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ETHICS FOR CIVIL TRIAL ATTORNEYS

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I. INTRODUCTION

A. Organization. This outline presents ethical issues in the order in which a lawyer might encounter them in handling a case (as opposed to the order in which they are presented in the Rules of Professional Conduct).

B. Sources. Ethical rules applicable to Florida lawyers come from three main sources: (1) Rules Regulating The Florida Bar, including Rules of Professional Conduct, as adopted by the Florida Supreme Court; (2) court decisions; and (3) Opinions from The Florida Bar's staff, Professional Ethics Committee or Board of Governors. According to Chastain v. Cunningham Law Group, P.A., 16 So. 3d 203 (Fla. 2d DCA 2009), "ethics opinions of The Florida Bar are not controlling; nevertheless, they are persuasive authority and, if well reasoned, are entitled to great weight."

C. Federal Courts. All three federal district courts in Florida have adopted Florida's Rules of Professional Conduct. For example, Rule 2.04(d) of the Middle District's Rules, provides that "the professional conduct of all members of the bar of this court . . . shall be governed by the Model Rules of Professional Conduct of the American Bar Association as modified and adopted by the Supreme Court of Florida to govern the professional behavior of the members of The Florida Bar." However, in In re Disciplinary Proceedings Regarding John Doe, 876 F. Supp. 265 (M.D. Fla. 1993), the court explained:

> We do not regard the provisions of our Rule 2.04(c), M.D. Fla. Rules, borrowing and adopting the Florida Rules of Professional Conduct, as an adoption also of the opinions of the Ethics Committee of The Florida Bar or even the decisions of the Supreme Court of Florida interpreting those rules. While the opinions of the Committee and of the Supreme Court of the state are highly persuasive, this court must retain the right to interpret and apply the rules in the federal setting. That responsibility and authority may not be abdicated to the state system.

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D. Importance of knowing the rules. "As the number of lawyers increases to an unprecedented level, the responsibility of ensuring that all lawyers conduct themselves within the ethical bounds required by the Rules Regulating the Florida Bar continues to be a top priority for this Court. . . . members of The Florida Bar are responsible for knowing the Rules Regulating the Florida Bar. . . . it is well established that ignorance of the law, especially by lawyers in disciplinary proceedings, is no excuse." The Florida Bar v. Adorno, 60 So. 3d 1016, 1018 (Fla. 2011). "In recent years this Court has moved towards stronger sanctions for attorney misconduct." The Florida Bar v. Rotstein, 835 So. 2d 241, 246 (Fla. 2002).

E. Themes. Ethics rules applicable to lawyers are dynamic, as they frequently change and evolve through amendments to the Rules Regulating The Florida Bar, Ethics Opinions, and court decisions. Accordingly, relying solely on one's instincts, experience, and sense of "right and wrong" can be risky and problematic. We need to keep up-to-date with developments relating to rules of ethics just as we do with substantive laws in our practice areas. In the words of the Florida Supreme Court, the rules of ethics "should be read by every lawyer as often as his preacher reads the Bible." The Florida Bar v. Murrell, 74 So. 2d 221 (1954).

II. ADVERTISING AND SOLICITATION

A. History and constitutional issues. During most of the last century, lawyers were prohibited from advertising by Canon 27 of the ABA's Canons of Professional Ethics. However, in Bates v. Bar of Arizona, 433 U.S. 350 (1977), the United States Supreme Court held that lawyer advertising constitutes commercial speech that is protected by the First Amendment; therefore, lawyer advertising may be subjected to reasonable regulations but may not be banned altogether. The following year, in Ohralik v. Ohio State Bar Association, 436 U.S. 447 (1978), the Court held that states may constitutionally prohibit all direct, in-person solicitation of prospective clients, but it subsequently confirmed that states could not categorically prohibit lawyers from soliciting legal business by sending written communications to potential clients. Shapero v. Kentucky Bar Association, 486 U.S. 466 (1988).

1. Florida example. The Florida Bar's ongoing efforts to regulate lawyer advertising remain subject to First Amendment challenges, as demonstrated by The Florida Bar v. Pape, 918 So. 2d 240 (Fla. 2005). In that case, a referee had held that a lawyer's television advertisements featuring the depiction of the head of a pit bull wearing a spiked collar and a 1-800-PIT-BULL telephone number were permissible as "constitutionally-protected commercial free speech." The Florida Supreme Court disagreed and concluded that

"the First Amendment does not prevent . . . sanctioning the attorneys." The Comment to Rule 4-7.13 explains that the advertisements in Pape were "false, misleading, and manipulative, because use of that animal implied that the advertising lawyers would engage in 'combative and vicious tactics' that would violate the Rules of Professional Conduct." See also, Harrell v. The Florida Bar, 608 F. 3d 1241 (Fla. 11th Cir. 2010).

B. Overhaul of rules in 2013. The Florida Supreme Court approved significant changes to the advertising rules, effective May 1, 2013. In re: Amendments to the Rules Regulating The Florida Bar – Subchapter 4-7, Lawyer Advertising Rules, 108 So. 3d 609 (Fla. 2013) Websites, which were previously "considered to be information provided upon request" and therefore not subject to most of the advertising rules, are now subject to the amended rules. However, testimonials and descriptions of past results, which were previously prohibited, are now permitted, subject to certain conditions, as explained below.

C. Application of Rules. The rules apply to "all forms of communication in any print or electronic forum," including television, radio, electronic mail, websites, social networking, and video sharing media. (4-7.11)

D. Required content. All advertisements for legal employment must include, among other things, a "bona fide" office location of the lawyer who will perform the services. If the matter will be referred to another lawyer or firm, that must be stated. (4-7.12)

E. Permitted content. Rule 4-7.16 lists types of information that are "presumed not to violate" the advertising rules such as foreign language ability, military service, and positions held with The Florida Bar.

F. Prohibited content. A lawyer may not engage in: "deceptive or inherently misleading advertising" (4-7.13); "potentially misleading advertising" (4-7.14); or "unduly manipulative or intrusive" advertising (4-7.15).

1. Past results. References to past results are permitted only if "objectively verifiable" and are not "potentially misleading." 4-7.13(b)(2). The Comment notes that a lawyer who refers to past results "must have the affected client's consent." The Board of Governors issued "Guidelines for Advertising Past Results" on January 17, 2014, which explain that "unacceptable" media for soliciting "past results" include billboards, radio and TV, while "acceptable" media include websites, print advertisements and direct mailings. The Guidelines also note that such ads must include all "material information" along with a disclaimer.

2. Skills, etc. Statements characterizing a lawyer's "skills, experience, reputation or record" are permitted only if "objectively verifiable." (4-7.13(b)(3))

3. Testimonials. Testimonials are permitted subject to conditions, such as: they may not be written by the lawyer; the lawyer may not give anything of value for the testimonials, and a disclaimer must be included. (4-7.13(b)(8))

4. Specialist or expert. Statements that a lawyer is a specialist or expert are not permitted unless the lawyer is certified by The Florida Bar or a program accredited by the ABA or The Florida Bar or by another state bar program with standards "reasonably comparable" to those in Florida. A lawyer who is not certified may communicate that he or she "limits his or her practice to 1 or more fields of law." (4-7.14(a)(4))

G. Filing with the Bar. Each advertisement must be filed with The Florida Bar for evaluation 20 days prior to its "first dissemination," subject to the exemptions in 4-7.20, as noted below. (4-7.19(a))

H. Exceptions to filing requirement. There are many exceptions to the filing requirement, including "information contained on the lawyer's Internet website(s)." (4-7.20)

I. Payment for advertising by others. "No lawyer may, directly or indirectly, pay all or any part of the cost of an advertisement by a lawyer not in the same firm." (4-7.17(a)) Similarly, "a lawyer may not permit a nonlawyer to pay all or a part of the cost of an advertisement by that lawyer." (4-7.17(c))

J. Payment for referrals. "A lawyer may not give anything of value to a person for recommending the lawyer's services," subject to the limited exceptions. (4-7.17(b))

1. Bonuses to nonlawyers. Rule 4-5.4(a) states that "a lawyer or law firm shall not share legal fees with a nonlawyer" subject to certain exceptions, one of which is that "bonuses may be paid to nonlawyer employees for work performed, and may be based on their extraordinary efforts. . . ." However, bonuses to nonlawyers may not be "calculated as a percentage of legal fees received by the lawyer or law firm." An amendment to this rule, effective January 1, 2006, clarified that "bonus payments shall not be based on cases or clients brought to the lawyer or law firm by the actions of the nonlawyer."

    a. However, in Patterson v. Law Office of Lauri J. Goldstein, P.A., 980 So. 2d 1234 (Fla. 4th DCA 2008), a paralegal was permitted to enforce an agreement against an attorney who

promised her a bonus of 10% of the attorney's fees from cases on which the paralegal worked, even though the agreement violated Rule 4-5.4.

2. Referral fees to lawyers. Referral fees to lawyers are discussed in Section IV of this outline.

K. Solicitation generally. What is the difference between advertising and solicitation? The word "advertisement" is defined to include "all forms of communication seeking legal employment" (4-7.11(a)), and that broad definition includes solicitations. The term "solicit" is more narrowly defined as "communication directed to a specific recipient." The general rule is that a "lawyer may not solicit . . . professional employment from a prospective client." (4-7.18(a)) However, this general rule is subject to the following exceptions:

1. Prior relationship. The prohibition against solicitations does not apply to prospective clients with whom the lawyer has a "family or prior professional relationship." (4-7.18(a)(1))

2. No pecuniary gain. The prohibition does not apply when "the lawyer's pecuniary gain" is not a "significant motive" of the solicitation. (4-7.18(a)(1))

3. Written solicitations. While Rule 4-7.18(a)(1) defines the term "solicit" to include "contact in person, by telephone, . . . and . . . any written form of communications," there are significant exceptions to the prohibition against solicitations by written communications (as contrasted with solicitations made "in person" or "by telephone"), as explained below.

L. Written solicitations. A lawyer may solicit professional employment through a written communication directed to a specific recipient if the conditions set forth in Rule 7.18(b) are satisfied. These conditions include, among many others:

1. In personal injury or wrongful death cases, the accident must have occurred more than 30 days prior to the mailing of the communication. (4-7.18(b)(1)(A)) This 30-day ban on targeted direct-mail solicitation was upheld by the United States Supreme Court in Florida Bar v. Went For It, Inc., 515 U.S. 618 (1995). Previously, the Court had held that a state could not categorically prohibit lawyers from soliciting legal business by sending letters to potential clients. Shapero v. Kentucky Bar Association, 486 U.S. 466 (1988).

2. The lawyer sending the communication must not have reason to believe that the person is already represented by a lawyer in the matter. (4-7.18(b)(1)(B))

3. Each page of the written communication and the face of the envelope must be "reasonably prominently marked 'advertisement'." If the written communication is sent via electronic mail, the subject line must begin with the word "Advertisement." However, "brochures solicited by clients or prospective clients need not contain the "'advertisement' mark." (4-7.18(b)(2)(B))

4. "Every written communication must be accompanied by a written statement detailing the background, training and experience of the lawyer or law firm." (4-7.18(b)(2)(C))

5. The first sentence of the communication must be: "If you have already retained a lawyer for this matter, please disregard this letter." (4-7.18(b)(2)(E))

6. Written communications prompted by a specific occurrence must disclose "how the lawyer obtained the information prompting the communication." (4-7.18(b)(2)(H))

M. Consequences of improper solicitation. In addition to any sanction imposed through the disciplinary process, the Rules provide that a lawyer may not collect any fee as a result of professional employment obtained in violation of the solicitation rule (4-7.18(a)(2) and 4-1.5(a)), and solicitation of legal work could even be a crime, pursuant to the statutes cited below.

1. No fee. An attorney who contacted a client at the suggestion of a mutual friend was determined to have improperly solicited the employment. The resulting fee agreement was void, and the attorney was prohibited from recovering in quantum meruit. Spence, Payne, Masington & Grossman, P.A. v. Gerson, P.A., 483 So. 2d 775 (Fla. 3d DCA), rev. denied, 492 So. 2d 1334 (Fla. 1986).

2. Discipline. In The Florida Bar v. Barrett, 897 So. 2d 1269 (Fla. 2005), the Florida Supreme Court disbarred an attorney who violated the solicitation and fee sharing rules (by hiring a minister as a "paralegal" to solicit clients in emergency rooms), explaining: "[T]his Court will strictly enforce the rules that prohibit these improper solicitations and impose severe sanctions on those who commit violations of them."

3. Crime. Section 877.02, Florida Statutes, provides that soliciting legal business is a first degree misdemeanor. Pursuant to Section 817.234(9), Florida Statutes, improper solicitation may be a third

degree felony. (However, in State v. Bradford, 787 So. 2d 811 (Fla. 2001), the Florida Supreme Court held that subsection 8 of 817.234, which is very similar to subsection 9, is an unconstitutional infringement on commercial speech since fraud is not an element of the offense).

N. Communications between lawyers. Written communications "between lawyers" are not subject to the requirements of Rule 4-7.18(b)(2), such as marking each page with the word "advertisement." (4-7.18(b)(3))(Communications with clients and family members are also excepted by this rule, but that seems unnecessary because such communications are not included in the prohibition against solicitation in 4-7.18(a)(1).)

O. Chat rooms. "[A]n attorney's participation in a chat room in order to solicit professional employment is prohibited," according to Opinion A-00-1. However, an amendment adopted in 2010 explains that: "This opinion should not be interpreted as suggesting that a lawyer cannot respond to specific requests for information about the lawyer or the lawyer's services in a chat room that were initiated by a prospective client and not at the prompting of the lawyer. A lawyer may also respond to the posting of a general question such as "Does anyone know a lawyer who handles X type of matter?" The Opinion also "cautions lawyers that they may inadvertently form a lawyer-client relationship . . . by responding to specific legal inquiries."

P. Video sharing and networking sites. Videos appearing on video sharing sites, such as YouTube, "that are used to promote the lawyer or law firm's practice are subject to the lawyer advertising rules." Furthermore, "[i]nvitations to view or link to the lawyer's video sent on an unsolicited basis for the purpose of obtaining, or attempting to obtain, legal business are direct solicitations in violation of Rule 4-1.18(a), unless the recipient is the lawyer's current client, former client, relative, has a prior professional relationship with the lawyer, or is another lawyer." Therefore, "[a]ny invitations to view the video sent via email" to other recipients who have not requested information from the lawyer must comply with the rules applicable to direct e-mail, which include the general advertising regulations in Rules 4-7.11 through 4-7.18 and 4-7.21 as well as the additional requirements in Rule 4-7.18(b). (See The Florida Bar's Standing Committee on Advertising's "Guidelines for Video Sharing Sites," as revised April 16, 2013. Revised guidelines were also issued by the Committee on the same date for lawyers using "networking sites," such as Facebook, MySpace, Twitter and LinkedIn.)

Q. Firm names. Lawyers may practice under trade names subject to certain restrictions. The name cannot imply a connection with a government agency or that the firm is something other than a private law firm by use of such names as "academy," "institute" or "center." (4-7.21(b) and Comment) The

name may include the phrase "legal clinic" if the firm provides routine legal services at lower than prevailing rates. (4-7.21(b) and Comment) Lawyers may not imply that they practice in a partnership if they in fact do not. (4-7.21(f))

III. CONFLICTS OF INTEREST

A. Existing clients. Generally, "a lawyer shall not represent a client" if "the representation of 1 client will be directly adverse to another client . . ." or if "there is a substantial risk that the representation of 1 or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer." (4-1.7, as amended in 2006) Ordinarily, a lawyer may not act as an advocate against a client the lawyer represents in some other matter "even if the other matter is wholly unrelated." (4-1.7 Comments)

1. Waiver of conflict. "Notwithstanding the existence of a conflict . . . a lawyer may represent a client if: (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; (2) the representation is not prohibited by law; (3) the representation does not involve the assertion of a position adverse to another client when the lawyer represents both clients in the same proceeding before a tribunal; and (4) each affected client gives informed consent, confirmed in writing or clearly stated on the record at a hearing." However, it could be deemed improper to ask for consent "when a disinterested attorney would conclude that the client should not agree to the representation under the circumstances." (4-1.7 Comment) See also The Florida Bar v. Scott, 39 So. 3d 309 (Fla. 2010)("Some kinds of conflicts of interest cannot be waived by a client.")

2. Written consent. When an existing client consents to representation of an adverse party, must the consent be in writing? In 2006, Rule 4-1.7 was amended to require the consent to be "informed" and "confirmed in writing" or "clearly stated on the record at a hearing." The phrase "informed consent" is defined in the Preamble to the Rules of Professional Conduct.

3. Materiality irrelevant. "Rule 4-1.7 leaves no room for a 'materiality' analysis," according to Lincoln Associates & Construction, Inc. v. Wentworth Construction Co., Inc., 26 So. 3d 638 (Fla. 1st DCA 2010), which held that disqualification was required when a law firm "failed to prove it had the written consent from each client, and failed to prove that the representation of both clients would not inadvertently affect the responsibilities to each client."

B. Representing an organization. A lawyer employed by an organization represents the organization. (4-1.13(a)) If it is apparent that the organization's interests are "adverse to those of the constituents with whom the lawyer is dealing" the lawyer "shall explain the identity of the client" to the constituents. (4-1.13(d)) If a lawyer for an organization knows that a person associated with the organization may violate a legal obligation that is "likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization." The steps the lawyer should take may include asking the representative to reconsider the matter, referring the matter to a higher authority in the organization, and resigning as counsel for the organization. (4-1.13(b) and (c))

1. Constituents. The lawyer may also represent the organization's directors, officers, employees, members, shareholders or other constituents, subject to the conflict of interest rules. (4-1.13(e))

2. Affiliates. Subject to certain exceptions, a lawyer is "not ethically precluded from undertaking representations adverse to affiliates [such as parent or subsidiary corporations] of an existing or former client." (4-1.13 Comment) See also ABA Formal Opinion 95-390. But see Gould, Inc. v. Mitsui Mining & Smelting Co., 738 F. Supp. 1121 (N.D. Ohio 1990) (Representation of subsidiary when suing parent corporation in separate case presents a conflict even if the matters are unrelated.)

3. Derivative Suits. "Most derivative actions" may be "defended by the organization's lawyer like any other suit. However, if the claim involves serious charges of wrongdoing by those in control of the organization, a conflict may arise . . . ." (4-1.13 Comment)

    a. An attorney may concurrently represent the same plaintiff in derivative claims and individual claims against a corporation. Gonzalez v. Chillura, 892 So. 2d 1075 (Fla. 2d DCA 2004).

4. Partnerships. By representing a partnership, a lawyer does not become counsel for each partner. Chaiken v. Lewis, 754 So. 2d 118 (Fla. 3d DCA 2000). See also ABA Formal Opinion 91-361.

C. Representing multiple parties. A lawyer may represent multiple parties in a case if their interests are not directly adverse to one another; however, in that event, the lawyer's "consultation shall include explanation of the implications of the common representation and the advantages and risks involved." (4-1.7(c)) "One of the risks that should be discussed before undertaking representation" is the possibility that the multiple parties may have "differences in willingness to make or accept an offer of settlement." (4-1.8 Comment, as amended in 2006)

1. Aggregate settlements. A lawyer who represents two or more parties shall not participate in making an aggregate settlement unless each client "gives informed consent, in a writing signed by the client." The lawyer's disclosure "shall include" the "nature of all of the claims" and "the participation of each person in the settlement." (4-1.8(g), as amended in 2006)

2. No secrets. "[I]n a joint representation it is ordinarily assumed that the joint clients and the lawyer are sharing information and have no secrets from each other." Hazard, The Law of Lawyering, section 1.9:104, p. 295. See § 90.502(4)(e); Fla. Stat.; Cone v. Culverhouse, 687 So. 2d 888 (Fla. 2d DCA 1997).

3. Subsequent conflict. If a conflict later arises and the lawyer withdraws from representing one of the clients, the lawyer's ability to continue representing any of the clients is determined by Rule 4-1.9, relating to former clients. (4-1.7 Comment)

4. Medical malpractice cases. In a medical malpractice case, it is "extremely unlikely" that one attorney could ethically represent three defendants when each could be responsible to the others for contribution. (Opinion 87-1)

5. Auto cases. In an automobile accident case, may one attorney represent both the driver and the passenger in a suit against a third party? "Each case must be dealt with on its own facts," according to Opinion 02-3, which sets forth an excellent analysis of various scenarios.

D. Insurer and insured. "[T]he same attorney may often ethically represent both the insured and the insurer" provided their interests are not adverse. Progressive Express Ins. Co. v. Scoma, 975 So. 2d 461, 466 (Fla. 2d DCA 2007).

1. Primary duty to insured. If a lawyer is hired by an insurance company to defend an insured in a suit alleging breach of contract and negligence, should the lawyer move for summary judgment on the negligence count if the motion could eliminate the basis for insurance coverage and leave the insured without representation? According to Opinion 97-1:

> An attorney who has been hired by an insurance company to represent an insured owes his primary duty to the insured. An attorney may not ethically continue the representation of the insured under instructions from

the insurance carrier that the lawyer file for summary judgment where the attorney has determined that such a motion would be against the insured's interest.

2. Statement of Insured Client's Rights. According to Rule 4-1.8(j), adopted in 2002, a lawyer hired by an insurance company to represent an insured in a personal injury, wrongful death, or property damage case must provide the insured with a Statement of Insured Client's Rights.

3. Scope of Representation. An amendment to Rule 4-1.7, adopted in 2003, states that "a lawyer has a duty to ascertain whether the lawyer will be representing both the insurer and the insured as clients, or only the insured" and to inform both of them "regarding the scope of representation." (4-1.7(e))

4. Insurance Staff Attorneys. Rule 4-7.10(g), added in 2003, requires lawyers "who practice law as employees within a separate unit of a liability insurer representing others pursuant to policies of liability insurance" to make various disclosures.

E. Positional conflicts. "A lawyer may represent parties having antagonistic positions on a legal question that has arisen in different cases, unless representation of either client would be adversely affected. Thus, it is ordinarily not improper to assert such positions in cases pending in different trial courts, but it may be improper to do so in cases pending at the same time in an appellate court." (4-1.7 Comment)

F. Former clients. Generally, a lawyer does not have a conflict of interest in representing one client against a former client unless the subject of the representation is "substantially related" to the matter in which the lawyer represented the former client. However, a lawyer is not permitted to "use information relating to the representation to the disadvantage of the former client" unless the information has become "generally known." Furthermore, a lawyer may not "reveal information" relating to a prior representation except as otherwise permitted or required by the rules. (4-1.9) See State Farm Mut. Auto. Ins. Co. v. K.A.W., 575 So. 2d 630 (Fla. 1991).

1. Substantially related. "Matters are 'substantially related' for purposes of this rule if they involve the same transaction or legal dispute or if the current matter would involve the lawyer attacking work that the lawyer performed for the former client." Health Care and Retirement Corporation of America, Inc. v. Bradley, 961 So. 2d 1071 (Fla. 4th DCA 2007).

2. Similar cases. "[G]eneral knowledge of the client's policies and practices generally will not preclude a subsequent representation" that is adverse to the client. Moreover, a lawyer "who recurrently handled a type of problem for a former client is not precluded from later representing another client in a wholly distinct problem of that type even though the subsequent representation involves a position adverse to the former client." (4-1.9 Comment)

    a. Notwithstanding this Comment, a federal court in Florida disqualified an attorney from representing a plaintiff in a products liability case against Kowasaki because the attorney had represented Kowasaki seven years previously in product liability cases. Contant v. Kowasaki Motors Corp., U.S.A., Inc., 826 F. Supp. 427 (M.D. Fla. 1993) See also Pastor v. Transworld Airlines, Inc., 951 F. Supp 27 (E.D. N.Y. 1996) (former in-house counsel disqualified from representing plaintiff against counsel's former employer). However, in Health Care and Retirement Corporation of America, Inc. v. Bradley, 961 So. 2d 1071 (Fla. 4th DCA 2007), the court refused to disqualify a lawyer who had previously represented the opposing party in similar cases, explaining that: "Unlike two products liability cases involving the identical product, each negligence case turns on its own facts."

3. Generally known. The Comment to Rule 4-1.9 was amended in 2006 to clarify that the phrase "generally known" refers to information "that has been widely disseminated by the media to the public, or that typically would be obtained by any reasonably prudent lawyer who had never represented the former client."

4. Waiver. In some circumstances, the former client may waive a conflict by giving "informed consent." (4-1.9 and 4-1.6) In contrast to waivers by current clients pursuant to Rule 4-1.7, waivers by former clients pursuant to Rule 4-1.9 are not required to be confirmed in writing or stated on the record at a hearing.

G. Hot potato doctrine. At the same time a lawyer is representing client A, client B contacts the lawyer about suing A on a matter that is totally unrelated to the matter in which the lawyer is representing A. May the lawyer withdraw from representing A - thereby making A a former client - and accept B's case against A? No. "A firm may not drop a client like a hot potato, especially if it is in order to keep a far more lucrative client." Picker International, Inc. v. Varian Assocs., Inc., 670 F. Supp. 1363, 1365 (N.D. Ohio 1987), aff'd, 869 F.2d 578 (Fed. Cir. 1989). See also Harrison v. Fisons Corp., 819 F. Supp. 1039 (M.D. Fla. 1993) ("A lawyer may not evade ethical responsibilities by choosing to jettison a client whose continuing representation becomes

awkward. Allowing lawyers to pick the more attractive representation would denigrate the fundamental concept of client loyalty.")

H. Prospective clients. An attorney-client relationship may arise "if the client merely consulted the attorney . . . with the view to employing the attorney professionally . . . although the attorney is not subsequently employed." Garner v. Somberg, 672 So. 2d 852 (Fla. 3d DCA 1996) (attorney disqualified by opposing party who consulted him even though attorney had no recollection of consultation and movant did not prove that any specific confidential information was disclosed). See also Metcalf v. Metcalf, 785 So. 2d 747 (Fla. 5th DCA 2001). "[T]he test for an attorney-client relationship is a subjective one and hinges upon the client's belief that he is consulting a lawyer in that capacity and his manifested intention is to seek professional legal advice. However, this subjective belief must . . . be a reasonable one." Mansur v. Podhurst Orseck, P.A., 994 So. 2d 435, 438 (Fla. 3d DCA 2008) (quoting The Florida Bar v. Beach, 675 So. 2d 106, 109 (Fla. 1996)).

1. Irrefutable presumption. If a relationship is shown to have existed, there is "an irrefutable presumption that confidences were disclosed during that relationship." State Farm Mutual Automobile Insurance Co. v. K.A.W., 575 So. 2d 630 (Fla. 1991). However, this "irrefutable presumption only applies in the case of a direct attorney-client relationship as governed by rule 4-1.9, not in the case of an imputed disqualification as governed by rule 4-1.10(b)." Scott v. Higginbottom, 834 So. 2d 221 (Fla. 2d DCA 2002) (no disqualification of law firm based on its hiring a "newly affiliated lawyer" who had worked at firm representing opposing party but claimed he did not acquire any confidential information about the case).

2. Rule 4-1.18. In 2006, the Florida Supreme Court adopted a new rule, 4-1.18, titled "Duties to Prospective Clients," which permits a law firm to avoid disqualification as a result of consultation with a prospective client if: (i) the lawyer who consulted with the prospective client "took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client"; (ii) that attorney is "timely screened" from participating in the matter; (iii) the attorney is apportioned no part of the fee, and (iv) written notice of the subject matter of the consultation and the screening procedures is promptly given to the prospective client.

3. Exceptions. Furthermore, according to the Comment, even the lawyer who had the consultation should not be disqualified if the lawyer received no "information that could be used to the disadvantage of the prospective client" or if the prospective client consulted the lawyer

"with the intent of disqualifying the lawyer from the matter, with no intent of possibly hiring the lawyer."

4. Unsolicited information. What if a person sends information to a lawyer on a "totally unsolicited basis" with no prior communication? According to Opinion 07-3, the lawyer "will not have a conflict of interest in representing the adversary" of the person and "may disclose or use that unsolicited information" in representing the adversary. The Opinion suggests that lawyers include a disclosure statement on their websites explaining these issues.

I. Imputed conflicts. When a lawyer has a conflict of interest the conflict is generally imputed to all lawyers who are "associated" with that lawyer's firm "unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm." (4-1.10(a))

1. Associated lawyers. "The meaning of 'associated' is not completely clear. But one thing is clear: not every lawyer who is paid by a law firm to do work of a legal nature is 'associated' with the firm. Thus, for example, a firm can outsource research or other support services so long as the firm complies with any applicable requirements on billing and on disclosures to the client. [Citations omitted.] An attorney to whom work is outsourced – for example, an attorney who contracts to do research or draft pleadings from the attorney's own premises on the attorney's own schedule – ordinarily is not an associate." Brown v. Florida Dept. of Highway Safety and Motor Vehicles, 2012 WL 4758150 (N.D. Fla.) (motion to disqualify "denied because the firm and the attorney entered only an outsourcing relationship that did not rise to the level of an association").

2. Co-counsel. The imputation rules may, under certain circumstances, be extended to co-counsel in a separate firm. Zarco Supply Co. v. Bonnell, 658 So. 2d 151 (Fla. 1st DCA 1995) ("To the extent the two firms worked together to draft the complaint . . . it appears illogical to assume the two firms have not exchanged confidential information. Thus, . . . the two firms may be viewed as one 'law firm.'"). But see Estate of Jones v. Beverly Health and Rehab. Servs., Inc., 68 F. Supp. 2d 1304 (N.D. Fla. 1999) ("In general the law does not impute disqualification between firms, even where members of the two firms are working together, so long as there is 'only a small actual risk of confidential information spreading from the primarily conflicted lawyer to the second firm.'"); Baybrook Homes, Inc. v. Banyan Constr. Dev., Inc., 991 F. Supp. 1440 (M.D. Fla. 1997)

3. Exception – lawyer as witness. Disqualification of a lawyer from acting as an advocate at trial because the lawyer will be a witness does not disqualify other lawyers in the firm from acting as advocates at the trial so long as there is no conflict of interest under Rules 4-1.7 or 4-1.9. (4-3.7(b)) See City of Lauderdale Lakes v. Enterprise Leasing Co., 654 So. 2d 645 (Fla. 4th DCA 1995) (error to disqualify attorney because another lawyer in the firm is a witness when the testimony is not adverse to the client).

J. Related lawyers. Lawyers who are closely related by either blood or marriage may not represent adverse parties in a matter except with consultation and consent. (4-1.7(d))

1. No imputation. This disqualification is "personal and is not imputed to members of firms with whom the lawyers are associated." (4-1.7 Comment)

K. Newly affiliated lawyer. When a lawyer moves between firms, the lawyer's new firm may be disqualified, under certain circumstances, from representing clients on matters that are substantially related to matters worked on by the lawyer's former firm if the lawyer acquired "actual knowledge" of confidential information. (4-1.10(b) and Comment) See Akrey v. Kindred Nursing Centers East, LLC, 837 So. 2d 1142 (Fla. 2d DCA 2003); Nissan Motor Corp. in U.S.A. v. Orozco, 595 So. 2d 240 (Fla. 4th DCA 1992). Similarly, the lawyer's former firm may be prohibited, under certain circumstances, from representing a person "with interests materially adverse" to those of a client represented by the formerly associated lawyer while at the firm if any lawyer remaining in the firm has confidential information. (4-1.10(b) and (c) and Comment)

1. Test. "Thus, under Rule 4-1.10(b), in order to establish a prima facie case for disqualification, the moving party must show that the newly associated attorney acquired confidential information in the course of the attorney's prior representation . . . . After the moving party meets this burden, the burden shifts to the firm whose disqualification is sought to show that the newly associated attorney has no knowledge of any material confidential information." Scott v. Higginbottom, 834 So. 2d 221 (Fla. 2d DCA 2002).

2. Presumption inapplicable. The "irrefutable presumption that confidences were disclosed" (as discussed in Garner v. Somberg, 672 So. 2d 852 (Fla. 3d DCA 1996)) "does not apply" in the case of an imputed disqualification governed by Rule 4-1.10(b). Solomon v. Dickison, 916 So. 2d 943 (Fla. 1st DCA 2005).

3. Competing affidavits require hearing. When the parties submit competing affidavits "the trial court needs to resolve by an evidentiary hearing" whether the newly associated attorney "received confidential information material to the issues in the underlying litigation" before deciding whether to disqualify the attorney's new firm. AGIC, Inc. v. North American Risk Services, Inc., 120 So. 3d 189 (Fla. 5th DCA 2013).

4. Chinese walls. If a firm has a conflict as a result of a newly affiliated attorney's prior involvement on the other side of a case, may the firm avoid disqualification by creating a Chinese wall, which screens the particular attorney from any participation in the matter? This procedure is effective if the newly affiliated attorney's conflict arises from prior employment as a public officer or employee. (4-1.11) However, "the Chinese wall or screening process is not a defense when a private attorney joins another private firm." Edward J. DeBartolo Corp. v. Petrin, 516 So. 2d 6 (Fla. 5th DCA 1987). (In 2009, the ABA amended Model Rule of Professional Conduct 1.10 to allow screening to avoid disqualification in this situation; The Florida Bar's Board of Governors endorsed the amendment, but it has not been adopted by the Supreme Court of Florida.)

5. Firing the lawyer. May the firm avoid disqualification by firing the newly affiliated lawyer? Maybe, according to Rule 4-1.10(c) and School Board of Broward County v. Polera Building Corp., 722 So. 2d 971 (Fla. 4th DCA 1999) (After termination of employment of newly affiliated lawyer who had a conflict, matter was remanded for an evidentiary hearing to determine whether any lawyer remaining at the firm acquired any protected information). In Nissan, supra, 595 So. 2d 240, the appellate court noted that the employment of the newly affiliated lawyer had been terminated in approving the trial court's denial of a motion to disqualify, and in a subsequent case, the court explained that Rule 4-1.9, rather than Rule 4-1.10, "would have applied had the conflicted attorney still been associated with the firm." Health Care and Retirement Corporation of America, Inc. v. Bradley, 944 So. 2d 508 (Fla. 4th DCA 2006). But see Harpley v. Ducane Industries, 183 B.R. 645 (M.D. Fla. 1995) ("There does not appear to be any authority to cure a conflict that has arisen under Rule 4-1.10(b), by terminating association with a tainted lawyer.").

L. Nonlawyer employees. If a secretary or paralegal working on a particular case leaves his or her firm and goes to work for the firm representing an opposing party in the case, will the hiring firm be disqualified?

1. Ethics opinion. According to Opinion 86-5, the answer is "no" but the hiring firm has a duty not to "seek or permit a disclosure of

confidences . . . and not to use such information" (and the former firm has a duty to admonish the departing employee not to reveal confidences). The Opinion states that in the case of a paralegal or legal assistant, the former firm must advise the client of the employee's departure and new employment if the employee had a close relationship with the client.

2. Conflicting appellate decisions. In Lackow v. Walter E. Heller & Co., Southeast, Inc., 466 So. 2d 1120 (Fla. 3d DCA 1985), the Third DCA held that a firm could be disqualified if the firm's new secretary was "privy to confidences" of the opposing party while employed by the opposing party's firm. Subsequently, in Esquire Care, Inc. v. McGuire, 532 So. 2d 740 (Fla. 2d DCA 1988), the Second DCA criticized Lackow stating that before the "drastic action of disqualification is considered," the trial court "should conduct an evidentiary hearing, the purpose of which is to determine, not just whether a potential ethical violation has occurred, but whether as a result one party has obtained an unfair advantage over the other which can only be alleviated by removal of the attorney." The Fifth DCA followed Esquire Care, noting that disqualification of a party's chosen counsel is "an extraordinary remedy which should be resorted to sparingly." Apopka v. All Corners, Inc., 701 So. 2d 641 (Fla. 5th DCA 1997).

   In Koulisis v. Rivers, 730 So. 2d 289 (Fla. 4th DCA 1999), the Fourth DCA certified conflict with Esquire Care and Apopka in disqualifying a law firm, explaining that "it makes no difference that Holmes was a secretary and not an attorney."

   The First DCA, in Stewart v. Bee-Dee Neon & Signs, Inc., 751 So. 2d 196 (Fla. 1st DCA 2000), held that disqualification is not required if the employee was not "exposed to confidential information" that is material to the case. Even with such exposure, disqualification is not required if: the employee has not disclosed confidential information to the new firm; the employee has not and will not work on the case at the new firm; and adequate screening measures have been implemented. (The court also noted that the former firm has "an independent duty under Rule 4-5.3 to instruct the departing nonlawyer . . . not to reveal. . . any confidential information . . . .")

   In First Miami Securities, Inc. v. Sylvia, 780 So. 2d 250 (Fla. 3d DCA 2001), the Third DCA disagreed with Stewart, explaining that "actual knowledge is the focus of the inquiry and screening is not a valid defense to disqualification." The court adopted the "burden shifting test from the Fourth District's Koulisis opinion," noting that while the record established that the secretary had been "exposed" to confidential information at the former firm (giving rise to a "rebuttable

presumption" that she had "actual knowledge"), the case must be remanded for an evidentiary hearing to determine whether the current employer could overcome the presumption by proving that she did not have "actual knowledge" of any confidential information.

In 2004, the Fourth DCA rejected "the view allowing for the screening of nonlawyer employees" and adhered to its prior opinion in Koulisis, supra, but held that "brief and now-completed employment in opposing counsel's firm, in a non-legal capacity, represent an exception to the rule in Koulisis." Eastrich No. 157 Corp. v. Gatto, 868 So. 2d 1266 (Fla. 4th DCA 2004).

3. 2006 Amendment. In 2006, the Florida Supreme Court adopted an amendment to the Comment to Rule 4-1.10 stating that the imputation rule "does not prohibit representation by others in the firm where the person prohibited from involvement in a matter is a nonlawyer, such as a paralegal or secretary. Such persons, however, ordinarily must be screened from any personal participation in the matter. . . ." As of 2006, the word "screened" is a defined term in the "Terminology" section at the beginning of the Rules of Professional Conduct.

M. Conflict alleged by adversary. "As a general proposition, 'a party … does not have standing to seek disqualification where, as here, there is no privity of contract between the attorney and the party claiming a conflict of interest.'" THI Holdings, LLC v. Shattuck, 93 So. 3d 419 (Fla. 2d DCA 2012). While "opposing counsel may properly raise the question" of conflict of interest in a proper case, such an objection "should be viewed with caution" because "it can be misused as a technique of harassment." (4-1.7 Comment). See Anderson Trucking Service, Inc. v. Gibson, 884 So. 2d 1046 (Fla. 5th DCA 2004); Singer Island Ltd., Inc. v. Budget Constr. Co., Inc., 714 So. 2d 651 (Fla. 4th DCA 1998); Yang Enterprises, Inc. v. Georgalis, 988 So. 2d 1180 (Fla. 1st DCA 2008)("Such motions are 'generally viewed with skepticism because . . . [they] are often interposed for tactical purposes.'").

N. Disqualification for conflict. While lawyers were disqualified in a number of the cases cited above, disqualification of a party's lawyer is nevertheless "an extraordinary remedy that should be used most sparingly." Akrey v. Kindred Nursing Centers East, LLC, 837 So. 2d 1142 (Fla. 2d DCA 2003). Disqualification "is a drastic measure which courts should hesitate to impose except when absolutely necessary." Freeman v. Chicago Musical Instrument Co., 689 F.2d 715, 721-22 (7th Cir. 1982). Moreover, a party can waive its right to seek disqualification of the opposing party's counsel by failing to move for disqualification promptly upon learning of the facts leading to the alleged conflict. Information Systems Associates, Inc. v. Phuture World, Inc., 106 So. 3d 982, 985 (Fla. 4th DCA 2013)(waiver of right to seek disqualification after delay of nine months).

1. While several opinions from federal courts in Florida state that "any doubt must be resolved in favor of disqualification" [e.g., McPartland v. ISI Investment Services, 890 F. Supp. 1029 (M.D. Fla. 1995)], the authority cited for that proposition in the opinions does not support the quoted language.

O. Appearance of impropriety. Canon 9 of the Code of Professional Responsibility stated that "a lawyer should avoid even the appearance of impropriety." While the Code was superseded in 1987 with the adoption of the Rules Regulating The Florida Bar, the Florida Supreme Court, in disqualifying a lawyer for a conflict, explained that "we do not believe that a different standard now applies because the specific admonition to avoid the appearance of impropriety does not appear in the Rules of Professional Conduct." State Farm Mut. Auto Ins. Co. v. K.A.W., 575 So. 2d 630 (Fla. 1991). But see Armor Screen Corp. v. Storm Catcher, Inc., 709 F. Supp.2d 1309 (S.D. Fla. 2010) ("This Court does not read the decision as retaining the appearance of impropriety standard and respectfully disagrees with those courts that do.")

P. Disqualification based on informational advantage. A law firm may be disqualified based on an improper "informational advantage", even though the adverse party was never a client or a prospective client. Frye v. Ironstone Bank, 69 So. 3d 1046 (Fla. 2d DCA 2011). In that case, a law firm was disqualified from representing a bank in a suit on a guaranty because the law firm was also representing the guarantor's former lawyer (who had represented the guarantor in connection with the guaranty and asset planning) in a separate malpractice suit and, therefore, had access to confidential information. According to Gutierrez v. Rubio, __ So. 3d __ (Fla. 3d DCA 2013), "Disqualification cases require the court to make a factual determination that 1) there is proof that confidential information was actually disclosed and 2) that this information gave the non-moving party an unfair tactical advantage."

Q. Forfeiture of fees. An attorney is entitled to a reasonable fee for services rendered before he knows or should have known of a conflict. Hill v. Douglass, 271 So. 2d 1 (Fla. 1972). However, this entitlement "terminates when the attorney realizes or should realize" that a conflict exists. Adams v. Montgomery, Searcy & Denney, P.A., 555 So. 2d 957 (4th DCA 1990). Accordingly, fees collected for services after a conflict should have been recognized may be subject to forfeiture. See also Rule 3-5.1(h) and The Florida Bar v. St. Louis, 967 So. 2d 108 (Fla. 2007).

R. Setting aside judgment. In order to have a judgment set aside based on a conflict of interest, "actual prejudice" must be established. Henry v.

Entertainment Design, Inc., 711 So. 2d 179 (Fla. 4th DCA 1998); Junger Utility & Paving Co., Inc. v. Myers, 578 So. 2d 1117 (Fla. 1st DCA 1989).

IV. ATTORNEY FEES AND RELATED MATTERS

A. General. Lawyers may not charge fees that are "illegal, prohibited, or clearly excessive" or obtained through "advertising or solicitation not in compliance with the Rules Regulating the Florida Bar or are otherwise illegal or prohibited." (4-1.5(a))

1. Excessive fees. A fee is "clearly excessive" when "a lawyer of ordinary prudence" would have "a definite and firm conviction" that the fee "[e]xceeds a reasonable fee . . . to such a degree as to constitute clear overreaching or an unconscionable demand . . . ." (4-1.5(a)(1)). Factors to be considered in determining whether a fee is "reasonable" are set forth in Rule 4-1.5(b).

2. Unit billing. "Unit billing" has been disapproved by Florida courts. See The Florida Bar v. Richardson, 574 So. 2d 60 (Fla. 1990), cert. denied, 502 U.S. 811 (1991) ("[A]bsolutely no justification exists to bill for twenty minutes for every telephone call . . . ."); Browne v. Costales, 579 So. 2d 161 (Fla. 3d DCA), rev. denied, 593 So. 2d 1051 (Fla. 1991) ("We cannot condone the practice of unreasonable 'unit billing' for an attorney's time without regard for the actual time spent on true legal work.").

3. Block billing. "[B]lock billing makes judicial review unnecessarily difficult and warrants reduction of the number of hours claimed in the attorneys' fee motion. However, the mere fact that an attorney includes more than one task in a single billing entry is not, in itself, evidence of block billing." Franklin v. Hartford Life Ins. Co., 2010 WL 916682 (M.D. Fla.)

4. Nonrefundable retainers. Nonrefundable retainers are permissible, but they are subject to Rule 4-1.5 regarding clearly excessive fees. (Opinion 93-2) As of 2010, they must be "confirmed in writing." (4-1.5) Circumstances such as the death of the client or the early termination of the attorney-client relationship can cause an otherwise permissible fee to become "clearly excessive." Florida Bar v. Grusmark, 544 So. 2d 188 (Fla. 1989).

5. Bonuses. "Fees that provide for a bonus . . . can be effective tools for structuring fees." However, "the bonus . . . must be stated clearly in [the] amount or formula for calculation of the fee" and bonuses are impermissible in some types of cases, such as domestic relations. (4-1.5 Comment)

6. Costs. Rule 4-1.5 was amended in 2004 to specifically state that costs, as well as fees, are subject to the prohibitions in the Rule, as set forth above. Factors to be considered in determining whether costs are reasonable are set forth in Rule 4-1.5(b). Subsection (b)(2)(E) provides a "safe harbor" by stating: "When the parties have a written contract in which the method is established for charging costs, the costs charged thereunder shall be presumed reasonable."

7. Surcharge on Costs. "[I]n the absence of disclosure to the contrary, it would be improper if the lawyer assessed a surcharge on . . . disbursements [such as for court reporters and travel] over and above the amount actually incurred unless the lawyer herself incurred additional expenses beyond the actual cost of the disbursement item." (ABA Formal Opinion 93-379) A new Comment to Rule 4-1.5, adopted in 2004, states that "[f]iling fees, transcription, and the like should be charged to the client at the actual amount paid by the lawyer." However, the lawyer and client may agree to a reasonable charge for "in-house" costs, such as copying, faxing, long distance telephone and computerized research and for "in-house" services, such as paralegal, investigative accounting and courier services.

8. Percentage of fees. Instead of tracking and itemizing all actual costs, is it proper to charge a client 4% of all fees billed to cover costs, assuming the client has agreed to such an arrangement in the retainer agreement? No, according to Staff Opinion 30989, dated January 4, 2012, which was affirmed by the Professional Ethics Committee on June 22, 2012.

9. Administrative fee for opening file. In The Florida Bar v. Carlon, 820 So. 2d 891 (Fla. 2002), the Florida Supreme Court upheld a referee's finding that a fee "including a $500 administrative fee for opening Woodburn's file" was unreasonable.

10. Overhead. "It is unprofessional and undignified for an attorney to separately charge a client for costs of secretarial work unless such work is extraordinary or unusual." (Opinion 75-29 and see 4-1.5 Comment) A new Comment to Rule 4-1.5, adopted in 2004, states that "[g]eneral overhead should be accounted for in a lawyer's fee, whether the lawyer charges hourly, flat, or contingent fees."

11. Credit Cards. Lawyers may accept credit cards for payment. However, the comment to Rule 4-1.5 was amended in 2004 to state that when a credit card is used to pay a refundable retainer or other advance the lawyer must not only place the funds received in trust but

add "the lawyer's own money . . . in an amount equal to the amount charged" by the credit card company.

B. Void agreements. Generally, fee agreements "which do not comply with the regulations [i.e., the Rules of Professional Conduct] are . . . void as against the public interest." Chandris v. Yanakakis, 668 So. 2d 180 (Fla. 1995). "A fee obtained by unethical means is a prohibited fee." The Florida Bar v. Adorno, 60 So.3d 1016 (Fla. 2011). For example, fee agreements procured through improper solicitation are void, and "an attorney's fee agreement that includes an unenforceable contingency provision is void in its entirety." King v. Young, Berkman, Berman, & Karph, P.A., 709 So. 2d 572 (Fla. 4th DCA 1998). However, in Lackey v. Bridgestone/Firestone, Inc., 855 So. 2d 1186 (Fla. 3d DCA 2003), the court held that so long as the "contingent fee clauses . . . do not violate the rules," non-complying clauses on other matters may be severed and "do not render the agreement void." See also, State Contracting & Eng'g Corp. v. Condotte America, Inc., 368 F. Supp. 2d 1296 (S. D. Fla. 2005), affirmed, 197 Fed. Appx. 915 (2006), in which the court enforced a contingent fee agreement despite several "minor" violations of the rules.

1. Third-party challenges. However, in Corvette Shop & Supplies, Inc. v. Coggins, 779 So. 2d 529 (Fla. 2d DCA 2001), the court upheld an award of contingent fees in a challenge by the opposing party, even though the contingent fee contract was not reduced to writing until after the trial. The court explained that Rule 4-1.5(f) was intended to protect clients rather than to allow opposing parties to avoid payment of fees after losing a case. Rule 4-1.5(e), as amended effective January 1, 2006, states: "The fact that a contract may not be in accord with these rules is an issue between the attorney and client and a matter of professional ethics, but is not the proper basis for an action or defense by an opposing party when fee-shifting litigation is involved."

2. Quantum meruit. "Even though a member of The Florida Bar cannot claim fees based upon a non-complying agreement, the attorney would still be entitled to the reasonable value of his or her services on the basis of quantum meruit." Chandris, supra, 668 So. 2d 180, 186. Similarly, in King, supra, the court explained: "[w]hen a fee agreement . . . fails to comply with the Rules Regulating The Florida Bar, the attorney is entitled to recover on the basis of quantum meruit." However, when a fee agreement is procured through improper solicitation, the attorney "is entitled to no fruit from the forbidden tree on any theory of recovery recognized in law or equity." Spence, Payne, Masington & Grossman, P.A. v. Gerson, 483 So. 2d 775 (Fla. 3d DCA), rev. denied, 492 So. 2d 1334 (Fla. 1986). See also, Morrison v. West, 30 So. 3d 561 (Fla. 4th DCA 2010) ("We hold that it

violates public policy for a court to award a fee, even in quantum meruit, for the unlicensed practice of law.")

C. Duty to communicate. "When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation." (4-1.5(e)) (emphasis added) Certain types of fees must be confirmed in writing, such as contingent fees (as discussed below) and any nonrefundable retainer (as provided in an amendment to 4-1.5(e), effective February 1, 2010).

D. Security for fees. Rule 4-1.8(a) prohibits a lawyer from acquiring a security interest adverse to the client (except "a lien granted by law") unless: the terms are fair and fully disclosed in writing, the client is given an opportunity to seek independent counsel and the client gives informed consent in writing. See Lee v. Gadasa Corp., 714 So. 2d 610, 612 (Fla. 1st DCA 1998).

1. Liens on client's homestead. May a lawyer enforce a charging lien against a client's homestead? In Trontz v. Winig, 905 So. 2d 1026 (Fla. 4th DCA 2005), the court affirmed a judgment foreclosing a lawyer's charging lien on a client's homestead where the client had "specifically waived his homestead protection" and agreed to an order that applied the charging lien to his homestead. Similarly, in Demayo v. Chames, 30 Fla. L. Weekly D2692 (Fla. 3d DCA Nov. 30, 2005), the court allowed an attorney to enforce a charging lien against a client's homestead where the fee agreement specifically provided that "the client hereby knowingly, voluntarily and intelligently waives his rights to assert his homestead exemption in the event a charging lien is obtained to secure the balance of attorney's fees and costs." A strong dissent in Demayo noted that the Florida Supreme Court had previously refused to enforce contractual waivers of homestead protection on public policy grounds in Sherbill v. Miller Mfg. Co., 89 So. 2d 28 (Fla. 1956). On March 15, 2006, the Third DCA withdrew its opinion dated November 30, 2005, and held that the attempted waiver was invalid. DeMayo v. Chames, 934 So. 2d 548 (Fla. 3d DCA 2006), rev. granted, 948 So. 2d 758 (2007), and affirmed in Chames v. Demayo, 972 So. 2d 850 (Fla. 2007).

E. Acquiring interest in cause of action. Rule 4-1.8(i) specifically prohibits a lawyer from acquiring "a proprietary interest in the cause of action or subject matter of the litigation" (except that a lawyer may "acquire a lien granted by law" and may contract for a "reasonable contingent fee"). See The Florida Bar v. Perry, 377 So. 2d 712 (Fla. 1979) (Attorney disciplined for making arrangements to sell van to pay for fees when ownership of van was issue in litigation.)

F. Charging liens. Under certain circumstances, an attorney may assert a charging lien for fees and costs on a judgment or property recovered for the client. JLA Inv. Corp. v. Colony Ins. Co., 922 So. 2d 249 (Fla. 2d DCA 2006).

1. Requirements. In Baker & Hostetler, LLP v. Swearingen, 998 So. 2d 1158 (Fla. 5th DCA 2008), the court explained that attorneys wishing to impose a charging lien "must show: (1) an express or implied contract between attorney and client; (2) an express or implied understanding for payment of attorney's fees, either dependent upon or out of recovery; (3) either avoidance of payment or a dispute as to amount of fees; and (4) timely notice." As to the timeliness of notice, the court explained that "unless jurisdiction is properly reserved by the trial court, a notice of an attorney's charging lien must generally be filed before the lawsuit has been reduced to judgment or dismissed pursuant to settlement in order to be timely."

2. Liability for ignoring charging lien. In Hall, Lamb & Hall, P.A. v. Sherlon Investments Corp., 7 So. 3d 639 (Fla. 3d DCA 2009), the former client, the former client's new counsel, and the opposing party were all jointly and severally liable to a law firm that had filed a charging lien and did not receive timely notice of a settlement. Arguably, opposing counsel could also be liable.

G. Retaining liens. An attorney may assert a possessory retaining lien for outstanding costs or fees on the client's papers, money, securities, and other property in his or her possession. Dowda and Fields, P.A. v. Cobb, 452 So. 2d 1140 (Fla. 5th DCA 1984), and Opinion 88-11 (Reconsideration).

1. Refusal to provide copies. An attorney who properly asserts a retaining lien on a case file for unpaid fees or costs is not required to provide copies to the client. Opinion 88-11 (Reconsideration). According to Rutherford, Mulhall & Wargo, P.A. v. Antidormi, 695 So. 2d 1300 (Fla. 4th DCA 1997), "[a]bsent exceptional circumstances . . . it is a departure from the essential requirements of the law for a court to disregard a retaining lien and release a client's file before the fee dispute has been resolved." See also Foreman v. Behr, 866 So. 2d 705 (Fla. 2d DCA 2003) (where attorney has valid lien court should not order attorney to turn over file to client even when client has sued attorney for malpractice) and Fox v. Widjaya, __ So. 3d __ (Fla. 3d DCA 2013) ("It matters not that the order compelled the production of the documents to successor counsel, rather than to the client himself.").

2. Avoiding prejudice. However, the attorney's right to assert a retaining lien is limited by the ethical obligation that the attorney must avoid foreseeable prejudice to the client. Opinion 88-11 (Reconsideration).

3. Trust property. Another limitation on the right to assert a retaining lien is set forth in the Comment to Rule 5-1.2, which states that "property entrusted to a lawyer for a specific purpose, including advances for fees, costs and expenses . . . must be applied only to that purpose" and is "not subject to . . . set-off for attorney's fees." The Comment goes on to state that "a refusal to account for and deliver over such property upon demand shall be a conversion." See also The Florida Bar v. Bratton, 413 So. 2d 754 (Fla. 1982), and Opinion 87-12.

H. Suing clients for fees. Attorneys cannot sue current clients for fees under any circumstances. Suits may be filed against former clients but only after other reasonable means of collection have been exhausted. See Rule 4-1.7(b) and Opinion 88-1. Under certain conditions, attorneys may report a delinquent former client to a credit reporting service and refer past due accounts to a reputable collection agency or assign them to a corporation which is wholly owned by the attorney or the attorney's firm. Opinions 81-3, 90-2 and 95-3.

I. Contingent fees - generally. A fee may be contingent on the outcome of the matter for which the service is rendered, except in domestic relations and criminal matters. (4-1.5(f))

1. Degree of risk. However, there must be a "degree of risk" in a case to justify a contingent fee. The Florida Bar v. Moriber, 314 So. 2d 145 (Fla. 1975). Furthermore, a lawyer may not charge a contingent fee for recovering PIP benefits. The Florida Bar v. Gentry, 475 So. 2d 678 (Fla. 1985).

2. Requirements. Contingent fee agreements must be in writing, state the terms in detail, and be signed by all parties, including all lawyers or firms that may participate in the fee. (4-1.5(f)(1) and (2)) Upon conclusion of the contingent fee matter, the lawyer shall advise the client of the outcome in writing. If there is a recovery, the lawyer shall prepare an itemized closing statement which shall be signed by all parties to the agreement and retained by the lawyer for six years. (4-1.5(f)(2) and (5))

J. Contingent fees - injury cases. Additional requirements apply to contingent fee agreements in claims involving personal injury and death. (4-1.5(f)(4)) The additional requirements include the following:

1. The contract must contain specific language referring to a "statement of client's rights" and describing the three day rescission period. The separate "statement of client's rights" must be provided, signed, and retained.

2. The amount of the contingent fee is subject to specific limitations which may not be exceeded absent a court order. (The Comments state that these limitations "should not be construed to apply to . . . the non-contingent portion of the fee agreement.")

K. Contingent fees – medical liens. May a lawyer who is representing a client in a personal injury or wrongful death matter with a contingent fee refer the client to another lawyer to resolve medical lien and subrogation claims? "Indeed, we take this opportunity to clarify that lawyers representing a client in a personal injury, wrongful death, or other such case charging a contingent fee should, as part of the representation, also represent the client in resolving medical liens and subrogation claims related to the underlying case." In re Amendments to Rules Regulating The Florida Bar (Biannual Report), 101 So. 3d 807 (Fla. 2012).

L. Contingent fees - medical malpractice. Contingent fees in "medical liability cases" are subject to additional limitations set forth in Rule 4-1.5(f)(4)(B), which are consistent with an amendment to the Florida Constitution, but the Rule also provides that those limitations may be waived by the client. In re Amendment to the Rules Regulating The Florida Bar, 939 So. 2d 1032 (Fla. 2006)

M. Contingent fees - commercial cases. Do the limitations in injury cases discussed above apply to commercial cases? While Rule 4-1.5(f)(4) refers to "property damages" the Comment specifically states that the Rule "should not be construed to apply to actions or claims seeking property or other damages arising in the commercial litigation context." However, footnote 6 in a concurring opinion in Arabia v. Siedlecki, 789 So. 2d 380 (Fla. 4th DCA 2001), states the view that the rule applies to all contingent fee cases, including those involving claims for fraud. Also, in The Florida Bar v. Kavanaugh, 915 So. 2d 89 (Fla. 2005), the court held that an attorney who charged a fee of 53% of the recovery in a commercial case (despite an agreement limiting the fee to 50%) violated Rule 4-1.5(a), which prohibits a "clearly excessive fee."

N. Contingent fees - calculation. If a client is awarded $10,000 plus statutory fees of $5,000, should the lawyer's contingent fee be calculated as a percentage of $10,000 or $15,000?

1. Fees on fee award. According to World Service Life Ins. Co. v. Bodiford, 537 So. 2d 1381 (Fla. 1989), a lawyer "is not entitled to add statutory attorney's fees to the principal and claim a percentage of the total." See also Royal Belge v. New Miami Wholesale, Inc., 858 So. 2d 336 (Fla. 3d DCA 2003). However, in Olmsted v. Emmanuel, 783 So. 2d 1122 (Fla. 1st DCA 2001), a contingent fee agreement specifically defined the "recovery" on which the fee was to be based as

including "court-awarded attorney's fees," and the court affirmed the trial court's ruling that the contract was enforceable and permitted by the Rules Regulating the Florida Bar.

O. Structured settlements. "[T]he contingent fee percentage shall be calculated only on the cost of the structured verdict or settlement or, if the cost is unknown, on the present money value of the structured verdict or settlement, whichever is less." However, this rule does not apply if "the damages and the fee are to be paid out over the long term future schedule." (Rule 4-1.5(f)(6))

P. Division of fees - generally. Rule 4-1.5(g) states that a division of fees between lawyers who are not in the same firm may be made only if the total fee is reasonable and either of the following two conditions is satisfied:

- The division is in proportion to the services performed by each lawyer; or
- By written agreement with the client, each lawyer assumes joint responsibility and agrees to be available, and the agreement fully discloses the basis for the division of fees.

Q. Division of fees - written agreement. Is an oral agreement to split fees ever appropriate? Yes, since the conditions referenced above in Rule 4-1.5(g) are in the alternative, an oral agreement to divide fees in proportion to the services performed by each lawyer may be appropriate in non-contingent fee cases. However, in contingent fee cases, Rule 4-1.5(f)(2) states that "No lawyer or firm may participate in the fee without the consent of the client in writing" and "[e]ach participating lawyer or law firm shall sign the contract…."

1. Absence of written agreement. If there is no written agreement to divide fees in a contingent fee case, the referring attorney is not entitled to a fee. In The Florida Bar v. Rubin, 709 So. 2d 1361 (Fla. 1998), an attorney who sued another attorney for a referral fee, when no written agreement existed, was publicly reprimanded for attempting "to achieve a civil remedy . . . when such remedy was ethically prohibited." See also Florida Bar v. Carson, 737 So. 2d 1069 (Fla. 1999) (Rule 4-1.5(f)2 "clearly prohibits not only the actual receipt of a contingent fee without a written contract, but also prohibits entering into an oral agreement for such a fee."). But see Lackey v. Bridgestone/Firestone, Inc., 855 So. 2d 1186 (Fla. 3d DCA 2003), in which the court permitted two attorneys who had no written agreement to recover in quantum meruit for assisting a third attorney, who had a valid written agreement, with a contingent case. (The decision in Lackey is arguably inconsistent with Rule 4-1.5(f)(2) which prohibits a lawyer from participating in a contingent fee "without the consent of the client in writing.")

2. Liability for malpractice. "Where there is an express or implied agreement for the payment of a referral fee, but the attorneys have not executed the written agreement required by Rule Regulating The Florida Bar 4-1.5(g), is the referring attorney civilly liable in the event of legal malpractice by the working attorney?" Yes. Even though the oral or implied agreement is not enforceable by the referring attorney, the referring attorney is liable, according to the Third DCA, which certified the question quoted above to the Florida Supreme Court. Noris v. Silver, 701 So. 2d 1238 (Fla. 3d DCA 1997).

R. Division of fees - injury cases. In injury or death cases in which any part of the fee is contingent the division of fees between lawyers in different firms is subject to the rules discussed above and to the special rules in 4-1.5(f)(4), which provide that the lawyer assuming primary responsibility for the legal services must receive a minimum of 75% of the total fee, and the lawyer assuming secondary responsibility may receive a maximum of 25% of the total fee. However, these limitations may be varied if the lawyers "accept substantially equal active participation in the providing of legal services" and seek court approval (with notice to The Florida Bar and the client) when (or before) suit is filed or "within 10 days of execution of a contract for division of fees when new counsel is engaged."

1. Conflict of interest. If the referral was made because of a conflict of interest, the referring attorney is not permitted to receive any part of the fee for services performed, or to be performed, after the emergence of the conflict. (Opinion 89-1)

S. Fee division with of counsel. May the restrictions on fee divisions between lawyers in different firms be avoided by forming an "Of Counsel" relationship? According to Opinion 94-7: "for the purposes of the fee division rules, an attorney is in the 'same firm' to which the attorney is 'of counsel' only if the attorney is 'of counsel' in the traditional sense - that is, only if the attorney is affiliated with and practices through that one firm exclusively."

T. Fee division with departing lawyer. According to Opinion 94-1, a fee splitting arrangement between a departing associate and a law firm is a "matter of contract to be decided by the parties, in accordance with applicable law." The Comment to Rule 4-5.6 (Restrictions on Right to Practice) provides that "[t]he percentage limitations found in Rule 4-1.5(f)(4)(D) do not apply to fees divided pursuant to a severance agreement" but also notes that severance agreements containing "punitive clauses" which "restrict competition or encroach upon a client's inherent right to select counsel" are prohibited.

1. Example. In Miller v. Jacobs & Goodman, P.A., 699 So. 2d 729 (5th DCA 1997), rev. denied, 717 So. 2d 533 (Fla. 1998), the court upheld a provision in an employment agreement requiring an associate to pay

a law firm 75% of any fees earned from firm clients who followed the associate to a new firm. (Note: Subsequent to this decision, the Board of Governors ratified Opinion 93-4 which disapproves employment contracts restricting a lawyer's right to represent clients of a law firm after leaving the firm.)

2. Restrictions on right to practice. Employment agreements which restrict a lawyer's right to practice after leaving a firm are discussed below in section XI.

U. Fee division with nonlawyers. Lawyers "shall not share legal fees with a non-lawyer" except in very limited circumstances set forth in Rule 4-5.4(a). The rule specifically prohibits paying bonuses to nonlawyer employees for bringing in cases or clients. Further, nonlawyers may not own any interest in a business entity that practices law. (4-5.4)

V. Fee division with out-of-state lawyers. A Florida lawyer may pay a referral fee to an out-of-state attorney who is consulted by a resident of his or her state about an accident in Florida. (Opinion 90-8) However, an out-of-state lawyer who resides in Florida and is no longer actively practicing law is treated as any other "nonlawyer" for purposes of the fee division rules. (Opinion 60-18) In Chandris, S.A. v. Yanakakis, 668 So. 2d 180 (Fla. 1995), the Florida Supreme Court held that "Florida contingent fee agreements entered by attorneys not subject to our professional regulations are unauthorized legal services and are void as against public policy." However, the court explained that "a non-Florida attorney can join with a Florida attorney in a joint representation of a client in Florida on the basis of a contingent fee agreement that complies with the rules." In Lackey v. Bridgestone/Firestone, Inc., 855 So. 2d 1186 (Fla. 3d DCA 2003), the court held that a non-Florida attorney who had no written agreement (but who worked on the case with Florida counsel who did have a valid agreement) was entitled to a quantum meruit recovery. As discussed above, Lackey is arguably inconsistent with Rule 4-1.5(f)(2) and Rubin, supra.

W. Payment with media rights. A lawyer may not negotiate an agreement giving the lawyer literary or media rights relating to the representation "prior to the conclusion of representation" of the client. (4-1.8(d))

X. Advancing expenses. A fee agreement may provide that the lawyer will advance all court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter. (4-1.8(e)) Except for advancing "court costs and expenses of litigation," a lawyer "shall not provide financial assistance to a client in connection with pending or contemplated litigation." (4-1.8(e))

1. May a lawyer agree to be responsible for all costs and expenses (and not seek repayment from the client) even if a recovery is obtained? No, according to Advisory Opinion 96-1, explaining that Rule 4-1.8(e) "contemplates repayment . . . in the event of a recovery." However, the rule may be different when "representing an indigent client." Rule 4-1.8(e)(2).

2. May an attorney advance the cost of a "diagnostic medical examination used for litigation purposes?" Yes, according to an amendment to the Comment to Rule 4-1.8(e), effective February 1, 2010. However, advances for medical treatment are not permitted.

3. May one attorney pay fees to another attorney, who is assisting with the representation, as an "expense of litigation"? No, according to The Florida Bar v. Patrick, 67 So. 3d 1009 (Fla. 2011), which says: "the comment explains the phrase 'litigation expenses' by providing an example of permissible litigation costs: the reasonable costs involved in obtaining and presenting evidence. The payment of another attorney's fees is not listed as a permissible litigation expense."

Y. Gifts to clients. The prohibition in Rule A 4-1.8(e) against providing "financial assistance" to clients applies to gifts. In The Florida Bar v. Roberto, 59 So. 3d 1101 (Fla. 2011), an attorney gave his client "$250 to buy clothes, groceries, and other personal goods," among other gifts; the Court imposed significant discipline for this and other breaches of ethics, noting that "[t]he ethical prohibition on this type of activity could not be more clear." However, in an earlier case, the Court appears to have reached a conclusion that is inconsistent with Roberto. In The Florida Bar v. Taylor, 648 So. 2d 1190 (Fla. 1994), a client was given used clothing and a check for $200 "for basic necessities." Explaining that the rule "does not bar all financial assistance given during the attorney/client relationship," the Court held that "the giving of used clothing to a client is not regarded as unethical where there is no agreement for repayment and the clothing is not given in an effort to maintain employment."

Z. Loans to clients. Lawyers are prohibited from loaning money to clients in connection with pending litigation. (Opinion 65-39) This rule applies even if the loan is made through a non-profit corporation funded by attorney contributions. (Opinion 68-15) While a lawyer "may suggest to a client where the client may try to obtain financial help for individual needs . . . the lawyer should not become part of the loan process." (Opinion 75-24) A lawyer who "routinely refers clients to a loan company and actively participates in the loan transaction would be providing financial assistance to those clients." (Opinion 92-6)

AA. Non-recourse advance funding. May an attorney provide information to a client regarding sources of non-recourse loans secured by the anticipated recovery in the client's lawsuit? According to Opinion 00-3 (as modified on March 15, 2002), "The Florida Bar discourages the use of non-recourse advance funding companies." A lawyer may advise a client about the existence of such companies "only if the attorney also discusses with the client whether the costs of the transaction outweigh the benefits." In addition, a lawyer must determine whether the potential transaction is legal by checking, for example, whether the company has all necessary licenses and whether the transaction complies with usury laws. Moreover, "the attorney shall not recommend the client's matter to the funding company nor initiate contact with the funding company on a client's behalf . . . . The attorney shall not co-sign or otherwise guarantee the financial transaction. . . . The attorney also shall not allow the funding company to . . . influence the attorney's independent professional judgment. The attorney shall not have any ownership interest in the funding company or receive any compensation or other value from the funding company in exchange for referring clients . . . . Additionally, the attorney shall not provide the funding company with an opinion regarding the worth of the client's claim or the likelihood of success. . . . Finally, the attorney may, at the client's request, honor a client's valid, written assignment of a portion of the recovery to the funding company. The attorney may not, however, provide a letter of protection to the funding company signed by the attorney. . . ."

1. In Rancman v. Interim Settlement Funding Corporation, 789 N.E.2d 217 (Oh. 2003), the Ohio Supreme Court held that advance funding transactions "are void as champerty and maintenance." Lower courts had held the transactions to be void for violating usury and licensing laws.

2. In Fausone v. U.S. Claims, Inc., 915 So. 2d 626 (Fla. 2d DCA 2005), the court upheld and enforced a "litigation loan" agreement pursuant to which a personal injury plaintiff had sold an interest in her claim. In the opinion, Judge Altenbernd observed that "[i]t cannot be denied that people like Ms. Fausone may need a credit source during litigation" but also noted that "[s]uch agreements create confusion concerning the party who actually owns and controls the lawsuit, and create risks that the attorney-client privilege will be waived unintentionally." The opinion concludes by stating that "[t]he legislature may wish to examine this industry to determine whether Florida citizens are in need of any statutory protection."

BB. Offers of Judgment. "An attorney may not ethically agree to pay fees and costs assessed to a client pursuant to the offer of judgment statute." Opinion 96-3. While an attorney may not agree to pay such fees, may the attorney agree to purchase an insurance policy that would cover fees and costs

awarded pursuant to an offer of judgment? According to The Florida Bar News, October 1, 2009, the Professional Ethics Committee will be issuing an opinion stating that an attorney "can advance the cost of the premium and make the repayment of that cost contingent on the outcome of the matter, but that the Bar offers no opinion on whether the policies themselves are legal or comply with the Rules Regulating The Florida Bar."

CC. Payment by third party. A lawyer may not accept compensation for representing a client from a third party unless the client "gives informed consent," there is no interference, and confidentiality is protected. (4-1.8(f))

DD. Limiting scope. A lawyer and client may limit the objectives or scope of representation if the limitation is reasonable and the client consents in writing after consultation. (4-1.2)

EE. Limiting liability. In a fee agreement (or any other agreement), a lawyer is prohibited from prospectively limiting liability for malpractice "unless permitted by law and the client is independently represented in making the agreement." (4-1.8(h)). Are attorneys "permitted by law" to limit their liability? See Moransais v. Heathman, 744 So. 2d 973 (Fla. 1999) ("Indeed, it is questionable whether a professional, such as a lawyer, could legally or ethically limit a client's remedies by contract in the same way that a manufacturer could do with a purchaser in a purely commercial setting."); Legal Ethics: The Lawyer's Deskbook on Professional Responsibility, Section 9-9.1.2 (ABA Center for Professional Responsibility, 2002); Little v. Middleton, 401 S.E.2d 751 (Ga. 1991) ("An attorney may not relieve himself by contract of the duty to exercise reasonable care and an attempt to do so is void as against public policy."). In 2009, the 3rd DCA, citing Moransais, supra, held that clauses limiting liability in professional service contracts (in a case involving a geologist) are invalid and unenforceable. Witt v. La Gorce Country Club, Inc., 35 So. 3d 1033 (Fla. 3d DCA 2010).

1. In The Florida Bar v. Head, 84 So. 3d 292 (Fla. 2012), the Court disciplined an attorney who sent a letter to a former client stating that a claim for fees would not be pursued if the former client would sign a mutual release because the letter did not advise the former client that independent representation would be appropriate, as required by Rule 4-1.8(h).

FF. Limiting fee disputes. A clause in a fee agreement providing that all objections to a bill are waived unless made within 10 days is unconscionable and unenforceable. Elser v. Law Offices of James M. Russ, P.A., 679 So. 2d 309 (Fla. 5th DCA 1996). However, in Franklin & Marbin, P.A. v. Mascola, 711 So. 2d 46 (Fla. 4th DCA 1998), a fee agreement stated that the client must object to monthly bills in writing within 15 days; the court held that the client's failure to object, under the circumstances, waived any objections to

the number of hours billed and "would operate as a tacit admission of the reasonability thereof in a later suit for a money judgment under the contract."

GG. Arbitration. May lawyers include a clause in fee agreements requiring all fee disputes to be resolved by arbitration? Yes, if the client is advised in writing to consider obtaining independent legal advice and if the agreement contains a specific "notice" in bold print, pursuant to an amendment creating Rule 4-1.5(i), effective March 1, 2008.

1. Malpractice claims. In Vargas v. Schweitzer-Ramras, 878 So. 2d 415 (Fla. 3d DCA 2004), the court held that an arbitration clause was not broad enough to include claims for malpractice, explaining that agreements are construed against the attorney and in favor of the client. Would it be ethical to require arbitration of malpractice claims? See Brian F. Spector, Predispute Agreements to Arbitrate Legal Malpractice Claims: Skating on Thin Ice in Florida's Ethical Twilight Zone?, Fla. B.J., Apr. 2008 at 50. More recently, the 4th DCA reversed an order denying a motion to compel arbitration, explaining that the language in the clause "is broad enough to encompass the malpractice and breach of fiduciary duty claims." Mintz & Fraade, P.C. v. Beta Drywall Acquisition, LLC, 59 So. 3d 1173 (Fla. 4th DCA 2011). Even more recently, the 2nd DCA enforced an arbitration clause in a fee agreement in a malpractice action. Johnson, Pope, Bokor, Ruppel & Burns, LLP v. Forier, 67 So. 3d 315 (Fla. 2d DCA 2011). And in Lash & Goldberg, LLP v. Clarke, 88 So. 3d 426 (Fla. 4th DCA 2012), the appellate court ruled that a law firm's motion to compel arbitration should have been granted, along with co-defendants' motion, even though the law firm did not sign the arbitration agreement, because the complaint alleged "concerted misconduct" by all defendants.

HH. Interest on fees. Lawyers may charge a lawful rate of interest on fees and cost advances not paid when due either as provided in advance by written agreement or, in the absence of a written agreement, upon reasonable notice "of 60 days." (Opinion 86-2) In The Florida Bar v. Fields, 482 So. 2d 1354 (Fla. 1986), an attorney was found to have committed an ethical violation for "charging a finance/interest charge without any authorization from the client and/or proper disclosure."

II. Attorney discharged without cause. An attorney who is discharged from a contingency fee contract without cause before the contingency has occurred is entitled to recover for the reasonable value of his or her services after the contingency occurs, but the recovery is limited by the maximum fee set forth in the contingent fee contract. Rosenberg v. Levin, 409 So. 2d 1016 (Fla. 1982).

1. Test. In such cases, the amount of fees should be determined by the "totality of circumstances" rather than by the lodestar method. Searcy, Denney, Scarola, Barnhart & Shipley v. Poletz, 652 So. 2d 366 (Fla. 1995). While the lodestar method set forth in Florida Patient's Compensation Fund v. Rowe, 472 So. 2d 1145 (Fla. 1985), focuses on the number of hours, hourly rates, and contingency risk factor, the "totality of circumstances" approach requires consideration of additional factors such as the benefit conferred on the client and the behavior of the parties after the discharge. Poletz, supra. Thus, under the "totality of circumstances" approach, the failure of an attorney to comply with a successor attorney's request to turn over the file should be considered in determining a reasonable fee. Riesgo v. Weinstein, 523 So. 2d 752 (Fla. 2d DCA 1988). See also Rule 4-1.16, Declining or Terminating Representation.

2. Disputes between co-counsel. However, in Jay v. Trazenfeld, 952 So. 2d 635 (Fla. 4th DCA 2007), the court held that while Levin v. Rosenberg, supra, applies to fees due from the client, it does not control a dispute between co-counsel when one has been discharged without cause and the other has collected a fee; in such a case, the terms of the contract, rather than quantum meruit, determine the division of the fee.

JJ. Attorney discharged with cause. An attorney who is discharged "with cause" for violating a duty to a client may be entitled to some fee or may be deemed to have forfeited any fee, depending on the circumstances. "In determining whether and to what extent forfeiture is appropriate, relevant considerations include the extent of the violation, its willfulness, any threatened or actual harm to the client, and the adequacy of other remedies. . . . [F]orfeiture is not an automatic remedy even for serious violations." Searcy, Scarola, Barnhart & Shipley, P.A. v. Scheller, 629 So. 2d 947 (Fla. 4th DCA 1993), rev. denied, (Fla. 1994). In that case, the court suggested that the trial judge should calculate a quantum meruit fee, reduce it by any damages caused to the client, and then consider whether all or part of the reduced fee should be forfeited.

KK. Voluntary withdrawal. "[W]hen an attorney withdraws from representation upon his own volition, and the contingency has not occurred, the attorney forfeits all right to compensation." Faro v. Romani, 641 So. 2d 69 (Fla. 1994). However, if the client's conduct makes the attorney's continued performance either legally impossible or would cause a violation of an ethical rule, the attorney may be entitled to a fee when the contingency occurs. Smith & Burnetti, P.A. v. Falk, 677 So. 2d 404 (Fla. 2d DCA 1996). In DePena v. Cruz, 884 So. 2d 1062 (Fla. 2d DCA 2004), the court refused to recognize an exception when the "conduct of the client has caused a break-down in the attorney-client relationship."

1. Unethical agreements. "Any contingent fee contract which permits the attorney to withdraw from representation without fault on the part of the client or other just reason and purports to allow the attorney to collect a fee for services already rendered would be unenforceable and unethical." The Florida Bar v. Hollander, 607 So. 2d 412 (Fla. 1992).

2. Outlier. However, according to Franklin & Marbin, P.A. v. Mascola, 711 So. 2d 46 (Fla. 4th DCA 1998), "where the lawyer withdraws before a result, but without fault by the client, under Scheller the client may be liable for quantum meruit." (In the author's opinion, Mascola is based upon a faulty reading of Scheller, supra, and is inconsistent with the Supreme Court's decision in Faro, supra.)

LL. Withdrawal because of suspension. In Frank J. Pepper, Inc. v. Vining, 783 So. 2d 1160 (Fla. 3d DCA 2001), the court held that fees claimed by an attorney, who withdrew from a case because his license to practice had been suspended, should be determined by the "totality of the circumstances," as explained in Poletz, supra, and that expert testimony based on the lodestar method should not be considered. See also Opinion 90-3 ("Payment of referral fee to attorney who, subsequent to execution of fee-division agreement, has become suspended, disbarred, or resigned from The Florida Bar, is to be made on a quantum meruit basis.")

MM. Successor counsel's fees. "The proper basis for awarding attorney's fees to discharged attorneys and their successors is as follows: Discharged attorneys hired under a contingent fee contract are entitled to recover quantum meruit for their services, limited by the maximum fee allowable under the fee agreement . . . . A substituted attorney, however, is entitled to the full contingent fee provided for in the contract." Lubell v. Martinez, 901 So. 2d 951 (Fla. 3d DCA 2005).

V. THE ATTORNEY/CLIENT RELATIONSHIP

A. Basics. A lawyer shall provide competent representation, shall act with reasonable diligence and promptness, and shall keep clients reasonably informed. (4-1.1, 4-1.3 and 4-1.4)

B. Fiduciary duty. "The relationship between an attorney and his or her client is a fiduciary relationship of the very highest character." Elkind v. Bennett, 958 So. 2d 1088 (Fla. 4th DCA 2007). "There is no relationship between individuals which involves a greater degree of trust and confidence than that of attorney and client. . . . The attorney is under a duty at all times to represent his client . . . with the utmost degree of honesty, forthrightness, loyalty and fidelity." Gerlach v. Donnelly, 98 So. 2d 493 (Fla. 1957)

1. Class actions. "At the very least" there is an "implied fiduciary relationship" between attorneys who file a class action lawsuit and potential members of the class even before a class is certified. Masztal v. City of Miami, 971 So. 2d 803 (Fla. 3d DCA 2008). See also The Florida Bar v. Adorno, 60 So. 3d 1016 (Fla. 2011)

2. Higher calling. While an attorney's fiduciary duty to a client is "of the very highest character," every attorney's "duty to his calling and to the administration of justice far outweighs – and must outweigh – even his obligation to his client." Boca Burger, Inc. v. Forum, 912 So. 2d 561 (Fla. 2005)

C. Confidentiality. A lawyer shall not reveal information relating to representation of a client except as specifically provided in Rule 4-1.6.

1. Scope. The confidentiality rule applies not merely to matters communicated in confidence by the client but also "to all information relating to representation, whatever its source." (4-1.6 Comment) The protection afforded by Rule 4-1.6 "is broader than the evidentiary attorney-client privilege and applies even though the same information is discoverable from other sources." Buntrock v. Buntrock, 419 So. 2d 402, 403 (Fla. 4th DCA 1982).

2. After relationship ends. "After withdrawal the lawyer is required to refrain from making disclosure of the client's confidences, except as otherwise provided in rule 4-1.16." (4-1.5 Comment) In The Florida Bar v. Knowles, 99 So. 3d 918 (Fla. 2012), the Court suspended an attorney for one year for violating Rule 1.6, among other rules, explaining: "A lawyer who is upset with her client is not permitted to turn on her client and begin disparaging and betraying her. Rather, the lawyer must maintain confidences even after withdrawing from representation."

3. Obtaining advice. An amendment to the Comment to Rule 4-1.6, adopted in 2006, provides that "[a] lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer's personal responsibility to comply with these rules."

4. Appellate remedies. When required by a tribunal to reveal confidential information, a lawyer may first exhaust all appellate remedies. (4-1.6(d))

D. Confidentiality - joint representation. "[I]n a joint representation it is ordinarily assumed that the joint clients and the lawyer are sharing information and have no secrets from each other." Hazard, The Law of Lawyering, section

1.9:104, p. 295. See § 90.502(4)(e); Fla. Stat.; Cone v. Culverhouse, 687 So. 2d 888 (Fla. 2d DCA 1997).

E. Confidentiality - mediation. Statements made during mediation are confidential pursuant to section 44.405, Florida Statutes, and Rule 10.420 requires mediators to inform parties about confidentiality. According to Enterprise Leasing Company v. Jones, 789 So. 2d 964 (Fla. 2001), the mediation privilege "does not differ substantially from . . . the attorney-client privilege." In Paranzino v. Barnett Bank, 690 So. 2d 725 (Fla. 4th DCA 1997), a party's pleadings were struck as a sanction for disclosing to the media a settlement offer made during mediation.

1. Mediation agreements. "[T]here is no confidentiality or privilege attached to a signed written agreement reached during a mediation, unless the parties agree otherwise." §44.405(4), Fla. Stat.

2. Exceptions. Other exceptions to the privilege and confidentiality rules include statements made at a mediation that are:

- "willfully used to plan a crime, commit or attempt to commit a crime, conceal ongoing criminal activity, or threaten violence;"
- "offered to report, prove, or disprove professional malpractice occurring during the mediation, solely for the purpose of the professional malpractice proceeding;"
- "offered for the limited purpose of establishing or refuting legally recognized grounds for voiding or reforming a settlement agreement reached during a mediation;" or
- "offered to report, prove, or disprove professional misconduct occurring during the mediation, solely for the internal use of the body conducting the investigation of the conduct." §44.405, Fla. Stat.

3. Example. In Cooper v. Austin, 750 So. 2d 711 (5th DCA 2000), a wife in a divorce case sent a note to her husband during a mediation stating that if he did not agree to a certain settlement, "the kids will take what information they have [about the husband allegedly taking nude pictures of an underage female] to whomever to have you arrested." The appellate court, finding that the wife's note constituted extortion, set aside the mediated settlement agreement.

F. Confidentiality – documents filed with court. Rule 2.420(d)(2) of the Florida Rules of Judicial Administration, which became effective on October 1, 2010, provides that "Any person filing any document containing confidential

information shall, at the time of filing, file with the clerk a 'Notice of Confidential Information within Court Filing.'" A form for this Notice is included with the Rule.

1. Duty of person filing. "Any person filing a document with the court shall ascertain whether any information contained within the document may be confidential," according to Rule 2.420(d)(3).

2. Procedures. Procedures for determining "Confidentiality of Trial Court Records in Noncriminal Cases" are set forth in Rule 2.420(e), and procedures relating to "Appellate Court Records" are set forth in 2.420(g).

3. Discovery. Rule 1.280(f) prohibits filing documents obtained in discovery without good cause, and it provides for sanctions if a filing violates Rule 2.425, which imposes limitations on filing "designated sensitive information," such as birth dates, social security numbers, account numbers and email addresses.

G. Confidentiality – HIPPA. When dealing with "personal health information," such as medical records, attorneys may be subject to confidentiality requirements in the Health Information Portability and Accountability Act, which provides for civil penalties of up to $1,500,000 and criminal penalties. Attorneys may also be responsible for ensuring that their experts, consultants and other agents comply with confidentiality requirements. See 45 CFR Part 164.

H. Confidentiality – information stored on hard drives. Opinion 10-2 states that any lawyer who uses devices with hard drives "has a duty to keep abreast of changes in technology to the extent that the lawyer can identify potential threats to confidentiality."

1. Policies. In addition to identifying potential threats to confidentiality, a lawyer must develop and implement policies to address the threats.

2. Inventory. A lawyer must maintain an inventory of devices with hard drives.

3. Supervision. A lawyer must supervise nonlawyers to maintain confidentiality.

4. Disposal. Before disposing of a device with a hard drive, "a lawyer has a duty to obtain adequate assurances that the Device has been stripped of all confidential information," which includes "an affirmative obligation to ascertain that the sanitization has been accomplished."

I. Confidentiality – cloud computing. According to Ethics Opinion 12-3, issued in 2013, lawyers may use "cloud computing" (in which files are stored at and accessed from a service provider's remote server) "if they take reasonable precautions to ensure that confidentiality of client information is maintained." The Opinion explains that the "lawyer should research the service provider" and "consider backing up the data elsewhere as a precaution."

J. Confidentiality – deceased clients. While the duty of confidentiality continues after a client dies, "[a] lawyer may disclose confidential information to serve the deceased client's interests, unless the deceased client previously instructed the lawyer not to disclose the information. Whether and what information may be disclosed will depend on who is making the request, the information sought, and other factors. Doubt should be resolved in favor of nondisclosure." (Opinion 10-3)

K. Scope of representation. As amended in 2004, Rule 4-1.2 states that "a lawyer and client may agree to limit the objectives or scope of the representation if the limitation is reasonable . . . and the client consents in writing after consultation." If a lawyer assists a pro se litigant with drafting a document to be submitted to a court, the lawyer "must indicate 'prepared with the assistance of counsel' on the document to avoid misleading the court …." (4-1.2 Comment)

L. Who makes decisions? "A lawyer shall abide by a client's decision concerning the objectives of representation" (subject to the limitations in Rule 4-1.2(c) and (d).) (Rule 4-1.2)

1. Settlements. A lawyer "shall abide by a client's decision whether to make or accept an offer of settlement of a matter." (4-1.2(a))

    a. "[P]rovision in the contingency fee agreement whereby client agrees 'not to settle this matter without the prior written approval of the law firm' is void." Ellis Rubin, P.A., v. Alarcon, 892 So. 2d 501 (Fla. 3d DCA 2004)

2. Assisting with improper conduct. "A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows or reasonably should know is criminal or fraudulent." (4-1.2(d)) An amendment to the Comment to this Rule, adopted in 2006, specifically provides that a lawyer is "required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent . . . ."

    a. In The Florida Bar v. Rood, 622 So. 2d 974 (Fla. 1993), an attorney was suspended for one year for knowingly assisting in the fraudulent conveyance of real property. (However, an

article in The Florida Bar Journal suggests, based on Freeman v. First Union National Bank, 865 So. 2d 1272 (Fla. 2004), that it is not unethical for an attorney to assist with a property transfer that is subsequently found to be a fraudulent conveyance. Denis A. Kleinfeld and Jonathan Alper, The Florida Supreme Court Finds No Liability for Aiding or Abetting a Fraudulent Transfer, Fla. B.J., June 2004 at 26. For a contrary view, see Will the Lawyers Pay? Counsel's Ethical, Civil and Criminal Exposure for Creating Offshore Asset Protection Trusts by Thomas Mayer (2003), which can be found by Googling the title.)

b. Could an attorney have civil liability for assisting with a fraudulent conveyance? "[T]here is no cause of action under the fraudulent conveyance statute against one who allegedly assists a debtor in a fraudulent conversion or transfer of property, where the person does not come into possession of the property." Danzas Taiwan, Ltd. v. Freeman, 868 So. 2d 537 (Fla. 3d DCA 2003). In Freeman v. First Union National Bank, 865 So. 2d 1272 (Fla. 2004), the Florida Supreme Court held that there is no cause of action "against an aider or abettor to a fraudulent transaction," but a footnote left open the possibility of a claim for civil conspiracy. Other courts have recognized claims for conspiracy to defraud creditors. See Elie v. TFB Properties, Inc., 652 So. 2d 1194 (Fla. 4th DCA 1995) and Huntsman Packaging Corp. v. Kerry Packaging Corp., 992 F.Supp. 1439 (M.D.Fla. 1998).

3. Calling a particular witness at trial. In Puglisi v. State, 110 So. 3d 1196 (Fla. 2013), the Florida Supreme Court held that defense counsel, rather than a criminal defendant, "has the final authority as to whether or not the defense will call a particular witness to testify at the criminal trial."

M. Terminating representation. Rule 4-1.16 provides that a lawyer may withdraw from representing a client at any time that it can be accomplished "without material adverse effect on the interests of the client." Furthermore, even if there is a material adverse effect, the lawyer may nevertheless withdraw for "good cause," examples of which are set forth in Rule 4-1.16(b). Under certain circumstances described in the Rule, a lawyer is required to terminate the representation. Upon termination of representation, a lawyer "shall take steps to the extent reasonably practicable to protect a client's interest." See The Florida Bar v. King, 664 So. 2d 925 (Fla. 1995) (holding that attorney "could not simply stop representing his clients without following the procedures for withdrawal described in Rule 4-1.16(a)").

1. Order required. Rule 2.505(f) of the Rules of Judicial Administration provides that an attorney shall not be permitted to withdraw from an action unless the withdrawal is approved "by order of court." Similarly, any substitution of counsel must be "by order of court."

2. Right to withdraw. According to the leading Florida case on this subject, an attorney has "the right to terminate the attorney-client relationship and to withdraw as an attorney of record upon due notice to his client and approval of the court." Such approval "should be rarely withheld" and "only upon a determination" that withdrawal would "interfere with the efficient and proper functioning of the court." However, approval of the court "will not relieve the attorney of any civil liability . . . nor from appropriate disciplinary procedures . . . if it [i.e. the withdrawal] is wrongfully done." Fisher v. State, 248 So. 2d 479 (Fla. 1971).

N. Client files upon termination. Upon termination of representation, the attorney is required to surrender papers and property "to which the client is entitled," but "the lawyer may retain papers and other property . . . to the extent permitted by law." (4-1.16(d))

1. Copies to client. Case files belong to the attorney, not the client. Dowda and Fields, P.A. v. Cobb, 452 So. 2d 1140, 1142 (Fla. 5th DCA 1984). Except for documents provided by the client, an attorney is not required to give materials from the client's file to the client or "make copies free of charge." Donahue v. Vaughan, 721 So. 2d 356 (Fla. 5th DCA 1998). However, "under normal circumstances, an attorney should make available to the client, at the client's expense, copies of information in the file where such information would serve a useful purpose to the client." Opinion 88-11 (Reconsideration) Notwithstanding this Opinion, an attorney who properly asserts a retaining lien is arguably not required to provide copies to the client, even if the client offers to pay for the copies or has filed suit against the attorney for malpractice. Rutherford, Mulhall & Wargo, P.A. v. Antidormi, 695 So. 2d 1300 (Fla. 4th DCA 1997) and Foreman v. Behr, 866 So. 2d 705 (Fla. 2d DCA 2003).

O. Accepting gifts from client. Rule 4-1.8(c) states that a lawyer shall not "prepare on behalf of a client an instrument giving the lawyer" (or a member of the lawyer's family) "any substantial gift" (unless the client is a family member). However, the Comment to the Rule explains that a "lawyer may accept a gift from a client, if the transaction meets general standards of fairness and if the lawyer does not prepare the instrument bestowing the gift." In 2006, the Florida Supreme Court adopted an amendment to Rule 4-1.8 prohibiting lawyers from "soliciting" a substantial gift from a client. A statute added to the Florida Probate Code in 2013, Section 732.806, provides: "Any

part of a written instrument which makes a gift to a lawyer or a person related to the lawyer is void if the lawyer prepared or supervised the execution of the written instrument, or solicited the gift, unless the lawyer or other recipient is related to the person making the gift."

P. Business transactions with client. Rule 4-1.8(a), as amended in 2006, provides that a lawyer "shall not enter into a business transaction with a client" or "knowingly acquire" a "pecuniary interest adverse to a client" unless: the terms are fair; the terms are fully and reasonably disclosed in writing; "the client is advised in writing of the desirability of seeking and is given an opportunity to seek the advice of independent legal counsel," and the client "gives informed consent, in a writing signed by the client . . . ." See also Opinion 02-8.

VI. FILING SUIT AND PLEADINGS

A. Standard in Rule 4-3.1. "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous." An action is considered frivolous "if the lawyer is unable either to make a good faith argument on the merits . . . or to support the action taken by a good faith argument for an extension, modification, or reversal of existing law." (4-3.1) See DeVaux v. Westwood Baptist Church, 953 So. 2d 677 (Fla. 1st DCA 2007).

1. Sanctions. In The Florida Bar v. Richardson, 591 So. 2d 908 (Fla. 1991), an attorney was suspended for sixty days for filing a "frivolous and malicious" lawsuit in federal court. In Florida Bar v. Kelly, 813 So. 2d 85 (Fla. 2002), an attorney who sued a client for filing a grievance against him was suspended for 91 days.

B. Related rules. Federal Rule 11 authorizes severe sanctions for filing frivolous pleadings, and 28 U.S.C. §1927 authorizes the court to award fees and costs against an attorney who "multiplies the proceedings in any case unreasonably and vexatiously." See Glenn J. Waldman, Federal Court Sanctions Against Attorneys Under 28 U.S.C. §1927, Fla. B.J., Jan. 2007. Similarly, Rule 2.515(a) of Florida's Rules of Judicial Administration provides that an attorney's signature constitutes a certificate that there is "good ground to support" the pleading and that it is "not interposed for delay." If a pleading is not signed or if it is signed "with intent to defeat the purpose of this rule," it may be stricken, pursuant to Rule 2.515(a). Trial courts also have "the inherent authority to impose attorneys' fees against an attorney for bad faith conduct." Moakley v. Smallwood, 826 So. 2d 221 (Fla. 2002).

C. Section 57.105, Florida Statutes. Subsection 1 of this statute states that the court "shall award" reasonable fees to the prevailing party if the losing party or attorney "knew or should have known" that "any claim or defense" was not

"supported by the material facts" or the "then-existing law" (subject to an exception for arguments to modify existing law made in good faith "with a reasonable expectation of success"). Subsection 2 authorizes an award of fees if "any action" is taken "primarily for the purpose of unreasonable delay." (For an excellent discussion of this statute, see John P. Fenner, New 57.105 Lawyer Sanctions, Our Ethics and The Florida Constitution, Fla. B.J., May 2003 at 26.)

1. Purpose. "The purpose of 57.105 is to discourage baseless claims" and "not to cast a chilling effect on use of the courts" or "discourage a party from pursuing a colorable claim." Therefore, section 57.105 "should be applied with restraint." Swan Landing Development, LLC v. First Tennessee Bank N.A., 97 So. 3d 326 (Fla. 2d DCA 2012).

2. Safe Harbor. The award may be made "at any time" during a civil proceeding. However, subsection 4 of the statute provides that a motion pursuant to this statute may not be filed until 21 days after it has been served on the opposing party and then only if the matter has not been corrected. This 21 day "safe harbor" applies only when a party moves for fees and does not apply when the court awards fees on its own initiative. Schmigel v. Cumbie Concrete Company, 915 So. 2d 776 (Fla. 1st DCA 2005), rev. denied, 930 So. 2d 622 (Fla. 2006). However, in Davidson v. Ramirez, 970 So. 2d 855 (Fla. 3d DCA 2007), the court reversed an award of fees, explaining that "[i]t would frustrate the legislative intent to avoid the twenty-one-day notice by allowing the court to adopt the party-filed motion as the court's own." In Koch v. Koch, 47 So. 3d 320 (Fla. 2d DCA 2010), the court distinguished Davidson (by noting that the trial court in that case had "effectively adopted the defendant's motion" as the court's own motion), and held that the 21-day notice requirement is not applicable when a court imposes sanctions on its own initiative. In Albelo v. Southern Oak Ins. Co., __ So. 3d __ (Fla. 3d DCA 2014), the Third District Court of Appeal followed, Koch, supra.

3. Liability of attorney and client. The award is to be paid in equal amounts by the losing party and attorney (unless the attorney acted in good faith based on representations of the client). Ferdie v. Isaacson, 8 So. 3d 1246 (Fla. 4th DCA 2009) ("the losing party's attorney is not personally responsible if he or she has acted in good faith, based on the representations of his or her client," and "a full evidentiary hearing on the good faith issue is necessary."). However, the court may order the attorney to pay 100% of the fees based on the "inequitable conduct doctrine." Korte v. US Bank National Association, 64 So. 3d 134 (Fla. 4th DCA 2011).

4. Duty to verify. Does a law firm have "a duty to independently verify what it was told by its client"? No, according to a concurring opinion in Wolfe v. Foreman, 128 So. 3d 67 (Fla. 3d DCA 2013). ("The plaintiff alleges the . . . law firm had a duty to independently verify what it was told by its client and lead counsel. That is not so.") See also Endacott v. International Hospitality, Inc., 910 So. 2d 915 (Fla. 3d DCA 2005) (attorneys "are entitled to rely on their client's representations of fact").

5. Additional damages. The court may award additional damages under Section 57.105, such as delay damages. Korte v. US Bank National Association, 64 So. 3d 134 (Fla. 4th DCA 2011).

6. Discovery. Even if a defense "initially appeared" to be "meritorious," an attorney may be liable under section 57.105 for failing to withdraw the defense promptly after facts disclosed during discovery made the defense "completely untenable." Gahn v. Holiday Property Bond, Ltd., 826 So. 2d 423 (Fla. 2d DCA 2002).

7. Informing client. When a motion under section 57.105 has been filed, "an ethical duty may arise on the part of the attorney to bring this matter to the client's attention and perhaps go as far as to recommend getting independent counsel." Kerzner v. Lerman, 849 So. 2d 1185 (Fla. 4th DCA 2003). See also Khoury v. Estate of Kashey, 553 So. 2d 908 (Fla. 3d DCA 1988) ("It is therefore incumbent upon the attorney facing a 57.105 proceeding to apprise the client of the conflict . . . .") and Geiger v. Spurlock, 30 So. 3d 704 (Fla. 5th DCA 2010).

8. Defending order on appeal. Could a lawyer ever be sanctioned pursuant to 57.105 for defending a trial court's order on appeal? In State Dept. of Highway Safety and Motor Vehicles v. Salter, 710 So. 2d 1039, 1041 (Fla. 2d DCA 1998), the Second District Court of Appeal concluded that since the judgment of a trial court carries a presumption of correctness, the defense of a judgment "necessarily involves the advancement of justiciable issues," and quashed the lower court's award of fees and costs pursuant to section 57.105. However, in Boca Burger, Inc. v. Forum, 912 So. 2d 561 (Fla. 2005), the Supreme Court disagreed, explaining that "allowing sanctions against appellees or their counsel for defending indefensible orders requires the quintessentially professional act of admitting defeat when there is no chance of victory, or when victory will have been obtained at the price of integrity and truth." (emphasis by the Court) The Court concluded that "the rules . . . require counsel to concede error on appeal when appropriate," explaining that "[t]oo many members of the Bar practice with complete ignorance of or disdain for the basic principle that a lawyer's duty to his calling and to the administration of justice far outweighs – and must outweigh – even his obligation to his

client." See also, Florida Rule of Appellate Procedure 9.410 and United Automobile Insurance Co. v. Doctor Rehab Center, Inc., 121 So. 3d 66 (Fla. 3d DCA 2013) (award of sanctions pursuant to 57.105 reversed because of failure to comply with 10-day notice provision in Rule 9.410).

9. Adding a Fabre defendant. After defendants specifically identify certain individuals who may be liable to plaintiff in a Fabre affirmative defense, the Plaintiff adds those individuals as defendants. Could the Plaintiff be sanctioned pursuant to 57.105 for this? Yes, Plaintiff "cannot avoid responsibility for attorneys fees" simply because Defendant claimed someone else was liable. Yakavonis v. Dolphin Petroleum, Inc., 934 So. 2d 615 (Fla. 4th DCA 2006).

D. Electronic filing. All court documents in civil courts must be filed electronically as of April 1, 2013 via a single website serving all courts known as E-Portal. Only lawyers may obtain a user name and password for filing via E-Portal. May lawyers permit their staff members to use the lawyer's access credentials? According to Opinion 12-2, the Professional Ethics Committee "is of the opinion that a properly supervised nonlawyer may use the credentials of a lawyer to file documents via the E-Portal at the lawyer's discretion."

E. Signing court papers. All papers filed with the court are to be signed "by an attorney of record." The signature "shall constitute a certificate" that the attorney "has read" the paper, that there is "good ground to support it," and that "it is not interposed for delay." Rule 2.515(a), Judicial Administration Rules.

1. Original signature. The signature may be an "original" or an original that has been "reproduced by electronic means," including "photocopied documents." Rule 2.515(c). See also Wemett v. State, 536 So. 2d 349 (Fla. 1st DCA 1988) ("In the absence of a statute prescribing the method of affixing a signature . . . it may be printed, stamped, typewritten, engraved, photographed or cut from one instrument and attached to another.").

2. Other formats. "Any other signature format authorized by general law" is allowed in state courts in which the clerk has obtained approval from the Supreme Court of Florida, but if the electronic filing does not contain an original signature, an identical paper with an original signature must be filed immediately thereafter. Rule 2.515, Judicial Administration Rules.

3. Signing by nonlawyer. "[A]n attorney should not under any circumstances permit nonlawyer employees to sign notices of

hearing." Opinion 87-11. But see Hanklin v. Blissett, 475 So. 2d 1303 (Fla. 3d DCA 1985) ("a pleading signed in the name of the attorney by the attorney's authorized agent [which was a secretary in that case] is, in effect, a pleading signed by the attorney.") In Standard Guaranty Insurance Co. v. Fidelity & Deposit Co. of Maryland, 140 F.R.D. 5 (M.D. Fla. 1991), rev'd, 980 F.2d 1447 (11th Cir. 1992), a motion to dismiss was stricken and a default was entered because the motion was signed by the attorney of record's partner. While the trial court's decision was "reversed in part, vacated in part" in an unpublished opinion, it was subsequently cited with approval in Ware v. U.S., 154 F.R.D. 291 (M.D. Fla. 1994).

4. Electronic signing. If a court paper is to be signed electronically, must the lawyer (as opposed to a staff member) actually touch the computer keys to accomplish the signing? Arguably, the answer is "yes" pursuant to Opinion 87-11. Opinion 12-2 specifically notes that it does not address the issue. However, on January 24, 2014, the Professional Ethics Committee voted to reconsider Florida Ethics Opinion 87-11 in light of Rule of Judicial Administration 2.515 regarding electronic signatures.

F. Default. Assume that a defendant has not filed any paper or requested an extension by the deadline for responding to a complaint, but you know that the defendant is represented by counsel and intends to defend the lawsuit. Should you take a clerk's default? In Makes & Models Magazine, Inc. v. Web Offset Printing, 13 So. 3d 178 (Fla. 2d DCA 2009), the court, referencing "civility and professionalism," held that a clerk's default must be vacated under these circumstances, explaining that the plaintiff "is required to serve the defendant with notice of the application for default and to present the matter to the court for entry of the default."

VII. COMMUNICATIONS WITH ADVERSARIES, PARTIES AND WITNESSES

A. Oath. As amended in 2011, the Oath of Admission provides that Florida attorneys "pledge fairness, integrity, and civility" to "opposing parties and their counsel" in "all written and oral communications." In re Oath of Admission to The Florida Bar, 73 So. 3d 149 (Fla. 2011).

B. Advocacy and courtesy. "An attorney has a responsibility to represent his client zealously within the bounds of the law. . . . He cannot, however, take action on behalf of his client that he knows will merely serve to harass his opponent. . . . Moreover, a lawyer should be courteous to and accede to the reasonable requests of his opposing counsel regarding matters which will not prejudice the rights of his client." Sanchez v. Sanchez, 435 So. 2d 347 (Fla. 3d DCA 1983)

C. Truthfulness. A lawyer is required to be truthful when dealing with others on a client's behalf. (4-4.1 Comment) A lawyer shall not knowingly "make a false statement of material fact or law" or "fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by rule 4-1.6 [confidentiality of information]." (4-4.1) Misrepresentations can occur by "partially true but misleading statements or omissions that are the equivalent of affirmative false statements." (4-4.1 Comment)

D. Settlement negotiations. Rule 4-4.1 states that a lawyer shall not knowingly "make a false statement of material fact or law." However, "[u]nder generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are in this category . . . ." (Rule 4-4.1 Comment) See also ABA Opinion 06-439 ("It is not unusual in a negotiation . . . to make a statement . . . that is less than entirely forthcoming.").

E. Disclosure of interest. In dealing on behalf of a client with a witness or other person who is not represented by counsel, a lawyer "shall not state or imply that the lawyer is disinterested." (4-4.3)

F. Unprofessional behavior. Rule 4-4.4 provides that "In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person or knowingly use methods of obtaining evidence that violate the legal rights of such a person." Similarly, Rule 4-8.4(d) prohibits behavior which has "no substantial purpose other than to embarrass, delay, or burden a third person." In The Florida Bar v. Sayler, 721 So. 2d 1152 (Fla. 1998), cert. denied, 528 U.S. 890 (1999), the Florida Supreme Court reprimanded an attorney who, in a workers' compensation case, sent the opposing attorney a letter referencing the recent murder of an attorney who represented employees in workers' compensation cases, explaining that "[t]he First Amendment does not protect those who make harassing or threatening remarks about the judiciary or opposing counsel." See also The Florida Bar v. Adams, 641 So. 2d 399 (Fla. 1994) (attorney suspended for 90 days for falsely accusing another attorney of suborning perjury).

1. Threats. An attorney may not "present, participate in presenting, or threaten to present" criminal charges "solely to obtain an advantage in a civil matter." (Rule 4-3.4(g)). See also Opinion 89-3. (It is "improper for an attorney to bring, participate in bringing, or threaten to bring criminal charges against someone solely to obtain an advantage in a civil matter, or if the primary purpose of such action is harassment.") Similarly, filing or threatening to file a disciplinary complaint against opposing counsel "solely to obtain an advantage in a civil matter" is

prohibited. (Rule 4-3.4(h) and Opinion 94-5) In contrast, the ABA Model Rules of Professional Conduct do not include a specific prohibition against threatening criminal charges, in recognition that raising the possibility of criminal charges is appropriate in some circumstances, as explained in ABA Formal Opinion 92-363.

G. Payment to witness. A lawyer shall not "offer an inducement to a witness" except a lawyer may pay reasonable expenses incurred, reasonable non-contingent fees of an expert witness, and reasonable compensation "to reimburse a witness for the loss of compensation incurred by reason of preparing for, attending, or testifying at proceedings." (4-3.4(b))

1. Medical-legal consulting service. "It is impermissible for an attorney to enter into an arrangement with a medical-legal consulting service on a contingency fee basis to provide services to the attorney's client, including provision of an expert witness." Opinion 98-1

2. Non-testifying witnesses. "Offering financial inducements to a fact witness is extremely serious misconduct," and the prohibition against paying witnesses "is not limited to testifying witnesses." The Florida Bar v. Wohl, 842 So. 2d 811 (Fla. 2003). In that case, a party to a dispute over a large estate hired a former employee of the family business to provide "assistance" with the litigation for $500 per hour plus a large bonus depending on "the usefulness of the information provided." The Florida Supreme Court suspended an attorney who participated in developing the agreement, rejecting the attorney's contention that the former employee was a "consultant" rather than a "fact witness."

H. Asking witness not to volunteer information. While lawyers may instruct their clients not to volunteer information, they are prohibited from requesting that a witness refrain from voluntarily giving relevant information to an opposing party (unless the witness is a relative, employee, or agent of the client and "the person's interests will not be adversely affected by refraining from giving such information"). (4-3.4(f))

I. Surreptitious recordings. May you secretly record a conversation with a witness? ABA Formal Opinion 337, which stated that it is unethical for a lawyer to engage in secret tape recordings, has been withdrawn pursuant to Formal Opinion 01-422, and the Restatement of the Law Governing Lawyers states that lawyers may make a secret recording if it does not violate the law of the relevant jurisdiction. While Florida's Rules of Professional Responsibility do not address the issue, Chapter 934, Florida Statutes, prohibits the recording of conversations without the consent of all participants, at least when the speaker has a reasonable expectation of privacy. State v. Tsavaris, 394 So. 2d 418 (Fla. 1981), rev. denied, 424 So. 2d 763 (1983);

State v. Sells, 582 So. 2d 1244 (Fla. 4th DCA 1991). "A significant factor used in determining the reasonableness of the defendant's expectation of privacy in a conversation is the location in which the conversation or communication occurs." Stevenson v. State, 667 So. 2d 410 (Fla. 1st DCA 1996).

J. Private investigators. The Comment to Rule 4-8.4 was amended in 2006 to specify that lawyers may not "knowingly assist or induce" someone else to violate the Rules of Professional Conduct or "request or instruct an agent to do so." In 2008, a prominent attorney in Los Angeles was convicted of "aiding and abetting" and conspiracy to commit wiretapping after it was discovered that a private investigator he hired had wiretapped telephone conversations of an opposing party. Victoria Kim, Attorney, Pellicano guilty of snooping, L.A. Times, Aug. 30, 2008.

K. Represented persons. If a lawyer knows that a person is represented by another lawyer in the matter, the lawyer shall not communicate "about the subject of the representation with the person unless the other lawyer consents." (4-4.2) "The rule applies even though the represented person initiates or consents to the communication." (4-4.2 Comment)

1. General counsel. "If an individual or a corporation has general counsel representing that party in all matters, communications must be with the attorney" even if the particular matter which is the subject of the communication has not yet been referred to the general counsel. (Opinion 78-4)

2. In-house counsel. According to an opinion from the ABA, a lawyer is not prohibited from communicating directly with an opposing party's in-house counsel about a matter even if outside counsel represents the opposing party in the matter. (ABA Formal Opinion 06-443)

3. Attorney as party. Since represented parties are not prohibited from communicating directly with one another, may an attorney who is a party to a lawsuit communicate directly with adverse represented parties? While there is no authority on this issue in Florida, other states say that attorneys may not do this. (E.g., Massachusetts Opinion 97-1 and Virginia Legal Ethics Opinion 1527).

4. Indirect communication. "A lawyer may not make a communication prohibited by this rule through the acts of another," according to the Comment to Rule 4-4.2, as amended in 2006, but "parties to a matter may communicate directly with each other, and a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make, provided that the client is not used to indirectly violate the Rules of Professional Conduct." (4-4.2 Comment) See The Florida Bar v. Nicnick, 963 So. 2d 219 (Fla. 2007) (when

attorney gave his client a settlement agreement with the understanding that it would be delivered to the opposing party, the attorney "had an obligation to share the document with opposing counsel.").

5. Copies to opposing party. If you suspect that your adversary is not relaying settlement offers, may you copy the opposing party with correspondence sent to opposing counsel? No. (Opinion 76-28) However, you could advise your client to ask the opposing party if the offer had been received. (ABA Formal Opinion 92-362)

6. Exception for required notices. The rule prohibiting attorneys from communicating directly with represented parties does not prohibit giving statutory or contractual notices directly to a represented party, but such communication "shall be strictly limited to that required by statute or contract, and a copy shall be provided to the adverse party's attorney." (4-4.2 and Opinion 89-6)

7. Post-judgment. When does the representation end for purposes of this rule? Even after entry of judgment and expiration of the appeal period, a plaintiff's attorney may not communicate directly with the defendant "until he has determined that the defendant is no longer represented by counsel." (Opinion 65-3)

8. Second opinions. Are lawyers restricted from giving second opinions by the statement in Rule 4-4.2 that "a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer . . ."? No, according to Advisory Opinion 02-5.

L. Current employees. As amended in 2006, the Comment to Rule 4-4.2 states: "In the case of a represented organization, this rule prohibits communications with a constituent of the organization who supervises, directs, or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability."

1. Permitted communications. There is no prohibition against direct communication with a corporation's employee so long as the employee is not an officer, director, managing agent, or "directly involved in the incident or matter giving rise to the investigation or litigation." However, "the attorney or the attorney's agent must specifically identify the capacity in which they are conducting the investigation." (Opinion 78-4) But see Lang v. Reedy Creek Improvement District, 888 F. Supp. 1143 (M.D. Fla. 1995) ("Plaintiff

shall not initiate ex parte communications with current employees of the Defendants absent prior consent of Defense counsel or this Court.").

2. Governmental employees. Rule 4-4.2 also applies to employees of governmental agencies. However, the rule does not prohibit an attorney from communicating with such employees "on subjects unrelated to those controversies in which the agency attorney is actually known to be providing representation." (Opinion 09-1)

M. Former employees. May an attorney representing one party in a lawsuit have ex parte communications with former employees of the opposing party, when the opposing party is represented by counsel? Yes, at least in Florida's state courts. In 2006, the Comment to Rule 4-4.2 was amended to specify that: "Consent of the organization's lawyer is not required for communication with a former constituent."

1. Bar Opinions. According to Florida Bar Ethics Opinion 88-14, "a plaintiff's attorney may communicate with former managers and former employees of a defendant corporation without seeking and obtaining consent of the corporation's attorney." However, "the attorney should not inquire into matters that are within the corporation's attorney/client privilege (e.g., asking former manager to relate what he told the corporation's attorney concerning the subject matter of the representation)." ABA Formal Opinion 91-359 reaches a similar conclusion.

2. Supreme Court Decision. In H.B.A. Management, Inc. v. Estate of Schwartz, 693 So. 2d 541 (Fla. 1997), the Florida Supreme Court held that Rule 4-4.2 "neither contemplates nor prohibits an attorney's ex parte communications with former employees of a defendant employer." The Court further explained that "there is no valid reason to distinguish between former employees who witnessed an event and those whose act or omission caused the event."

3. Federal Cases. While the Florida Supreme Court has clarified the law relating to ex parte communications with former employees in state court cases, "practice in federal district courts in Florida is still unsettled." Bernard H. Dempsey, Jr., Ex Parte Communications with Current and Former Employees of a Corporate Defendant, Fla. B.J., December 1997 at 10; see also Lang v. Reedy Creek Improvement District, 888 F. Supp. 1143 (M.D. Fla. 1995), for a list of guidelines to be followed when contacting former employees. More recently, in Pepperwood of Naples Condominium Ass's, Inc. v. Nationwide Mut. Fire Ins. Co., 2011 WL 4382104 (M.D. Fla. 2011), the court held that plaintiff's counsel could contact former managers and other former

high level employees of defendant "but must do so through defense counsel." See also, NAACP v. Florida Dept. of Corrections, 122 F. Supp. 2d 1335 (M.D. Fla. 2000).

N. Expert witnesses. May an attorney representing one party in a case have ex parte communication with the other party's expert witnesses?

1. Section 456.057(5), Florida Statutes. This Statute prohibits a health care provider from disclosing information about a patient without written authorization from the patient or pursuant to subpoena. See Acosta v. Richter, 671 So. 2d 149 (Fla. 1996); Bradley v. Brotman, 836 So. 2d 1129 (Fla. 4th DCA 2003) (attorney improperly subpoenaed medical records without giving notice to patient, as required by statute).

2. Rule 1.280 (b)(4). Furthermore, by providing that "[d]iscovery of facts known and opinions held by experts . . . may be obtained only as follows . . ." (emphasis added), the Rules of Civil Procedure arguably prohibit a party from having ex parte communication with an opposing party's expert.

3. Federal cases. However, some federal courts have permitted ex parte communication with experts, reasoning that the federal equivalent of Florida's Rule 1.280(b)(4) only establishes a "formal method of acquiring evidence" and does not "preclude the use of such venerable, if informal, discovery techniques as the ex parte interview of a witness who is willing to speak." Doe v. Eli Lilly & Co., 99 F.R.D. 126 (D.D.C. 1983). Other federal cases have disagreed with this analysis. See Horner v. Rowan Companies, Inc., 153 F.R.D. 597 (S.D. Texas 1994). In Franklin v. Nationwide Mut. Fire Ins. Co. 566 So. 2d 529 (Fla. 1st DCA), rev. dismissed, 574 So. 2d 142 (Fla. 1990), the court criticized Doe v. Eli Lilly & Co., supra, and reversed a trial court's order which compelled an insured to execute a medical authorization permitting ex parte communications between the insurer's attorney and the insured's physicians.

O. Hiring adversary's former employee or expert. May an attorney hire a former employee or former expert of an opposing party to testify as an expert?

1. Former employee. An attorney was disqualified for doing this in Rentclub, Inc. v. Transamerica Rental Finance Corp., 811 F. Supp. 651 (M.D. Fla. 1992), affirmed, 43 F.3d 1439 (11th Cir. 1995), but that case was distinguished and a motion to disqualify was denied in Carnival Corporation v. Romero, 710 So. 2d 690 (Fla. 5th DCA 1998).

2. Former expert. There is no "automatic" disqualification of an expert who was previously retained by an opposing party. However, the expert will be disqualified if his or her opinion discloses or is based on any confidential communication from the opposing lawyer or party. Sultan v. Earing-Doud, 852 So. 2d 313 (Fla. 4th DCA 2003). The opinion also states that whether an attorney should be disqualified for contacting an opponent's non-testifying expert depends upon whether the attorney obtained confidential information. See Kendall Coffey, Inherent Judicial Authority and the Expert Disqualification Doctrine, 56 Fla. L. Rev. 195 (Jan. 2004).

P. Unrepresented party as adversary. Assume that your client negotiates a settlement with the opposing party, who is unrepresented, and asks you to put the agreement in writing. If you believe that the settlement is so favorable to your client that it may be unconscionable, you may have an affirmative duty to explain the material terms of the settlement documents to the opposing party so that he "fully understands their actual effect." See The Florida Bar v. Belleville, 591 So. 2d 170 (Fla. 1991); William J. Hazzard, Professional Responsibility: Duties Owed to an Unrepresented Party, 44 Fla. L. Rev. 489 (1992). While an amendment to Rule 4-4.3, adopted in 2006, states that a lawyer "shall not give legal advice to an unrepresented person, other than the advice to seek counsel," the Comment to the Rule, as amended in 2006, explains that a lawyer "may explain . . . the meaning" of a transaction or settlement document to an unrepresented opposing party.

VIII. DISCOVERY AND EVIDENCE

A. Discovery. A lawyer shall not "make a frivolous discovery request or intentionally fail to comply with a legally proper discovery request by an opposing party." (4-3.4(d)) See Pecorelli v. Vantage Real Property Holding Corp., 685 So. 2d 1309 (Fla. 2d DCA 1995) (order striking pleadings upheld for repeatedly failing to appear for depositions).

B. Concealing or altering evidence. A lawyer shall not "unlawfully obstruct another party's access to evidence" or unlawfully alter or conceal material that the lawyer knows, or should know, is relevant to a pending or reasonably foreseeable proceeding. (4-3.4(a))

1. "Drastic sanctions, including default, are appropriate when a defendant alters or destroys physical evidence, and when the plaintiff has demonstrated an inability to proceed without such evidence." Sponco Manufacturing, Inc. v. Alcover, 656 So. 2d 629 (Fla. 3d DCA), rev. granted, 666 So. 2d 144 (Fla. 1995), rev. denied, 679 So. 2d 771 (Fla. 1996). "Alternatively, when a party fails to produce evidence within his control, an adverse inference may be drawn that the withheld evidence would be unfavorable to the party failing to produce it." New

Hampshire Ins. Co., Inc. v. Royal Ins. Co., 559 So. 2d 102 (Fla. 4th DCA 1990). In Federal Ins. Co. v. Allister Manufacturing Co., 622 So. 2d 1348 (Fla. 4th DCA 1993), the court concluded that a sanction which was the equivalent of a dismissal, was not warranted where the loss of evidence was "inadvertent and not for improper purpose." See Bard D. Rockenbach, Spoliation of Evidence/A Double Edged Sword, Fla. B.J., Nov. 2001 at 34.

C. Depositions. While Rule 4-4.4 prohibits unduly "embarrassing" or "burdening" a witness and Rule 4-3.4 prohibits unlawfully obstructing access to evidence, special related guidelines and rules have been developed for depositions, including the following:

1. Examination. According to the "Guidelines for Professional Conduct" of The Florida Bar Trial Lawyers' Section, "[c]ounsel should not inquire into a deponent's personal affairs or question a deponent's integrity where such inquiry is irrelevant to the subject matter of the deposition."

2. Objections. Rule 1.310(c), Florida Rules of Civil Procedure, provides that "[a]ny objection during a deposition shall be stated concisely and in a nonargumentative and non-suggestive manner." According to the "Guidelines for Professional Conduct" of The Florida Bar Trial Lawyers' Section, "[w]hen objecting to the form of a question, counsel should simply state 'I object to the form of the question.' The grounds should not be stated unless asked for by the examining attorney. When the grounds are then stated they should be stated succinctly and only what is necessary to state the grounds should be stated."

3. Instructions. "A party may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation on evidence directed by the court, or to present a motion under subdivision (d) [to terminate or limit a deposition]." Fla. R. Civ. P. 1.310(c).

D. Inadvertent disclosure. "An attorney who receives confidential documents of an adversary as a result of an inadvertent release is ethically obligated to promptly notify the sender of the attorney's receipt of the documents. It is up to the sender to take any further action." (Opinion 93-3)

1. Rule 4-4.4(b). In 2006, the Florida Supreme Court codified the concept in Opinion 93-3 by amending Rule 4-4.4(b) to state that a lawyer "who knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender." The Comment, also amended in 2006, explains: "Whether the lawyer is required to take additional steps, such as returning the original document, is a

matter of law beyond the scope of these rules, as is the question of whether the privileged status of a document has been waived."

2. No waiver or disqualification. In Kusch v. Ballard, 645 So. 2d 1035 (Fla. 4th DCA 1994), the court concluded that an inadvertent disclosure of a document did not waive the attorney/client privilege and would not require disqualification of either attorney. See also Cunningham v. Appel, 831 So. 2d 214 (Fla. 5th DCA 2002); Dorothea Beane and Heath Nailos, Inadvertent Disclosure of Attorney-Client Privilege Material: Putting the Horse Back in the Barn, Fla. B. J., Oct. 1995 at 67; John T. Hundley, Annotation, Waiver of Evidentiary Privilege by Inadvertent Disclosure B Federal Law, 159 ALR Fed. 153 (2000).

3. Disqualification. However, in Abamar Housing and Dev., Inc. v. Lisa Daly Lady Decor, Inc., 724 So. 2d 572 (Fla. 3d DCA 1998), rev. denied, 729 So. 2d 918 (Fla. 1999), the court held that the inadvertent receipt of privileged documents was grounds for disqualification regardless of whether prejudice resulted from the disclosure. In a footnote, the court explained that "an attorney who follows the dictates of the Ethics Opinion [i.e., Opinion 93-3, supra], and complies with the obligation to promptly notify and to return immediately the inadvertently produced documents without exercising any unfair advantage (such as photocopying the 'confidential documents' prior to returning them), will not be subject to disqualification." (emphasis by the court). See also General Accident Insur. Co. v. Borg-Warner Acceptance Corp., 483 So. 2d 505 (Fla. 4th DCA 1986) (firm disqualified after receiving privileged file as a result of judge's error).

4. Unfair informational advantage. In Moriber v. Dreiling, 95 So. 3d 449 (Fla. 3d DCA 2012), the court explained that there must be an "inadvertent disclosure" and the "possibility" of a resulting "unfair informational advantage" to warrant disqualification. To determine whether there was an unfair advantage the court must look at "the actions taken by the receiving lawyers," citing Abamar, supra.

5. Actions of receiving lawyer. In Atlas Air, Inc. v. Greenberg Traurig, P.A., 997 So. 2d 1117 (Fla. 3d DCA 2008), the court, noting that a law firm "fell far short of satisfying the requirements" of Abamar Housing, supra, and gained an unfair informational advantage, held that not only the individual lawyer who reviewed the inadvertently produced documents – but the entire law firm – must be disqualified. A concurring judge explained that "[b]ecause there is no requirement that prejudice be shown . . . and it is so difficult to measure how much of an advantage, if any, was obtained due to the inadvertent disclosure of privileged documents, the court must look to the actions taken by

the receiving lawyer or law firm in determining whether the drastic remedy of disqualification is warranted." See also Etan Mark, Inadvertent Document Productions and the Threat of Attorney Disqualification, Fla. B.J., Nov. 2009 at 9.

6. Vacated order. In Coral Reef of Key Biscayne Developers, Inc. v. Lloyds' Underwriters at London, 911 So. 2d 155 (Fla. 3d DCA 2005), a trial court ordered disclosure of documents, rejecting an argument that they were privileged. However, after the documents had been produced, the trial court's order was vacated by the appellate court, which concluded that the documents were privileged. The party who produced the documents then moved to disqualify opposing counsel based on Abamar, supra. The appellate court denied the motion, stating: "[w]e hold that a higher standard must apply for disqualifying counsel when the privileged documents are received pursuant to a court order that is subsequently vacated." The court said it was persuaded by a Texas court which had concluded in a similar case that "the party moving to disqualify counsel must show that (1) the opposing counsel's review of the privileged documents caused actual harm to the moving party, and (2) disqualification is necessary because the trial court lacks means to remedy the moving party's harm."

7. Test for waiver. In Nova Southeastern University, Inc. v. Jacobson, 25 So. 3d 82 (Fla. 4th DCA 2009), the court confirmed that "the relevant circumstances test" should be applied in determining whether an inadvertent disclosure of documents results in the waiver of the attorney-client privilege. That test includes the following five factors: "1) the reasonableness of the precautions taken to prevent inadvertent disclosure . . .; 2) the number of inadvertent disclosures; 3) the extent of the disclosure; 4) any delay and measures taken to rectify the disclosures; and 5) whether the overriding interests of justice would be served by relieving a party of its error."

8. Federal Court. Rule 502, Federal Rules of Evidence (adopted in 2008), provides that the "inadvertent" disclosure of privileged material does not result in a waiver of attorney-client and work product privileges so long as the holder of the privileges "took reasonable steps to prevent disclosure" and "promptly took" reasonable steps to rectify the error.

9. New Florida Rule of Civil Procedure. Rule 1.285, Florida Rules of Civil Procedure, effective January 1, 2011, provides that a party asserting that inadvertently disclosed documents are privileged must do so by serving a written notice within 10 days of discovering the disclosure. A party receiving such a notice "shall promptly return, sequester, or

destroy the materials specified in the notice, as well as any copies of the materials." If the receiving party wishes to challenge the claim of privilege, a "notice of challenge" must be served within 20 days.

E. Documents wrongfully obtained by client. If your client has wrongfully obtained documents from the opposing party, you "must inform the client that the materials cannot be retained, reviewed or used without informing the opposing party" that you and the client have the documents. "If the client refuses to consent to disclosure," you must withdraw but you remain bound by confidentiality obligations to the client. (Opinion 07-1)

1. Disqualification. In Minakan v. Husted, 27 So. 3d 695 (Fla. 4th DCA 2010), a dissolution of marriage case, the wife obtained and provided to her counsel an email between her husband and his counsel. The appellate court instructed the trial court to "determine whether the husband treated the e-mail as confidential and, if so, whether the wife gained an unfair advantage in discovering it and having it forwarded to her attorney. If the court determines that the wife gained an unfair advantage, then disqualification of the wife's attorneys may be appropriate. Regardless of whether the wife gained an unfair advantage, however, disqualification and other sanctions still may be appropriate under the 'inequitable conduct doctrine' if the court finds that the wife, in bad faith, discovered the e-mail and had it forwarded to her attorney. If disqualification is not appropriate, the court can consider lesser remedies, such as precluding any discovery based on the e-mail's contents, precluding the use of the email at trial, or both."

2. Sanctions. In Castellano v. Winthrop, 27 So. 3d 134 (Fla. 5th DCA 2010), a party illegally obtained a USB drive containing privileged and confidential information, which was reviewed by the party's law firm ("Firm"). The Firm was not only disqualified but ordered to delete from its computers all information obtained from the USB drive and "to make their computers available for third-party inspection to confirm deletion of this information – all at the Firm's expense." The Firm and the client were also ordered to indemnify the opposing party "for any damages he might suffer from the improper use" of the information, and the trial court reserved jurisdiction to award attorneys' fees to the opposing party. The appellate court, referencing Opinion 07-1, denied a petition for certiorari.

F. Metadata. Metadata is "information describing the history, tracking, or management of an electronic document," which may be inadvertently transmitted. Opinion 06-2 requires lawyers to "take reasonable steps to safeguard the confidentiality of all communications sent by electronic means . . . and to protect . . . all confidential information, including . . . metadata." The Opinion also prohibits a receiving lawyer from trying to obtain metadata

that is not intended for the lawyer. Issues relating to metadata can usually be avoided by sending electronic documents in PDF.

IX. TRIAL

A. Communication with the court. "A lawyer shall not seek to influence a judge, juror, prospective juror, or other decision maker except as permitted by law or the rules of court." (4-3.5(a)) A lawyer shall only communicate with a judge "as to the merits or the cause" as provided in 4-3.5(b).

B. Conduct in court. "A lawyer shall not engage in conduct intended to disrupt a tribunal." (4-3.5(c))

C. Candor - law. A lawyer shall not make a false statement of law to a tribunal "or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer." (4-3.3(a)(1)) Furthermore, a lawyer shall not knowingly "fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel." (4-3.3(a)(3))

D. Candor - facts. A lawyer shall not knowingly "make a false statement of fact" to a tribunal or "fail to correct a false statement of material fact . . . previously made to the tribunal by the lawyer." (4-3.3(a)(1)) Furthermore, a lawyer shall not knowingly "fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client." (4-3.3(a)(2)) In The Florida Bar v. Corbin, 701 So. 2d 334 (Fla. 1997), an attorney was suspended for 90 days for deliberately misrepresenting facts in a motion for summary judgment.

E. Evidence believed to be false. "A lawyer may refuse to offer evidence that the lawyer reasonably believes is false." (4-3.3(c)) However, "[a] lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact." (4-3.3 Comment)

F. Evidence known to be false. A lawyer shall not knowingly "offer evidence that the lawyer knows to be false." (4-3.3(a)(4))

1. Obligation to prevent perjury. "If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer the false evidence." (4-3.3 Comment) "A lawyer whose client has repeatedly stated that the client will commit perjury must withdraw from the representation and inform the court of the client's intent to lie under oath." (Opinion 04-1)

2. Sanctions. "[D]isbarment is the presumptive sanction for an attorney knowingly presenting false testimony in a judicial proceeding." The Florida Bar v. Cox, 794 So. 2d 1278 (Fla. 2001). Furthermore, false testimony may provide grounds for dismissal or default. John T. Kolinski, Fraud on the Court as a Basis for Dismissal with Prejudice or Default, Fla. B.J., Feb. 2004.

G. False evidence – remedial measures. "If a lawyer, the lawyer's client, or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures including, if necessary, disclosure to the tribunal." (4-3.3(a)(4))

1. Disclosure. "If perjured testimony or false evidence has been offered, the advocate's proper course ordinarily is to remonstrate with the client confidentially if circumstances permit. In any case, the advocate should ensure disclosure is made to the court. It is for the court then to determine what should be done – making a statement about the matter to the trier of fact, ordering a mistrial, or perhaps nothing." (4-3.3 Comment)

2. Withdrawal. If a client offers false testimony, "then the lawyer must convince the client to agree to disclosure and remediation of the false testimony; failing that, the lawyer must disclose to the court anyway. Absent client consent, the lawyer's disclosure of the client's false testimony or intent to offer false testimony will create a conflict between the lawyer and the client requiring the lawyer to move to withdraw from representation." (Opinion 04-1)

3. Privilege. The duties in Rule 4-3.3 apply "even if compliance requires disclosure of information otherwise protected by rule 4-1.6." (4-3.3(d))

4. Conclusion of Proceeding. The duties in Rule 4-3.3 "continue beyond the conclusion of the proceeding." (4-3.3(d))

5. False name. One situation in which it has been determined that withdrawal from representation, without disclosure, is a sufficient remedial measure is when a criminal defendant is proceeding under a false name. According to Opinion 90-6, "[a] lawyer who learns that a criminal defendant who is an existing client is proceeding under a false name must withdraw from representation and must admonish the client not to commit perjury, but cannot disclose the client's use of the false name to the court unless the client makes an affirmative misrepresentation to the court regarding the name."

6. Depositions. An attorney who learns that a client has lied in a deposition is obligated to utilize the remedial measures described above, even if the deposition has not been filed with the court. (Opinion 75-19, as affirmed and clarified in 1998, and 4-3.3 Comment)

H. Attorney as witness. Rule 4-3.7 provides that "[a] lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness on behalf of the client . . . ." (emphasis added).

1. Exceptions. This rule does not apply if "disqualification of the lawyer would work substantial hardship on the client" or if the attorney's testimony relates to: an uncontested issue; a matter of formality; or the nature and value of legal services rendered in the case. (4-3.7)

2. Called by adversary. "An attorney need not withdraw from representation of a client simply because he expects to be called to testify by his adversary; rather, he may continue the representation until it is apparent that his testimony is or may be prejudicial to his client." (Opinion 72-2) In Ray v. Stuckey, 491 So. 2d 1211 (Fla. 1st DCA 1986), the court stated that such testimony is prejudicial "only when sufficiently adverse to the factual assertions or account of events offered on behalf of the client." See also Allstate v. English, 588 So. 2d 294 (Fla. 2d DCA 1991) (disqualification order quashed where there was no evidence that attorney's testimony would be prejudicial to client or that attorney was the only witness who could provide contemplated testimony) and Alto Const. Co., Inc. v. Flagler Const. Equipment, LLC, 22 So. 3d 726 (Fla. 2d DCA 2009) ("an attorney that will be called as a witness by an opposing party may be disqualified if the attorney's testimony will be 'sufficiently adverse to the factual assertions or account of events offered on behalf of the client.'").

3. Pre-trial matters. Disqualification as counsel at trial because an attorney may be called as a witness does not necessarily extend to pretrial or appellate matters. See Cerillo v. Highley, 797 So. 2d 1288 (Fla. 4th DCA 2001) (holding that attorney may participate in pre-trial proceedings but cannot try the case if he will be a witness at trial); Columbo v. Puig, 745 So. 2d 1106 (Fla. 3d DCA 1999) (attorney not disqualified from representing client at deposition even though likely to be necessary fact witness at trial); Fleitman v. McPherson, 691 So. 2d 37 (Fla. 1st DCA 1997) (holding that attorney who is an indispensable witness in a client's case may not represent the client at trial but "may participate in the representation up until trial and after the trial."); KMS Restaurant Corp. v. Searcy, Denney, Scarola, Barnhart & Shipley, P.A., 107 So. 3d 552 (Fla. 4th DCA 2013) ("The fact that counsel will be a material witness does not preclude him from participating in proceedings before and after trial.")

4. No imputation. This disqualification is personal and other attorneys in the same firm may represent the client at trial unless precluded from doing so because of a conflict of interest. (4-3.7(b)) See City of Lauderdale Lakes v. Enterprise Leasing Co., 654 So. 2d 645 (Fla. 4th DCA 1995).

I. Mary Carter agreements. In Dosdourian v. Carsten, 624 So. 2d 241 (Fla. 1993), the Florida Supreme Court stated that Mary Carter agreements "by their very nature, promote unethical practices by Florida attorneys" and concluded that "the only effective way to eliminate" their "sinister influence" was "to outlaw their use." The Court defined the typical Mary Carter agreement as "a contract by which one co-defendant secretly agrees with the plaintiff that, if such defendant will proceed to defend himself in court, his own maximum liability will be diminished proportionately by increasing the liability of the other co-defendants," and the Court further explained that: "[w]e include within our prohibition any agreement which requires the settling defendant to remain in the litigation. . . ." See also, La Costa Beach Club Resort Condominium Association v. Carioti, 37 So. 3d 303 (Fla. 4th DCA 2010).

1. High-low agreements. "It is unclear whether the Supreme Court in Dosdourian intended to outlaw high-low agreements in addition to 'Mary Carter agreements'… If the trial court concludes that the 'high-low agreement' is not a settlement and the co-defendant still has a genuine incentive to defend, then in our view the agreement would not be prohibited by Dosdourian." Garrett v. Mohammed, 686 So. 2d 629 (Fla. 5th DCA 1996), rev. denied, 697 So. 2d 510 (Fla. 1997). Similarly, in Gulf Industries, Inc. v. Nair, 953 So. 2d 590 (Fla. 4th DCA 2007), the court held that a high-low agreement was not prohibited; the court also held that the agreement did not need to be disclosed to the jury. However, in State Farm Mutual Automobile Insurance Co. v. Thorne, 110 So. 3d 66 (Fla. 2d DCA 2013), the Court held that a high-low agreement, based upon its particular terms, should have been disclosed to the jury. See Michael L. Forte, Admissibility of High-low Agreements in Multi-defendant Litigation, Fla. B. J., December 2013 at 26.

2. Charades. In Dosdourian, "we took a strong stand against charades in trials. To have the U.M. insurer, which by statute is a necessary party, not be so named to the jury is a pure fiction in violation of this policy." Government Employees Insurance Co. v. Krawzak, 675 So. 2d 115 (Fla. 1996).

J. Disparage or discriminate. A lawyer shall not "engage in conduct in connection with the practice of law that is prejudicial to the administration of

justice, including to knowingly, or through callous indifference, disparage, humiliate, or discriminate against litigants, jurors, witnesses, court personnel, or other lawyers on any basis, including, but not limited to, on account of race, ethnicity, gender, religion, national origin, disability, marital status, sexual orientation, age, socioeconomic status, employment, or physical characteristic . . . ." (4-8.4(d))

K. Fairness. In trial, a lawyer shall not "allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant . . . ." (4-3.4(e))

1. Appellate courts have overturned jury verdicts due to arguments that violated this rule. Sacred Heart Hospital of Pensacola v. Stone, 650 So. 2d 676 (Fla. 1st DCA), rev. denied, 659 So. 2d 1089 (Fla. 1995); Dutcher v. Allstate Ins. Co., 655 So. 2d 1217 (Fla. 4th DCA 1995).

L. Voir dire. Comments designed only "to ingratiate" an attorney to potential jurors and "focus their attention on irrelevant matters" (such as mentioning that an attorney has a son the same age as the decedent) should not be made during voir dire. Bocher v. Glass, 874 So. 2d 701 (Fla. 1st DCA 2004).

1. A comment during voir dire by defense counsel, who was hired by an insurer, that "I'm a consumer justice attorney" representing an individual, rather than a company, was deemed to be a misleading suggestion that the individual would pay any adverse judgment and an improper "appeal to the jury to protect that individual from a harmful verdict." Hollenbeck v. Hooks, 993 So. 2d 50 (Fla. 1st DCA 2008).

M. Opening statements. In an opening statement, counsel is prohibited "both legally and ethically" from "telling the jury he will prove something he cannot prove or that is doubtful." Chin v. Caiaffa, 42 So. 3d 300 (Fla. 3d DCA 2010).

N. Coaching witnesses. While the CFO of the plaintiff was on the witness stand, being questioned about whether a key document had been received, the sole shareholder of the company sent him two text messages concerning the document. The trial court declared a mistrial and dismissed the case with prejudice. The appellate court affirmed, explaining that plaintiff's conduct constituted a "blatant showing of fraud, pretense, collusion or other similar wrongdoing." Sky Development, Inc. v. Vistaview Development, Inc., 41 So. 3d 918 (Fla. 3d DCA 2010).

O. Violating orders granting motions in limine. In a personal injury action, the appellate court affirmed a trial court's decision to strike the defendant's pleadings because of defense counsel's "conscious, intentional acts" violating

orders that granted motions in limine. Adams v. Barkman, 114 So. 3d 1021 (Fla. 5th DCA 2012).

P. Closing arguments. Florida courts have ruled upon the propriety of the following types of arguments:

1. General. "[C]losing argument must not be used to inflame the minds and passions of the jurors so that their verdict reflects an emotional response rather than the logical analysis of evidence in light of the applicable law." Murphy v. International Robotic Systems, Inc., 766 So. 2d 1010 (Fla. 2000).

2. Golden rule. "An argument that jurors place themselves in the plaintiff's shoes, commonly referred to as a 'golden rule' argument, is impermissible . . . because it encourages the jury to . . . decide the case on the basis of personal interest and bias rather than on the evidence." Schreidell v. Shoter, 500 So. 2d 228 (Fla. 3d DCA 1986), rev. denied, 511 So. 2d 299 (Fla. 1987). Arguing that clients would "walk past" $6 million to press a "magic button" to bring their son back was deemed an improper golden rule argument because its only purpose was to suggest that the jurors imagine themselves in the place of the parents. Bocher v. Glass, 874 So. 2d 701 (Fla. 1st DCA 2004).

3. Conscience of community. "Appeals to 'community conscience' and 'civic responsibility' are inappropriate." Superior Industries International, Inc. v. Faulk, 695 So. 2d 376 (Fla. 5th DCA 1997). For example, it is improper to argue: "I want to send a message to the community" so others "won't think they can get away with stealing some elderly folks' monies." Murphy v. Murphy, 622 So. 2d 99 (Fla. 2d DCA 1993). However, such arguments are appropriate when there is a claim for punitive damages. Ocwen Financial Corp. v. Kidder, 950 So. 2d 480 (Fla. 4th DCA 2007).

4. Overcrowded courtrooms and insurance crisis. References to "overcrowded courtrooms" and the "insurance crisis" are deemed to be improper appeals to the conscience of the community. Davidoff v. Segert, 551 So. 2d 1274 (Fla. 4th DCA 1989); Stokes v. Wet 'N Wild, Inc., 523 So. 2d 181 (Fla. 5th DCA 1988).

5. Nationalistic appeals. Repeated references to how business is conducted "in America" (when the opposing party was a company owned by foreigners) were strongly criticized by two judges in Telemundo Network, Inc. v. Spanish Television Services, Inc., 812 So. 2d 461 (Fla. 3d DCA 2002). The following question was certified to the Supreme Court: "are unobjected to comments made during closing

argument which appeal to a jury's racial, ethnic, religious or xenophobic prejudices, sufficient to justify an appellate court's finding of fundamental error . . .?"

6. Racism. "Our system of justice cannot tolerate an attempt to exploit these feelings of racial prejudice . . . ." Wallace v. State, 768 So. 2d 1247, 1250-1 (Fla. 1st DCA 2000).

7. Appeals to jurors' self-interest. It is improper to ask jurors to consider the effect that a verdict might have on them as taxpayers. Davis v. South Florida Water Mgmt. District, 715 So. 2d 996 (Fla. 4th DCA 1998). Similarly, suggesting a relationship between verdicts in automobile cases and rising insurance premiums is "clearly" an "improper tactic." Russell v. Guider, 362 So. 2d 55 (Fla. 4th DCA 1978), cert. denied, 368 So. 2d 1373 (Fla. 1979).

8. Currying favor with jury. Counsel's comment in closing that he "liked the jury when he picked them and he likes them now" was "inappropriate . . . unprofessional and should be met by rebuke." Kelley v. Mutnich, 481 So. 2d 999 (Fla. 4th DCA 1986).

9. Referring to jurors by name. Two Florida cases suggest that it is not proper to refer to jurors by name during closing argument. See Bocher v. Glass, 874 So. 2d 701 (Fla. 1st DCA 2004); Cummins Alabama, Inc. v. Allbritten, 548 So. 2d 258 (Fla. 1st DCA 1989).

10. Familial rhetoric. "Irrelevant familial rhetoric" (such as an attorney telling a story about walking in the woods with his grandfather or an attorney mentioning that he has a child the same age as the decedent) "must not be condoned." Bocher v. Glass, 874 So. 2d 701 (Fla. 1st DCA 2004).

11. Attacks on counsel. "[I]t is never acceptable for one attorney to effectively impugn the integrity or credibility of opposing counsel before the jury." Owens-Corning Fiberglass Corp. v. Crane, 683 So. 2d 552, 554-55 (Fla. 3d DCA 1996). Accordingly, asking the jurors if "they would buy a used car" from opposing counsel is "utterly and grossly improper." Jackson v. State, 421 So. 2d 15 (Fla. 3d DCA 1982). "[T]he repeated use of the term 'B.S." [in describing the opposing party's argument] was not only clearly improper, but also highly unprofessional." Lingle v. Dion, 776 So. 2d 1073 (Fla. 4th DCA 2001). See also Sanchez v. Nerys, 954 So. 2d 630, 632 (Fla. 3d DCA 2007) (argument that defense counsel was "'pulling a fast one,' 'hiding something,' and 'trying to pull something,' was tantamount to calling defense counsel liars and accusing them of perpetrating a fraud upon the court and jury," requiring a new trial).

12. "Whatever it takes." A statement in a closing argument that "the City would 'do whatever it takes to try to win this case' suggests that the City is engaging in improper or less than honest tactics." Orlando v. Pineiro, 66 So. 3d 1064 (Fla. 5th DCA 2011).

13. Criticism for defending case. Arguments by plaintiff's counsel suggesting that defendant should not have contested liability and should not have presented a particular defense were deemed improper in Carnival Corporation v. Pajares, 972 So. 2d 973 (Fla. 3d DCA 2007).

14. "Shameful" and failure to take responsibility. Describing a defense as "shameful" or arguing that a defendant has "never taken responsibility" is improper. State Farm Mutual Automobile Ins. Co. v. Thorne, 110 So. 3d 66 (Fla. 2d DCA 2013).

15. Lack of remorse or apology. Arguments that the jury "did not see one bit of remorse of any of the officers who testified in trial" and that not one of the officers "looked over at mom during the trial and said sorry for your loss" were "improper" because they suggested that "the City is doing something wrong by either vigorously defending itself or not showing proper sympathy or empathy." Orlando v. Pineiro, 66 So. 3d 1064 (Fla. 5th DCA 2011).

16. Failure to conduct "honest, fair" investigation. A reference to "the City's alleged failure to conduct an 'honest, fair' investigation into Alvarado's death was also improper." Orlando v. Pineiro, 66 So. 3d 1064 (Fla. 5th DCA 2011).

17. Attacks on experts. Describing an opposing expert as "nothing more than an unqualified doctor who prostitutes himself for the benefit of lawyers" warranted a new trial in Venning v. Roe, 616 So. 2d 604 (Fla. 2d DCA 1993). See also, King v. Byrd, 716 So. 2d 831 (Fla. 4th DCA 1998) ("We specifically condemn counsel's use of the term 'hired gun' to refer to a defense expert.")

18. Vouching. Counsel's comment that he "had heard nothing but wonderful things" about his client was deemed improper (as were his references to opposing witnesses as "a good soldier" and "this joker"). Walt Disney World Company v. Blalock, 640 So. 2d 1156 (Fla. 5th DCA 1994).

19. Statements unsupported by record. Defense counsel's argument that "any Plaintiff's attorney always asks for at least ten or fifteen times what they want" was deemed to be "improper rhetoric" that "does

considerable harm to the already impaired reputation of the legal profession," in Hartford Accident & Indemnity Co. v. Ocha, 472 So. 2d 1338 (Fla. 4th DCA 1985).

20. Nullification. "Nullification arguments [i.e., asking the jury to disregard the law] have absolutely no place in a trial . . . ." Liggett Group, Inc. v. Engle, 853 So. 2d 434 (Fla. 3d DCA 2003), approved in part, reversed in part, Engle v. Liggett Group, Inc., 945 So. 2d 1246 (Fla. 2006).

21. Wealth or poverty. "In Florida, the general rule is that during trial no reference should be made to the wealth or poverty of a party, nor should the financial status of one party be contrasted with the other's." Sossa v. Newman, 647 So. 2d 1018 (Fla. 4th DCA 1994).

22. Personal opinions. While Rule 4-3.4(e) specifically prohibits a lawyer from stating a personal opinion, the "use of the personal pronoun 'I' is not, in and of itself, improper. . . . use of the phrases 'I think' and 'I believe' did not impermissibly express a personal opinion, but was instead merely a figure of speech." Murphy v. International Robotic Systems, Inc., 766 So. 2d 1010 (Fla. 2000).

23. Calling party a liar. "[I]t is not improper for counsel to state during closing argument that a witness 'lied' or is a 'liar,' provided such characterizations are supported by the record." Murphy v. International Robotic Systems, Inc., 766 So. 2d 1010 (Fla. 2000). Rule 4-3.4(e) was amended, effective January 1, 2006, to say that an attorney may not "state a personal opinion about the credibility of a witness unless the statement is authorized by current rule or case law." An amendment to the Comment to the rule discusses Murphy, supra.

24. "Value of human life" argument. Arguments that "place a monetary value on the life of the decedent" (such as by comparing the value of a life to the value of a painting or a jet) are not proper. Wilbur v. Hightower, 778 So. 2d 381 (Fla. 4th DCA 2001). See also Chin v. Caiaffe, 42 So. 3d 300 (Fla. 3d DCA 2010) (asking jury to consider value of a Picasso painting in determining damages in a personal injury case "was highly improper and grounds for reversal").

25. Failure to call witness. When witnesses are "equally available" to both parties "no inference should be drawn or comments made on the failure of either party to call the witness." State v. Michaels, 454 So. 2d 560 (Fla. 1984). However, in that case the uncalled witness was the defendant's daughter, and the court held that a comment on the defendant's failure to call her was permissible, even though she was "equally available," because of "the parent-child relationship which

would normally bias her toward supporting her father's defenses." In Wall v. Costco Wholesale Corp., 857 So. 2d 975, 976 (Fla. 3d DCA 2003), the Court held that defense counsel's comments regarding the plaintiff's failure to call her daughter to testify were improper when defense counsel knew that the daughter was estranged from her parents and had disappeared. See also Lowder v. Economic Opportunity Family Health Center, Inc., 680 So. 2d 1133 (Fla. 3d DCA 1996) (indicating that "current employees" of one party may not be "equally available" to the other party). With regard to expert witnesses, the court held in Gianos v. Baum, 941 So. 2d 581 (Fla. 4th DCA 2006), that it was reversible error to prevent a party from commenting on another party's failure to call an expert witness.

26. Failure to present excluded evidence. If you are successful in excluding certain evidence or a witness from a trial, may you comment in closing on your adversary's failure to present that evidence? No, according to Carnival Corporation v. Pajares, 972 So. 2d 973 (Fla. 3d DCA 2007). "Case law indicates it is improper for a lawyer, who has successfully excluded evidence, to seek an advantage before the jury because the evidence was not presented." JVA Enters., I, LLC v. Prentice, 48 So. 3d 109, 115 (Fla. 4th DCA 2010).

Q. Publicity. A lawyer shall not make an extra judicial statement to be disseminated by means of public communication if the lawyer knows or should know that the statement "will have a substantial likelihood of materially prejudicing an adjudicative proceeding due to its creation of an imminent and substantial detrimental effect on that proceeding." A lawyer must also "exercise reasonable care" to prevent others, who are associated with the lawyer, from doing so. (4-3.6)

1. Rule 4-3.6 was amended in 1994 to conform with Gentile v. State Bar of Nevada, 501 U.S. 1030 (1991), which held that a publicity rule similar to Florida's prior rule was unconstitutionally vague.

X. POST-TRIAL

A. Communication with jurors. Before and during the trial, a lawyer shall not "communicate or cause another to communicate" with anyone known to be a member of the venire from which the jury will be selected or, subsequently, with any member of the jury. Furthermore, after dismissal of the jury, a lawyer shall not "initiate communication" (or cause another to initiate communication) with any juror regarding the trial except "to determine whether the verdict may be subject to legal challenge." (4-3.5(d))

1. Notice. Even when trying "to determine whether the verdict may be subject to legal challenge," a lawyer may not interview a juror unless

the lawyer has a reason to believe that grounds for such challenge may exist, and, before conducting any such interview, the lawyer must file and serve a notice. (4-3.5(d))

2. Motion. The Florida Rules of Civil Procedure set forth a procedure for interviewing jurors that varies from the procedure in the Rules of Professional Conduct: "A party who believes that grounds for legal challenge to a verdict exist may move for an order permitting an interview . . . . The motion shall be served within ten days after rendition of the verdict unless good cause is shown for the failure to make the motion within that time." (1.431(h))

3. Violation of rules. When the facts supporting allegations of juror misconduct were obtained in violation of the rules, a motion to interview jurors should be denied. Walgreens, Inc. v. Newcomb, 603 So. 2d 5 (Fla. 4th DCA 1992), rev. denied, 613 So. 2d 7 (Fla. 1993).

4. Contempt. In Alan v. State, 39 So. 3d 343 (Fla. 1st DCA 2010), an attorney who telephoned a juror without obtaining permission from the court (and after the court had denied an oral request for permission to obtain the juror's medical records) was found guilty of indirect criminal contempt and sentenced to 5 months and 29 days in jail. (While this decision is based in part on a criminal rule of procedure, that rule is very similar to Rule 1.431(h), as quoted above, so the result could be the same in a civil case.)

B. Appeals. After an adverse result, "the lawyer should advise the client of the possibility of appeal before relinquishing responsibility for the matter." (4-1.3)

1. Duty to appeal? If you send a letter advising your client of appellate rights and receive no response, should you file a notice of appeal just in case your client might decide to pursue an appeal? No, according to W.J.E. v. Department of Children and Family Services, 731 So. 2d 850 (Fla. 3d DCA 1989) ("[C]ounsel, having fulfilled all his ethical obligations and duties, should not have filed the appeal.")

2. Settlement pending appeal. If you settle a case while an appeal is pending, do you have a duty to inform the court? "When a pending appeal becomes moot by reason of a settlement, rule 9.350(a) requires counsel to notify the appellate court immediately by filing a signed stipulation for dismissal of the appeal." Merkle v. Guardianship of Jacoby, 912 So. 2d 595 (Fla. 2d DCA 2005).

XI. RULES HAVING GENERAL APPLICABILITY

A. Misconduct generally. Rule 4-8.4, titled "Misconduct," enumerates many categories of prohibited misconduct, and Rule 3-4.3 explains that "any act that is unlawful or contrary to honesty and justice . . . may constitute cause for discipline," regardless of whether the act is committed outside the state or in the course of practicing law.

1. Examples. Specific prohibitions in Rule 4-8.4 include: dishonesty; stating or implying "an ability to influence improperly a government agency or official"; conduct that is "prejudicial to the administration of justice"; willfully refusing to "timely pay a child support obligation"; and engaging "in sexual conduct with a client or a representative of a client that exploits or adversely affects the interests of the client or the lawyer-client relationship."

2. Sex with clients. Rule 4-8.4 provides that when sexual conduct begins after the formation of the attorney-client relationship, there is a rebuttable presumption of a violation of the rules. (4-8.4) In The Florida Bar v. Bryant, 813 So. 2d 38 (Fla. 2002), the Florida Supreme Court suspended an attorney for one year noting that "[t]his court will strictly enforce the rule against lawyers engaging in sexual conduct with a client that exploits the lawyer-client relationship." In The Florida Bar v. Senton, 882 So. 2d 997 (Fla. 2004), the court disbarred an attorney who had sex with a client and lied about it under oath. In The Florida Bar v. Roberto, 59 So. 3d 1101 (Fla. 2011), the Court held that an attorney's sexual relationship with a client "created a conflict of interest between" the attorney's "own interests and those of his client."

3. Fraudulent transfers. In The Florida Bar v. Draughon, 94 So. 3d 566 (2012), a lawyer who engaged in a fraudulent transfer was suspended for one year. Even though the lawyer was not representing a client, "the Court expects members of The Bar to conduct their personal business affairs with honesty and in accordance with the law."

4. Misrepresentations about personal finances. In connection with purchasing a cooperative apartment in New York City, a Florida lawyer made misrepresentations to the cooperative apartment board about his ownership interest in his law firm and failed to disclose that 100% of his purchase price was borrowed. The Florida Supreme Court rejected the referee's recommendations of a 30 day suspension, and suspended the lawyer for 91 days. The Florida Bar v. Adler, 126 So. 3d 244 (Fla. 2013).

5. Forum and judge shopping. Rule 4-8.4(d) prohibits conduct that is "prejudicial to the administration of justice," and forum shopping has

been deemed to violate this rule. The Florida Bar v. Klein, 774 So. 2d 685 (Fla. 2000). According to In re: Bellsouth Corp., 334 F.3d 941 (11th Cir. 2003), "every court considering attempts to manipulate the random assignment of judges has considered it to constitute a disruption of the orderly administration of justice." See also McCuin v. Texas Power and Light Co., 714 F. Supp. 1255 (5th Cir. 1983) ("The general rule of law is clear: a lawyer may not enter a case for the primary purpose of forcing the presiding judge's recusal"). In Grievance Administrator v. Fried, 570 N.W.2d 262, 267 (Mich. 1997), the Supreme Court of Michigan held that "[A] lawyer who joins a case as co-counsel, and whose principal activity on the case is to provide recusal, is certainly subject to discipline." The consequences of judge shopping can be severe; according to Alvarado v. Bank of America, N.A., 2009 WL 720875 (E.D. Cal. 2009), "a district court has inherent power to dismiss a case due to judge shopping as part of its power to sanction conduct that abuses the judicial process."

B. Supervising attorneys. According to Rule 4-5.1, lawyers with managerial authority must "make reasonable efforts to ensure" that the firm "has in effect measures giving reasonable assurance that all lawyers therein conform to the Rules of Professional Conduct." Further, a supervising lawyer must "make reasonable efforts to ensure" that lawyers being supervised conform to the Rules of Professional Conduct.

1. Responsibility. A lawyer may be responsible for another's violation of the Rules of Professional Conduct if the lawyer "knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action." (Rule 4-5.1(c)(2)) "Thus, if a supervising lawyer knows that a subordinate misrepresented a matter to an opposing party in negotiation, the supervisor as well as the subordinate has a duty to correct the resulting misapprehension." (4-5.1 Comment)

C. Nonlawyer assistants. "Although paralegals or legal assistants may perform the duties delegated to them by the lawyer without the presence or active involvement of the lawyer, the lawyer shall review and be responsible for the work product . . . ." (4-5.3(c)) The Comment to this Rule was amended in 2006 to explain that the Rule "requires lawyers with managerial authority within a law firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that nonlawyers in the firm will act in a way compatible with the Rules of Professional Conduct."

D. Outsourcing. A lawyer may "engage the services of an overseas provider, as long as the lawyer adequately addresses" relevant ethical obligations relating to supervision, confidentiality, consent to disclose information, and billing. (Opinion 07-2)

E. Trust account procedures and records. All lawyers are required to maintain minimum trust accounting records as described in Rule 5-1.2(b), and those records must be maintained "for 6 years subsequent to the final conclusion of each representation in which the trust funds or property were received." (5-1.2(d)) Moreover, all lawyers are required to follow minimum trust accounting procedures, as set forth in Rule 5-1.2(c), such as monthly reconciliations.

1. Disbarment. In The Florida Bar v. Rousso, 117 So. 3d 756 (2013), a nonlawyer bookkeeper embezzled millions of dollars over an extended period of time. Even though the two lawyers in the firm did not profit from the theft and they went to extraordinary lengths to deal with the problem after it was discovered, they were disbarred because, among other reasons, they failed to follow the "minimum trust accounting procedures," which would have revealed the problem quickly and limited the extent of the theft.

F. Trust property - generally. "Money or other property entrusted to an attorney for a specific purpose, including advances for fees, costs, and expenses, is held in trust and must be applied only to that purpose." (5-1.1(b))

1. Commingling. "A lawyer shall hold in trust, separate from the lawyer's own property, funds and property of clients or third persons that are in a lawyer's possession in connection with a representation." (5-1.1(a)(1))

   a. "Earned fees" must not be placed in a trust account, but deposits or retainers for unearned fees and future costs must be placed in a trust account. (Opinion 93-2; see also Rule 5-1.2 Comment)

   b. In 2004, Rule 5-1.1(a)(1) was amended to allow lawyers to "maintain funds belonging to the lawyer in the trust account in an amount no more than is reasonably sufficient to pay bank charges relating to the trust account."

2. No set-off. "Money and other property of clients coming into the hands of a lawyer are not subject to counterclaim or set-off for attorney's fees, and a refusal to account for and deliver over such property upon demand shall be a conversion." However, this rule does not "preclude the retention of money or other property upon which a lawyer has a valid lien for services" or "the payment of agreed fees from the proceeds of transactions or collection." (5-1.1 Comment)

a. In The Florida Bar v. Bratton, 413 So. 2d 754 (Fla. 1982), the Court disciplined an attorney for refusing to return $10,000 that had previously been posted as a bond in a foreclosure proceeding and applying it against unpaid fees, explaining that property delivered for a specific purpose is not subject to a lien.

3. Safe deposit boxes. If a lawyer uses a safe deposit box to store trust property, the lawyer "shall advise the institution" that the box "may include property of clients or third persons." (5-1.1(a)(3))

4. IOTA. "All nominal or short-term funds belonging to clients or third persons that are placed in trust with any member of The Florida Bar practicing from an office or other business location within the state of Florida shall be deposited into one or more IOTA accounts" (subject to certain exceptions). (5-1.1(g)(2)) While a lawyer must exercise good faith judgment in determining whether funds are "nominal or short-term," the rule specifically provides that "no lawyer shall be charged with ethical impropriety or other breach of professional conduct based on the exercise of such good faith judgment." (5-1.1(g)(3))

5. Cleared funds. May a lawyer disburse funds from a trust account in reliance upon a deposited check which has not yet "been finally settled and credited to the account?" Generally, the answer is "no" but there are exceptions for certain types of checks, including certified or cashiers checks and checks from an insurance company authorized to do business in Florida or checks drawn on a trust account from a member of The Florida Bar (so long as there is a "reasonable and prudent belief that the deposit will clear and constitute collected funds in the lawyer's trust account within a reasonable period of time"). (5-1.1(j))

6. Garnishment. Funds held by a lawyer in a trust account are subject to garnishment. If checks have been drawn on a trust account but have not cleared at the time a lawyer is served with a writ of garnishment, does the attorney have an obligation to stop payment on the checks? Yes. Arnold, Matheney & Eagan, P.A. v. First American Holdings, Inc., 982 So. 2d 628 (Fla. 2008).

7. Indemnity agreements. May a lawyer require a client to sign an indemnity agreement before releasing trust funds? No, at least under the circumstances set forth in Advisory Opinion 02-6, which involves a deposit in a real estate transaction.

8. Overdraft protection. "An attorney shall not authorize overdraft protection for any account that contains trust funds." (5-1.1(k))

9. Separate trust account. Effective July 1, 2012, a separate trust account is required for "all funds received in connection with transactions in which the attorney is serving as a title or real estate settlement agent." Section 626.8473, Florida Statutes. An attorney is not permitted to allow a title insurance company to audit the separate trust account if it holds funds for transactions unrelated to the particular insurer requesting the audit, unless the affected clients give informed consent; however, "Consistent with Florida Ethics Opinion 93-5, a lawyer would not be required to obtain clients' informed consent to permit one title insurer to audit a separate trust account that is devoted exclusively to funds for clients' transactions that are insured by the one title insurer requesting the audit, because the audit would serve the clients' interests under Rule 4-1.6(c)(1)." Proposed Advisory Opinion 12-4 (August 21, 2013; revised January 24, 2014).

G. Proceeds from settlement or judgment. "A lawyer shall hold in trust, separate from the lawyer's own property, funds and property of clients or third persons that are in a lawyer's possession in connection with the representation." (5-1.1(a)(1))

1. Client's account. An attorney should not agree to a settlement requiring proceeds to be placed in an account with the client as the sole signatory because the attorney cannot fulfill responsibilities to third parties, such as medical providers, and participate in the IOTA program. (Opinion 00-2) However, according to Opinion 00-2 (Reconsideration), adopted January 21, 2005, "a lawyer may participate in an arrangement where an insurance company pays only that portion of the settlement proceeds owed directly to the client into a client's financial account or to another recipient designated by the client . . . however, a lawyer should not participate in a settlement if the funds deposited into the client's account include the attorney's fees, costs and funds to which a third party may have a claim."

2. Notification of receipt. Upon receiving funds in which a client or a third person has an interest, "a lawyer shall promptly notify" the client or third person. (5-1.1(e)) In The Florida Bar v. Silver, 788 So. 2d 958 (Fla. 2001), an attorney was publicly reprimanded for failing to timely notify a doctor that settlement proceeds had been received.

3. Delivery of funds. A lawyer is required to deliver promptly any funds or other property that the client or a third person is entitled to receive and to provide an accounting upon request. (5-1.1(e))

a. However, if there is a risk that the client may divert the funds without paying the fee, the lawyer is not required to remit the

portion from which the fee is to be paid. (5-1.1 Comment; See also Rule 5-1.1(f))

4. Instructions not to pay. What if your client instructs you not to pay a treating physician who has demanded payment from settlement proceeds you are holding?

   a. According to the Comment to Rule 5-1.1, a lawyer "may have a duty under applicable law" to protect a third-party claim, and "[w]hen the lawyer has a duty under applicable law to protect the third-party claim and the third-party claim is not frivolous under applicable law, the lawyer must refuse to surrender the property to the client until the claims are resolved." The lawyer should not "unilaterally assume to arbitrate" a dispute between a client and a third party and "should consider the possibility of depositing the funds into the registry of the court."

   b. In The Florida Bar v. Silver, 788 So. 2d 958 (Fla. 2001), the Court stated that, "[q]uite apart from any legal duty on his part, the attorney has a professional duty to accomplish the disbursement of such funds in a matter which accords a proper regard and respect for the rights and legitimate expectations of his own creditors, as well as those of his client." (emphasis added)

   c. Opinion 02-4 states that "the lawyer may act as a negotiator for his client, but not as an arbitrator. . . . The lawyer should take no action which would be against his client's interests unless fully confident that under the law such action must be taken . . . If possible, the client should be given an opportunity to seek independent legal counsel before any action is taken against the client's interests, such as depositing the funds or property into the court registry . . . . In any event, the lawyer at all times must act as an advocate for the client in resolving the dispute." The Opinion further states that "it is impossible for the Committee to announce any bright line rule that applies in all situations."

   d. In Koenig v. Charles S. Theofilos, M.D., P.A., 933 So. 2d 1293 (Fla. 4th DCA 2006), the court affirmed a summary judgment against a lawyer who failed to honor a letter of protection.

H. File retention. How long must an attorney retain client files before they may be discarded? According to Opinion 06-1, "There are very few Rules Regulating the Florida Bar that address records retention," but various rules do require certain records (such as contingent fee agreements and closing

statements, Statements of Insured Client's Rights, advertising records and trust accounting records) to be retained for six (6) years. Before files are discarded, efforts must be made to contact clients, according to Opinion 81-8, and when files are discarded, reasonable efforts should be made to prevent unauthorized access to sensitive information. See FTC's "Disposal Rule," 69 Fed. Reg. 68,690.

I. Electronic file retention. The Rules also say little about the method of file retention (except for certain specific documents such as trust account checks). Opinion 06-1 "encourages . . . electronic file storage," unless "a statute or rule requires retention of an original document, the original document is the property of the client, or destruction of a paper document adversely affects the client's interests." The Opinion goes on to emphasize that "electronic files must be readily reproducible and protected from inadvertent modification, degradation or destruction."

J. Settlement agreements. While a case is pending or after a plaintiff's verdict, defense counsel proposes a settlement in which plaintiff's counsel must agree not to represent anyone else with a similar claim against the defendant. Is this permitted? A lawyer shall not participate in "an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a controversy between private parties." (4-5.6(b)) This "prohibits a lawyer from agreeing not to represent other persons in connection with settling a claim on behalf of a client." (4-5.6 Comment) But see Lee v. Florida Department of Insurance, 586 So. 2d 1185 (Fla. 1st DCA 1991) ("Rule does not reach agreements with or by the client to preclude the lawyer's representation of other persons with respect to cases that involve the same facts, transactions, and events as does the case settled for the client.") and Garfinkel v. Mager, 57 So. 3d 221 (Fla. 5th DCA 2010) (The "public interest in ensuring that a litigant is free from the risk of opposition by a lawyer once privy to that litigant's confidences" must be balanced with the public policy that "favors providing individuals with the right to retain an attorney of their choosing"; an agreement that properly balances these policies may be enforceable even though it restricts an attorney from accepting cases against a particular party.) There is an excellent discussion of this rule in Adams v. BellSouth, 2001 WL 34032759 (S.D. Fla.).

1. Ability to represent other clients. In Opinion 04-2, the Professional Ethics Committee set forth a detailed discussion of this issue, concluding that a provision in a settlement agreement that "negatively affects" the lawyer's "ability to represent other clients" is "impermissible under Rule 4-5.6."

2. Limiting use of information. ABA Opinion 00-417 states that a lawyer may not seek or agree to a settlement term prohibiting the lawyer's future use of information obtained during the representation because

"[a]s a practical matter . . . this proposed limitation effectively would bar the lawyer from future representations . . . ." (emphasis added).

3. Agreement to represent opposing party. In The Florida Bar v. St. Louis, 967 So. 2d 108 (Fla. 2007), the Florida Supreme Court disbarred an attorney who agreed, as part of a settlement for his existing clients, to represent the opposing party in the future; the Court explained that "[t]he true purpose of the engagement was to create the appearance of a conflict," which would prevent the lawyer from taking future cases against the defendant in violation of Rule 4-5.6(b).

K. Restricting right to practice. "A lawyer shall not participate in offering or making . . . a partnership or employment agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement . . . ." (Rule 4-5.6(a))

1. No per se prohibition. The Rule does not create a "per se prohibition against severance agreements," and it does not apply to the sale of a law practice in accordance with Rule 4-1.17. (4-5.6 Comment)

2. Example. An agreement stating that a law firm would be entitled to 75% of any fee from a client for whom a departing lawyer continued to perform legal services violates the Rule. (Opinion 93-4) Nevertheless, in Miller v. Jacobs & Goodman, P.A., 699 So. 2d 729 (Fla. 5th DCA 1997), rev. denied, 717 So. 2d 533 (Fla. 1998), the court held that "lawyers are free to enter into agreements which provide for post termination allocation of client fees." Subsequent to this decision, the Board of Governors refused to recede from Opinion 93-4. Therefore, while such agreements may be enforced by some courts, the parties may be subject to discipline by The Florida Bar. See Restrictive agreements in law firms, Fla. B. News, June 1, 1999, at 26. (Fee splitting arrangements between law firms and departing lawyers are also discussed above in Section IV.)

L. Leaving a firm. Effective January 1, 2006, Rule 4-5.8 was amended to provide that "a lawyer who is leaving a law firm shall not unilaterally contact . . . clients . . . unless the lawyer has approached an authorized representative of the law firm and attempted to negotiate a joint communication . . . and bona fide negotiations have been unsuccessful." The amended rule also describes the notice that may be given when negotiations have been unsuccessful. In 2012, the Florida Supreme Court suspended two lawyers who, while planning to leave a firm, unilaterally solicited the firm's clients, took files without the firm's permission and made misrepresentations. The Florida Bar v. Winters, 104 So. 3d 299 (2012).

M. Selling a firm. May a law practice be sold? The answer was "no" prior to 1992, but Rules 4-1.17 and 4-5.4 now permit practices to be sold. See Advisory Opinion 03-1. In 2006, the Florida Supreme Court adopted an amendment to Rule 4-1.17, which permits the sale of the entire practice or the sale of an "entire area of practice" without selling the entire practice. (emphasis added)

N. Inventory attorneys. Rule 1-3.8(e), effective January 1, 2006, requires every bar member to designate another member who has agreed to serve as "inventory attorney" if the need arises. The main purpose of an inventory attorney is "to avoid prejudice to clients" of an attorney who ceases practicing, and a secondary purpose is to "prevent or reduce claims" against the attorney.

O. Rule violations and malpractice. May a violation of the Rules of Professional Conduct be used as evidence of attorney malpractice? As amended in 2006, the Preamble to the Rules states that while a violation of the Rules "should not itself give rise to a cause of action" nor create any "presumption" that "a legal duty has been breached," a violation "may be evidence of a breach of the applicable standard of care." See Smith v. Bateman Graham, P.A., 680 So. 2d 497 (Fla. 1st DCA), rev. dismissed, 678 So. 2d 337 (Fla. 1996) ("the ethics Rules themselves preclude a private cause of action arising from a violation of the Rules."). In Oberon Investments, N.V. v. Angel, Cohen and Rogovin, 492 So. 2d 1113, 1114 n.2 (Fla. 3d DCA 1986), quashed on other grounds, 512 So. 2d 192 (Fla. 1987), the court noted that while a violation of the Rules of Professional Responsibility "does not prove negligence per se, . . . it may be used as some evidence of negligence." See also Noris v. Silver, 701 So. 2d 1238 (Fla. 3d DCA 1997); Pressley v. Farley, 579 So. 2d 160 (Fla. 1st DCA 1991); Gomez v. Hawkins Concrete Construction Co., 623 F. Supp. 194 (N.D. Fla. 1985); Kathleen J. McKee, Admissibility and Effect of Evidence of Professional Ethics Rules in Legal Malpractice Action, 50 ALR 5th 301 (1997). In a legal malpractice case, "[t]he decision to admit or exclude" evidence that a rule of professional conduct has been violated "remains vested in the broad discretion of the trial court, and will not be disturbed absent an abuse of that discretion." Greenwald v. Eisinger, Brown, Lewis & Frankel, P.A., 118 So. 3d 867 (Fla. 3d DCA 2013).

P. Reporting violations. Lawyers have a duty to report a violation of the Rules of Professional Conduct by another lawyer if the violation raises "a substantial question" about the lawyer's "honesty, trustworthiness, or fitness as a lawyer." Likewise, a lawyer "who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority." However, this rule does not require disclosure of information protected by the confidentiality rule. (4-8.3)

Q. Agreements to prevent reporting. Lawyers may not seek or assist in preparing an agreement to protect a lawyer from disciplinary charges. See The Florida Bar v. Frederick, 756 So. 2d 79 (Fla. 2000) (attorney disciplined for conditioning refund of attorney's fees on client's agreement not to contact The Florida Bar); The Florida Bar v. Fitzgerald, 541 So. 2d 602, 605 (Fla. 1989) (agreement not to file grievance is unenforceable); ABA Journal, p. 92 (August 1996).

R. Multijurisdictional practice of law. Rule 4-5.5 has been extensively amended, effective January 1, 2006, to explain the circumstances under which lawyers from other states and other countries "may provide legal services on a temporary basis in Florida." The rule now provides, among many other provisions, that a lawyer who is admitted in a state other than Florida may perform legal services in Florida on a "temporary basis" so long as the services "are performed for a client who resides in or has an office in the jurisdiction in which the lawyer is authorized to practice" or "arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice." However, the rule states that such lawyers may not "establish an office or other regular presence in Florida for the practice of law." The procedure for "Foreign Attorneys" to seek permission to appear in a Florida case is set forth in Rule 2.510, Judicial Administration Rules.

1. Rule 4-5.5 was further amended, effective January 1, 2009, to clarify, according to the Comment, that it "prohibits a lawyer who is not admitted to practice in Florida from appearing in a Florida court, before an administrative agency, or before any other tribunal in Florida unless the lawyer has been granted permission to do so."

S. Criticizing judges. Rule 4-8.2(a) prohibits lawyers from making "a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge."

1. Standard. In The Florida Bar v. Ray, 797 So. 2d 556 (Fla. 2001), an attorney was publicly reprimanded for questioning a judge's veracity and alleging that he was unfair. The Court, while emphasizing that it was not limiting "an attorney's legitimate criticism of judicial officers," explained that "the state's compelling interest in preserving public confidence in the judiciary supports applying a different standard than applicable in defamation cases" and held that "the standard to be applied is whether the attorney had an objectively reasonable factual basis for making the statements."

2. First Amendment. In Ray, supra, the Florida Supreme Court concluded that the attorney had no "objectively reasonable factual basis" for making the statements, the Court rejected a First Amendment defense. Subsequently, in The Florida Bar v. Conway,

996 So. 2d 213 (Fla. 2008), an attorney referred to a judge as an "Evil, Unfair Witch" or "EUW" in an internet blog and said she was "seemingly mentally ill," among other statements. While the American Civil Liberties Union submitted a brief arguing that the attorney's comments constituted protected free speech, The Florida Bar argued that the attorney had "no reasonable objective basis in fact" for the "personal attack" on the judge, and therefore his blogging did not constitute "protected free speech under the First Amendment." The Supreme Court agreed with The Florida Bar and ordered a public reprimand. See John Schwartz, A Legal Battle: Online Attitude vs. Rules of The Bar, N.Y. Times, Sept. 12, 2009.