

# *Nova Law Review*

---

*Volume 10, Issue 3*

1986

*Article 6*

---

## Florida's New Rules of Professional Conduct

Howard Messing\*

\*

Copyright ©1986 by the authors. *Nova Law Review* is produced by The Berkeley Electronic Press (bepress). <https://nsuworks.nova.edu/nlr>

# Florida's New Rules of Professional Conduct

Howard Messing

## **Abstract**

This article considers the ethical directives contained in Florida's New *Rules of Professional Conduct* adopted by the Florida Bar late in 1984.

**KEYWORDS:** relationship, communicate, conflict

# Florida's New Rules of Professional Conduct

**Howard Messing\***

---

I. INTRODUCTION AND SCOPE .....	1109
II. MODEL RULES: A BRIEF HISTORY.....	1110
III. FORMAT OF THE <i>Model Rules</i> .....	1112
IV. PREAMBLE AND SCOPE OF THE NEW <i>Rules of Professional Conduct</i> .....	1113
V. ARTICLE ONE: LAWYER-CLIENT RELATIONSHIP .....	1114
A. <i>The Lawyer-Client Relationship (Rules 4-1.1, 4-1.2, 4-1.3)</i> .....	1115
B. <i>Communication with the Client (Rule 4-1.4)</i> .....	1116
C. <i>Fees (Rule 4-1.5)</i> .....	1117
D. <i>Confidentiality (Rule 4-1.6)</i> .....	1119
E. <i>Conflict of Interest (Rules 4-1.7, 4-1.8, 4-1.9)</i> .....	1120
1. <i>Third Party Interest (Rule 4-1.8(f))</i> .	1121
2. <i>Guilty Pleas and Settlement Offers when Representing Two Clients (Rule 4-1.8(g))</i> .....	1122
3. <i>Attorney Family Relationships (Rule 4-1.7(d))</i> .....	1122
4. <i>Media Rights (Rule 4-1.8(d))</i> .....	1122
5. <i>Conflict of Interest: Former Client (Rule 4-1.9)</i> .....	1123
6. <i>Imputed Disqualification (Rule 4-1.10)</i> .....	1124
7. <i>Successive Government and Private Employment and the Activities of Former Judge or Arbitrator (Rules 4-1.11 and 4-1.12)</i> .....	1124

---

\* Associate Professor, Nova University Center for the Study of Law; J.D., Syracuse University School of Law, 1973; A.B., Syracuse University, 1963.

F.	<i>The Organization as a Client (Rule 4-1.13)</i> .....	1125
G.	<i>Clients with Disabilities (Rule 4-1.14)</i> ..	1126
H.	<i>Safekeeping of Property (Rule 4-1.15)</i> ..	1126
I.	<i>Withdrawal from the Case (Rule 4-1.16)</i>	1127
VI.	THE ATTORNEY AS COUNSELOR — ARTICLE TWO .....	1128
A.	<i>The Attorney as Advisor (Rule 4-2.1)</i> ...	1129
B.	<i>The Attorney as Intermediary (Rule 4-2.2)</i> .....	1129
C.	<i>Evaluations for the Use of Third Parties (Rule 4-2.3)</i> .....	1130
VII.	TRIAL PRACTICE — ARTICLE THREE .....	1130
A.	<i>Meritorious Claims and Contentions (Rule 4-3.1)</i> .....	1131
B.	<i>Expediting Litigation (Rule 4-3.2)</i> .....	1131
C.	<i>Candor Toward the Tribunal (Rule 4-3.3)</i>	1132
	1. <i>Legal Argument</i> .....	1132
	2. <i>False Evidence</i> .....	1132
D.	<i>Fairness to Opposing Party and Counsel (Rule 4-3.4)</i> .....	1133
E.	<i>Impartiality and Decorum of the Tribunal (Rule 4-3.5)</i> .....	1134
F.	<i>Trial Publicity (Rule 4-3.6)</i> .....	1135
G.	<i>The Lawyer as Witness (Rule 4-3.7)</i> ....	1136
H.	<i>Special Responsibilities of a Prosecutor (Rule 4-3.8)</i> .....	1136
I.	<i>Advocate in Nonadjudicative Proceedings (Rule 4-3.9)</i> .....	1137
VIII.	TRANSACTIONS WITH PERSONS OTHER THAN CLIENTS — ARTICLE FOUR .....	1137
A.	<i>Duty to the Opposing Party and to Third Persons (Rules 4-3.4, 4-4.1, 4-4.2, 4-4.3 and 4-4.4)</i> .....	1138
B.	<i>Communication with a Person who is Represented by Counsel (Rule 4-4.2)</i> ...	1139
C.	<i>Dealing With Unrepresented Persons (Rule 4-4.3)</i> .....	1139

IX.	LAW FIRMS AND ASSOCIATIONS — ARTICLE FIVE.....	1140
	A. <i>Law Firm and Government Office Responsibility for Professional Conduct (Rule 4-5.1)</i> .....	1140
X.	PUBLIC SERVICE — ARTICLE SIX .....	1141
	A. <i>Pro bono Service (Rules 4-6.1 and 4-6.2)</i> .....	1141
	B. <i>Membership in Legal Services Organizations (Rule 4-6.3)</i> .....	1142
	C. <i>Law Reform Activity (Rule 4-6.4)</i> .....	1142
XI.	INFORMATION ABOUT LEGAL SERVICES — ARTICLE SEVEN .....	1143
	A. <i>Advertising (Rules 4-7.1, 4-7.2, 4-7.3)</i> ...	1143
	B. <i>Solicitation (Rule 4-7.3)</i> .....	1145
	C. <i>Communication of Fields of Practice (Rule 4-7.4)</i> .....	1147
	D. <i>Firm Names and Letterheads (Rule 4-7.5)</i> .....	1148
XII.	INTEGRITY OF THE PROFESSION — ARTICLE EIGHT .....	1148
	A. <i>Bar Admission and Disciplinary Matters (Rule 4-8.1)</i> .....	1149
	B. <i>Judicial and Legal Officials (Rule 4-8.2)</i> .....	1149
	C. <i>Professional Misconduct (Rules 4-8.3, 4-8.4)</i> .....	1149
	D. <i>The Jurisdiction of the New Rules (Rule 4-8.5)</i> .....	1150
XIII.	SUMMARY .....	1150

## I. Introduction and Scope

This article considers the ethical directives contained in Florida's *New Rules of Professional Conduct* adopted by the Florida Bar late in 1984. These Model Rules were recommended to the Florida Supreme Court by the Florida Bar in November 1984 and after lengthy consideration were promulgated by the court on July 17, 1986 to take effect on January 1, 1987.<sup>1</sup>

This article considers all proposed rules contained in the final ver-

---

1. This article was written in March, 1986, and updated in August, 1986.

sion of Florida's *Rules of Professional Conduct* as adopted by the Florida Supreme Court. Also discussed is the format of the new rules, which represents a significant departure from Florida's former *Code of Professional Responsibility*.<sup>2</sup> Reference will be made to former Code sections and a comparison between the Code and Rules will be offered where helpful.

Among the most controversial rules discussed in detail in this article are those relating to: confidentiality of information<sup>3</sup> (one of the most highly debated of the ABA Model and Florida rules); conflict of interest;<sup>4</sup> advertising and solicitation;<sup>5</sup> and trial practice<sup>6</sup> (especially candor to the tribunal). The author will also discuss the various roles filled by attorneys in the practice of law. To a lesser extent this article will consider rules addressing pro bono service, client disability, case control and the expediting of litigation.

## II. Model Rules: A Brief History

In this century, the ethical conduct of lawyers has been regulated by three sets of rules adopted by the American Bar Association and the several states. The first set of rules, the *Canons of Professional Ethics*,<sup>7</sup> were adopted in 1908 and remained in effect until 1970. In 1970, the American Bar Association adopted the *Model Code of Professional Responsibility*.<sup>8</sup> These regulations remained in effect until 1983. On August 2, 1983, the American Bar Association adopted the most recent set of regulations, the *Model Rules of Professional Conduct*.<sup>9</sup>

In 1977, the American Bar Association began a review and evaluation of the then-existent *Model Code of Professional Responsibility*. The ABA's evaluating committee was chaired during most of its existence by Robert J. Kutak of Omaha, Nebraska, and is often referred to

---

2. FLORIDA'S CODE OF PROFESSIONAL RESPONSIBILITY (1970) [hereinafter cited as FLORIDA'S CODE].

3. FLORIDA'S RULES OF PROFESSIONAL CONDUCT Rule 4-1.6 (1986) [hereinafter cited as FLORIDA NEW RULES].

4. FLORIDA NEW RULES Rules 4-1.7, 4-1.8, 4-1.9 and 4-1.10 (1986).

5. FLORIDA NEW RULES Rules 4-7.1, 4-7.2, 4-7.3, 4-7.4 and 4-7.5 (1986).

6. FLORIDA NEW RULES Rule 4-3.3 (1986).

7. CANONS OF PROFESSIONAL ETHICS (1908) [hereinafter cited as CANONS].

8. MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1970) [hereinafter cited as ABA MODEL CODE].

9. MODEL RULES OF PROFESSIONAL CONDUCT (1983) [hereinafter cited as ABA MODEL RULES].

as the Kutak Committee. The Kutak Committee proposed new guidelines for professional conduct. Many of the proposals were highly controversial. For example, proposed were rules which mandated substantial disclosure by an attorney if such disclosure were necessary to prevent criminal conduct by a client. Disclosure was also proposed to prevent the continuing consequences of past criminal conduct. A Kutak Committee draft also required attorneys to perform mandatory pro bono service.

This ABA committee determined that a new format for these professional rules was necessary. The old Code, with its Ethical Consideration (EC), Disciplinary Rule (DR) and Canon format, was relatively inaccessible and often confusing to the practitioner. These controversial proposals went through many redrafts before final consideration by the American Bar Association. A draft of the rules even returned to the old Code format in May 1981. However, the Restatement format was ultimately adopted.

Passage of the *Model Rules of Professional Conduct* was not easy. It required over a year and a half of vigorous debate at annual and mid-year ABA meetings in San Francisco, New Orleans and Atlanta before the final *Model Rules of Professional Conduct* were adopted in 1984. The San Francisco debate considered only Rule 1.5 (Fees) in the time originally allotted for consideration of all rules. The next mid-year meeting in New Orleans went into "overtime" each evening, debating the remaining sections of the Proposed *Model Rules*. Almost no section of the Rules was too minor for debate. There was wide-ranging input from state and local bar associations and lawyers groups, and many alternative wordings were considered. In the end, a "traditional" coalition was successful in deleting from the Proposed *Model Rules* all rules considered too progressive or controversial. Finally, in August 1984, a consensus developed between the opposing factions and the interpretive comment sections were adopted almost without debate at the annual meeting in Atlanta. Among the state delegations voting against the *Model Rules* were Florida, California and New York. Florida's delegation, led by Bar President Gerald Richman, specifically rejected the rule limiting disclosure of a client's proposed illegal activities.

A Florida Bar special committee had been tracking the development of the *Model Rules* since mid-1980. This committee was therefore ready to offer its own proposal to the Board of Governors of the Florida Bar less than a year after the adoption of the ABA's *Model Rules*. This special study committee, chaired by attorney Steven Busey

of Jacksonville, decided early in its deliberations to follow the ABA *Model Rules* format and content whenever possible. The committee felt that editing for its own sake would be detrimental to the potential for uniformity of these Rules among the many states. The Board of Governors of the Florida Bar reviewed the Rules presented to them, approving the *Model Rules* with only a few changes and relatively little debate. The Board then petitioned the Supreme Court of Florida for expeditious adoption of the Rules. The Florida Bar's formal petition was presented to the Supreme Court for adoption on September 14, 1984. Oral argument took place on November 5, 1984. After lengthy consideration the Florida Supreme Court adopted the proposed rules package with several changes<sup>10</sup> on July 17, 1986 with an effective date of January 1, 1987.

In addition to adoption of the ABA *Model Rules* by the federal courts and in Florida, versions of the Rules have also been adopted in Arizona, Arkansas, Connecticut, Delaware, Maryland, Minnesota, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, Oregon, Washington and Virginia. Additionally, most other states have study commissions or proposals for adoption before their respective supreme courts at this time.<sup>11</sup>

### III. Format of the *Model Rules*

The *Model Rules of Professional Conduct* have abandoned the traditional Code format of Canons, Ethical Considerations (aspirational) and Disciplinary Rules (mandatory) in favor of a Restatement format. This format provides a black letter rule mandating or prohibiting attorney conduct. The black letter rule is followed by a non-binding comment section intended to assist in interpretation of the rule. Following each comment section is a Code comparison section in which citations to former Code sections are given. All rules with the exception of pro bono service are mandatory.<sup>12</sup> The *Model Rules* also contain an exceptionally accessible table of contents and a readily available comprehensive index.

---

10. The court altered the following rules originally proposed by the Florida Bar: 4-1.15(a); 4-3.6; and a major change to Rule 4-7.3 (solicitation).

11. The New York State Bar Association is the first state group to categorically reject the new Rules.

12. Rule 4-6.1 states, "A lawyer *should* render public interest legal service" (emphasis added).



The ABA *Model Rules of Professional Conduct* are numbered 1.1 through 8.5, while the Florida Rules are numbered identically with the addition of the prefix "4-" before each of the rules. Florida's draft of the New Rules distinguished between differing American Bar Association *Model Rules* and Florida Proposed Rules sections by "legislative" underlining and strike through. Furthermore, the Florida rules include an extensive table of contents and an available cross-reference table to Code sections addressed by the *Model Rules*.

The *Model Rules* view the role of lawyer in a wider and more varied manner than the "traditional" litigator model of the previous Code and *Canons of Professional Conduct*. The lawyer is viewed as an adviser, mediator, negotiator, evaluator, and an advocate. As an advisor the attorney helps explain "the client's legal rights and obligations and explains their practical implications."<sup>13</sup> The more traditional advocate model is discussed, as are other views of the attorney as negotiator and the companion role of intermediary.<sup>14</sup> Finally, a lawyer is shown as acting as an evaluator "examining a client's legal affairs"<sup>15</sup> and discussing them (in a variety of ways) with the client and third parties.<sup>16</sup>

Almost all rules use the terms "shall or shall not" to define proper conduct for attorneys. Only one rule, the pro bono rule,<sup>17</sup> is permissive. Although the comments following each rule may use directive terms of art (such as "shall" or "must"), they do not create black-letter law. These terms of art are merely used to place special emphasis on particular commentary sections.

Finally, the *Model Rules* are only one source of guidance for the practitioner. Consideration must be given to case law<sup>18</sup> and other rules such as the *Florida Rules of Evidence* on lawyer-client privilege.<sup>19</sup>

#### IV. Preamble and Scope of the New Rules of Professional Conduct

The Preamble and Scope provide a framework for understanding the underlying philosophical policy of the proposed rules. In a sense,

13. FLORIDA NEW RULES *Preamble: A Lawyer's Responsibilities* (1986).

14. *Id.*

15. *Id.*

16. *Id.*

17. FLORIDA NEW RULES Rule 4-6.1 (1986).

18. *See, e.g.,* Bates v. State Bar of Arizona, 433 U.S. 350 (1977).

19. FLA. STAT. § 90.502 (1985).

the Preamble is a statement to the public and the bar of the requirements and aspirations of the legal profession. The Preamble speaks to the role of attorney as the client's representative in the legal system and as a special "public citizen" responsible for the quality of justice.<sup>20</sup> The Preamble then defines the various roles played by lawyers. The requirement for maintaining a diligent and competent practice is also discussed. The Preamble stresses that "[z]ealous advocacy is not inconsistent with justice."<sup>21</sup>

The Scope section of the Rules is directed more to the needs of lawyers than laypersons. It attempts to provide protection for the practitioner by stating that although attorneys are bound to follow the rules which direct them to act or refrain from acting, failure to follow these rules should "not give rise to a cause of action nor should it create any presumption that a legal duty has been breached."<sup>22</sup> The Scope section also directs the reader to other rules and principles of substantive law which must be considered in determining "a framework for the ethical practice of law."<sup>23</sup>

The Scope section is followed by a terminology section which defines those terms used most often in the *Model Rules*.<sup>24</sup> This terminology section defines eleven words and their derivatives. For example, the list includes the definitions of: lawyer, fraud or fraudulent, and reasonable belief.

## V. Article One: Lawyer-Client Relationship

Article One includes general rules considering the lawyer-client relationship. These include basic guidance in practice areas such as: diligence; communication with a client; competence; and the reasonableness of fees charged.<sup>25</sup> The controversial rule regarding confidentiality of information<sup>26</sup> is in this article, as are the several conflict of interest<sup>27</sup> rules. The remaining Article One rules consider a variety of specific situations including the special problems of representing an organiza-

---

20. FLORIDA NEW RULES *Preamble: A Lawyer's Responsibilities* (1986).

21. *Id.*

22. FLORIDA NEW RULES *Scope* (1986).

23. *Id.*

24. FLORIDA NEW RULES *Terminology* (1986).

25. FLORIDA NEW RULES Rules 4-1.1, 4-1.2, 4-1.3, 4-1.4 and 4-1.5 (1986).

26. FLORIDA NEW RULES Rule 4-1.6 (1986).

27. FLORIDA NEW RULES Rules 4-1.1, 4-1.7, 4-1.8, 4-1.9 and 4-1.10 (1986).

tion,<sup>28</sup> and declining or terminating client representation.<sup>29</sup>

### A. *The Lawyer-Client Relationship (Rules 4-1.1, 4-1.2, 4-1.3)*

A lawyer is required to be sufficiently competent in the area of law in which his potential client requests representation.<sup>30</sup> Diligence is required during this representation and the client must be informed of case progress.<sup>31</sup> Ignoring these straightforward requirements gives rise to a significant number of client complaints.<sup>32</sup> It is unfortunately quite easy to place a less interesting or less lucrative case on the back burner while directing attention to more compelling issues. However, every client is owed the attorney's zealous commitment to his or her case.

Clients should be informed and involved in all stages of their case. It is the client whose property or liberty is in jeopardy and the client who must make the ultimate policy decisions including case objectives.<sup>33</sup> For example, offers of a plea bargain or settlement should be communicated quickly to a client. Many attorneys have found it beneficial to send copies of all pleadings filed and other relevant material to their clients to keep them informed of the progress of their case. However, these mailings are not a substitute for the in-person contact which clients desire and demand.

The objectives of the representation are ultimately the client's decision. However, a lawyer is obligated to provide advice and assistance to the client in reaching that decision. It is not unusual for a client to lack an understanding of the legal system. Clients often seek an attorney's advice and direction on how best to handle the matter in question. Despite this fact, ultimate decisions remain the province of the client. The attorney may only properly determine the means used to implement those objectives.

In a very real sense, the ideal representation is a partnership between attorney and client with a mutual sharing of information and goals by both parties. The attorney may, however, place limits on representation if agreed to in advance. A lawyer may (although less so in

---

28. FLORIDA NEW RULES Rule 4-1.13 (1986).

29. FLORIDA NEW RULES Rule 4-1.16 (1986).

30. FLORIDA NEW RULES Rule 4-1.1 (1986).

31. FLORIDA NEW RULES Rules 4-1.3 and 4-1.4(a) (1986).

32. From July 1, 1984 to June 30, 1985 approximately 45% of all complaints to the Florida Bar (2457 of 5514 total complaints) involved attorney neglect, relations with clients, or personal behavior.

33. FLORIDA NEW RULES Rule 4-1.2 (1986).

criminal than civil matters) limit the objectives or means to accomplish those objectives if the lawyer regards certain actions as repugnant or imprudent. This may include a too vigorous investigation of certain witnesses or a determination of whether the client should testify. Typically, these are defendant's decisions. It is possible, however, for a fully-informed defendant to waive these prerogatives when contracting for representation.

The Rules further prohibit attorneys from assisting a client in criminal or fraudulent conduct or in behavior not permitted by the *Rules of Professional Conduct*.<sup>34</sup> For example, a lawyer may not assist a defendant in creating illegal tax shelters or in hiding a murder weapon.

Finally, a practitioner is required to be competent in the area in which he or she is providing representation.<sup>35</sup> This competence is difficult to define. A new lawyer may with study reach a satisfactory level of competence while an experienced practitioner (due to inattention to new legal developments) may be insufficiently qualified. A reasonable-lawyer standard is used, requiring thoroughness in preparation and willingness to spend the time necessary to be fully informed of the law, procedure and facts relevant to the particular case.

## B. *Communication with the Client (Rule 4-1.4)*

Perhaps no action by an attorney leads to greater complaints about the quality of representation than a failure in communication with a client. Florida's *Code of Professional Responsibility* has no section which is the direct counterpart of Rule 4-1.4,<sup>36</sup> which requires that a lawyer keep clients "reasonably informed" about their case.<sup>37</sup> This rule recognizes that a client needs to be able to intelligently participate in his or her representation. This responsibility includes the duty to expeditiously inform a client of a plea offer or settlement offer made in his or her case. A lawyer is permitted to withhold information from the client only if it is in the client's best interest; not included is withholding information to serve the lawyer's interest or convenience.<sup>38</sup> The rule

---

34. FLORIDA NEW RULES Rule 4-1.2(d)(e) (1986).

35. FLORIDA NEW RULES Rule 4-1.1 (1986).

36. Note however that Florida's Code addresses this issue to some extent. See FLORIDA'S CODE DR 9-1.2(b), EC 7-8, EC 9-02 (1970).

37. FLORIDA NEW RULES Rule 4-1.4(a) (1986).

38. *Id.* at Rule 4-1.4 Comment.

suggests that it might be appropriate for a lawyer to "withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates the disclosure would harm the client."<sup>39</sup>

### C. Fees (Rule 4-1.5)

The ABA's longest debate concerned this section of the Rules.<sup>40</sup> Rule 4-1.5 is divided into three sections. The first considers the reasonableness of a fee; the second contingent fees; and the third referral fees.<sup>41</sup>

Florida's New Rules require that lawyers "not enter into an agreement for, charge, or collect an illegal or *clearly excessive* fee."<sup>42</sup> This is a departure from the ABA approach which requires that "a lawyer's fee shall be reasonable."<sup>43</sup> "Clearly excessive" was felt to be a more understandable and absolute standard. The excessiveness of a fee is determined by a reasonable-lawyer standard, that is, a lawyer of ordinary prudence. This rule lists a variety of factors to assist in determining the reasonableness of a fee. Among these factors are: the amount of work involved; the novelty of the issue; the skill required of the lawyer to perform this service; and the fees customarily charged for work of this nature in the area. Also considered are: the amount in question in the lawsuit; the results of the lawsuit; time limitations placed on the attorney; and whether this case will prevent the lawyer from taking other cases. Finally, this Model Rule considers how long the professional relationship has existed<sup>44</sup> (the longer the relationship the more flexibility); the experience, reputation and capability of the attorney performing the service; and whether the agreement is for a fixed fee or a contingent amount. The *Model Rules* encourage, but do not require, that the fee agreement be memorialized in writing.<sup>45</sup>

Contingent fee agreements are permitted in all matters except

39. *Id.*

40. The ABA General Assembly meeting in San Francisco spent the time allotted for review of all rules debating only Rule 1.5.

41. Referral fees were previously prohibited by FLORIDA'S CODE.

42. FLORIDA NEW RULES Rule 4-1.5 (1986) (emphasis added). *See also Florida Bar re Amendment to the Code of Professional Responsibility (contingent fees)*, 11 FLA. L. WEEKLY 294 (Fla. June 30, 1986), limiting contingency fees, now adopted as part of the "rules" package.

43. ABA MODEL RULES Rule 1.5(a) (1983).

44. FLORIDA NEW RULES Rule 4-1.5(b)(6) (1986).

45. *Id.* at Rule 4-1.5(c).

criminal law and domestic relations cases.<sup>46</sup> These prohibitions exist for public policy reasons. There was substantial support during consideration of the Florida *Model Rules* for allowing contingent fees in criminal cases. However, the Florida Bar's Criminal Law Section strenuously opposed the use of contingency agreements in these cases and this provision was deleted at the last minute from the final draft. The Florida Rules, unlike their ABA counterpart, require that contingent fee agreements must be in writing, as must the closing statements which distribute those fees.<sup>47</sup> The drafting committee felt that due to the somewhat controversial nature of contingent fee agreements, and the relative lack of sophistication of many clients entering into them, a relationship in writing was necessary to clarify the attorney-client fee relationship.

The New Rules accept what was often the standard, if unethical, practice of giving referral fees. It has always been possible to divide a fee between two or more lawyers not in the same firm. However, this "fee-splitting" required that each attorney be paid according to his or her amount of the work done on the case. Rule 4-1.5 now additionally allows a division of the fee between lawyers (not in the same firm) if the client consents in writing and the lawyers' assume joint responsibility for the representation.<sup>48</sup> While the amount of work done by each is no longer a factor, the total fee must still be reasonable. However, surprisingly, the lawyers need not disclose to the client the share that each lawyer will receive.

Florida's New Rules continue to allow the acceptance of credit cards but prohibit any additional fee for their use. Finally, the comment section of 4-1.5 expresses the Florida Bar's long-standing policy of encouraging the use of arbitration or mediation procedures if a fee dispute should arise between attorney and client.

46. *Id.* at Rule 4-1.5(d)(3).

47. *Id.* at Rule 4-1.5(d)(1)(4) (1986).

Florida attorneys should also note that New Rule 4-1.5 requires that a *Statement of Client's Rights* be given to prospective clients before they enter into a contingent fee agreement. If a client believes that an attorney has charged an excessive or illegal fee, the client is offered the opportunity to contact The Florida Bar via a telephone number supplied with the *Statement of Client's Rights*.

The New Rules also mandate that each contingency fee contract contain two provisions. The first provision acknowledges the client's receipt of the *Statement of Client's Rights*. The second provision informs the client of his or her opportunity to cancel the contract by written notification to the attorney within three business days.

48. FLORIDA NEW RULES Rule 4-1.5(e) (1986).

**D. Confidentiality (Rule 4-1.6)**

Confidentiality was an area of major controversy during the American Bar Association debates as well as during Florida's Busey Committee meetings on this Model Rule. Early ABA drafts required disclosure of a client's planned criminal conduct or of criminal conduct which had continuing consequences. However, the final draft adopted by the American Bar Association strictly limited the disclosure of client information. This requirement of confidentiality, one of the strongest themes of the American Bar Association *Model Rules*, is based upon the belief of the American Bar Association's General Assembly that confidentiality and resultant client trust is the cornerstone of the American legal system.

Florida, joined by several other states, rejected this argument. In fact, Florida's negative ABA General Assembly vote on the *Model Rules* was based upon its rejection of this philosophy. Most of the states which have adopted versions of the *Model Rules* (or which are far along in the adoption process) have also rejected the ABA's position with regard to the absolute supremacy of confidentiality.<sup>49</sup>

Florida's *Code of Professional Responsibility* requires disclosure of a client's intent to commit any crime.<sup>50</sup> The Model Rule for the Florida Bar continues and expands this disclosure requirement. The American Bar Association Rules only permit disclosure of criminal conduct likely to result in death or substantial bodily harm or when necessary to collect an attorney's fee.<sup>51</sup> Florida's version of the Rules opted for mandatory disclosure to prevent the client from committing any crime<sup>52</sup> or to prevent other acts which while no longer criminal might result in death or substantial bodily harm to another.<sup>53</sup> This second required disclosure supplements Florida's long-standing disclosure rule, adding mandatory disclosure of any act with continuing consequences which might result in death or substantial bodily harm.<sup>54</sup>

49. Of 17 states adopting a version of the Model Rules to date, a majority have required or permitted more disclosure of the criminal plans of their clients.

50. FLORIDA'S CODE DR 4-101 (1970).

51. ABA MODEL RULES Rule 1.6(b)(1)(2).

52. FLORIDA NEW RULES Rule 4-1.6(1) (1986).

53. *Id.* at Rule 4-1.6(b)(2).

54. The classic example of a past act with continuing consequences would be the "girl in the box": the kidnapped heiress buried underground awaiting release upon payment of ransom. Another example of a past act with continuing consequences is a corporation's past pollution of an aquifer which has the current consequence of polluting a

"Permissive" disclosure is now allowed in several categories by Florida's New Rules. A lawyer may reveal a client's confidences when necessary to serve the client's interest,<sup>55</sup> to assist the lawyer in responding to charges or claims arising from representation of the client,<sup>56</sup> or to assist one to comply with the *Rules of Professional Conduct*.<sup>57</sup> When required to disclose the confidences of a client by a tribunal, a lawyer may but is not required to exhaust all appellate remedies before disclosure.<sup>58</sup>

It is important to note that the confidences covered by rule 4-1.6 expand the net of protected material beyond the lawyer-client privilege of *Florida Evidence Code* section 90.502.<sup>59</sup> The Rules define confidentiality as applying to all matters *relating* to the representation of a client, whatever its source,<sup>60</sup> and not just the confidences and secrets protected by Florida Statutes section 90.502.

#### E. *Conflict of Interest (Rules 4-1.7, 4-1.8, 4-1.9)*

In accepting a new client, a lawyer should always be aware of the potential for conflict with a prior or existing client, or with the attorney's own interests. Courts exhibit a strong prejudice against even potentially conflicting representation. The policy reason for this prejudice is quite simple. Courts are most concerned about divided loyalty on the part of an advocate or even the appearance of a divided loyalty. Practitioners are well-advised to refuse a case (no matter how attractive) if a conflict appears at the start of a case and to withdraw if a conflict occurs during the case.<sup>61</sup>

The "general" conflict rule is 4-1.7. This rule instructs an attorney to avoid representation against the interest of one client on behalf of another client even if the matter in question is unrelated.<sup>62</sup> Furthermore, an attorney may not represent a client if the attorney's interests or responsibilities to another party will restrict the attorney's represen-

---

city's water system.

55. FLORIDA NEW RULES Rule 4-1.6(c)(1) (1986).

56. *Id.* at Rule 4-1.6(c)(4).

57. *Id.* at Rule 4-1.6(c)(5).

58. *Id.* at Rule 4-1.6(d).

59. FLA. STAT. § 90.502 (1985).

60. FLORIDA NEW RULES Rule 4-1.6(a) (1986).

61. *Id.* at Rule 4-1.7 Comment: Conflicts in Litigation.

62. *Id.* at Rule 4-1.7(a).



tation of that client.<sup>63</sup> It should be noted that these are two distinctly different situations. The first prohibition is more absolute. An attorney is prohibited from taking sides against a client. The second involves an attorney's professional judgment which may be limited by his interest or responsibilities to another. In both instances, this rule permits a client to consent to this potentially conflicting representation after consultation.<sup>64</sup> However, an attorney may not request the client to consent if the attorney reasonably believes the potential conflict will adversely affect his representation of the client.<sup>65</sup> Case law in this area also directs the practitioner to proceed with caution.<sup>66</sup>

Somewhat more subtle areas regarding the representation of a client and the potential for conflict follow.

### 1. *Third Party Interests (Rule 4-1.8(f))*

An attorney may occasionally find his or her fee paid by a third party to guarantee representation of a client. There is nothing inherently unethical about such payment but it may be subject to scrutiny by the courts if there is a suggestion of a divided loyalty.<sup>67</sup> It is clear, however, that the client's interest must guide the attorney, and not the interest of the party who is paying for the client's representation. Third-party payment is always subject to the following three provisos. The client must always consent to the third-party payment;<sup>68</sup> the attorney's loyalty to the client may not be compromised by this payment;<sup>69</sup> and the lawyer-client confidential relationship<sup>70</sup> must always be protected.

63. *Id.* at Rule 4-1.7(b).

64. *Id.* at Rule 4-1.7(b)(2).

65. *Id.* at Rule 4-1.7(a)(1).

66. *See, e.g.,* Cinema 5 Ltd. v. Cinerama, Inc. 528 F.2d 1384 (2d Cir. 1976), a civil case, or Holloway v. Arkansas 435 U.S. 475 (1978), a criminal case.

67. Prosecutors in a criminal case may also be interested in the name of the party paying for the client's representation. This is especially true in illegal drug cases. This topic, however, is beyond the scope of a chapter on legal ethics.

68. FLORIDA NEW RULES Rule 4-1.8(f)(1) (1986).

69. *Id.* at Rule 4-1.8(f)(2).

70. *Id.* at Rule 4-1.8(f)(3).

## 2. *Guilty Pleas and Settlement Offers when Representing Two Clients (Rule 4-1.8(g))*

In the extraordinary event of permissible dual representation, the case resolution will often be a plea bargain or settlement arrived at between the defense attorney and the prosecutor, or the plaintiff's attorney and defense counsel. The Rules attempt to guarantee loyalty to each individual client.<sup>71</sup>

An attorney is required to insure that each client's interests are treated separately in plea or settlement agreements. Aggregate settlement or plea agreements are not permitted, and neither is bargaining one client's interest against the other. This bargaining would present a clear conflict and the attorney should immediately attempt to withdraw and seek new representation for each client. If, however, the agreement is fair to both clients, it is possible to represent two (or more) clients if each consents after full and complete consultation.

## 3. *Attorney Family Relationships (Rule 4-1.7(d))*

An area of growing concern is the potential for conflict when lawyers on opposing sides are related to one another (for example, husband/wife, parent/child). While a client may consent to this representation, it is probably the wisest course to transfer the case to another member of the same law firm. This may be done despite imputed disqualification,<sup>72</sup> as this "in-firm" transfer is specifically permitted by the rules.<sup>73</sup> To clearly understand the policy reasons for this rule one need only view the classic film *Adam's Rib*, in which Katherine Hepburn portrays a defense attorney and Spencer Tracy portrays a prosecutor who is her husband. A recent California case suggested that the same exclusion might apply when opposing counsel were dating each other over an extended period of time and they failed to disclose this fact to the defendant.<sup>74</sup>

## 4. *Media Rights (Rule 4-1.8(d))*

In a high profile practice of law, particularly criminal law, the op-

---

71. *Id.* at Rule 4-1.8(g).

72. *Id.* at Rule 4-1.10.

73. *Id.* at Rule 4-1.7(d).

74. *See People v. Jackson*, 167 Cal. App. 3d 829, 213 Cal. Rptr. 521 (1985).

portunity for the sale of media rights (books, TV, etc.) may arise. This was true for the attorney who represented the "Son of Sam" killer in New York as well as for the attorneys who have represented other notorious criminal defendants.<sup>76</sup> At first, it may not appear obvious why the sale of a "good story" is prohibited by the rules which regulate conflict of interest. However, a conflict between an attorney and a client may arise from a media rights agreement. The attorney will now have an interest in the outcome of the case (e.g., a plea agreement might detract from the value of the book sales) and the attorney may no longer have an undivided loyalty in representing his or her client. This rule is absolute (the client may not waive its operation) and continues until the conclusion of the representation of the client. Nothing in the rule, however, seems to prohibit "subsequent" negotiation with the client nor sale of the lawyer's own story regarding the case "after" representation has ended.

### 5. *Conflict of Interest: Former Client (Rule 4-1.9)*

This rule, which has no direct counterpart in the Code,<sup>76</sup> prohibits a lawyer from appearing against a former client in a "substantially related matter,"<sup>77</sup> or when a new client's interest will be "materially adverse"<sup>78</sup> to a previous client's interest. However, a previous client is permitted to consent to an attorney's appearance for a new client via a full and informed disclosure of the possible conflicts.<sup>79</sup> An attorney is not prohibited from representing another party in a "wholly distinct problem."<sup>80</sup>

The essence of the "conflict of interest" rule is noted in the comment section, which declares that "subsequent representation can be justly regarded as a changing of sides."<sup>81</sup> Lastly, the rule prohibits an attorney from using information gained by representing a former client to the detriment of that client in a later action.<sup>82</sup> This information may

---

75. See, e.g., *Conflict of Interests When Attorneys Acquire Rights to the Client's Life Story*, 6 J. LEGAL PROFESSION 299 (1981).

76. But see FLORIDA'S CODE DR 5-105c and EC 4-6 (1970).

77. FLORIDA NEW RULES Rule 4-1.9(a) (1986).

78. *Id.*

79. *Id.*

80. *Id.* at Rule 4-1.9 Comment.

81. *Id.*

82. FLORIDA NEW RULES Rule 4-1.9(b) (1986).

be used, however, when it has "become generally known."<sup>83</sup>

## 6. *Imputed Disqualification (Rule 4-1.10)*

When a lawyer is prohibited from taking a case or continuing to represent an individual by any disqualification under Rules 4-1.7, 4-1.8, or 4-1.9, any other member of the lawyer's firm shall also be prohibited from representing this individual. This is subject to the previously mentioned exception for familial relationships<sup>84</sup> and to some qualification regarding the permissive client waiver of the disqualifying rules.<sup>85</sup> Imputed disqualification operates quite strictly. An attorney is well-advised to consider the possibility of conflict as soon as possible when establishing a new relationship or in continued representation of a client. Failure to do so may result in significant damage to the rights of the client as well as a frustrating loss of time and effort to the practitioner.

## 7. *Successive Government and Private Employment and the Activities of Former Judge or Arbitrator (Rules 4-1.11 and 4-1.12)*

These rules apply the general conflict principles mentioned in the preceding sections to successive government and private employment and the subsequent employment of a former judge or arbitrator. The first rule (4-1.11) attempts to balance the right of former government lawyers to seek meaningful employment after leaving government service, with the right of the public to be protected from undue influence on government lawyers with future plans for private employment. This rule rather closely tracks the other conflict rules and is also quite similar to DR 9-101(b) of the Code. However, 4-1.11 contains a new provision which allows a government agency to waive a conflict where appropriate and in the best interest of the government agency. While this provision was subject to considerable debate, it was the belief of the drafting committee that a government lawyer should be placed at no greater disadvantage than lawyers in private practice experiencing a conflict.

Rule 4-1.12 regarding the activities of a former judge or arbitrator

---

83. *Id.*

84. *Id.* at Rule 4-1.7(d).

85. *Id.* at Rule 4-1.7(a)(2) and 4-1.7(b)(2).

is quite similar to Rule 4-1.11 and includes judges, judges *pro-tempore*, referees, special masters, hearing officers and other quasi-judicial or part-time judges.<sup>86</sup> The rule prohibits a judge or adjudicative officer from appearing in a matter in which they “participated personally and substantially as a judge.”<sup>87</sup> However, the rule permits representation where all parties consent. A judge or adjudicative officer is also prohibited from attempting to gain employment from those appearing before the judge.<sup>88</sup> This rule is quite similar to Code section DR 9-101(a). However, it is considerably more comprehensive and allows representation if all clients consent. The Code does not allow the clients to consent to an attorney’s representation of them where the attorney handled their matters as a judge.

#### F. *The Organization as a Client (Rule 4-1.13)*

This rule considers the relationship between an attorney and an organization; for example, a corporation or government agency. The rule defines the attorney’s client as the organization;<sup>89</sup> that is, the “entity” itself is the client of the attorney rather than a specific individual. The attorney works through the constituents of the corporation in proceeding with the entity’s representation.<sup>90</sup> Interestingly, the rule currently allows the attorney to represent the corporation and its individual constituents where there is no conflict between their interests.<sup>91</sup>

The body of this rule offers direction for an attorney on how best to proceed when the organizational components are acting contrary to law or contrary to the best interests of the organization itself.<sup>92</sup> An attorney is directed to proceed in a manner which will “minimize disruption of the organization and the risk of revealing information.”<sup>93</sup> This rule offers a series of increasingly active alternatives which culminate in permissive resignation if the organization refuses to correct its action.<sup>94</sup>

Nothing in this rule will limit or increase a lawyer’s responsibili-

---

86. *Id.* at Rule 4-1.12 Comment.

87. *Id.* at Rule 4-1.12(a).

88. *Id.* at Rule 4-1.12(b).

89. *Id.* at Rule 4-1.13(a).

90. *See, e.g.*, *Upjohn Co. v. United States*, 449 U.S. 383 (1981).

91. FLORIDA NEW RULES Rule 4-1.13(e) (1986).

92. *Id.* at Rule 4-1.13(b).

93. *Id.*

94. *Id.* at Rule 4-1.13(c).

ties under rules such as 4-1.6, on Confidentiality, and 4-1.2(d), regarding the use of a lawyer's services in a crime. This rule has no real counterpart in the *Code of Professional Responsibility*, and for the first time specifically addresses the special problems in the representation of an organization.

### G. *Clients with Disabilities (Rule 4-1.14)*

An attorney should be especially sensitive to the problems of a client suffering a "disability" such as mental illness or minority. The rules suggest maintaining as normal a relationship as possible with the client subject to the special needs of their disability.<sup>95</sup> When necessary, a lawyer is directed to seek professional evaluation and advice to adequately assist in representing the client's rights.

The attorney involved in representing a juvenile, for example, must be cognizant of the fact that while young people are often quite sophisticated (even at a very tender age) and deserve thoughtful consideration of their opinion, they may be unable to make all decisions regarding their legal representation without assistance. The same is also true of clients suffering from mental disease or retardation.

For this special client (in addition to the normal demands of representation), the lawyer may become a de facto guardian. As much as possible, the lawyer should follow the client's wishes, paying special attention to the maintenance of full and detailed communication with his client. Although the rules specifically suggest that an attorney seek guidance from an appropriate diagnostician when the client's condition requires,<sup>96</sup> this raises the problem of disclosure of the client's condition during the course of the representation. For example, in a criminal case, a court so informed may commit a client who would otherwise go free.

There are no absolute answers in this area. However, the criminal practitioner is advised to be alert to the possibility that their client may be suffering a disability which requires special attention and care.

### H. *Safekeeping of Property (Rule 4-1.15)*

This rule, which is substantially similar to Florida's *Code of Pro-*

---

95. *Id.* at Rule 4-1.14.

96. *Id.* at Rule 4-1.14(b).

*Professional Responsibility*<sup>97</sup> and was redrafted by Florida's Supreme Court, discusses the lawyer's responsibility to keep in trust (in a separate bank account or otherwise) clients' or third persons' funds and property in the lawyer's possession.<sup>98</sup> The rules also require an attorney to comply with the Bar's proposed rules regarding trust accounting procedure<sup>99</sup> and requires strict adherence to the lawyer's fiduciary responsibilities. While this rule appears obvious, violation of this rule and the Bar's requirements for trust accounting is a common cause for attorney discipline.

### I. *Withdrawal from the Case (Rule 4-1.16)*

Declining or terminating representation of a client includes withdrawal immediately before or during trial. A client has the right to fire his or her lawyer at any time although the client remains responsible for paying for the lawyer's fair services to that point. Likewise, a lawyer may withdraw at any time during representation if the client demands that the lawyer engage in conduct that is illegal or which violates the *Rules of Professional Conduct* or law.<sup>100</sup> Of course, once a notice of the appearance has been filed, withdrawal is contingent upon the permission of the court. Said permission is unlikely to be granted during a trial except for a very compelling reason. Compelling reasons include an attorney's physical or mental inability to proceed.<sup>101</sup> Even at trial, however, a lawyer may withdraw from representing a client with the court's permission if this can be accomplished without serious damage to the client's position.<sup>102</sup> Among the factors permitting this withdrawal would be: the client has used the lawyer's services to perpetrate a crime or fraud;<sup>103</sup> the client insists upon pursuing an objective that the lawyer considers repugnant or imprudent;<sup>104</sup> the client fails to fulfill an obligation to the lawyer;<sup>105</sup> the representation results in an unrea-

---

97. See FLORIDA'S CODE DR 9-102 (1970).

98. FLORIDA NEW RULES Rule 4-1.15(a) (1986). This rule suggests that funds be kept in a separate bank account unless the client "specifically instructs, in writing" that these funds be held "other than in a bank account."

99. *Id.* at Rule 4-1.15(d).

100. *Id.* at Rule 4-1.16(a).

101. *Id.* at Rule 4-1.16(a)(2).

102. *Id.* at Rule 4-1.16(b).

103. *Id.* at Rule 4-1.16(b)(2).

104. *Id.* at Rule 4-1.16(b)(3).

105. *Id.* at Rule 4-1.16(b)(4).

sonable financial burden on the lawyer;<sup>106</sup> or other good cause.<sup>107</sup> Even with good cause shown, when ordered to do so by a tribunal, a lawyer is required to continue representation.<sup>108</sup>

An attorney is under no obligation to accept a paying client.<sup>109</sup> Monetary considerations may affect this decision, but the creation of a lawyer-client relationship should be a matter of choice for both parties. Court-appointed attorneys are not always free to make such choices.<sup>110</sup> Before agreeing to represent a client, an attorney should carefully consider his or her decision. Attorneys may find themselves tied to the client and unable to withdraw even if the client fails to show up for trial or fails to meet the fee. Also, the Rules mandate a lawyer not represent a client if that representation will require a violation of the *Rules of Professional Conduct* or law, or if the lawyer is physically or mentally unable to adequately represent the client.<sup>111</sup>

An attorney who is allowed to withdraw from representation is directed to assist the client in minimizing any negative consequences resulting from the withdrawal.<sup>112</sup> Finally, Florida's Proposed Rules direct an attorney to return any unused portion of an advanced fee upon withdrawal, less any earned or "reasonable, non-refundable fee" which was originally agreed to by the parties.<sup>113</sup>

## VI. The Attorney as Counselor — Article Two

Article Two of the proposed Rules discusses the role of attorney as counselor. The attorney-counselor may serve as advisor,<sup>114</sup> intermediary,<sup>115</sup> or evaluator for third persons.<sup>116</sup>

106. *Id.* at Rule 4-1.16(b)(5).

107. *Id.* at Rule 4-1.16(b)(6).

108. *Id.* at Rule 4-1.16(c).

109. Neither the Code nor the Rules suggest accepting a paying client unless both parties agree to the representation.

110. FLORIDA NEW RULES Rule 4-6.2 (1986).

111. *Id.* at Rule 4-1.16.

112. *Id.* at Rule 4-1.16(d).

113. *Id.* at Rule 4-1.16 Comment.

114. *Id.* at Rule 4-2.1.

115. *Id.* at Rule 4-2.2.

116. *Id.* at Rule 4-2.3.



### A. *The Attorney as Advisor (Rule 4-2.1)*

This rule recognizes that an attorney during the representation of a client may offer advice which exceeds the scope of strictly legal representation. "An attorney may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation."<sup>117</sup> The comment section to this rule points out that advice which is limited to the law may be of little value to a client when other factors may play a much greater role in a client's decision-making. Moral and ethical advice may be very important to a full and complete representation of a client. When the advice which is required exceeds the attorney's experience, the comment to 4-2.1 directs the attorney to suggest other professional help for their client. This rule has no counterpart in the *Code of Professional Responsibility*, but mirrors the reality of practice by recognizing that there are many roles of the modern attorney beyond that of litigator.

### B. *The Attorney as Intermediary (Rule 4-2.2)*

In many situations an attorney is called upon to represent "the situation" and thereby represent two or more individuals with potentially conflicting interests. This rule specifically excludes the attorney acting as arbitrator or mediator and suggests the difficulty of representing parties of conflicting interests. However, there will be situations where the attorney as intermediary will best solve the needs of the several clients. For example, an attorney may be called upon to form a business or arrange for the distribution of property in the settling of an estate. In any event, an attorney must fully explain his or her role to each client and receive their knowing consent.<sup>118</sup> When forced to withdraw, the intermediary must withdraw from representation of *all* clients. This is necessary even if only one client has brought an action for the attorney's withdrawal. It is clear that an attorney must seek to avoid the confidentiality and privilege conflicts which could arise should he or she fail to withdraw.<sup>119</sup>

This rule also has no counterpart in the earlier Code, and, once again, recognizes the new and varied roles filled by attorneys today.

---

117. *Id.* at Rule 4-2.1.

118. *Id.* at Rule 4-2.2(a)(1).

119. *Id.* at Rule 4-2.2(c).

### C. *Evaluations for the Use of Third Parties (Rule 4-2.3)*

This rule considers lawyer's activities such as opinion letters. Opinion letters, while conducted for the attorney's client, will often be used by a third party. If the attorney is limited in her ability to obtain information for this evaluation, she is required to report any limitations for the benefit of the third parties.<sup>120</sup> Perhaps the most interesting question posed by this rule remains unanswered by it; that is, what is the professional relationship between the attorney and the third-party client who relies upon the attorney's opinion? The comment section to the rule simply says "that legal question is beyond the scope of this rule."<sup>121</sup> This rule is new, and was not considered by the *Code of Professional Responsibility*.

## VII. Trial Practice — Article Three

"A lawyer's responsibility as a representative of clients, and also to the legal system and as a public citizen are usually harmonious. Vigorous advocacy is not inconsistent with justice."<sup>122</sup> Many of the proposed rules arguably affect trial practice situations.<sup>123</sup> However, Article Three speaks directly to the lawyer as an advocate, and includes sections on: trial publicity;<sup>124</sup> lawyers as witnesses;<sup>125</sup> advocacy in nonadjudicative proceedings;<sup>126</sup> fairness to opposing counsel and parties;<sup>127</sup> meritorious claims or contentions;<sup>128</sup> expediting litigation;<sup>129</sup> and the central rule, 4-3.3, candor toward the tribunal. During the ABA debate and the Florida adoption process, Rule 4-3.3 remained the bottom-line limit on a lawyer's protection of the confidentiality of his client and the minimum standard of his responsibility as an officer of the court.

---

120. *Id.* at Rule 4-2.3(b).

121. *Id.* at Rule 4-2.3 Comment.

122. FLORIDA NEW RULES *Preamble* (1986).

123. *See, e.g.*, FLORIDA NEW RULES Rules 4-1.2 and 4-1.3.

124. FLORIDA NEW RULES Rule 4-3.6 (1986).

125. *Id.* at Rule 4-3.7.

126. *Id.* at Rule 4-3.9.

127. *Id.* at Rule 4-3.4.

128. *Id.* at Rule 4-3.1.

129. *Id.* at Rule 4-3.2.

### A. *Meritorious Claims and Contentions (Rule 4-3.1)*

Rule 4-3.1 suggests that while a client has a right to the full benefit of representation, an attorney is prohibited from abusing the legal process. The benefit of any ambiguity and potential for change in the law should always be given to one's client. However, action taken primarily to harass, injure or embarrass the other party is prohibited by the rule.<sup>130</sup>

Rule 4-3.1 is similar to the Florida Code's DR 7-102 with some difference in emphasis only. Rule 4-3.1 requires that the litigation not be "frivolous," while the Code prohibited conduct designed "merely to harass and maliciously injure another."<sup>131</sup>

### B. *Expediting Litigation (Rule 4-3.2)*

Rule 4-3.2 establishes the Rules' general policy "to expedite litigation."<sup>132</sup> However, this policy is limited by the requirement that an attorney's efforts must be consistent with the interest of the client. A lawyer's convenience, or an attempt to frustrate the opposing parties' rights, are not sufficient grounds for delay. Also, the fact that this delay is typical in the jurisdiction, or that the client may realize financial benefit from the delay, are not sufficient grounds for delaying litigation. This is similar to the Code's DR section 7-102(a)(1), although the phrase "legitimate interest of the client"<sup>133</sup> is added to the Model Rule.

This rule requires an attorney to "make reasonable efforts to expedite litigation consistent with the interests of the client."<sup>134</sup> A litigator does not appear to be significantly affected by this rule. If delay is a valid technique (which would serve the interests of the client), this rule permits such delay. However, rules of procedure, constitutional rights and court practices may require an attempt at an expeditious resolution of a case. Nothing in the Rules makes it a violation of professional conduct for criminal attorneys, acting in the best interests of their clients, to delay a case.

---

130. *Id.* at Rule 4-3.1 Comment.

131. FLORIDA'S CODE Rule 3.1 (1970).

132. FLORIDA NEW RULES Rule 4-3.2 (1986).

133. *Id.* at Rule 4-3.2 Comment.

134. *Id.* at Rule 4-3.2.

### C. *Candor Toward the Tribunal (Rule 4-3.3)*

This rule requires an attorney to disclose important information or relevant law to a court, or to correct a false statement of the same despite the requirement of confidentiality.<sup>135</sup> Although the past conduct of a client is still protected, Florida's rule on attorney-client confidentiality requires significantly more disclosure than the ABA Model Rule. Both ABA and Florida confidentiality rules, however, are subject to the mandate of 4-3.3 (ABA Rule 3.3) requiring disclosure to the tribunal.<sup>136</sup>

#### 1. *Legal Argument*

A lawyer must always be scrupulously honest in presenting the law to a court.<sup>137</sup> This rule requires an advocate to disclose legal authority in the controlling jurisdiction which is directly adverse to the position of the client if it has not been disclosed by the opposing party.<sup>138</sup> This is an area of considerable concern to the courts today.

#### 2. *False Evidence*

Under no circumstance should a lawyer offer evidence which the lawyer knows to be false even if the client insists.<sup>139</sup> If false evidence has been offered and is material, the lawyer must withdraw and/or correct this false evidence.<sup>140</sup> When the evidence has been offered by the attorney's client, the client should be persuaded to withdraw that evidence. If the client refuses, the attorney must take "reasonable remedial measures."<sup>141</sup> The rules recognize that this disclosure will severely damage the lawyer-client relationship.<sup>142</sup> However, the comment says the "alternative is that the lawyer cooperate in deceiving the court, thereby subverting the truth finding process."<sup>143</sup> The rule also points

135. *Id.* at Rule 4-3.3.

136. ABA MODEL RULES Rule 3.3(b) (1983) and FLORIDA NEW RULES Rule 4-3.3(b) (1986).

137. FLORIDA NEW RULES Rule 4-3.3(a)(1) (1986).

138. *Id.* at Rule 4-3.3(a)(3).

139. *Id.* at Rule 4-3.3 Comment.

140. *Id.* at Rule 4-3.3(a)(3).

141. *Id.* at Rule 4-3.3 Comment.

142. *Id.*

143. *Id.*

out that if an attorney in a civil matter could not disclose false evidence in every case, the lawyer could be made an unwilling party to fraud on the court. It is interesting to note that the Rules recognize that the obligation may be different for a criminal defendant but are unequivocal in requiring disclosure in civil matters.<sup>144</sup> In *Nix v. Whiteside*,<sup>145</sup> the United States Supreme Court recently held that threatened disclosure of a client's lies does not violate a criminal client's sixth amendment rights.

In any event, if a civil client has offered false evidence to the court and the client cannot be convinced to rectify the same, the Rules allow an advocate to withdraw "if that would remedy the situation."<sup>146</sup> If the withdrawal will not satisfactorily remedy the problem or cannot be accomplished, disclosure must be made.<sup>147</sup>

Rule 4-3.3(c) allows a lawyer to refuse to offer any testimony or other proof which the lawyer believes is untrustworthy. This is true despite the general policy of the Rules which require client control of matters relating to representation.<sup>148</sup>

Finally, Rule 4-3.3(d) considers the advocate's special responsibilities in an *ex parte* proceeding. A lawyer is held to have a duty to disclose all material facts known to the lawyer necessary for an informed decision by the court.<sup>149</sup> Disclosure is required even if the facts are contrary to the position held by the lawyer's client. The protection of the "unrepresented" other side from what may be a significant and unfair decision is the policy basis for this rule.

Rule 4-3.3 is substantially similar to Disciplinary Rule 7-102. However, the rule clarifies the attorney's duty to rectify the use of perjured testimony or false evidence, and extends the professional judgment of the lawyer in refusing to offer evidence reasonably believed to be false.<sup>150</sup>

#### D. *Fairness to Opposing Party and Counsel (Rule 4-3.4)*

This rule considers an attorney's obligation to the opposing party

---

144. *Id.*

145. *Nix v. Whiteside*, 106 S. Ct. 988 (1986).

146. FLORIDA NEW RULES Rule 4-3.3 Comment (1986).

147. *Id.*

148. *Id.*

149. *Id.* at Rule 4-3.3(d).

150. The *ex parte* section is a new addition to the rule discussing candor to the tribunal.

and their lawyer in trial or immediately pre-trial and is directed to "fair competition" with a goal of guaranteeing the effective functioning of the adversary system.<sup>151</sup> Prohibited are: the destruction of evidence; hiding of witnesses; fabrication of evidence; failure to comply with discovery; and attempts to use irrelevant or inadmissible evidence in trial. Most of this rule calls for the judicious application of common sense. For example, the rule states that a legally made discovery request must be complied with<sup>152</sup> and that the fabrication of testimony is prohibited.<sup>153</sup> Although often ignored in practice, perhaps the most interesting sections of this rule prohibit an attorney's use of evidence known to be inadmissible.

An attorney is prohibited at trial from "allud[ing] to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence."<sup>154</sup> Thus, an attorney may not properly use the traditional tactic of asking questions that are inadmissible or irrelevant hoping the opposing party will not object. This rule also prohibits an attorney from asking inadmissible questions simply for the "effect" of the question.

An attorney is also prohibited from stating a "knowledge of facts in issue" except when the attorney has been called as a witness. For example, in closing argument an attorney is prohibited from guaranteeing the truthfulness of evidence which he or she has presented. An attorney is also prohibited from stating an opinion "as to the justness of a cause" or commenting on the credibility of the witness or the culpability of a civil litigant.<sup>155</sup>

### E. *Impartiality and Decorum of the Tribunal (Rule 4-3.5)*

This rule restates the obvious: for the court system to function properly, neither judge, jury, nor prospective juror should be improperly influenced by an advocate. Of course, influence through the presentation of evidence and the persuasive ability of an attorney is not prohibited. *Ex parte* communications are prohibited during an official proceeding. Contact with a juror after the case has ended is also prohibited.

---

151. FLORIDA NEW RULES Rule 4-3.4 (1986).

152. *Id.* at Rule 4-3.4(a).

153. *Id.* at Rule 4-3.4(b).

154. *Id.* at Rule 4-3.4(e).

155. *Id.* Rule 4-3.4 is essentially the same as DR 7-106(c)(1) — (c)(4).

hibited unless such contact is initiated by the juror.<sup>156</sup>

This rule is substantially the same as Code Disciplinary Rules 7-106, 7-108, and 7-110. The Busey Committee determined that DR 7-110(b) was more practical than the ABA Model Rule 3.5(b). Therefore, they included the complete text of DR 7-110(b) in Florida's Rule 4-3.5(b).

#### F. *Trial Publicity (Rule 4-3.6)*

The "trial publicity" rule, as redrafted by the Florida Supreme Court, details permitted and prohibited conduct by an attorney, when he or she is offering information to the media before and during trial. This is a troubling area because the interests of free speech and a fair trial conflict. This "trial publicity" rule deserves particular attention because even a cursory review of much of the popular media suggests that the dictates of this rule are rarely honored.<sup>157</sup>

Rule 4-3.6 generally prohibits any out-of-court statement which is likely to be reported by the media and might "materially prejudice" a trial.<sup>158</sup> Lawyers are also prohibited by the Florida rule from aiding another in making such a statement.<sup>159</sup> Examples of such statements are those which: relate to the character, credibility or reputation of a party;<sup>160</sup> discuss results of any test or the nature of physical evidence which might be presented at trial;<sup>161</sup> or divulge information which would be inadmissible at trial or prejudice an impartial trial.<sup>162</sup>

The "trial publicity" rule does allow certain statements to be made "without elaboration."<sup>163</sup> Statements which give general information about the claim or defense; divulge publicly-recorded information; announce that an investigation is underway; or request assistance in ob-

156. FLORIDA NEW RULES Rule 4-3.5(c) (1986).

157. An almost daily review of local television or newspapers reveals attorney comments on pending and in-trial cases contrary to the dictates of this rule.

158. FLORIDA NEW RULES Rule 4-3.6(a) (1986).

159. *Id.* The Florida Supreme Court specifically added the following proviso to 4-3.6(a): "[P]rosecutors and defense counsel shall exercise reasonable care to prevent investigators, employees, or other persons assisting in or associated with a criminal case from making extrajudicial statements that are prohibited under this rule." Very similar wording had been considered but dropped by the drafting committee from Rule 4-3.8, Special Responsibilities of a Prosecutor.

160. *Id.* at Rule 4-3.6(b)(1).

161. *Id.* at Rule 4-3.6(b)(3).

162. *Id.* at Rule 4-3.6(b)(5).

163. *Id.* at Rule 4-3.6(c).

taining evidence and information, are allowed under this rule.<sup>164</sup>

### G. *The Lawyer as Witness (Rule 4-3.7)*

The bar and courts have been long concerned about the confusion which results from an attorney serving as advocate and witness in the same trial. Therefore, this rule was adopted to prohibit an attorney from acting as an advocate in a trial where he or she is likely to be called as a witness. This rule is subject to four exceptions in Florida's *New Rules*.

Since disqualification of a lawyer is often brought by an opposing party to obtain a tactical advantage, withdrawal will not be required where it will "work a substantial hardship on the client."<sup>165</sup> However, the court will consider the foreseeability of the lawyer's need to serve as a witness in reaching its decision on disqualification.

To determine whether or not a potential for conflict exists, lawyers should determine if their testimony relates to any of the three other areas which do not require disqualification. These include: testimony on an uncontested issue; testimony relating to the nature and value of the legal services rendered in the case; and testimony having to do with a matter of formality where it is unlikely that substantial evidence will be offered in opposition.<sup>166</sup>

This rule generally tracks Florida's current Disciplinary Rules, sections 5-101(b) and 5-102. The proposed rule, however, adds a section which allows a lawyer who is required to act as a witness "to assist in trial preparation."<sup>167</sup> The Rules also do not require a firm to withdraw from representation when one member of the firm will be called as a witness.<sup>168</sup> The Florida approach suggests that this is a tactical rather than an ethical decision, and should not require withdrawal of the whole firm.

### H. *Special Responsibilities of a Prosecutor (Rule 4-3.8)*

This rule recognizes the special role of a prosecutor as spokesperson for justice, and discusses the special obligations imposed by this

---

164. *Id.* at Rule 4-3.6(c)(1) — (c)(7). Rule 4-3.6 is similar to Code DR 7-107.

165. FLORIDA NEW RULES Rule 4-3.7(a)(4) (1986).

166. *Id.* at Rule 4-3.7 Comment.

167. *Id.*

168. *Id.* at Rule 4-3.7(b).



role.<sup>169</sup> A prosecutor is directed to only bring criminal charges which are supported by sufficient probable cause.<sup>170</sup> A prosecutor is also directed to be especially sensitive to the very important constitutionally protected pre-trial rights of an unrepresented criminal defendant.<sup>171</sup> Finally, a prosecutor is directed to provide the defense with evidence and information which might "negate the guilt of the accused or mitigate the offense"<sup>172</sup> and at sentencing to disclose all mitigating information which is not privileged.<sup>173</sup> This special role of the prosecutor in the criminal justice system is in accord with prior code section DR 7-103.

### I. *Advocate in Nonadjudicative Proceedings (Rule 4-3.9)*

Although not strictly addressing a "trial situation," this rule applies the previously mentioned rules requiring honest and ethical conduct to representation before a legislative or administrative tribunal. In administrative law practice, a lawyer may be subject to regulations and procedures of an administrative tribunal. However, the *Model Rules* may subject the attorney to a standard of conduct higher than that of other non-lawyer advocates before the same tribunal. The comment section to this rule suggests that "legislatures and administrative agencies have a right to expect lawyers to deal with them as they deal with the courts."<sup>174</sup>

## VIII. Transactions with Persons Other than Clients — Article Four

This article provides guidance for an attorney's dealing with persons other than his or her client. These rules consider truthfulness in statements to others;<sup>175</sup> in communications with persons represented by

---

169. Rule 4-3.8 comment section cites to the ABA STANDARDS OF CRIMINAL JUSTICE relating to the Prosecution Function which have been adopted in Florida and provide more guidance on the specific role of the prosecutor. Prosecutors are also directed to Rule 4-3.3(d) regarding *ex parte* proceedings, Rule 4-8.4 regarding systematic abuse of prosecutorial discretion, and Rule 4-3.6(a) on extrajudicial statements.

170. FLORIDA NEW RULES Rule 4-3.8(a) (1986).

171. *Id.* at 4-3.8(b).

172. *Id.* at 4-3.8(c).

173. *Id.*

174. *Id.* at Rule 4-3.9 Comment.

175. *Id.* at Rule 4-4.1.

attorneys;<sup>176</sup> when dealing with those not represented by attorneys;<sup>177</sup> and with respect for the rights of third persons.<sup>178</sup> One should also consider Rule 4-2.3 (Evaluation for Use by Third Persons) and Rule 4-3.4 (Fairness to Opposing Party and Counsel) as relevant to material covered by this article.

A. *Duty to the Opposing Party and to Third Persons (Rules 4-3.4, 4-4.1, 4-4.2, 4-4.3, and 4-4.4)*

Rule 4-3.4, previously considered as part of the "trial" rules, contains substantial material which applies to pre-trial practice as well. The adversary system requires "fair competition" between the parties to work properly. Substantive law, procedural law and the *New Rules* require that a lawyer not hide, destroy or fabricate evidence. This applies even where no formal case yet exists.

For example, assume a crazed killer appears at a lawyer's office and drops a blood-stained knife on the lawyer's desk. No formal charges exist (the murder has not been discovered); however, the destruction of the murder weapon is a violation of ethics and law. If a potential action is reasonably foreseeable, lawyers are prohibited by the *New Rules* from hiding, destroying or fabricating evidence.<sup>179</sup> The Rules prohibit assisting others in doing that which an attorney is prohibited from doing.<sup>180</sup> Therefore, advising a client to "get rid of the knife" would also violate this rule.<sup>181</sup>

Rule 4-3.4(b), (c) and (f) prohibits assisting perjury or discouraging a witness from giving information to an adversary. A client and the client's relatives, employees or other agents are excluded from the operation of the rule if they will not be hurt by withholding information.

The Rules also require respect for the rights of third persons.<sup>182</sup> These rights should be honored whenever consistent with the role of the advocate. Naturally clients' rights must supercede the rights of the third person. However, an attorney should refrain from using tactics which "have no substantial purpose other than to embarrass, delay or

---

176. *Id.* at Rule 4-4.2.

177. *Id.* at Rule 4-4.3.

178. *Id.* at Rule 4-4.4.

179. *Id.* at Rule 4-3.4(a).

180. *Id.*

181. *Id.* at Rule 4-3.4.

182. *Id.* at Rule 4-4.4.

burden a third person.”<sup>183</sup> Furthermore, methods of obtaining evidence which “violate the legal rights” of the third parties are also prohibited.<sup>184</sup>

The rights of third parties also include the requirement for truthfulness to the third party and may include some limited disclosure.<sup>185</sup> Attorneys are prohibited from making false statements of material law or fact to third parties and are required to disclose material facts if it will help a third party avoid becoming victimized by their client’s actions. However, this disclosure requirement is subject to Rule 4-1.6.<sup>186</sup> This may be applicable to the situation where a lawyer’s client proposes a criminal activity and refuses the attorney’s advice to refrain from such action.<sup>187</sup>

#### B. *Communication with a Person Who is Represented by Counsel (Rule 4-4.2)*

This rule is substantially the same as Florida’s prior Code section.<sup>188</sup> A lawyer is prohibited from communicating with a person about the subject matter of an attorney representation. Communication not regarding the subject matter of the representation is permitted. Parties are allowed to communicate directly with each other, despite the fact they are represented by counsel. Lastly, an attorney representing a client may consent to another attorney’s communication with that person.

#### C. *Dealing with Unrepresented Persons (Rule 4-4.3)*

Rule 4-4.3 cautions attorneys to refrain from dealing with unrepresented persons.<sup>189</sup> Attorneys are best advised to avoid contact with unrepresented persons outside a formal, structured setting or a courtroom. However, if contact is initiated by an unrepresented person, the Rules permit an attorney to speak with this person. The attorney is best advised to hold this conversation in the presence of an independent wit-

---

183. *Id.*

184. *Id.*

185. *Id.* at Rule 4-4.1(b).

186. *Id.*

187. See FLORIDA NEW RULES Rules 4-1.6 and 4-4.1 (1986). Each requires disclosure to an intended victim.

188. See FLORIDA’S CODE DR 7-104(a)(1) (1970).

189. FLORIDA NEW RULES Rule 4-4.3 (1986).

ness to protect all parties. The attorney should clearly explain that he or she is not there to help the unrepresented person, and should also explain all options available to that person.

## IX. Law Firms and Associations — Article Five

This section of the *Model Rules* details the responsibilities of law firms and subordinate attorneys. It clearly discusses the responsibility of supervising lawyers,<sup>190</sup> subordinate lawyers,<sup>191</sup> and non-lawyer assistants.<sup>192</sup> This article also considers unauthorized practice of law,<sup>193</sup> a lawyer's independence,<sup>194</sup> and limitations on restriction of the right to practice.<sup>195</sup>

### A. *Law Firm and Government Office Responsibility for Professional Conduct (Rule 4-5.1)*

This rule clarifies an individual attorney's responsibility for himself as well as those he supervises to comply with the *Rules of Professional Conduct*.<sup>196</sup> Every lawyer's responsibility extends to those supervised by the lawyer including secretaries, paralegals and clerks. Ultimately the lawyer is responsible for the action of these "non-lawyer assistants" if he or she has directed them to act or permits them to act in violation of the Rules. The law firm partner or government office supervisor is also responsible for ensuring that his or her office takes reasonable steps to guarantee that all office staff observe the *Rules of Professional Conduct*. Measures to ensure compliance can range from informal support and guidance to structured seminars. Junior firm members should be encouraged to raise ethical issues. Formal mechanisms should be established within the workplace to promote this compliance. Lawyers who are required to act in a supervisory capacity have a greater obligation to ensure that the conduct of their subordinates meets the standards of the *Rules of Professional Conduct*.<sup>197</sup>

Junior associates are not, however, relieved of their individual re-

---

190. *Id.* at Rule 4-5.1.

191. *Id.* at Rule 4-5.2.

192. *Id.* at Rule 4-5.3.

193. *Id.* at Rule 4-5.5.

194. *Id.* at Rule 4-5.4.

195. *Id.* at Rule 4-5.6.

196. *Id.* at Rule 4-5.1.

197. *Id.*

sponsibility to follow the *Rules of Professional Conduct*. It is not an excuse that a supervisor has directed the action of the junior lawyer, unless the ethical issue in question is subject to a disagreement between reasonable attorneys.<sup>198</sup>

## X. Public Service — Article Six

Article Six was one of the most controversial during the ABA and Florida debate and adoption process. It discusses pro bono service,<sup>199</sup> law reform,<sup>200</sup> and legal service activities.<sup>201</sup>

### A. *Pro bono Service (Rules 4-6.1 and 4-6.2)*

This is the only rule that is purely aspirational in nature,<sup>202</sup> but does apply this pro bono “obligation” to civil and criminal matters. Lawyers are encouraged to provide free legal services to those in need who are unable to afford required legal assistance. Although the Florida public defender system has dealt with most indigent criminal representation, the criminal practitioner is still required to observe this rule by providing service to those in need of civil representation. The Florida Rules provide three ways to meet this suggested pro bono responsibility: 1) free or reduced fee representation to those of limited means; 2) service without compensation in public interest activities that improve the law, the legal system, and the legal profession; or 3) provision of financial support to Legal Aid or similar organizations.

Several times in the past few years, proposals for mandatory pro bono service have been considered and rejected by the Florida Supreme Court and the Florida Bar. While such mandatory plans have been rejected, at least one voluntary bar association (Orange County) has instituted a mandatory pro bono plan. This plan requires pro bono service or a financial assessment to support the local legal services office, and seems to operate most satisfactorily.

It is likely that the debate on mandatory pro bono service will continue in Florida. The Florida Bar's Special Commission on Access to the Legal System recently proposed a change in Rule 4-6.1, suggesting

---

198. *Id.* at Rule 4-5.2.

199. *Id.* at Rule 4-6.1.

200. *Id.* at Rule 4-6.4.

201. *Id.* at Rule 4-6.3.

202. *Id.* at Rule 4-6.1.

that the Bar make pro bono service mandatory. This change was rejected by the Board of Governors of the Florida Bar but will no doubt resurface. Since attorneys have a monopoly on access to the legal system, lively debate in this area is guaranteed for years to come.

In other states, courts have appointed attorneys (without fee or with minimal compensation) to represent indigent clients in criminal and civil matters. Such "involuntary servitude" has been gaining acceptance in many states.<sup>203</sup> Given the substantial cost counties incur when appointing special public defenders, this approach may also be a matter for future consideration in criminal cases in Florida.

The Rules encourage the acceptance of these court appointments and strongly discourage refusal or withdrawal except for "good cause."<sup>204</sup> "Good cause" means that the representation would require a violation of the rules of professional conduct; an unreasonable financial burden will be placed upon the lawyer; or "the client or the cause is so repugnant"<sup>205</sup> that the lawyer cannot adequately enter into this relationship.

### B. *Membership in Legal Services Organizations (Rule 4-6.3)*

This rule, which has no counterpart in the Code, encourages attorneys to participate in legal service organizations. However, an attorney is warned that potential conflicts can arise from such activities. Therefore, the attorney is directed to consider his or her obligations under Rule 4-1.7.<sup>206</sup>

### C. *Law Reform Activity (Rule 4-6.4)*

The "law reform activity" rule encourages attorneys to support and participate in law reform activities. An attorney is encouraged to do so even if the activities are contrary to the interests of the attorney's client. A lawyer represents the client but is not married to the client's cause. Denying lawyers participation in law reform activities would deny society the input of those best trained in this area.<sup>207</sup> If a lawyer participates in law reform activities and his client will be materially

---

203. California, for example, has accepted the constitutionality of this "involuntary servitude."

204. FLORIDA NEW RULES Rule 4-6.2 (1986).

205. *Id.*

206. *Id.* at Rule 4-6.3(a).

207. *Id.* at Rule 4-6.4 Comment.

affected by these activities, the client's relationship must be disclosed. The client need not be identified, however.

## XI. Information about Legal Services — Article Seven

Article Seven deals with the activities of a lawyer in communicating the availability of his or her services.<sup>208</sup> Among the areas discussed are attorney advertising,<sup>209</sup> solicitation,<sup>210</sup> specialization,<sup>211</sup> and law firm names.<sup>212</sup>

### A. Advertising (Rules 4-7.1, 4-7.2, 4-7.3)

State bars have reluctantly allowed advertising in response to the mandates of the United States Supreme Court and state supreme courts. Rules 4-7.1, 4-7.2, and 4-7.3 are an attempt to accomodate the hesitancy of the bar to the directives of case law.

The *New Florida Rules* allow advertising in a wide variety of media, with "truthfulness" the only limitation on a lawyer's right to advertise. Advertising is permitted by Rule 4-7.2 in all public media including telephone directories, legal directories, newspapers or other periodicals, outdoor signs, radio, television or written communication.<sup>213</sup> Florida's drafting committee was concerned about lawyers abusing the right to advertise, but concluded that the right to commercial speech was a superior interest. Considering the traditional reticence of the profession to be involved in the "business world," the drafting committee agreed that advertising helps serve the public's need for information regarding the availability and cost of legal services.

False or misleading advertising is defined in the rules as advertising which contains "a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not misleading."<sup>214</sup> Advertising is also false or misleading if a lawyer's ad creates an "unjustified expectation about results the lawyer can

---

208. *Id.* at Rule 4-4.1.

209. *Id.* at Rule 4-7.1.

210. *Id.* at Rule 4-7.3.

211. *Id.* at Rule 4-7.4.

212. *Id.* at Rule 4-7.5.

213. *Id.* at Rule 4-7.2(a).

214. *Id.* at Rule 4-7.1(a).

achieve."<sup>215</sup> An attorney's advertisement should not compare "the lawyer's services with other lawyers' services unless the comparison can be factually substantiated."<sup>216</sup> Prohibited communications include advertisements which discuss the results obtained on behalf of a particular client, the lawyer's win/loss record, or client endorsements.<sup>217</sup> Beyond that, little regulation and little guidance is offered to an attorney regarding the content or format of an advertisement. Since "taste is a highly subjective matter"<sup>218</sup> advertisements should "comport with the dignity of the profession."<sup>219</sup>

The comment to Rule 4-7.2 discourages the use of slogans; gimmicks or other garish techniques; large electrical or neon signs; or other extravagant media.<sup>220</sup> Despite the specific addition of this commentary section to Florida's rules (it does not exist in the Model Rules), it is questionable if such guidance is more than aspirational at best.

For example, an Ohio Bar rule which prohibited most advertising illustrations and cautioned against an attorney giving advice regarding specific legal problems in their advertisements was recently overturned by the United States Supreme Court in *Zauderer v. Office of Disciplinary Counsel*.<sup>221</sup> Zauderer, an Ohio attorney, used an illustration of a Dalkon Shield in a newspaper advertisement which asked, "Did you use this IUD? [This device is] . . . alleged to have caused [many injuries]. Do not assume it is too late to take legal action against the shield's manufacturer."<sup>222</sup>

The Supreme Court held that this advertisement was protected commercial speech, and the Ohio Bar could only prohibit false and misleading advertisements.<sup>223</sup> Absent a showing on the part of the state that the regulation prohibiting this advertisement served a substantial governmental interest, the Court indicated it was inclined to allow all advertisements meeting the standards of New Florida Rule 4-7.1.

Recently, the United States Supreme Court rejected an Iowa Supreme Court ruling which had prohibited television advertisements by

215. *Id.* at Rule 4-7.1(b).

216. *Id.* at Rule 4-7.1(c).

217. *Id.* at Rule 4-7.1 Comment.

218. *Id.* at Rule 4-7.2 Comment.

219. *Id.*

220. *Id.*

221. 105 S. Ct. 2265 (1985).

222. *Id.* at 2271.

223. *Id.*



lawyers,<sup>224</sup> thereby reaffirming the almost unlimited access to the public by truthful attorneys.

Only a few additional restrictions are mandated by Rule 4-7.2(b) and 4-7.2(d). A copy of an advertisement or written communication must be kept for at least three years after it was last used, along with a record of to whom it was sent and where. This "communication" by an attorney also must include the name of at least one lawyer responsible for its content. Florida's Rules Drafting Committee debated but abandoned the "laundry list format" of the Code's DR 2-101 in favor of a more defensible general standard of truthfulness. The Committee correctly felt that *In re R.M.J.*<sup>225</sup> and *Bates v. State Bar of Arizona*<sup>226</sup> prohibited most specific limitations on advertising without a showing of a commensurately compelling state interest.

The Florida Rules also permit lawyers to communicate their fields of practice subject to restrictions contained in Rule 4-7.4. While lawyers may not state they are specialists in a given field, they may state those areas in which they choose to practice. Exceptions to this rule are attorneys in patent and admiralty practice, and those lawyers who are certified under Florida certification or designation plans.

Law firms in Florida continue to have the option of using trade names or other professional titles. Trade names, however, must not be misleading nor may lawyers state or imply that they practice in a partnership or other organization when that is not the fact.<sup>227</sup>

### B. Solicitation (Rule 4-7.3)

Solicitation, the direct contact with prospective clients, is an area more closely regulated by the courts than advertising. There is a long history of prohibition of this conduct by the Florida and United States Supreme Courts. However, the United States Supreme Court's decision *In re R.M.J.*, and the Florida Supreme Court's decision in *Florida Bar v. Schreiber*,<sup>228</sup> have begun to reshape this area of regulation. Schreiber, a Dade County Commissioner and attorney, sent letters to international trade companies explaining the availability of his firm for legal

---

224. See *Humphrey v. Commission of Professional Conduct*, 105 S. Ct. 2693 (1985). At time of publication the Iowa Supreme Court on rehearing has still strictly limited such advertising.

225. 455 U.S. 191 (1982).

226. 433 U.S. 350 (1977).

227. FLORIDA NEW RULES Rule 4-7.5 (1986).

228. 407 So. 2d 595 (Fla. 1981), *vacated on reh'g*, 420 So. 2d 599 (Fla. 1982).

services in immigration matters. In light of the Supreme Court's *In re R.M.J.* ruling, the Florida court reluctantly allowed this relatively non-intrusive solicitation subject to certain guidelines contained in direct-mail rules issued by the court in January 1984.<sup>229</sup>

Florida's Rules continue the generalized prohibition against solicitation of new clients when a lawyer's profit motive is the primary reason for this solicitation. Solicitation of this type is prohibited whether it is made in person, by telephone or in writing.<sup>230</sup> However, solicitation for social causes or the public welfare (that is, without the primary motive of financial reward) is still permitted by Rule 4-7.3 and by *In re Primus*.<sup>231</sup>

Now targeted direct-mail advertisements, which are often characterized as solicitation, are permitted. However, direct-mail advertisement must be marked "advertisement" on the envelope and at the top of each page. Furthermore, the word "advertisement" must be in type one size larger than the largest type<sup>232</sup> in the communication.

Even this permitted "solicitation" is subject to the requirement of truthfulness and must avoid "coercion, duress, fraud, over-reaching, harrassment, intimidation or undue influence."<sup>233</sup> Further, those known to be represented in a specific matter may not be contacted nor may those who do not wish to receive communications from the lawyer.<sup>234</sup>

The most unsupportable section of the committee draft solicitation rule prohibited mail contact with those known to be in need of legal services in a specific matter (e.g., direct-mail contact with the families of airplane accident victims). A growing body of case law seems to permit such conduct. For example, New York State's highest court recently overruled a Bar rule (similar to Florida's) which prohibited targeted direct mail.<sup>235</sup> Responding to this the Florida Supreme Court

229. *Id.* Arguably, this alters the limitations required by FLA. STAT. § 877.02 (1985).

230. FLORIDA NEW RULES Rule 4-7.3(a) (1986).

231. 436 U.S. 412 (1978).

232. The Florida Supreme Court redrafted 4-7.3(b)(1) to include larger type and 4-7.3(b)(2) to include the mailing of a copy of all written solicitations to staff counsel at bar headquarters.

233. FLORIDA NEW RULES Rule 4-7.3(B)(2)(c).

234. *Id.* at Rule 4-7.3(B)(2)(a) and Rule 4-7.3(B)(2)(b).

235. See *In re Von Wiegen*, 63 N.Y.2d 163, 481 N.Y.S.2d 40, 470 N.E.2d 838 (1984), *on remand*, 108 A.D.2d 1012, 485 N.Y.S.2d 399 (N.Y. App. Div.), *cert. denied sub nom.* Committee on Professional Standards v. Von Wiegen, 105 S. Ct. 2701 (1985). See also Messing, *The Latest Word on Solicitation*, FLA. BAR J., May 1986, at

wisely concluded that this targeted mailing could not be prohibited. In its rewriting of this Rule the court proposed five rules<sup>236</sup> regulating such communication and said it would revisit this area if a pattern of abuse is established.

The danger of "ambulance chasing," exemplified by *Ohralik v. Ohio State Bar Association*,<sup>237</sup> is the basis for the rules prohibiting solicitation. Ohralik, an Ohio attorney, solicited the parents of one of the drivers injured in an automobile accident. The parents suggested that whether an attorney would be hired would be the injured daughter's decision. Ohralik approached the daughter at the hospital and offered to represent her. She would not sign an agreement until conferring with her parents.

The Ohio attorney then went back to the parents' home with a tape recorder concealed under his raincoat. He examined the parents' insurance policy and discovered that the daughter's passenger also could benefit from the policy. Ohralik eventually got the daughter to sign a contract with him, and an oral agreement with the daughter's passenger to allow him to represent her as well.

Eventually, each of these parties discharged Ohralik and filed a formal complaint against him with the Ohio Bar's Grievance Board. The Board rejected the attorney's defense that his conduct was protected under the first and fourteenth amendments. The Supreme Court of Ohio, as well as the United States Supreme Court, adopted the findings of the Board.

This type of conduct by an attorney still invokes the Rules' strongest limits on a lawyer's right to communicate the availability of his or her services. In this situation the possibility of undue influence, intimidation and overreaching<sup>238</sup> is without limit, while public scrutiny or regulation is almost impossible.

### C. *Communication of Fields of Practice (Rule 4-7.4)*

This rule allows attorneys to communicate to the public the areas of law in which they do and do not practice. However, it prohibits attorneys from stating that they are specialists except for a few limited

---

17.

236. See FLORIDA NEW RULES Rule 4-7.3(b)(2)a-e (1986).

237. 436 U.S. 477 (1978).

238. *Id.* at 464.

areas such as patent practice;<sup>239</sup> admiralty;<sup>240</sup> certification,<sup>241</sup> as set forth in Article 21 of the integration rule and Article 14 of the by-laws of the Florida Bar; and designation.<sup>242</sup> The rule specifically rejects the Code prohibition of communication regarding limitation of practice<sup>243</sup> but is essentially similar in other respects.

#### D. *Firm Names and Letterheads (Rule 4-7.5)*

This rule allows the use of trade names which are not misleading,<sup>244</sup> and requires truthful and complete communication in the use of trade names and in the printing of a letterhead for a firm.

### XII. Integrity of the Profession — Article Eight

Article Eight rules mandate respect for and obligation to the legal profession and the courts. For example, Rule 4-8.2, Judicial and Legal Officials, directs a lawyer not to make a statement which he or she knows to be false or "with reckless disregard as to the truth or falsity concerning the qualifications or integrity of a judge."<sup>245</sup> Lawyers are encouraged by the commentary to this rule to defend judges in courts when they have been unjustly criticized, but are allowed to express honest and candid opinions on such matters to contribute to improving the administration of justice.<sup>246</sup>

Lawyers are directed by Rule 4-8.3 to report a violation of the *Rules of Professional Conduct* on the part of a court, and to report the professional misconduct of opposing counsel that "raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer."<sup>247</sup>

Rule 4-8.4 is a catch-all, requiring conduct similar to earlier "officer and a gentleman" standards. This includes the prohibition of conduct that is "prejudicial to the administration of justice."<sup>248</sup>

239. FLORIDA NEW RULES Rule 4-7.4(a) (1986).

240. *Id.* at Rule 4-7.4(b).

241. *Id.* at Rule 4-7.4(c).

242. *Id.* at Rule 4-7.4(d).

243. *See* FLORIDA'S CODE DR 2-105 (1970).

244. FLORIDA NEW RULES Rule 4-7.5(a) (1986).

245. *Id.* at Rule 4-8.2(c).

246. *Id.* at Rule 4-8.2 Comment.

247. *Id.* at Rule 4-8.3(a).

248. *Id.* at Rule 4-8.3.

*A. Bar Admission and Disciplinary Matters (Rule 4-8.1)*

This rule requires applicants to the Bar and admitted attorneys to be completely candid in their relationship with the Florida Board of Bar Examiners. The rule further requires that an attorney or applicant respond to any request for information from the Board of Bar Examiners or the Florida Bar and to correct any misunderstanding which may have occurred in the matter.<sup>249</sup>

*B. Judicial and Legal Officials (Rule 4-8.2)*

This is a judicial protection rule requiring lawyers to be moderate in their public evaluation of judges and encouraging them to defend "judges and courts which have unjustly been criticized."<sup>250</sup>

*C. Professional Misconduct (Rules 4-8.3, 4-8.4)*

The Florida Rules (4-8.3, 4-8.4) regarding misconduct are so general and so obvious as to require only a brief listing. Rule 4-8.4 prohibits a lawyer from attempting to violate or from violating any other rule, or helping or encouraging another to do so; from committing a crime of moral turpitude; from engaging in conduct involving dishonesty, fraud, deceit or misrepresentation, or conduct prejudicial to the administration of justice; from stating or implying an ability to improperly influence a government agency or official; or from assisting a judge in violating the code of judicial conduct.

Of greater interest and sophistication, however, are the Rule 4-8.3 requirements for reporting the misconduct of others. Lawyers are obligated to maintain the high standards (theirs and others) of the profession. There is a strong bias in America in favor of loyalty to one's fellows. The rule requiring reporting professional misconduct for this reason does not require reporting every violation of the rules. Only violations that "raise a substantial question as to . . . [a] lawyer's honesty, trustworthiness or fitness as a lawyer"<sup>251</sup> must be reported. The same is true of reporting judicial misconduct. Failure to report "substantial" misconduct is a clear violation of the rules.<sup>252</sup>

It is important to note that Rule 4-8.3(c) does not permit disclos-

---

249. *Id.* at Rule 4-8.1(b).

250. *Id.* at Rule 4-8.2 Comment.

251. *Id.* at Rule 4-8.3(a).

252. *Id.* at Rule 4-8.3(b).

ure of information protected by confidentiality.<sup>253</sup> A lawyer representing another attorney accused of professional misconduct, therefore, is under no obligation to report the nature of their discussions. More typically, a lawyer obtains information regarding another lawyer's misconduct from a client. Under these circumstances, a client should be encouraged to allow disclosure of this misconduct unless it would significantly injure the client's interest.<sup>254</sup>

#### D. *The Jurisdiction of the New Rules (Rule 4-8.5)*

This rule applies the new rules to attorneys admitted in Florida but practicing elsewhere. Rule 4-8.5, which has no counterpart in the Code, suggests that where the rules of the attorneys in two jurisdictions are in disagreement the "principles of conflict of laws may apply."<sup>255</sup>

### XIII. Summary

It is somewhat exceptional for a law review's annual law survey to include a full section on *Rules of Professional Conduct*. In the post-Watergate years, ethical conduct has taken on a new importance for the Bar. There is an increased awareness in law schools and in practice of the need for attention to ethical concerns.

The *Florida Code of Professional Responsibility* is a rather inaccessible reference source. However, the *New Rules of Professional Conduct* are accessible to all practitioners and contain a comprehensive table of contents and an even more extensive index. These Rules may be consulted for easy guidance in all major ethical areas. For more complex questions, there exist published formal opinions of the Florida Bar. These formal opinions are available from the Bar, law schools and most county law libraries. The opinions provide guidance on a wide range of topics relating to professional conduct.

The practitioner (especially the new attorney) is encouraged to discuss matters of ethical concern with partners or other senior attorneys. This discussion leads to an improved awareness on the part of all members of the Bar of the importance of ethical issues. Further guidance may be obtained by calling one of Florida's law schools and speaking with faculty members responsible for the Professional Ethics

---

253. *Id.* at Rule 4-8.3(c).

254. *Id.* at Rule 4-8.3 Comment.

255. *Id.* at Rule 4-8.5.

programs at that institution.

For more formal guidance, the nearest Florida Bar office may be consulted. These offices are most helpful in providing informal, over-the-telephone opinions on ethical concerns. Opinions are also available from the Florida Bar Ethics Counsel in Tallahassee at 1-800-235-8619. The Tallahassee office will upon request provide a written ethical opinion. Especially controversial areas may be referred to the Florida Bar Professional Ethics Committee, which drafts and approves the previously mentioned formal opinions.

Case law is evolving rapidly in this area. This is especially so in the areas of advertising, solicitation and client truthfulness. The practitioner may wish to consult the *ABA/BNA Lawyers Manual on Professional Conduct*, which is available at most law libraries.

The Rules of Professional Conduct are minimum guideposts for the practitioner. An awareness of ethical concerns and open discussion of ethical issues will help guarantee the continued high standard of professional conduct in Florida.