mandamus to compel counsel to furnish him with certain materials from the file, including depositions and witness statements. The court held that, in this situation, mandamus would lie to compel the lawyer to furnish the requested documents.41 In support of its decision, the court cited two cases deciding that, as an exception to the general rule reiterated in Long regarding lawyer ownership of the case file, documents prepared at public expense must always be furnished by court-appointed counsel to their clients.43 The court also referred to RPC 4-1.16 (d).44

Fees charged by lawyers are often the topic of litigation, and 1998 included its share of cases in this sensitive area. Negotiating a fee agreement with a client presents a lawyer with a potential, but largely unavoidable, conflict of interest. Terms favorable to the lawyer may be seen as unfavorable from the client’s point of view. The specific terms of the agreement may, themselves, create a conflict situation. In Cole v. State,45 the lawyer-client employment agreement in a felony criminal case provided that the flat fee paid by the client would include all discovery and investigative fees, as well as the fee for the lawyer’s services.46 The court noted that an “inherent conflict” was presented because the arrangement provided that the out-of-pocket discovery and investigative costs came from the lawyer’s

39. Id.
40. 698 So. 2d 628 (Fla. 5th Dist. Ct. App. 1997).
41. Id. at 628.
42. See supra notes 35–39 and accompanying text.
43. McCaskill, 698 So. 2d at 628 (citing Bermed v. Tacher, 565 So. 2d 833 (Fla. 3d Dist. Ct. App. 1990). See also Dubose v. Shelnutt, 566 So. 2d 921 (Fla. 5th Dist. Ct. App. 1990)).
44. McCaskill, 698 So. 2d at 628. (citing RPC 4-1.16(d)). Subdivision (d) of RPC 4-1.16, “DECLINING OR TERMINATING REPRESENTATION,” provides:
(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 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(d).
45. 700 So. 2d 33 (Fla. 5th Dist. Ct. App. 1997).
46. Id. at 37.
pocket rather than from the client's.\footnote{47} Although not discussed by the court, this type of fee agreement, if not structured properly, could also violate the lawyer trust accounting rules.\footnote{48}

Fee related conflict issues also are presented when a client's fee is paid by a third party.\footnote{49} Marcus v. Sullivan\footnote{50} was a civil case concerning a promissory note for a client's legal fees executed by the client's girlfriend.\footnote{51} She was not represented by independent counsel in making the note. When the lawyer sued on the note, the girlfriend defended by asserting that she signed it under duress. The trial judge agreed, finding that a conflict existed due to the circumstances and relationships involved and that, as a result, the lawyer should have advised the client's girlfriend to have independent counsel regarding signing the promissory note.\footnote{52} The trial court held that duress was present and declared the note to be unenforceable.\footnote{53} The appellate court reversed, stating that it was "aware of no law that an attorney need require the payee of a note to secure counsel prior to signing a note to

\footnote{47} Id. The conflict was particularly pronounced, and deception appeared to be present, in view of the lawyer's stated "policy" of not conducting discovery in these types of cases. Id.


\footnote{49} Subdivision (f) of RPC 4-1.8, "CONFLICT OF INTEREST; PROHIBITED TRANSACTIONS," provides:

(f) Compensation by Third Party. A lawyer shall not accept compensation for representing a client from one other than the client unless:

1. the client consents after consultation;
2. there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
3. information relating to representation of a client is protected as required by RPC 4-1.6.

RPC 4-1.8(f).

\footnote{50} 701 So. 2d 660 (Fla. 3d Dist. Ct. App. 1997).

\footnote{51} Id. at 660.

\footnote{52} Id. at 662 (citing RPC 4-4.3). RPC 4-4.3, "DEALING WITH UNREPRESENTED PERSONS," provides:

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.

\footnote{53} Marcus, 701 So. 2d at 662.
secure the legal fees of another." The trial court's legal conclusion of duress was deemed incorrect.

In addition to maintaining sensitivity to ethical questions of conflicts and legal issues such as duress in the making of fee contracts, Florida lawyers must adhere to the specific provisions of the rule that regulate first party fee agreements and payments. Decisions in the past year continued the recent trend of requiring strict adherence to these rules in the civil, as well as in the disciplinary, context. Guetzloe v. Hartley concerned lawyers who had defended a client in a replevin action and had filed counterclaims on the client's behalf for breach of contract, quantum meruit, and several torts (including assault). The original lawyer-client fee agreement provided for payment of an hourly fee plus a percentage of any recovery obtained for the client. When the client became seriously delinquent in his hourly fee obligations, the parties renegotiated the fee agreement. The client still did not pay the fees charged, and the firm sued to collect.

One of the defenses raised by the client was the lawyer's alleged noncompliance with RPC 4-1.5. This rule contains ethical regulations

54. Id. at 663.
55. Id. at 662.
56. See, e.g., Foodtown Inc. v. Argonaut Ins. Co., 102 F.3d 483 (11th Cir. 1996) (holding oral contingent fee agreements that do not comply with ethics rules governing contingent fee contracts cannot be considered by a court in determining fees recoverable under the Florida Fee-Shifting Statute); Florida Bar v. Rubin, 709 So. 2d 1361 (Fla. 1998) (holding discipline warranted against lawyer who filed a complaint against another lawyer on alleged verbal referral fee agreement which did not comply with ethics rules); Chandris, S.A. v. Yanakakis, 668 So. 2d 180 (Fla. 1995) (holding contingent fee agreements that do not comply with the Code of Professional Responsibility or Rules Regulating The Florida Bar are not enforceable by an attorney who claims fees based upon a noncomplying agreement). See also infra notes 57–58 and accompanying text.
57. 710 So. 2d 1044 (Fla. 5th Dist. Ct. App. 1998).
58. Id. at 1044.
59. Id. at 1044–45.
60. Subdivision (f) of RPC 4-1.5, "FEES FOR LEGAL SERVICES," provides: (f) Contingent Fees. As to contingent fees:

   (1) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (f)(3) or by law. A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial, or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.
(2) Every lawyer who accepts a retainer or enters into an agreement, express or implied, for compensation for services rendered or to be rendered in any action, claim, or proceeding whereby the lawyer’s compensation is to be dependent or contingent in whole or in part upon the successful prosecution or settlement thereof shall do so only where such fee arrangement is reduced to a written contract, signed by the client, and by a lawyer for the lawyer or for the law firm representing the client. No lawyer or firm may participate in the fee without the consent of the client in writing. Each participating lawyer or law firm shall sign the contract with the client and shall agree to assume joint legal responsibility to the client for the performance of the services in question as if each were partners of the other lawyer or law firm involved. The client shall be furnished with a copy of the signed contract and any subsequent notices or consents. All provisions of this rule shall apply to such fee contracts.

(3) A lawyer shall not enter into an arrangement for, charge, or collect:
   (A) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof; or
   (B) a contingent fee for representing a defendant in a criminal case.

(4) A lawyer who enters into an arrangement for, charges, or collects any fee in an action or claim for personal injury or for property damages or for death or loss of services resulting from personal injuries based upon tortious conduct of another, including products liability claims, whereby the compensation is to be dependent or contingent in whole or in part upon the successful prosecution or settlement thereof shall do so only under the following requirements:
   (A) The contract shall contain the following provisions:
       (i) The undersigned client has, before signing this contract, received and read the statement of client’s rights and understands each of the rights set forth therein. The undersigned client has signed the statement and received a signed copy to refer to while being represented by the undersigned attorney(s).
       (ii) This contract may be cancelled by written notification to the attorney at any time within 3 business days of the date the contract was signed, as shown below, and if cancelled the client shall not be obligated to pay any fees to the attorney for the work performed during that time. If the attorney has advanced funds to others in representation of the client, the attorney is entitled to be reimbursed for such amounts as the attorney has reasonably advanced on behalf of the client.
   (B) The contract for representation of a client in a matter set forth in subdivision (f)(4) may provide for a contingent fee arrangement as agreed upon by the client and the lawyer, except as limited by the following provisions:
(i) Without prior court approval as specified below, any contingent fee that exceeds the following standards shall be presumed, unless rebutted, to be clearly excessive:

a. Before the filing of an answer or the demand for appointment of arbitrators or, if no answer is filed or no demand for appointment of arbitrators is made, the expiration of the time period provided for such action:
   1. 33 1/3% of any recovery up to $1 million; plus
   2. 30% of any portion of the recovery between $1 million and $2 million; plus
   3. 20% of any portion of the recovery exceeding $2 million.

b. After the filing of an answer or the demand for appointment of arbitrators or, if no answer is filed or no demand for appointment of arbitrators is made, the expiration of the time period provided for such action, through the entry of judgment:
   1. 40% of any recovery up to $1 million; plus
   2. 30% of any portion of the recovery between $1 million and $2 million; plus
   3. 20% of any portion of the recovery exceeding $2 million.

c. If all defendants admit liability at the time of filing their answers and request a trial only on damages:
   1. 33 1/3% of any recovery up to $1 million; plus
   2. 20% of any portion of the recovery between $1 million and $2 million; plus
   3. 15% of any portion of the recovery exceeding $2 million.

d. 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.

(ii) If any client is unable to obtain an attorney of the client’s choice because of the limitations set forth in (f)(4)(B)(i), the client may petition the circuit court for approval of any fee contract between the client and an attorney of the client’s choosing. Such authorization shall be given if the court determines the client has a complete understanding of the client’s rights and the terms of the proposed contract. The application for authorization of such a contract can be filed as a separate proceeding before suit or simultaneously with the filing of a complaint. Proceedings thereon may occur before service on the defendant and this aspect of the file may be sealed. Authorization of such a contract shall not bar subsequent inquiry as to whether the fee actually claimed or charged is clearly excessive under subdivisions (a) and (b).

(iii) In cases where the client is to receive a recovery that will be paid to the client on a future structured or periodic basis, the contingent fee percentage shall only be calculated on the cost of the
structured verdict or settlement or, if the cost is unknown, on the present money value of the structured verdict or settlement, whichever is less. If the damages and the fee are to be paid out over the long term future schedule, then this limitation does not apply. No attorney may separately negotiate with the defendant for that attorney’s fee in a structured verdict or settlement where such separate negotiations would place the attorney in a position of conflict.

(C) Before a lawyer enters into a contingent fee contract for representation of a client in a matter set forth in this rule, the lawyer shall provide the client with a copy of the statement of client’s rights and shall afford the client a full and complete opportunity to understand each of the rights as set forth therein. A copy of the statement, signed by both the client and the lawyer, shall be given to the client to retain and the lawyer shall keep a copy in the client’s file. The statement shall be retained by the lawyer with the written fee contract and closing statement under the same conditions and requirements as subdivision (f)(5).

(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 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.

(5) In the event there is a recovery, upon the conclusion of the representation, the lawyer shall prepare a closing statement reflecting an itemization of all costs and expenses, together with the amount of fee received by each participating lawyer or law firm. A copy of the closing statement shall be executed by all participating lawyers, as well as the client,
governing all fees charged or collected by lawyers. The rule includes both provisions generally applicable to contingent fees and additional, detailed regulations (e.g., a maximum fee schedule, a requirement that attorneys furnish clients written “Statements of Client’s Rights”) that apply to contingent fees for claims involving “personal injury or for property damages or for death or loss of services resulting from personal injuries based upon tortious conduct of another, including products liability claims.” The client asserted that the lawyers’ failure to provide him with the “Statement of Client’s Rights” violated RPC 4-1.5 and, thus, rendered the entire fee agreement void and unenforceable. Rejecting this contention, the Fifth District Court of Appeal noted that the client’s tort claims arose in the context of the replevin case, which was a commercial action. The comment to RPC 4-1.5 expressly states that the provisions of the rule governing contingent fees in personal injury type tort cases “should not be construed to apply to actions or claims seeking property or other damages arising in the commercial litigation context.”

The failure to observe the requirements of the ethics rules for fee divisions, in the referral fee situation, led to the imposition of discipline in Florida Bar v. Rubin. Lawyer Rubin filed a grievance complaint with The Florida Bar, alleging that another lawyer had acted unethically by failing to pay him an allegedly agreed upon referral fee in a contingent fee matter. Rubin sued the other lawyer for the fee. Turning the tables, the Bar filed disciplinary charges against Rubin. RPC 4-1.5(f)(2) requires that every lawyer or law firm who participates in a contingent fee sign the contract with the client. Rubin had not signed the contract in the case in question. The Supreme Court of Florida ordered him publicly reprimanded, explaining:

and each shall receive a copy. Each participating lawyer shall retain a copy of the written fee contract and closing statement for 6 years after execution of the closing statement. Any contingent fee contract and closing statement shall be available for inspection at reasonable times by the client, by any other person upon judicial order, or by the appropriate disciplinary agency.

RPC 4-1.5(f).

61. Id. at 4-1.5(f)(4)(B).
62. Id. at 4-1.5(f).
63. Guetzloe, 710 So. 2d at 1045.
64. Id. (RPC 4-1.5(f)).
65. Id. at 4-1.5(f)(4)(B).
66. Id. at 4-1.5(f).
67. RPC 4-1.5(f)(2). See supra note 60 and accompanying text.
This Court expects strict compliance with this rule and similar rules requiring a client’s written consent to an attorney’s fee regardless of the circumstances involved. These requirements must be diligently adhered to and enforced in order to avoid the troublesome situation which arose in this case and, more importantly, to preserve public confidence in the legal profession.68

In not complying with the rule requiring a written fee agreement, negative consequences arose for the lawyer in D.H. Blair & Co. v. Johnson.69 A National Association of Securities Dealers (“NASD”) arbitration panel awarded the claimants damages.70 Moreover, the panel also awarded attorneys’ fees in an amount to be determined by a court of competent jurisdiction.71 The trial court determined and awarded the amount of fees for the work of two lawyers, Tepper and Weissman.72 On appeal, the Fourth District Court of Appeal overturned the award of attorneys’ fees on an issue of law.73 Additionally, however, the court concluded that the award of fees for Weissman’s work was improper because he had not signed the fee agreement with the clients, as required by RPC 4-1.5(f)(2).74 Interestingly, the court’s opinion did not cite Chandris, S.A. v. Yanakakis.75

Noris v. Silver76 was a case in which a Florida court cited and discussed Chandris.77 Client Noris sued lawyer Silver for legal malpractice and negligent referral. Noris alleged that he was injured while visiting another state. He contacted Silver, who referred him to lawyer Falk. In the past, Silver had referred clients to Falk and received a share of Falk’s fee. Noris

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69. 697 So. 2d 912 (Fla. 4th Dist. Ct. App. 1997).
70. Id. at 913.
71. Id.
72. Id.
73. Id.
74. D.H. Blair & Co., 697 So. 2d at 914 (citing RPC 4-1.5(f)(2)). See supra note 60 and accompanying text.
75. D.H. Blair & Co., 697 So. 2d at 914 (referring to Chandris, S.A. v. Yanakakis, 668 So. 2d 180 (Fla. 1995)). The court, however, did cite Perez v. George, Hartz, Lundeen, Flagg & Fulmer, 662 So. 2d 361 (Fla. 3d Dist. Ct. App. 1995), which held that a law firm not entitled to fee where the “client” did not sign contract with firm or agree to formal affiliation between his counsel and firm. Id.
76. 701 So. 2d 1238 (Fla. 3d Dist. Ct. App. 1997) (opinion on rehearing).
77. Id. at 1240–41.
retained Falk to handle his injury claim. The Noris-Falk employment agreement did not mention Silver, and Silver and Falk did not execute a written fee division agreement. Falk let the statute of limitations lapse without filing suit. Noris then sued Silver.\footnote{Id. at 1239.}

The trial court entered an order of summary judgment for Silver on the legal malpractice claim, and ordered the negligent referral claim dismissed.\footnote{Id. at 1239-40.} Dismissal of the negligent referral claim was affirmed “because Noris’ claim for negligent referral did not allege that Silver had knowledge of any facts that would indicate that Falk would commit malpractice and because Noris’ counsel conceded during oral argument that Silver had no such knowledge.” \footnote{Id. at 1241.}

The Third District Court of Appeal reversed the summary judgment order on the malpractice claim.\footnote{Noris, 701 So. 2d at 1240.} The court concluded that a genuine issue of material fact existed regarding whether Silver had retained a financial interest in Noris’s case by expressly or impliedly agreeing to divide the legal fee with Falk.\footnote{Id.} According to the court, this issue was material because “pursuant to Rules Regulating The Florida Bar 4-1.5(g), if Falk and Silver agreed to divide the attorney’s fee, Silver would be liable for the malpractice committed by Falk.”\footnote{Id. (citing to RPC 4-1.5(g)).} RPC 4-1.5(g)(2) allows a lawyer to receive what is commonly called a “referral fee” — that is, a fee that one attorney receives for referring a client to another attorney.\footnote{Subdivision (g) of RPC 4-1.5, “FEES FOR LEGAL SERVICES,” provides: (g) Division of Fees Between Lawyers in Different Firms. Subject to the provisions of subdivision (f)(4)(D), a division of fee between lawyers who are not in the same firm may be made only if the total fee is reasonable and: (1) the division is in proportion to the services performed by each lawyer; or (2) by written agreement with the client: (A) each lawyer assumes joint legal responsibility for the representation and agrees to be available for consultation with the client; and (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).}

The court’s decision that a fee division agreement, which apparently did not comply with the relevant ethics rule, thereby creates malpractice liability because of that rule seems questionable. Furthermore, the Preamble to the RPC states that breach of the rule “should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached.” RPC preamble. The court acknowledged the existence of this language, but did not consider it controlling in light of the reasoning underlying the supreme court’s decision in Chandris. Noris, 701 So. 2d at 1240.

Prior to the adoption of the \textit{Rules of Professional Conduct} (effective Jan. 1, 1987), the ethics rules did not permit division of fees among attorneys in different firms except on the basis of work performed. \textit{See MODEL CODE OF PROFESSIONAL RESPONSIBILITY} DR 2-107
result of the referral, rather than from any work performed on the case by the referring attorney.

The Third District Court of Appeal noted that, pursuant to Chandris, Silver could not have enforced an oral fee division against Falk. Nevertheless, the court believed that noncompliance with the governing ethics rule should not be allowed to shield a lawyer from the responsibilities and liabilities that the court believed the rule imposes. However, believing this issue to be one of great public importance, the court certified it to the Supreme Court of Florida.

Another important case in which a Florida court cited Chandris is King v. Young, Berkman, Berman & Karpf P.A.. Central to this case was the applicability of RPC 4-1.5(f)(3)(A), which prohibits lawyers from charging or collecting a contingent fee “in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof.” In King, a man retained a law firm to represent him in a dissolution of marriage case. The written fee agreement provided for a $25,000 nonrefundable retainer, set hourly rates for the firm’s lawyers (ranging from $165 to $325), and provided for a payment of a “bonus” fee at the conclusion of the case.

(1986). Thus, the rules did not permit referral fees. In adopting the Rules of Professional Conduct, the Supreme Court of Florida permitted referral fees, subject to certain regulations (i.e., written agreement signed by all participating attorneys and the client, in which all attorneys accepted joint legal responsibility for the case and agreed to be available to consult with the client). The Florida Bar re: Rules Regulating The Florida Bar, 494 So. 2d 977 (Fla. 1986). Effective January 1, 1998, the court amended the rules to restrict the amount of the fee which the referring attorney court receive in the absence of court approval to 25%. The Florida Bar re: Amendments to the Rules Regulating The Florida Bar, 519 So. 2d 971 (Fla. 1987).

84. Noris, 701 So. 2d at 1240.
85. Id.
86. Id. at 1241.
87. 709 So. 2d 572, 574 (Fla. 3d Dist. Ct. App. 1998).
88. Id. at 573. Subdivision (f)(3) of RPC 4-1.5, “FEES FOR LEGAL SERVICES,” provides:

(3) A lawyer shall not enter into an arrangement for, charge, or collect:
(A) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof; or
(B) a contingent fee for representing a defendant in a criminal case.

RPC 4-1.5(f)(3).
89. King, 709 So. 2d at 573.
This "bonus" fee was to be determined by "taking into consideration the results achieved and the complexity of the matter."\textsuperscript{90}

The client paid the retainer fee and the firm's hourly charges. After the case was concluded, however, the client refused to pay the $750,000 bonus fee demanded by the firm. The firm then sued, seeking a bonus fee of $1,150,000. The client argued, and the Third District Court of Appeal agreed, that the bonus fee was contingent on the "results obtained."\textsuperscript{91}

\begin{itemize}
\item \textsuperscript{90} Id. at 573 (quoting fee agreement).
\item \textsuperscript{91} Id. Subdivision (b) of RPC 4-1.5, "FEES FOR LEGAL SERVICES," provides:
\begin{enumerate}
\item The time and labor required, the novelty, complexity, and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
\item The likelihood that the acceptance of the particular employment will preclude other employment by the lawyer;
\item The fee, or rate of fee, customarily charged in the locality for legal services of a comparable or similar nature;
\item The significance of, or amount involved in, the subject matter of the representation, the responsibility involved in the representation, and the results obtained;
\item The time limitations imposed by the client or by the circumstances and, as between attorney and client, any additional or special time demands or requests of the attorney by the client;
\item The nature and length of the professional relationship with the client;
\item The experience, reputation, diligence, and ability of the lawyer or lawyers performing the service and the skill, expertise, or efficiency of effort reflected in the actual providing of such services; and
\item Whether the fee is fixed or contingent, and, if fixed as to amount or rate, then whether the client's ability to pay rested to any significant degree on the outcome of the representation.
\end{enumerate}
RPC 4-1.5(b) (emphasis added).
\end{itemize}

It can be argued that a fee based to any significant degree on the "results obtained" for the client is, in effect, a contingent fee. Regarding the definition of "contingent fee," Florida case law has stated that "the controlling substantive character of a contingency fee agreement is the feature that the attorney gets paid in one event and not in another." Quanstrom v. Standard Guaranty Ins. Co., 519 So. 2d 1135, 1136 n.1 (Fla. 5th Dist. Ct. App. 1988), rev. on other grounds, 555 So. 2d 828 (Fla. 1990). If a "results obtained" fee is indeed a contingent fee, lawyers may not ethically charge it in most domestic relations cases or in criminal defense cases. RPC 4-1.5(f)(3). Persons who argue that the rules permit "results obtained" fees in domestic and criminal cases point out that RPC 4-1.5(b) explicitly lists "the results obtained" as a factor lawyers should consider in setting a reasonable fee. RPC 4-1.5(b)(4).
Consequently, the court held that the bonus fee clause called for a prohibited contingent fee, and thus was unenforceable under the holding in Chandris.92

Another domestic relations case involving a “results obtained” fee is May v. Sessums & Mason, P.A..93 A law firm had represented a client in a contested dissolution matter, with a fee agreement for hourly billing as well as a provision stating that, upon conclusion of the case, “an additional attorney’s fee may be requested” based on factors including “results obtained.”94 The fee contract further stated that this additional fee would be “subject to discussion and agreement with [the client] prior to such bill being tendered.”95 At the end of the case, and without an agreement by the client, the law firm billed the client for an additional $1,000,000. The client refused to pay, the law firm sued to collect, and the firm ultimately obtained a judgment of $564,500.96

On appeal, the client argued that the “additional fee” provision was an unethical, unenforceable contingent fee because it was based, at least in part, on “results obtained.”97 The Second District Court of Appeal did not reach this question.98 Rather, it reversed the lower court’s judgment on other grounds.99 The client had not contracted to pay the additional fee; the language of the contract only stated that an additional fee might be requested by the firm.100 Regarding the possible effect on the public’s perception of the legal system, however, the court observed:

This is an unfortunate case for the legal profession. Regardless of the outcome of these proceedings, this case, in all likelihood, will, justifiably or not, cause some segments of the legal profession to suffer further disrepute. This is particularly unfortunate because the disputes at issue could clearly have been avoided by a more carefully drawn document which the experienced attorneys involved were fully capable of preparing.101

92. King, 709 So. 2d at 573. After voiding the noncomplying fee agreement, the court limited the firm’s quantum meruit recovery to the amount of fees already received, $342,989. Id. at 574.
93. 700 So. 2d 22 (Fla. 2d Dist. Ct. App. 1997).
94. Id. at 23–24.
95. Id. at 24.
96. Id. at 23.
97. Id. at 25.
98. May, 700 So. 2d at 25.
99. Id. at 26.
100. Id.
101. Id. at 28.
A third case on the subject of “results obtained” fees was *Martin L. Haines, III, Chartered v. Sophia.* A law firm had represented a client in a family law matter. Throughout the representation the client paid fees charged on an hourly basis. At the conclusion of the case, the firm sought additional fees. In the employment contract, the client had agreed that the parties could determine the amount of fee owed in a summary proceeding to enforce the firm’s charging lien and, consequently, the firm moved to enforce its charging lien.

The employment agreement also provided that the firm’s final fee, to be determined at the conclusion of case, would be based on stated criteria, which were identical to most of the “factors to be considered as guides in determining a reasonable fee” set out in RPC 4-1.5(b) including the “results obtained” provision. The Fourth District Court of Appeal construed the agreement to mean that the “entire fee will be based solely on the hours billed, unless the client agrees later to an additional amount.” The court harmonized this decision with its opinion in *Franklin & Marbin, P.A. v. Mascola,* which ruled that the rights and duties of the parties ordinarily are determined by the fee agreement. The court affirmed the trial court’s judgment which held that the client owed no further fees to the law firm. As in *May,* the court did not address whether the “results obtained” provision ran afoul of the *Florida Rules of Professional Conduct.*

Other cases have addressed different fee related issues. *Hollub v. Clancy,* was an appeal of an attorney’s fee award in a commercial dispute. Appellants argued that the trial court erred by awarding fees for time charged under an unreasonable unit billing arrangement. The questionable charges included, for example, twelve instances in which a lawyer claimed one hour or more to review a one or two page document. As a result, the Third District Court of Appeal determined the amount of fees

102. 711 So. 2d 209 (Fla. 4th Dist. Ct. App. 1998).
103. *Id.* at 209–10.
104. *Id.* at 209 n.1 (citing RPC 4-1.5(b)). *See supra* note 90 and accompanying text.
105. *Haines,* 711 So. 2d at 210.
106. 711 So. 2d 46 (Fla. 4th Dist. Ct. App. 1998).
107. *Id.* at 47.
108. *Id.*
109. *Id.* at 47 n.1.
110. 706 So. 2d 16 (Fla. 3d Dist. Ct. App. 1997).
111. *Id.* at 16.
112. *Id.* at 19 (citing Browne v. Costales, 579 So. 2d 161, 162 (Fla. 3d Dist. Ct. App. 1991) (stating that “[u]nit billing is a practice where the attorney bills a predetermined number of minutes for a given task.”)). *See also* Nickerson v. Nickerson, 608 So. 2d 835 (Fla. 3d Dist. Ct. App. 1992).
awarded to be excessive. The court remanded the case with directions for
the trial court to eliminate the unreasonable unit billing amounts. Another Third District Court of Appeal case, *Girten v. Andreu*, mentioned excessive fees. The case was a paternity action in which a major issue of contention was whether the child would bear the surname of the mother or of the father. Paternity of the child was uncontested. The trial court ordered the father to pay the mother’s attorney fees. The appellate court affirmed this award. Total fees incurred by the parties exceeded $165,000. The appellate court agreed with the trial court’s description of the total fees incurred in the case as “shocking,” but found no abuse of discretion. A concurring opinion went further, declaring that the adjective “shocking” “gravely understates the reality.” Judge Sorondo thought that “unconscionable” was a more accurate description. A review of the RPC 4-1.5(a)(1), 4-1.5(b)(1) and 4-1.5(b)(4) led him to the conclusion that the fees generated in the case were “grossly excessive.”

Several 1998 cases addressed various aspects of a useful fee collection tool for lawyers, the charging lien. A lawyer’s charging lien is perfected

113. *Hollub*, 706 So. 2d at 19.
114. *Id.* at 19.
115. 698 So. 2d 886 (Fla. 3d Dist. Ct. App. 1997).
116. *Id.* at 889.
117. *Id.* at 888.
118. *Id.* at 887.
119. *Id.* at 888–89.
120. *Girten*, 698 So. 2d at 889 (Sorondo, J., concurring specially).
121. *Id.*
122. *Id.* (Jorgenson, J., concurring specially) (citing RPC 4-1.5(a)). 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).

123. See, e.g., *Sinclair*, Louis, Siegel, Heath, Nussbaum & Zavertnik, P.A. v. Baucom, 428 So. 2d 1383, 1384 (Fla. 1983) (“charging lien is an equitable right to have costs and fees
by providing timely notice to the affected parties.124 In Gaebe, Murphy, Mullen & Antonelli v. Bradt,125 the court addressed the question of what constituted timely notice.126 A law firm withdrew from representing a plaintiff in a wrongful death action and filed a charging lien. The firm sent a notice of the charging lien to its former client and to the lawyer for the defendant, although the defendant’s lawyer asserted that he never received it. The firm apparently did not send a notice to the defendant’s insurer. New counsel took over the plaintiff’s case and settled it. When the law firm attempted to enforce its charging lien, the trial court allowed enforcement against only the firm’s former client, ruling that the defendant’s counsel and insurer had not received notice of the lien.127 The Fourth District Court of Appeal reversed, agreeing with the law firm that “the filing of the charging lien prior to the dismissal of the case and/or entry of judgment constituted timely notice and, thus, perfected the lien against [defense counsel and the insurer].”128 Cohen & Cohen, P.A. v. Angrand129 also addressed the issue of sufficient notice of a claimed charging lien.130 In Angrand, a law firm represented a client in a case involving three separate lawsuits. Eventually the client discharged the firm without cause.131 The firm then filed a charging lien, but used the wrong case number. The court clerk noticed the error and filed the lien in one of the cases, but not in the other. Later, when the firm sought to enforce its charging lien, a general master ruled that the typographical error rendered the lien a nullity and denied its claim of fees.132 Reversing, the appellate court concluded that the lien was enforceable

due an attorney for services in the suit secured to him in the judgment or recovery in that particular suit”). Id.
124. Id. at 1385.
125. 704 So. 2d 618 (Fla. 4th Dist. Ct. App. 1997).
126. Id. at 618.
127. Id.
128. Id. at 619.
129. 710 So. 2d 166 (Fla. 3d Dist. Ct. App. 1998).
130. Id. at 166.
131. Id. at 167. A discharged lawyer’s right to a fee for services performed prior to discharge can differ greatly, depending on whether the discharge was with or without cause. Compare Rosenberg v. Levin, 409 So. 2d 1016 (Fla. 1982) (holding that a lawyer discharged without cause was entitled to a reasonable value of services performed, limited by a maximum contract fee), with Searcy, Denney, Scarola, Barnhart & Shipley, P.A. v. Scheller, 629 So. 2d 947 (Fla. 4th Dist. Ct. App. 1993) (holding that a lawyer discharged with cause was entitled to quantum meruit value of services rendered minus the damages suffered by client as result of the lawyer’s breach of contract). See also Kushner v. Engelberg, Cantor & Leone, P.A., 699 So. 2d 850 (Fla. 4th Dist. Ct. App. 1997).
132. Angrand, 710 So. 2d at 167.
because the firm's intent was obvious and there was no claim that the firm misled any of the parties or that any of the parties failed to receive notice. 133

In Kushner v. Engelberg, Cantor & Leone, P.A., 134 the proper method of calculating the amount of fees due under a claimed charging lien was at issue. 135 In an estate matter, a personal representative discharged his lawyer with cause. 136 Citing Searcy, Denney, Scarola, Barnhart & Shipley, P.A. v. Scheller, 137 the Fourth District Court of Appeal concluded that the discharged lawyer was entitled to the “quantum meruit value of the services rendered less any damages which the client incurred due to the attorney’s conduct and discharge.” 138

Another charging lien case concerning fee calculation was Carbonic Consultants, Inc. v. Herzfeld & Rubin, Inc., 139 in which a law firm represented a client on a contingent fee basis in an antitrust case. 140 The firm moved to withdraw from the case because the lawyer who actually was handling the case resigned from the firm. The trial court granted the motion to withdraw and the firm's motion for a charging lien. 141 However, the Third District Court of Appeal reversed the order granting the charging lien. 142 The court recited the rule, established by the Supreme Court of Florida in Faro v. Romani, 143 that a lawyer who voluntarily withdraws from a contingent fee case before the contingency occurs ordinarily is not entitled to any fee. 144 An exception to this “no fee rule” occurs when the client’s conduct makes the representation legally impossible or will result in ethical violations by the lawyer. 145

Applying the principles of Faro, the Third District Court of Appeal held that the trial court erred in granting the charging lien. 146 The firm, not the client, created the firm’s ethical problem of remaining in the case.

133. Id.
134. 699 So. 2d 850 (Fla. 4th Dist. Ct. App. 1997).
135. Id. at 851.
136. Id. For the distinction between a discharge with cause and a discharge without cause for purposes of calculating fees owed, see supra note 130 and accompanying text.
137. 629 So. 2d 947 (Fla. 4th Dist. Ct. App. 1993).
138. Kushner, 699 So. 2d at 851. See supra note 91 and accompanying text.
140. Id. at 322.
141. Id. at 323.
142. Id. at 322.
143. 641 So. 2d 69 (Fla. 1994).
144. Carbonic, 699 So. 2d at 323 (citing Faro v. Romani, 641 So. 2d 69, 71 (Fla. 1994)).
145. Faro, 641 So. 2d at 71.
146. Carbonic, 699 So. 2d at 322.
without the necessary subject matter expertise. The client had not engaged in any conduct that would have made the firm's continued representation unethical. Accordingly, the firm forfeited its right to a fee when it withdrew from the case. 147

At least one charging lien case addressed broader issues relating to fee agreements between lawyer and client. In Franklin & Marbin, P.A. v. Mascola,148 a client in a paternity case hired a law firm and entered into a fee contract providing, inter alia, that the client would: 1) pay the firm a "reasonable attorney's fee against which [the firm] will bill [the client] in accordance with our established hourly rates;" and 2) read all billing statements and notify the firm in writing within fifteen days of any objections, with failure to do so presumed to be agreement with the "correctness, accuracy and fairness" of the bill.149 Prior to conclusion of the case, the firm withdrew and filed a notice of charging lien. Evidence adduced by the firm in support of its claim of lien included unobjected to bills sent to the client totaling more than $19,000. The trial court entered judgment for the firm, but in the amount of only $6800.150

The law firm appealed, contending that the trial court erred because the fee contract, in particular, the provision waiving client objections to the bill if not presented within fifteen days, was controlling.151 The client, on the other hand, argued that the court should uphold the judgment because the law required the court only to award a reasonable fee, as opposed to the fee the law firm actually billed.152

The Fourth District Court of Appeal's opinion reviewed Florida law concerning client liability to his or her lawyer under various circumstances.153 Relying on cases concluding that the lodestar formula of Florida Patients Compensation Fund v. Rowe154 is inapplicable to a lawyer's claim for fees directly from the lawyer's client, as well as RPC 4-

147. Id. at 321. The fact that the firm procured an informal advisory opinion from the staff of The Florida Bar Ethics Department was not, in the court's opinion, determinative. Id. at 324. Although the Bar staff opinion correctly concluded that the law firm's continued representation of the client would be unethical under these circumstances, this did not change the fact that the firm, not the client, created the ethical dilemma. Id. Regarding issuance of informal advisory opinions, see Florida Bar Procedures for Ruling on Questions of Ethics, 70 Fla. B. J. 684, 864–85 (Sept. 1996).

148. 711 So. 2d 46 (Fla. 4th Dist. Ct. App. 1998). See also supra note 105 and accompanying text.

149. Franklin, 711 So. 2d at 47–48 (emphasis omitted).

150. Id. at 48.

151. Id. at 49.

152. Id.

153. Id. at 49–50.

154. 472 So. 2d 1145 (Fla. 1985).
1.5(d), the court concluded that, under the facts of this case, "[i]n the absence of a legal determination by the court that the fee contract is illegal, prohibited or excessive, under a periodic fee agreement for services already performed the lawyer is entitled to a money judgment for the amount of fees due under the contract."

Despite what appeared to be a favorable construction of law, the firm ended up with a disappointing result. Although it might have prevailed in an action at law seeking a money judgment, the firm was seeking to recover on a charging lien theory. A basic tenant of Florida law is that a charging lien can attach only to funds or property recovered in the case at issue. In this case, there had been no such recovery to which a lien could attach and, thus, the court reversed the judgment.

Application of the ethics rules prohibiting clearly excessive fees was a central issue in another charging lien case. In Kerrigan, Estess, Rankin & McLeod v. State, lawyers who represented the state in litigation against tobacco companies attempted to enforce their claimed charging lien. The state moved to quash the lien under the doctrine of sovereign immunity and under other grounds. The trial court ultimately quashed the lien, but on grounds neither pleaded nor argued by the parties. Relying on the

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155. Subdivision (d) of RPC 4-1.5, "ENFORCEABILITY OF FEE CONTRACTS," provides:

(d) Enforceability of Fee Contracts. Contracts or agreements for attorney's fees between attorney and client will ordinarily be enforceable according to the terms of such contracts or agreements, unless found to be illegal, obtained through advertising or solicitation not in compliance with the Rules Regulating The Florida Bar, prohibited by this rule, or clearly excessive as defined by this rule.

RPC 4-1.5(d).

In prefacing its reference to RPC 4-1.5(d), the court cited Chandris, supra notes 67 and 81, for the proposition that "fee contracts that do not comply with the lawyer disciplinary rules are subject to being held void as against public policy." Franklin, 711 So. 2d at 51 n.8. The court noted that there was "no evidence that the present agreement was obtained through noncomplying advertising or solicitation." Id. at 51.

156. Id. at 52 (citing Lugassy v. Independent Fire Ins. Co., 636 So. 2d 1332 (Fla. 1994); Pierce v. Issac, 184 So. 509 (Fla. 1938); Stabinski, Funt & De Oliveira, P.A. v. Law Offices of Frank H. Alvarez, 490 So. 2d 159 (Fla. 3d Dist. Ct. App. 1986)).


158. Franklin, 711 So. 2d at 52.

159. 711 So. 2d 1246 (Fla. 4th Dist. Ct. App. 1998).

160. Id. at 1247.

161. Id. at 1249.
rationale of *Chandris*, the Fourth District Court of Appeal ruled that the amount of fee claimed by the law firms was violative of the RPC 4-1.5 as unreasonable and unconscionable.

The law firms appealed the order, asserting that the court raised the issue of unconscionability of the claimed fee *sua sponte* without proper notice, and that the firms had no opportunity to present evidence or argument relating to this issue. Holding that the trial court’s action denied the law firms due process, the appellate court reversed the order and remanded the case for further proceedings.

As seen above, the majority of attorney’s lien cases reported in 1998 dealt with charging liens. Florida law recognizes a second type of common law attorney’s lien, called a “retaining lien.” *Rathburn v. Policastro* involved an interesting application of the retaining lien doctrine. Despite a lawyer’s assertion of a retaining lien, the trial court ordered the lawyer to disclose during her testimony all statements made to others by her. In addressing the matter on appeal, the Fourth District Court of Appeal noted that, as it stated in a prior decision, “the value of a retaining lien rests entirely upon the attorney’s right to retain possession until the bill is paid” and that, consequently, “courts may not impair that lien by compelling disclosure of the paper or items” upon which the attorney asserts the lien. Although the court had not ordered the lawyer to reveal her file or any items in it, the appellate court reasoned that the order compelling testimonial disclosure of the statements in question could result in disclosure of work product information and thus could “improperly impinge upon [the lawyer]’s retaining lien, just as forced disclosure of her file’s contents could do.” Accordingly, the court quashed the order.

Florida courts addressed a final aspect of the lawyer-client relationship in cases where that relationship was broken down as a result of the lawyer’s

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162. 668 So. 2d 180 (Fla. 1995). *See supra* note 67 and accompanying text.
163. *Kerrigan*, 711 So. 2d at 1249 (citing RPC 4-1.5(a)). *See supra* note 154 and accompanying text.
164. *Kerrigan*, 711 So. 2d at 1249.
165. A retaining lien is a possessory lien, asserted as security for payment of accrued but unpaid fees or costs, that a lawyer has on papers, funds, and other property of his or her client that comes into the lawyer’s possession in the course of the lawyer’s professional employment. *See, e.g.*, Daniel Mones, P.A. v. Smith, 486 So. 2d 559 (Fla. 1986); Wintter v. Fabber, 618 So. 2d 375 (Fla. 4th Dist. Ct. App. 1993); Dowda & Fields, P.A. v. Cobb, 452 So. 2d 1140 (Fla. 5th Dist. Ct. App. 1984).
166. 703 So. 2d 537 (Fla. 4th Dist. Ct. App. 1997).
167. *Id.* at 537.
168. *Id.*
169. *Id.*
170. *Id.*
171. *Rathburn*, 703 So. 2d at 537.
alleged legal malpractice.\textsuperscript{172} Although the preamble to the Florida Rules of Professional Conduct states that the violation of a rule "should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached,"\textsuperscript{173} there are instances in which the rules are relevant to issues of alleged malpractice.\textsuperscript{174} Rule 4-1.8(h), for example, sets parameters within which lawyers who wish to limit their liability to clients for legal malpractice must operate.\textsuperscript{175}

In \textit{Florida Bar v. Jordan},\textsuperscript{176} a lawyer had represented a client in a civil action that the trial court ultimately dismissed.\textsuperscript{177} The lawyer did not notify the client of the dismissal. When the client became aware of the dismissal and confronted the lawyer, the lawyer offered to pay the client for her damages by entering into a contract with her. The lawyer, however, "never advised [the client] that she should seek independent representation in connection with a claim for professional malpractice."\textsuperscript{178} The Supreme Court of Florida concluded that this conduct violated RPC 4-1.8(h) and, for this and other violations, suspended the lawyer from practice for one year.\textsuperscript{179}

Another case, \textit{Kozich v. Shahady},\textsuperscript{180} discussed the lawyer-client relationship in the context of a legal malpractice action.\textsuperscript{181} A law firm represented a client in a civil matter. Four days before the jury rendered its verdict, the client assigned his right to the jury award to his brother. Unhappy with the amount of the verdict, the client sued the law firm for malpractice. In its defense, the firm argued that the client was not the real party in interest because of the assignment that he executed in favor of his

\begin{itemize}
\item \textsuperscript{172} See infra notes 173, 177.
\item \textsuperscript{173} RPC preamble.
\item \textsuperscript{174} Id.
\item \textsuperscript{175} Rathburn, 703 So. 2d at 537. Subdivision (h) of RPC 4-1.8, "CONFLICT OF INTEREST; PROHIBITED TRANSACTIONS," provides:

\textbf{(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).
\item \textsuperscript{176} 705 So. 2d 1387 (Fla. 1998).
\item \textsuperscript{177} Id. at 1389.
\item \textsuperscript{178} Id. at 1390.
\item \textsuperscript{179} Id.
\item \textsuperscript{180} 702 So. 2d 1289 (Fla. 4th Dist. Ct. App. 1997).
\item \textsuperscript{181} Id. at 1289.
\end{itemize}
brother in the underlying suit. If this argument was valid, the firm would have been insulated from malpractice liability in the case because Florida law does not recognize assignments of legal malpractice claims.

Reversing the summary judgment that the trial court had granted in favor of the firm, the Fourth District Court of Appeal noted that the client had assigned only his right to “the jury award,” not his entire interest in the case. This limited assignment did not constitute an assignment of his subsequent claim against the firm for malpractice. “[T]he effect of assigning only his right to any future award was to retain in [the client] the ability to control the conduct of the trial, to accept or reject any settlement offers, and to maintain the attorney-client relationship, with any corresponding obligations.” The bar against assigning malpractice claims arises from the highly personal and confidential nature of the lawyer-client relationship, and, for purposes of the question presented, had not been affected by the limited assignment.

*Turner v. Anderson* was an unusual case indicating that clients cannot evade responsibility for their actions by asserting that they took those actions at the direction of their lawyers. The client had committed perjury, allegedly on the advice of the law firm that represented him and his employer in a securities arbitration matter. The matter resulted in an award against the client and, in a lesser amount, against the employer. The client sued the law firm for malpractice and for breach of its fiduciary duty. He claimed that the firm breached its duty to him by advising him to testify untruthfully, and that he followed this advice to his detriment. The firm defended by arguing that the doctrine of *in pari delicto* barred the claim and that the client’s claims were an impermissible collateral attack on the award. The trial court granted summary judgment for the firm on both grounds.

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182. *Id.* at 1290.
184. *Kozich,* 702 So. 2d at 1290.
185. *Id.*
186. *Id.*
188. *Kozich,* 702 So. 2d at 1291.
189. 704 So. 2d 748 (Fla. 4th Dist. Ct. App. 1998).
190. *Id.* at 749.
191. *Id.*
192. *In pari delicto* has been defined as “[i]n equal fault; equally culpable or criminal; in a case of equal fault or guilt.” BLACK’S LAW DICTIONARY 543 (6th ed. 1991).
193. *Turner,* 704 So. 2d at 749.
Reversing without much discussion on the collateral attack ground, the Fourth District Court of Appeal spent the bulk of its opinion explaining why it affirmed the lower court on the in pari delicto ground.\textsuperscript{194} The court began by noting that the "question of whether a client who does an illegal act on advice of counsel can sue counsel for damages resulting therefrom" was a matter of first impression in Florida.\textsuperscript{195} After reviewing authorities from other jurisdictions, the court ultimately concluded that, under the facts in the case before it, the client's misconduct precluded him from recovering damages for the perjury that he allegedly committed on the advice of counsel.\textsuperscript{196}

III. THE LAWYER'S RELATIONSHIP WITH THE COURT AND THE JUDICIAL SYSTEM

One of the most important, yet difficult, relationships that lawyers have is with the courts, of which they are officers, and with the judicial system. Cases in 1998 addressed various aspects of this relationship: 1) the propriety of a lawyer's dual role as advocate and witness in the same matter; 2) the lawyer's obligation of candor toward a tribunal;\textsuperscript{197} 3) the lawyer's withdrawal from a matter in litigation;\textsuperscript{198} 4) a lawyer's disqualification from a litigated matter;\textsuperscript{199} and 5) the appropriateness of a lawyer's trial conduct, particularly in the context of real or perceived professionalism obligations.\textsuperscript{200}

In the course of representing a client a lawyer can act in many roles, and this often does not implicate professional responsibility issues. One area in which the Florida Rules of Professional Conduct specifically addresses the multiplicity of roles is in the context of a lawyer who wishes to act as both an advocate and a witness on behalf of a client.\textsuperscript{201} Rule 4-3.7 ordinarily precludes the same lawyer from acting in both of these roles at trial.\textsuperscript{202}

\textsuperscript{194} Id. at 750.
\textsuperscript{195} Id.
\textsuperscript{196} Id. at 752.
\textsuperscript{198} See Garcia v. Manning, 717 So. 2d 59 (Fla. 3d Dist. Ct. App. 1998).
\textsuperscript{199} See Billings, Cunningham, Morgan & Boatwright, P.A. v. Isom, 701 So. 2d 1271 (Fla. 5th Dist. Ct. App. 1997).
\textsuperscript{201} See H.B.A. Management, Inc. v. Estate of Schwartz, 693 So. 2d 541 (Fla. 1997).
\textsuperscript{202} RPC 4-3.7, "LAWYER AS WITNESS," provides:
In *Conquest v. Auto-Owners Insurance Co.*, the Second District Court of Appeal expressed its concern about a lawyer being both an advocate and a witness. The court noted that "neither Conquest nor her attorney" had testified regarding the willingness of the client, Conquest, to accept an offer below policy limits. In a footnote, the court acknowledged that it was "puzzled by the fact that Conquest's trial counsel became a significant witness in the trial." This, stated the court, appeared to be a "clear violation" of rule 4-3.7.

The purpose of rule 4-3.7 was clearly articulated by the Supreme Court of Florida in *Scott v. State*. In appealing from the denial of postconviction relief, a lawyer's former client argued that the trial court had erred by allowing an assistant state attorney to serve as both prosecutor and as a witness at the postconviction relief hearing. The lawyer in question represented the state in that matter, in which his former client called him as a witness to testify regarding alleged *Brady* violations by the state in the original trial. In his appeal from the postconviction proceeding, the former client claimed that the prosecutor's dual role violated ethical and constitutional considerations. Rejecting this argument, the supreme court provided some helpful clarification regarding the scope and purpose of rule 4-3.7:

(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 [concerning conflicts of interest].

RPC 4-3.7.

204. *Id.* at D930.
205. *Id.* at D929.
206. *Id.* at D930 n.3.
207. *Id.*
208. 717 So. 2d 908 (Fla. 1998).
[A] purpose of the rule is to prevent the evils that arise when a lawyer dons the hats of both an advocate and witness for his or her own client. Such a dual role can prejudice the opposing side or create a conflict of interest. These concerns are not implicated in the present case where the state attorney was called as a witness for the other side on a Brady claim in a post conviction evidentiary hearing before a judge.\footnote{10}

The Fourth District Court of Appeal addressed the scope of RPC 4-3.7 in \textit{Larkin v. Pirthauer},\footnote{11} when a personal representative of an estate sought certiorari review of an order disqualifying her lawyer.\footnote{12} The lawyer in question apparently had been involved in the preparation and execution of the testator's will. The personal representative for the testator's estate engaged that lawyer to represent her. It became clear that the lawyer would be a witness in a will contest in which testamentary capacity and undue influence were issues. The Fourth District Court of Appeal denied certiorari, but in doing so limited the scope of the disqualification order.\footnote{13} The court stated, "[a]lthough the order of disqualification does not so provide, we interpret it to disqualify counsel only from the litigation, and not from other matters pertaining to the administration of the estate."\footnote{14} The court's view of the proper scope of a disqualification order founded on RPC 4-3.7 is consistent with the language of the rule and with the result reached in a recent First District Court of Appeal case which disqualified a lawyer from trial representation but not from pretrial or posttrial representation in the case.\footnote{15}

When acting as an advocate, one of the most important obligations that a lawyer has is that of candor to the tribunal.\footnote{16} Two 1998 cases specifically addressed this obligation as it applied to prosecuting attorneys. \textit{Garcia v. Manning}\footnote{17} was an appeal arising from a civil contempt proceeding.\footnote{18} The appellate court held that the trial judge had improperly applied the law

\begin{itemize}
    \item \footnote{10} \textit{Scott}, 717 So. 2d at 908.
    \item \footnote{11} 700 So. 2d 182 (Fla. 4th Dist. Ct. App. 1997).
    \item \footnote{12} \textit{Id.} at 182.
    \item \footnote{13} \textit{Id.} at 183.
    \item \footnote{14} \textit{Id.}
    \item \footnote{16} \textit{See, e.g.}, RPC 4-3.3, "CANDOR TOWARD THE TRIBUNAL."
    \item \footnote{17} 717 So. 2d 59 (Fla. 3d Dist. Ct. App. 1998).
    \item \footnote{18} \textit{Id.} at 59.
\end{itemize}
regarding the contemnor's ability to pay. Additionally, however, in a lengthy footnote, the court criticized the prosecutor's conduct in encouraging the judge to incarcerate the unrepresented contemnor, despite his apparent inability to pay.\footnote{Id. at 60 n.4.} Agreeing with the Fourth District Court of Appeal's opinion in \textit{Dilallo By and Through Dilallo v. Riding Safely, Inc.},\footnote{687 So. 2d 353, 355 (Fla. 4th Dist. Ct. App. 1997).} the court noted that RPC 4-1.1\footnote{RPC 4-1.1, "COMPETENCE," provides that: "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.} and 4-3.3(3)\footnote{Subdivision (a)(3) of RPC 4-3.3, "CANDOR TOWARD THE TRIBUNAL," provides that: "A lawyer shall not knowingly... 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[.]" RPC 4-3.3(a)(3).} "imply a duty to know and disclose to the court adverse legal authority" and that it "construe[d] these rules to also require an attorney to provide full information to the trial court such that the court has all necessary information to determine the issue presented to it."\footnote{Garcia, 707 So. 2d at 60 n.4 (citing RPC 4-1.1, 3.3(3)).}

This obligation, the court stated, is particularly important when the opposing party is unrepresented.\footnote{Id.}

The second case, \textit{State v. James},\footnote{710 So. 2d 180 (Fla. 3d Dist. Ct. App. 1998).} did not consider silence in the face of an obligation to speak, but, rather, affirmative misrepresentations by the prosecutor.\footnote{Id. at 181.} The prosecutor had represented to the court that the state would call a certain witness, but rested without calling her.\footnote{Id.} When questioned about this after the defense moved for a mistrial, the prosecutor stated that he knew when the case began that he would not be calling the witness.\footnote{Id.} The Third District Court of Appeal court "heartily endorse[d]" the trial court’s expression of "utmost concern" regarding the prosecutor’s "lack of candor and professionalism" in misleading the court regarding his intentions concerning the witness.\footnote{Id. at 182 n.4.}

Issues relating to a lawyer’s withdrawal from a litigated matter were discussed in several 1997 and 1998 cases. \textit{Billings, Cunningham, Morgan &}
Boatwright, P.A. v. Isom\(^{231}\) turned on the trial court's application of RPC 4-1.16(c),\(^{232}\) which recognizes the long standing rule that a judge has the inherent authority to determine whether a law firm will be permitted to withdraw from litigation, regardless of the existence of ethical elements that would militate in favor of withdrawal.\(^{233}\) In *Isom*, a law firm settled a case for its personal injury client, who signed a release.\(^{234}\) The client later moved to set aside the settlement due to allegedly incorrect advice from the firm's associate regarding the effect of the release. Concluding that there was a conflict between its interests and those of the client, the firm moved to withdraw.\(^{235}\) After "analyz[ing] the complex factors in this case," the Fifth District Court of Appeal ruled that the trial court did not depart from essential requirements of law by denying the firm's motion to withdraw.\(^{236}\) Referencing RPC 4-1.16(c), the court viewed this as a situation in which the trial court had the authority to order continued representation "even when potential ethical conflicts are presented."

An interesting contention regarding a perceived duty to withdraw appeared in *Remeta v. State*.\(^{237}\) Capital Collateral Regional Counsel ("CCRC") moved to withdraw as counsel for a death row inmate. The trial court denied the motion, and CCRC appealed.\(^{238}\) CCRC alleged that a conflict existed as a result of statements and questions from members of an oversight committee, the Commission on the Administration of Justice, in capital cases regarding the handling of related litigation involving the client. In affirming the order, the supreme court agreed with the trial judge that "if the facts as set forth by CCRC constitute conflict, the entire legal system would collapse because there is not a public defender who does not

\[\begin{align*}
231. & \quad 701 \text{ So. 2d 1271} (\text{Fla. 5th Dist. Ct. App. 1997}). \\
232. & \quad \text{Subdivision (c) of RPC 4-1.16, "DECLINING OR TERMINATING REPRESENTATION," provides that: "When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation." RPC 4-1.16(c).} \\
233. & \quad *Isom*, 701 \text{ So. 2d at 1272}. \\
234. & \quad \text{*Id.*} \\
235. & \quad \text{Id. In moving to withdraw, the firm stated that it had been advised by The Florida Bar that its withdrawal was mandatory pursuant to RPC 4-1.16(a). Presumably the firm sought an informal advisory opinion from the Bar ethics staff. *Id.*} \\
236. & \quad \text{*Id.*} \\
237. & \quad *Isom*, 701 \text{ So. 2d at 1272 (citing RPC 4-1.16(c)).} \\
238. & \quad 707 \text{ So. 2d 719 (Fla. 1998).} \\
239. & \quad \text{Id. at 719.}
\end{align*}\]
have the same asserted ‘conflict.’\textsuperscript{240} Every government official must account to some governing body as to how it allocates its resources.”\textsuperscript{241}

Public defenders see certain recurring issues relating to withdrawal. One of these issues is the ethically and procedurally proper method of handling the situation that arises when a criminal defense client wishes to move to withdraw his or her guilty plea on the basis that counsel advised improperly or negligently concerning the plea. In two Florida cases, \textit{Karg v. State}\textsuperscript{242} and \textit{Holfiield v. State},\textsuperscript{243} the First District Court of Appeal reaffirmed that in this situation counsel is faced with a conflict of interest that requires the appointment of conflict-free counsel for the purpose of representation on the motion to withdraw the plea.\textsuperscript{244} The Fourth District Court of Appeal discussed this procedure, and the rationale supporting it, more fully in \textit{Roberts v. State}.\textsuperscript{245}

Another recurring withdrawal issue for public defenders relates to the likelihood that one of their former clients will testify against a current client. \textit{Costa v. State}\textsuperscript{246} arose from a trial court’s denial of an assistant public defender’s motion to withdraw.\textsuperscript{247} The motion certified the existence of an irreconcilable conflict between the lawyer’s current client and a former client based on confidential communications with the former client concerning issues relevant to the present case.\textsuperscript{248} In quashing the order and remanding with directions to grant the motion, the Fourth District Court of Appeal cited authority, including \textit{Guzman v. State},\textsuperscript{249} holding that a public defender should be permitted to withdraw upon certifying the existence of a conflict.\textsuperscript{250}

Similarly, the denial of an assistant public defender’s motion to withdraw was reversed in \textit{Cankur v. State}.\textsuperscript{251} The public defender’s former client was identified as a prosecution witness.\textsuperscript{252} When the public defender moved to withdraw, the state attempted to eliminate the problem by offering

\textsuperscript{240} Id.
\textsuperscript{241} Id. at 719–20.
\textsuperscript{242} 706 So. 2d 124 (Fla. 1st Dist. Ct. App. 1998).
\textsuperscript{243} 717 So. 2d 69 (Fla. 1st Dist. Ct. App. 1998).
\textsuperscript{244} Id.; \textit{Karg}, 706 So. 2d at 125.
\textsuperscript{245} 670 So. 2d 1042, 1045 (Fla. 4th Dist. Ct. App. 1996); \textit{see Chandris}, 668 So. 2d 180, 253–54 (Fla. 1995) and \textit{supra} note 55 and accompanying text.
\textsuperscript{246} 712 So. 2d 455 (Fla. 4th Dist. Ct. App. 1998).
\textsuperscript{247} Id. at 456.
\textsuperscript{248} Id.
\textsuperscript{249} 644 So. 2d 996 (Fla. 1994). \textit{See also} Babb v. Edwards, 412 So. 2d 859 (Fla. 1982).
\textsuperscript{250} \textit{Costa}, 712 So. 2d at 456 (citing \textit{Guzman v. State}, 644 So. 2d 996, 999 (Fla. 1994)).
\textsuperscript{251} 706 So. 2d 944 (Fla. 4th Dist. Ct. App. 1998).
\textsuperscript{252} Id. at 944.
to refrain from calling the witness.\textsuperscript{253} The court then denied the motion.\textsuperscript{254} Citing \textit{Guzman}\textsuperscript{255} as well as other cases,\textsuperscript{256} the appellate court reversed, stating that "under the circumstances of this case, the trial court was required to grant the motion to withdraw without reweighing the facts considered by the public defender in determining and certifying that a conflict exists."\textsuperscript{257}

In a concurring opinion, \textit{Crowe v. State}\textsuperscript{258} criticized \textit{Guzman}.\textsuperscript{259} Judge Dauksch argued that trial judges should have discretion to analyze the nature of the conflict and the surrounding circumstances in ruling on motions to withdraw filed by public defenders.\textsuperscript{260} In contrast to cases involving a lawyer’s attempted voluntary withdrawal from a litigated matter, a number of cases deal with the \textit{involuntary} removal of a lawyer or law firm from litigation. These cases include conflicts involving a lawyer’s current clients,\textsuperscript{261} a lawyer’s former clients,\textsuperscript{262} imputed disqualification resulting from the movement of nonlawyer employees between law firms,\textsuperscript{263} and the involvement of lawyers with former employees of opposing parties.\textsuperscript{264} A basic principle of conflicts law is that, in the same litigated matter, one lawyer or law firm may not represent both a plaintiff and a defendant.\textsuperscript{265}

\begin{itemize}
\item \textsuperscript{253} Id.
\item \textsuperscript{254} Id.
\item \textsuperscript{255} See supra note 147 and accompanying text.
\item \textsuperscript{256} \textit{Cankur}, 706 So. 2d at 945 (citing \textit{Hope v. State}, 654 So. 2d 639 (Fla. 4th Dist. Ct. App. 1995); \textit{Crowe v. State}, 701 So. 2d 431 (Fla. 5th Dist Ct. App. 1997)). See also infra note 151.
\item \textsuperscript{257} \textit{Cankur}, 706 So. 2d at 944–45.
\item \textsuperscript{258} 701 So. 2d 431, 431–32 (Fla. 5th Dist. Ct. App. 1997) (Dauksch, J., specially concurring).
\item \textsuperscript{259} Id. at 432.
\item \textsuperscript{260} Id. at 431–32.
\item \textsuperscript{261} Cardasis v. HP America, Inc., 710 So. 2d 146 (Fla. 3d Dist. Ct. App. 1998); Henry v. Entertainment Design, Inc., 711 So. 2d 179 (Fla. 4th Dist. Ct. App. 1998).
\item \textsuperscript{263} City of Apopka v. All Corners, Inc., 701 So. 2d 641 (Fla. 5th Dist. Ct. App. 1997); Esquire Care, Inc. v. Maguire, 532 So. 2d 740 (Fla. 2d Dist. Ct. App. 1988); Lackow v. Walter E. Heller & Co. Southeast, 466 So. 2d 1120 (Fla. 3d Dist. Ct. App. 1985).
\item \textsuperscript{264} Carnival Corp. v. Romero, 710 So. 2d 690 (Fla. 5th Dist. Ct. App. 1998); H.B.A. Management, Inc. v. Estate of Schwartz, 693 So. 2d 541 (Fla. 1997); Rentclub, Inc. v. Transamerica Rental Fin. Corp., 43 F.3d 1439 (11th Cir. 1995).
\item \textsuperscript{265} RFC 4-1.7 cmt. (discussing prohibition representing opposing parties in litigation).
\end{itemize}
In Cardasis v. HP America, Inc., the Third District Court of Appeal ruled that "the trial court departed from the essential requirements of law" by denying the defendants' motion to disqualify the plaintiff's lawyers from also representing one of the defendants in the pending case below. The matter was remanded with directions to grant the motion and to disqualify the lawyers in question from representing any party in the case.

An unusual conflicting scenario was present in Henry v. Entertainment Design, Inc. A law firm opposed an individual who was represented on unrelated matters by another office of that law firm. This conflict became known to the client after rendition of an unfavorable jury verdict in a case where the firm opposed him. Upon discovery of the conflict, the client sought relief from the verdict. Clearly this situation presented a conflict of interest; the trial court faced the question of how to deal with the conflict problem at the juncture at which it arose in the case. The Fourth District Court of Appeal affirmed the trial court's denial of requested relief, holding that the client was unable to demonstrate actual prejudice as a result of the conflict.

J.M. Lumber, Inc. v. M.L. Builders, Inc. is a disqualification case based on conflicts involving a lawyer's former clients. The decision in this case focused on the proper application of RPC 4-1.9, governing conflicts with former clients. The plaintiff's lawyer, in post judgment execution proceedings, formerly represented one of the defendants in various matters. Defendants moved to disqualify the lawyer. At the evidentiary hearing on the motion, the trial court found that plaintiff's counsel had not breached his duty of lawyer-client confidentiality and that the matter in question was not related to any knowledge gained in representing his former client. The court nevertheless concluded that an appearance of impropriety existed and disqualified the lawyer, "finding simply that it was too close in time to the prior representation which had ceased three years earlier."

266. 710 So. 2d 146 (Fla. 3d Dist. Ct. App. 1998).
267. Id. at 146.
268. Id.
269. 711 So. 2d 179 (Fla. 4th Dist. Ct. App. 1998).
270. Id. at 180.
271. Id.
272. Id. at 181.
273. 706 So. 2d 84 (Fla. 4th Dist. Ct. App. 1998).
274. Id. at 84–85.
275. See RPC 4-1.9 supra note 23.
276. J.M. Lumber, 706 So. 2d at 85.
277. Id.
278. Id.
The Fourth District Court of Appeal reversed the order of disqualification.\(^\text{279}\) Referencing RPC 4-1.9, the court stated that the trial court’s order departed from the essential requirements of law because it did not make a specific finding that the matters involved in the lawyer’s representation of the plaintiff were substantially related to the matters covered by his previous representation of the defendant.\(^\text{280}\) The court thus recognized that RPC 4-1.9 contains two independent and distinct tests that must be examined in a former client conflict situation: 1) whether the former and current matters are substantially related; and 2) whether, regardless of any relationship between the matters, there are issues of client confidentiality present.\(^\text{281}\)

Another case in which RPC 4-1.9 was central did not concern disqualification, but the propriety of awarding attorney’s fees under section 57.105 of the Florida Statutes.\(^\text{282}\) In Rodell v. Narson,\(^\text{283}\) a party hired a lawyer who had previously been consulted by another party about certain property that was the subject of litigation.\(^\text{284}\) During the earlier consultation, confidential information regarding the property was disclosed to the lawyer. Subsequently, the party who originally consulted the lawyer moved to disqualify the lawyer based on an alleged violation of RPC 4-1.9. On appeal, the Third District Court of Appeal ruled that the motion to disqualify

\begin{footnotes}
\item[279] \textit{Id.}.
\item[280] \textit{Id.} (citing RPC 4-1.9).
\item[281] \textit{See supra} note 23 and accompanying text.
\item[282] \textit{FLA. STAT.} § 57.105 (1997). Section 57.105 of the Florida Statutes provides:

(1) The court shall award a reasonable attorney’s fee to be paid to the prevailing party in equal amounts by the losing party and the losing party’s attorney in any civil action in which the court finds that there was a complete absence of a justiciable issue of either law or fact raised by the complaint or defense of the losing party; provided, however, that the losing party’s attorney is not personally responsible if he or she has acted in good faith, based on the representations of his or her client. If the court finds that there was a complete absence of a justiciable issue of either law or fact raised by the defense, the court shall also award prejudgment interest.

(2) If a contract contains a provision allowing attorney’s fees to a party when he or she is required to take any action to enforce the contract, the court may also allow reasonable attorney’s fees to the other party when that party prevails in any action, whether as plaintiff or defendant, with respect to the contract. This act shall take effect October 1, 1988, and shall apply to contracts entered into on said date or thereafter.

\textit{FLA. STAT.} § 57.105 (1997).
\item[283] 706 So. 2d 392 (Fla. 3d Dist. Ct. App. 1998).
\item[284] \textit{Id.} at 393.
\end{footnotes}
was a "meritorious claim" that was not subject to Florida Statutes section 57.105 award of fees. 285

As noted above, the protection of client confidentiality is one of the key elements of RPC 4-1.9. However, this protection is not absolute. The rule provides that a lawyer who now opposes a former client may not use confidential information 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." 286 Although some lawyers equate "generally known" information with information that is a matter of public record, the district court in King v. Byrd 287 made clear that these two terms are not synonymous for purposes of conflict of interest analysis. 288 A lawyer defended a doctor in a medical malpractice action. 289 One of the plaintiff's expert witnesses was a doctor whom the lawyer had represented in an administrative grievance proceeding filed by a patient. The lawyer attempted to attack the expert with, inter alia, the existence of this grievance proceeding. On appeal, the court ruled that it was error to allow this cross-examination. 290 Replying to the lawyer's contention that this proceeding was a matter of public record and therefore "generally known" under RPC 4-1.9, the court commented, "[w]e are not prepared to state that all information contained in any public document is 'generally known' within the meaning of the rule." 291 Although not expressly stated in the opinion, the court implicitly recognized that the real question when analyzing a "generally known" question is not whether the information is a matter of public record, but whether, for the lawyer's prior representation of the client, the lawyer would know of the existence and location of that information. 292

In Carnival Corp. v. Romero, 293 two expert witnesses for the plaintiff were former employees of the defendant cruise line. 294 The defendant moved to disqualify the experts on the ground that they had information protected by the attorney-client and work product privileges. Additionally,

285. Id.
286. RPC 4-1.9(b) (emphasis supplied). See supra note 23 and accompanying text.
288. Id. at D1175.
289. Id. at D1174.
290. Id. at D1175.
291. Id.
292. See King, 23 Fla. L. Weekly at D1175. Interestingly, the defendant's lawyer complained that plaintiff's counsel had unfairly questioned his ethics. Id. at D1174. The court, however, expressed "substantial concerns as to the ethics of defense counsel's attacks on his former client." Id. at D1175.
293. 710 So. 2d 690 (Fla. 5th Dist. Ct. App. 1998).
294. Id. at 691.
the defense moved to disqualify plaintiff's counsel on the basis of allegedly improper contact with the defendant corporation's former employees and because of an alleged appearance of impropriety. The trial court denied the motions, and the Third District Court of Appeal ruled that the trial court did not depart from the essential requirements of law in denying the motions.²⁹⁵

Regarding potential disqualification of the plaintiff's counsel, the appellate court cited the Supreme Court of Florida's decision in *H.B.A. Management, Inc. v. Estate of Schwartz*²⁹⁶ holding that RPC 4-4.2²⁹⁷ did not prohibit a lawyer from *ex parte* contacts with former employees of a represented corporation.²⁹⁸ Although in making such contacts a lawyer is not ethically permitted to inquire into matters subject to attorney-client privilege, the defendant had not shown that its former employees, the experts, had access to any protected communications.²⁹⁹

Moreover, the defendant cruise line did not succeed in demonstrating that the law firm had engaged in the appearance of impropriety.³⁰⁰ The defendant relied on *Rentclub, Inc. v. Transamerica Rental Finance Corp.*³⁰¹ in which a law firm was disqualified from representing its client in litigation after the firm hired a former high ranking officer of its represented corporate

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²⁹⁵. *Id.* at 695.

²⁹⁶. 693 So. 2d 541 (Fla. 1997). The *Carnival* court noted that *H.B.A. Management* relied on Florida Bar Professional Ethics Committee Opinion 88-14, (1989) which concluded that it was not unethical for a lawyer to contact former employees of a represented organization, provided the lawyer did not inquire into privileged matters. *Carnival*, 710 So. 2d at 692–93 (citing *H.B.A. Management, Inc. v. Estate of Schwartz*, 693 So. 2d 541 (Fla. 1997)).

²⁹⁷. *Schwartz*, 693 So. 2d at 546. See RPC 4-4.2, "COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL," which provides:

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer. Notwithstanding the foregoing, an attorney may, without such prior consent, communicate with another's client in order to meet the requirements of any statute or contract requiring notice or service of process directly on an adverse party, in which event the communication shall be strictly restricted to that required by statute or contract, and a copy shall be provided to the adverse party's attorney.

RPC 4-4.2.

²⁹⁸. *Carnival*, 710 So. 2d at 693; see Lackow v. Walter, 466 So. 2d 1120 (Fla. 3d Dist. Ct. App. 1985).

²⁹⁹. *Carnival*, 710 So. 2d at 693.

³⁰⁰. *Id.* at 692–93.

³⁰¹. 43 F.3d 1439 (11th Cir. 1995).
opponent as a "trial consultant." In rejecting this argument, the court distinguished Rentclub in several ways: 1) the Supreme Court of Florida decided H.B.A. Management after the federal court's decision in Rentclub; 2) the experts in the instant case had not been high-level, managerial employees; and 3) importantly, there was no showing that either had access to any confidential or privileged information. Thus, the court stated, "[w]e do not think this case is one which requires disqualification based on the attorney having gained access to an adversary party's privileged communications or documents, thereby gaining an informational advantage."

Disqualification of the experts was not required because it was not established that either expert had access to privileged information or materials protected by the work product doctrine. The court acknowledged that the "prospect of paying [one of the experts] for this fact testimony [relating to information gathered during employment regarding other, unrelated incidents] could pose a possible violation under [RPC] 4-3.4," but stated that "any payments made in this case are also intertwined with his expert opinion." City of Apopka v. All Corners, Inc. addressed the question of imputed disqualification when nonlawyer employees of law firms move from one employing firm to another. Rule 4-1.10(a) provides that most conflict problems of one lawyer in a law firm are imputed to the other lawyers in that firm, but is silent with respect to how these rules apply to nonlawyer firm employees such as secretaries or paralegals.

302. Carnival, 710 So. 2d at 693 (citing Rentclub, 43 F.3d at 1439–40).
303. Id.
304. Id.
305. Id.
306. Id. at 695. Subdivision (b) of RPC 4-3.4, "FAIRNESS OF OPPOSING PARTY AND COUNSEL," provides that:

A lawyer shall not:

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

RPC 4-3.4(b).
307. 701 So. 2d 641 (Fla. 5th Dist. Ct. App. 1997).
308. Id. at 642.
309. Subdivision (a) of RPC 4-1.10, "IMPUTED DISQUALIFICATION; GENERAL RULE," provides that "[w]hile lawyers are associated in a firm, none of them
Two earlier Florida cases, as well as an opinion of the Florida Bar Professional Ethics Committee, addressed the nonlawyer issue. In *Lackow v. Walter E. Heller & Co.*, the Third District Court of Appeal disqualified a law firm that hired a secretary from another law firm that opposed the hiring firm in a litigated matter. While with her former employer, the secretary clearly had access to confidential information and trial preparation materials. In fact, she had worked on the case in question. No showing that a breach of confidentiality had occurred was required. However, a different approach was taken by the Second District Court of Appeal in *Esquire Care, Inc. v. Maguire*. There the court declined to adopt a presumption that confidentiality was breached. Rather, the court required a hearing to determine "not just whether a potential ethical violation has occurred, but whether as a result one party has obtained an unfair advantage over the other which can only be alleviated by removal of the attorney." The Professional Ethics Committee's Opinion 86-5 expressed the view that the rules governing the movement of lawyers between opposing law firms did not apply to nonlawyers. The opinion focused instead on the ethical obligations of the law firms to advise the moving nonlawyer not to breach confidentiality and to refrain from seeking any confidential information from the moving nonlawyer. After discussing the varied approaches in Florida case law, the *All Corners* court stated, "we align ourselves with the Second District and hold that disqualification is required only when there is evidence that the law firm obtained confidential information, thereby gaining an unfair advantage, from its new personnel."

Attorneys are often most visible to the public in their role as advocates at trial. An attorney's behavior at trial is subject to the *Rules of Professional Conduct*, rules of court, and case law. Therefore, it is not surprising that the conduct of attorneys during trial is subject to close scrutiny and criticism.

shall knowingly represent a client when any 1 of them practicing alone would be prohibited from doing so by rule 4-1.7, 4-1.8(c), 4-1.9, or 4-2.2." RPC 4-1.10(a).

311. 466 So. 2d 1120 (Fla. 3d Dist. Ct. App. 1985).
312. *Id.* at 1123.
313. *Id.*
314. 532 So. 2d 740 (Fla. 2d Dist. Ct. App. 1988).
315. *Id.* at 742.
316. *Id.* at 741.
318. *Id.* at 1119–20.
319. *All Corners*, 701 So. 2d at 644.
There have been many 1998 cases dealing with improper argument, when analyzing improper arguments. Although most appeals based on improper argument do not succeed due to a failure to properly preserve the objection on the record, the cases do provide examples of what does and does not constitute impermissible argument.

In Airport Rent-a-Car v. Lewis, the Fourth District Court of Appeal found a counsel’s comments regarding the opposing party’s state of mind and reporting the matter to the IRS to be outside the record, prejudicial, and in violation of RPC 4-3.4(e). In Cooper v. State, the district court found that a prosecutor’s suggestion in closing that “the defendant suborned perjury or that a defense witness manufactured evidence” was improper since they had


321. In fact, in two cases published this year, the court commented with frustration on the large number of improper argument cases. In Murphy v. International Robotics Systems, Inc., 710 So. 2d 587 (Fla. 4th Dist. Ct. App. 1998), Judge Klein stated that “[i]t seems as though, in every week in which we sit, we get at least one appeal in which we are asked to reverse because of improper, but unobjected-to, closing argument of counsel.” Id. at 587. In Palazon v. State, 711 So. 2d 1176 (Fla. 2d Dist. Ct. App. 1998), a judge wrote a concurrence “because of my concern with the number of criminal cases we review that involve improper argument by the State[,]” and suggested distribution of earlier decisions regarding improper argument on trial benches and counsel tables in every courtroom. Id.

322. Subdivision (e) of RPC 4-3.4 provides that:

A lawyer shall not:

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

RPC 4-3.4(e).


324. Murphy, 710 So. 2d at 587 (discussing the case law requiring contemporaneous objection to improper argument).

325. 701 So. 2d 893 (Fla. 4th Dist. Ct. App. 1997).

326. Id. at 896–97.

327. 712 So. 2d 1216 (Fla. 3d Dist. Ct. App. 1998).
no basis in the facts presented. The court gave a scathing criticism of the prosecutor in this case, stating:

The prosecutor’s comments here—impugning the defense witnesses and the defendant without any record basis—were improper, unethical and unprofessional; we hereby voice our strong disapproval of them. The trial judge undoubtedly recognized the impropriety of the comments because he sustained defense counsel’s objection to them. We urge trial courts to supplement such rulings, in the future, with an admonishment to the offending attorney, if not disciplinary sanctions.

Other examples of improper argument by a prosecutor can be found in Urbin v. State, an appeal from a capital case. The court found that an invitation for the jury to disregard the law, criticism of the defendant’s mother for failure to show sympathy for the victim’s family, and his “show no mercy” argument about sentencing were all impermissible. The court likewise found counsel’s statement in closing to the jury to be an improper “conscience of the community” argument.

In Davis v. South Florida Water Management District, the appellate court stated that an attorney improperly “bolstered” credibility and expressed his own opinion of the evidence when he stated “as a lawyer and an officer of the court, and an attorney who is proud to represent South Florida Water Management District and other condemning authorities and private property owners, I will tell you that $18 million” was overcompensation for a person’s property which was taken in a condemnation action. On the other hand, the court in Gouits v. Express Transport, found that the mere use of verbal tics such as “I would propose” or “I submit” do not amount to a comment by the attorney of his or her own opinion.

Courts are often critical of trial conduct even if they do not find that it rises to the level of a violation of the Rules of Professional Conduct. The Fourth District Court of Appeal rigorously criticized the conduct of two

328. Id. at 1217.
329. Id.
330. 714 So. 2d 411 (Fla. 1998).
331. Id. at 411.
332. Id. at 413.
333. Id. at 421.
334. 715 So. 2d 996 (Fla. 4th Dist. Ct. App. 1998).
335. Id. at 998.
337. Id. at 763–64 (emphasis omitted).
attorneys throughout the course of a medical malpractice trial in *Myron v. Doctors General Hospital.*\textsuperscript{338} The court, after reversing on other grounds, stated the following regarding the attorneys' behavior:

[W]e feel compelled to comment on the lawyers' conduct in this trial. The trial lawyers on this case are all highly professional, skilled lawyers with excellent reputations. Yet, from reading this entire transcript, we cannot help but cringe at the exchanges between them and with the court. The argument, both in front of the jury and at sidebar, reflected a disrespect of each other and exasperation with the proceedings. Even the trial court commented several times that things were getting way out of hand. At one point, after heated argument, the court said "[y]ou know, the public is here. There are members of the public here who have not been perhaps associated with this... Let's keep it a profession, if we could please."\textsuperscript{339}

The court then admonished the lawyers to behave themselves in the retrial.\textsuperscript{340}

IV. THE LAWYER'S RELATIONSHIP TO THIRD PARTIES

In addition to their duties to clients and the court, attorneys also have duties to opposing parties, attorneys, and other third persons. Among the most important of these duties is that of honesty. Although an attorney is not required and sometimes not permitted to reveal information,\textsuperscript{341} an attorney may not engage in conduct involving dishonesty or misrepresentation.\textsuperscript{342}

Thus, the Supreme Court of Florida suspended an attorney for ninety days in a matter in which the attorney stopped payment on a check to a travel agency.\textsuperscript{343} The referee found, based on the fact that the attorney immediately stopped payment on the check, that the attorney intended to deceive the travel agency, who had already extended the time for payment on a bill of over $2000 for 120 days.\textsuperscript{344} The referee stopped short of finding that the attorney made misrepresentations to the court by declining to find by the

\begin{itemize}
\item \textsuperscript{338} 704 So. 2d 1083 (Fla. 4th Dist. Ct. App. 1997).
\item \textsuperscript{339} Id. at 1092–93.
\item \textsuperscript{340} Id. at 1093.
\item \textsuperscript{341} See RPC 4-1.6. See supra note 20 and accompanying text.
\item \textsuperscript{342} Subdivision (c) of RPC 4-8.4 provides that "[a] lawyer shall not... engage in conduct involving dishonesty, fraud, deceit, or misrepresentation[.]" RPC 4-8.4(c).
\item \textsuperscript{343} Florida Bar v. Schultz, 712 So. 2d 386 (Fla. 1998).
\item \textsuperscript{344} Id. at 388.
\end{itemize}
clear and convincing standard that the check stubs presented by the respondent attorney to prove payment to the travel agency were false.\(^{345}\)

Probably the most grievous misrepresentation an attorney can make is to the court.\(^{346}\) In addition to dishonesty, misrepresentations to the court may impact the fair and impartial administration of justice.\(^{347}\) The Supreme Court of Florida found just such an impact in *Florida Bar v. Vining*.\(^ {348}\) Vining represented the wife in a marriage dissolution matter and in her appeal regarding alimony and attorneys' fees.\(^ {349}\) The appeals court reversed the trial court's denial of alimony and fees, and a hearing was held on attorneys' fees.\(^ {350}\) In the hearing, Vining did not disclose to the court that he had been paid by the client in the dissolution matter.\(^ {351}\) The court awarded a fee to be deposited into a supersedeas account, which was disbursed in a check made out to both Vining and his client.\(^ {352}\) The client refused to sign the check over to Vining because she had paid him for his services in the dissolution.\(^ {353}\) The attorney's motion to disburse the funds on his signature only, filed without notice to the client, was denied.\(^ {354}\) Vining then filed an action against the bank to disburse the funds, without informing the opposing attorney that the client opposed disbursement of the funds to Vining.\(^ {355}\) The opposing counsel then stipulated to the release of the money to Vining.\(^ {356}\) The client, on discovery that Vining had obtained the funds, sued, and recovered for theft.\(^ {357}\) Oddly, although the court upheld the referee's finding that Vining engaged in "dishonest, fraudulent, and deceitful conduct" before the trial judge, Vining was not found to have violated RPC

\(^{345}\) *Id.* at 387.

\(^{346}\) RPC 4-3.3.

\(^{347}\) See *Schultz*, 712 So. 2d at 387. Subdivision (d) of RPC 4-8.4 provides that: "A lawyer 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).

\(^{348}\) 707 So. 2d 670 (Fla. 1998).

\(^{349}\) *Id.* at 671.

\(^{350}\) *Id.*

\(^{351}\) *Id.*

\(^{352}\) *Id.*

\(^{353}\) *Vining*, 707 So. 2d at 671.

\(^{354}\) *Id.*

\(^{355}\) *Id.*

\(^{356}\) *Id.* at 672.

\(^{357}\) *Id.*
4-3.3(a) concerning candor to the tribunal. Vining was suspended for three years for violations of RPC 4-8.4(c) and (d).

However, the court did find a violation of RPC 4-3.3 in Florida Bar v. Hmielewski. Hmielewski represented a client in a Minnesota wrongful death and medical malpractice matter. The client informed Hmielewski that he had stolen medical records from the facility being sued. Hmielewski failed to provide the documents when a discovery request was made and indicated that all documents in the possession of the client had already been turned over to the medical facility. He also told the court that an issue in the case was the failure of the facility to properly maintain their records, and that the facility had lost the records. Opposing counsel discovered these misrepresentations during a deposition of Hmielewski’s client. The court, in sanctioning Hmielewski, found that his “violations made a mockery of the justice system and flew in the face of [his] ethical responsibilities as a member of The Florida Bar.” The court suspended Hmielewski for three years, stating that “[i]f it were not for [the absence of selfish motive], the extremely strong character evidence, and Hmielewski’s relatively unblemished record (one admonishment for minor misconduct in twenty-one years of practice), this [c]ourt would have no hesitation in imposing disbarment.”

In another case involving candor toward the tribunal, an attorney was suspended for ninety days in Florida Bar v. Corbin. The attorney

358. Vining, 707 So. 2d at 673.
359. Id. at 674. Subdivisions (c) and (d) of RPC 4-8.4 prohibit conduct involving dishonesty and conduct prejudicial to the administration of justice, respectively. RPC 4-8.4(c), (d).
360. 702 So. 2d 218, 220 (Fla. 1997).
361. Id. at 219.
362. Id.
363. Id.
364. Id. at 219–20.
365. Hmielewski, 702 So. 2d at 220.
366. Id.
367. Id. at 221. It is odd that the court found no selfish motive. The referee, as noted by the court, found that “[t]here was no motive of personal gain behind the respondent’s actions. If anything, the respondent was overzealous in his efforts to promote his client’s interests. The respondent appeared to adopt his client’s belief that the Mayo Clinic would falsify or fabricate medical records regarding his client’s father’s demise.” Id. However, the case was, in all likelihood, taken on a contingency fee basis. Therefore, the attorney had a financial interest in the outcome of the case. If the attorney’s fee is based on a percentage of the recovery, the attorney’s fee increases proportionately with the size of the award to his client. If the attorney could establish bad faith on the part of the medical facility, he could have claimed and received punitive damages.
368. 701 So. 2d 334, 337 (Fla. 1997).
represented plaintiffs in a civil landlord-tenant dispute. The defendants, representing themselves, provided the attorney with copies of canceled checks and told her that some of the rent was paid in cash and some with the canceled checks. Nevertheless, the attorney filed a motion for summary judgment, stating that there were no material facts in issue and that the defendants had paid no rent during the time period covered by the canceled checks. In recommending suspension of Corbin, the referee noted the larger issue facing the court involving pro se litigants:

The Referee fully appreciates that attorneys and judges have no responsibility to pro se litigants to assist them in preparing their case. At the same time, the [c]ourt and the Bar have a responsibility not to mislead or undermine the efforts of pro se litigants to represent themselves. This is a critical issue for the future of our Bar.

Dishonesty can have broad ranging consequences for an attorney. In Florida Bar v. Ash, an attorney was denied board certification after a determination that she made false statements on her application for certification. The attorney, in answering a question of whether a court had ever questioned her conduct in writing, listed “N/A.” The committee on certification determined that a court had issued a show cause order for sanctions in an earlier case of the attorney which indicated that she argued case law which had been quashed. Ash cited case law which was in conflict with case law in that jurisdiction, and failed to disclose a Supreme Court of Florida case which was in conflict with the case she argued. The supreme court, in upholding the denial of the certification, indicated that “it is difficult to conceive of a clearer violation of the oath of truthfulness at the conclusion of the application” in referring the matter to The Florida Bar for investigation.

An attorney also owes duties to other lawyers in some circumstances. Often, questions of a lawyer’s relationship to another lawyer revolve around the division of attorney fees. The Fifth District Court of Appeal, in Miller v.

369. Id. at 334.
370. Id. at 335.
371. Id.
372. Id.
373. 701 So. 2d 552 (Fla. 1997).
374. Id. at 553-54.
375. Id.
376. Id. at 554.
377. Id.
Jacobs & Goodman, P.A., found that an employment contract requiring departing lawyers to pay the attorneys' prior firm 75% of fees earned from clients taken when they left the firm is valid and enforceable. The case involved enforcement of an employment contract signed by associates of the firm. The contract called for the payment of 75% of the fees earned by the associates in their own private practice after they left the firm for clients who were initially clients of the law firm. All of the clients involved had personal injury cases with the firm prior to departing and accepting representation by the former associates of the firm. The former associates argued that the employment contract was void against public policy since it infringed on the client's right to choose her own attorney by placing an economic disincentive on the attorney. Ordinarily, the former firm would be entitled to some fee for the value of services performed by the firm prior to the client's departure. The court declined to find the contract void as to public policy but overturned the case on other grounds. In doing so, the court cited two Florida ethics opinions which discuss division of fees between a departing lawyer and the law firm. The court failed to even mention Florida Ethics Opinion 93-4, in which the Florida Bar Professional Ethics Committee opined that an employment contract which required payment of 50% of fees generated by a former client of the law firm violated RPC 4-5.6, regulating restrictions on the right to practice. Ironically, shortly before the Miller case was decided, the Supreme Court of Florida clarified the rule against restrictions against the right to practice by adding language to the comment discussing law firm employment


379. An attorney in a contingent fee case who is discharged by the client without cause prior to a recovery is usually entitled to quantum meruit for the value of services provided prior to discharge. Rosenberg v. Levin, 409 So. 2d 1016 (Fla. 1982).

380. Miller, 699 So. 2d at 732.

381. Id. (citing Fla. Bar Comm. on Professional Ethics, Op. 94-1 (1994) and Fla. Bar Comm. on Professional Ethics, Op. 84-1 (1984, rev. 1993) (concluding that such a division of fees is a matter of contract, not ethics)).


383. Miller, 699 So. 2d at 732. RPC 4-5.6 provides:

A lawyer shall not participate in offering or making:

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

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

RPC 4-5.6.

384. Miller, 699 So. 2d at 732.
This rule is not a per se prohibition against severance agreements between lawyers and law firms. Severance agreements containing reasonable and fair compensation provisions designed to avoid disputes requiring time-consuming quantum meruit analysis are not prohibited by this rule. Severance agreements, on the other hand, that contain punitive clauses, the effect of which are to restrict competition or encroach upon a client’s inherent right to select counsel, are prohibited.  

Following the decision in the Miller case, the Professional Ethics Committee was asked to review enforcement of a contract, found to be unethical in an earlier ethics opinion, in light of the court decision. The committee declined to answer the question because it involved past conduct of the attorney. The inquirer appealed the Professional Ethics Committee decision to the Florida Bar Board of Governors. The committee declined to issue an advisory opinion in response to an inquiry regarding enforcement of a contract involving restrictions on an attorney’s right to practice. At its meeting on April 3, 1998, the Florida Bar Board of Governors reviewed the decision and voted to overturn the decision of the committee, but declined to recede from Florida Ethics Opinion 93-4 (approved by the Board of Governors in February, 1995), notwithstanding the Miller case, as the inquiry related to a contract regarding hourly fees.

386. Id.
389. Id. See also Rule 2(d) of the Florida Bar Procedures for Ruling on Questions of Ethics, which provides:

Ethics counsel shall decline to issue a staff opinion to anyone who either inquires about another lawyer’s conduct or asks a question of law and may decline to issue a staff opinion when the inquiry raises a question for which there is no previous precedent or underlying bar policy upon which to base an opinion. When ethics counsel declines to issue an opinion pursuant to this rule, ethics counsel shall advise the inquirer of the provisions of rule 3.

391. Id.
The court has continued its efforts in support of the professionalism movement. Although declining to find a violation of the Rules of Professional Conduct, in Florida Bar v. Martocci, the Supreme Court of Florida chided the attorneys for the "patently unprofessional" conduct. The attorney directed epithets at another attorney at a deposition and made other personal remarks about him. The court stated that these actions did not rise to the level of discipline, but published details of the exchange to point out the lack of professionalism involved, opining:

As noted in our opening paragraph we find the conduct of the lawyers involved in the incident giving rise to these proceedings to be patently unprofessional. We would be naive if we did not acknowledge that the conduct involved herein occurs far too often. We should be and are embarrassed and ashamed for all bar members that such childish and demeaning conduct takes place in the justice system. It is our hope that by publishing this opinion and thereby making public the offending and demeaning exchanges between these particular attorneys, that the entire bar will benefit and realize an attorney's obligation to adhere to the highest professional standards of conduct no matter the location or circumstances in which an attorney's services are being rendered.

Relationships with the public are often evidenced through the attorney’s conduct at trial. The Second District Court of Appeal affirmed that misbehavior by an attorney in the course of a trial results in sanctions to the attorney in the case of Elder v. Norton. The court reversed a dismissal based on misconduct of the attorney during the discovery process, stating that the client should not suffer for the sins of the attorney, particularly since there are many sanctions available to the court which directly affect the attorney.

Supreme Court of Florida Justice Wells criticized the conduct of both attorneys and judges through both the trial and the appellate process in his dissent in Valle v. State. Valle involved an appeal of a capital case in which the defendant, having been convicted of murder, filed an ineffective

392. See supra n. 60 and accompanying text (discussing the court's activities in the professionalism movement).
393. 699 So. 2d 1357 (Fla. 1997).
394. Id. at 1358.
395. Id. at 1360.
397. Id.
398. 705 So. 2d 1331, 1337 (Fla. 1997) (Wells, J., dissenting).
The defendant claimed that his counsel should have filed for recusal of the sentencing judge who allegedly kissed the victim's wife and conversed with the victim’s friends in front of the jury. The court found that the allegations were sufficient to warrant an evidentiary hearing. However, most interesting was the dissent by Justice Wells, which was highly critical of the delay which occurred in the case. Wells stated that “[a]voidance of the delay and the kind of mistake made here requires only the level of professional competence and attention of judges and counsel that defendants and the public have a right to expect and receive in these cases.” He then pointed out that, although the defendant was arrested nearly twenty years before, the case has yet to be resolved. Wells specifically condemned delay in the capital case, noting that “I do not believe that a knowing refusal to disclose or failure to have the information at a hearing are proper tactics. A game of “hide the evidence” has no appropriate place in these proceedings and should not be tolerated.”

However, advocacy is not the only role that attorneys play in the courtroom. Attorneys, like all qualified citizens, sometimes play the role of juror. Attorneys are subject, as are all qualified citizens of the State of Florida, to a summons for jury service. Unlike most citizens, however, attorneys may be excused from service by the court. The Supreme Court of Florida, in *Hoskins v. State,* determined that discretion of the court to excuse attorneys and others from jury service is not delegable to other court.

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399. *Id.* at 1332–33.
400. *Id.* at 1333.
401. *Id.*
402. *Id.* at 1336.
403. *Valle,* 705 So. 2d at 1336 (Wells, J., dissenting).
404. *Id.* at 1337.
405. *Id.*
406. See generally FLA. STAT. § 40.01 (1997).
407. FLA. STAT. § 40.013(5) provides:

   A presiding judge may, in his or her discretion, excuse a practicing attorney, a practicing physician, or a person who is physically infirm from jury service, except that no person shall be excused from service on a civil trial jury solely on the basis that the person is deaf or hearing impaired, if that person wishes to serve, unless the presiding judge makes a finding that consideration of the evidence to be presented requires auditory discrimination or that the timely progression of the trial will be considerably affected thereby. However, nothing in this subsection shall affect a litigant’s right to exercise a peremptory challenge.

408. 702 So. 2d 202 (Fla. 1997).
The case, which involved an appeal from a capital conviction, addressed an issue regarding the selection of the jury. In that particular circuit, the chief judge had issued an administrative order which permitted the clerk to excuse jurors based on the Florida Statutes, including a statute which gave discretion to the presiding judge to excuse practicing attorneys from jury service. Although the court denied the appeal for failure to raise the objection to the jury panel in a timely manner, the court was careful to note that the procedure permitted by the administrative order was impermissible. In so opining, the court stated:

In reaching this decision, however, we emphasize that we are in no way sanctioning any process whereby a clerk of court is to carry out statutory mandated judicial responsibilities. We conclude that trial judges may not delegate their discretionary authority under section 40.013(5) to clerks of court or any other official.

Justice Anstead, in dissent, would have upheld the appeal on the jury panel issue because the jury panel was not “selected or drawn according to law.” Justice Anstead pointed out that the clerk excused classes of people without having the presiding judge hear their request and rationale for excusal. Justice Anstead also noted his concern that the statute excluded entire groups of people from service merely because of their profession, “discarding traditional notions of fairness and public duty.”

Attorneys also have a relationship with the State of Florida. An attorney has responsibilities, not only as a private citizen, but often also in the course of his or her conduct as an attorney. For example, attorneys are the subject of legislation specific to their roles as attorneys. The Supreme Court of Florida found such a statute unconstitutionally vague in State v. Mark Marks, P.A. The state charged a law firm and several of its employees with filing false or incomplete insurance claims. The state claimed that the attorneys failed to reveal “medical records or statements...
that were unfavorable to the claim.\textsuperscript{419} The relevant statute provided that one who prepares written statements in connection with an insurance claim that "contains any false, incomplete, or misleading information ... material to such claim" is guilty of a felony.\textsuperscript{420} The statute also provided that an attorney who assists in such a claim is guilty of a felony as well.\textsuperscript{421} The court found use of the term "incomplete" in the statute unconstitutionally vague as applied to attorneys in the representation of their clients.\textsuperscript{422} The court pointed out the special role that attorneys serve and the nature of their obligations to clients, in stating that "[b]ecause attorneys, pursuant to statute, case law, procedural rules, and rules of professional regulation, are customarily required to withhold certain types of information throughout the representation of a client, the term 'incomplete' without more does not give attorneys an ascertainable standard of guilt by which to measure their conduct."\textsuperscript{423}

The court disagreed with the state's argument that the specific intent portion of the statute, coupled with the term "incomplete," sufficiently put attorneys on notice of the behavior penalized by the statute, concluding that the attorneys "were under no clear duty to disclose the information they allegedly withheld."\textsuperscript{424}

An attorney may not assist in the unlicensed practice of law.\textsuperscript{425} The Supreme Court of Florida enjoined an individual and his business from the practice of law where the individual and his business prepared, among other things, a dissolution complaint without using a form approved by the supreme court, prepared bankruptcy petitions, gave legal advice regarding bankruptcy, and put his name in an "Attorney" slot on petitions.\textsuperscript{426} The referee's report, adopted by the Supreme Court, found that preparing the complaint and drafting a letter for the complainant "would be the unlicensed practice of law even if an attorney had drafted the complaint as Respondent Davide would have been the conduit for obtaining and relaying the

\begin{footnotes}
\item[419] Id. at 536.
\item[420] Id. at 535-36 n.9 (citing FLA. STAT. § 817.234(1) (1987)).
\item[421] Id. at 536 n.10 (citing FLA. STAT. § 817.43(3) (1987)).
\item[422] Id. at 533.
\item[423] Marks, 698 So. 2d at 537.
\item[424] Id. at 539.
\item[425] 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).
\item[426] Florida Bar v. Davide, 702 So. 2d 184, 185 (Fla. 1997).
\end{footnotes}
information, without the client ever having spoken with the attorney.\footnote{427} Most notably, however, the court found that the use of the name “Florida Law Center, Inc.,” and the advertising of that name, constituted the unlicensed practice of law since “the use of the name is misleading and gives the public the expectation that Florida Law Center, Inc. [sic] has expertise in the field of law.”\footnote{428} The court then enjoined the respondent from use of the name or any similar name from which the public could infer that the business offered legal services.\footnote{429}

Not only may a lawyer not engage in the unlicensed practice of law, but a lawyer may not assist in the unlicensed practice of law.\footnote{430} The court disbarred an attorney without leave to reapply for five years when he engaged in the practice of law after resigning from The Florida Bar.\footnote{431} The attorney, after resignation, undertook a two and one-half year litigation in county court on behalf of his son, who had reached majority and was engaged in a dispute with his insurance company over an auto accident.\footnote{432} Although the court noted a lack of selfish motive in the representation, having received no payment for the representation, the court found that he “intentionally violated this Court’s order granting his resignation from the Bar . . . and this misconduct caused injury to the legal system and the profession.”\footnote{433} The court therefore found an appropriate sanction to be disbarment without leave to reapply for readmission for five years.\footnote{434}

V. THE LAWYER’S RELATIONSHIP TO THE FLORIDA BAR AND THE DISCIPLINARY SYSTEM

This section focuses on attorneys’ relationship to The Florida Bar and the grievance process. The section reports on cases which determine the effect of the grievance process on other proceedings. Grievance cases that are not easily defined by the relationships that attorneys have with clients, the court, or third parties are also analyzed. Finally, this section discusses

\footnote{427} Id. at 184. See Fla. Bar Comm. on Professional Ethics, Op. 88-6 (1988) for a discussion of the ethical considerations involved in having nonlawyer employees gather information for an attorney.

\footnote{428} Davide, 702 So. 2d at 184–85.

\footnote{429} Id. at 185.

\footnote{430} RPC 4-5.5(a) provides that: “A lawyer shall not . . . practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction.” RPC 4-5.5(a).


\footnote{432} Id. at S269.

\footnote{433} Id. at S270.

\footnote{434} Id. at S271.
significant changes to the *Rules Regulating The Florida Bar* and the *Rules of the Florida Board of Bar Examiners*.

The Supreme Court of Florida decided that a complainant in a grievance proceeding enjoys absolute immunity from a defamation claim by the respondent attorney for all statements made privately within the grievance process. In *Tobkin v. Jarboe*, the Jarboes, clients of a Florida attorney, filed complaints about his conduct. The Florida Bar Grievance Committee unanimously found no probable cause for the complaint and dismissed it. The attorney then filed a defamation claim against the Jarboes which was based upon their complaint to the Bar. The trial court dismissed the claim, and under a theory of absolute immunity, the Fourth District Court of Appeal affirmed. The Supreme Court of Florida upheld the decision of the Fourth District Court of Appeal, finding that "Bar complainants are protected by an absolute privilege in so far as the complainant makes no public announcement of the complaint outside of the grievance process, thus allowing the grievance procedure to run its natural course." The court dismissed Tobkin's argument that, in opening up the grievance process to the public in 1990, the court also afforded a complainant qualified immunity as opposed to the absolute immunity previously enjoyed by complainants. The court recognized public policy against the "chilling" effect on complainants if they did not have absolute immunity in filing a complaint. Justice Wells dissented, noting that the Florida Bar Disciplinary Review Commission that recommended opening up the grievance process also recommended only qualified immunity from defamation claims. In his argument for qualified immunity, Justice Wells noted the following:

[M]alicious grievance filings are actually a fact of the present practice of law. Such filings can be and have been used as tactical weapons against attorneys to accomplish purposes that have nothing to do with violation of the rules of professional conduct. Attorneys should not be defenseless against this tactic nor should

436. *Id.* at 975.
437. *Id.* at 976.
438. *Id.*
439. *Id.*
440. *Tobkin*, 710 So. 2d at 976.
441. *Id.*
442. *Id.* at 976–77.
443. *Id.* at 977.
444. *Id.* at 978 (Wells, J., dissenting).
the grievance process be freely available to those who employ this
tactic.\textsuperscript{445}

Justice Wells also noted that the "public exoneration" that the majority
found to be a "suitable remedy for any negative effects created" by a
baseless complaint "ignores the reality" of the effect a complaint can have
on the life and career of the lawyer complained about.\textsuperscript{446}

An attorney also has certain rights during the grievance process. The
Third District Court of Appeal found in \textit{State v. Spiegel}\textsuperscript{447} that an attorney's
statements during the course of a Florida Bar investigation did not waive his
Fifth Amendment privilege during a subsequent criminal prosecution.\textsuperscript{448}

During the course of their divorce, the attorney's wife, also a lawyer, filed a
bar complaint against him.\textsuperscript{449} A member of the Florida Bar Grievance
Committee interviewed Spiegel. At the time of the interview, both the
Grievance Committee member and Spiegel believed that the \textit{Rules of the
Florida Bar} compelled Spiegel to answer the questions posed.\textsuperscript{450} The wife
filed for a domestic violence injunction against Spiegel, and later accused
him of violating the injunction.\textsuperscript{451} The Grievance Committee then held a
hearing, at which Spiegel asserted his Fifth Amendment privilege. Spiegel
then sought the suppression of his earlier statements made to the Grievance
Committee member in his criminal case.\textsuperscript{452} The court granted the motion to
suppress and certified the question to the Third District Court of Appeal.\textsuperscript{453}

Citing to the public interest, the Third District Court of Appeal found that
not invoking the privilege in a grievance proceeding did not waive the
privilege for the purpose of other proceedings in Spiegel's case:

\begin{quote}
Primarily, we are concerned that a ruling allowing such statements
to be admissible would interfere with the Bar's truth-seeking and
disciplinary functions. Bar Grievance proceedings play an
important role in protecting the public from improper professional
conduct by attorneys. In order to carry out this important function,
grievance committee members must be able to conduct meaningful
investigations to ascertain all facts relating to the grievance.
Requiring an attorney to plead the Fifth as soon as possible in order
\end{quote}

\begin{itemize}
\item \textsuperscript{445} \textit{Tobkin}, 710 So. 2d at 978.
\item \textsuperscript{446} \textit{Id.}
\item \textsuperscript{447} 710 So. 2d 13 (Fla. 3d Dist. Ct. App. 1998).
\item \textsuperscript{448} \textit{Id.} at 18.
\item \textsuperscript{449} \textit{Id.} at 15.
\item \textsuperscript{450} \textit{Id.} at 15.
\item \textsuperscript{451} \textit{Id.} at 15.
\item \textsuperscript{452} \textit{Spiegel}, 710 So. 2d at 15.
\item \textsuperscript{453} \textit{Id.} at 16.
\end{itemize}
to preserve the privilege would directly conflict with the Bar
Grievance committee's truth-seeking function.\textsuperscript{454}

Since the results can be so severe, it is appropriate to safeguard attorneys' constitutional rights within the grievance process. The Supreme Court of Florida disbarred an attorney for a felony conviction in \textit{Florida Bar v. Grief}.\textsuperscript{455} The attorney was convicted in federal court of filing documents in immigration cases that the attorney knew to be false.\textsuperscript{456} The referee recommended a three-year suspension due to mitigation established during the hearing.\textsuperscript{457} The court, in disbarring the attorney, affirmed its position that a felony conviction does not automatically lead to disbarment.\textsuperscript{458} In this instance, however, the court found a pattern of misconduct in the filing of false documents, which warranted disbarment.\textsuperscript{459}

Not only may an attorney not violate the law, an attorney may not violate a court order. In \textit{Florida Bar v. Gersten},\textsuperscript{460} the Supreme Court of Florida suspended an attorney indefinitely for refusing to comply with a court order that he answer questions of the state attorney's office.\textsuperscript{461} The state granted the attorney immunity from testifying regarding the reported theft of his car.\textsuperscript{462} When the attorney refused to testify, the trial court entered a civil contempt order.\textsuperscript{463} The attorney exhausted the appellate process and maintained his silence.\textsuperscript{464} When the trial court ordered him jailed, the attorney refused to report and went to Australia.\textsuperscript{465} Gersten claimed that refusal to testify is permitted under RPC 4-3.4(c), which provides that "[a] lawyer shall not knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists."\textsuperscript{466} The Supreme Court of Florida concluded that, under such a reading of the rule, any attorney could evade discipline for violating a court order "indefinitely by asserting a subjective belief that no valid obligation exists. Such a result invites disrespect for the judicial

\begin{footnotes}
\textsuperscript{454} \textit{Id.} at 17.
\textsuperscript{455} 701 So. 2d 555, 557 (Fla. 1997).
\textsuperscript{456} \textit{Id.} at 555.
\textsuperscript{457} \textit{Id.}
\textsuperscript{458} \textit{Id.} at 556–57.
\textsuperscript{459} \textit{Id.}
\textsuperscript{460} 707 So. 2d 711 (Fla. 1998).
\textsuperscript{461} \textit{Id.} at 714.
\textsuperscript{462} \textit{Id.} at 712.
\textsuperscript{463} \textit{Id.}
\textsuperscript{464} \textit{Id.}
\textsuperscript{465} \textit{Gersten}, 707 So. 2d at 712.
\textsuperscript{466} \textit{Id.} (quoting RPC 4-3.4(c)).
\end{footnotes}
The court then suspended Gersten indefinitely until he testified under the court order and for one year following his compliance with the court order.

The supreme court disciplined several attorneys for trust accounts violations during the year. The court suspended an attorney for one year for misappropriating client funds in the settlement of a claim. The attorney settled a claim in a products liability matter, which would be divided between the client, the attorney, and the client’s health care providers. The attorney deposited the settlement check and wrote a check to the client on the agreed upon amount, without sending a closing statement. The attorney kept money to pay the health care providers, but used the money for his own purposes instead. The client filed a complaint after being contacted by the health care providers for payment. In another case, the court suspended an attorney for ninety days for having fifty-nine checks returned for insufficient funds. The attorney indicated that he was currently being treated for a substance abuse problem and had ceased the practice of law. The court placed the attorney on probation for three years with the conditions that the attorney hire a certified public accountant to report to The Florida Bar on the attorney’s trust and operating accounts, that he be subject to random drug testing, and that he remain on under contract to

467. *Id.* at 713.
468. *Id.* at 714.
469. *See, e.g.,* The Florida Bar v. Krasnove, 697 So. 2d 1208 (Fla. 1997).
470. *Id.* at 1209–10.
471. *Id.* at 1209.
472. *Id.* *See subdivision (f)(5) of RPC 4-1.5, which provides:

In the event there is a recovery, upon the conclusion of the representation, the lawyer shall prepare a closing statement reflecting an itemization of all costs and expenses, together with the amount of fee received by each participating lawyer or law firm. A copy of the closing statement shall be executed by all participating lawyers, as well as the client, and each shall receive a copy. Each participating lawyer shall retain a copy of the written fee contract and closing statement for 6 years after execution of the closing statement. Any contingent fee contract and closing statement shall be available for inspection at reasonable times by the client, by any other person upon judicial order, or by the appropriate disciplinary agency.

RPC 4-1.5(f)(5).

473. *Krasnove,* 697 So. 2d at 1209. Subdivision (a) of RPC 4-1.15 provides that “[a] lawyer shall hold in trust, separate from the lawyer’s own property, funds and property of clients or third persons that are in a lawyer’s possession in connection with a representation.” RPC 4-1.15(a). Subdivision (a) of RPC 5-1.1 provides that “[m]oney or other property entrusted to an attorney for a specific purpose, including advances for costs and expenses, is held in trust and must be applied only to that purpose.” RPC 5-1.1(a).

Florida Lawyer’s Assistance, Inc. Finally, the court suspended another attorney for ninety days for trust account violations which were similar to those for which the attorney was previously placed on probation. The attorney was found to have collected into and disbursed from his trust account during his period of suspension and to have commingled client funds with personal funds.

Often, complaints filed against attorneys alleging trust account violations also contain other allegations as well. In *Florida Bar v. Pelligrini*, the Florida Bar accused an attorney of charging an excessive fee as well as misappropriating client funds. Pelligrini represented a client in a personal injury matter and filed a complaint a week after the settlement check was mailed (one day before the client signed the release). An answer was never filed. Nevertheless, Pelligrini collected 40% of the fee, in violation of RPC 4-1.5(f)(4)(B)(i)(a)(1). After upholding the referee’s findings of the trust account and excessive fee violations, the court suspended Pelligrini for three years.

As is usual, attorneys were disciplined this year for neglect of their clients’ matters. The Supreme Court of Florida suspended an attorney for thirty days for lack of diligence when the attorney requested three extensions of time in a criminal appeal and then failed to file a brief. In *Florida Bar v. Kassier*, the court suspended an attorney for one year and placed him on probation for three years for violations including neglect and trust account violations. The attorney accepted a retainer from a client to represent her in a contract matter, did nothing on her case, did not return her retainer, and did not refer her to another lawyer. Finally, in *Florida Bar v. Nowacki*, the court suspended an attorney for ninety-one days in a neglect case in

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475. *Id.* at 825.
477. *Id.* at 954.
478. 714 So. 2d 448 (Fla. 1998).
479. *Id.* at 450.
480. *Id.*
481. *Id.*
482. *Id.* See also RPC 4-1.5(f)(4)(B)(i)(a)(1), which provides for 33 1/3% of a recovery up to $1 million which is made prior to the filing of an answer by the defendant.
483. *Pelligrini*, 714 So. 2d at 453.
484. *Florida Bar v. Nesmith*, 707 So. 2d 331, 332–33 (Fla. 1998). See RPC 4-1.3, which requires that an attorney act with diligence relating to client matters. RPC 4-1.3.
485. 711 So. 2d 515 (Fla. 1998).
486. *Id.* at 517.
487. *Id.* at 516.
488. 697 So. 2d 828 (Fla. 1997).
which the court also found the attorney guilty of dishonesty and failure to supervise an associate of her firm. In addition to chiding the attorney’s neglect of client matters, the court condemned her “wholesale delegation of her caseload to a new associate.” The court, in suspending the attorney for ninety-one days, noted that “[t]his case involves a persistent pattern of client neglect and mismanagement by the respondent.”

Competence is another area in which courts may discipline attorneys. An attorney who repeatedly failed to follow the Florida Rules of Civil Procedure and the Florida Rules of Appellate Procedure received a ninety-one day suspension in Florida Bar v. Solomon. The Supreme Court of Florida affirmed The Florida Bar’s argument that “actual harm or prejudice is not an element of incompetence or lack of diligence under the Rules Regulating The Florida Bar;” although they noted that Solomon’s numerous errors in his cases must have affected the clients. The supreme court also disciplined an attorney for incompetence, among other violations, in the case of Florida Bar v. Boland. A client hired the attorney to obtain a restraining order against the client’s husband and to transfer a custody case to Florida. The client stated that, after the court awarded the husband custody in the other jurisdiction and the court ordered the client to turn the children over to the sheriff, attorney Boland advised the client to remove the children from the jurisdiction while Boland dealt with the matter. He also advised others to deny knowledge of the whereabouts of the children. The court stated that “[u]pon becoming her lawyer, Boland was charged with representing his client competently, which would include informing his client of the legal consequences of her behavior, notifying her of the various proceedings in the case, and giving her competent legal advice.”

An attorney must also avoid representations involving conflicts of interest. The court found a clear conflict of interest in Florida Bar v. Wilson. Wilson represented a couple in a declaratory action to share lottery winnings of the wife. He then represented them in additional

489. *Id.* at 833. See RPC 4-8.4(c).
490. *Nowacki,* 697 So. 2d at 831. See RPC 4-5.1(b).
491. *Nowacki,* 697 So. 2d at 831.
492. *Id.* at 833.
493. RPC 4-1.1 mandates that: “A lawyer provide . . . competent representation to a client.” RPC 4-1.1.
494. 711 So. 2d 1141, 1143–47 (Fla. 1998).
495. *Id.* at 1146 (citing Florida Bar v. Littman, 612 So. 2d 582 (Fla. 1993)).
496. 702 So. 2d 229, 232 (Fla. 1997).
497. *Id.* at 229.
498. *Id.* at 232.
499. 714 So. 2d 381, 383 (Fla. 1998).
500. *Id.* at 382.
matters involving their home.\footnote{Some time later, the husband requested that Wilson represent him in a dissolution matter, which Wilson declined.} The husband filed a dissolution action with the representation of another lawyer.\footnote{Wilson then represented the wife in the dissolution matter and in an action to set aside the declaratory judgment regarding the lottery winnings.} After the court disqualified him in an oral hearing, Wilson then filed a motion to recuse the judge, as well as a motion for rehearing on the disqualification.\footnote{Wilson then represented the wife in the dissolution matter and in an action to set aside the declaratory judgment regarding the lottery winnings. After the court disqualified him in an oral hearing, Wilson then filed a motion to recuse the judge, as well as a motion for rehearing on the disqualification.} In addition to agreeing with the referee’s finding of a “clear conflict of interest in violation of rule 4-1.9,”\footnote{The court also found that Wilson had violated RPC 4-8.4(d), since he continued the representation by filing the motion to recuse after the court disqualified him from the representation, and suspended him for one year.} the court also found that Wilson had violated RPC 4-8.4(d),\footnote{Wilson, 714 So. 2d at 382-83. Subdivision (d) of RPC 4-8.4 provides, in pertinent part, that “A lawyer 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).} since he continued the representation by filing the motion to recuse after the court disqualified him from the representation, and suspended him for one year.\footnote{Violations of the attorney advertising rules may also result in discipline, as evidenced by Florida Bar v. Greenspan. The attorney failed to file a yellow page advertisement for review with The Florida Bar. Not only did the attorney refuse to file the advertisement, but he also failed to respond to the Bar’s inquiries regarding both the filing and the investigation of the matter. See Subdivision (b) of RPC 4-7.5 which requires that an attorney file any nonexempt advertisement for review with the standing committee on advertising. RPC 4-7.5(b).}

Violation of the attorney advertising rules may also result in discipline, as evidenced by \textit{Florida Bar v. Greenspan}.\footnote{Id. at 926-27. See Subdivision (b) of RPC 4-7.5 which requires that an attorney file any nonexempt advertisement for review with the standing committee on advertising. RPC 4-7.5(b).} The attorney failed to file a yellow page advertisement for review with The Florida Bar.\footnote{708 So. 2d 926 (Fla. 1998).} Not only did the attorney refuse to file the advertisement, but he also failed to respond to the Bar’s inquiries regarding both the filing and the investigation of the
complaint filed by the Bar. The Supreme Court of Florida publicly reprimanded the attorney and placed him on probation for one year.

The Supreme Court of Florida's authority over attorneys goes beyond discipline. The supreme court affirmed its ability to place an attorney on the inactive list over the attorney's objections in *Florida Bar v. Arthur.* The Florida Bar requested that the attorney undergo an evaluation by Florida Lawyers Assistance, Inc., regarding her competency after she was involuntarily hospitalized and medicated for "expressing paranoid ideations." After the attorney refused the request, the Grievance Committee held a hearing, determined that she was incompetent to practice, and directed the Bar to request that the court place the attorney on the inactive list. The court appointed a referee, who ordered the attorney to undergo a mental evaluation. When she refused, the court placed her on the inactive list. Relying on RPC 3-7.13, the court found that although there was no proof of any misconduct of the attorney, her refusal to undergo psychiatric evaluation ordered by the referee warranted her placement on the inactive list.

Attorneys and judges have an obligation under the *Rules of Professional Conduct* to report the violations of the rules by others. In 5-

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511. *Greenspan*, 708 So. 2d at 927.
512. *Id.* at 928.
513. 22 Fla. L. Weekly S551, S551–52 (Sept. 4, 1997).
514. *Id.* at S551.
515. *Id.*
516. *Id.*
517. *Id.*
518. Section (a) of RPC 3-7.13 permits an attorney who has been found incompetent to practice law to be placed on the inactive list even without proof of misconduct. RPC 3-7.13(a).
520. RPC 4-8.3 provides:

(a) Reporting Misconduct of Other Lawyers. A lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects shall inform the appropriate professional authority.

(b) Reporting Misconduct of Judges. A lawyer having knowledge that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.

(c) Confidences Preserved. This rule does not require disclosure of information otherwise protected by rule 4-1.6.

RPC 4-8.3.
The First District Court of Appeal reported an attorney for using expletives and specious argument in a motion for rehearing. The complaint was dismissed for no probable cause. The attorney then came before the court in a related appeal, and moved for disqualification because of the prior referral to The Florida Bar. The supreme court found that Florida judges have a duty to report unprofessional conduct under RPC 4-8.3, and ruled that the discharge of that obligation did not give rise to good grounds for disqualification. A finding of good cause for disqualification would invite attorneys to forum shop by misbehaving in court, then disqualify judges who reported the conduct to the Bar.

The Supreme Court of Florida also regulates the activities of The Florida Bar as an organization. In Florida Bar v. Schwarz, the supreme court affirmed that The Florida Bar's activity regarding lobbying is restricted. A member of The Florida Bar sought to enjoin it from lobbying in association with the Florida Lawyers Association for the Maintenance of Excellence, Inc. ("FLAME"). Schwarz claimed that employees of the Bar organize and work for FLAME in violation of case law and rules which restrict the Bar's activity regarding legislative action. The court found that although the Bar enters contracts with FLAME to provide administrative services, and that employees of the Bar act as agents to hold money contributed to FLAME, such activity does not constitute impermissible lobbying activity. In so deciding, the court pointed out that contributions to FLAME are voluntary, unlike mandatory membership fees to the Bar, and that the Bar has no control over actions taken by FLAME.

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521. 708 So. 2d 244 (Fla. 1997).
522. Id. at 246-47.
523. Id. at 245.
524. Id.
525. Id.
526. 5-H Corp., 708 So. 2d at 246.
527. Id. at 247.
528. 708 So. 2d 589 (Fla. 1998).
529. Id.
530. Id.
531. Id. (citing The Florida Bar re Schwarz, 552 So. 2d 109 (Fla. 1989) and RPC 2-9.3 (containing provisions for a Florida Bar member to receive a refund after timely objection to a legislative position taken by the Bar)).
532. Id. at 589-90.
533. Schwarz, 708 So. 2d at 589.
In addition to its responsibilities in discipline, the Supreme Court of Florida also made several changes to the *Rules Regulating The Florida Bar*. Among the most important is a change to RPC 1-3.8, dealing with inventory attorneys. An inventory attorney reviews the files of an attorney who is suspended, disbarred, or otherwise incapacitated to practice law, and protects the clients of that attorney. 534 The court clarified the role of the inventory attorney, by adding subsection (c) to rule 1-3.8, which provides that “[n]othing herein creates an attorney and client, fiduciary, or other relationship between the inventory attorney and the subject attorney.” 535 The court also indicated that “[t]he purpose of appointing an inventory attorney is to avoid prejudice to clients of the subject attorney.” 536 The supreme court also approved a change to the rules which permits resolution of problems between attorneys and clients without resort to grievance proceedings. 537 The Florida Bar proposed removal of certain cases from discipline to a mediation process to resolve client complaints. 538 Such removal would occur only if “the public interest is satisfied by the resolution of the private rights of the parties to the mediation.” 539 The court approved the mediation program, stating that:

> The mediation program should benefit the public by providing an alternative means to promptly and efficiently resolve grievances filed against members of the Bar. This Court commends The Florida Bar Board of Governors for their efforts in encouraging alternative dispute resolution methods as a means to enhance the efficacy of the grievance process. 540

The Supreme Court of Florida also made changes to the rules regulating admissions to The Florida Bar, mainly codifying existing policy of the Florida Board of Bar Examiners. 541 However, the changes also include shortening the time period for response to a Board inquiry from 120 to ninety days and “raising the passing score on the [Multistate Professional

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534. RPC 1-3.8.  
536. *Id.* at 120.  
538. *Id.*  
539. *Id.* (quoting RPC 3-8.1(d)).  
540. *Id.* at 499.  
541. Amendments to the Rules of the Supreme Court Relating to Admissions to the Bar, 712 So. 2d 766 (Fla. 1998).
VI. CONCLUSION

Florida authorities addressed a wide range of professional responsibility issues in 1998. Practicing lawyers can look to civil cases, criminal cases, ethics opinions, and amendments to rules in order to understand the changing scope of their obligations toward each other, clients, third parties, and the judicial system of which they are an integral part. With such a wide range of sources generating important decisions that affect the practice of law, it can truly be said that we have moved beyond a concern for only the black letter rules into an arena where activities of bar members are governed by the wider, more encompassing "law of lawyering."

542. Id. at 766.
543. Id. at 767.