Florida Professional Responsibility in 1999: The Rules of the Game

Timothy P. Chinaris
Belmont University - College of Law

Elizabeth Clark Tarbert
University of Florida

Follow this and additional works at: https://repository.belmont.edu/lawfaculty

Part of the Legal Writing and Research Commons

Recommended Citation
24 Nova L. Rev. 199 (Fall 1999)
The year 1999 saw a number of changes and developments in Florida professional responsibility law. This article surveys these developments by reviewing: 1) relevant reported cases; 2) ethics opinions; 3) rules changes; and 4) disciplinary actions affecting lawyers and the practice of law in the Sunshine State. These authorities are examined in the context of the various relationships upon which a lawyer's professional life is built and within which the lawyer typically operates.

Developments relating to the relationship between lawyer and client are collected in Part II. A lawyer's relationship with judges and the judicial system is discussed in Part III. Part IV addresses the lawyer's relationship and interaction with third parties, such as witnesses and other attorneys. Finally, Part V looks at the lawyer's relationship with the lawyer disciplinary.
II. THE LAWYER’S RELATIONSHIP WITH CLIENTS

Perhaps the lawyer’s most fundamental relationships are created and maintained with the clients that he or she serves. Within this relationship, ethical issues may arise relating to creation of the relationship, decision-making authority of lawyer and client, communication with clients lawyer-client confidentiality, conflicts of interest, fiduciary obligations, competence, legal fees, and termination of the lawyer-client relationship.

In Keepsake, Inc. v. P.S.I. Industries, Inc., the United States District Court for the Middle District of Florida noted that the test in Florida for determining whether a lawyer-client relationship exists “hinges upon the client’s reasonable subjective belief that he is consulting a lawyer in that capacity with the intention of seeking professional legal advice.” Keepsake and P.S.I. entered an exclusive distributorship agreement regarding a disposable camera that used technology developed by Keepsake. While continuing to represent Keepsake in various matters, Keepsake’s law firm assisted P.S.I. in seeking intellectual property protection and also represented P.S.I. in state court litigation relating to this technology. The law firm’s fee agreement with P.S.I. contained a conflict of interest provision providing that circumstances could arise that would require the firm to withdraw from the representation of both clients. The state court litigation ended in late 1997.

Keepsake and P.S.I. subsequently had a falling out, resulting in the law firm filing suit against P.S.I. on Keepsake’s behalf. P.S.I. moved to dis-
qualify the law firm, and Keepsake's response surprisingly admitted that the firm had "performed legal services" for P.S.I. but refused to admit that this performance had resulted in the formation of an attorney-client relationship. The court rejected this unusual position out of hand, ultimately disqualifying the law firm.

Even with an understanding of the legal test for the establishment of a lawyer-client relationship, application of that test is not always easy. The court recognized this in Boca Investors Group, Inc. v. Potash, noting that, at least in the disqualification context, there is a distinction between an initial consultation regarding counsel's availability (characterized by the court as a "job interview"), and a lawyer-client discussion that included disclosure of confidential information. The latter creation of a lawyer-client relationship, would require disqualification, while the former would not.

Once a lawyer-client relationship has been established, communication between the two parties is an essential ingredient for successful teamwork. Failure to communicate effectively, or the failure to document such communications, can create ethical problems for the lawyer. The lawyer in The Florida Bar v. Fredericks suffered disciplinary consequences when a series

13. Id. at 1037 n.3. In a footnote, the court observed that the law firm's "implicit distinction between 'little' and 'big' clients is without any legal or ethical support." Id. Regarding other lawyers or law firms who have encountered legal or disciplinary difficulties as a result of improperly attempting to distinguish between "real" clients and "other" clients, see, e.g., The Florida Bar v. Jasperson, 625 So. 2d 459 (Fla. 1993) (lawyer who filed bankruptcy petition for client and client's spouse, whom lawyer never met or advised, disciplined for violating rules requiring communication with and effective representation of spouse/client); Smith v. Perry, 635 So. 2d 1019 (Fla. 1st Dist. Ct. App. 1994) (lawyer who represented husband in personal injury case and filed consortium claim for wife, whom lawyer had not met nor entered into employment agreement with, was sued by wife for malpractice as result of lawyer's role in husband receiving lion's share of settlement proceeds). See also Brennan v. Independence Blue Cross, 949 F. Supp. 305 (E.D. Pa. 1996) (lawyer who represented insured in medical malpractice case and insurer on related subrogation claim disqualified from representing insured against insurer in later dispute over future medical benefits; subrogation representation was more than mere courtesy and established lawyer-client relationship with insured).
15. 728 So. 2d 825 (Fla. 3d Dist. Ct. App. 1999).
16. See infra part III regarding disqualification cases.
17. Boca Investors Group, Inc., 728 So. 2d at 825.
18. Id.
19. Id.
20. 731 So. 2d 1249 (Fla. 1999).
of representations went awry and the client filed a complaint with the Florida Bar. The client's and the lawyer's recollections of the operative events were quite discrepant, but neither could back up his version with any written documentation. The lawyer was found guilty of violating RPC 4-1.4, RPC 4-1.3 (requiring diligent representation), and RPC 4-8.4(c) (prohibiting conduct involving dishonesty, fraud, deceit, or misrepresentation). The lawyer was suspended from the practice of law for six months for violating RPC 4-1.4, which requires that a lawyer keep a client informed about the status of the case.

The allocation of decision-making responsibility between a client and a lawyer within their professional relationship is also an ethical matter. RPC 4-1.2 contains a framework for considering this issue. The question was discussed by the Fourth District Court of Appeal in affirming a trial court's denial of a motion for postconviction relief based on alleged ineffective assistance of counsel in a criminal representation. Demurjian v. State concerned a petitioner who had been charged with first degree murder. He contended that "he killed the victim in self-defense." At his trial, instructions on lesser included offenses were given to the jury, but during the

21. Id. at 1250.
22. Id.
23. RPC 4-1.4, "COMMUNICATION" provides:
   (a) Informing Client of Status of Representation. A lawyer shall keep a
   client reasonably informed about the status of a matter and promptly comply
   with reasonable requests for information.
   (b) Duty to Explain Matters to Client. A lawyer shall explain a matter to
   the extent reasonably necessary to permit the client to make informed
   decisions regarding the representation.

Id.

24. Federicks, 731 So. 2d at 1254.
25. RPC 4-1.4 (1993).
26. Subdivision (a) of Rule 4-1.2 of the RPC, "SCOPE OF REPRESENTATION," provides:

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

Id.

28. Id.
29. Id. at 325.
30. Id.
closing argument, petitioner's counsel used what is called an "all or nothing" argument: the lawyer told the jury that his client wanted them to ignore the lesser included offenses and to either convict him of first degree murder or find him not guilty. He was convicted. In his post-conviction relief motion, the petitioner alleged that he had never consented to the "all or nothing" closing argument. The appellate court noted that this form of litigation strategy was not uncommon in criminal defense cases, and stated that "there is no requirement for counsel to obtain a client's consent for trial strategy decisions." Whether the client consented to the "all or nothing" approach was irrelevant, and the court concluded that counsel's performance was not constitutionally deficient.

A regularly recurring question facing many practitioners is the extent of the duty to provide clients, or former clients, with copies of file material generated during the lawyer-client relationship. This is a mixed issue of ethics and law, as indicated in RPC 4-1.16. This rule requires that, upon the termination of employment, a lawyer turn over to the client "papers and property to which the client is entitled" but permits the lawyer to "retain papers and other property relating to or belonging to the client to the extent permitted by law." In Donahue v. Vaughn, a former client filed a writ of mandamus to compel his former lawyer to provide to him, free of charge, "all records" in his case. The court denied the writ for several reasons, first among them being the fact that

31. Id. at 326.
32. Demurjian, 727 So. 2d at 325.
33. Id. at 326.
34. Id. at 327.
35. Id.
37. Subdivision (d) of RPC 4-1.16, "DECLINING OR TERMINATING REPRESENTATION," provides:

(d) Protection of Client's Interest. Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interest, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled, and refunding any advance payment of fee that has not been earned. The lawyer may retain papers and other property relating to or belonging to the client to the extent permitted by law.

Id.
38. Id.
40. Id. at 356.
there is no duty upon a private attorney to give any of his files to a client, save documents which are solely those of the client and held by the lawyer. Pleadings, investigative reports, subpoena copies, reports and other case preparation documents are property of the lawyer. He is not required to give that material to the client or make copies free of charge.\textsuperscript{41}

Confidentiality is an essential part of the lawyer-client relationship. This is recognized in both legal ethics\textsuperscript{42} and law.\textsuperscript{43} The ethical duty of confidentiality requires that, with certain limited exceptions, a lawyer refrain from voluntarily revealing any "information relating to representation" of a client.\textsuperscript{44} This duty continues even after the lawyer-client relationship has ended.\textsuperscript{45} In \textit{The Florida Bar v. Carricarte},\textsuperscript{46} a lawyer was disciplined for

\begin{enumerate}
\item Id. at 357.
\item RPC 4-1.6, "CONFIDENTIALITY OF INFORMATION," provides:
\begin{enumerate}
\item Consent Required to Reveal Information. A lawyer shall not reveal information relating to representation of a client except as stated in subdivisions (b), (c), and (d), unless the client consents after disclosure to the client.
\item When Lawyer Must Reveal Information. A lawyer shall reveal such information to the extent the lawyer reasonably believes necessary:
\begin{enumerate}
\item to prevent a client from committing a crime; or
\item to prevent a death or substantial bodily harm to another.
\end{enumerate}
\item When Lawyer May Reveal Information. A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:
\begin{enumerate}
\item to serve the client's interest unless it is information the client specifically requires not to be disclosed;
\item to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and client;
\item to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved;
\item to respond to allegations in any proceeding concerning the lawyer's representation of the client; or
\item to comply with the Rules of Professional Conduct.
\end{enumerate}
\item Exhaustion of Appellate Remedies. When required by a tribunal to reveal such information, a lawyer may first exhaust all appellate remedies.
\item Limitation on Amount of Disclosure. When disclosure is mandated or permitted, the lawyer shall disclose no more information than is required to meet the requirements or accomplish the purposes of this rule.
\end{enumerate}
\item Id.
\item In Florida the law of client-lawyer privilege is codified in FLA. STAT. § 90.502 (1999).
\item RPC 4-1.6(a), supra note 42.
\item RPC 4-1.6, comment (1993).
\end{enumerate}
failing to honor this obligation. The lawyer had been house counsel for corporations owned by members of his family. Following his termination as counsel, the lawyer misappropriated trade secrets and disclosed them to third parties. He also threatened to reveal additional confidential information unless his former client authorized him to receive $25,000 "severance pay" from funds being held in the lawyer's trust account. The Supreme Court of Florida upheld the finding of the referee that the lawyer had violated the basic duty of confidentiality expressed in RPC 4-1.6(a) and had violated RPC 4-1.6(e) by revealing more confidential information than was reasonably necessary at a hearing held as part of a suit that the former client filed against the lawyer for disclosing the trade secrets.

Two legal malpractice cases reflected the respect that courts accord the principle of lawyer-client confidentiality and the cautious approach courts often take when disclosure of confidential information is sought. Coyne v. Schwartz, Gold, Cohen, Zakarin & Kotler, P.A. arose from an erroneous title certification that affected a real estate development project. A law firm's former clients sued the firm, alleging that they had suffered damages as a result of the firm's negligence relating to the title certification. The clients had been sued by third parties when they began construction on the project. The clients hired a second law firm to defend them in that suit, which was ultimately settled. The clients, represented by the second law firm...
firm, then brought the malpractice action against the first law firm. The first firm alleged negligence on the part of the second firm and sought production of all correspondence between the clients and the second firm, concerning the property. The trial court ordered production. The Fourth District Court of Appeal reversed the order, concluding that the information was protected by the attorney-client privilege. The fact that the clients had hired a second law firm to represent them in connection with a matter in which they had been represented by the first firm did not constitute a waiver of the privilege as to communications between the clients and the second firm. The possible relevance of the documents sought was not sufficient to override the privilege.

In Volpe v. Conroy, Simberg & Ganon, P.A., insureds were defended under a reservation of rights by a law firm hired by the insurance company. The insureds also hired their personal counsel. The insureds later brought a malpractice suit against the law firm for failing to give certain advice. In defense, the law firm alleged that actions of their former client's personal counsel had contributed to the clients' damages. The law firm sought to depose the personal counsel to ascertain if the advice in question had been given by personal counsel, but the insureds asserted attorney-client privilege. The trial court's order compelling production of this information was reversed on appeal.

The appellate court pointed out that there was no evidence that the insureds had intended to share all communications between them and their personal counsel with the law firm hired by the insurance company. Although the law firm and the personal counsel had represented the same clients,

60. Coyne, 715 So. 2d at 1021.
61. Id. at 1022.
62. Id. at 1021.
63. Id. at 1023.
64. Id. at 1022.
65. Coyne, 715 So. 2d at 1023. See also Shafnaker v. Clayton, 680 So. 2d 1109 (Fla. 1st Dist. Ct. App. 1996). The court in Coyne relied upon Shafnaker, wherein the First District Court of Appeal also applied a narrow construction of the attorney-client privilege in a similar situation. Id. at 1111.
66. 720 So. 2d 537 (Fla. 4th Dist. Ct. App. 1998).
67. Id. at 538.
68. Id.
69. Id.
70. Id.
71. Volpe, 720 So. 2d at 539.
72. Id. at 540.
73. Id. at 539.
it does not follow that the client cannot assert the attorney-client privilege with respect to matters which may have been discussed with one attorney but not with another. Particularly in an insurance representation context, the interest of the insured in further protecting his or her own position may compel the insured to retain and communicate with a personal attorney. The client has every right to assume that the attorney will keep those communications confidential.\textsuperscript{74}

The appellate court narrowly construed the lawyer-client dispute exception to the privilege,\textsuperscript{75} considering it as not applicable under the facts presented.\textsuperscript{76} The court also rejected the argument that the "joint defense" exception\textsuperscript{77} to waiver of the privilege, applied to permit the law firm's access to the communications between the clients and their personal counsel.\textsuperscript{78} Concluding that the joint defense doctrine was inapplicable, the court stated that it "does not give a coparty the right to obtain disclosure of all communications shared by a coparty with that party's own attorney."\textsuperscript{79}

Various types of conflicts of interest can arise in the lawyer-client relationship. Several cases addressed one of the most common sources of conflict questions, which is a lawyer's representation of a current client in a matter that is adverse to the interest of one of the lawyer's former clients. RPC 4-1.9\textsuperscript{80} is the primary rule governing former client conflicts. It can be difficult to precisely define and apply the operative terms of this rule. For example, the rule prohibits a lawyer from representing a current client whose interests are "materially adverse" to the interests of the lawyer's former client in a "matter" that is the "same" as or "substantially related" to the

\textsuperscript{74} Id. at 539 (emphasis added).
\textsuperscript{75} See FLA. STAT. § 90.502(4)(c) (1999).
\textsuperscript{76} Volpe, 720 So. 2d at 539–40.
\textsuperscript{78} Volpe, 720 So. 2d at 539.
\textsuperscript{79} Id.
\textsuperscript{80} RPC 4-1.9, "CONFLICTS OF INTEREST; FORMER CLIENT," provides:
A lawyer who has formerly represented a client in a matter shall not thereafter:
(a) represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation; or
(b) use information relating to the representation to the disadvantage of the former client except as rule 4-1.6 would permit with respect to a client or when the information has become generally known.

\textit{Id.}
matter in which the lawyer represented the former client, unless the former client "consents after consultation."\textsuperscript{81} Similarly, the rule also precludes the lawyer from using "information relating to the representation"\textsuperscript{82} of the former client to the former client's disadvantage, unless one of the exceptions to the confidentiality rule applies or the information is "generally known."\textsuperscript{83}

Two of these issues, the question of "consent after consultation" to a former client conflict and the question of whether one matter is "substantially related" to another, were addressed in \textit{The Florida Bar v. Dunagan}.\textsuperscript{84} In Dunagan, a lawyer represented a husband and wife in buying a business and in litigation relating to that business.\textsuperscript{85} A year or two later, the lawyer represented the husband against the wife in a divorce proceeding in which ownership of the business was an issue.\textsuperscript{86} The wife consulted with her new lawyer about the fact that her former lawyer now opposed her.\textsuperscript{87} Her new lawyer told her that "there were better attorneys to be up against" but never clearly advised her of her rights or that she might be prejudiced by the prior representation.\textsuperscript{88} The wife subsequently sued her former lawyer for malpractice.\textsuperscript{89} A Florida Bar disciplinary case was also instituted against the former lawyer.\textsuperscript{90} Charges against him included violating RPC 4-1.9 by opposing his former client, the wife, in the same or a substantially related matter without her consent after consultation.\textsuperscript{91}

Regarding the issue of "consent after consultation," the lawyer asserted that the wife's failure to object to his representation of the husband was tantamount to the required consent.\textsuperscript{92} The court rejected this defense.\textsuperscript{93} The lawyer had never consulted with the wife about the conflict question.\textsuperscript{94} Furthermore, the court stated that the failure of the wife and her new lawyer "to affirmatively object cannot be construed as 'consent after consultation' as required by the rules."\textsuperscript{95} The court went on to explain that the burden of raising the conflict issue and securing consent after consultation belonged to

\begin{itemize}
\item \textsuperscript{81} RPC 4-1.9(a), \textit{supra} note 80.
\item \textsuperscript{82} See RPC 4-1.6(a), \textit{supra} note 42 and accompanying text.
\item \textsuperscript{83} RPC 4-1.9(b), \textit{supra} note 80.
\item \textsuperscript{84} 731 So. 2d 1237 (Fla. 1999).
\item \textsuperscript{85} \textit{id.} at 1238.
\item \textsuperscript{86} \textit{id.} at 1239.
\item \textsuperscript{87} \textit{id.} at 1241.
\item \textsuperscript{88} \textit{id.}
\item \textsuperscript{89} \textit{Dunagan}, 731 So. 2d at 1239.
\item \textsuperscript{90} \textit{id.}
\item \textsuperscript{91} \textit{id.}
\item \textsuperscript{92} \textit{id.} at 1240.
\item \textsuperscript{93} \textit{id.} at 1241.
\item \textsuperscript{94} \textit{Dunagan}, 731 So. 2d at 1241.
\item \textsuperscript{95} \textit{id.}
\end{itemize}
the lawyer and was “not the responsibility of the client or the client's new attorney.”

The court also rejected the lawyer's contention that the divorce matter in which he opposed the wife was not “substantially related” to the matters in which he previously represented her. Noting that “[w]hether two legal matters are substantially related depends upon the specific facts of each particular situation or transaction[,]” the court concluded that there was a substantial relationship between the matters. The ownership of the business was clearly a material issue in the divorce case.

*Keepsake, Inc. v. P.S.I. Industries, Inc.* also dealt with application of the “substantially related” portion of RPC 4-1.9. Keepsake's law firm had also represented P.S.I. in connection with securing trademark and international patent protection for a product that was the subject of a distributorship agreement between P.S.I. and Keepsake. The firm also represented P.S.I. in state court litigation concerning the product and its distribution. The law firm referred to its representations of Keepsake and P.S.I. as a “joint representation.” Subsequently the firm represented Keepsake in suing P.S.I. for alleged breach of the distributorship agreement. In granting P.S.I.'s motion to disqualify the law firm from that case, the trial court concluded that the pending suit was substantially related to the law firm's prior representation of P.S.I. The court noted that P.S.I. had retained the law firm to help it perform obligations that it had under the distributorship agreement, and that these actions were undertaken to protect and advance P.S.I.'s interests. "Having undertaken to protect and advance PSI's business interest, [the law firm] can not now, without consent, represent an adverse party [Keepsake] in litigation regarding the extent of and limitations on those interests."

The Eleventh Circuit Court of Appeals, in *Freund v. Butterworth*, held, in a habeas corpus case based on alleged ineffective assistance of counsel, that the issue of whether a lawyer's prior representation is

---

96. *Id.*
97. *Id.* at 1239.
98. *Id.* at 1240.
99. *Dunagan*, 731 So. 2d at 1240.
100. 33 F. Supp. 2d 1033 (M.D. Fla. 1999).
101. *Id.* at 1035.
102. *Id.*
103. *Id.*
104. *Id.*
106. *Id.* at 1036.
107. *Id.* at 1037.
108. *Id.*
109. 165 F.3d 839 (11th Cir. 1999).
substantially related to a later representation "is a mixed question of law and fact." In this case, the court also addressed the applicability of the provision in RPC 4-1.9(b) that permits a lawyer to use otherwise confidential information about a former client to the disadvantage of that former client in a later, unrelated matter, even without the consent of the former client. This provision allows such use of information as permitted by RPC 4-1.6 or when the information has become "generally known."

The Eleventh Circuit appeared to construe this exception broadly under the facts before it. The petitioner charged that his law firm at trial labored under a conflict because the law firm had also represented a key potential adverse witness in numerous prior, unrelated matters. Petitioner contended that the law firm's cross-examination of that witness would be impeded by the ethical obligation in RPC 4-1.9(b), not to use confidential information to the disadvantage of the witness (the former client). The court rejected the argument that RPC 4-1.9(b) was implicated, pointing out that the "only arguably relevant information that the law firm knew" about the former client was the existence of certain previous arrests and charges against him. Relying on the "generally known" exception in RPC 4-1.9(b), the court stated that "[u]nder the Rules Regulating the Florida Bar,

110. Id. at 861.
111. See supra note 80, and accompanying text.
112. Freund, 165 F.3d at 865.
113. See supra note 42, and accompanying text.
114. Freund, 165 F.3d at 865.
115. Id. Other authorities seem to have taken a less expansive view of the "generally known" exception. See Russakoff v. Department of Ins., 724 So. 2d 582 (Fla. 1st Dist. Ct. App. 1998); King v. Byrd, 716 So. 2d 831 (Fla. 4th Dist. Ct. App. 1998) (declining to equate "public record" with "generally known" provision of Florida Rules of Professional Conduct 4-1.9(b)). See also Lawyer Disciplinary Bd. v. McGraw, 461 S.E.2d 850, 861-62 (W.Va. 1995) ("ethical duty of confidentiality is not nullified by the fact that the information is part of a public record"). When applying the "generally known" exception in cases where the information in question is a matter of public record, the focus of the inquiry should be on whether, but for the lawyer's prior representation of that client, the lawyer would have known of the existence and location of that information. A lawyer who, as in Freund, would be using public record information that is available and known to any reasonably competent lawyer in that position should fall within the scope of the "generally known" exception in RPC 4-1.9(b). On the other hand, some bit of relevant but obscure information buried deep within the "public records" and not known to anyone except the client's lawyer (or former lawyer) should not be considered "generally known" for purposes of RPC 4-1.9(b).
116. Freund, 165 F.3d at 862.
117. Id. at 865.
118. Id. at 864. The court went on to note that the prosecutor's decision not to call the law firm's former client to testify removed the possibility that the firm would cross-examine him using protected confidential information. Id. at 865.
the law firm's knowledge of those charges cannot be the basis of a conflict of interest."\textsuperscript{119}

Conflict of interest problems can also arise when a lawyer's personal interest conflicts or potentially conflicts with the interests of a client.\textsuperscript{120} A relatively unusual personal interest conflict was alleged in \textit{Herring v. State}.\textsuperscript{121} In a motion for post-conviction relief, a petitioner alleged that he had received ineffective assistance of counsel because one of the assistant public defenders who represented him at trial, Howard Pearl, had a conflict of interest because Pearl was a special deputy sheriff.\textsuperscript{122} Attorney Pearl had applied to become a special deputy sheriff in order to be authorized to carry a concealed firearm for protective purposes.\textsuperscript{123} The issue before the court was whether the lawyer had an actual conflict of interest that resulted in the rendition of ineffective assistance.\textsuperscript{124} The court concluded that "[t]he record

\begin{itemize}
  \item \textsuperscript{119} \textit{Id.} at 864.
  \item \textsuperscript{120} RPC 4-1.7, "CONFLICT OF INTEREST; GENERAL RULE," provides:
    \begin{itemize}
      \item \textbf{(a) Representing Adverse Interests.} A lawyer shall not represent a client if the representation of that client will be directly adverse to the interests of another client, unless:
        \begin{itemize}
          \item (1) the lawyer reasonably believes the representation will not adversely affect the lawyer's responsibilities to and relationship with the other client; and
        \end{itemize}
      \item (2) each client consents after consultation.
    \end{itemize}
    \begin{itemize}
      \item \textbf{(b) Duty to Avoid Limitation on Independent Professional Judgment.} A lawyer shall not represent a client if the lawyer's exercise of independent professional judgment in the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person or by the lawyer's own interest, unless:
        \begin{itemize}
          \item (1) the lawyer reasonably believes the representation will not be adversely affected; and
        \end{itemize}
      \item (2) the client consents after consultation.
    \end{itemize}
    \begin{itemize}
      \item \textbf{(c) Explanation to Clients.} When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.
      \item \textbf{(d) Lawyers Related by Blood or Marriage.} A lawyer related to another lawyer as parent, child, sibling, or spouse shall not represent a client in a representation directly adverse to a person who the lawyer knows is represented by the other lawyer except upon consent by the client after consultation regarding the relationship.
    \end{itemize}
  \end{itemize}
\textit{Id.}

\begin{itemize}
  \item \textsuperscript{121} 730 So. 2d 1264 (Fla. 1998).
  \item \textsuperscript{122} \textit{Id.} at 1266.
  \item \textsuperscript{123} \textit{Id.} at 1267.
  \item \textsuperscript{124} \textit{Id.} at 1265.
reveals no evidence suggesting that [petitioner]'s interests were impaired or compromised as a result of Pearl's special deputy status."¹²⁵

A more conventional personal interest conflict was presented in The Florida Bar v. Cox.¹²⁶ A lawyer co-owned a business with one of his clients, and also was the business's general counsel.¹²⁷ The lawyer represented another client in connection with organizing a line of credit for this business.¹²⁸ The lawyer did not disclose to the other client his interest in the business, his position as its general counsel, or the fact that his co-owner was also one of his clients.¹²⁹ The Supreme Court of Florida affirmed the finding that the lawyer was guilty of violating both RPC 4-1.7(b),¹³⁰ which proscribe personal interest conflicts, and RPC 4-1.8(a),¹³¹ governing business transactions with clients.¹³² The court observed that the lawyer's independent professional judgment in the other client's representation was limited by his own interests and by the responsibilities that he owed to the client who co-owned the business with him.¹³³

¹²⁵. Id. at 1268. Attorney Pearl's status as a special deputy sheriff has generated a number of conflict claims in post-conviction litigation. See, e.g., Teffeteller v. Dugger, 734 So. 2d 1009 (Fla. 1999); Stano v. State, 708 So. 2d 271 (Fla. 1998); Robinson v. State, 707 So. 2d 688 (Fla. 1998); Swafford v. State, 636 So. 2d 1309 (Fla. 1994); Henderson v. Singletary, 617 So. 2d 313 (Fla. 1993); Jones v. State, 612 So. 2d 1370 (Fla. 1992); Wright v. State, 581 So. 2d 882 (Fla. 1991); Quince v. State, 732 So. 2d 1059 (Fla. 1990); Harich v. State, 573 So. 2d 303 (Fla. 1990).

¹²⁶. 718 So. 2d 788 (Fla. 1998).

¹²⁷. Id. at 790.

¹²⁸. Id.

¹²⁹. Id.

¹³⁰. Supra note 120.

¹³¹. Subdivision (a) of Rule 4-1.8, "CONFLICT OF INTERESTS; PROHIBITED TRANSACTIONS," provides:

(a) Business Transactions With or Acquiring Interest Adverse to Client. A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client, except a lien granted by law to secure a lawyer's fee or expenses, unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner that can be reasonably understood by the client;

(2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and

(3) the client consents in writing thereto.

¹³². For these and a number of other violations, the lawyer was disbarred. Cox, 718 So. 2d at 794.

¹³³. Id. at 792.
Another variety of personal interest conflict was seen in *The Florida Bar v. Vining*.

The lawyer purported to represent his client in one matter while, at the same time, the lawyer was being sued by, and counterclaiming against, the same client in another matter. The client did not consent to this conflict. The lawyer was disciplined for, among other things, violating RPC 4-1.7(b).

A lawyer’s relationship with clients also implicates duties that include, but can extend beyond, the standards set by the ethics rules. These are duties imposed upon lawyers as a matter of law. They include fiduciary responsibilities and duties of competent representation. Typically these legal duties are articulated and enforced in the context of legal malpractice cases. Some of the developments in the area of legal malpractice law are worthy of special notice.

The close, personal, confidential nature of the lawyer-client relationship has long been recognized by Florida courts in the context of actions for legal malpractice. For example, lawyers' liability for malpractice ordinarily runs only to persons who have privity of contract with the lawyer. The only exception to the rule of privity is in a situation where the known intent of the client was for the lawyer’s services to benefit a third party. For this reason, malpractice claims are not assignable. In *National Union Fire Insurance Co. v. Salter*, the court relied on these principles in concluding that an insurance company that paid its insured’s losses under the insurance policy was not subrogated to the insured’s right to recover on an alleged legal malpractice claim against the insured’s attorneys, whose negligence allegedly caused the loss.

As noted, a lawyer’s duty to competently represent a client is an intensely personal one. Even if multiple lawyers represent a client, each lawyer must take care to see that proper representation is being provided. In

134. 721 So. 2d 1164 (Fla. 1998).
135. Id. at 1166.
136. Id. Quite to the contrary; during the course of the representation the client in fact, discharged the lawyer. Id.
137. Id. at 1170.
138. This article does not attempt to undertake a comprehensive survey of developments in the area of legal malpractice. Rather, significant developments most directly relating to lawyers' professional responsibility are reviewed.
139. See, e.g., Espinosa v. Sparber, Shevin, Shapo, Rosen & Heilbronner, 612 So. 2d 1378 (Fla. 1998); Angel, Cohen & Rogovin v. Oberson Investments, N.V., 512 So. 2d 192 (Fla. 1987).
140. Angel, 512 So. 2d at 194.
142. 717 So. 2d 141, 143 (Fla. 5th Dist. Ct. App. 1998).
143. Id. at 143.
Spaziano v. Price, a person was injured during a scuba diving trip to the Bahamas. Upon returning to his home in New Jersey, this person hired a Philadelphia law firm to represent him in this matter. The Philadelphia law firm determined that the suit should be brought in Florida, and contacted Florida lawyer Price to assist. The Philadelphia law firm was of the opinion that the Florida four year statute of limitation on negligence actions applied. This opinion turned out to be incorrect. In the ensuing legal malpractice action brought by the client against Price, Price defended by asserting that he was entitled to rely on the Philadelphia firm’s opinion concerning the limitations period. Concluding that this contention was “without merit,” the appellate court observed that the Florida lawyer and his firm were “required to bring to that representation the requisite knowledge and skill to determine the appropriate statute of limitations.” The lawyer’s reliance on the Philadelphia firm’s opinion did not relieve him of the duty that he owed to the client.

Another, more conventional, defense raised by lawyers who are accused of malpractice is that of judgmental immunity. The lawyer makes many judgments in the course of the lawyer-client relationship. In making these judgments, the lawyer has a duty to exercise reasonable care and skill. Nevertheless, the law recognizes that a lawyer’s good faith decision, made after diligent inquiry, regarding a fairly debatable or unsettled point of law is not actionable as a breach of this duty, even if the lawyer’s decision later turns out to be incorrect. In DeBiasi v. Snaith, a client’s chance to have an unfavorable decision of an appellate court reviewed was lost when his motion to certify a question was denied as untimely filed. The client then sued his lawyer for alleged malpractice. The lawyer defended on the ground of judgmental immunity, arguing that the language of the procedural rule in question was ambiguous and thus provided him with the protection...
of the judgment immunity doctrine. Summary judgment was granted in the lawyer's favor. The appellate court reversed. The lawyer's contention that the procedural rule was ambiguous was not sufficient to warrant the determination that, as a matter of law, his actions were clothed with judgmental immunity. No showing of diligent inquiry was made on his part, and he apparently cited no law authorizing his interpretation of the rule. Thus, on remand the lawyer would have to prove "the factual issue of his good faith and diligent inquiry."

A novel but unsuccessful defense to a malpractice claim was raised by the lawyer in Tarleton v. Arnstein & Lehr. A law firm was sued by its former client for alleged malpractice arising from the representation of her in a dissolution of marriage action. After trial, the jury entered a verdict finding that the law firm was negligent in its representation and that its negligence was responsible for seventy-five percent of the wife's claimed damages; however, the jury found the wife to be comparatively negligent for twenty-five percent of her damages. The court granted the firm's motion for judgment notwithstanding the verdict and denied the former client's motion for entry of judgment. The former client appealed, urging that the trial court erred in denying her motion. The Fourth District Court of Appeal made it clear that the defense of the former client's comparative negligence was not available to the law firm. "A client cannot be found to be comparatively negligent for relying on an attorney's erroneous legal advice or for failing to correct errors of the attorney which involve the exercise of professional expertise." The relative sophistication of the client "does not impose upon her the burden to second guess her attorney's advice or hire a second attorney to see if such advice was proper."

A final consideration for lawyers in this area is the question of when the statute of limitations for an alleged act of malpractice accrues. The Supreme Court of Florida announced what it termed a "bright-line rule" in Silvestrone

158. Id.
159. Id. at 16.
160. Id. at 15.
161. Id. at 16.
162. DeBiasi, 732 So. 2d at 16.
163. 719 So. 2d 325 (Fla. 4th Dist. Ct. App. 1998).
164. Id. at 326.
165. Id. at 328.
166. Id.
167. Id.
168. Tarelton, 719 So. 2d at 328.
169. Id. at 331.
170. Id.
v. Edell. The court held that, in cases that proceed to judgment, Florida's two-year limitations period begins to run when the final judgment becomes final. To illustrate, the court noted that "a judgment becomes final either upon the expiration of the time for filing an appeal or postjudgment motions, or, if an appeal is taken, upon the appeal being affirmed and either the expiration of the time for filing motions for rehearing or a denial of the motions for rehearing." The newly announced rule was quickly applied by the Third District Court of Appeal in Gaines v. Russo.

The applicable limitation period for claims of malpractice arising from criminal defense representations also was addressed by the Supreme Court of Florida. In Steele v. Kehoe, the court answered the question of whether the defense lawyer's former client must be exonerated as a prerequisite to bringing a legal malpractice action against the lawyer. After reviewing some policy considerations, the court followed the majority rule and held that "a convicted criminal defendant must obtain appellate or post conviction relief as a precondition to maintaining a legal malpractice action." Furthermore, the court held that the statute of limitations on the defendant's malpractice claim did not begin to run until final appellate relief or post conviction relief has been obtained.

Interestingly, the Second District Court of Appeal held that even persons who are not lawyers may be held liable in a legal malpractice action. In Buscemi v. Intachai, a financial planner who held a law degree but was not licensed to practice was sued by a former customer for giving allegedly incorrect and damaging advice concerning the client's legal affairs. The defendant asserted that, as a non-lawyer, he could not be held liable for

171. 721 So. 2d 1173, 1175-76 (Fla. 1998).
172. Id. at 1175-76.
173. Id. at 1175 n.2.
175. 24 Fla. L. Weekly S237 (May 27, 1999).
176. Id. at S237. There had been some disagreement among the district courts of appeal concerning the correct rule. Compare Rowe v. Schreiber, 725 So. 2d 1245, 1250 (Fla. 4th Dist. Ct. App. 1999) (stating "we agree with those courts that have required criminal defendants to obtain post conviction relief or to set aside their convictions on appeal before pursuing an action for legal malpractice against their defense attorneys"), with Martin v. Pafford, 583 So. 2d 736, 738 (Fla. 1st Dist. Ct. App. 1991) (holding defendant "was not required to have succeeded in obtaining collateral relief from her criminal conviction before she could civilly sue her attorney for malpractice").
177. Steele, 24 Fla. L. Weekly at S238.
178. Id.
181. Id. at 330.
failing to give the proper legal advice. Disagreeing, the appellate court stated, "[a]ppellant overlooks the fact that whether a lawyer or not, if he undertakes to give legal advice, he is subject to a standard of due care."

Fees, of course, are an essential aspect of the lawyer-client relationship. The importance of being aware of and complying with the relevant rules of ethics was highlighted in several cases decided over the past year. The Florida Bar v. Carson concerned a lawyer who complained to the Florida bar about the alleged failure of another lawyer to pay him a referral fee in a personal injury case. Upon investigation, it was determined that the alleged agreement to pay a referral fee had not been reduced to writing and that the lawyer had accepted other referral fees in the absence of written agreements. This conduct was contrary to the relevant ethics rules, which require any division of fee between lawyers not in the same firm to be pursuant to a written agreement, signed by the participating lawyers and the client, disclosing how the fee will be divided and providing that each participating lawyer will accept joint legal responsibility for the case. The

182. Id.
183. Id.
184. 737 So. 2d 1069 (Fla. 1999).
185. Id. at 1069.
186. Id. at 1071.
187. Subdivision (g) of RPC 4-1.5, "FEES FOR LEGAL SERVICES," provides:

(g) Division of Fees Between Lawyers in Different Firms. Subject to the provisions of subdivision (f)(4)(D), a division of fee between lawyers who are not in the same firm may be made only if the total fee is reasonable and:

1. the division is in proportion to the services performed by each lawyer; or
2. by written agreement with the client:
   (A) each lawyer assumes joint legal responsibility for the representation and agrees to be available for consultation with the client; and
   (B) the agreement fully discloses that a division of fees will be made and the basis upon which the division of fees will be made.

Id. Additional rules that apply to fee divisions in contingent fee personal injury-type cases are set forth in subdivision (f)(4)(D) of RPC 4-1.5, which provides:

(f) Contingent Fees. As to contingent fees:

(4) A lawyer who enters into an arrangement for, charges, or collects any fee in an action or claim for personal injury or for property damages or for death or loss of services resulting from personal injuries based upon tortious conduct of another, including products liability claims, whereby the compensation is to be dependent or contingent in whole or in part upon the successful prosecution or settlement thereof shall do so only under the following requirements:
bar then turned the tables on the lawyer by instituting disciplinary proceedings against him.\textsuperscript{188} The lawyer was found guilty and ordered to attend a practice and professionalism enhancement program.\textsuperscript{189}

In addition to presenting possible disciplinary problems,\textsuperscript{190} in 1995 the Supreme Court of Florida clearly stated in Chandris, S.A. v. Yanakakis\textsuperscript{191} that a fee agreement that does not comply with applicable ethics rules may

\begin{itemize}
  \item As to lawyers not in the same firm, a division of any fee within subdivision (f)(4) shall be on the following basis:
    \begin{enumerate}
      \item To the lawyer assuming primary responsibility for the legal services on behalf of the client, a minimum of 75\% of the total fee.
      \item To the lawyer assuming secondary responsibility for the legal services on behalf of the client, a maximum of 25\% of the total fee. Any fee in excess of 25\% shall be presumed to be clearly excessive.
      \item The 25\% limitation shall not apply to those cases in which 2 or more lawyers or firms accept substantially equal active participation in the providing of legal services. In such circumstances counsel shall apply to the court in which the matter would be filed, if litigation is necessary, or if such court will not accept jurisdiction for the fee division, the circuit court wherein the cause of action arose, for authorization of the fee division in excess of 25\%, based upon a sworn petition signed by all counsel that shall disclose in detail those services to be performed. The application for authorization of such a contract may be filed as a separate proceeding before suit or simultaneously with the filing of a complaint. Proceedings thereon may occur before service of process on any party and this aspect of the file may be sealed. Authorization of such contract shall not bar subsequent inquiry as to whether the fee actually claimed or charged is clearly excessive. An application under this subdivision shall contain a certificate showing service on the client and The Florida Bar. Counsel may proceed with representation of the client pending court approval.
      \item The percentages required by this subdivision shall be applicable after deduction of any fee payable to separate counsel retained especially for appellate purposes.
    \end{enumerate}
  \end{itemize}

\textit{Id.}

188. \textit{Carson}, 737 So. 2d at 1070.
189. \textit{Id.} In 1994 the Supreme Court of Florida approved the creation of the practice and professionalism enhancement program (sometimes known as "ethics school") "as an alternative to existing sanctions," in order to "provide educational opportunities to members of the Bar for enhancing skills and avoiding misconduct allegations." Florida Bar Re Amendments to Rules Regulating The Florida Bar, 644 So. 2d 282, 283 (Fla. 1994).
190. See The Florida Bar v. Rubin, 709 So. 2d 1361 (Fla. 1998) (disciplining lawyer for suing another lawyer on alleged verbal referral fee agreement, which did not comply with ethics rules).
191. 668 So. 2d 180 (Fla. 1995). "[W]e hold that a contingent fee contract entered into by a member of The Florida Bar must comply with the rule governing contingent fees in order to be enforceable." \textit{Id.} at 185–86.
be unenforceable.\textsuperscript{192} Despite this significant statement from the supreme court, more than one court has seemingly ignored the \textit{Chandris} decision in circumstances that call for its application. \textit{Eakin v. United Technology Corp.}\textsuperscript{193} is one such case.\textsuperscript{194} Former counsel for the plaintiff in a personal injury action attempted to enforce their contingent fee agreement through a charging lien.\textsuperscript{195} The plaintiff defended by contending that lawyers were not entitled to a fee because the settlement proceeds from which the fee was to be paid had never been distributed (the defendant had refused to pay the agreed-upon settlement amount until there had been a resolution of various liens asserted against the settlement).\textsuperscript{196} The plaintiff also challenged the underlying validity of the fee agreement.\textsuperscript{197} Plaintiff alleged that the agreement violated The Florida Bar ethics rules thus was unenforceable.\textsuperscript{198} Specifically, Plaintiff claimed that the agreement provided that the two lawyers would divide the fee in a manner that would violate RPC 4-1.5(f)(4)(D) (governing division of contingent fee between counsel in personal injury matters).\textsuperscript{199} Without even mentioning \textit{Chandris}, the court rejected Plaintiff's claim.\textsuperscript{200} The court purported to base its decision on language in the RPC's Preamble, which states that the RPC are "not designed to be a basis for civil liability."\textsuperscript{201} The court's rationale failed to

\textsuperscript{192} \textit{Id.}

\textsuperscript{193} \textit{Id.} 998 F. Supp. 1422 (S.D. Fla. 1998).

\textsuperscript{194} \textit{Id.} at 1422. Another such case is Miller v. Jacobs & Goodman, P.A., 699 So. 2d 729 (Fla. 5th Dist. Ct. App. 1997) (in suit by law firm against its former employee to enforce provision of employment agreement that allegedly violated RPC 4-5.6(a), which prohibits agreements restricting a lawyer's right to practice after termination of the employment relationship, the court's decision failed to even mention \textit{Chandris} in rejecting former employee's argument that agreement was unenforceable as against public policy because it violated RPC 4-5.6(a)).

\textsuperscript{195} \textit{Eakin}, 998 F. Supp. at 1424.

\textsuperscript{196} \textit{Id.} at 1425.

\textsuperscript{197} \textit{Id.}

\textsuperscript{198} \textit{Id.} at 1428.

\textsuperscript{199} \textit{Id.} See supra note 187.

\textsuperscript{200} \textit{Eakin}, 998 F. Supp. at 1429.

\textsuperscript{201} \textit{Id.} (emphasis omitted). The court quoted the following paragraph from the "Scope" section of the Preamble to the RPC:

Violation of a rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached. The rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has
recognize that, even though the RPC themselves are not standards governing civil actions, agreements providing for violation of an ethical rule can nevertheless be so contrary to public policy that the agreement is considered void and unenforceable—as the Supreme Court of Florida expressly held in Chandris.202

Several cases of interest dealt with various aspects of contingent fees. The definition of a “contingent fee” was addressed in Worobec v. Morse.203 The lawyer and client entered into a fee agreement in two matters, collection of promissory notes and partition.204 Their agreement provided that the money recovered in the partition action would be used to pay for all hours worked by the lawyer in both cases, but that the lawyer would receive nothing if nothing was recovered in the partition case.205 The appellate court held that arrangement did not create a contingent fee in the promissory note collection matter, because the fee was not contingent on outcome of that (promissory note) case, and thus the contingent fee risk multiplier did not apply.206

The right of a lawyer who withdraws from a contingent fee representation prior to occurrence of the contingency was discussed in Calley v. Thomas M. Woodruff, P.A.207 The lawyer was hired to handle a personal injury claim on a contingent fee basis, but withdrew prior to conclusion of the case.208 The client hired a new lawyer, who settled the case.209 The original lawyer filed a charging lien and ultimately was awarded fees by the trial court.210 The general rule in Florida is that an attorney who withdraws from a contingent fee case before the contingency occurs forfeits all right to compensation, unless the withdrawal was standing to seek enforcement of the rule. Accordingly, nothing in the rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such duty.

Id.

202. Chandris, 668 So. 2d at 186.
203. 722 So. 2d 227 (Fla. 5th Dist. Ct. App. 1998). Regarding the definition of “contingent fee,” see also Seminole County v. Delco Oil, Inc., 669 So. 2d 1162, 1167 (Fla. 5th Dist. Ct. App. 1996) (defining contingent case as “one where payment depends on winning and collecting”); Quanstrom v. Standard Guar. Ins. Co., 519 So. 2d 1135, 1136 n. 1 (Fla. 5th Dist. Ct. App. 1988), rev’d on other grounds, 555 So. 2d 828 (Fla. 1990) (“controlling substantive character of a contingency fee agreement is the feature that the attorney gets paid in one event and not in another.”).
204. Morse, 722 So. 2d at 227.
205. Id.
206. Id. at 227–28.
208. Id. at D1999.
209. Id.
210. Id.
necessitated by the client’s demand for illegal or unethical conduct by the lawyer.\textsuperscript{211} The trial court in \textit{Calley} awarded fees based on its finding that the lawyer had withdrawn as a result of a “well-founded belief” that the client would perjure himself at trial.\textsuperscript{212} The Second District Court of Appeal reversed the fee award, concluding that there was insufficient evidence to support the trial court’s finding that the unethical conduct exception to the general rule applied.\textsuperscript{213} The lawyer had

made no attempt to inquire to confirm his suspicion that [the client] intended to offer false testimony, nor did he take any action to dissuade [the client] from offering false testimony. In the absence of compelling evidence to show that the client’s conduct is criminal or fraudulent, a lawyer cannot have a reasonable belief the client will lie without at least inquiring of the client.\textsuperscript{214}

Enforcement of a lawyer’s claimed right to a fee, whether contingent or non-contingent cases, typically generates litigation. This past year was no exception. One of the most common and efficient means of enforcing a right

\textsuperscript{211} Faro v. Romani, 641 So. 2d 69 (Fla. 1994).
\textsuperscript{212} \textit{Calley}, 23 Fla. L. Weekly at D1999.
\textsuperscript{213} \textit{Id}.
\textsuperscript{214} \textit{Id.} at D1999–2000. \textit{Calley} is also instructive regarding a lawyer’s duty under RPC 4-3.3 when faced with a client who intends to offer false evidence or engage in a fraud on the court. Subdivisions (a) and (b) of RPC 4-3.3, “CANDOR TOWARD THE TRIBUNAL,” provides:

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

(1) make a false statement of material fact or law to a tribunal;
(2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;
(3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
(4) permit any witness, including a criminal defendant, to offer testimony or other evidence that the lawyer knows to be false. A lawyer may not offer testimony that the lawyer knows to be false in the form of a narrative unless so ordered by the tribunal. If a lawyer has offered material evidence and thereafter comes to know of its falsity, the lawyer shall take reasonable remedial measures.

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

\textit{Id}.
to a fee is through the mechanism of a lawyer's charging lien. In *Feldman v. New Alliance Insurance Co.*, a lawyer represented a client in a breach of contract action against the client's insurer. Suit was filed just two weeks after the subject auto accident occurred. Not long thereafter the client discharged the lawyer, who filed a charging lien for fees allegedly due him. The client settled the case with a new lawyer. Neither the client nor the insurer paid the fees claimed by the original lawyer, and the trial court denied his motion for fees on the ground that the suit was filed "prematurely" and did not help the client's case. The Third District Court of Appeal reversed. The lawyer provided some legal services to the client and established his charging lien for those services. Accordingly, the matter was remanded for determination of the amount due the lawyer.

A high-profile case in which a charging lien was at issue was *State v. American Tobacco Co.* This case centered around a dispute over attorney's fees arising from the multi-billion dollar settlement in Florida's litigation against the tobacco industry. A group of private law firms had contracted to represent the State in the litigation. A very favorable settlement was reached with some of the defendants. The lawyers filed a charging lien on the date that the settlement agreement was approved by the

215. One of two common law liens available to lawyers in Florida, a "charging lien is [an] equitable right to have costs and fees due an attorney for services in [the] suit secured to him in [the] judgment or recovery in that particular suit." Sinclair, Louis, Siegel, Heath, Nussbaum & Zaverik, P.A. v. Baucom, 428 So. 2d 1383, 1384 (Fla. 1983). The other equitable lien is called a retaining lien, which is a possessory lien, asserted as security for payment of accrued but unpaid fees or costs, that a lawyer has on papers, funds, and other property of his or her client that comes into the lawyer's possession in the course of the lawyer's professional employment. See, e.g., Daniel Mones, P.A. v. Smith, 486 So. 2d 559 (Fla. 1986); Wintter v. Fabb, 618 So. 2d 375 (Fla. 4th Dist. Ct. App. 1993); Dowda & Fields, P.A. v. Cobb, 452 So. 2d 1140 (Fla. 5th Dist. Ct. App. 1984). Unlike a charging lien, which is case-specific, a lawyer may assert a retaining lien over property relating to one case that he or she is handling for a client in order to secure the fee owed by that client to the lawyer from another case. Mones, 486 So. 2d at 561.
216. 722 So. 2d 938 (Fla. 3d Dist. Ct. App. 1998).
217. Id. at 939.
218. Id.
219. Id.
220. Id.
221. *Feldman*, 722 So. 2d at 939.
222. Id.
223. Id.
224. Id.
225. 723 So. 2d 263 (Fla. 1998).
226. Id. at 264.
227. Id.
228. Id.
Pursuant to the settlement agreement, millions of dollars were deposited in an escrow account. The trial court, however, quashed the charging lien on the ground that the underlying fee contract was unenforceable. This order was subsequently reversed by the Fourth District Court of Appeal. On remand, the lawyers moved to enforce their charging lien, and the State filed a writ of prohibition in the supreme court to prevent the trial court from ordering disbursement of any funds to the lawyers. The supreme court relied on the fee contract between the parties in reaching its decision. The contract specified that, when the settlement agreement became final, all monies were to be distributed to the State. Accordingly, the court held that no charging lien could be imposed upon the funds because such a lien "would be contrary to the contract for legal services entered into" between the lawyers and the State.

The scope of an attorney's retaining lien was addressed in Boroff v. Bic Corp. A lawyer represented the plaintiffs in a personal injury suit, advancing costs and expenses of about $20,000 on his clients' behalf. The defendant prevailed in the suit and obtained a costs judgment against the lawyer's clients. In a separate personal injury suit for the same clients, the lawyer secured a recovery and had $4500 placed in his trust account. When the defendant in the first suit sought to garnish the lawyer's trust account, the lawyer asserted a retaining lien for the costs owed from the first suit and the fees owed from the second suit. The trial court recognized the retaining lien, but permitted it to attach only to the fees owed to the lawyer from the second suit. The appellate court held that the lien should extend to both fees and costs: "an attorney's retaining lien attaches to all property

229. Id. at 266.
230. American Tobacco Co., 723 So. 2d at 266.
231. Id.
232. Id. at 268.
233. Id.
234. Id.
236. Id. at 267-69.
237. Id. at 268.
238. 718 So. 2d 348 (Fla. 2d Dist. Ct. App. 1998).
239. Id. at 349.
240. Id.
241. Id.
242. Id.
243. Boroff, 718 So. 2d at 349.
of the client that comes into the attorney's possession, to secure payment of all debts—including fees and costs—owed by the client to the attorney.\textsuperscript{244}

An interesting fee-related issue was raised in \textit{Dadic v. Schneider}.\textsuperscript{245} A couple sued their former lawyer and his law firm for malpractice.\textsuperscript{246} Among the allegations was a count alleging legal malpractice through the charging of excessive fees by the lawyer.\textsuperscript{247} The Fourth District Court of Appeal affirmed a summary judgment for the lawyer, stating that "[n]o authority supports a cause of action on this theory."\textsuperscript{248}

Termination of the lawyer-client relationship can also raise ethical issues. RPC 4-1.16\textsuperscript{249} sets forth the standards governing termination of a

\textsuperscript{244} Id.
\textsuperscript{245} 722 So. 2d 921 (Fla. 4th Dist. Ct. App. 1998).
\textsuperscript{246} Id. at 922.
\textsuperscript{247} Id. at 923.
\textsuperscript{248} Id.
\textsuperscript{249} RPC 4-1.16, "DECLINING OR TERMINATING REPRESENTATION," provides:

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

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

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

(3) the lawyer is discharged.

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

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

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

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

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

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

(6) other good cause for withdrawal exists.

(c) Compliance With Order of Tribunal. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.
One of the most basic principles in this area is that a lawyer must withdraw (or attempt to withdraw) from the representation when discharged by the client.\(^{250}\) Apparently, however, some lawyers do not always understand or adhere to this basic principle. In *Florida Bar v. Vining*,\(^{252}\) a lawyer was disciplined for several rules violations, including the failure to comply with RPC 4-1.16\(^{253}\) by withdrawing from representation after his client discharged him.\(^{254}\) The lawyer was representing the client in connection with a certain building controlled by the client and in which the lawyer happened to be a tenant.\(^{255}\) The lawyer represented the client in suing another tenant.\(^{256}\) While an appeal of the trial court’s decision in that case was pending, the client discharged the lawyer and, four days later, sued the lawyer’s professional association for unpaid rent.\(^{257}\) Refusing to take no for an answer, the lawyer continued to represent the client in the appeal—and even participated in oral argument.\(^{258}\) The client complained to the Florida Bar, which ultimately led to the lawyer’s suspension from the practice of law for six months.\(^{259}\) The supreme court noted that “Rule 4-1.16 requires a lawyer to withdraw from representation if the lawyer is discharged.”\(^{260}\)

Application of the termination of representation rules in the criminal context creates special concerns, however, particularly in view of the constitutional obligation of the state to provide legal representation to defendants who cannot afford to hire a lawyer.\(^{261}\) The Supreme Court of Florida previously ruled that a trial court must grant a public defender’s motion to withdraw from a representation when the public defender certifies

---

(d) Protection of Client’s Interest. Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client’s interest, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled, and refunding any advance payment of fee that has not been earned. The lawyer may retain papers and other property relating to or belonging to the client to the extent permitted by law.

*d. Id.*

250. *Id.*
251. *Id.*
252. 721 So. 2d 1164 (Fla. 1998).
253. *Id.* at 1166. Specifically, the lawyer violated subdivision (a)(3) of RPC 4-1.16. *See supra* note 249.
254. *Vining*, 721 So. 2d at 1164.
255. *Id.* at 1165.
256. *Id.*
257. *Id.* at 1167.
258. *Id.* at 1168.
259. *Vining*, 721 So. 2d at 1170.
260. *Id.* at 1168.
261. U.S. CONST., amend. VI.
to the court that the interests of one client are so adverse or hostile to those of another client that the public defender cannot represent the two clients without a conflict of interest. The trial court has no discretion in this situation; it is not permitted to reweigh the underlying facts and substitute its conclusion for that of the public defender. Despite this clear pronouncement from the supreme court, in at least six reported cases, the Fourth District Court of Appeal reversed trial court orders denying public defenders’ motions to withdraw due to certified conflicts. In one of these cases, Reardon v. State, the appellate court appeared to invite the legislature to change the result of the supreme court’s controlling decision.

A trial court’s order denying court-appointed criminal defense counsel’s motion to withdraw was affirmed on appeal in Thomas v. State. Counsel moved to withdraw on eve of trial, stating that his law firm previously employed the mother of one of the witnesses and previously represented members of that witness’s family in an unrelated civil case. The trial court denied the lawyer’s motion to withdraw. The defendant was convicted, and the conviction was affirmed on appeal. The appellate court distinguished between conflicts of interest involving current or former clients of a criminal defense lawyer and conflicts arising from the lawyer’s personal interests:

The conflict in this case did not involve representation of clients or former clients with competing interest. Rather the conflict arose from a personal relationship not shown to involve substantial emotional ties. In these circumstances, prejudice is not presumed and the defendant must

---

262. Guzman v. State, 644 So. 2d 996 (Fla. 1994).
263. Id. at 998–99.
265. 715 So. 2d 348 (Fla. 4th Dist. Ct. App. 1998) (noting that it was “bound to follow Guzman,” the court stated that “[a]ny change in which a public defender’s certification of conflict is treated by the trial courts and reviewed will have to come from the legislature”).
266. Id. at 348.
267. 725 So. 2d 1171 (Fla. 5th Dist. Ct. App. 1998).
268. Id. at 1172–73.
269. Id. at 1173.
270. Id.
271. Id.
demonstrate that he has been prejudiced in some way to establish reversible error. 272

A case of interest involving a "nonwithdrawal" was *Milane v. State*. 273 On appeal of his criminal conviction, the defendant asserted that the trial court had erred by not replacing his public defender with private counsel. 274 Apparently, the defendant was concerned because another lawyer in the public defender's office was representing, in another case, a person who was a material witness against the defendant in his case. 275 The public defender had refused to certify conflict on these facts. 276 In affirming the conviction, the appellate court noted that there was no indication that defense counsel's cross-examination of the witness "was anything other than vigorous" and that the defendant had failed to establish the existence of a conflict that adversely affected his lawyer's performance. 277 While the court may have correctly affirmed the conviction as a matter of law, it appears that the defense counsel's apparent non-recognition of any conflict may have been an incorrect application of the ethics rules. 278 A lawyer's cross-examination of a current client is considered a conflict of interest. 279 This conflict ordinarily would extend to all lawyers within the law firm pursuant to RPC 4-1.10(a). 280

Finally, lawyers who have the good fortune to be elevated to a position on the bench should take care to close out their practices in an orderly, responsible fashion as contemplated by RPC 4-1.16. 281 A lawyer who allegedly "virtually abandoned her law practice and neglected several client matters during the time she ran for office as a county court judge" was found guilty of violating a number of RPC and disciplined by the Supreme Court of Florida. 282

272. *Thomas*, 725 So. 2d at 1173.
273. 716 So. 2d 837 (Fla. 5th Dist. Ct. App. 1998).
274. Id. at 837.
275. Id.
276. Id.
277. Id.
278. *Milane*, 716 So. 2d at 837.
280. Subdivision (a) of RPC 4-1.10, "IMPUTED DISQUALIFICATION; GENERAL RULE," provides: "(a) Imputed Disqualification of All Lawyers in Firm. While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by rule 4-1.7, 4-1.8(c), 4-1.9, or 4-2.2." Id.
281. *See supra* note 249.
282. *In re Hapner*, 718 So. 2d 785, 786 (Fla. 1998). Among the rules violated were RPC 4-1.1 (competence), 4-1.3 (diligence), 4-1.4 (communicating with clients), 4-1.5(e)
III. THE LAWYER'S RELATIONSHIP WITH THE JUDICIAL SYSTEM

A lawyer's relationship with the system of justice is a more abstract, yet critically important one. How does one have a relationship with a "system?" In a practical sense, how are one's responsibilities to and within a "system" determined and measured? For the lawyer, the answers to these questions are probably best arrived at by considering their relationships with and responsibilities to the two principal constituencies of the justice system, judges and the public whom the system is designed to serve. Cases in 1999 addressed relevant issues such as the disqualification of a lawyer or law firm from a litigated matter, the question of a lawyer's dual role as advocate and witness, a lawyer's ability to comment publicly on matters in which he or she is participating, the lawyer's obligation of candor owed to the court, the conduct of lawyers during a trial, a lawyer's professionalism obligations, and the question of proper argument to the jury.

Disqualification of a lawyer based on the fact that he had previously represented the opposing party was addressed in *Eplee v. Eplee.* The lawyer was representing the husband in a divorce action. Sixteen years earlier, while representing the same client in a criminal matter, the lawyer had given legal advice to the client's girlfriend (who was now the wife in this divorce action) concerning her possible claim of spousal immunity. The trial court granted the wife's motion disqualifying the lawyer based on a finding that the prior advice to her created an attorney-client relationship. On petition for writ of certiorari the First District Court of Appeal quashed the order of disqualification, concluding that there had been no assertion that the lawyer had obtained any confidential information from the wife and no showing that the prior legal advice was substantially related to the current case.

(communicating basis or rate of fee to client), 4-1.6(d) (confidential information), 4-3.3 (candor toward a tribunal), and 4-8.4 (misconduct). *Id.* at 787.

284. *Id.* at 277–78.
285. *Id.* at 278.
286. *Id.*
287. *Id.* As a general rule, when a lawyer represents a new client whose interests are materially adverse to those of his or her former client, a conflict of interest exists if either the two matters are the same or substantially related or the lawyer possesses confidential information that could be used to the disadvantage of the former client. RPC 4-1.9, *supra* note 80. See, e.g., Jenkins v. Harris Ins., Inc., 572 So. 2d 1011 (Fla. 1st Dist. Ct. App. 1991).
The imputed disqualification\textsuperscript{288} of lawyers or law firms was addressed in several cases. \textit{Russakoff v. State}\textsuperscript{289} concerned an order disqualifying a law firm. The law firm had represented a Health Maintenance Organization ("HMO") that subsequently went into receivership and was taken over by the state's Department of Insurance.\textsuperscript{290} The Department sought to recover certain funds from the HMO's former chief executive officer and sole shareholder, who then hired the law firm to defend him.\textsuperscript{291} The trial court granted the Department's motion to disqualify the law firm, "finding that the law firm had represented [the HMO] in a related matter, and that, moreover, the Department would certainly call as witnesses the lawyers who had advised [the HMO] regarding this matter."\textsuperscript{292} The appellate court quashed the order and remanded the case for further proceedings.\textsuperscript{293}

The court discussed the issues of conflicts resulting from the firm's former representation of the HMO and from the possibility that firm lawyers would testify as witnesses.\textsuperscript{294} Significantly, the court indicated that screening of certain lawyers might prevent the law firm from being disqualified under the former client conflict rule, RPC 4-1.9,\textsuperscript{295} stating that:

\begin{quote}
[t]he fact that there was an attorney-client relationship between [the HMO] and [the law firm] would automatically disqualify those individual lawyers from working on matters that they handled or were directly related to matters that they handled. Other lawyers in the firm, however, would be disqualified only if any [law firm] lawyer would be called at trial, or if confidences would be exchanged that would disadvantage the [Department].\textsuperscript{296}
\end{quote}

\begin{footnotes}
\item[288] "Imputed disqualification" is the principle under which the conflict or disqualification of one lawyer is deemed to apply to all lawyers practicing together in the conflicted lawyer's firm. RPC 4-1.10(a) (1993).
\item[289] 724 So. 2d 582 (Fla. 1st Dist. Ct. App. 1998).
\item[290] \textit{Id.} at 583.
\item[291] \textit{Id.}
\item[292] \textit{Id.}
\item[293] \textit{Id.} at 585.
\item[294] \textit{Russakoff}, 724 So. 2d at 584–85.
\item[295] \textit{Supra} note 80.
\item[296] \textit{Russakoff}, 724 So. 2d at 584 (emphasis added). Regarding the issue of disqualification due to the lawyers' testimony, the opinion correctly recognized that the mere fact that a lawyer in the firm would testify as a witness would not automatically disqualify the entire firm, but that any testimony of a firm lawyer that would involve confidential information would create a disqualifying conflict for entire firm. \textit{Id.} at 583. \textit{See} RPC 4-3.7(b), \textit{infra} note 338 and accompanying text.
\end{footnotes}
The opinion's apparent support for the concept of screening to prevent disqualification of a private law firm is unique in Florida. Decisions of other Florida state and federal courts have declined to permit this practice, which is not recognized in the RPC.

The principle of imputed disqualification becomes more difficult to apply when lawyers move between law firms. The relatively simple rule of "one lawyer's conflict is every lawyer's conflict" that ordinarily applies to all lawyers practicing together in an organization is modified somewhat when lawyers move between employers. School Board of Broward County v. Polera Building Corp. concerned a lawyer who had worked on some matters relating to his law firm's representation of a school board in various cases. The lawyer then changed employers; he moved to another law firm that represented a plaintiff in a suit against the school board. The school board moved to disqualify the lawyer's new firm. Unfortunately

Screening is effective to avoid disqualifying conflicts of interest when lawyers move from government employment to private practice, or vice versa. RPC 4-1.11 (1993).


See subdivision (a) of RPC 4-1.10, supra note 280.

Subdivisions (b) and (c) of RPC 4-1.10, "IMPUTED DISQUALIFICATION; GENERAL RULE," provide:

(b) Former Clients of Newly Associated Lawyer. When a lawyer becomes associated with a firm, the firm may not knowingly represent a person in the same or a substantially related matter in which that lawyer, or a firm with which the lawyer was associated, had previously represented a client whose interests are materially adverse to that person and about whom the lawyer had acquired information protected by rules 4-1.6 and 4-1.9(b) that is material to the matter.

(c) Representing Interests Adverse to Clients of Formerly Associated Lawyer. When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by rules 4-1.6 and 4-1.9(b) that is material to the matter.

Id.
for the lawyer, the new firm reacted by terminating his employment. The trial court denied the motion to disqualify the new firm, based on affidavits submitted by the parties. On petition for writ of certiorari, the court quashed the order of disqualification because the trial court erred in basing its decision on affidavits rather than holding an evidentiary hearing. A hearing is needed because the imposition of imputed disqualification in a situation involving lawyers who change employment in the private firm setting depends in large part on the factual issue of possession of confidential information. The Polera court concluded that RPC 4-1.10(c) applies when a law firm responds to a motion to disqualify by terminating the employment of its lawyer who is alleged to have a conflict. It then specified that the trial court must make the factual determinations of whether the lawyer with the alleged conflict had any confidential information and whether the new firm gained any confidential information from that lawyer before he was fired from the firm; a hearing is required for these determinations.

The need for the trial court to hold an evidentiary hearing before ruling on a disqualification motion was also recognized in Boca Investors Group, Inc. v. Potash. The appellate court reversed an order of disqualification, noting that the nature of the lawyer’s meeting with the purported former client was unresolved. This case is also noteworthy because, at least for disqualification purposes, the court recognized the distinction between an initial consultation regarding counsel’s availability, which would not require

305. Id.
308. See supra note 300.
309. Polera Bldg. Corp., 722 So. 2d at 973. The court relied on the Nissan case in reaching this conclusion. Id. It would appear, however, that Nissan reached the wrong result. If, in the type of factual scenario presented in both cases, the new law firm had not fired the allegedly conflicted lawyer, the firm would have been governed by the more stringent rule expressed in RPC 4-1.10(a), rather than the relatively lenient standard of RPC 4-1.19(c). It seems inappropriate to allow the law firm to benefit by firing a lawyer that it knew or should have known presented a potential conflict problem when hired. This type of conflict avoidance strategy typically does not work with respect to current client conflicts. A lawyer or law firm usually is not permitted to turn a current client into a “former” client through withdrawal and then claim that it no longer has a conflict problem. See, e.g., Florida Ins. Guaranty Ass’n Inc. v. Carey Canada, Inc., 749 F. Supp. 255 (S.D. Fla. 1990). See also Hilton v. Barnett Banks, Inc., No. 94-1036-CIV-T-24(A), 1994 WL 776971, at *1 (M.D. Fla. Dec. 30, 1994).
310. Polera Bldg. Corp., 722 So. 2d at 973. These two issues track the requirements of RPC 4-1.10(c). Id.
311. 728 So. 2d 825 (Fla. 3d Dist. Ct. App. 1999).
312. Id.
disqualification, and a discussion that included disclosure of confidential information, which would result in the creation of a lawyer-client relationship and thus require disqualification.\footnote{313}

A conflict arising from a lawyer's personal interest can also form the basis of a motion to disqualify counsel. \footnote{314} \textit{Lee v. Gadasa Corp.} \footnote{315} concerned mortgage foreclosure litigation that began in 1987. In 1997, a motion was filed to disqualify defense counsel from the case. The motion was based on defense counsel's 1988 action to secure his fee by taking a junior mortgage on the property that was the subject matter of the foreclosure litigation. The movant alleged that the lawyer's conduct violated RPC 4-1.8(i)\footnote{317} and created a disqualifying conflict of interest. The trial court granted the motion, but its order was reversed by the First District Court of Appeal. \footnote{318} The appellate court stated that "the trial court may well have been justified in concluding that [the lawyer] had violated" RPC 4-1.8(i). \footnote{319} Nevertheless, despite the fact that the lawyer's "actions may merit investigation by the Florida Bar," it concluded that disqualification was not appropriate. \footnote{320} The lawyer's client had expressly waived any conflict of interest \footnote{321} and, perhaps most significantly, the movant had waited several years after learning of the mortgage before filing the motion to disqualify. \footnote{322}

\begin{itemize}
\item \footnote{313} \textit{Id.}
\item \footnote{314} 714 So. 2d 610 (Fla. 1st Dist. Ct. App. 1998).
\item \footnote{315} \textit{Id.} at 611.
\item \footnote{316} \textit{Id.}
\item \footnote{317} Subdivision (i) of RPC 4-1.8, "CONFLICTS OF INTERESTS; PROHIBITED TRANSACTIONS," provides:
\begin{itemize}
\item (i) Acquiring Proprietary Interest in Cause of Action. A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:
\begin{itemize}
\item (1) acquire a lien granted by law to secure the lawyer's fee or expenses;
\end{itemize}
\item and
\item (2) contract with a client for a reasonable contingent fee.
\end{itemize}
\item \footnote{318} \textit{Lee,} 714 So. 2d at 612.
\item \footnote{320} \textit{Lee,} 714 So. 2d at 612.
\item \footnote{321} The court's opinion did not discuss the fact that RPC 4-1.8(i) contains no provision for client waiver or consent. Compare subdivision (a) of RPC 4-1.8, \textit{supra} note 131.
\item \footnote{322} \textit{Lee,} 714 So. 2d at 612.
\end{itemize}
This delay led the appellate court to conclude that the movant had "waived any right it might have otherwise had to seek [the lawyer's] disqualification." 323

Lawyers must be aware that the non-lawyers they employ can create disqualification risks. An important case in this area was *Koulisis v. Rivers.* 324 A secretary working on a case for the defendant's law firm had access to confidential and privileged information in the firm's files, attended meetings at which the case was discussed, spoke with the client during pendency of the suit, and so forth. 325 During the litigation, the secretary left the defense firm and began working for the plaintiff's firm. The plaintiff's firm completely screened the secretary from the case. 326 The trial court denied the defendant's motion to disqualify the plaintiff's firm, concluding that the firm had taken sufficient steps "to insure that there [was] no impropriety." 327 The Fourth District Court of Appeal reversed, applying the same conflict rule that would apply if a lawyer had switched sides—Rule 4-1.10(b). 328 In refusing to recognize any distinction between lawyers and non-lawyers in this type of situation, the court went further than any of the other Florida authorities that have addressed this issue. 329

The court flatly stated that "[the secretary]'s desertion was akin to a lawyer switching to an opposing firm in the middle of a lawsuit." 330 The court noted that the secretary had access to confidential information while employed by the defense firm and that she then began to work for the law firm on the other side of same suit. In the court's opinion, nothing more was required to support the disqualification of the hiring firm. 331 The screening procedures employed by the hiring firm did not save it from disqualification; screening of lawyers is not recognized by RPC 4-1.10(b) and so was not

---


324. 730 So. 2d 289 (Fla. 4th Dist. Ct. App. 1999).

325. *Id.* at 291.

326. *Id.*

327. *Id.*

328. *Id.* at 293.


330. *Koulisis,* 730 So. 2d at 291.

331. *Id.* at 292.
Nova Law Review

available to the non-lawyer employee under the view taken by the court. Furthermore, the court rejected the idea that an evidentiary showing of unfair advantage was necessary because it simply applied RPC 4-1.10(b), unlike other cases that have required such a showing before ordering disqualification as a result of a non-lawyer's move between law firms.\textsuperscript{332}

An interesting aspect of the issue of non-lawyers and disqualification from litigation was brought out in \textit{Caridi v. Inorganic Recycling Corp.}\textsuperscript{333} A corporation hired a person who used to be a lawyer, who was no longer admitted to the bar of any state, to perform a "legal audit" of the corporation.\textsuperscript{334} At the time, the corporation's principals believed that the person was licensed to practice law and had given him information that could be considered privileged under Florida law.\textsuperscript{335} Later, a dispute arose among the corporation's principals. One side's counsel hired the ex-lawyer to assist in the litigation. Consequently, that counsel was disqualified because his client reasonably believed that he was a lawyer, and because of the access to confidential information regarding the opposing side that was enjoyed by the ex-lawyer as a result of his performance of the legal audit.\textsuperscript{336}

The RPC\textsuperscript{337} recognize that it may be unethical for a lawyer to act as both advocate and witness for a client in a matter.\textsuperscript{338} Violation of RPC 4-3.7

\begin{itemize}
\item \textsuperscript{332} See All Corners, 701 So. 2d at 642; Esquire Care, Inc., 532 So. 2d at 740. The \textit{Koulisis} court certified conflict with these cases. 730 So. 2d at 293.
\item \textsuperscript{333} 715 So. 2d 1072 (Fla. 4th Dist. Ct. App. 1998).
\item \textsuperscript{334} \textit{Id.} at 1072.
\item \textsuperscript{335} The Florida attorney-client privilege is codified in \texttt{FLA. STAT. \$ 90.502} (1997).
\item \textsuperscript{336} \textit{Caridi}, 715 So. 2d at 1073.
\item \textsuperscript{337} Regarding the underlying rationale of RPC 4-3.7, see Scott v. State, 717 So. 2d 908 (Fla. 1998); Mansur v. Drage, 484 So. 2d 618 (Fla. 5th Dist. Ct. App. 1986).
\item \textsuperscript{338} RPC 4-3.7, "\textit{LAWYER AS WITNESS}," provides:
\begin{enumerate}
\item \textit{When Lawyer May Testify.} A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness on behalf of the client except where:
\begin{enumerate}
\item the testimony relates to an uncontested issue;
\item the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony;
\item the testimony relates to the nature and value of legal services rendered in the case; or
\item disqualification of the lawyer would work substantial hardship on the client.
\end{enumerate}
\item \textit{Other Members of Law Firm as Witnesses.} A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 4-1.7 or 4-1.9 [concerning conflicts of interest].
\end{enumerate}
\end{itemize}
can lead to disqualification from litigation for the lawyer and, in some situations, the lawyer's firm. In *Singer Island, Ltd. v. Budget Construction Co.*, the appellate court upheld a trial court's denial of a motion to disqualify. The court emphasized the seriousness of disqualification and its view that motions to disqualify based on allegations that a party's lawyer will also be a witness should be regarded "with some skepticism, because they sometimes are filed for tactical or harassing reasons, rather than the proper reason, [RPC] 4-3.7." Courts have disqualified lawyers and law firms on the ground of improper communications with represented persons. In this case, the trial court correctly denied the motion to disqualify because, at the time the motion was filed, the movant had alleged "only a possibility that disqualification might be necessary," rather than waiting to file the motion after developing more of a record to support the allegations that the subject lawyer would testify as a witness.

Although disqualification motions are often interposed due to alleged conflicts of interest, other ethical transgressions may form the basis of such motions. In *Pinebrook Towne House Associations, v. C.E. O'Dell & Associates, Inc.*, an engineer met with a company's lawyers concerning the company's potential claims against him. When litigation ensued, the engineer retained a lawyer who asserted that disqualification was warranted due to this allegedly improper communication. The trial court granted the engineer's motion to disqualify the lawyers but on review the Second District Court of Appeal quashed the order. The engineer knew that the

---

341. 714 So. 2d 651 (Fla. 4th Dist. Ct. App. 1998).
342. Id. at 652.
344. *Singer Island*, 714 So. 2d at 652.
345. 725 So. 2d 431 (Fla. 2d Dist. Ct. App. 1999).
346. The movant apparently urged disqualification based on RPC 4-1.7, the general conflict of interest rule, supra note 120, but the crux of the allegations seemed to concern the communication issue rather than any conflict allegations. Perhaps the movants focused on this language in the Comment to RPC 4-1.7 that states: "[w]here the conflict is such as clearly to call in question the fair or efficient administration of justice, opposing counsel may properly raise the question." RPC 4-1.7 comment (1993).
347. *Pinebrook Towne House Ass'ns*, 725 So. 2d at 433–34.
lawyers represented the opposing party, no documents provided to the attorneys were confidential, and it was "undisputed that [the engineer] was aware that these attorneys represented" the company, meaning that there was no violation of RPC 4-4.3.348 The appellate court refused the engineer's invitation to "craft a rule, similar to Miranda warnings, which would require putting a potential defendant in a civil case on notice that anything he says will be used against him."349

A final case of interest in the disqualification arena dealt with the authorization of an out-of-state lawyer to appear in a Florida court pro hac vice.350 In Srou v. Srou,351 the out-of-state lawyer was admitted as co-counsel with a Florida law firm. The opposing party moved to disqualify the lawyer on the grounds of alleged failure to comply with section 2.060(b) of the Florida Rules of Judicial Administration.352 The district court withdrew its grant of pro hac vice admittance not on this ground, however, but because

348. Id. RPC 4-4.3, "DEALING WITH UNREPRESENTED PERSONS," provides:
In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.


349. Pinebrook Towne House Ass'n, 725 So. 2d at 433.

350. BLACK'S LAW DICTIONARY 1212 (6th ed. 1999) defines "pro hac vice" as: "For this turn; for this one particular occasion. For example, an out-of-state lawyer may be admitted to practice in a local jurisdiction for a particular case only." Id.

351. 733 So. 2d 593 (Fla. 5th Dist. Ct. App. 1999).

352. Subdivision (b) of FLA. R. JUD. ADMIN. 2.060 provides:
(b) Foreign Attorneys. Attorneys of other states shall not engage in a general practice in Florida unless they are members of The Florida Bar in good standing. Upon verified motion filed with a court showing that an attorney is an active member in good standing of the bar of another state, attorneys of other states may be permitted to appear in particular cases in a Florida court. A motion for permission to appear shall be submitted with or before the attorney's initial personal appearance, paper, motion, or pleading. The motion shall state all jurisdictions in which the attorney is an active member in good standing of the bar and shall state the number of cases in which the attorney has filed a motion for permission to appear in Florida in the preceding three years.

Id.
the lawyer was a family member of one of the litigants. The appellate court ruled that this decision was an abuse of the trial court's discretion. "Although there is considerable discretion of the trial court in reference to admitting lawyers to pro hac vice practice, the decision should not be arbitrary. There is no prohibition against a lawyer representing himself, let alone a family member."354

As officers of the court, lawyers have an obligation not to impair the fairness of proceedings in which they are involved by making prejudicial extra judicial statements. This duty is embodied in RPC 4-3.6, which precludes a lawyer from making a public, out-of-court statement that the lawyer knows or reasonably should know "will have a substantial likelihood of materially prejudicing an adjudicative proceeding." Of course, restrictions on a lawyer's right to speak publicly must be carefully scrutinized in light of the First Amendment. The United States Supreme Court has held that the standard expressed in RPC 4-3.6 permissibly balances the lawyer's free speech rights and the state's interest in providing fair trials. A trial court that imposes restrictions or "gag orders" on lawyers' rights to publicly comment on pending proceedings should do so only after finding that such action is necessary to ensure a fair trial, and narrowly tailoring the prohibition to bar only those statements that are substantially likely to materially prejudice the trial. The court in Rodriguez v. Feinstein did not make such findings to support its protective order restricting the extra judicial statements of lawyers in a medical malpractice case, and the order was quashed by the appellate court.

353. Srour, 733 So. 2d at 593.
354. Id.
355. RPC 4-3.6 (1993).
356. RPC 4-3.6, "TRIAL PUBLICITY," provides:
   (a) Prejudicial Extrajudicial Statements Prohibited. A lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding due to its creation of an imminent and substantial detrimental effect on that proceeding.
   (b) Statements of Third Parties. A lawyer shall not counsel or assist another person to make such a statement. Counsel shall exercise reasonable care to prevent investigators, employees, or other persons assisting in or associated with a case from making extrajudicial statements that are prohibited under this rule.

Id.
357. U.S. CONST. amend. I.
360. Id.
A lawyer owes strict duties of candor toward the court before which he or she practices, and is also obligated not to engage in misconduct that would affect the outcome of the proceedings. Making false representations to a court is one of the most serious professional offenses that a lawyer can commit. In Florida Bar v. Klausner, a lawyer who engaged in such conduct was suspended from the practice of law for three years. In its opinion, the supreme court indicated that, but for the referee’s recommendation of a suspension rather than disbarment, the lawyer would have been disbarred.

Lying to a court can also result in civil sanctions. A lawyer, found guilty of such misconduct, was ordered to pay the attorney’s fees that the opposing party incurred due to the lawyer’s failure to appear at a scheduled deposition in Lathe v. Florida Select Citrus, Inc. In trying to excuse his conduct, the lawyer falsely stated to the court that he had been ordered to appear before another judge at the time in question. The lawyer then sought a writ of certiorari to quash the court’s prior order requiring him to pay the opposing party’s legal fees. Denying the writ, the Fifth District Court of Appeal stated that “[i]t takes chutzpah to admit to lying to a court and yet still seek review of an order imposing sanctions.”

The courts condemned other forms of misrepresentation during the past year. In Leyva v. Samess, an auto accident case, the plaintiffs’ lawyer violated an order in limine by referring to a defendant by his title of “doctor.” Plaintiffs’ brief on appeal contained what the appellate court characterized as “a gross misrepresentation” of the order in limine. The court went on to issue this admonition to other lawyers who might appear before it: “Attorneys should be aware that in this court’s preparation for determining cases on the merits, the record on appeal is thoroughly reviewed. We cannot help but notice attorneys’ distortions of the record in their briefs. Such misrepresentations diminish the force and effect of the argument made.”

---

361. See, e.g., The Florida Bar v. Rightmyer, 616 So. 2d 953 (Fla. 1993); The Florida Bar v. Dodd, 118 So. 2d 17 (Fla. 1960).
362. 721 So. 2d 720, 721 (Fla. 1998).
363. Id. at 722.
364. Id. (Pariente, J., concurring with Wells, J., dissent urging disbarment).
365. 721 So. 2d 1247, 1247 (Fla. 5th Dist. Ct. App. 1998).
366. Id.
367. 732 So. 2d 1118 (Fla. 4th Dist. Ct. App. 1999).
368. Id. at 1120.
369. Id.
370. Id. at 1121.
Another case in which a party’s argument on appeal was criticized for a lack of candor was Builder’s Square, Inc. v. Shaw.\textsuperscript{371} The appellant’s counsel presented a number of contentions, some of which the court described with terms such as “specious” and “disingenuous.”\textsuperscript{372} In an attempt to reinforce the need for professionalism among lawyers, the court sternly warned:

The fact that [appellant] has some legitimate issues to be presented to this court does not give it license to add specious ones. Nor does it give it the right to distort facts and erroneously present a judge’s statement. Perhaps the only way to eliminate such issues is to refuse to respond to all issues presented by the party at fault. The Appellant’s attorney, who appeared before the trial court, has an otherwise well-respected reputation. We are hesitant to single him out because he is not alone in presenting the problems we have present. We do, however, remind all counsel that they have a duty to the Bar and their profession, as well as to their clients. We must begin to reevaluate how many “bites of an apple” we, as an appellate court, are willing to recognize, and we will not hesitate in the future to sanction those that engage in the conduct this court has faced in this cause.\textsuperscript{373}

In Rampart Life Associates, Inc. v. Turkish,\textsuperscript{374} the Fourth District Court of Appeal again had the opportunity (or misfortune) to address misconduct on the part of appellate counsel.\textsuperscript{375} The appellant appealed a non-final order denying a motion to dismiss for lack of personal jurisdiction.\textsuperscript{376} While the case was on appeal, appellant’s lawyer moved to supplement the record with a deposition taken after entry of the order being appealed.\textsuperscript{377} The appellate court denied the motion.\textsuperscript{378} Despite this, the lawyer included in her brief information from the subject deposition (the information was placed in a footnote).\textsuperscript{379} The court struck the offending footnote and imposed a

\textsuperscript{372}  Id. at D653.
\textsuperscript{373}  Id. at D654.
\textsuperscript{374}  730 So. 2d 384 (Fla. 4th Dist. Ct. App. 1999).
\textsuperscript{375}  Id. at 385.
\textsuperscript{376}  Id. at 384.
\textsuperscript{377}  Id. at 385.
\textsuperscript{378}  Id.
\textsuperscript{379}  Turkish, 730 So. 2d at 385.
monetary sanction on the lawyer, stating that her action had violated two ethical rules, 380 RPC 4-3.5(a), 381 and RPC 4-3.4(c). 382

Lawyers are not the only professionals who have ethical obligations in the courtroom. Sparks v. State 383 concerned a judge's duty to maintain impartiality. 384 During a bench conference in a criminal case, the judge pointed out the fact that the defendant had completed an affidavit of indigence containing information that might have conflicted with his trial testimony. 385 The prosecutor then cross-examined the defendant, using the information the judge alluded. 386 The affidavit was introduced into evidence over a non-specific objection of defense counsel. 387 Thus, the issue of the partiality of the trial judge was raised for the first time on appeal. The appeals court ruled that this issue constituted fundamental error that could not be considered harmless. 388 The conviction was reversed. 389

Tampering with witnesses is considered serious misconduct on the part of a lawyer, and is prohibited by RPC 4-34(b). 390 The United States

380. Id.
381. Subdivision (a) of RPC 4-3.5, "IMPARTIALITY AND DECORUM OF THE TRIBUNAL," provides: "(a) Influencing Decision Maker. 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." Id.
382. Subdivision (c) of RPC 4-3.4, "FAIRNESS TO OPPOSING PARTY AND COUNSEL," provides: "A lawyer shall not knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists." Id.
384. Id. at D829.
385. Id.
386. Id.
387. Id.
388. Sparks, 24 Fla. L. Weekly at D830.
389. Id. A dissenting opinion agreed with the majority that it is improper for a trial judge to assume the role of advocate, but disagreed that the judge had crossed that line in this case. Rather, the dissenting justice viewed the trial judge's conduct as a reasonable exercise of judgment in addressing a case of perjury that arose during the trial. Id. at D831 (Padovano, J., dissenting).
390. Subdivision (b) of RPC 4-3.4, "FAIRNESS TO OPPOSING PARTY AND COUNSEL," provides:

A lawyer shall not:
(b) fabricate evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness, except a lawyer may pay a witness reasonable expenses incurred by the witness in attending or testifying at proceedings; a reasonable, noncontingent fee for professional services of an expert witness; and reasonable compensation to reimburse a witness for the loss of compensation incurred by reason of preparing for, attending, or testifying at proceedings.
Eleventh Circuit Court of Appeals addressed an interesting application of this rule in *United States v. Lowery.* The defendants in separate criminal cases moved to suppress testimony of their alleged co-conspirators that had been obtained by the prosecution as a result of plea bargains. They argued that the plea agreements violated federal law against bribing witnesses and Florida ethics rule RPC 4-3.4(b), which prohibits a lawyer (in this case, the government prosecutor) from "offer[ing] an inducement to a witness." Based on the reasoning in *United States v. Singleton* concerning the legal issue and on the language of RPC 4-3.4(b) concerning the ethical issue, the trial court granted the motion to suppress.

The Eleventh Circuit reversed and remanded. Regarding the RPC 4-3.4(b) question, the court noted that "[i]t is far from clear that Rule 4-3.4(b) prohibits conduct leading to the type of agreements at issue in this case." The court, however, did not decide the case on that ground. Rather, it ruled that "a state rule of professional conduct cannot provide an adequate basis for a federal court to suppress evidence that is otherwise admissible."

A civil case involving conduct as "witness tampering" was *Jost v. Ahmad.* A treating physician, who was a testifying witness for the plaintiff in a medical malpractice case, was contacted on the day he testified by the defendant hospital’s insurance carrier. Allegations were made that the contact was made with the knowledge of defense counsel. The trial court declined to permit the plaintiff's lawyer to investigate the matter and bring the existence of this contact before the jury. This ruling was error, and the appellate court reversed the jury’s verdict for the defense and remanded the case for a new trial.

---

*Id.* (emphasis added).

391. 166 F.3d 1119 (11th Cir. 1999).
392. *Id.* at 1119.
394. RPC 4-3.4(b) (1993).
395. *Id.*
396. 144 F.3d 1343 (10th Cir. 1998), reviewed en banc, 165 F.3d 1297 (10th Cir. 1999).
397. *Lowery,* 166 F.3d at 1121.
398. *Id.* at 1125.
399. *Id.* at 1124.
400. *Id.*
401. 730 So. 2d 708, 710 (Fla. 2d Dist. Ct. App. 1998).
402. *Id.* at 709.
403. *Id.*
404. *Id.* at 710.
405. *Id.* at 711.
Other types of trial conduct involving lawyers were criticized in reported decisions. In *Harley v. Lopez.*, a lawyer represented personal injury claimants who sued a county and lost at both trial and on appeal. The county’s motion for appellate fees and costs was denied by the trial court for “failure to present expert testimony.” The claimants’ lawyer objected to the county’s expert affidavits for the first time at fees/costs hearing. The county’s motion for a continuance to allow it to produce its expert was denied. Reversing the award, the Third District Court of Appeal stated that “we believe that affirming the trial court’s denial of appellate fees in this instance would reward [the lawyer]’s ‘gotcha’ tactics, tactics long abhorred by this court.”

In *Banderas v. Advance Petroleum, Inc.*, a lawyer who filed a meritless motion for rehearing, which appeared to be filed “solely as a tool to express his personal displeasure” with the court’s per curiam affirmance, was deemed to have violated Rule 9.330(a) of the *Florida Rules of Appellate Procedure*. The court denied rehearing, then referred the lawyer to the Florida Bar by directing the court clerk to provide the Bar with a copy of the court’s opinion. Additionally, the court ordered the lawyer to show cause why sanctions should not be imposed. After considering the lawyer’s response, the court imposed a monetary sanction of $2500.

A lawyer’s motion to disqualify a judge can also create ethical concerns. The Second District Court of Appeal expressed its displeasure about the contents of certain motions in *J & J Industries, Inc. v. Carpet Showcase of Tampa Bay, Inc.* The court served notice that it expects candor and ethical behavior on the part of lawyers who file such motions:

> While it is not our role in reaching a decision—nor has it been in this instance—to pass on the truth of the various allegations counsel for [petitioner] has pleaded, we point out

---

407. *Id.* at D878.
408. *Id.*
409. *Id.*
410. *Id.*
412. 716 So. 2d 876 (Fla. 3d Dist Ct. App. 1998).
413. *Id.* at 876.
414. *Id.*
415. The court stated that it was referring the lawyer to the Bar “pursuant to the mandatory language contained in 5-H Corp. v. Padovano.” *Id.* at 877 (internal citation omitted).
416. *Id.*
418. 723 So. 2d 281 (Fla. 2d Dist. Ct. App. 1998).
this misleading and ethically suspicious excerpt from its motion in the hope that counsel’s reliance on disingenuous accusations during proceedings to disqualify trial judges—themselves largely insulated from inspection of their reliability—will not always be shielded from public scrutiny.419

Similarly, lawyers who behave inappropriately toward each other in the context of litigation may suffer criticism from the bench. In Baitty v. Weaver,420 a lawyer appealed an order directing her to pay fees and costs of more than $76,000 to opposing counsel.421 The order was premised on the trial court’s finding that the lawyer misrepresented the truth to a Florida court.422 The appellate court reversed the order, concluding that the record did not support this finding.423 In dissenting, one justice added a “personal observation” to the effect that lawyers should think very carefully before engaging in bitter litigation such as this based on alleged misstatements of other lawyers.424 He noted that, while judges should not take lightly a finding that a lawyer has lied to a court, “the image of lawyers calling one another liars raises its own set of problems.”425

In the criminal defense arena, a criminal prosecutor’s conduct was considered questionable enough to warrant a referral to the Florida Bar for investigation.426 In Lewis v. State,427 the prosecution withheld material that should have been turned over to defense counsel pursuant to Brady v. Maryland.428 Noting that the trial court made no findings concerning whether the failure to turn over the material was intentional or unintentional, the appeals court pointed out that an intentional withholding would violate RPC 4-3.8(c),429 which concerns the ethical duties of prosecutors, and turned the matter over to the Florida Bar.430

419. Id. at 284.
420. 734 So. 2d 582 (Fla. 4th Dist. Ct. App. 1999).
421. Id.
422. Id.
423. Id. at 585.
424. Id. at 586.
425. Baitty, 734 So. 2d at 586 (Farmer, J., dissenting).
427. Id. at 1202.
429. Subdivision (c) of RPC 4-3.8, “SPECIAL RESPONSIBILITIES OF A PROSECUTOR,” provides:
The prosecutor in a criminal case shall:
(c) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the
Another prosecutor’s conduct was criticized in *Dunstall v. State*. A defendant’s conviction of sexual battery was reversed and remanded for a new trial as a result of prosecutorial misconduct. A certain writing was referred to by defense counsel, and the state objected. At the ensuing bench conference, defense counsel stated that he did not intend to try to introduce the writing itself into evidence. The court ruled the writing inadmissible. Despite this ruling, the prosecuting attorney asked a witness to produce the writing and, “incredibly enough, then proceeded to object when the witness complied.” Based on this objection, the trial court “erroneously struck the exculpatory testimony of the witness.” A concurring opinion termed the prosecutor’s actions “unprofessional” and commented that “she followed neither her oath of office nor the ideals and goals of professionalism of the Florida Bar.”

Every year numerous cases are decided on improper argument, and this year presents a dizzying array, which ranges from reversal, despite a failure to contemporaneously object and preserve the issue for appeal, to a “bright line” decision, never to reverse without proper preservation of the issue at trial. Although courts frequently find argument to be improper under the RPC, courts have been reluctant to reverse a case without preservation of defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.

*Id.*

430. *Lewis*, 714 So. 2d at 1203. The conviction was not reversed because the information that was withheld “did not have the probability of changing the outcome of [the] trial.” *Id.*

431. 730 So. 2d 819 (Fla. 5th Dist. Ct. App. 1999).

432. *Id.* at 822.

433. *Id.*

434. *Id.*

435. *Id.*

436. *Dunstall*, 730 So. 2d at 822.

437. *Id.*


440. *Dunstall*, 730 So. 2d at 823 (Thompson, J., concurring).

441. Most frequently, courts find a violation of RPC 4-3.4(e), “FAIRNESS TO OPPOSING PARTY AND COUNSEL,” which provides that:

A lawyer shall not:

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

*Id.*
the record by contemporaneous objection. The courts have, however, continued their recent trend to comment on the inappropriateness of attorneys' comments, apparently in the hope that pointing out these errors will deter attorneys from making them.  

Thus, the Second District Court of Appeal refused to reverse the conviction of a defendant despite the improper argument of the prosecutor. The court, however, specifically stated that "our affirmance should not be construed as approval of the remarks made by the prosecutor." The court found that the state attorney improperly "vouched for the truthfulness of the officers, told the jury to send [the defendant] a message, argued matters not in evidence, and commented on [the defendant's] exercise of his right to a jury trial." Judge Alternbernd, in a concurring opinion, opined that attorneys who practice criminal law should be required to review continuing legal educations videotapes on improper arguments.

The Second District Court of Appeal also affirmed a conviction while finding that the prosecutor made an improper closing in *Henderson v. State*. The court found that the prosecutor's remarks improperly shifted the burden of proof to the defendant and expressed personal opinions about the defendant's honesty. The prosecutor stated in closing that the defendant "would not know the truth if it hit him up side the head" and stated that the jury should find the defendant not guilty if the jury "believe[d] what [the defendant] said on the witness stand," among other improper remarks.

The Fifth District Court of Appeal took a bright line approach to improper argument, in stating that the court will not reverse cases if the error is not preserved by contemporaneous objection, finding that lawyers have failed to object as a tactical weapon. The court concluded that comments by a plaintiff's attorney were improper because they "request[ed] the jury to act as the conscience of the community and accus[ed] [the defendant], his attorney, and his witnesses of committing perjury." Nevertheless, the

442. E.g., id.
444. Id.
445. Id.
446. Id. This approach to prosecutorial misconduct was reiterated in Dunsizer v. State, 1999 WL 94970, at *1 (Fla. 2d Dist. Ct. App. Feb. 26, 1999), in which the court found that the prosecutor argued facts not in evidence, stating that "[a]lthough it is proper for prosecutors to argue inferences that may reasonably be drawn from the evidence ... they have no license to argue fiction." Id.
448. Id. at 285–286.
449. Id.
451. Id. at 1034.
court also suggested that attorneys fail to object as a tactical weapon, hoping to gain a verdict in their favor, while believing that the appellate courts would reverse the case based on improper argument if not. The court further noted that attorneys are subject to discipline by the Florida Bar for misconduct, and that courts and other attorneys have an obligation to report such misconduct. Two judges dissented, stating that the appellate courts had just removed themselves from the fray of curbing attorney excesses in argument, and stating that prior courts were “content to uphold the honor of its court and the integrity of the judicial process by merely denying the unethical lawyer the benefit of his misconduct” in reversing cases for improper comments.

The Supreme Court of Florida, on the other hand, does not share the Fifth District’s “bright line” rule and has been willing to reverse cases without contemporaneous objection. In a scathing opinion, the Supreme Court of Florida reversed a conviction for prosecutorial misconduct in a death penalty case, finding that the argument constituted fundamental error in Ruiz v. State. The court blasted a series of improper arguments by the prosecutors in this case, stating that “[i]t is particularly improper, even pernicious, for the prosecutor to seek to invoke his personal status as the government’s attorney or the sanction of the government itself as a basis for conviction of a criminal defendant.” The court thus found improper the prosecutor’s statements, such as “what interest do we [ ] as representatives of the citizens of this county have in convicting somebody other than the person” and “what interest is there to bamboozle anybody about [the defendant’s] real role in this case,” implying that “[i]f the defendant wasn’t guilty, he wouldn’t be here.” The prosecutors in this case referred to the defendant as “Pinocchio” and then stated that “[t]ruth equals justice.” The court found that such argument “invit[es] the jury to convict [the defendant] . . . because he is a liar.” If these statements were not bad

452. Id. at 1035. Another case which chided attorneys for failing to object, in the hopes of gaining a tactical advantage, is Simmons v. Swinton, 715 So. 2d 370 (Fla. 5th Dist. Ct. App. 1998).

453. Fravel, 727 So. 2d at 1036.
454. See id. at 1040.
455. Id. at 1042.
456. 24 Fla. L. Weekly S157 (Apr. 1, 1999). Apparently, although the defense objected to some of the prosecutor’s remarks, it did not object to all of them. Id. at S157.

457. Id.
458. Id. at S158.
459. Id.
460. Ruiz, 24 Fla. L. Weekly at S158.
461. Id.
462. Id.
463. Id. at S158.
enough, one of the prosecutors also improperly sought to appeal to the juror’s personal sympathies by mentioning her father’s role in the military during Desert Storm. In response to the State’s argument that many of the comments were not the subject of contemporaneous objection, the court stated that “[w]hen the properly preserved comments are combined with additional acts of prosecutorial overreaching set forth below, we find that the integrity of the judicial process has been compromised and the resulting convictions and sentences irreparably tainted.” The court then referred the prosecutors to the Florida Bar for possible disciplinary action.

Many of the lower courts have followed the supreme court’s example in reversing cases for improper argument without objection. In Freeman v. State, the Fifth District Court of Appeal, prior to its “bright line” ruling, reversed a conviction after the prosecutor improperly bolstered the credibility of its police witnesses by stating that the police should be believed merely because they are police officers. A prosecutor’s personal attack on the defense attorney was also the basis of a reversal in D’ambrosio v. State. The Third District Court of Appeal appeared particularly incensed with the statements of a prosecutor whose improper remarks were before the court for the third time in Izquierdo v. State. Continuing a trend, the court referred the attorney to the Florida Bar for investigation after finding that “the improprieties committed by [the prosecutor] . . . are both breathtaking in their number, variety, and gravity and perhaps unprecedented even in our long and dreary experience with this problem.” The court found that he improperly called the defense a “pathetic fantasy” and

464. Id. at S158. The court stated the following about these remarks:
This blatant appeal to jurors’ emotions was improper for a number of reasons: it personalized the prosecutor in the eyes of the jury and gained sympathy for the prosecutor and her family; it contrasted the defendant (who at that point had been convicted of murder) unfavorably with [the prosecutor]’s heroic and dutiful father; it put before the jury new evidence highly favorable to the prosecutor; it exempted this new evidence from admissibility requirements and from the crucible of cross-examination; and most important, it equated [the prosecutor]’s father’s noble sacrifice for his country with the jury’s moral duty to sentence Ruiz to death.

465. Id. at 5159.
466. Id.
467. 717 So. 2d 105 (Fla. 5th Dist. Ct. App. 1998).
468. Id. at 105.
469. 736 So. 2d 44 (Fla. 5th Dist. Ct. App. 1999); see also, Boyer v. State, 713 So. 2d 1133 (Fla. 5th Dist. Ct. App. 1998).
471. Id. at 125.
472. Id.
"improperly appealed to the jury’s sympathy and emotions as, for example, by asking it to consider the effects a crime such as this has on 'the water we drink, the air we breathe, the ground our children play on."' The court then invited the trial court to consider dismissing the case for prosecutorial misconduct after the reversal and remand.\footnote{474}

In \textit{Nigro v. Brady},\footnote{475} the Fourth District Court of Appeal found that preservation of the error by requesting a mistrial is not required in a motion for new trial, even if the comments do not rise to the level of fundamental error.\footnote{476} The court found that the defense attorney badgered the witness by asking questions to obtain inadmissible evidence.\footnote{477} The court found that a trial court has "broad discretion to set aside a jury verdict and grant a new trial," based on the improper comments even \textit{sua sponte}.

The court also remarked on the deterrent effect such a ruling may have on attorneys who act improperly.\footnote{479} A trial court can avoid reversal by properly admonishing a jury regarding inappropriate remarks. Thus, the trial court who sustained an objection for improper argument, admonished the prosecutor and gave a curative instruction to the jury to disregard the prosecutor’s remarks was upheld in \textit{Sinclair v. State}.\footnote{480} The prosecutor in closing argument improperly indicated that a police officer should be relied on because “the officer would not put his or her career on the line by committing perjury.”\footnote{481}

The court wrote specifically to reprimand the prosecutor, stating that “[i]t ill becomes those who represent the state in the application of its lawful penalties to themselves ignore the precepts of their profession and their office.”\footnote{482} Similarly, the supreme court found no error in a matter in which the trial court gave a curative instruction to the jury when the prosecutor called the defendant an “amoral, vicious, cold-blooded killer.”\footnote{483} In concurring, Justice Pariente specifically pointed out several improper remarks of the prosecutor to “send a message to the community” in stating that a jury recommendation for life for a deaf defendant is “an insult to all who have achieved greatness and lived law abiding and productive lives in

\begin{itemize}
\item \textit{Id. at 125–126.}\footnote{473}
\item \textit{Id. at 126.}\footnote{474}
\item 731 So. 2d 54 (Fla. 4th Dist. Ct. App. 1999).\footnote{475}
\item \textit{Id. at 54.}\footnote{476}
\item \textit{Id. at 55.}\footnote{477}
\item \textit{Id. at 56.}\footnote{478}
\item \textit{Id.}\footnote{479}
\item 717 So. 2d 99 (Fla. 4th Dist. Ct. App. 1998).\footnote{480}
\item \textit{Id. at 100.}\footnote{481}
\item \textit{Id. at 101.}\footnote{482}
\item Hawk v. State, 718 So. 2d 159, 162 (Fla. 1998).\footnote{483}
\end{itemize}
spite of the same handicap." She also stated that the prosecutor's statements, that mitigation evidence is "pathetic excuses," were "clearly improper."

Failure to handle an objection properly, however, will result in reversal, as evidenced by the case of Barnes v. State. The prosecutor referred to defense counsel as a "hired gun," prompting the defense attorney to ask that the remarks be stricken; the trial court responded by telling the jury to "[i]gnore the last comment." The appellate court pointed out that the instruction was "quite ambiguous" because it could be referring to the defense attorney's request that the remarks be stricken. The appellate court also stated that the trial court should specifically reprimand the prosecutor and give a clear curative instruction, stating that "[f]or a curative instruction conceivably to erase the palpable prejudice to the defendant in this situation, the court should have condemned the comment in the clearest and most unmistakable terms." Finally, the court referred the prosecutor to the Florida Bar for investigation of improper conduct, noting that the prosecutor had "persisted in this improper conduct for more than five years in spite of repeated disapproval of it by our court."

Other cases involving reversal include one in which the prosecutor improperly referred to matters not in evidence in Jones v. State. A prosecutor was also reprimanded for bolstering his expert witness by inappropriately asking if the defense attorney had attempted to hire the same expert in Milburn v. State. A reversal was also required where a prosecutor attempted to introduce evidence of other crimes in violation of a pre-trial ruling, and referred to those other crimes in closing argument.

Based on a finding that "truth is a defense," the appellate court found that no improper remarks had been uttered by the plaintiff's counsel who stated that the opening statement of the defendant's attorney was "the most unethical opening statement I have ever heard." The court found that the plaintiff's attorney had stated the truth, in finding that "[b]y calling the

484. Id. at 164.
485. Id. at 165.
487. Id. at D459.
488. Id.
489. Id.
490. Id. at D459.
492. 730 So. 2d 346 (Fla 4th Dist. Ct. App. 1999).
495. Owens-Corning Fiberglass Corp. v. McKenna, 726 So. 2d 361, 363 (Fla. 3d Dist. Ct. App. 1999).
defendant's argument 'unethical,' plaintiff's lawyer was simply defending himself and his client's case against a barrage of blatant improprieties by his opponent. His comment was an accurate description of defense counsel's tirade.496

IV. THE LAWYER'S RELATIONSHIP TO THIRD PARTIES

Most of the duties owed by a lawyer are to the client, including duties such as competence,497 diligence,498 confidentiality,499 and loyalty.500 Lawyers also owe special fiduciary obligations to clients regarding their property.501 Under some circumstances, lawyers also owe fiduciary obligations to third parties regarding funds or property.502 Thus, the

496. Id.
497. RPC 4-1.1 (1993).
498. Id. at R. 4-1.3.
499. Id. at R. 4-1.6.
500. Id. at R. 4-1.7-1.12.
501. RPC 4-1.15, the safekeeping property rule, and Chapter five on trust accounting, set forth the obligations of a lawyer toward client funds.
502. RPC 4-1.15 "SAFEKEEPING PROPERTY," states the following:
(a) Clients' and Third Party Funds to be Held in Trust. 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. All funds, including advances for costs and expenses, shall be kept in a separate account maintained in the state where the lawyer's office is situated or elsewhere with the consent of the client or third person, provided that funds may be separately held and maintained other than in a bank account if the lawyer receives written permission from the client to do so and provided that such written permission is received prior to maintaining the funds other than in a separate bank account. In no event may the lawyer commingle the client's funds with those of the lawyer or those of the lawyer's law firm. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property, including client funds not maintained in a separate bank account, shall be kept by the lawyer and shall be preserved for a period of 6 years after termination of the representation.
(b) Notice of Receipt of Trust Funds; Delivery; Accounting. Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.
(c) Disputed Ownership of Funds. When in the course of representation a lawyer is in possession of property in which both the lawyer and another person claim interests, the property shall be treated by the lawyer as trust property, but the portion belonging to the lawyer or law firm shall be withdrawn within a reasonable time after it becomes due unless the right of the lawyer or law firm to receive it is disputed, in which event the portion in dispute shall be kept separate by the lawyer until the dispute is resolved.

(d) Compliance With Trust Accounting Rules. A lawyer shall comply with The Florida Bar Rules Regulating Trust Accounts.

Id. RPC 4-1.15 Comment:
A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. All property that is the property of clients or third persons should be kept separate from the lawyer’s business and personal property and, if money, in 1 or more trust accounts, unless requested otherwise in writing by the client. Separate trust accounts may be warranted when administering estate money or acting in similar fiduciary capacities.

Lawyers often receive funds from third parties from which the lawyer’s fee will be paid. If there is 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. However, a lawyer may not hold funds to coerce a client into accepting the lawyer’s contention. The disputed portion of the funds should be kept in trust and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds shall be promptly distributed.

Third parties, such as a client’s creditors, may have just claims against funds or other property in a lawyer’s custody. A lawyer may have a duty under applicable law to protect such third party claims against wrongful interference by the client and, accordingly, may refuse to surrender the property to the client. However, a lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party and where appropriate the lawyer should consider the possibility of depositing the property or funds in dispute into the registry of the applicable court so that the matter may be adjudicated.

The obligations of a lawyer under this rule are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction.

Subdivision (d) of this rule requires each lawyer to be familiar with and comply with Rules Regulating Trust Accounts as adopted by The Florida Bar.

Money or other property entrusted to a lawyer for a specific purpose, including advances for costs and expenses, is held in trust and must be applied only to that purpose. Money and other property of clients coming into the hands of a lawyer are not subject to counterclaim or setoff for
Supreme Court of Florida disciplined an attorney for engaging in fraud and misrepresentation by signing checks payable to his client and third-party medical providers, depositing the funds into his trust account, failing to advise the third party that he received a settlement check on its behalf, and failing to pay the third party the money owed in settlement in *Florida Bar v. Sweeney.* The referee found that the lawyer had received settlement checks from an insurance company which were made out to both the client and medical providers. The attorney signed the checks, deposited them into his trust account, and distributed the proceeds to himself, to the client, and all but two of the medical providers. The referee specifically found that the attorney did not intend to defraud the medical providers or Medicaid after the attorney testified that he believed that Medicaid would pay the providers, but found that the attorney had violated RPC 4-1.15(a) and (b), 4-8.4(a) and (c), and 5-1.1. The supreme court agreed with the referee's findings that the attorney violated the safekeeping property and trust accounting rules, but additionally found that the attorney defrauded Medicaid by failing to pay the medical providers from the settlement checks, and suspended the attorney for ninety-one days.

Attorneys may incur obligations, which they do not intend regarding the rights of others, as evidenced by the case of *Berger v. Silverstein, Silverstein & Silverstein.* In *Berger,* the attorney represented a client in a personal injury case on a contingent fee basis. The attorney and the client signed a

---

attorney's fees, and a refusal to account for and deliver over such property upon demand shall be a conversion. This is not to preclude the retention of money or other property upon which a lawyer has a valid lien for services or to preclude the payment of agreed fees from the proceeds of transactions or collections.

*Id.*

503. 730 So. 2d 1269 (Fla. 1998).

504. *Id.* at 1270.

505. *Id.*

506. *Id.*

507. RPC 4-1.15(a) provides that "[a] lawyer shall hold in trust, separate from the lawyer's own property, funds and property of clients or third persons that are in a lawyer's possession in connection with a representation." *Id.*

508. RPC 4-1.15(b) states that "Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person." *Id.*

509. RPC 4-8.4(a) provides that "a lawyer shall not ... violate or attempt to violates the Rules of Professional Conduct." *Id.*

510. RPC 4-8.4(c) prohibits a lawyer from "engag[ing] in conduct involving dishonesty, fraud, deceit, or misrepresentation." *Id.*

511. RPC 5-1.1 sets forth specific requirements regarding trust accounts.

512. *Sweeney,* 730 So. 2d at 1272.

513. 727 So. 2d 312 (Fla. 3d Dist. Ct. App. 1999).

514. *Id.* at 313.
letter of protection, agreeing to pay the client’s physical therapist from the recovery. The attorney, after withdrawing his fees and costs from the settlement, had insufficient funds to pay the therapist’s bill. The physical therapist then filed suit against the client and the attorney to recover his fees. The trial court granted the attorney’s motion for summary judgment, finding that the attorney’s claim for fees had a higher priority than the physical therapist’s claim for fees. The Fourth District Court of Appeal overruled the trial court decision, finding that the case should not be treated as a priority of lien case. The court found that the specific language of the letter of protection created a contract between the attorney and the physical therapist, requiring the attorney to pay the full amount owed to the physical therapist from the recovery before paying himself for fees and costs outstanding. In a concurring opinion, Judge Nesbitt indicated that, although the attorney had a charging lien for his costs and fees, “the effect of his agreement with the therapist was to partially or wholly divest himself from enforcing that lien.” In light of this case, the prudent personal injury practitioner who regularly issues letters of protection to medical providers and others, should analyze the letters of protection he or she signs to ensure that the language of the agreements does not create an unintended contractual obligation.

An attorney owes some obligations to the opposing party, such as the duty not to communicate with the opposing party without the consent of the opposing party’s lawyer. Interpretation of RPC 4-4.2 is often the subject

---

515. Id.
516. Id.
517. Id.
518. Berger, 727 So. 2d at 313.
519. Id.
520. Id. The court quoted from the contract the specific language that the attorney would “withhold [the necessary] sums from any settlement, judgment or verdict as [might] be necessary to adequately protect” the physical therapist’s fee. Id.
521. Berger, 727 So. 2d at 313.
522. Id. (Nesbitt, J., concurring).
523. RPC 4-4.2, infra note 524.
524. RPC 4-4.2, “COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL,” provides:

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer. Notwithstanding the foregoing, an attorney may, without such prior consent, communicate with another’s client in order to meet the requirements of any statute or contract requiring notice or service of process directly on an adverse party, in which event the communication shall be strictly restricted to
of cases regarding attorney discipline, disqualification, and admissibility of evidence. The meaning of RPC 4-4.2 as applied to corporate parties was tested this year in the case of United States ex rel. Mueller v. Eckerd Corp.\(^{525}\) The United States government and the State of Florida sued Eckerd Corporation under the Federal False Claims Act\(^{526}\) and the Florida False Claims Act\(^{527}\) on the theory that Eckerd’s was not properly filling prescriptions.\(^{528}\) The government sought to communicate \textit{ex parte} with pharmacists, technicians, and clerks employed by Eckerd’s, stating that the employees were non-managerial and had expressed interest in speaking with the government.\(^{529}\) The magistrate judge denied the government’s motion for \textit{ex parte} interviews, from which the government appealed as to pharmacy technicians and clerks.\(^{530}\) The United States District Court for the Middle District of Florida, upheld the magistrate’s order denying the request for \textit{ex parte} contact.\(^{531}\) The court cited the comment to RPC 4-4.2, which states, in part, that in dealing with organizations as parties, an attorney may not communicate with an employee of the organization “whose statement may constitute an admission on the part of the organization.”\(^{532}\) The court stated that the technicians and clerks were involved in contacting health care providers for refill information and in counting and packaging medicine.\(^{533}\) In so doing, the court held that “[i]t is for the very reason stated in the statutory description of the pharmacy technicians’ duties that the statements obtained in an \textit{ex parte} interview would have a ‘substantial likelihood’ of being used against the organizations in a later proceeding.”\(^{534}\) The court found that information from these employees would be used to establish the government’s claims regarding incomplete filling of prescriptions, stating that these employees “would be precisely the employees who could verify Eckerd’s practices in regards to filling patients prescriptions.”\(^{535}\)

A lawyer also has responsibilities to the opposing party when the opposing party inadvertently discloses documents. In \textit{Abamar Housing &

\begin{itemize}
  \item that required by statute or contract, and a copy shall be provided to the adverse party’s attorney.
\end{itemize}

\textit{Id.}

\begin{itemize}
  \item 525. 35 F. Supp. 2d 896 (M.D. Fla. 1999).
  \item 527. FLA. STAT. §§ 68.01–.092 (1999).
  \item 528. \textit{Eckerd Corp.}, 35 F. Supp. 2d at 897.
  \item 529. \textit{Id.}
  \item 530. \textit{Id.}
  \item 531. \textit{Id.} at 899.
  \item 532. \textit{Id.} at 898 (quoting RPC 4–4.2).
  \item 533. \textit{Eckerd Corp.}, 35 F. Supp. 2d at 898.
  \item 534. \textit{Id.}
  \item 535. \textit{Id.}
Development, Inc. v. Lisa Daly Lady Decor, Inc.,\textsuperscript{536} an attorney was disqualified for his failure to immediately notify opposing counsel and return documents which were inadvertently disclosed by the other side.\textsuperscript{537} The court found that disqualification of the attorney was appropriate, stating that the "case demonstrates the effects of the inadvertent disclosure, the plaintiffs' recalcitrance in rectifying the disclosure, and the unfair tactical advantage gained from such disclosure."\textsuperscript{538} The court added, however, that disqualification will not always result from an inadvertent disclosure of information.\textsuperscript{539} If an attorney immediately notifies the person who disclosed the information and returns the documents, the attorney will not be disqualified, having gained no unfair advantage.\textsuperscript{540}

In another disqualification case, the court chose not to disqualify an attorney after the attorney misrepresented the law on work product privilege to opposing counsel's investigator during deposition.\textsuperscript{541} The attorney set a deposition of the opposing counsel's investigator, who had been listed as a witness.\textsuperscript{542} At the deposition, the investigator asked the attorney if he was inquiring into information protected by the work product privilege.\textsuperscript{543} The attorney answered by stating that the privilege "has been waived because [opposing counsel] listed you on his witness list. You are correct that typically what an investigator does is work product."\textsuperscript{544} The trial court disqualified the attorney and awarded fees, finding that the attorney had violated RPC 4-4.1,\textsuperscript{545} which prohibits making false statements of fact or law

\textsuperscript{536} 724 So. 2d 572 (Fla. 3d Dist. Ct. App. 1998).
\textsuperscript{537} Id. at 573.
\textsuperscript{538} Id. at 574.
\textsuperscript{539} Id. at 574 n.2.
\textsuperscript{540} Id. In reaching this conclusion, the court cited to Florida Ethics Opinion 93-3, stating that the opinion dictated disclosure of the receipt and immediate return of the documents. Interestingly, the opinion merely requires notification of receipt of the inadvertently disclosed documents; the opinion does not require their return. A prudent practitioner, however, will return the documents to avoid the disqualification, which is the result in this case. Fla. Bar Professional Ethics Comm. Op. 93-3 (1994).
\textsuperscript{541} 5500 North Corp. v. Willis, 729 So. 2d 508, 514 (Fla. 5th Dist. Ct. App. 1999).
\textsuperscript{542} Id. at 509.
\textsuperscript{543} Id. at 510.
\textsuperscript{544} Id.
\textsuperscript{545} RPC 4-4.1, "TRUTHFULNESS IN STATEMENTS TO OTHERS," provides:
In the course of representing a client a lawyer shall not knowingly:
(a) make a false statement of material fact or law to a third person; or
(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by rule 4-1.6.

\textit{Id.}
to a third party, and that the attorney had obtained privileged information. The appellate court overturned the disqualification and the award of attorney's fees, indicating that the attorney did not gain an "unfair advantage" necessitating disqualification, although the attorney misrepresented the law to the witness; the court specifically found that no information protected by the work product privilege had been disclosed. The court also overturned the award of attorney's fees, finding that opposing counsel did not obtain a protective order, did not attend the deposition, and did not instruct his own investigator on proper areas of inquiry at the deposition. The court admonished both attorneys in this case regarding their lack of professionalism in stating "the circumstances of this case present a textbook example of lack of cooperation between opposing counsel. We would expect more civility from Beavis and Butthead than was displayed here by [the attorneys]."

Beyond being admonished for a mere lack of professionalism, lawyers have been disciplined for their conduct toward opposing counsel and judges. In Florida Bar v. Sayler, the Supreme Court of Florida publicly reprimanded an attorney who sent a threatening letter to opposing counsel. The letter enclosed copies of articles about the murder of another lawyer who practiced in the same area of law as the recipient, and quoted from the articles. The court found that the sole purpose of the letter was to harass the opposing counsel, violating RPC 4-4.4 and 4-8.4(d). In another case, the supreme court suspended an attorney who, among other violations, accused opposing counsel of stealing the court file. In the same case, the court also found that the attorney had impugned the integrity of a judge by

---

546. Willis, 729 So. 2d at 510–11.
547. Id. at 513.
548. Id.
549. Id. at 514.
550. 721 So. 2d 1152 (Fla. 1998).
551. Id. at 1155. The Supreme Court of Florida has also disciplined an attorney for sending an insulting letter to the opposing party in Florida Bar v. Uhrig, 666 So. 2d 887, 888 (Fla. 1996). The letter was meant to disparage the opposing party, who was a member of a protected class under RPC 4-8.4(d). Id.
552. Sayler, 721 So. 2d at 1153–54.
553. Id. at 1154. RPC 4-4.4 provides that “[i]n representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person.” Id. RPC 4-8.4(d) states that “[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 . . . other lawyers on any basis.” Id.
554. Florida Bar v. Nunes, 734 So. 2d 393 (Fla. 1999). The court found that the attorney had violated Rule 4-3.1, regarding filing frivolous proceedings, 4-4.4, supra note 553, and 4-8.4(d), supra note 553.
filing a motion which included statements indicating that the judge had made a mistake in an order due to lack of experience and by filing a brief indicating that opposing counsel was trying to "get away with" conduct before a female judge that "he could not get away with from the two (2) [sic] male judges." The content of an attorney's communication with others is not the only area of controversy; 1999 saw at least one case in which the method of communication was a bone of contention in *Pee v. Arnold H. Aaron, P.A.* The Fourth District Court of Appeal overturned a trial court's order requiring an attorney with a fax machine to accept documents faxed by the opposing counsel. The attorney who was subject to the order filed for writ of certiorari after losing his argument that he should not be required to accept faxes from opposing counsel because "counsel constantly and continually [sent] argumentative letters, non-emergency pleadings, and other materials over the fax, which constantly and continuously interrupted his working day." The court found that, although Rule 1.080(b)(5) of the *Florida Rules of Civil Procedure* permits delivery by fax, it does not require an attorney to have a fax machine. Accordingly, an attorney who does not wish to receive documents by fax cannot be required to do so.

Attorneys communicate not only with the court and opposing counsel, attorneys also communicate with the public. Attorneys' communication with the public, in offering legal services, is the subject of regulation as well. Regulation of attorney advertising was subject to constitutional challenge in the case of *Mason v. Florida Bar.* Attorney Mason filed a yellow pages advertisement for review with the Florida Bar. The advertisement included the information "'AV' rated, the Highest Rating Martindale-Hubbell National Legal Directory." The Florida Bar opined that the advertisement did not comply with RPC 4-7.2(j), which prohibits "self-laudatory" statements. The Florida Bar further indicated that the advertisement would comply if the attorney included a statement that

555. *Nunes*, 734 So. 2d at 395. RPC 4-8.2(a) states that "a lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge." *Id.*
556. 719 So. 2d 372 (Fla. 4th Dist. Ct. App. 1998).
557. *Id.* at 372.
558. *Id.*
559. *Id.*
560. *Id.*
561. The rules regulating attorney advertising are RPC 4-7.1 through 4-7.8.
563. *Id.* at 1330. Attorneys must file non-exempt advertising for review under RPC 4-7.5.
564. *Id.*
565. *Id.* RPC 4-7.2(j) further proscribes "statements describing or characterizing the quality of the lawyer's services." *Id.*
Martindale-Hubbell does not rate all lawyers and that the ratings are based on confidential interviews.\textsuperscript{566} The attorney challenged the rule on First Amendment grounds and on the basis that the rule is unconstitutionally vague.\textsuperscript{567} The court found that the advertisement was commercial speech, subject to the \textit{Central Hudson}\textsuperscript{568} test, requiring that regulation by the State must be "narrowly drawn" and advance a substantial state interest.\textsuperscript{569} The court upheld the rule on the basis that The Florida Bar had shown substantial interest in "ensuring (1) that lawyer advertisements are not misleading, (2) that the public has access to relevant information to assist in the comparison and selection of attorneys, and (3) that rating services have a strong incentive to use objective criteria."\textsuperscript{570} The attorney argued that the public understands the rating system or has access to information which explains the rating process, and therefore it could not be misleading.\textsuperscript{571} The court found that Martindale-Hubbell is directed at the legal community, and that the public was unlikely to research the ratings system.\textsuperscript{572} The court also found that requiring a brief disclosure was narrowly tailored to advance the government interest, because it allows the attorney to convey the information.\textsuperscript{573} The court dismissed the attorneys "void for vagueness" argument, stating that "only an attorney could be confused by that language."\textsuperscript{574} The court summarized its opinion by stating that "[t]his case is a tempest in a teapot wherein Mr. Mason challenges the sensible requirement that if an attorney characterizes his Martindale-Hubbell rating with the words 'the Highest Ratings' then he must explain what that means to a public generally unfamiliar with the Martindale-Hubbell rating system."\textsuperscript{575}

Under the RPC, lawyers also have an obligation not to bring frivolous proceedings.\textsuperscript{576} "A lawyer shall not bring or defend a proceeding, or assert

\textsuperscript{566} Mason, 29 F. Supp. 2d at 1330.
\textsuperscript{567} Id.
\textsuperscript{569} Mason, 29 F. Supp. 2d at 1330–31.
\textsuperscript{570} Id. at 1331.
\textsuperscript{571} Id.
\textsuperscript{572} Id.
\textsuperscript{573} Id. at 1332-33.
\textsuperscript{574} Mason, 29 F. Supp. 2d at 1333.
\textsuperscript{575} Id.
\textsuperscript{576} RPC 4-3.1 provides the following:
A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal or existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.
or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law. Nevertheless, “a lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may . . . so defend the proceeding as to require that every element of the case be established.” This obligation can lead not only to discipline by the Florida Bar, but also to sanctions by the trial court. Thus, the Third District Court of Appeal upheld a monetary sanction against a woman and her attorney for filing a frivolous subpoena in *Moakley v. Smallwood*. During the course of post-dissolution proceedings, the former wife sought to compel production of a note that was awarded to her in the divorce by issuing subpoenas to the former husband and his attorneys. The motion itself stated that one of the attorneys did not possess the note, and that attorney could not quash the subpoena because there was little notice provided prior to the deposition. The appellate court upheld the sanctions imposed, stating that the trial court found that the attorney “was subpoenaed on short notice, for no good reason, to attend an evidentiary hearing fifty miles distant.”

Similarly, the Third District Court of Appeal ordered an attorney to show cause why sanctions should not be imposed based on his abuse of the appellate process in *Banderas v. Advance Petroleum, Inc.* In *Banderas*, the attorney filed a motion for rehearing after the court issued a per curiam opinion indicating that the opinion was “a travesty of justice” and a “cop-out” and scolded the court for not writing an opinion explaining the decision. The appellate court found the motion “frivolous and insulting” and filed “solely as a tool to express his personal displeasure with this Court’s conclusion.” Attorneys should be careful in statements made to the court, whether oral or written, because in addition to the

---

577. *Id.*
578. *Id.*
579. *Id.*
580. 730 So. 2d 286 (Fla. 4th Dist. Ct. App. 1999).
581. *Id.* at 286.
582. *Id.*
583. *Id.* at 287.
584. 716 So. 2d 876 (Fla. 3d Dist. Ct. App. 1998).
585. *Id.* at 877.
586. *Id.*
587. *Id.* at 877.
sanctions the court can impose, the court may also refer the issue to the Florida Bar for potential disciplinary action, as in this case.\textsuperscript{588}

An attorney's responsibilities do not come solely from the RPC. The attorney also has a relationship with the state, which also regulates attorneys' conduct. The State's regulation of attorney conduct was at issue in \textit{State v. Falk}.\textsuperscript{589} Section 817.234(9) of the Florida Statutes, which prohibits attorneys from soliciting car accident victims, was upheld against an equal protection challenge.\textsuperscript{590} The state filed an information charging an attorney with violating the statute, and the attorney filed a motion to dismiss, citing equal protection and free speech grounds; the motion was granted.\textsuperscript{591} The appellate court found a rational basis for the state's distinction between car accident victims and other accident victims, indicating that the statute appeared in a section entitled "[F]alse and fraudulent insurance claims."\textsuperscript{592} The court stated that the legislature "may have concluded that the likelihood of insurance fraud is greater with motor vehicles accidents" because car insurance is required by law in the State of Florida, thereby denying the equal protection claim.\textsuperscript{593} The court also found that, because the information filed by the State did not specify any particular conduct, the trial court erred in finding that the statute violated the First Amendment, because it could not implement the "as applied" test;\textsuperscript{594} the appellate court therefore remanded the case to the trial court to allow the state to amend the information, and the defendant to renew his motion to dismiss.\textsuperscript{595}

Other constitutional law developments were the subject of \textit{Chiles v. State Employees Attorneys Guild}.\textsuperscript{596} The Supreme Court of Florida struck down section 447.203(3)(j) of the Florida Statutes, which prohibited attorneys employed by the state from engaging in collective bargaining because it was constitutionally overbroad.\textsuperscript{597} The court held that "we emphasize that lawyers exercising their constitutional right to bargain collectively may not violate the Rules Regulating The Florida Bar and must give unqualified deference to the traditional duty of loyalty that a lawyer

\begin{itemize}
\item \textsuperscript{588} \textit{Id.} at 878. \textit{See also} Timothy P. Chinaris & Elizabeth Clark Tarbert, 23 NOVA L. REV. 161, 224–25 (1998) (discussing 5-H Corp. v. Padovano, 708 So. 2d 244 (1998)).
\item \textsuperscript{589} 724 So. 2d 146 (Fla. 3d Dist. Ct. App. 1998).
\item \textsuperscript{590} \textit{Id.} at 149. \textit{See also} FLA. STAT. § 817.234(8) (1999). The chiropractic counterpart to the statute prohibiting attorneys from soliciting car accident victims, was also upheld against First Amendment and equal protection challenge in \textit{Barr v. State}, 731 So. 2d 126 (Fla. 4th Dist. Ct. App. 1999).
\item \textsuperscript{591} \textit{Falk}, 724 So. 2d at 147.
\item \textsuperscript{592} \textit{Id.} at 148. \textit{See also} FLA. STAT. § 817.234 (1999).
\item \textsuperscript{593} \textit{Falk}, 724 So. 2d at 148–49.
\item \textsuperscript{594} \textit{Id.} at 148.
\item \textsuperscript{595} \textit{Id.} at 149.
\item \textsuperscript{596} 734 So. 2d 1030 (Fla. 1999).
\item \textsuperscript{597} \textit{Id.} at 1031.
\end{itemize}
owes to a client.\footnote{598} The Supreme Court of Florida, in reaching its decision, cited to Florida Ethics Opinion 77-15,\footnote{599} which states that mere membership in a union is not an ethical violation.\footnote{600}

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

This section discusses the attorney’s relationship to the Florida Bar and the disciplinary system. Included within this section are discipline cases that are not easily categorized within the attorney’s relationship to clients, the court and third parties. Also discussed are changes to the RPC.

One of the most egregious violations of the RPC is that of dishonesty. Often violations involving dishonesty invoke the harshest penalties in discipline cases. The Supreme Court of Florida ordered a ninety-one day suspension in the case of Florida Bar v. Cibula\footnote{601} for conduct involving dishonesty.\footnote{602} The attorney attended a hearing in his own case regarding alimony.\footnote{603} While under oath, the attorney testified regarding his income.\footnote{604} At the time he testified, he had already earned well over the amount of income he admitted in the court proceeding, and he had overpaid his income taxes, which the bar’s expert witness testified can be used to conceal income.\footnote{605} The supreme court found that the attorney had committed a fraud on the court and had engaged in dishonest or fraudulent conduct.\footnote{606}

The court disbarred an attorney for fraudulent conduct in the case of Florida Bar v. Vernell.\footnote{607} The attorney was hired by a client for representation in multiple matters, including an eminent domain case.\footnote{608} The attorney received funds from the state both prior to trial and after the verdict in the trial for the client.\footnote{609} The client filed a complaint stating that the attorney did not inform the client that he had received funds on the client’s

\begin{itemize}
\item \footnote{598} Id.
\item \footnote{599} Id. at 1036.
\item \footnote{600} Fla. Bar Comm. on Professional Ethics, Op. 77-15 (1997).
\item \footnote{601} 725 So. 2d 360 (Fla. 1998).
\item \footnote{602} Id. at 365. According to RPC 3-5.1(e), a ninety-one day suspension is particularly severe because an attorney is required to show rehabilitation in order to be reinstated and may be ordered to re-take the Bar exam. RPC 3-5.1(e) (1993).
\item \footnote{603} Cibula, 725 So. 2d at 361.
\item \footnote{604} Id.
\item \footnote{605} Id. at 362.
\item \footnote{606} Id. The court found that the attorney had violated RPC 4-3.3(a) and 4-8.4(c), respectively. Id.
\item \footnote{607} 721 So. 2d 705 (Fla. 1998).
\item \footnote{608} Id. at 706.
\item \footnote{609} Id.
\end{itemize}
behalf, and that the attorney had never discussed the issue of fees with the client regarding any of the matters for which the attorney had been hired. The attorney claimed that there was no fee agreed upon at the outset of the attorney-client relationship because of the friendship between the two, and that the amount of his fees in the matters exceeded the amount he received on the client’s behalf. The referee found that, in addition to violating the trust accounting and safekeeping property rules, the attorney had engaged in conduct involving dishonesty and deceit, all relating to the misappropriation of the client’s funds. The supreme court upheld the referee’s findings of fact and disbarred the attorney, based on his prior disciplinary history and the egregiousness of the offense.

An attorney remains subject to the jurisdiction of the supreme court even while under suspension. The Supreme Court of Florida undertook a lengthy explanation of the basis of its jurisdiction over disbarred and suspended attorneys in Florida Bar v. Ross. The court explained that Rule 3-5.1(e) of the Rules Regulating The Florida Bar specifically states that attorneys are subject to discipline as members of The Florida Bar during the period of the suspension. Both suspended and disbarred attorneys remain subject to the court’s contempt powers if they violate the court order imposing discipline. Thus, attorney Ross was disbarred for conduct committed during the time period of his suspension from the practice of law. Ross became involved in a dispute with his landlord regarding property that was foreclosed on and purchased at a foreclosure sale. The landlord started proceedings to set aside the foreclosure, and filed an affidavit stating that he did not receive notice of the sale. Ross offered to sell the purchaser information which he claimed would rebut the affidavit filed by the landlord. The purchaser’s attorney declined to buy the information, but informed Ross that he would subpoena him for a deposition. The opposing counsel contacted Ross to tell him the date of

610. Id.
611. Id. at 707.
612. Vernell, 721 So. 2d at 706.
613. Id. at 709–10. In another case involving dishonesty, the supreme court denied reinstatement to an attorney who was convicted of writing over 150 worthless checks during her probation, including writing worthless checks after applying for reinstatement. Florida Bar v. Roberts, 721 So. 2d 283 (Fla. 1998).
614. 732 So. 2d 1037 (Fla. 1998).
615. Id. at 1040.
616. Id. at 1041.
617. Id. at 1043.
618. Id. at 1038–39.
619. Ross, 732 So. 2d at 1039 (Fla. 1998).
620. Id.
621. Id.
his scheduled deposition and to determine what information he had.622 Ross offered to evade service of the subpoena for the deposition, provided the opposing counsel paid Ross several thousand dollars; the opposing counsel declined.623 Ross eluded service of process by posting a notice at his address, which stated that he was on vacation.624 In light of this conduct, the supreme court found that Ross had violated RPC 4-8.4(c), which prohibits dishonesty, deceit, and misrepresentation, and disbarred him.625

An attorney may also be disciplined for violating specific obligations to the court and to the Florida Bar. Attorneys have duties during the discipline process, and this year several cases were decided regarding those responsibilities.626 The supreme court thus suspended an attorney for not responding to a court order to answer a subpoena duces tecum in Florida Bar v. Kassier.627 Furthermore, the court suspended an attorney for failing to respond to the Florida Bar regarding a complaint and for failure to appear at her final hearing in Florida Bar v. Summers.628 Finally, the court suspended an attorney for submitting false documentation in responding to the bar regarding a complaint in Florida Bar v. Arango.629 A client had complained that the attorney failed to act diligently in a representation, and the attorney submitted a medical authorization from the client, correspondence between the attorney and a medical provider, and notations in a log that indicated work was being performed on the case, all of which the court found to be false.630

The supreme court also considered the applicability of the RPC in computing a suspension from another state in the case of Florida Bar v. Shinnick.631 An attorney was suspended from practice in Minnesota for fraudulent conduct in business transactions not related to the practice of law.632 The suspension was indefinite, but with the ability to apply for

622. Id.
623. Id.
624. Ross, 732 So. 2d at 1039 (Fla. 1998).
625. Id.
626. See Florida Bar v. Summers, 728 So. 2d 739 (Fla. 1999); Florida Bar v. Kassier, 730 So. 2d 1273 (Fla. 1998); Florida Bar v. Arango, 720 So. 2d 248 (Fla. 1998).
627. 730 So. 2d 1273 (Fla. 1998). The attorney was also found to have issued worthless checks. Id.
628. 728 So. 2d 739 (Fla. 1999). The complaint to which Summers did not respond involved a federal case which was dismissed because she did not follow the trial court’s orders in a forfeiture case as an Assistant United States Attorney. Her failure to appear at her final hearing in the disciplinary case resulted in the referee finding her guilty of all charges by The Florida Bar. Id.
629. 720 So. 2d 248 (Fla. 1998).
630. Id. at 250.
631. 731 So. 2d 1265 (Fla. 1999).
632. Id. at 1265.
reinstatement after six months. Because the attorney had begun to practice before the suspension period had expired, the Florida Bar prosecuted the attorney and the referee found that the respondent had violated the RPC based on the Minnesota suspension. The referee recommended a suspension in Florida until the attorney was reinstated in Minnesota nunc pro tunc to the date of suspension in Minnesota, which was July 25, 1996. The Florida Bar argued that the suspension was for longer than ninety days, requiring proof of rehabilitation prior to reinstatement in Florida. The attorney, on the other hand, contended that his suspension in Florida was for under ninety days, because the six months in Minnesota had expired prior to the entry of the referee's findings and recommendation. The Supreme Court of Florida held that the attorney's suspension in Minnesota was for longer than ninety days, pointing out that he had not been reinstated in Minnesota at the time of the referee's hearing, and required proof of rehabilitation.

On a more positive note, the supreme court held that a Florida Bar member who has been found not guilty of violations of the RPC cannot be ordered to bear the bar's costs of prosecution. At the final hearing, the referee found that the attorney had not violated the Rules, but ordered that she pay half of the costs of the bar for the disciplinary proceeding. The attorney appealed, arguing that the bar was not a "prevailing party" and should therefore bear its own costs in the case. The supreme court agreed, finding that:

[a] referee does not have discretion to recommend that a respondent in a bar disciplinary proceeding pay any portion of the Bar's costs pursuant to rule 3-7.6(o) when the referee recommends that the respondent be found not guilty of any of the charged offenses and recommends no discipline or

633. Id.
634. Id at 1266. RPC 3-4.6, states that a final disciplinary order in another jurisdiction "shall be considered as conclusive proof of such misconduct in a disciplinary proceeding under this rule." Id.
635. Shinnick, 731 So. 2d at 1266.
636. Id.
637. Id at 1267.
638. Id.
639. Florida Bar v. Williams, 734 So. 2d 417, 421 (Fla. 1999).
640. Id at 418.
641. Id.
other sanctions, and where the Bar is otherwise not successful in whole or in part.\footnote{642}

The court did note, however, that it was not addressing whether sanctions could be imposed for lack of cooperation in the disciplinary proceeding.\footnote{643}

As in every year, the supreme court considered changes to the RPC.\footnote{644} Many of the changes this year involved RPC 4-1.5, regarding fees. The court amended RPC 4-1.5(f)(4)(B)(ii) and 4-1.5(f)(4)(D)(iii) to allow approval of a contingent fee contract in excess of the contingent fee schedule and approval of a division of fees between attorneys not in accordance with the schedule in "the court in which the matter would be filed" or the circuit court of competent jurisdiction, in the event that the former court will not accept jurisdiction.\footnote{645} Instead of requiring that attorneys file a separate action in circuit court, it is now possible for attorneys to have these matters heard in the court in which the underlying litigation takes place.\footnote{646} The court also amended the Statement of Client's Rights to indicate that a client may be obligated to pay "costs and expenses" to the opposing party.\footnote{647} The court declined to change the percentages stated in the contingent fee schedule at the bar's request, because the bar did not indicate the rationale for the proposed rule change.\footnote{648}

The supreme court also amended RPC 4-3.4,\footnote{649} adding two new subdivisions, (g) and (h), regarding threatening criminal prosecution or disciplinary action as leverage in a civil matter.\footnote{650} The supreme court adopted the Code of Professional Responsibility in 1970.\footnote{651} Contained within the code was Disciplinary Rule ("DR") 7-105, which stated that "[a] lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter."\footnote{652} When the supreme court adopted the current RPC,\footnote{653} the rules contained no counterpart to DR 7-105. In the interim, the Professional Ethics Committee of the Florida Bar published formal opinion 89-3, which stated that, although

\begin{itemize}
  \item 642. \textit{Id.} at 420.
  \item 643. \textit{Id.} at 420.
  \item 644. \textit{In re} Amendments to the Rules Regulating The Florida Bar, 718 So. 2d 1179 (Fla. 1998).
  \item 645. \textit{Id.} at 1181.
  \item 646. \textit{Id.}
  \item 647. \textit{Id.} at 1181–82.
  \item 648. \textit{Id.} at. 1180–81.
  \item 649. RPC 4-3.4 (1993).
  \item 650. \textit{In re} Amendments to the Rules Regulating The Florida Bar, 718 So. 2d at 1182.
  \item 651. \textit{In re} The Integration Rule of The Florida Bar, 235 So. 2d 723 (Fla. 1970).
  \item 653. \textit{In re} Rules Regulating The Florida Bar, 494 So. 2d 977. For the correct opinion, see 507 So. 2d 1366 (Fla. 1986).
\end{itemize}
the rules contain no express prohibition, attorneys may not "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." This rule change re-enacts the specific prohibition previously expressed in DR 7-105. Although the Code of Professional Conduct did not contain an express prohibition against bringing a disciplinary action as leverage in a civil matter, the Professional Ethics Committee of the Florida Bar issued formal opinion 94-5, which prohibits lawyers from threatening to file a bar complaint "to obtain advantage in a civil matter." The amendment to RPC 4-3.4 codifies this interpretation of the Rules of Professional Conduct.

VI. CONCLUSION

This past year saw continued development of the law of lawyers' professional responsibility in Florida. It has become increasingly more difficult for lawyers to sort out and prioritize the numerous responsibilities to and relationships with various persons and entities. Fortunately, the courts and the Florida Bar continue to provide guidance for the interested attorney in the form of cases, ethics opinions, and rules changes. In the final analysis, lawyers must not only avail themselves of these resources but must also draw upon themselves to realize that commitment to their clients, dedication to our system of justice, and service to the public are the hallmarks of our honored profession.

654. Fla. Bar Comm. on Professional Ethics, Op. 89-3 (1989). In making its decision, the committee relied on Rule 4-3.1 of the RPC, which prohibits frivolous actions, 4-4.4, which prohibits actions with "no substantial purpose other than to embarrass, delay or burden a third person," 4-8.4(c) which prohibits dishonest or deceitful conduct, and 4-8.4(d) which states that an attorney shall not "engage in conduct that is prejudicial to the administration of justice." Id.

655. Fla. Bar Comm. on Professional Ethics, Op. 94-5 (1995). The committee used the same rationale as in opinion 89-3, supra, note 654. In addition, the committee noted that attorneys have an obligation to report attorneys who have violated the Rules of Professional Conduct "that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer" under Rule 4-8.3 of the Florida Rules of Professional Conduct. Id.