MAINTAINING THE INTEGRITY OF THE PROFESSION

Rule 8.3
Reporting Professional Misconduct

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

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

(c) This Rule does not require disclosure of information otherwise protected by Rule 1.6 or information gained by a lawyer or judge while participating in an approved lawyers assistance program.

COMMENT

[1] Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of the Rules of Professional Conduct. Lawyers have a similar obligation with respect to judicial misconduct. An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Reporting a violation is especially important where the victim is unlikely to discover the offense.

[2] A report about misconduct is not required where it would involve violation of Rule 1.6. However, a lawyer should encourage a client to consent to disclosure where prosecution would not substantially prejudice the client's interests.

[3] If a lawyer were obliged to report every violation of the Rules, the failure to report any violation would itself be a professional offense. Such a requirement existed in many jurisdictions but proved to be unenforceable. This Rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of this Rule. The term "substantial" refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware. A report should be made to the bar disciplinary agency unless some other agency, such as a peer review agency, is more appropriate in the circumstances. Similar considerations apply to the reporting of judicial misconduct.

[4] The duty to report professional misconduct does not apply to a lawyer retained to represent a lawyer whose professional conduct is in question. Such a situation is governed by the Rules applicable to the client-lawyer relationship.

[5] Information about a lawyer's or judge's misconduct or fitness may be received

by a lawyer in the course of that lawyer's participation in an approved lawyers or judges assistance program. In that circumstance, providing for an exception to the reporting requirements of paragraphs (a) and (b) of this Rule encourages lawyers and judges to seek treatment through such a program. Conversely, without such an exception, lawyers and judges may hesitate to seek assistance from these programs, which may then result in additional harm to their professional careers and additional injury to the welfare of clients and the public. These Rules do not otherwise address the confidentiality of information received by a lawyer or judge participating in an approved lawyers assistance program; such an obligation, however, may be imposed by the rules of the program or other law.

ANNOTATION

THE DUTY TO REPORT

If a lawyer knows that a lawyer or a judge has committed misconduct raising a "substantial question" about honesty or "fitness," the lawyer is required to report this knowledge to the appropriate authority unless the information is confidential. *See generally* Hussey, *Reporting Another Attorney for Violating the Rules of Professional Conduct: The Current Status of Law in the States Which Have Adopted the Model Rules of Professional Conduct*, 23 J. Legal Prof. 265 (1998/1999); Richmond, *The Duty to Report Professional Misconduct: A Practical Analysis of Lawyer Self-Regulation*, 12 Geo. J. Legal Ethics 175 (1999).

The duty to report misconduct under Rule 8.3 is nondiscretionary. It is therefore unethical to threaten to report opposing counsel as a bargaining chip in litigation. ABA Formal Ethics Op. 94-383 (1994); Fla. Ethics Op. 94-5 (1995); Wis. Ethics Op. E-0101 (2001).

• *Reporting "Another Lawyer" or a Judge*

Rule 8.3 requires a lawyer to report the misconduct of partners and associates. *See Skolnick v. Altheimer & Gray*, 730 N.E.2d 4 (Ill. 2000) (trial court abused its discretion by refusing to modify protective order so associate could report misconduct by firm's former partner).

Although a lawyer is not required to report his or her own misconduct, the lawyer must report the misconduct of others even if doing so would implicate the lawyer's own conduct as well. *See, e.g., In re Rivers*, 331 S.E.2d 332 (S.C. 1984) (inexperienced lawyer helped his partner use private investigator to contact potential jurors; lawyer disciplined for failing to report partner, as well as for his own role in improper conduct); Conn. Informal Ethics Op. 89-21 (1989) (lawyer must report former partner who covered up failure to file suit by giving client money and claiming it was "settlement" proceeds; opinion notes that under imputed-responsibility principles of Rule 5.1, "by reporting his partner, he may also be reporting himself"); *see also In re Dowd*, 559 N.Y.S.2d 365 (App. Div.) (suspending two lawyers who paid kickbacks to lawyer serv-

ing as city official and did not report kickback demands), *appeal denied*, 564 N.E.2d 672 (N.Y. 1990); *Lisi v. Several Attorneys*, 596 A.2d 313 (R.I. 1991) (lawyers' loans to judge violated Rule 3.5; lawyers' failure to report judge violated Rule 8.3). *See generally* Blackwell, *Wieder's Paradox: Reporting Legal Misconduct in Law Firms*, 1992/1993 Ann. Surv. Am. L. 9 (1993); Gendry, *An Attorney's Duty to Report the Professional Misconduct of Co-Workers*, 18 S. Ill. U. L.J. 603 (1994); Kirkpatrick, *Partners Dumping Partners: Business Before Ethics in* Bohatch v. Butler & Binion [977 S.W.2d 543 (Tex. 1998)], 83 Minn. L. Rev. 1767 (1999); Senior, Comment, *Does New York's Code of Professional Responsibility Force Lawyers to Put Their Jobs on the Line? A Critical Look at* Wieder v. Skala [609 N.E.2d 105 (N.Y. 1992)], 9 Hofstra Lab. L.J. 417 (1992); Tate, *The Boundaries of Self-Policing: Must a Law Firm Prevent and Report a Firm Member's Securities Trading on the Basis of Client Confidences?*, 40 U. Kan. L. Rev. 807 (1992) (analyzing insider trading as ethics violation subject to mandatory reporting).

Misconduct by a suspended lawyer is treated as misconduct by "another lawyer" for reporting purposes. *See Attorney Grievance Comm'n v. Brennan*, 714 A.2d 157 (Md. 1998) (lawyer must report that suspended lawyer is misrepresenting his status); *In re Galmore*, 530 S.E.2d 378 (S.C. 2000) (lawyer failed to report suspended lawyer's offer to practice law).

"KNOWS"

At what point is a lawyer's knowledge of misconduct sufficient to compel a report? "Knows" denotes "actual knowledge," but actual knowledge "may be inferred from circumstances," according to Rule 1.0 (Terminology). As a court confronted with this question noted, "actual knowledge," for purposes of the reporting requirement, is nowhere defined:

> The possible range stretches from "any information" to "personal knowledge" sufficient to qualify one as a witness under our rules of evidence. We opt for a line short of the latter but considerably beyond the former.

Attorney U. v. Mississippi Bar, 678 So. 2d 963 (Miss. 1996) (client's unsworn uncorroborated description of apparently improper fee-splitting arrangement with another lawyer, who denied any such arrangement, did not trigger duty to report; collecting authorities). *See, e.g., Skolnick v. Altheimer & Gray*, 730 N.E.2d 4 (Ill. 2000) (reasonable inference drawn from documents is sufficient to trigger reporting requirement); N.Y. City Ethics Op. 1990-3 (1990) (absolute certainty not required, but mere suspicion not enough; collecting ethics opinions). *See generally* N.Y. State Ethics Op. 635 (1992) (analyzing nature of knowledge that would trigger duty to report when representing legal malpractice plaintiff); Mitchem, *The Lawyer's Duty to Report Ethical Violations*, 18 Colo. Law. 1915 (1989) (noting that reporting requirement does not include duty to make reasonable inquiry, as is necessary under Rule 11 of Rules of Civil Procedure).

Ethics opinions have noted the distinction between objective and subjective knowledge. *Compare Attorney U. v. Mississippi Bar*, 678 So. 2d 963 (Miss. 1996) ("The standard must be an objective one . . . not tied to the subjective beliefs of the lawyer in question. The supporting evidence must be such that a reasonable lawyer under the circumstances would have formed a firm opinion that the conduct in question had more like-

ly than not occurred."), *with* R.I. Ethics Op. 95-40 (1995) ("[T]he determination as to whether another attorney has violated an ethical rule . . . is one which involves a credibility determination that is largely subjective and is therefore one to be made by the attorney witnessing such conduct.").

"Substantial Question" about Honesty, Trustworthiness, or Fitness

Rule 8.3 obligates lawyers to report only those violations of the Model Rules that raise "a substantial question" about honesty or fitness. "Substantial" is opaquely defined as "of clear and weighty importance." *Model Rules of Prof'l Conduct* R. 1.0(l) (2002). *See, e.g.*, Conn. Informal Ethics Op. 01-04 (2001) (backdating motion and submitting false certificate of service raise substantial question about trustworthiness); Conn. Informal Ethics Op. 94-33 (1994) (lawyer's ex parte contact with judge's clerk on housekeeping matter did not contain "requisite degree of odiousness" to warrant reporting; opinion contrasts it with "intentional, perhaps even pre-meditated, effort to abuse the position of attorney to the advantage of the offending attorney"); Ill. Ethics Op. 01-04 (2002) (under Illinois version of Rule—which does not require reporting unless conduct is criminal, dishonest, or fraudulent—lawyers acting as bar association officers not required to report lawyer's failure to segregate referral fees owed bar association, nor must they report lawyer's failure to comply with lien adjudication in their favor, unless evidence of criminal intent); Pa. Informal Ethics Op. 97-40 (1997) (lawyer who believes opposing counsel's simultaneous representation of two clients poses impermissible conflict notwithstanding their consent should report conflict to disciplinary authority only if lawyer has "reliable information" that dual representation will adversely affect opposing counsel's relationship with one or both clients; opinion suggests this would be most unlikely); Tex. Ethics Op. 534 (2000) (reporting required if lawyer determines that divorce lawyer's failure to correct materially defective order raises substantial question of honesty and fitness); Tex. Ethics Op. 523 (1997) (mistake or isolated incident of negligence does not satisfy "substantial question" standard); Utah Ethics Op. 98-12 (1998) (lawyer must report another lawyer's unlawful possession of controlled substance if it raises substantial question about other lawyer's honesty, trustworthiness, or fitness).

Timing of Reporting

Rule 8.3 does not specify how promptly a report must be made. *See generally In re Anderson*, 769 A.2d 1282 (Vt. 2000) (nine months was too long for former disciplinary board member to wait to report partner's mishandling of client trust account); N.Y. City Ethics Op. 1990-3 (1990) (although reporting must be "prompt," some delay may be warranted to protect client's interest; lawyer should balance severity of misconduct and likelihood of its repetition against possible prejudice to client). *Cf. United States v. Cantor*, 897 F. Supp. 110 (S.D.N.Y. 1995) (reporting requirement "must be read to require reporting . . . within a reasonable time under the circumstances"; state's interest in immediate reporting of lawyer's unethical conduct subordinate to federal interest in protecting its investigation into violation of bribery laws).

REPORT TO WHOM?

Some jurisdictions have amended their versions of Rule 8.3 to identify the "appropriate professional authority" for reporting purposes. Although the Model Rule does not give specifics, paragraph [1] of the Comment does mention the need to "initiate [a] disciplinary investigation," and paragraph [3] refers to making a report "to the bar disciplinary agency unless some other agency . . . is more appropriate in the circumstances." *See generally* Utah Ethics Op. 98-12 (1998) (cannot satisfy reporting requirement by telling lawyers assistance program, in which participation is purely voluntary, about another lawyer's illegal drug use); W. Va. Ethics Op. 92-04 (1992) (lawyer who discovers alcoholic lawyer has stolen client funds cannot satisfy reporting requirement by contacting lawyer impairment committee; committee not charged with duty to protect public).

NO DUTY TO DISCLOSE CONFIDENTIAL INFORMATION

The duty to report misconduct is subordinate to the duty of confidentiality set forth in Rule 1.6. *See, e.g., In re Ethics Advisory Panel Opinion No. 92-1*, 627 A.2d 317 (R.I. 1993) (if lawyer learns of another lawyer's misconduct while representing client, duty of confidentiality prohibits reporting it without client's consent—even if lawyer learned of it from other lawyer's admission rather than from client); Ariz. Ethics Op. 94-09 (1994) (lawyer who has no doubt that his client was charged excessive fee by another lawyer must report it, but if it is confidential, lawyer must obtain client's consent first); D.C. Ethics Op. 246 (1994) (lawyer representing plaintiff in legal malpractice action may not report misconduct alleged in malpractice action unless client consents; filing suit does not waive confidentiality of underlying information for reporting purposes; in seeking client's consent to make report, lawyer must explain that reporting could jeopardize any potential malpractice recovery); Mich. Ethics Op. RI-314 (1999) (good-faith decisions by client to withhold information necessary to allow lawyer to report misconduct must be respected; client effectively vetoed any reporting of billing fraud when it instructed lawyer to keep its identity and its files confidential to protect "sensitive product information"); Or. Ethics Op. 1991-95 (1991) (lawyer must abide by client's directive not to report confidential information revealing misconduct of client's former lawyer and another lawyer; client believes disclosure could be embarrassing); Pa. Informal Ethics Op. 99-53B (1999) (corporation's new lawyer must consult with client before reporting predecessor counsel's misconduct; lawyer should explain that reporting could lead to disclosure of protected information, and that disciplinary counsel would likely seek to interview corporate officer). *See generally* Pitulla, *Should Clients Be Able to Veto the Duty to Report?*, 7 Prof. Law. 2 (1996). *Cf.* Kentra, *Hear No Evil, See No Evil, Speak No Evil: The Intolerable Conflict for Attorney-Mediators between the Duty to Maintain Mediation Confidentiality and the Duty to Report Fellow Attorney Misconduct*, 1997 BYU L. Rev. 715 (1997).

• In re Himmel

The most radical application of the reporting requirement appears in the case of *In re Himmel*, 533 N.E.2d 790 (Ill. 1988). Himmel's client came to him to recover the pro-

ceeds of a settlement her first lawyer had converted. Himmel negotiated a very favorable recovery for her, but one of the terms was that she would not initiate any criminal, civil, or disciplinary action against her former lawyer.

Himmel was charged with violating the duty to report. The case is anomalous in that this was the sole charge against him; no other misconduct was alleged. The court ruled that Himmel should have reported the lawyer even against his client's wishes. The court construed the Illinois exception to the reporting requirement—as it was then in effect—very narrowly. (The rule at issue in *Himmel* used privilege as the criterion for making an exception to the reporting requirement; the Model Rule is phrased more broadly, and exempts any "information otherwise protected by Rule 1.6.") Unless information is protected by the evidentiary attorney-client privilege, the court ruled, the lawyer must report it. Himmel was suspended for a year. *See generally* Burke, *Where Does My Loyalty Lie?:* In re Himmel, 3 Geo. J. Legal Ethics 643 (1990); Burwick, *You Dirty Rat! Model Rule 8.3 and Mandatory Reporting of Attorney Misconduct*, 8 Geo. J. Legal Ethics 137 (1994); Gatland, *The* Himmel *Effect: "Snitch Rule" Remains Controversial but Effective, Especially in Illinois*, 83 A.B.A. J. 24 (1997); Oldham & Whitledge, *The Catch-22 of Model Rule 8.3*, 15 Geo. J. Legal Ethics 881 (2002); Rotunda, *The Lawyer's Duty to Report Another Lawyer's Unethical Violations in the Wake of* Himmel, 1988 U. Ill. L. Rev. 977 (1988).

• ***Lawyers Assistance Programs***

For reasons of social policy, Rule 8.3(c) exempts from the reporting requirement any information learned through participation in an approved lawyers assistance program. *See* N.C. Ethics Op. 5 (2001) (disclosures made during lawyers assistance program support group meeting are confidential and not reportable under Rule 8.3).

The exception was broadened in 2002 to protect information learned by lawyers and judges who are "participating in"—as opposed to "serving as a member of"—these programs. At the same time, a confusing analogy to the attorney-client privilege in the context of participation in a lawyers assistance program was deleted from this subsection, as well as from paragraph [5] of the Comment. ABA Report to the House of Delegates, No. 401 (Feb. 2002), Model Rule 8.3, Reporter's Explanation of Changes.

H

Supreme Court of Connecticut.
Douglas R. DANIELS et al.
v.
Honorable Jon M. ALANDER.
No. 17002.

Argued Feb. 9, 2004.
Decided April 6, 2004.

Background: Attorneys filed writ of error after the Superior Court, Judicial District of New Haven, Jon M. Alander, J., reprimanded attorneys for having violated rule of professional conduct governing candor toward tribunal during ex parte proceeding in which client sought temporary custody of children. On transfer from the Supreme Court, the Appellate Court, 75 Conn.App. 864, 818 A.2d 106, dismissed the writ. Certification was granted in part.

Holdings: The Supreme Court, Katz, J., held that
(1) associate attorney had duty to correct misrepresentations that employer-attorney made to trial court, and
(2) the misrepresentations were material.

Appellate Court affirmed.

West Headnotes

[1] Attorney and Client 45 32(3)

45 Attorney and Client
45I The Office of Attorney
45I(B) Privileges, Disabilities, and Liabilities
45k32 Regulation of Professional Conduct, in General
45k32(3) k. Power and Duty to Control. Most Cited Cases

Attorney and Client 45 36(2)

45 Attorney and Client
45I The Office of Attorney
45I(C) Discipline
45k36 Jurisdiction of Courts
45k36(2) k. Power of Judge at Chambers. Most Cited Cases
The Superior Court has the authority to regulate the conduct of attorneys and has a duty to enforce the standards of conduct regarding attorneys.

[2] Attorney and Client 45 36(2)

45 Attorney and Client
45I The Office of Attorney
45I(C) Discipline
45k36 Jurisdiction of Courts
45k36(2) k. Power of Judge at Chambers. Most Cited Cases
The Superior Court has the inherent power to discipline members of the bar, and to provide for the imposition of reasonable sanctions to compel the observance of its rules.

[3] Attorney and Client 45 49

45 Attorney and Client
45I The Office of Attorney
45I(C) Discipline
45k47 Proceedings
45k49 k. Nature and Form in General. Most Cited Cases
A court disciplining an attorney does so not to punish the attorney, but rather to safeguard the administration of justice and to protect the public from the misconduct or unfitness of those who are members of the legal profession.

[4] Attorney and Client 45 57

45 Attorney and Client
45I The Office of Attorney
45I(C) Discipline
45k47 Proceedings
45k57 k. Review. Most Cited Cases
As with any discretionary action of the trial court, appellate review of an order disciplining an attorney requires every reasonable presumption in favor of the action, and the ultimate issue is whether the trial court could have reasonably concluded as it did.

[5] Attorney and Client 45 32(14)

45 Attorney and Client
45I The Office of Attorney
45I(B) Privileges, Disabilities, and Liabilities
45k32 Regulation of Professional Conduct, in General
45k32(14) k. Candor, and Disclosure to Opponent or Court. Most Cited Cases

Attorney and Client 45 42

45 Attorney and Client
45I The Office of Attorney
45I(C) Discipline
45k37 Grounds for Discipline
45k42 k. Deception of Court or Obstruction of Administration of Justice. Most Cited Cases
Connecticut associate attorney had duty, under rules of professional conduct governing candor to tribunal, to correct a false statement of material fact the associate's employer-attorney made to the Connecticut trial court in the associate's presence, in ex parte proceeding in which client sought temporary custody of children, regarding the contents of a conversation the associate had with client's New Jersey counsel for New Jersey trial court proceeding in which a decision on child custody issues was pending, about which conversation the Connecticut trial court had been questioning the employer-attorney so that the court could determine whether it could and should exercise jurisdiction over the ex parte request for temporary custody; associate attorney had personal knowledge of contents of his conversation with New Jersey counsel. Rules of Prof.Conduct, Rule 3.3(a)(1).

[6] Attorney and Client 45 32(14)

45 Attorney and Client
45I The Office of Attorney
45I(B) Privileges, Disabilities, and Liabilities
45k32 Regulation of Professional Conduct, in General
45k32(14) k. Candor, and Disclosure to Opponent or Court. Most Cited Cases

Attorney and Client 45 42

45 Attorney and Client
45I The Office of Attorney
45I(C) Discipline
45k37 Grounds for Discipline
45k42 k. Deception of Court or Obstruction of Administration of Justice. Most Cited Cases
Rule of professional conduct on candor to tribunal, prohibiting an attorney from knowingly making a false statement of material fact or law to a tribunal, does not merely prohibit misrepresentations that take the form of an affirmative statement; it can also prohibit misrepresentations that take the form of a failure to disclose. Rules of Prof.Conduct, Rule 3.3(a)(1).

[7] Attorney and Client 45 32(14)

45 Attorney and Client
45I The Office of Attorney
45I(B) Privileges, Disabilities, and Liabilities
45k32 Regulation of Professional Conduct, in General
45k32(14) k. Candor, and Disclosure to Opponent or Court. Most Cited Cases
The observance of an enhanced duty of candor by attorneys to the tribunal is especially critical in ex parte hearings deciding the custody of children, because of the fundamentally important rights at stake. Rules of Prof.Conduct, Rule 3.3.

[8] Attorney and Client 45 32(14)

45 Attorney and Client
45I The Office of Attorney
45I(B) Privileges, Disabilities, and Liabilities
45k32 Regulation of Professional Conduct, in General
45k32(14) k. Candor, and Disclosure to Opponent or Court. Most Cited Cases

Attorney and Client 45 42

45 Attorney and Client
45I The Office of Attorney
45I(C) Discipline
45k37 Grounds for Discipline
45k42 k. Deception of Court or Obstruction of Administration of Justice. Most Cited Cases
Conversation that Connecticut associate attorney had with client's New Jersey counsel for New Jersey trial

court proceeding in which a decision on child custody issues was pending was material to the Connecticut trial court in client's ex parte proceeding to obtain temporary custody of child, as element for determining whether associate violated duty of candor to tribunal by failing to correct the misrepresentations that employer-attorney made to Connecticut trial court regarding contents of the conversation; Connecticut trial court had been questioning the employer-attorney so that the court could determine whether it could and should exercise jurisdiction over the ex parte request for temporary custody; if Connecticut trial judge had known the contents of that conversation, the judge would have declined to exercise jurisdiction. C.G.S.A. §§ 46b-115n, 46b-115q; Rules of Prof.Conduct, Rule 3.3(d).

****183** Kenneth A. Votre, New Haven, for the plaintiff in error Dennis Driscoll.
Gregory T. D'Auria, associate attorney general, with whom were Karla A. Turekian, assistant attorney general, and, on the brief, Richard Blumenthal, attorney general, for the defendant in error.

SULLIVAN, C.J., and BORDEN, KATZ, VERTEFEUILLE and ZARELLA, Js.

KATZ, J.
321** This case is before us, pursuant to our grant of certification,[FN1] from the judgment of the Appellate ***322** Court dismissing a writ of error brought by the plaintiff in error Dennis Driscoll (plaintiff), who is a member of the bar of this state.[FN2] *Daniels v. Alander*, 75 Conn.App. 864, 818 A.2d 106 (2003). The plaintiff claims that the defendant in error, Honorable Jon M. Alander (trial court), improperly reprimanded him for having violated subsections (a)(1) and (d) of rule 3.3 of the Rules of Professional Conduct[FN3] during a proceeding in the Superior*184** Court. In his writ of error, the plaintiff claimed that: (1) the evidence did not support the trial court's factual findings and that its legal conclusions were improper; and (2) the trial court violated the plaintiff's due process rights by failing to give him adequate notice of the purpose of the misconduct hearing at which the trial court determined that the plaintiff had violated rule 3.3. Id., at 866, 818 A.2d 106. The Appellate Court dismissed the writ or error. Id., at 883, 818 A.2d 106. On appeal to this court, the plaintiff claims that his failure to correct falsehoods made by another attorney during a court proceeding cannot form the basis of the disciplinary action taken against him. We disagree.

FN1. We granted certification limited to the following issue: "Did the Appellate Court properly conclude that an attorney violates rule 3.3(a)(1) and (d) of the Rules of Professional Conduct by not correcting or supplementing statements made to the court by another attorney?" *Daniels v. Alander*, 264 Conn. 901, 823 A.2d 1219 (2003).

FN2. Douglas R. Daniels, another member of the Connecticut bar, also was named as a plaintiff in error in the writ, which was brought to this court pursuant to Practice Book § 72-1 and, thereafter, was transferred to the Appellate Court pursuant to Practice Book § 65-1. The trial court had issued a reprimand against both the plaintiff and Daniels, finding that they had violated rule 3.3(a)(1) and (d) of the Rules or Professional Conduct. Although the Appellate Court dismissed the writ as to both the plaintiff and Daniels following its determination that the trial court's reprimand was proper; *Daniels v. Alander*, 75 Conn.App. 864, 818 A.2d 106 (2003); Daniels did not seek certification and therefore does not join in this appeal. Accordingly, we refer herein to Daniels by name and references to the plaintiff are to Driscoll only.

FN3. Rule 3.3 of the Rules of Professional Conduct provides in relevant part: "(a) A lawyer shall not knowingly:

"(1) Make a false statement of material fact or law to a tribunal....

"(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse."

The following procedural history, as set forth by the Appellate Court, is relevant to the plaintiff's claims on ***323** appeal. "On January 16, 2001, [Douglas R. Daniels and the plaintiff], both of whom were practicing law in Daniels' law firm, filed an ex parte ap-

plication for temporary custody and relief from abuse on behalf of Ines Montalvo. [The trial court] conducted an ex parte hearing on the matter on that same date. The application sought an order awarding Montalvo temporary custody of her two minor children as well as an order restraining the children's father, Felipe Nieves, from threatening or assaulting the children or entering Montalvo's Connecticut residence. The application alleged that the children had been abused physically by Nieves and that they feared returning to his care in New Jersey. See *Montalvo v. Nieves*, Superior Court, judicial district of New Haven, Docket No. 447041 (April 9, 2001) (29 Conn. L. Rptr. 352).

"The application also alleged that an action was pending in the New Jersey Superior Court to resolve outstanding issues of custody and visitation. During the hearing on Montalvo's application, Daniels indicated that Montalvo had retained legal representation in New Jersey, that a full trial on the issue of the children's custody had taken place in the New Jersey Superior Court and that Montalvo was awaiting the decision in that matter. Nonetheless, Daniels argued on behalf of Montalvo that apart from the pending New Jersey matter, judicial intervention was warranted to protect the children from an immediate threat from Nieves.

"At the [January 16, 2001] hearing, the [trial] court inquired directly of Montalvo and Daniels as to why it should issue the order. Central to the court's line of inquiry was why Montalvo did not file her application before the Superior Court in New Jersey, which already had conducted a hearing on the issue of the children's ***324** custody.[FN4] Montalvo testified that she did not want to file the emergency application in New Jersey because she feared that it would endanger the immediate physical safety of the children. The [trial] court inquired directly of Daniels as to why he chose to pursue the application in Connecticut rather than to pursue it before the New Jersey trial judge who had presided over the custody trial, the Honorable John A. Peterson, Jr. In response to the [trial] court's questioning, Daniels represented ****185** that his colleague, [the plaintiff], 'spoke to [Veronica Davis, Montalvo's] counsel in New Jersey and it was her opinion that we should not [pursue the emergency custody application] in New Jersey for a number of reasons, none of which I think are flattering to the judiciary there, but we were relying on that.'

FN4. The trial court was attempting to determine whether Connecticut had jurisdiction over the matter, and if so, whether it nevertheless should decline to exercise that jurisdiction, pursuant to General Statutes §§ 46b-115n and 46b-115q; see footnotes 7 and 8 of this opinion; in light of the fact that a decision in a custody and visitation proceeding was pending in New Jersey.

"[The trial court] recessed the hearing on the application and spoke via telephone with Judge Peterson in New Jersey. Judge Peterson agreed to conduct a hearing on Montalvo's application for temporary emergency custody on January 19, 2001, and [the trial court] issued a temporary emergency order awarding Montalvo custody of the children until that time. [The trial court] noted that both [it] and Judge Peterson believed that New Jersey was the appropriate forum in which to resolve the matter.

"After the [January 16] hearing, [the trial court] received a letter from ... Davis, the attorney who was representing Montalvo in the custody proceeding in New Jersey. Davis informed the court that she had reviewed the transcript of proceedings of January 16, 2001, and that some of the representations made by Daniels during the hearing were false. By means of a ***325** letter dated February 5, 2001, [the trial court] informed Davis, as well as the [plaintiff and Daniels], that [it] wanted to conduct a hearing in regard to Davis' allegations and that such hearing would enable [it] to determine if further action was warranted.

"On March 16, 2001, the [trial] court conducted a hearing related to Davis' allegations. Davis testified that Daniels had misrepresented her opinion about bringing the application before Judge Peterson in New Jersey. The court also heard testimonial evidence from Daniels, [the plaintiff] and Montalvo." *Daniels v. Alander*, supra, 75 Conn.App. at 866-68, 818 A.2d 106. At the March 16 hearing, Davis testified that she had spoken to Montalvo several times during the week leading up to the January 16, 2001 hearing, and had advised her that New Jersey had jurisdiction to determine any issues that might arise relating to the custody of her children, and that, if she wanted to pursue any further action to gain temporary custody of them, she should do so in New Jersey and not in Connecticut. Davis testified that she had her

associate prepare an emergency temporary custody application that she intended to file in New Jersey on January 16, 2001, the same day that Daniels and the plaintiff filed their ex parte application in Connecticut. Davis further testified that she had spoken to the plaintiff before January 16, 2001, and had advised him that she was prepared to proceed on Montalvo's behalf in New Jersey. After the hearing on January 16, 2001, Davis had a conversation with Montalvo about why she had pursued the action in Connecticut and Montalvo told her that it had been upon the advice of her Connecticut counsel.

During the March 16, 2001 hearing, the plaintiff testified that he had had a conversation with Davis on January 15, 2001, during which she requested that he not proceed in Connecticut. In that same conversation, the plaintiff had asked Davis if she intended on taking action in New Jersey based on Montalvo's allegations ***326** and, according to the plaintiff, Davis responded that she did not because she was concerned that any such further action might "anger the judge and ... compromise the outcome of the custody trial that had just taken place." According to the plaintiff, Davis also related her advice to Montalvo that she should not proceed in New Jersey with such a motion. The plaintiff denied that Davis had told him that she had prepared a show cause motion in New Jersey ****186** or was otherwise prepared to proceed in New Jersey on January 16, 2001. He did admit, however, that Davis had told him that she did not believe the action for temporary custody should be brought at all-in New Jersey or Connecticut. Montalvo also testified at the March 16 hearing and confirmed that Davis had told her not to proceed at all, but that if she were to go to court based on an emergency situation, she should do so in New Jersey and not in Connecticut.

Thereafter, on April 9, 2001, the trial court issued its decision concluding that the plaintiff and Daniels had violated subsections (a)(1) and (d) of rule 3.3 of the Rules of Professional Conduct. Critical to the trial court's decision were several findings of fact relating to representations made at the January 16, 2001 hearing, as well as testimony given at the March 16, 2001 hearing. Specifically, after sifting through the conflicting evidence presented at the latter hearing, the trial court found the following facts: "Davis [had] expressly told [the plaintiff] on January 15, 2001, that she was prepared to file an emergency petition for temporary custody on [Montalvo's] behalf in New Jersey. [The plaintiff] did not take ... Davis up on her offer because he believed that Connecticut had jurisdiction and because of her reluctance to file an emergency petition.... [Daniels'] statement to the court that it was the opinion of [Davis] that an emergency application for temporary custody should not be brought in New Jersey for reasons***327** concerning the judiciary there was false. Both ... Daniels and [the plaintiff] knew it was false.[FN5] ... The statement made to the [trial] court by ... Daniels that it was the opinion of [Davis] that an emergency petition should not be brought in New Jersey did not provide a complete picture of the opinions of ... Davis as they related to the appropriate forum for bringing an emergency petition in this case.... Daniels failed to tell [the trial court] that ... Davis believed that New Jersey had jurisdiction in this matter and that New Jersey, not Connecticut, was the appropriate forum for filing such a petition. He also neglected to inform [the trial court] that it was ... Davis' opinion that no emergency petition should be filed at all. Finally, [Davis] did not tell [the trial court] that, despite her reservations ... Davis was prepared to file an emergency petition on ... Montalvo's behalf in New Jersey." (Citations omitted.)

> FN5. The trial court indicated in a footnote of its memorandum of decision that the plaintiff knew the statement attributed to Davis was false because he had been a party to the conversation with Davis and Daniels knew it was false because the plaintiff had told Daniels the content of his conversation with Davis.

The trial court further stated: "Had I known at the time of the ex parte proceeding the accurate and complete opinions of ... Davis-that she believed that New Jersey had jurisdiction over any application for temporary custody, that New Jersey was the appropriate forum to file such an application, and that she was prepared to file an emergency custody petition in New Jersey, I would have instructed [Montalvo] to file her application for temporary custody in New Jersey and [would] not have granted the emergency application providing temporary custody of the two minor children to [Montalvo]." The trial court thereafter concluded that Daniels had violated rule 3.3(a)(1) by making the false statement to the court and that the ***328** plaintiff had violated the same rule

by failing to correct that false statement when it was made to the court in his presence. Finally, the trial court determined that Daniels and the plaintiff had violated rule 3.3(d) by failing to inform the court of all the material facts known to ****187** them regarding Davis' opinions and the steps she had taken in preparing to file an emergency petition.

Accordingly, the trial court reprimanded both Daniels and the plaintiff for their conduct, and thereafter denied their motion to reargue. Subsequently, pursuant to Practice Book § 72 1 et seq., the plaintiff and Daniels filed a writ of error to this court; see footnote 2 of this opinion; challenging the reprimand. The writ was transferred to the Appellate Court, which dismissed the writ, determining, inter alia, that the plaintiff had violated rule 3.3(a)(1) by failing to correct the false statements made by Daniels in his presence; *Daniels v. Alander*, supra, 75 Conn.App. at 879, 818 A.2d 106; and that, because the plaintiff was aware of the court's line of inquiry into the reasons why the application had not been brought in New Jersey, his failure to inform the trial court of all material facts known to him concerning the matter constituted a violation of rule 3.3(d). Id., at 880, 818 A.2d 106.

On appeal to this court, the plaintiff challenges the judgment of the Appellate Court affirming the trial court's determination that he had violated his professional obligations under rule 3.3(a)(1) and (d) of the Rules of Professional Conduct. He claims that his failure to correct Daniels' false statements to the court concerning the plaintiff's own conversations with Davis cannot, as a matter of law, form the basis of a violation of rule 3.3(a)(1). Specifically, the plaintiff argues that only the attorney who actually made the misstatement can be held accountable under the rule and that, because he personally made no such misstatements to the trial court, there was no basis upon which to conclude***329** that he had violated rule 3.3(a)(1).[FN6] The plaintiff also argues that the misstatement was not material to the trial court's determination of the issues at hand and that, therefore, it cannot form the basis of a violation of rule 3.3(d). Finally, he argues that rule 3.3(d) should not be extended to a situation in which an associate, like himself, sitting at counsel table with his employer, remains silent when that employer makes a misstatement of fact to the court.

FN6. On appeal to this court, the plaintiff does not challenge the propriety of the trial court's finding that Daniels had made a misstatement, but only whether, as a matter of law, the plaintiff can be held accountable for failing to correct the misstatement and whether the misstatement was material.

[1][2][3][4] We begin with our well settled jurisprudence regarding the authority of the judges of the Superior Court. "The trial court has the authority to regulate the conduct of attorneys and has a duty to enforce the standards of conduct regarding attorneys." *Bergeron v. Mackler*, 225 Conn. 391, 397, 623 A.2d 489 (1993). A trial court also has the "inherent power ... to discipline members of the bar, and to provide for the imposition of reasonable sanctions to compel the observance of its rules." (Internal quotation marks omitted.) *Gionfrido v. Wharf Realty, Inc.*, 193 Conn. 28, 33, 474 A.2d 787 (1984). "[A] court disciplining an attorney does so not to punish the attorney, but rather to safeguard the administration of justice and to protect the public from the misconduct or unfitness of those who are members of the legal profession." (Internal quotation marks omitted.) *Burton v. Mottolese*, 267 Conn. 1, 54, 835 A.2d 998 (2003); see also *In re Dodson*, 214 Conn. 344, 354, 572 A.2d 328 ("[t]he trial judge ... has the duty to deter and correct misconduct of attorneys with respect to their obligations as officers of the court to support the authority of the court and enable the trial to proceed with dignity"), cert. denied sub nom. ****188***Dodson v. Superior Court*, 498 U.S. 896, 111 S.Ct. 247, 112 L.Ed.2d 205 (1990). ***330** "As with any discretionary action of the trial court, appellate review requires every reasonable presumption in favor of the action, and the ultimate issue for us is whether the trial court could have reasonably concluded as it did." (Internal quotation marks omitted.) *Burton v. Mottolese*, supra, at 54, 835 A.2d 998.

I

[5] The plaintiff's first challenge is to the propriety of the Appellate Court's judgment affirming the trial court's determination that he violated rule 3.3(a)(1). Essentially, he argues that because Daniels made the misstatements, only Daniels could be held accountable. According to the plaintiff, the rule, as adopted by the judges of the Superior Court, applies only to the attorney who actually makes the misstatement, and

not to an attorney who simply fails to correct it. We disagree.

[6] Rule 3.3(a) of the Rules of Professional Conduct provides in relevant part: "A lawyer shall not knowingly ... (1)[m]ake a false statement of material fact or law to a tribunal...." The issue then is whether the rule applies only to misrepresentations that take the form of an affirmative statement, or whether it also can apply to misrepresentations that take the form of a failure to disclose. Turning first to the commentary to rule 3.3, which provides that "[t]here are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation," it is apparent that the drafters of rule 3.3, which is entitled "Candor toward the Tribunal," did not intend to limit its application solely to the party actually making the affirmative misstatement. Depending upon the circumstances, the rule can pertain to an attorney who fails to correct a misstatement to the court that was made in his presence by another attorney.

In this case, the words Daniels spoke pertained to a conversation that *the plaintiff* had had with Davis. ***331** Daniels made representations to the trial court regarding that conversation that the court concluded were not truthful and that the plaintiff knew from his own personal knowledge to be false. Because the recitation by Daniels pertained to the plaintiff's firsthand knowledge of events that had occurred outside the trial court's presence, which the plaintiff personally had related to Daniels as part of their joint representation of Montalvo, the plaintiff was well situated to remedy the misstatement and thereby uphold his duty of candor to the court. Under the particular circumstances of this case, the plaintiff, as an officer of the court, was duty bound to correct the misstatement.

Instead, during the January 16, 2001 proceeding, the plaintiff introduced himself to the trial court as representing Montalvo, but then sat quietly allowing Daniels to answer questions by recounting the details of a conversation that the plaintiff had had with Davis, details that the trial court later concluded had not been reported accurately. Of even greater significance is the fact that the plaintiff had the opportunity to rectify the situation when he testified during the March 16, 2001 hearing. Rather than correct Daniels' misstatement, the plaintiff instead explicitly attested to the accuracy of the representations that Daniels had made during the January 16 ex parte hearing when the plaintiff related that, in his conversation with Davis, he had "asked if she had intended on going forward with any legal proceedings in New Jersey, based on the allegations that ... Montalvo was making. And that is when [Davis] told [the plaintiff] that she [did not], that she was afraid any further legal ****189** proceedings of this nature would anger the judge and would compromise the outcome of the custody trial that had just taken place." Additionally, the plaintiff testified that he had repeated that conversation to Daniels and that the plaintiff had been at the January 16, 2001 hearing when Daniels made ***332** representations to the court regarding the plaintiff's conversation with Davis, representations that the court later determined, based on Davis' testimony, to have been untruthful. During the March 16, 2001 hearing, the plaintiff was under oath and, therefore, his representations to the trial court comprised testimonial evidence so that he was obligated, both as a witness and as an attorney and officer of the court, to make truthful representations to the tribunal. See Rules of Professional Conduct 3.3. Importantly, everything that the plaintiff recounted to the trial court was within his own specific knowledge; unlike Daniels, the plaintiff was not making representations concerning the acts of third parties.

[7] Finally, separate and apart from the obligations imposed independently by rule 3.3(d), the very fact that this action began as an ex parte proceeding was a unique circumstance that created an enhanced duty of candor toward the trial court, which was wrestling with the threshold issue of whether to entertain the emergency custody application. Whether New Jersey counsel was prepared to proceed with an application in New Jersey or whether only a Connecticut court reasonably could address the child protection concerns that first prompted this action were at the heart of the forum issue. As the trial court noted: "The observance of [an enhanced duty of candor] is especially critical in ex parte hearings deciding the custody of children because of the fundamentally important rights at stake." That obligation is heightened even further when an attorney in an ex parte proceeding either makes false assertions or fails to correct misstatements that purport to be based on his or her own personal observations and knowledge of events that have occurred outside the court's presence. Accordingly, we conclude that the trial court's finding that the plaintiff had violated rule 3.3(a)(1) was not improper.

***333** II

[8] The plaintiff next argues that the Appellate Court improperly affirmed the trial court's determination that he had violated rule 3.3(d). Specifically, he contends that he had no duty to disclose Davis' representations to him because they were not material. He also argues that rule 3.3(d) should not be extended to a situation in which an associate, like himself, sitting at counsel table with his employer, remains silent when that employer makes a misstatement of fact to the court. We disagree with both assertions.

In deciding the first claim, we must remember what issues were before the trial court. In deciding the ex parte emergency custody application, the trial court first had to determine whether Connecticut had jurisdiction over the matter, and if so, whether it nevertheless should decline to exercise that jurisdiction, pursuant to General Statutes §§ 46b-115n[FN7] and 46b-115q,[FN8] in light ***334** of the fact that a decision ****190** in a custody and visitation proceeding was pending in New Jersey. Central to the court's line of inquiry was why Montalvo did not file her application before the Superior Court in New Jersey, which already had conducted a hearing on the issue of the children's custody.

FN7. General Statutes § 46b-115n(a) provides in relevant part: "A court of this state has temporary emergency jurisdiction if the child is present in this state and (1) the child has been abandoned, or (2) it is necessary in an emergency to protect the child because the child, a sibling or a parent has been, or is under a threat of being, abused or mistreated...."

FN8. General Statutes § 46b-115q provides in relevant part: "(a) A court of this state which has jurisdiction under this chapter to make a child custody determination may decline to exercise its jurisdiction at any time if it determines that it is an inconvenient forum under the circumstances and that a court of another state is a more appropriate forum....

"(b) In determining whether a court of this state is an inconvenient forum and that it is more appropriate for a court of another state to exercise jurisdiction, the court shall allow the parties to submit information and shall consider all relevant factors including: (1) Whether family violence has occurred and is likely to continue in the future and which state could best protect the parties and the child; (2) the length of time the child has resided outside this state; (3) the distance between the court in this state and the court in the state that would assume jurisdiction; (4) the relative financial circumstances of the parties; (5) any agreement of the parties as to which state should assume jurisdiction; (6) the nature and location of the evidence required to resolve the pending litigation, including testimony of the child; (7) the ability of the court of each state to decide the issue expeditiously and the procedures necessary to present the evidence; and (8) the familiarity of the court of each state with the facts and issues in the pending litigation...."

Indeed, as we previously have indicated, the trial court in the present case stated that, had it "known at the time of the ex parte proceeding the accurate and complete opinions of ... Davis-that she believed that New Jersey had jurisdiction over any application for temporary custody, that New Jersey was the appropriate forum to file such an application, and that she was prepared to file an emergency custody petition in New Jersey, [it] would have instructed [Montalvo] to file her application for temporary custody in New Jersey and [would] not have granted the emergency application providing temporary custody of the two minor children to [Montalvo]." Therefore, the line of inquiry was *pivotal* to the issues before the trial court. See *State v. Gombert*, 80 Conn.App. 477, 488-89, 836 A.2d 437 (2003) ("materiality turns upon what is at *issue* in the case, which generally will be determined by the pleadings and the applicable substantive law" [emphasis in original; internal quotation marks omitted]), cert. denied, 267 Conn. 915, 841 A.2d 220 (2004); see also Conn.Code Evid. § 4-1, commentary.[FN9]

FN9. Indeed, during the dispositional phase of the proceeding, the plaintiff "acknowledge[d] that the significance to

> [the court's] decision on this emergency application, to knowing as much as possible about the alternative forum.... So I think, Your Honor, there would be an acknowledgment." Therefore, this colloquy seriously undermines his challenge to the materiality of the representations to the trial court.

Lastly, the plaintiff claims that rule 3.3(d) should not be extended to him because he was merely an ***335** associate, sitting at counsel table with Daniels, his employer, and that therefore, remaining silent when Daniels made a misstatement of fact to the court should not serve as the basis for the reprimand. As we stated previously; see footnote 3 of this opinion; rule 3.3(d) of the Rules of professional Conduct provides: "In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse." As we already have concluded, the facts were material and they were known to the plaintiff. Therefore, the only question that remains is whether there is some policy reason why Driscoll should not be held accountable.

****191** It is apparent that the trial court was examining the issues of jurisdiction, namely, whether Montalvo could obtain relief in New Jersey and whether this was a situation involving potential imminent harm to children. Therefore, the status of the proceedings in New Jersey and Davis' views and intentions were material facts known to the plaintiff that would have enabled the trial court to determine what action, if any, to take. The commentary to rule 3.3 regarding ex parte proceedings provides: "Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in an ex parte proceeding, such as an application for a temporary restraining order, there is no balance of presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision." ***336** This is so even when such disclosures may not benefit the disclosing lawyer's position. Therefore, under the circumstances of this case, the trial court reasonably could have expected the plaintiff to inform it of Davis' views and intentions in the January 16, 2001 ex parte proceeding.

Moreover, when Daniels related Davis' observations and the plaintiff remained silent, the trial court reasonably could have inferred that it possessed all the pertinent information. Indeed, if that had not been the case, the circumstances naturally would have called for a reply. See *Obermeier v. Nielsen*, 158 Conn. 8, 11-12, 255 A.2d 819 (1969). The plaintiff has not presented, nor can we identify, any sound reason to graft an exception onto the rule when an attorney whose conduct is at issue is an associate joined by his employer.

The judgment of the Appellate Court is affirmed.

In this opinion the other justices concurred.
Conn.,2004.
Daniels v. Alander
268 Conn. 320, 844 A.2d 182

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Supreme Court, Appellate Division, First Department, New York.
In the Matter of Mark E. SEGALL, an attorney and counselor-at-law:
Departmental Disciplinary Committee for the First Judicial Department, Petitioner,
Mark E. Segall, Esq., Respondent.
Feb. 22, 1996.

In attorney disciplinary proceeding, the Supreme Court, Appellate Division, held that attorney's participation in overbilling scheme, which constituted misconduct involving dishonesty, fraud, deceit, or misrepresentation that adversely reflected on his fitness to practice law, warranted public censure, given presence of substantial mitigating factors.

Public censure ordered.

West Headnotes

Attorney and Client 45 ⇦59.8(1)

45 Attorney and Client
45I The Office of Attorney
45I(C) Discipline
45k59.1 Punishment; Disposition
45k59.8 Public Reprimand; Public Censure; Public Admonition
45k59.8(1) k. In General. Most Cited Cases
(Formerly 45k58)
Attorney's participation in overbilling scheme, which constituted misconduct involving dishonesty, fraud, deceit, or misrepresentation that adversely reflected on his fitness to practice law, warranted public censure, where substantial mitigating factors were present, including lack of knowledge of overall scheme and subordinate level of participation therein, immediate acknowledgment of wrongdoing and sincere expression of remorse, complete and fruitful cooperation with authorities, suffering of significant consequences, and otherwise clean record and good moral character. Code of Prof.Resp., DR 1-102, subd. A, pars. 4, 8, McKinney's Judiciary Law App.

****444 *331** Raymond Vallejo, New York City, of counsel (Hal R. Lieberman, attorney) for petitioner.
Gerard E. Lynch, Sara E. Moss and Steven R. Peikin, New York City, of counsel (Howard, Darby & Levin, attorneys) for respondent.

Before MILONAS, J.P., and ROSENBERGER, WALLACH, TOM and MAZZARELLI, JJ.

PER CURIAM.
Disciplinary proceedings instituted by the Departmental Disciplinary Committee for the First Judicial Department. Respondent was admitted to the Bar at a Term of the Appellate Division of the Supreme Court for the Second Judicial Department on February 28, 1979.

Respondent was admitted to the practice of law at the Second Judicial Department in 1979, and has maintained an office for such practice within the First Department at all pertinent times since then. In 1985 he became affiliated with the firm of ***332** Finley, Kumble, Wagner, Heine, Underberg, Manley, Myerson & Casey, where he worked under the supervision of attorney Harvey Myerson, who headed the litigation department. After the firm collapsed in 1987 and filed for bankruptcy, respondent satisfied all his personal financial obligations and followed his mentor to a new firm, Myerson & Kuhn. There he devoted most of his energies to litigation on behalf of a major client, Shearson Lehman Hutton. As with his role at Finley Kumble, respondent did not serve in a management position at Myerson & Kuhn.

In April 1988, Myerson confided to respondent that Shearson had agreed to pay the firm a flat fee of up to $800,000 per month to handle its litigation. Under Myerson's direction and assurance of propriety, respondent was to prepare monthly statements for Shearson, reflecting charges of at least $800,000, even when the actual monthly fees were considerably less. During the period from April 1988 through January 1989, respondent prepared statements reflecting about $1.2 million worth of excess time, a major portion of the $2 million Shearson was defrauded under this overbilling scheme. Ultimately, the firm stopped

paying its attorneys, and Myerson even stole money from respondent. This firm also went under, and again respondent paid all his debts. His full cooperation with government investigators, including testimony in court, led to successful prosecution of Myerson (*see*, ****445***Matter of Myerson*, 182 A.D.2d 242, 588 N.Y.S.2d 142; 206 A.D.2d 299, 615 N.Y.S.2d 271) and others. This publicity further sullied his reputation and made it difficult for him to find work.

There are substantial mitigating factors in this case, including respondent's lack of knowledge of the overall scheme and his subordinate level of participation therein, his immediate acknowledgement of wrongdoing and sincere expression of remorse, his complete and fruitful cooperation with authorities, the significant consequences he has suffered as a result of this activity, and his otherwise clean record and good moral character. In light of these, the Hearing Panel recommended a public censure.

Respondent is guilty of engaging in misconduct involving dishonesty, fraud, deceit or misrepresentation (Code of Professional Responsibility DR 1-102[A][4]; 22 NYCRR 1200.3[a][4]), which adversely reflects on his fitness to practice law (DR 1-102[A][8]; 22 NYCRR 1200.3[a][8]). Two other attorneys at the firm who also fell under the influence of the notorious Mr. Myerson received one-year suspensions from the practice of law (*Matter of Ruegger*, 207 A.D.2d 166, 621 N.Y.S.2d 308; ***333***Matter of Cooper*, 200 A.D.2d 221, 613 N.Y.S.2d 396), despite similar mitigating factors. However, those colleagues each pleaded guilty to the serious (Federal) crime of scheming to defraud a client by submitting false billing statements, whereas respondent was able to avoid criminal conviction by cooperating with authorities from the outset of their investigation.

Respondent, who had initially sought a lesser sanction, is satisfied with the recommended discipline; petitioner defers to this Court's discretion in imposing sanction. Under the circumstances, we determine that a public censure is appropriate. Accordingly, the motion and cross motion to confirm the Hearing Panel's report and recommendation are granted, and respondent is publicly censured for his misconduct.

Motion and cross motion granted, the Hearing Panel's findings of fact and conclusions of law confirmed, and respondent publicly censured.

All concur.

N.Y.A.D. 1 Dept.,1996.
Matter of Segall
218 A.D.2d 331, 638 N.Y.S.2d 444

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LexisNexis

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As of: Feb 06, 2009

ANN E. SNOW, Appellant, v. RUDEN, McCLOSKY, SMITH, SCHUSTER & RUSSELL, P.A., Appellee.

Case No. 2D03-5188

COURT OF APPEAL OF FLORIDA, SECOND DISTRICT

896 So. 2d 787*; *2005 Fla. App. LEXIS 266*; *36 A.L.R.6th 845*; *22 I.E.R. Cas. (BNA) 873*; *30 Fla. L. Weekly D 219

January 19, 2005, Opinion Filed

SUBSEQUENT HISTORY: Rehearing denied by *Snow v. McClosky, 2005 Fla. App. LEXIS 9059 (Fla. Dist. Ct. App. 2d Dist., Feb. 22, 2005)*

PRIOR HISTORY: **[**1]** Appeal from the Circuit Court for Hillsborough County; Herbert J. Baumann, Jr., Judge.

DISPOSITION: Affirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: The Circuit Court for Hillsborough County (Florida) dismissed a second amended complaint filed by plaintiff employee against appellee, her former employer, alleging both a violation of Fla. Stat. ch. 448-101(2), (3) (1999), part of which was referred to as Florida's Private Sector Whistle-Blower Act, and that her termination was a breach of the implied covenant of good faith as well as a violation of public policy. The employee appealed.

OVERVIEW: The employee challenged the judgment entered. As a result, the appeals court was required to interpret the phase "law, rule, or regulation" and whether Fla. R. Bar *4-8.3* met this definition. In so doing, the court disagreed with the employee, stating that the rules governing the conduct of members of the Florida Bar did not flow from either a legislatively enacted statute, ordinance, or administrative rule. They also did not originate from any similar federal source. Rather, they were promulgated by the Florida Supreme Court. Thus, they were not laws, rules, or regulations, as defined in *Fla. Stat. ch. 448.104*. While her former employer's act of terminating her might have been inappropriate, the Private Sector Whistle-Blower Act did not provide her any redress. Second, affording the employee protection under the instant circumstances was a policy-making function left to the legislature. Further, because the employee's amended complaint failed to link the implied covenant of good faith to a breach of an express provision of her at-will employment contract, she did not state a cause of action for which relief could be granted.

OUTCOME: The judgment was affirmed.

LexisNexis(R) Headnotes

Legal Ethics > Professional Conduct > General Overview

[HN1] Fla. R. Bar *4-8.3* provides that an attorney having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects shall inform the appropriate professional authority.

Labor & Employment Law > Wrongful Termination > Public Policy
Labor & Employment Law > Wrongful Termination > Whistleblower Protection Act > General Overview
[HN2] See *Fla. Stat. ch. 448.102*.

Governments > Legislation > Interpretation
[HN3] In interpreting a statute, an appellate court must examine the plain meaning of the words used in that statute. It is axiomatic that in construing a statute courts must first look at the actual language used in the statute.

Labor & Employment Law > Wrongful Termination > Whistleblower Protection Act > General Overview
[HN4] As defined by *Fla. Stat. ch. 448.101(4)*, the terms "law, rule, or regulation" includes any statute or ordinance or any rule or regulation adopted pursuant to any federal, state, or local statute or ordinance applicable to the employer and pertaining to the business.

Administrative Law > Agency Rulemaking > General Overview
Governments > Legislation > Types of Statutes
Real Property Law > Mobilehomes & Mobilehome Parks > Maintenance & Use
[HN5] A statute is a form of positive law enacted by the legislative branch of government. Similarly, an ordinance is a form of statutory law enacted by a local governmental body, such as a county commission or city council. A regulation is synonymous to a rule enacted pursuant to the administrative law process; a rule or regulation comes into being as a result of a legislative grant of authority to an executive branch department or agency. Each of these terms-statute, ordinance, rule, and regulation-and their meanings are well known to the legislature. The legislature is presumed to know the meaning of the words it utilizes and to convey its intent by use of specific terms.

Labor & Employment Law > Wrongful Termination > Public Policy
Labor & Employment Law > Wrongful Termination > Whistleblower Protection Act > General Overview
Legal Ethics > Professional Conduct > General Overview
[HN6] Whether it is appropriate to afford whistle-blower protection to an attorney who reports a potential ethical violation under the rules regulating the Florida Bar is a policy-making function left to the legislature. It is not the prerogative of the courts to extend, by interpretation, the clear legislative definition. Even where a court is convinced that the Legislature really meant and intended something not expressed in the phraseology of the act, it will not deem itself authorized to depart from the plain meaning of the language which is free from ambiguity.

Contracts Law > Breach > General Overview
Contracts Law > Contract Interpretation > Good Faith & Fair Dealing
Contracts Law > Types of Contracts > Covenants
[HN7] The implied covenant of good faith exists in virtually all contractual relationships. Its purpose is to protect the reasonable expectations of the contracting parties. However, the reach of this implied contractual covenant is restricted in several respects. First, the implied covenant is not an independent term within the parties' contract. Thus, it cannot override an express contractual provision. Because the implied covenant is not a stated contractual term, to operate it attaches to the performance of a specific or express contractual provision. There can be no cause of action for a breach of the implied covenant absent an allegation that an express term of the contract has been breached. The covenant of good faith cannot be used to create a breach of contract on one party's part where there was no breach of any express term of the contract. Hence, the duty of good faith performance does not exist until a plaintiff can establish a term of the contract the other party was obligated to perform and did not.

COUNSEL: Karen Coolman Amlong and William R. Amlong of Amlong & Amlong, P.A., Fort Lauderdale, for Appellant.

Maurice M. Garcia of Abrams Anton P.A., Hollywood, for Appellee.

JUDGES: CASANUEVA, Judge. STRINGER and WALLACE, JJ., Concur.

OPINION BY: CASANUEVA

OPINION

[*789] CASANUEVA, Judge.

Ann E. Snow appeals a final judgment that dismissed with prejudice her two-count second amended complaint against her former law firm, Ruden, McClosky, Smith, Schuster and Russell, P.A. Ms. Snow's suit alleged a violation of *section 448.101(2)-(3), Florida Statutes* (1999), part of what is commonly referred to as Florida's Private Sector Whistle-Blower Act. [1] She also alleges that her termination of employment was a breach of the implied covenant of good faith in her at-will employment contract as well as a violation of

public policy. We affirm the trial court's dismissal of the complaint but write to address several aspects of her argument that merit discussion.

1 *§§ 448.101-.105, Fla. Stat.* (1999).

[2] FACTS**

Because this appeal arises from the dismissal of Ms. Snow's second amended complaint, we must take as true the facts as alleged in the complaint. *Fla. Dep't of Health & Rehab. Servs. v. S.A.P., 835 So. 2d 1091 (Fla. 2002).* Ms. Snow, a member of The Florida Bar, was employed by the Ruden, McClosky firm from March 20, 2000, to June 26, 2000, in their Tampa office. She joined Ruden, McClosky along with another, more senior attorney, who was a shareholder and her supervisor at their previous firm. Her former supervisor's position with Ruden, McClosky was of counsel; Ms. Snow was hired as an associate.

Her complaint alleged that Ms. Snow learned that her former supervisor had improperly diverted fees due their former law firm to himself. She believed that this diversion of funds constituted the crime of theft. As an attorney licensed in Florida, Ms. Snow is subject to the Rules Regulating the Florida Bar. In the chapter containing **[*790]** the Rules of Professional Conduct,[HN1] *rule 4-8.3* provides that an attorney "having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's **[**3]** honesty, trustworthiness, or fitness as a lawyer in other respects shall inform the appropriate professional authority." She claims she was thus ethically bound to report her former supervisor's illegal conduct.

The complaint further alleged that in a series of meetings beginning in May 2000, Ms. Snow informed the managing partner of Ruden, McClosky's Tampa office, the office manager, and the head human resource officer of her belief that her former supervisor's conduct was illegal and that she intended to report the matter to the State Attorney. The managing partner told her she was causing trouble, advised her to think "long and hard" before going to the authorities, and suggested she try to "work things out" with her former supervisor. In June 2000, refusing to join what she believed was Ruden, McClosky's cover-up of the illegal and unethical conduct of her former supervisor, Ms. Snow reported the matter to the State Attorney. When the managing partner learned what she had done, he became angry and told her that she should have allowed the firm to work out the problem internally. She was discharged soon thereafter and allegedly was told that the main office had decided to terminate **[**4]** her employment because her reporting of her former supervisor to the State Attorney had created an unworkable environment.

THE WHISTLE-BLOWER CLAIMS

The two counts of Ms. Snow's second amended complaint asserted an "objection" claim and a "providing information" claim under Florida's Private Sector Whistle-Blower Act. Specifically, she claimed that Ruden, McClosky terminated her for activity protected by section *448.102(2)* and *(3)*, [2] because she refused to join in Ruden, McClosky's after-the-fact cover-up of illegal and unethical conduct and provided information to the State Attorney about it. Both of the alleged violations of the Whistle- Blower Act rest on her interpretation that the Rules Regulating the Florida Bar, specifically the Rules of Professional Conduct, qualify as a "law, rule, or regulation" as outlined in the statute. The trial court dismissed her second amended complaint because it found that she failed to state a cause of action under the Whistle-Blower Act.

2 *Section 448.102* provides:

> [HN2] An employer may not take any retaliatory personnel action against an employee because the employee has:
>
> (1) Disclosed, or threatened to disclose, to any appropriate governmental agency, under oath, in writing, an activity, policy, or practice of the employer that is in violation of a law, rule, or regulation. However, this subsection does not apply unless the employee has, in writing, brought the activity, policy, or practice to the attention of a supervisor or the employer and has afforded the employer a reasonable opportunity to correct the activity, policy, or practice.
>
> (2) Provided information to, or testified before, any appropriate governmental agency, person, or entity conducting an investigation, hearing, or inquiry into an alleged violation of a law, rule, or regulation by the employer.
>
> (3) Objected to, or refused to participate in, any activity, policy, or practice of the employer which

> is in violation of a law, rule, or regulation.

[5]** In this case, we are required to interpret a state statute. To do so, [HN3] we examine the plain meaning of the words used in the statute. "It is axiomatic that in construing a statute courts must first look at the actual language used in the statute." *Woodham v. Blue Cross & Blue Shield of Fla., Inc., 829 So. 2d 891, 897 (Fla. 2002)*. Here, the critical statutory **[*791]** phrase is "law, rule, or regulation." [HN4] As defined by *section 448.101(4)*, the term includes "any statute or ordinance or any rule or regulation adopted pursuant to any federal, state, or local statute or ordinance applicable to the employer and pertaining to the business." Ms. Snow advances the proposition that the Rules Regulating the Florida Bar, more particularly *rule 4-8.3*, meet this definition. We disagree.

[HN5] A statute is a form of positive law enacted by the legislative branch of government. Similarly, an ordinance is a form of statutory law enacted by a local governmental body, such as a county commission or city council. A regulation is synonymous to a rule enacted pursuant to the administrative law process; a rule or regulation comes into being as a result of a legislative grant of authority to an executive **[**6]** branch department or agency. Each of these terms-statute, ordinance, rule, and regulation-and their meanings are well known to the legislature. "The legislature is presumed to know the meaning of the words it utilizes and to convey its intent by use of specific terms." *Brate v. Chulavista Mobile Home Park Owners Ass'n, 559 So. 2d 1190, 1193 (Fla. 2d DCA 1990)* (quoting *Caloosa Prop. Owners Ass'n v. Palm Beach County Bd. of County Comm'rs, 429 So. 2d 1260, 1264 (Fla. 1st DCA 1983))*. The rules governing the conduct of members of The Florida Bar do not flow from either a legislatively enacted statute, ordinance, or administrative rule. Neither do they originate from any similar federal source. Rather, the rules are promulgated by the Florida Supreme Court, the head of the judicial branch of state government, under the authority given to it by *article V, section 15 of the Florida Constitution*. Thus, it cannot be said that the Bar rules are either laws, rules, or regulations as defined in *section 448.104*, despite their designation as "rules." If it is true that Ruden, McClosky dismissed Ms. Snow because she reported her former supervisor to the State Attorney, **[**7]** the law firm's reaction may have been inappropriate, but the plain language of the statute indicates that the Private Sector Whistle-Blower Act does not provide her any redress.

By affirming the order of dismissal based on Florida's Private Sector Whistle-Blower Act, we limit our role to the judicial function of statutory interpretation. [HN6] Whether it is appropriate to afford whistle-blower protection to an attorney in Ms. Snow's circumstance is a policy-making function left to the legislature. It is not our prerogative to extend, by interpretation, the clear legislative definition. *See Van Pelt v. Hilliard, 75 Fla. 792, 78 So. 693, 694 (Fla. 1918)* ("Even where a court is convinced that the Legislature really meant and intended something not expressed in the phraseology of the act, it will not deem itself authorized to depart from the plain meaning of the language which is free from ambiguity.").

Ms. Snow also argues, based on a prior amended complaint, that her at-will employment contract with Ruden, McClosky precludes her discharge. She contends that the contract's implied covenant of good faith operated to bar her employer's actions. We again must disagree.

[HN7] "The **[**8]** implied covenant of good faith exists in virtually all contractual relationships." *Sepe v. City of Safety Harbor, 761 So. 2d 1182, 1184 (Fla. 2d DCA 2000)*. Its purpose is to protect the reasonable expectations of the contracting parties. *Cox v. CSX Intermodal, Inc., 732 So. 2d 1092 (Fla. 1st DCA 1999)*. However, the reach of this implied contractual covenant is restricted in several respects. First, the implied covenant is not an independent term within the parties' contract. Thus, it cannot override an express contractual provision. *Ernie Haire Ford, Inc. v. Ford Motor Co., 260 F.3d 1285 (11th Cir. 2001)*; **[*792]** *see also Ins. Concepts & Design, Inc. v. Healthplan Servs., Inc., 785 So. 2d 1232 (Fla. 4th DCA 2001)*. Because the implied covenant is not a stated contractual term, to operate it attaches to the performance of a specific or express contractual provision. There can be no cause of action for a breach of the implied covenant "absent an allegation that an express term of the contract has been breached." *Ins. Concepts, 785 So. 2d at 1234*; *see also Johnson Enters. of Jacksonville, Inc. v. FPL Group, Inc., 162 F.3d 1290 (11th Cir. 1998)*. **[**9]** Or, as stated in *Avatar Development Corp. v. De Pani Construction, Inc., 834 So. 2d 873, 876 (Fla. 4th DCA 2002)*, "the covenant of good faith cannot be used to create a breach of contract on [one party's] part where there was no breach of any express term of the contract." In *Avatar*, the court held that the defendant's ulterior motive for the plaintiff's termination had no relevance because their contract gave the defendant the right to terminate the plaintiff at any time and Florida law requires nothing more of the defendant. *Id.* Thus, the duty of good faith performance does not exist until a plaintiff can establish a term of the contract the other party was obligated to perform and did not. *See also Hosp. Corp. of Am. v. Fla. Med. Ctr., Inc., 710 So. 2d 573, 575 (Fla. 4th DCA 1998)* (holding that "a duty of good faith must relate to the performance of an express term of the contract and is not an abstract and independent term of a con-

tract"). *But see Scott v. County of Ramsey, 180 F.3d 913, 918 (8th Cir. 1999)* (affirming the giving of a jury instruction stating that employment decisions or actions can be made for "a good **[**10]** reason, bad reason or no reason at all, but they cannot be based on intentional retaliation").

Here, Ms. Snow's amended complaint failed to link the implied covenant of good faith to a breach of an express provision of her at-will employment contract with the Ruden, McClosky law firm. Thus, she did not state a cause of action for which a breach of the implied covenant of good faith can provide her relief.

In conclusion, we hold that Ms. Snow's complaint does not state a cause of action and the trial court was correct to dismiss her suit. *See J.R.D. Mgmt. Corp. v. Dulin, 883 So. 2d 314 (Fla. 4th DCA 2004)* (stating that a plaintiff may not sue for breach of at-will employment).

Affirmed.

STRINGER and WALLACE, JJ., Concur.

LEXSEE 967 SO. 2D 108


Caution
As of: Dec 22, 2008

THE FLORIDA BAR, Complainant, vs. ROLAND RAYMOND ST. LOUIS, JR., Respondent.

No. SC04-49

SUPREME COURT OF FLORIDA

967 So. 2d 108*; *2007 Fla. LEXIS 762*; *32 Fla. L. Weekly S 191

May 3, 2007, Decided

SUBSEQUENT HISTORY: Released for Publication October 11, 2007.
Clarified by *Fla. Bar v. St. Louis, 2007 Fla. LEXIS 1943 (Fla., Oct. 11, 2007)*

PRIOR HISTORY: *Fla. Bar v. Rodriguez, 959 So. 2d 150, 2007 Fla. LEXIS 761 (Fla., 2007)*

CASE SUMMARY:

PROCEDURAL POSTURE: The court had for review a referee's report recommending that respondent attorney be found guilty of professional misconduct and that he receive a sixty day suspension and serve a three-year period of probation. The referee also recommended forfeiture of $ 2,277,663 to The Florida Bar's Clients' Security Fund. Complainant Florida Bar sought, inter alia, disbarment.

OVERVIEW: The attorney was engaged in a secret "engagement agreement" with a corporation which he was suing on behalf of 20 clients. The corporation agreed to pay the attorney's law firm $ 6,445,000 in exchange for the firm's agreement not to pursue future claims against it and for the firm to possibly perform future work for the corporation on an hourly basis. Thus, the $ 59,000,000 offered to the law firm's clients and the $ 6,445,000 offered to the firm through the engagement agreement constituted separate funds. They created a conflict of interest when they executed the engagement agreement with DuPont, placing their financial interests above those of their Benlate clients. The attorney made false statements to a judge, made a false representation and committed an omission to two Florida Bar representatives, and deliberately did not tell his clients about the engagement agreement. The court held that it was clear that the attorney engaged in an extensive pattern of intentional deceit. Thus, disbarment was the appropriate sanction. Pursuant to *R. Regulating Fla. Bar 3-5.1(h)*, the referee appropriately recommended forfeiture of the prohibited fees to the Florida Clients' Security Fund.

OUTCOME: The court imposed the sanction of disbarment. In addition to disgorgement of $ 2,277,663, the court ordered the attorney to pay interest on that amount.

LexisNexis(R) Headnotes

Legal Ethics* > *Sanctions* > *Disciplinary Proceedings* > *General Overview
[HN1] A defense based on advice of counsel is not available to respondents in Florida Bar discipline cases unless specifically provided for in a rule or considered as a matter in mitigation.

Civil Procedure* > *Judgments* > *Preclusion & Effect of Judgments* > *Res Judicata
[HN2] The doctrine of res judicata applies when all four of the following conditions are present: (1) identity of the thing sued for; (2) identity of the cause of action; (3) identity of persons and parties to the action; and (4) identity of quality in persons for or against whom claim is made. Thus, the causes of action must be closely related for the doctrine of res judicata to apply.

Civil Procedure > Judgments > Preclusion & Effect of Judgments > Estoppel > Collateral Estoppel
[HN3] Where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered.

Legal Ethics > Sanctions > Disciplinary Proceedings > Appeals
[HN4] In regard to attorney discipline, a referee's finding of fact carries with it a presumption of correctness that should be upheld unless clearly erroneous or without support in the record. Absent a showing that the referee's findings are clearly erroneous or lacking in evidentiary support, the court is precluded from reweighing the evidence and substituting its judgment for that of the referee.

Legal Ethics > Professional Conduct > Tribunals
Legal Ethics > Sanctions > Disciplinary Proceedings > General Overview
[HN5] *R. Regulating Fla. Bar 4-8.1* provides that a lawyer, in connection with a disciplinary matter, shall not fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter or knowingly fail to respond to a lawful demand for information from a bar admissions or bar disciplinary authority. The rule may be violated by an omission in connection with a disciplinary investigation of the lawyer's own conduct. Thus, *R. Regulating Fla. Bar 4-8.1* imposes an affirmative duty upon lawyers to abide by high standards of truthfulness and candor in order to maintain the integrity of the profession.

Legal Ethics > Sanctions > Disciplinary Proceedings > Appeals
[HN6] The court's scope of review in attorney disciplinary actions is broader for legal conclusions than it is for factual findings. *R. Regulating Fla. Bar 4-1.7(a)* provides that a lawyer shall not represent a client if representation of that client will be directly adverse to the interests of another client unless (1) the lawyer reasonably believes the representation will not adversely affect the lawyer's responsibilities to and relationship with the other client; and (2) each client consents after consultation. The rule imposes a mandatory prohibition on such representation, unless the lawyer meets the two-step exception.

Legal Ethics > Client Relations > Conflicts of Interest
[HN7] See *R. Regulating Fla. Bar 4-5.6(b).*

Constitutional Law > Equal Protection > Level of Review
[HN8] The rational basis test is two-pronged: (1) whether there is a legitimate state interest to be served; and, if so, (2) whether the rule bears some reasonable relationship to that legitimate state interest.

Constitutional Law > The Judiciary > Case or Controversy > Constitutionality of Legislation > General Overview
Legal Ethics > Client Relations > Conflicts of Interest
[HN9] In regard to *R. Regulating Fla. Bar 4-5.6*, clearly, the legitimate state purpose is to promote public welfare and the public's trust and confidence in the legal process, thus satisfying the first prong of the rational basis test. The second prong is satisfied because *rule 4-5.6(b)* promotes public welfare by prohibiting lawyers from entering in engagement agreements and thereby ensuring that (1) the public has access to qualified attorneys; (2) clients' awards are based on the merits of their claims; and (3) no conflicts exist between the interests of present and future clients. Thus, *R. Regulating Fla. Bar 4-5.6* does not wantonly or arbitrarily interfere in the private rights of individuals.

Legal Ethics > Sanctions > General Overview
[HN10] The practice of law is not a right, but a conditional and revocable privilege.

Legal Ethics > Sanctions > Disciplinary Proceedings > Hearings
[HN11] Typically, the rule of lenity, as codified in *§ 775.021, Fla. Stat.* (2006), only applies in the criminal context. The rule is applicable where the language of a criminal statute is susceptible to differing interpretations, thus allowing for construction in favor of the accused. *§ 775.021(1), Fla. Stat.* Further, *§ 775.021(3)* provides that it does not affect the power of a court to punish for contempt or to employ any sanction authorized by law for the enforcement of an order or a civil judgment or decree. Bar disciplinary proceedings are not considered civil or criminal, but are quasi-judicial. Thus, the rule of lenity does not apply to bar proceedings, where the court has the inherent power to employ any lawfully authorized sanction to discipline Florida attorneys.

Legal Ethics > Sanctions > Disbarments
[HN12] The court typically imposes the severe sanction of disbarment on lawyers who intentionally lie to a court. An officer of the court who knowingly seeks to corrupt the legal process can expect to be excluded from that process.

Legal Ethics > Sanctions > Disbarments
[HN13] Disbarment is appropriate when a lawyer intentionally engages in conduct that is a violation of a duty owed as a professional with the intent to obtain a benefit for the lawyer or another, and causes serious or potentially serious injury to a client, the public, or the legal system. Fla. Stds. Imposing Law. Sancs. 7.1.

Legal Ethics > Client Relations > Attorney Fees > General Overview
Legal Ethics > Sanctions > General Overview
[HN14] See *R. Regulating Fla. Bar 3-5.1(h).*

Legal Ethics > Sanctions > General Overview
[HN15] Sanctions imposed for unethical conduct by members of the Bar must serve three purposes. First, the judgment must be fair to society, both in terms of protecting the public from unethical conduct and at the same time not denying the public the services of a qualified lawyer as a result of undue harshness in imposing penalty. Second, the judgment must be fair to the respondent, being sufficient to punish a breach of ethics and at the same time encourage reformation and rehabilitation. Third, the judgment must be severe enough to deter others who might be prone or tempted to become involved in like violations.

COUNSEL: **[**1]** John F. Harkness, Jr. Executive Director, Kenneth Lawrence Marvin, Director of Lawyer Regulation, and James A.G. Davey, Jr., Bar Counsel, The Florida Bar, Tallahassee, Florida, for Complainant.

Roland Raymond St. Louis, Jr., pro se, Coral Gables, Florida, for Respondent.

JUDGES: LEWIS, C.J., and WELLS, ANSTEAD, PARIENTE, QUINCE, CANTERO, and BELL, JJ., concur.

OPINION

[*111] Original Proceeding - The Florida Bar

PER CURIAM.

We have for review a referee's report recommending that Roland Raymond St. Louis, Jr., be found guilty of professional misconduct for violating a number of the Rules Regulating the Florida Bar. The referee is recommending several sanctions, the most significant of which are a sixty-day suspension, probation for three years, and forfeiture of $ 2,277,663 to The Florida Bar's Clients' Security Fund. We have jurisdiction. *See art. V, § 15, Fla. Const.*

For the reasons explained herein, we disapprove the referee's recommendation that St. Louis be suspended. Instead, we impose disbarment. Further, in addition to disgorgement of $ 2,277,663, we order St. Louis to pay interest on that amount.

BACKGROUND

St. Louis was a shareholder in the law firm of Friedman, Rodriguez, Ferraro, and St. Louis (FRF&S). **[**2]** The firm was hired to represent twenty clients who sought to sue DuPont Corporation for damages allegedly resulting from use of the DuPont product Benlate, a fungicide that was suspected of causing severe crop damage and was recalled from the market in March 1991, which lead to mass tort litigation by farmers against DuPont. The partners in the firm were Paul D. Friedman, Diane D. Ferraro, Roland R. St. Louis, and Francisco R. Rodriguez. The Florida Bar brought separate disciplinary actions against the four named partners of the firm alleging that they committed misconduct by engaging in a secret "engagement agreement" with the DuPont Corporation, solely for their own financial benefit, while they were representing the clients in the Benlate cases against DuPont. Based on the partners' separate acts of misconduct, they received different sanctions.

Ferraro received a public reprimand and made restitution of $ 425,000 to the clients. *Fla. Bar v. Ferraro, 839 So. 2d 700 (Fla. 2003)* (table citation). The sanction was based on the referee's finding that Ferraro had "absolutely nothing to do with the settlement negotiations with DuPont" and did not even know about the engagement agreement **[**3]** until well after her former partners received the prohibited funds. Due to these facts, the referee ultimately recommended a public reprimand.

Friedman did not know about the engagement agreement until after it had been executed. Thus, he had a comparatively small role in the firm's misconduct. Also, Friedman cooperated with the Bar and he paid restitution before his disciplinary case was reviewed by this Court. However, Friedman partook in the financial benefits of the unethical engagement agreement, exposed the Benlate clients to potential harm by engaging in the conflict of interest, and acquiesced in the firm lying to the clients. Friedman's misconduct merited a ninety-day suspension and payment of restitution in the amount of $

910,000. *Fla. Bar v. Friedman, 940 So. 2d 428 (Fla. 2006)* (table citation).

St. Louis and Rodriguez were the firm's principal actors in developing and executing the engagement agreement. They created a conflict of interest when they executed the engagement agreement with DuPont, placing their financial interests above those of their Benlate clients. *See Fla. Bar v. Rodriguez, No. SC03-909, 959 So. 2d 150, 2007 Fla. LEXIS 761 (Fla. May 3, 2007)* (imposing a two-year suspension on **[*112]** Rodriguez). As **[**4]** discussed herein, St. Louis engaged in additional misconduct, including acts of dishonesty such as lying to a judge and the Bar regarding the secret engagement agreement. Clearly, St. Louis's cumulative misconduct is the most egregious.

FACTS

With regard to St. Louis, a referee issued a report making the following findings and recommendations.

St. Louis and Rodriguez were the firm's primary lawyers working on the Benlate matters. St. Louis, who had been practicing law for approximately fourteen years, brought the Benlate clients to FRF&S. He had primary authority for communicating with the clients, and he was the main strategist in the case.

The Engagement Agreement Between the Firm and DuPont.

[1] In 1994, Jim Davis, the owner of Davis Tree Farm (Davis), came to St. Louis, who agreed to take over Davis's Benlate case from a previous firm that had quit the case. If the Davis case went to trial, it had fair prospects of a recovery, although the liability, causation, and damages elements of Benlate cases can be difficult to prove. Davis's previous lawyer advised Davis that he thought the most DuPont would offer in settlement would be $ 200,000.

> 1 The referee found that entering into this agreement **[**5]** violated *rule 4-5.6(b)* (restriction on the right to practice) of the Rules Regulating the Florida Bar and resulted in the acceptance of a prohibited fee in violation of *rule 4-1.5(a) of the Rules Regulating the Florida Bar*.

Over the next two years, St. Louis and FRF&S were representing nineteen additional Benlate claimants. DuPont vigorously defended itself with carefully calculated strategies and "scorched earth" discovery tactics. St. Louis aggressively pursued discovery, motion practice, and investigations. He documented a pattern and practice of DuPont's deliberate discovery abuse. By "diligent and extraordinary" efforts, St. Louis discovered a secret Benlate field test DuPont conducted in 1992 in Costa Rica, in which Benlate had severely damaged the plants. He proved that DuPont had concealed or destroyed all of the physical evidence of that test, and that DuPont had denied under oath that the test even took place. St. Louis parlayed that evidence, together with other DuPont discovery violations, into a 110-page motion for sanctions, asking the trial judge to strike DuPont's pleadings in the Davis case. The judge agreed, and orally advised the parties that she was striking DuPont's **[**6]** pleadings as a sanction. The judge encouraged DuPont to settle the case.

As a result of the judge's anticipated written order, DuPont actively sought to settle all twenty cases. During the settlement discussions, Rodriguez learned that DuPont was requesting the firm to cease representing any Benlate plaintiffs as a condition of the settlement. At various points in the negotiations, DuPont raised the issue of the firm not bringing any future Benlate cases. Initially, St. Louis refused to discuss such an "engagement agreement." Nevertheless, the firm researched the issue with regard to *rule 4-5.6(b) of the Rules Regulating the Florida Bar*. [2] The rule provides that a lawyer shall **[*113]** not participate in offering or making "an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy."

> 2 In July 1996, Rodriguez asked an associate to research whether the firm could ethically agree to DuPont's condition that the firm not litigate against DuPont in the future. The associate researched the issue and reported to Rodriguez that the law was unclear, but he thought that DuPont's objective could be achieved by DuPont engaging the firm after the **[**7]** firm finished its representation of the twenty Benlate clients. This is the action the firm subsequently undertook.

DuPont made substantial offers for all the cases except Davis's. The amounts exceeded what the clients could have reasonably expected to recover if their cases went to trial. However, these nineteen Benlate clients had only marginal claims unless their cases were tied to the Davis case. Thus, because the Davis case was still unsettled, the parties agreed to submit the case to mediation. The parties employed a mediator, who was the special master for Benlate cases in Dade County.

During a recess in mediation, the trial judge entered a written order striking DuPont's pleadings in the Davis case. This had the effect of vitiating all of the irrevocable settlement offers made by DuPont over the prior month of negotiations. To salvage the situation, both parties contacted the mediator to secure an emergency hearing before the trial judge for 8:30 the next morning. Thereafter, the mediation evolved into a settlement negotiation of the Davis case. That evening, the negotiations resulted

in a $ 30 million settlement for the Davis case. DuPont's offers were irrevocable for sixty **[**8]** days with the following contingencies: (1) the trial judge's order striking DuPont's pleadings would be vacated and sealed without any publicity; (2) all offers to all plaintiffs were contingent on actual settlement of the Davis case and another case brought by Fred Haupt; and (3) the settlement figures were to be kept confidential. The confidentiality of the settlement offers made to each client was ensured by a "hold back" provision that retained ten percent of the clients' settlement funds in escrow for two years. Those funds would be forfeited to DuPont if there were a breach of confidentiality.

After the settlement numbers were agreed upon in negotiation, the mediator reported to FRF&S that DuPont's counsel insisted that the firm agree not to bring any future Benlate cases against DuPont. St. Louis and Rodriguez initially rejected this condition, but DuPont's counsel insisted on the engagement agreement, asserting that it was DuPont's policy to secure such an agreement. The referee noted that the main proponents of the scheme were the attorneys for DuPont. In fact, DuPont's counsel referred to an article purportedly written for an American Bar Association publication that allegedly **[**9]** supported their position. The article allegedly described a practice where opposing attorneys are retained by the defendant, which would supposedly prevent the plaintiff's attorney from suing the defendant in the future. St Louis testified that FRF&S asked the mediator whether agreements like this were done and that the mediator responded in the affirmative. Ultimately, St. Louis and Rodriguez agreed to DuPont's conditions. St Louis went with DuPont's counsel to draft the engagement agreement and finalize the settlement agreement.

The engagement agreement stated that the firm accepted DuPont's offer to be retained for $ 6,445,000 and to perform unspecified work concerning Benlate matters. The engagement agreement provided that the work for DuPont was to commence "upon completion of all activities on behalf of our existing Benlate clients." Based on that provision, the referee found that St. Louis did not become an agent of DuPont, had no conflict of interest with his clients or DuPont, and did not violate *rule 4-1.7(a)* (representing adverse interests) of the Rules Regulating the Florida Bar. The referee found that St. Louis had violated *rule 4-1.7(b)* (duty to avoid limitation on independent **[**10]** professional judgment) because the exercise of his independent professional **[*114]** judgment was limited by his own interest in keeping the engagement agreement a secret from his clients.

FRF&S received the $ 6,445,000 from DuPont for the engagement agreement. Although DuPont and FRF&S agreed that payments for work in the future were to be based on the FRF&S standard hourly rate, at no time did St. Louis or DuPont's counsel expect the firm to actually represent DuPont. The true purpose of the engagement agreement was to create the appearance of a conflict so FRF&S might circumvent *Rule Regulating the Florida Bar 4-5.6(b)*.

St. Louis testified that, in his estimate, the value of potential future Benlate business that FRF&S surrendered to DuPont far exceeded $ 6.4 million. However, he claimed that if the firm had not agreed to DuPont's demand regarding the engagement agreement, the value of nineteen of the Benlate claims (other than the Davis claim) would have been greatly diminished. Thus, before the referee, St. Louis asserted that he was acting in the best interests of his clients when he signed the engagement agreement for $ 6,445,000. Nevertheless, the unrefuted evidence shows that the $ 59,000,000 **[**11]** paid to the clients and the $ 6,445,000 paid to FRF&S for the engagement agreement were separate funds. The $ 6,445,000 was not taken from funds that were available to the clients.

St. Louis and the DuPont attorneys finished drafting the engagement and settlement agreements in the early morning hours. St. Louis signed the engagement agreement and the settlement agreement on behalf of FRF&S. At the time, St. Louis was aware that *rule 4-5.6(b)* (a lawyer shall not participate in making an agreement in which a restriction on the lawyer's right to practice is part of the settlement) prohibited the making of such an agreement. The referee found that by entering into this agreement, St. Louis violated *rule 4-5.6(b)*. In turn, St. Louis also violated *rule 4-8.4(a)* (a lawyer shall not violate the Rules of Professional Conduct) of the Rules Regulating the Florida Bar.

At 8:30 a.m., the parties appeared before the trial judge and announced that a settlement had been reached. FRF&S and DuPont did not disclose any of the details to the judge.

Aftermath of the Settlement and Engagement Agreements.

After the settlement, St. Louis traveled around the state meeting with the Benlate clients, presenting **[**12]** the DuPont settlement offers. He urged them to accept the settlements. In fact, he informed some clients that if they did not accept, FRF&S would withdraw as their lawyers. St. Louis did not tell the nineteen clients about FRF&S's engagement agreement with DuPont or that FRF&S was now retained by DuPont. Further, each client received a redacted copy of the settlement agreement containing only his own settlement offer and an authorization to settle form.

Eventually, every client ended up authorizing the settlement, although some clients were dissatisfied and

demanded more information. One client, Jerry Gilley, demanded to know the specifics of the settlement negotiations. St. Louis refused to tell Gilley anything other than the dollar amount he would receive. In addition, St. Louis refused to advise Gilley. Thus, Gilley was compelled to hire another attorney, Marc P. Ossinsky, to uncover the details of the settlement negotiations. St. Louis refused to provide Ossinsky or Gilley any information regarding the engagement agreement. By his behavior, St. Louis failed to keep his clients reasonably informed about the status of the engagement agreement and therefore violated *rule 4-1.4(a)* (informing **[**13]** client of status of **[*115]** representation) of the Rules Regulating the Florida Bar. Further, St. Louis failed to explain the terms of the settlement to the extent reasonably necessary for his clients to make informed decisions regarding the representation and the offer from DuPont, even though there were specific inquiries regarding the terms of the settlement agreement. Thus, St. Louis also violated *rule 4-1.4(b)* (duty to explain matters to client).

By purposefully not disclosing the engagement agreement, St. Louis was protecting FRF&S's interest in the $ 6,445,000, his own interest in his share of that fee ($ 2,277,663), and DuPont's economic interests by not having it publicly disclosed that it had paid a law firm in violation of *rule 4-5.6(b)*. Such information could have caused DuPont serious financial and legal harm because it had ongoing Benlate litigation across the country. Thus, the referee found St. Louis's exercise of his independent professional judgment was materially limited by his own financial interest. Therefore, he violated *rule 4-1.7(b)* (duty to avoid limitation on independent professional judgment) of the Rules Regulating the Florida Bar.

Except for Davis Tree Farms, none **[**14]** of the clients were told of the engagement agreement. St. Louis knew that the clients had not been told, did not tell them himself, and never explained the terms of the engagement agreement to any of his clients. Thus, he failed to keep his clients reasonably informed about the status of the engagement agreement and, therefore, violated *rule 4-1.4(a)*.

Thereafter, St. Louis accepted his share of the $ 6,445,000 engagement agreement, which was $ 2,277,663. By accepting those proceeds, St. Louis ratified the terms of the engagement agreement. Also, St. Louis participated fully in all of the discussions and negotiations with DuPont concerning the engagement agreement. Thus, in executing the engagement agreement and keeping it secret from his clients, on behalf of the firm, St. Louis also violated *rule 4-5.1(c)* (a lawyer is responsible for another lawyer's violations of the Rules of Professional Conduct under certain circumstances) of the Rules Regulating the Florida Bar.

The referee also found that the $ 6,445,000 engagement agreement payment was in violation of *rule 4-5.6(b)* and, therefore, was a prohibited fee. Thus, St. Louis also violated *rule 4-1.5(a)* (an attorney shall not enter into **[**15]** an agreement for, charge, or collect an illegal, prohibited, or clearly excessive fee or cost) of the Rules Regulating the Florida Bar.

1997 Bar Investigation.

In 1997, having received informal complaints, the Bar conducted an investigation into allegations that the $ 59,000,000 settlement agreement was not explained to the clients and that it was a prohibited aggregate settlement.

In January 1997, St. Louis sent a letter to Bar Counsel Elena Evans, which served as his response to the complaints. In that response, he made the following statement: "It is therefore disappointing that Mr. Ossinsky would continue to insist that we have withheld some kind of 'documentation' relating to the settlement negotiations; we simply cannot furnish him with what does not exist." This statement was false because the engagement agreement did exist, and it had not been disclosed to Ossinsky or the Bar. At the time St. Louis made the statement, he knew his statement was false. It was a misrepresentation that was material to the Bar's investigation. Thus, St. Louis violated *rules 4-8.1(a)* and *4-8.4(c)* (engaging in conduct involving misrepresentation) of the Rules Regulating the Florida Bar.

[*116] The Bar received **[**16]** additional complaints from several former Benlate clients. The Bar's counsel for these investigations was Joan Fowler, and the Grievance Committee member was Jeanette Haag. At the request of St. Louis and Rodriguez, a meeting was arranged with these Bar representatives in Inverness. Prior to the meeting, Fowler had telephone conversations with St. Louis and Rodriguez in which she asked them to bring all documents relating to the settlements to the Inverness meeting. The meeting was held in Haag's office, with Haag, Fowler, St. Louis, Rodriguez, and Robert Batsel, the attorney representing St. Louis and Rodriguez, present.

Batsel advised St. Louis that he had a duty to answer all of the Bar's questions fully and truthfully, and to supply all documents that were responsive to an inquiry by the Bar. However, Batsel also advised St. Louis that he was not required to volunteer the existence of the engagement agreement or the confidential terms of the settlement.

Pursuant to the Bar's direction that St. Louis and Rodriguez bring any documents they wanted the Bar to review, they brought a box of records to the Inverness meeting. Although the records of the settlement and the

engagement agreement **[**17]** were in the box, the engagement agreement was neither inspected by the Bar nor brought to the Bar's attention. There are two versions of what transpired at this meeting. St. Louis and Rodriguez contend that no question was asked that would require them to show the engagement agreement to the Bar. In contrast, Fowler testified that St. Louis and Rodriguez pulled documents out of the box one at a time, showed them to the Bar representatives, and explained each document. Fowler testified that she believed she had seen all of the documents in the box. Thus, she was under a misapprehension that she had seen all of the documents. St. Louis never revealed the existence of the engagement agreement to Fowler or Haag, even when Fowler asked Rodriguez and St. Louis if they had received money from DuPont. This issue was discussed in the context of $ 245,000 that appeared to have been paid directly to the firm by DuPont. The Bar's concern was whether this was a payoff for an agreement not to represent future Benlate plaintiffs against DuPont. Thus, at that time, Fowler was under the misapprehension that the $ 245,000 was the payment by DuPont to FRF&S for a restriction on the right to practice. **[**18]** When Fowler inquired about that money, St. Louis stated that the amount was an award of sanctions against DuPont on the Davis case. Fowler believed this was a complete answer. However, at this point St. Louis knew or should have known of Fowler's misapprehension, yet St. Louis failed to correct it. Nor did St. Louis disclose the existence of the engagement agreement.

The referee found St. Louis's purposeful omission created a misunderstanding for Fowler. St. Louis's conduct, from the start, was designed to gain Fowler's trust by his offer of complete cooperation with the investigation, his willingness to travel to Inverness, and his eagerness to meet face to face to explain his position. Yet, while St. Louis knew the engagement agreement was relevant to the investigation of the settlements of the clients' claims, he deliberately obfuscated matters and omitted showing the engagement agreement to Fowler. Thus, St. Louis violated *rule 4-8.1(b)* (a lawyer in connection with a disciplinary matter shall not fail to disclose a fact necessary to correct a misapprehension) of the Rules Regulating the Florida Bar. Because St. Louis had requested the meeting to explain his position and demonstrate **[**19]** the good work he **[*117]** had performed for his clients, he had a duty to volunteer the engagement agreement to Fowler, especially because he knew at the time that he had created the misunderstanding. Yet, St. Louis purposefully failed to correct the misunderstanding. Thus, he violated *rule 4-8.1(b)* by his omission, and *rule 4-8.4(c)* (a lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation) by engaging in this misrepresentation to the Bar investigators.

Misrepresentation to Judge Wilson.

In October 2000, St. Louis appeared before Circuit Judge Thomas S. Wilson, Jr., while representing Carolyn W. Smith in a malpractice action against her former lawyers, who had represented Smith in a Benlate claim against DuPont. Defendant's counsel moved to disqualify St. Louis because of a conflict of interest. Even though St. Louis knew that the engagement agreement with DuPont was material to the conflict of interest issue, he failed to disclose its existence to the circuit judge.

Judge Wilson later discovered the existence of the engagement agreement and a prior disciplinary consent judgment regarding the settlement. He asked St. Louis why he should not provide that **[**20]** information to the Bar. In response, St. Louis claimed: "I disclosed to The Florida Bar at the time I was questioned every piece of information, every document at my disposal." The referee found this statement to be false because the engagement agreement had not been disclosed to the Bar. Further, at the time St. Louis made this statement to Judge Wilson, St. Louis knew it was false. He also knew that it concerned a fact that was material to the inquiry of Judge Wilson regarding a possible conflict of interest in the malpractice case.

Judge Wilson asked St. Louis if he did not have the $ 6,445,000 agreement at his disposal, did not know about it, or whether it did not exist. St. Louis replied: "No, Your Honor, I'm not telling you that. I am telling you, sitting as the Court presiding over this case, that I made full disclosure to The Florida Bar." This statement was false because St. Louis had not disclosed the engagement agreement to the Bar. Further, St. Louis knew that the statement was false when he made the statement to Judge Wilson. The referee found that St. Louis's statements to Judge Wilson were misrepresentations that violated *rules 4-3.3* (candor toward the tribunal) and *4-8.4(c) of the Rules Regulating the Florida Bar*.

[21]** *Defenses Raised by Respondent.*

Before the referee, St. Louis raised three affirmative defenses (1) the constitutionality of *rule 4-5.6(b)*; (2) he acted under duress, coercion, and necessity; and (3) he acted on the advice of counsel.

The referee found that *rule 4-5.6(b),* the practice restriction rule, is constitutional on its face and as applied. The referee also found that the policy reasons for the rule directly apply to this case. When DuPont issued its ultimatum that the firm be retained, DuPont effectively made St. Louis, who the referee stated was among the most qualified Benlate plaintiffs' lawyers in the world, unavailable to future claimants.

Next, the referee found that duress, coercion, and necessity were not viable defenses to the rule violations under the facts of this case. As a matter of law, fear of not receiving money cannot be the basis for a claim of duress. Also, St. Louis's argument that the settlement had to be finalized on the night in question does not amount to coercion. St. Louis further testified that he was acting in his clients' best interests by entering into the engagement agreement. As a matter of law, that is not a defense to rule violations.

[*118] Lastly, St. Louis **[**22]** raised advice of counsel as a defense to some of the alleged rule violations. *Rule 4-5.2(a) of the Rules Regulating the Florida Bar* states that a lawyer is bound by the rules of professional conduct even if the lawyer is instructed otherwise by another person. Thus, [HN1] a defense based on advice of counsel is not available to respondents in Florida Bar discipline cases unless specifically provided for in a rule or considered as a matter in mitigation. [3]

> 3 Similarly, other jurisdictions have held that the defense is not available in bar discipline proceedings. In *People v. Katz, 58 P.3d 1176, 1187 (Colo. P.D.J. 2002)*, that court said: "It is the individual attorney's duty and obligation to comply with the Rules of Professional Conduct. The attorney may not delegate that duty or responsibility to another under the umbrella of advice of counsel and thereby create a defense to a violation of those Rules."

Findings as to Guilt.

The referee found St. Louis guilty of violating *Rules Regulating the Florida Bar 4-1.4(a)* (informing client of status of representation); *4-1.4(b)* (duty to explain matters to client); *4-1.5(a)* (prohibited fees); *4-1.7(b)* (duty to avoid limitation on independent professional **[**23]** judgment); *4-3.3* (candor toward a tribunal); *4-5.1(c)* (responsibilities of a partner); *4-5.6(b)* (restriction on right to practice); *4-8.1(a)* (knowingly making a false statement of material fact); *4-8.1(b)* (failure to disclose a fact necessary to correct a misapprehension); *4-8.4(a)* (violating or attempting to violate the rules of professional conduct); and *4-8.4(c)* (engaging in conduct involving misrepresentation).

Disciplinary Recommendations.

With regard to aggravating factors, the referee found that St. Louis (1) had a dishonest motive; (2) submitted false statements during the disciplinary process; and (3) had substantial experience in the practice of law based on his fourteen years of experience as a lawyer when he entered into the practice restriction. However, the referee noted that St. Louis had no substantial experience in mass tort litigation.

With regard to mitigating factors, the referee found that St. Louis (1) had no prior disciplinary record; (2) was inexperienced in the practice of mass tort litigation; (3) had good character or reputation; and (4) has shown remorse for violating the rules and for what this has done to his family. The referee further noted that St. Louis **[**24]** has been through a significant amount of turmoil and that he and his family have been financially damaged by this experience.

As to discipline, the referee recommended that St. Louis (1) be suspended from the practice of law for sixty days; (2) be placed on probation for three years during which time he would be required to perform one hundred hours of pro bono services per year and to take five additional ethics hours per year; and (3) forfeit $ 2,277,663 to The Florida Bar's Clients' Security Fund in accordance with *rule 3-5.1(h) of the Rules Regulating the Florida Bar*. The referee found that such a forfeiture is authorized and that it is not a fine. The referee also awarded costs to the Bar in the amount of $ 72,218.37.

On Review. Before this Court, the Bar filed an initial brief seeking disbarment and review of the referee's finding that St. Louis did not violate *rule 4-1.7(a)*. St. Louis filed an amended answer brief and initial brief on cross appeal, in which he raised numerous issues.

ANALYSIS

1998 Consent Judgment and Res Judicata.

St. Louis argues that the Bar's claims are barred by the doctrine of res judicata. In 1998, St. Louis and the Bar entered into a consent judgment regarding **[**25]** **[*119]** disciplinary proceedings against St. Louis based on his misconduct in dealing with the firm's twenty Benlate clients. St. Louis asserts that the instant case is a subsequent attempt by the Bar to discipline him for conduct relating to the Benlate clients and that the doctrine of res judicata applies to this proceeding.

We disagree. The Bar was not precluded from bringing a second complaint that is based on the firm's secret agreement with DuPont. [HN2] The doctrine of res judicata applies when all four of the following conditions are present: (1) identity of the thing sued for; (2) identity of the cause of action; (3) identity of persons and parties to the action; and (4) "identity of quality in persons for or against whom claim is made." *McGregor v. Provident Trust Co. of Philadelphia, 119 Fla. 718, 162 So. 323, 328 (Fla. 1935)*; *see also Palm AFC Holdings, Inc. v. Palm Beach County, 807 So. 2d 703, 704 (Fla. 4th DCA 2002)*. Thus, the causes of action must be closely related

for the doctrine of res judicata to apply. *See Hay v. Salisbury, 92 Fla. 446, 109 So. 617, 621 (Fla. 1926).*

With regard to St. Louis, the previous and current proceedings broadly stem from his representation of the Benlate clients in a lawsuit against **[**26]** DuPont. However, the previous case focused on how FRF&S dealt with its clients and whether the firm improperly negotiated an aggregate settlement for the clients. In contrast, the current case is based on the secret engagement agreement that FRF&S arranged directly with DuPont while still representing its Benlate clients. [HN3] Where "the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered." *Gray v. Gray, 91 Fla. 103, 107 So. 261, 262 (Fla. 1926)* (quoting *Cromwell v. County of Sac, 94 U.S. 351, 353, 24 L. Ed. 195 (1876)).* Thus, the current case is not barred by res judicata as it is based on a different cause of action, *i.e.*, St. Louis's relationship with DuPont. *See Fla. Bar v. Gentry, 447 So. 2d 1342 (Fla. 1984)* (holding that because subsequent Bar allegations were based on separate, additional, and continuing misconduct, there was no identity of facts for res judicata to bar the proceedings).

Findings of Fact.

St. Louis challenges the referee's findings of fact. He contends the referee's finding that he made a **[**27]** material misrepresentation when responding to Bar Counsel Evans's initial inquiry letter is not supported by the record. [HN4] A referee's finding of fact carries with it a presumption of correctness that should be upheld unless clearly erroneous or without support in the record. *Fla. Bar v. Barrett, 897 So. 2d 1269, 1275 (Fla. 2005).* Absent a showing that the referee's findings are clearly erroneous or lacking in evidentiary support, this Court is precluded from reweighing the evidence and substituting its judgment for that of the referee. *Id.*

In January 1997, St. Louis sent the response letter to Bar Counsel Evans, in which he stated: "It is therefore disappointing that Mr. Ossinsky would continue to insist that we have withheld some kind of 'documentation' relating to the settlement negotiations; we simply cannot furnish him with what does not exist." When St. Louis wrote that response, he knew that the engagement agreement existed because he had assisted in drafting it. Further, he knew that it had not been disclosed to Gilley, Ossinsky, or the Bar. Thus, it is clear St. Louis lied to the Bar when he claimed that he was not withholding any documents and that no other documents existed. **[**28]** The referee's factual findings **[*120]** on this point are supported by the record.

Next, St. Louis claims the referee's finding that St. Louis failed to correct the apparent misapprehension of Bar investigators at the Inverness meeting is also not supported by the record. He argues that he did not lie to the investigators. In contrast to St. Louis's assertions, however, the record supports the referee's finding. St. Louis admitted that he did not want to divulge the engagement agreement to the Bar. In fact, he purposefully avoided disclosing the engagement agreement to the Bar investigators. Based on St. Louis's handling of the documents that were brought to the meeting and displayed by St. Louis to the Bar investigators, Fowler was under a misapprehension that she had seen all of the documents in the box.

[HN5] *Rule 4-8.1 of the Rules Regulating the Florida Bar* provides that a lawyer, in connection with a disciplinary matter, shall not "fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter or knowingly fail to respond to a lawful demand for information" from a bar admissions or bar disciplinary authority. The rule may be violated by an omission **[**29]** in connection with a disciplinary investigation of the lawyer's own conduct. Thus, *rule 4-8.1* imposes an affirmative duty upon lawyers to abide by high standards of truthfulness and candor in order to maintain the integrity of the profession. We conclude that the record and the rule support the referee's findings in this case.

St. Louis also challenges the referee's finding that he made deliberate misrepresentations of material facts to Judge Wilson. St. Louis asserts that he merely "misspoke" when telling Judge Wilson that he had engaged in "full disclosure" with the Bar. We strongly disagree with St. Louis's characterization of his statements and conclude that the record supports the referee's findings. Judge Wilson questioned St. Louis because of an allegation that St. Louis had a conflict of interest that could result in disqualification. Obviously, at that time, St. Louis knew that he had previously signed the engagement agreement with DuPont, which would create a conflict of interest for St. Louis regarding Benlate cases. The record clearly demonstrates that St. Louis did not answer Judge Wilson with candor and truthfulness. Thus, the referee's findings are amply supported.

[30]** *Violation of Rule 4-1.7(a).*

The Bar argues that the referee was clearly erroneous in failing to find that St. Louis violated *rule 4-1.7(a)* (representing interests adverse to his clients). We agree. The referee's determination that St. Louis was not guilty of violating *rule 4-1.7(a)* was a legal conclusion. [HN6] This Court's scope of review in attorney disciplinary actions is broader for legal conclusions than it is for factual findings. *See Fla. Bar v. Joy, 679 So. 2d 1165 (Fla.*

1996). Rule 4-1.7(a) provides that a lawyer shall not represent a client if representation of that client will be directly adverse to the interests of another client unless (1) the lawyer reasonably believes the representation will not adversely affect the lawyer's responsibilities to and relationship with the other client; and (2) each client consents after consultation. The rule imposes a mandatory prohibition on such representation, *unless* the lawyer meets the two-step exception. St. Louis did not meet those steps.

With regard to the first step, St. Louis knowingly entered into the engagement agreement with DuPont, forming a lawyer-client relationship with DuPont while still representing the Benlate clients. The record reveals **[**31]** that St. Louis even pressured some of his Benlate clients to accept Dupont's **[*121]** settlement offer. He informed clients that he would cease representing them unless they accepted the settlement, although he refused to inform those clients of the settlement details. In addition, St. Louis decided not to inform his clients about his decision to represent DuPont, the very decision he made while negotiating their cases against DuPont. Thus, the record demonstrates that through his actions St. Louis had divided loyalties, and that his divided loyalties could have adversely affected his Benlate clients. As to the second step, the record also demonstrates that St. Louis did not consult with or receive the consent of the Benlate clients before he entered into the engagement agreement. In fact, St. Louis went to great efforts to keep the engagement agreement secret from his Benlate clients.

St. Louis continued to advise his Benlate clients after he signed the secret engagement agreement with DuPont. He actually represented the Benlate plaintiffs for two years after signing the engagement agreement by acting as the escrow agent who administered the ten percent holdback monies. Thus, St. Louis was **[**32]** representing adverse interests because he was on retainer to DuPont during that period. Accordingly, we disapprove the referee's finding. We conclude that St. Louis violated *rule 4-1.7(a)* through his actions.

Constitutionality of Rule 4-5.6(b).

St. Louis asserts that *rule 4-5.6(b)* (restriction on practice) is unconstitutional. He broadly claims that the rule lacks a reasonable relation to a legitimate purpose and represents the taking of a lawyer's liberty or property rights without due process and adequate compensation. *Rule 4-5.6(b)* states that a [HN7] "lawyer shall not participate in offering or making . . . an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy." The constitutionality of *rule 4-5.6(b)* is determined by applying the rational basis test. *See generally DeBock v. State, 512 So. 2d 164, 168 (Fla. 1987)* (stating that there is a "rational basis" for holding attorneys to different standards than other regulated professionals); *In re Fla. Bar Amendment to Code of Prof'l Responsibility (Contingent Fees), 349 So. 2d 630, 635 (Fla. 1977)* (applying rational basis test in analyzing proposed amendment that impinged upon **[**33]** constitutional guarantee of freedom of contract).[HN8] The rational basis test is two-pronged: (1) whether there is a legitimate state interest to be served; and, if so, (2) whether the rule bears some reasonable relationship to that legitimate state interest. *See Amerisure Ins. Co. v. State Farm Mutual Auto. Ins. Co., 897 So. 2d 1287, 1290 (Fla. 2005).*

St. Louis incorrectly claims that *rule 4-5.6(b)* does not bear a rational relationship to a legitimate state purpose. [HN9] Clearly, the legitimate state purpose is to promote public welfare and the public's trust and confidence in the legal process, thus satisfying the first prong of the rational basis test. The second prong is satisfied because *rule 4-5.6(b)* promotes public welfare by prohibiting lawyers from entering in engagement agreements and thereby ensuring that (1) the public has access to qualified attorneys; (2) clients' awards are based on the merits of their claims; and (3) no conflicts exist between the interests of present and future clients. *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 371 (1993). Thus, *rule 4-5.6(b)* does not wantonly or arbitrarily interfere in the private rights of individuals.

St. Louis also asserts **[**34]** that *rule 4-5.6(b)* infringes on his liberty and property rights inherent in his freedom to contract and practice law. He overlooks the crucial point that[HN10] the practice of law is not a right, but a conditional and revocable privilege. **[*122]** *See DeBock, 512 So. 2d at 168.* Moreover, the freedom to contract may be duly limited in the interest of public welfare. *In re Fla. Bar Amendment, 349 So. 2d at 634* (stating that the freedom to contract is not an absolute right, but a qualified right and therefore subject to a reasonable restraint in the interest of public welfare). Thus, the rule regulates the privilege to practice law for the public's best interests. Accordingly, we conclude that the rule passes the rational basis test and is constitutional.

Rule of Lenity and Bar Proceedings.

St. Louis claims that the referee erroneously rejected the "rule of lenity" when he examined the allegations of rule violations and the fee forfeiture issue. He claims that the rules regarding the forfeiture of fees are ambiguous and, therefore, the rules should be construed in favor of the accused, *i.e.*, St. Louis should not be subject to this sanction. We disagree. [HN11] Typically, the rule of lenity, as codified in *section 775.021, Florida Statutes* **[**35]** (2006), only applies in the criminal context. *See, e.g., Jones v. State, 728 So. 2d 788 (Fla. 1st DCA 1999).* The rule is applicable where the language of a criminal

statute is susceptible to differing interpretations, thus allowing for construction in favor of the accused. *Id. § 775.021(1)*. Further, *section 775.021(3)* provides that "[t]his section *does not affect the power of a court to punish for contempt or to employ any sanction authorized by law* for the enforcement of an order or a *civil* judgment or decree." (Emphasis added.) Bar disciplinary proceedings, as in the instant case, are not considered civil or criminal, but are quasi-judicial. *See Fla. Bar v. Rotstein, 835 So. 2d 241, 243 (Fla. 2002)*. Thus, the rule of lenity does not apply to bar proceedings, where this Court has the inherent power to employ any lawfully authorized sanction to discipline Florida attorneys. Accordingly, we approve the referee's finding that the rule of lenity does not apply to this case.

Asserted Defenses.

St. Louis claims that the referee erred in finding that the defenses of duress, necessity, and coercion are inapplicable in this case. He contends that the referee's legal conclusion that "fear of **[**36]** not receiving money cannot be a basis for a claim of duress" is erroneous. Further, St. Louis reasons that he was in a difficult position when DuPont insisted that the engagement agreement was necessary to settle the cases.

The defenses of duress, necessity, and coercion are rarely presented in bar proceedings. In *Florida Bar v. Wishart, 543 So. 2d 1250, 1251 (Fla. 1989)*, we approved the referee's rejection of the necessity defense when Wishart, a lawyer and step-grandfather, sought custody of his step-granddaughter and in the process disobeyed court orders and claimed a necessity defense to protect his step-granddaughter from harm. Similarly, in this case, the referee ruled that duress, coercion, and necessity are not viable defenses to St. Louis's rule violations under these facts. There is no authority to support St. Louis's claims, but there is authority for the referee's finding. *See Wishart*. Accordingly, we conclude that the referee properly found that the defenses of duress, necessity, and coercion are inapplicable in this case.

Disciplinary Sanction.

The Bar argues that the referee's recommended disciplinary sanction of suspension is not supported and that disbarment is the appropriate **[**37]** sanction. We agree. St. Louis engaged in several acts of dishonesty. He violated *rules 4-3.3* and *4-8.4(c)* when he made false statements to Judge Wilson. [HN12] This Court typically imposes the severe sanction of disbarment on lawyers who intentionally lie to a court. An officer **[*123]** of the court who knowingly seeks to corrupt the legal process can expect to be excluded from that process. *See Fla. Bar v. Kickliter, 559 So. 2d 1123 (Fla. 1990)* (disbarring attorney who committed a fraud on the court); *Fla. Bar v. Agar, 394 So. 2d 405 (Fla. 1980)* (disbarring attorney who solicited false testimony, thereby allowing his client to perpetrate a fraud on the court).

In addition, St. Louis engaged in further violations of *rule 4-8.4(c)* when he made a false representation and committed an omission to two Florida Bar representatives. Further, he deliberately did not tell his clients about the engagement agreement. Thus, it is clear that St. Louis engaged in an extensive pattern of intentional deceit.

[HN13] Disbarment is appropriate "when a lawyer intentionally engages in conduct that is a violation of a duty owed as a professional with the intent to obtain a benefit for the lawyer or another, and causes serious or **[**38]** potentially serious injury to a client, the public, or the legal system." Fla. Stds. Imposing Law. Sancs. 7.1. At the time St. Louis made the misrepresentations to Judge Wilson and the Bar representatives, he knew his statements were false. Also, he knowingly failed to inform his Benlate clients about the engagement agreement and the conflict of interest. He intentionally engaged in these misrepresentations, violating the duties he owed as a professional, in order to preserve his portion of the $ 6,445,000 engagement agreement. These acts of deceit were detrimental to the legal system, negatively impacting the proceedings before Judge Wilson and St. Louis's representation of his Benlate clients.

Further, when St. Louis entered into the engagement agreement, he violated *rule 4-5.6(b)* by restricting his right to practice. Attorneys who engage in such engagement agreements receive severe sanctions, even when the misconduct is far less egregious than that in the instant case. *See In re Hager, 812 A.2d 904 (D.C. 2002)*(suspending for one year a lawyer who, while representing fifty clients in claims against a manufacturer, secured a side agreement with the manufacturer involving restricting **[**39]** his right to practice, dropping the pending case, and maintaining confidentiality about the side agreement); *In re Brandt, 331 Ore. 113, 10 P.3d 906 (Or. 2000)*(imposing thirteen-month and twelve-month suspensions on two lawyers, one with a prior disciplinary record and the other without, for entering into a side agreement with the adversary to act as legal counsel). In light of the severe sanctions imposed on attorneys who have engaged in secret engagement agreements and St. Louis's extensive acts of deceit, we conclude that disbarment is the appropriate sanction.

Forfeiture of the Prohibited Fee.

St. Louis challenges the referee's recommendation that he forfeit the funds he acquired through the engagement agreement. The funds for the engagement agreement were not a portion of the clients' settlement. The

engagement agreement funds were from the separate agreement between FRF&S and DuPont. Thus, as the funds were never client funds, it would be improper to provide the funds to the clients as restitution.

The proceeds from the engagement agreement are a prohibited fee, which are addressed by *rule 3-5.1(h)*. The rule provides, in pertinent part:

> [HN14] Forfeiture of Fees. An order of the Supreme Court of Florida **[**40]** or a report of minor misconduct adjudicating a respondent guilty of entering into, charging, or collecting a fee prohibited by the Rules Regulating The Florida Bar may order the respondent to forfeit the fee or any **[*124]** part thereof. . . . [A] fee otherwise prohibited by the Rules Regulating The Florida Bar may be ordered forfeited to The Florida Bar Clients' Security Fund and disbursed in accordance with its rules and regulations.

Thus, pursuant to *rule 3-5.1(h)*, the referee appropriately recommended forfeiture of the prohibited fees to the clients' security fund.

St. Louis disagrees with the referee's recommendation and relies on *Florida Bar v. Frederick, 756 So. 2d 79 (Fla. 2000)*, to argue that fines are not permitted in disciplinary cases. St. Louis is correct that fines are not allowed. However, in the context of this case, his reliance on *Frederick* is misplaced and his argument is without merit. *Frederick* does not address the distinct concept of disgorgement of prohibited fees pursuant to *rule 3-5.1(h)*.

Next, St. Louis argues that he should be permitted to retain the prohibited fee. We disagree. Allowing St. Louis to keep these funds would permit him to benefit from his own wrongdoing. **[**41]** Reimbursing DuPont would also be improper because DuPont has "unclean hands" and is partially responsible for the instant misconduct. The only remaining option is payment to the Florida Bar Clients' Security Fund, a fund that compensates clients who have been harmed by their lawyers.

Requiring St. Louis to disgorge his prohibited fee to the Clients' Security Fund is in accord with the three well-established principles that this Court has set for attorney discipline.

> [S]anctions [HN15] imposed for unethical conduct by members of the Bar must serve three purposes. First, the judgment must be fair to society, both in terms of protecting the public from unethical conduct and at the same time not denying the public the services of a qualified lawyer as a result of undue harshness in imposing penalty. Second, the judgment must be fair to the respondent, being sufficient to punish a breach of ethics and at the same time encourage reformation and rehabilitation. Third, the judgment must be severe enough to deter others who might be prone or tempted to become involved in like violations.

Fla. Bar v. Thue, 244 So. 2d 424, 425 (Fla. 1971) (quoting *Fla. Bar v. Pahules, 233 So. 2d 130, 132 (Fla. 1970))*. Permitting **[**42]** St. Louis to retain his ill-gotten gains would fail to provide a deterrent and could actually encourage misconduct by unethical lawyers, who would seize an opportunity to reap huge monetary rewards. Moreover, society would be harmed by allowing St. Louis to benefit in such a substantial way from his misconduct.

In *In re Hager, 812 A.2d 904 (D.C. 2002)*, the District of Columbia Court of Appeals examined a situation similar to the instant case. An attorney representing clients in a potential class action against a shampoo manufacturer entered into a settlement whereby clients would receive full purchase price refunds for the shampoo. The attorney was to be paid $ 225,000 in fees and expenses by the manufacturer, in return for agreeing not to represent present or future clients on similar claims against the manufacturer. Further, the attorney was not to disclose this agreement and the amount of his payment to the clients. *Id. at 908*. The court found that the attorney violated bar rules and it considered ordering him to disgorge his ill-gotten fees. The court speculated that restitution to the clients was inappropriate, but it was deeply concerned about the attorney's unjust enrichment. **[**43]** *Id. at 922-23*. Eventually, as part of his reinstatement proceedings, the attorney was required to place the improper **[*125]** fees into a client security fund. *See In re Hager, 878 A.2d 1246 (D.C. 2005)*.

Based on the clear language of *rule 3-5.1(h)*, the three purposes of attorney discipline, and *Hager*, we approve the referee's recommendation that St. Louis be required to disgorge the prohibited fee into the Clients' Security Fund. Further, after considering the referee's report, we modify the amount that the referee recommended for disgorgement. Footnote 18 of the referee's report sets out the computation for determining the amount of $ 2,277,663. We defer to the referee as the finder of fact on this figure. However, we note that the referee recommended that this total be reduced by the amount St. Louis paid in taxes. We disagree. St. Louis can seek a refund of those taxes from the Internal Revenue Service. Thus, we require St. Louis to disgorge the full amount of $ 2,277,663, plus interest. Interest shall be calculated as starting on August 12, 1996, the date the firm received the $ 6,445,000.

CONCLUSION

Accordingly, Roland Raymond St. Louis, Jr., is hereby disbarred. The disbarment will be effective **[**44]** thirty days from the filing of this opinion so that St. Louis can close out his practice and protect the interests of existing clients. If St. Louis notifies this Court in writing that he is no longer practicing and does not need the thirty days to protect existing clients, this Court will enter an order making the disbarment effective immediately. St. Louis shall accept no new business from the date this opinion is filed until he is readmitted to the practice of law in Florida. Further, St. Louis is required to disgorge $ 2,277,663, plus interest, to The Florida Bar Clients' Security Fund.

Judgment is entered for The Florida Bar, 651 East Jefferson Street, Tallahassee, Florida 32399-2300, for recovery of costs from Roland Raymond St. Louis, Jr., in the amount of $ 72,218.37, for which sum let execution issue.

It is so ordered.

LEWIS, C.J., and WELLS, ANSTEAD, PARIENTE, QUINCE, CANTERO, and BELL, JJ., concur.

THE FILING OF A MOTION FOR REHEARING SHALL NOT ALTER THE EFFECTIVE DATE OF DISBARMENT.

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Positive
As of: Dec 22, 2008

THE FLORIDA BAR, Complainant/Cross-Respondent, vs. DAVID A. BARRETT, Respondent/Cross-Complainant.

No. SC03-375

SUPREME COURT OF FLORIDA

897 So. 2d 1269*; *2005 Fla. LEXIS 486*; *30 Fla. L. Weekly S 169

March 17, 2005, Decided

PRIOR HISTORY: **[**1]** Original Proceeding - The Florida Bar.

DISPOSITION: ,David A. Barrett is hereby disbarred from the practice of law in the State of Florida.

CASE SUMMARY:

PROCEDURAL POSTURE: Complainant Florida Bar filed a complaint against respondent attorney, alleging that the attorney committed various ethical violations arising from two client solicitation schemes. A referee found that the attorney violated seven sections of the Rules Regulating the Florida Bar and recommended one year's suspension. The Florida Bar appealed the recommended sanction; the attorney cross-appealed.

OVERVIEW: The referee found that the attorney hired an individual as a "paralegal," but the individual instead solicited clients at a hospital while acting as a hospital chaplain. The attorney eventually fired the individual to avoid getting caught, but the individual continued to solicit clients for the attorney's firm while working for a chiropractor. The attorney also improperly split fees with the individual. The court found that Florida Bar did not unreasonably delay in filing its complaint. The overwhelming record evidence supported the referee's findings of fact, so the attorney's challenge to those findings failed. The court found that disbarment rather than a suspension was the appropriate sanction given the nature of the solicitation schemes, the fact that 22 clients were improperly solicited, the attorney's selfish motive, the attorney's dishonesty during the disciplinary proceedings, and the vulnerability of one of the victims who was solicited at the hospital.

OUTCOME: The court approved the referee's findings of fact and recommendations as to guilt, but the court declined to approve the referee's recommended discipline and instead disbarred the attorney.

LexisNexis(R) Headnotes

Civil Procedure* > *Judicial Officers* > *Referees* > *General Overview
Legal Ethics* > *Sanctions* > *Disciplinary Proceedings* > *Hearings
[HN1] The referee in an attorney disciplinary case does not err when he adopts the Florida Bar's proposed findings, particularly where the referee first announces his findings as to guilt and further states that he intends to adopt the allegations of the Bar.

Governments* > *Legislation* > *Statutes of Limitations* > *Time Limitations
Legal Ethics* > *Sanctions* > *Disciplinary Proceedings* > *General Overview
[HN2] Fla. R. Bar 3-7.16 was not adopted until 1995. Rule 3-7.16 not applicable where misconduct occurred prior to the adoption of the statute of limitations.

Civil Procedure* > *Judicial Officers* > *Referees* > *Judicial Review

Evidence > Inferences & Presumptions > Presumption of Regularity
Legal Ethics > Sanctions > Disciplinary Proceedings > Appeals
[HN3] When the Florida Supreme Court reviews a referee's factual findings in an attorney discipline case, the court's standard of review is as follows: A referee's findings of fact regarding guilt carry a presumption of correctness that should be upheld unless clearly erroneous or without support in the record. Absent a showing that the referee's findings are clearly erroneous or lacking in evidentiary support, the court is precluded from reweighing the evidence and substituting its judgment for that of the referee. The objecting party carries the burden of showing that the referee's findings of facts are clearly erroneous. The objecting party cannot satisfy this burden by simply pointing to contradictory evidence when there is also competent, substantial evidence in the record that supports the referee's findings.

Civil Procedure > Judicial Officers > Referees > General Overview
Legal Ethics > Sanctions > Disciplinary Proceedings > Appeals
[HN4] When reviewing a referee's recommended discipline of an attorney, the Florida Supreme Court's scope of review is broader than that afforded to the referee's findings of fact because the court has the ultimate responsibility to determine the appropriate sanction.

Civil Procedure > Judgments > General Overview
Legal Ethics > Sanctions > General Overview
[HN5] In determining a proper sanction, the Florida Supreme Court will take into consideration the three purposes of lawyer discipline. First, the judgment must be fair to society, both in terms of protecting the public from unethical conduct and at the same time not denying the public the services of a qualified lawyer as a result of undue harshness in imposing penalty. Second, the judgment must be fair to the respondent, being sufficient to punish a breach of ethics and at the same time encourage reformation and rehabilitation. Third, the judgment must be severe enough to deter others who might be prone or tempted to become involved in like violations.

Civil Procedure > Judicial Officers > Referees > Appointments
Legal Ethics > Sanctions > Disciplinary Proceedings > Appeals
[HN6] As a general rule, when evaluating a referee's recommended discipline of an attorney, the Florida Supreme Court will not second-guess a referee's recommended discipline as long as that discipline (1) is authorized under the Florida Standards for Imposing Lawyer Sanctions, and (2) has a reasonable basis in existing case law.

Legal Ethics > Legal Services Marketing > Direct Contact With Prospective Clients
Legal Ethics > Sanctions > Disbarments
Legal Ethics > Sanctions > Suspensions
[HN7] Florida cases involving unethical solicitation of clients have imposed a wide variety of discipline depending on the specific facts of each case. Moreover, the Florida Standards for Imposing Lawyer Sanctions authorize either disbarment or suspension in such circumstances, depending on the amount of harm or potential harm caused and on whether the conduct was intentional versus knowing.

Legal Ethics > Sanctions > General Overview
[HN8] When an attorney affirmatively engages in conduct he or she knows to be improper, more severe discipline is warranted.

Governments > Courts > Rule Application & Interpretation
[HN9] The Florida Supreme Court expects that its rules will be respected and followed.

COUNSEL: John F. Harkness, Jr., Executive Director, John Anthony Boggs, Staff Counsel, Thomas Gary, Chair, Second Judicial Circuit Grievance Committee, and James A. G. Davey, Jr., Bar Counsel, The Florida Bar, Tallahassee, Florida, for Complainant/Cross-Respondent.

John A. Weiss of Weiss and Etkin, Tallahassee, Florida and W. O. Birchfield of Birchfield and Humphrey, P.A., Jacksonville, Florida, for Respondent/Cross-Complainant.

JUDGES: PARIENTE, C.J., and WELLS, ANSTEAD, LEWIS, QUINCE, CANTERO, and BELL, JJ., concur.

OPINION

[*1271] PER CURIAM.

We have for review a referee's report regarding alleged ethical breaches by attorney David A. Barrett. We have jurisdiction. *See art. V, § 15, Fla. Const.* We approve the referee's findings of fact and recommendations as to guilt. For the reasons explained below, we decline

to approve the recommended sanction of a one-year suspension and instead disbar Barrett.

I. FACTS

The Florida Bar filed a complaint against respondent David A. Barrett, alleging numerous counts of misconduct involving two unethical schemes to solicit clients. After a multiple-day hearing, the referee issued a report making the **[**2]** following findings and recommendations.

Barrett was the senior partner and managing partner in the Tallahassee law firm of Barrett, Hoffman, and Hall, P.A. In approximately January 1993, Barrett hired Chad Everett Cooper, an ordained minister, as a "paralegal." Although Cooper had previously worked for a law firm in Quincy, Florida, Cooper's primary duty at Barrett's law firm was to bring in new clients. As Cooper testified, Barrett told him to "do whatever you need to do to bring in some business" and "go out and . . . get some clients." Cooper was paid a salary averaging $ 20,000 and, in addition to his salary, yearly "bonuses" which generally exceeded his yearly salary. In fact, Cooper testified that Barrett offered him $ 100,000 if he brought in a large case.

To help Cooper bring in more personal injury clients to the law firm, Barrett devised a plan so that Cooper could access the emergency areas of a hospital and thus be able to solicit patients and their families. In order to gain such access, Barrett paid for Cooper to attend a hospital chaplain's course offered by Tallahassee Memorial Hospital.

In approximately March of 1994, Molly Glass's son was critically injured when **[**3]** he was struck by an automobile while on his bicycle. While her son was being treated in the intensive care unit at Tallahassee Memorial Hospital, Cooper met the Glass family. Cooper, who dressed in "clothing that resembled a pastor," identified himself to the family as a chaplain and offered to pray with them. Thereafter, Cooper gave a family member of Molly Glass the business card of attorney Eric Hoffman, one of the partners in Barrett's law firm, and suggested that the family call the firm. Neither Barrett nor Cooper knew Molly Glass prior to Cooper's solicitation at the hospital. After her son died, Molly Glass retained Barrett's law firm in a wrongful death action. A settlement was negotiated, and she was pleased with the result until May of 1999, when she read a newspaper article about improper solicitation of clients and realized that Cooper's actions in the hospital constituted inappropriate **[*1272]** solicitation. The referee specifically found that Cooper was Barrett's agent at the time that Cooper solicited Molly Glass and that Barrett ordered the conduct and ratified it by paying Cooper a salary and bonuses.

In April 1994, Cooper referred his friend, Terry Charleston, to Barrett's **[**4]** law firm. Charleston was an automobile accident victim whose injuries left him a quadriplegic. After the case was settled for over $3 million, Cooper was paid a bonus that year of $ 47,500. [1] Barrett attempted to justify the extremely large bonus, contending that the bonus was based on personal services, pastoral services, and companionship that Cooper provided to Charleston. The referee rejected this explanation, finding that Barrett lied about the reason for the bonus. Instead, the referee found that Barrett gave Cooper the bonus for bringing in the case, and thus Barrett engaged in an illegal fee-splitting plan.

1 Since Cooper knew Charleston before referring him to the law firm, the only issue raised to the referee was whether Barrett had engaged in an improper fee-splitting plan with a nonlawyer.

On September 19, 1997, Barrett, who had the ultimate authority for hiring and firing in his law firm, fired Cooper. In the words of Barrett's now-deceased partner, Eric Hoffman, Barrett fired Cooper because "it **[**5]** was getting pretty hot and he was afraid that everyone would get caught." [2] However, even after Cooper was fired, his relationship with Barrett did not end.

2 Sandra Scott, a legal assistant at respondent's law firm, testified that Hoffman made this statement to her.

While Cooper obtained accident reports and solicited patients for a chiropractor, he also continued to solicit clients for Barrett. After the patients were seen by the chiropractor, the accident reports were forwarded to Barrett's law partner, Hoffman. Cooper was paid $ 200 for each client who was brought into the law firm. The referee specifically found that Barrett knew about this scheme and that he ratified the conduct of Hoffman and Cooper. Barrett micromanaged the office, especially the finances, and personally signed the checks to Cooper in the amount of $ 200 per client for soliciting eight clients. Moreover, Barrett inquired as to whether there was insurance coverage before authorizing the firm's checks written to Cooper for soliciting **[**6]** clients. In addition to Molly Glass, the referee found that Barrett improperly solicited twenty-one other clients in violation of the Rules of Professional Conduct.

Finally, in May 1996, Barrett sent Cooper to Miami and Chicago in order to solicit clients as a result of the Value Jet airplane crash in the Everglades. Although Barrett denied any knowledge about this, his own busi-

ness records show that $ 974.24 was paid for Cooper's travel expenses. The referee found that Barrett's testimony regarding this matter was not credible. While neither solicitation resulted in clients for Barrett's firm, the referee concluded these were inappropriate solicitation attempts directed by Barrett.

Based on the above factual findings, the referee found that Barrett was guilty of violating the following sections of the Rules Regulating the Florida Bar: 4-5.1(c)(1) (responsibilities of a partner); 4-5.3(b)(3)(A) (responsibilities regarding nonlawyer assistants); 4-5.4(a)(4) (sharing fees with nonlawyers); *4-7.4(a)* (solicitation); *4-8.4(a)* (violating or attempting to violate the rules of professional conduct); 4-8.4(c) (engaging in conduct involving deceit); and 4-8.4(d) (engaging in conduct in connection **[**7]** with the practice of law that is **[*1273]** prejudicial to the administration of justice). In turning to the recommended discipline, the referee found the following aggravating circumstances applied in this case: (1) Barrett had a dishonest or selfish motive; (2) he exhibited a pattern of misconduct; (3) he was guilty of multiple offenses; (4) he submitted false statements during the disciplinary process by lying to the referee; (5) the victim was in a vulnerable condition; and (6) Barrett had substantial experience in the practice of law. As to mitigation, the referee found that four mitigating circumstances applied here: (1) Barrett did not have a prior disciplinary record; (2) he made full and free disclosure to the disciplinary board or had a cooperative attitude toward the proceedings; (3) character witnesses testified to Barrett's good character and reputation; and (4) Barrett exhibited remorse as to the effect of his conduct upon his family, friends, and clients. After considering the foregoing aggravating and mitigating factors, the referee recommended that Barrett be suspended from the practice of law for one year and be ordered to pay the Bar's costs.

The Florida Bar appeals to this **[**8]** Court, contending that we should increase the discipline to disbarment. Respondent cross-appeals and challenges whether (1) the referee made independent findings of fact; (2) the referee improperly denied several preliminary motions; (3) there is sufficient proof to support the referee's findings of fact; and (4) the sentence is excessive in light of our previous Bar discipline decisions. Since Barrett challenges both the findings of fact and the recommended discipline, we address the cross-appeal first.

II. ANALYSIS

Sufficiency of the Referee's Report

In his first claim, Barrett requests that this Court disregard the referee's findings of fact because the referee adopted verbatim the Bar's proposed findings of fact without first making any prior pronouncements on the factual issues before him, and thus, the referee's findings do not reflect the judge's independent decision-making. In support of his contentions, Barrett alleges that Florida courts have condemned trial judges for blindly adopting orders submitted by one party without first making factual findings on the record. *See Perlow v. Berg-Perlow, 875 So. 2d 383, 388 n.4 (Fla. 2004)*; *Rykiel v. Rykiel, 795 So. 2d 90, 92 (Fla. 5th DCA 2000),* **[**9]** *quashed on other grounds, 838 So. 2d 508 (Fla. 2003)*; *Waldman v. Waldman, 520 So. 2d 87, 89 (Fla. 3d DCA 1988), receded from on other grounds by Acker v. Acker, 821 So. 2d 1088 (Fla. 3d DCA 2002), review granted, 842 So. 2d 842 (Fla. 2003).*

The record does not support Barrett's contentions that the referee failed to make his findings on the record before adopting the proposed report. The record shows that after defense counsel requested that the referee make specific findings of fact prior to the next hearing, the referee informed both parties that he found that Barrett knew about and participated in the solicitation schemes, that Barrett was also vicariously responsible, and that the referee's subsequent report would find that the Bar had sufficiently proved all of the allegations contained in its complaint. The Bar submitted the proposed findings of fact, which contained statements similar to those contained in its initial complaint.

This Court has already rejected Barrett's argument in *Florida Bar v. Cramer, 678 So. 2d 1278 (Fla. 1996)*. In that case, this Court held that [HN1] the referee did not err **[**10]** when it adopted the Bar's proposed findings, particularly in light of the fact that the referee first announced his findings as **[*1274]** to guilt and further stated that he intended to adopt the allegations of the Bar. *Id. at 1279*. Since the record shows that the referee in the case before us made his findings on the record before adopting the proposed report, we likewise find the referee here did not err.

Preliminary Motions

Next, Barrett contends that the referee erred in denying several of his preliminary motions, including two motions to dismiss and a motion to strike the testimony of Molly Glass. Barrett first challenges the referee's denial of his motion to dismiss the Bar's entire case when the Bar withdrew the allegations relating to Frances Brown. [3] According to Barrett, when the Bar withdrew the Brown allegations, all of the charges were essentially withdrawn because the case number assigned to the

Brown allegations encompassed the entire Bar complaint.

> 3 At the conclusion of the first day of the final hearing, counsel for the Bar stated:
>
> > Your Honor, before we proceed, I would like to advise the Referee that The Florida Bar will no longer pursue in the complaint paragraphs 12, 13 or 14. Mr. Cooper's testimony today [that he only gave Brown the number to the church where Cooper was a pastor and not the telephone number to Respondent's law firm] comports with what he told me last night. I believe him.

[11]** We find Barrett's argument to be without merit. The fact that the Bar withdrew the allegations relating to Brown from the disciplinary proceedings and that the case number assigned to the Brown complaint included the other complaints against Barrett did not require the remainder of the allegations contained in the Bar's complaint to be withdrawn. While the Brown allegations were withdrawn, the remainder of the allegations remained in full force.

Barrett next argues that the reference to Molly Glass in the complaint was impermissible since that claim was barred by the six-year statute of limitations which is provided in *Rule Regulating the Florida Bar 3-7.16(a)*. This argument is incorrect. The improper solicitation concerning Molly Glass occurred in approximately March 1994; however, [HN2] *rule 3-7.16* was not adopted until 1995. *See Fla. Bar re Amendments to Rules Reg. Fla. Bar, 658 So. 2d 930 (Fla. 1995)* (adopting *rule 3-7.16*). Accordingly, the statute of limitations is not applicable here. *See, e.g., Florida Bar v. Walter, 784 So. 2d 1085, 1086 (Fla. 2001)* (*rule 3-7.16* not applicable where misconduct occurred prior **[**12]** to adoption of statute of limitations). Instead, the only issue remaining is whether the Bar proceeded within a "reasonable time" in filing its complaint against Barrett, a question which leads us into Barrett's next argument.

Specifically, Barrett challenges the referee's denial of his motion to dismiss based on prosecutorial delay, contending that his case is similar to and should be controlled by the decision of *Florida Bar v. Walter, 784 So. 2d 1085 (Fla. 2001)*. In *Walter*, we dismissed disciplinary proceedings where the prosecutorial delay lasted seven years. We noted that, although it was a "close call," the Bar did not act within a "reasonable time" in taking seven years to file its complaint. *Id. at 1087*. In that opinion, we pointed out that the dismissal was a result of the "unique circumstances" of Walter's case.

We agree with the Bar that the delay in the instant case was the result of an ongoing joint investigation between the Bar and the Fraud Division of the Florida Department of Insurance. Evidence in the record and from the referee's findings of fact supports the assertion that the Bar actively pursued its claim against Barrett **[**13]** during this period of time. Accordingly, **[*1275]** we hold that any delay in proceeding in this case was insufficient under the circumstances of this case.

Findings of Fact

Next, Barrett challenges numerous aspects of the referee's findings of fact, contending that the Bar did not prove his misconduct by clear and convincing evidence. Barrett argues that the referee erred in finding that (1) Chad Cooper's job did not involve paralegal work; (2) Barrett was responsible for devising an improper plan to bring in more clients; (3) Cooper was Barrett's agent, over whom Barrett had direct supervisory authority; (4) Barrett lied during his testimony about the bonuses to Cooper; (5) Cooper was fired because Barrett did not want to get caught; (6) Cooper solicited clients after he was fired from Barrett's firm; (7) Barrett improperly solicited twenty-one clients; and (8) Barrett sent Cooper to Miami and Chicago to improperly solicit clients. We disagree.

[HN3] When this Court reviews a referee's factual findings, our standard of review is as follows:

> A referee's findings of fact regarding guilt carry a presumption of correctness that should be upheld unless clearly erroneous or without support **[**14]** in the record. Absent a showing that the referee's findings are clearly erroneous or lacking in evidentiary support, this Court is precluded from reweighing the evidence and substituting its judgment for that of the referee.

Florida Bar v. Spann, 682 So. 2d 1070, 1073 (Fla. 1996) (citations omitted). The objecting party carries the burden of showing that the referee's findings of facts are clearly erroneous. *Florida Bar v. Miele, 605 So. 2d 866, 868 (Fla. 1992)*. Barrett cannot satisfy this burden by simply pointing to contradictory evidence when there is also competent, substantial evidence in the record that supports the referee's findings. *Florida Bar v. Vining,*

761 So. 2d 1044, 1048 (Fla. 2000). While there may be conflicting evidence, the overwhelming record evidence supports the referee's findings of fact. Therefore, we reject Barrett's contention that the findings of fact in the referee's report are not properly supported by the evidence. Because competent, substantial evidence in the record supports the referee's findings, we adopt the findings of fact and further approve without further discussion the referee's recommendation **[**15]** that Barrett be found guilty of violating the above rules.

Discipline

Both parties appeal the recommended discipline of a one-year suspension. Barrett argues that a twenty-day suspension is appropriate based on previous solicitation cases. The Bar argues that the appropriate discipline for such egregious ethical misconduct is disbarment. We agree with the Bar.

[HN4] When reviewing a referee's recommended discipline, this Court's scope of review is broader than that afforded to the referee's findings of fact because this Court has the ultimate responsibility to determine the appropriate sanction. *Florida Bar v. McFall, 863 So. 2d 303, 307 (Fla. 2003)*. [HN5] In determining a proper sanction, the Court will take into consideration the three purposes of lawyer discipline.

> First, the judgment must be fair to society, both in terms of protecting the public from unethical conduct and at the same time not denying the public the services of a qualified lawyer as a result of undue harshness in imposing penalty. Second, the judgment must be fair to the respondent, being sufficient to punish a breach of ethics and at the same time encourage reformation and rehabilitation. **[*1276]** Third, **[**16]** the judgment must be severe enough to deter others who might be prone or tempted to become involved in like violations.

Florida Bar v. Lord, 433 So. 2d 983, 986 (Fla. 1983) (emphasis omitted). [HN6] As a general rule, when evaluating a referee's recommended discipline, the Court will not second-guess a referee's recommended discipline as long as that discipline (1) is authorized under the Florida Standards for Imposing Lawyer Sanctions (the Standards), and (2) has a reasonable basis in existing case law. *McFall, 863 So. 2d at 307*.

[HN7] Our cases involving unethical solicitation of clients have imposed a wide variety of discipline depending on the specific facts of each case. *See, e.g., Florida Bar v. Wolfe, 759 So. 2d 639 (Fla. 2000)* (one-year suspension); *Florida Bar v. Weinstein, 624 So. 2d 261 (Fla. 1993)* (disbarment); *Florida Bar v. Stafford, 542 So. 2d 1321 (Fla. 1989)* (six-month suspension); *Florida Bar v. Sawyer, 420 So. 2d 302 (Fla. 1982)* (eighteen-month suspension); *Florida Bar v. Gaer, 380 So. 2d 429 (Fla. 1980)* (public reprimand). Moreover, the Standards **[**17]** authorize either disbarment or suspension in such circumstances, depending on the amount of harm or potential harm caused and on whether the conduct was intentional versus knowing. *Compare* Fla. Stds. Imposing Law. Sanct. 7.1 *with* Fla. Stds. Imposing Law. Sancs. 7.2.

Barrett argues that he should receive the same discipline (a twenty-day suspension) ordered in two previous unpublished decisions that involved improper solicitations: *Florida Bar v. Vanture, 833 So. 2d 775 (Fla. 2002)* (table report of unpublished order), and *Florida Bar v. Flowers, 826 So. 2d 993 (Fla. 2002)* (table report of unpublished order). He further alleges that discipline is completely unwarranted because the facts of the case do not support that Barrett was responsible for the improper schemes. The referee found that Barrett was responsible for the misconduct based on findings that he personally directed some of the solicitations and because he ratified all of the misconduct. As addressed above, these findings are supported by competent, substantial evidence.

We find that the facts of this case are substantially similar to those in the case of *Weinstein*. In *Weinstein* **[**18]** , the attorney personally solicited a critically injured patient in his hospital room, using lies and deception to gain entrance into the room. *624 So. 2d at 261-62*. Further, the attorney gave false or misleading testimony under oath regarding his improper solicitations. We stated that

> in-person solicitation of a [critically injured] patient in a hospital room, accompanied by lying to health-care personnel, [is] one of the more odious infractions that a lawyer can commit; his conduct brings his profession into disrepute and reduces it to a caricature. Disbarment is the appropriate sanction in the aggravated circumstances of this case.

Id. at 262.

Similarly, Barrett used deception to gain access to hospital patients by paying for Cooper to complete a hospital chaplain's course and sending him under the

guise of providing spiritual comfort to people in their most needy time, when at the time Cooper was an attorney's employee being paid to obtain clients. Barrett then changed his scheme when "it was getting pretty hot," instead relying on Cooper to obtain clients while he worked for a chiropractor. His schemes resulted in twenty-two improperly **[**19]** solicited clients. Additionally, Barrett also engaged in an illegal fee-splitting plan with Cooper. The conduct in this case is clearly as egregious as the conduct in *Weinstein*. Moreover, this is not a situation where Barrett failed to **[*1277]** realize his actions were wrong; he engaged in the conduct intentionally and then fired Cooper when he became concerned about the possibility of being caught. As this Court has held, [HN8] when an attorney "affirmatively engages in conduct he or she knows to be improper, more severe discipline is warranted." *Florida Bar v. Wolfe, 759 So. 2d 639, 645 (Fla. 2000)*. Finally, the instant case had substantial aggravating circumstances, including that (1) Barrett engaged in this type of improper solicitations based on a selfish motive to obtain clients; (2) the improper solicitations were a part of organized schemes that lasted for years; (3) multiple offenses occurred, including two different schemes which led to at least twenty-two improper solicitations; (4) Barrett lied to the referee during the proceedings; (5) one of the victims was especially vulnerable and in fact retained Barrett's law firm only because she was angry that somebody else **[**20]** had tried to take advantage of her during a time in which she was clearly preoccupied with her son's critical injuries; [4] and (6) Barrett had substantial experience in the practice of law. While the referee did find that mitigating circumstances applied, these pale by comparison to the aggravating circumstances in this case. Any discipline less than disbarment is far too lenient based on the amount and type of misconduct which occurred here and would not fulfill the three purposes of lawyer discipline.

4 Molly Glass was in a precarious emotional state, sitting in a bedside vigil while her son was fighting for his life. During this time, a potential defendant attempted to exploit this very weakness, offering to pay her $10,000 if she signed a release agreeing not to sue. Molly Glass, infuriated that someone would attempt to take advantage of her while in the midst of such a tragedy, turned to somebody she thought she could trust to help her, an attorney that was recommended to her by a hospital chaplain, only to realize years later that her attorney also exploited this very same vulnerability in order to obtain her business.

[21]** In sum, members of The Florida Bar are ethically prohibited from the solicitation of clients in the manner engaged in by Barrett. [HN9] The Court expects that its rules will be respected and followed. This type of violation brings dishonor and disgrace not only upon the attorney who has broken the rules but upon the entire legal profession, a burden that all attorneys must bear since it affects all of our reputations. Moreover, such violations harm people who are already in a vulnerable condition, which is one of the very reasons these types of solicitations are barred. Therefore, this Court will strictly enforce the rules that prohibit these improper solicitations and impose severe sanctions on those who commit violations of them.

III. CONCLUSION

We approve the referee's findings of fact and recommendations as to guilt, but we decline to approve the recommended discipline of a one-year suspension and instead disbar respondent. Accordingly, David A. Barrett is hereby disbarred from the practice of law in the State of Florida. The disbarment will be effective thirty days from the date this opinion is filed so that Barrett can close out his practice and protect the interests of **[**22]** existing clients. If Barrett notifies this Court in writing that he is no longer practicing and does not need the thirty days to protect existing clients, this Court will enter an order making the disbarment effective immediately. Barrett shall accept no new business after this opinion is filed.

Judgment is entered in favor of The Florida Bar, 651 East Jefferson Street, Tallahassee, Florida 32399, for recovery of costs from David A. Barrett in the amount **[*1278]** of $ 16,156.67, for which sum let execution issue.

It is so ordered.

PARIENTE, C.J., and WELLS, ANSTEAD, LEWIS, QUINCE, CANTERO, and BELL, JJ., concur.

THE FILING OF A MOTION FOR REHEARING SHALL NOT ALTER THE EFFECTIVE DATE OF THIS DISBARRMENT

5 of 10 DOCUMENTS

Analysis
As of: Dec 22, 2008

THE FLORIDA BAR, Complainant, vs. HOWARD GROSS, Respondent.

No. 75,347

SUPREME COURT OF FLORIDA

610 So. 2d 442*; *1992 Fla. LEXIS 2122*; *18 Fla. L. Weekly S 14

December 24, 1992, Decided

PRIOR HISTORY: **[**1]** Original Proceeding - The Florida Bar

CASE SUMMARY:

PROCEDURAL POSTURE: Respondent judge appealed a decision of the Florida Bar that found him guilty of judicial misconduct and recommended discipline.

OVERVIEW: Respondent judge accepted a bribe in exchange for lowering a defendant's bond upon his attorney's request. Respondent was charged with failing to report professional misconduct of another attorney, in violation of Fla. *Bar Rule **4-8.3(**a)*, and engaging in conduct involving dishonesty, fraud, deceit or misrepresentation and engaging in conduct prejudicial to the administration of justice, in violation of Fla. *Bar*. *Rule 4-8.4(a)*, (c), and (d). Petitioner referee concluded that respondent engaged in misconduct and respondent appealed, alleging that the findings were not supported by legally sufficient evidence. The court ordered that respondent be disbarred because the referee's findings were not clearly erroneous and were supported by the evidence as the circumstantial evidence of guilt was strong. The court also ruled that judicial misconduct could be grounds for attorney discipline.

OUTCOME: The court disbarred respondent judge because the finding that respondent engaged in judicial misconduct by accepting a bribe was legally sufficient based upon the evidence.

LexisNexis(R) Headnotes

Civil Procedure* > *Judicial Officers* > *Referees* > *Appointments
Legal Ethics* > *Sanctions* > *Disciplinary Proceedings* > *Appeals
Legal Ethics* > *Sanctions* > *Disciplinary Proceedings* > *Hearings
[HN1] While the Florida Bar has the burden of proof in bar disciplinary proceedings, the Florida Supreme Court delegates the responsibility of fact finding to the referee. A referee's findings enjoy the same presumption of correctness as the judgment of a trier of fact in a civil proceeding.

Civil Procedure* > *Judicial Officers* > *Referees* > *Judicial Review
Legal Ethics* > *Sanctions* > *Disciplinary Proceedings* > *Appeals
[HN2] Upon review, the Florida Supreme Court must sustain a referee's findings if they are supported by competent and substantial evidence.

Civil Procedure* > *Judicial Officers* > *Referees* > *General Overview
Legal Ethics* > *Sanctions* > *Disciplinary Proceedings* > *Appeals
[HN3] A referee's findings are upheld unless they are without support in the evidence.

Legal Ethics* > *Judicial Conduct
Legal Ethics* > *Sanctions* > *General Overview

[HN4] It is clear that misconduct as a judge can be grounds for attorney discipline.

COUNSEL: John F. Harkness, Jr., Executive Director and John T. Berry, Staff Counsel, Tallahassee, Florida; David G. McGunegle, Bar Counsel, Orlando, Florida, and Warren Jay Stamm, Bar Counsel, Miami, Florida, for Complainant.

Rhea P. Grossman of Rhea P. Grossman, P.A., Miami, Florida, for Respondent.

JUDGES: BARKETT, C.J., OVERTON, SHAW, GRIMES and HARDING, JJ., and JAMES E. JOANOS and DOUGLASS B. SHIVERS, Associate Justices, concur. McDONALD and KOGAN, JJ., recused.

OPINION BY: PER CURIAM

OPINION

[*442] PER CURIAM.

Howard Gross seeks review of the referee's finding of guilt and recommended discipline in this matter. We have jurisdiction. *Art. V, § 15, Fla. Const.*

Gross was charged with violating certain Rules Regulating The Florida *Bar: rule **4-8.3(a)*** (mandatory duty to report professional misconduct of another lawyer) and *rule 4-8.4(a),* (c) & (d) (violating the rules of professional conduct; engaging in conduct involving dishonesty, fraud, deceit or misrepresentation; and engaging in conduct prejudicial to the administration of justice). The alleged violations arose during an investigation by the State **[**2]** Attorney's Office and the Florida Department of Law Enforcement into a suspected bribery and conspiracy involving former attorney Harvey S. Swickle and then Circuit Court Judge Howard Gross, respondent in this action.

Pursuant to the investigation and a judicial order, dialed number recorders, commonly known as "pen registers," were installed on the Swickle and Gross residences. In addition, Undercover Agent Cassal was equipped with a body bug to record conversations between him and Swickle.

The events giving rise to these charges began early in the evening on October 7, 1987, and culminated in an exchange of monies on the morning of October 8, 1987. A fictitious defendant known as Orlando Zirio was placed in the Dade County Jail system on October 7 and charged with cocaine trafficking, conspiracy to traffic in cocaine, and possession of cocaine. The multiple charges accounted for a $ 750,000 bond on Zirio. Agent Cassal posed as a representative of wealthy South American **[*443]** principals who wanted to secure the release of their employee, defendant Zirio.

Cassal contacted attorney Swickle. In discussions during the late afternoon of October 7, Cassal implied to Swickle that he was **[**3]** engaged in questionable businesses, that he needed to secure the release of his "runner" Zirio, and that Zirio was arrested with approximately one dozen kilos of cocaine.

Cassal emphasized to Swickle the urgency in securing Zirio's release and having the bond lowered to effectuate the release. Swickle implied he could have the bond lowered in an emergency hearing that evening, if "[his] guy" was the on-duty judge.

Pen registers indicated that twelve calls were made from Swickle's phone to the Gross residence within a twelve-minute period. Later, pen register activity indicated an outgoing call from Gross to Swickle which lasted two minutes, forty-three seconds. Thereafter, Gross called the Dade County jail facility.

When Cassal told Swickle that his people could meet a $ 200,000 bond, Swickle replied that he required a $ 20,000 retainer. Cassal met Swickle that evening with $ 10,000, and said another $ 10,000 would be forthcoming. Expressing concern about the balance of the retainer, Swickle said he could not "have someone do something unless they know that, that ah, I'm fully represented." *See* Report of Referee at 7, *The Florida Bar v. Gross, 582 So. 2d 624, 1991 Fla. LEXIS 712 (Fla. 1991).* Shortly **[**4]** thereafter, Swickle telephoned Gross and the following telephone call was recorded:

> Swickle: Yeah, OK, I've, ah, I've got the signed contract.
>
> Gross: So they did, this man now has a lawyer.
>
> Swickle: Yes sir.
>
> Gross: OK, if you are his lawyer and you tell me those are the facts, I'll reduce the bond accordingly.
>
> Swickle: Ah, what time you going to be in?
>
> Gross: I'll be in, ah, probably eight fifteen.
>
> Swickle: Umm.
>
> Gross: I'll be there all day. I've got that murder trial.
>
> Swickle: That's right. I am, I'm going to be tied up. How about if I meet you in the morning at the house.

> Gross: Where here?
>
> Swickle: Yeah.
>
> Gross: Well, I don't care, it doesn't matter.
>
> Swickle: About eight
>
> Gross: Yeah.
>
> Swickle: OK.

Id. at 7-8. The referee found the conversation between Swickle and Gross

> sufficiently cryptic for the finder of fact to conclude that the attainment of "the signed contract" was in fact the parties' code that the funds with which to effectuate the bribery had been secured. . . . Having been apprised of the necessary information, (the acquisition of the bribery money) at 10:47 p.m. Judge Gross placed a call to the Dade County Jail.

Id. at 8-9. Gross reduced **[**5]** the bond from $ 750,000 to $ 200,000.

Swickle received the remaining $ 10,000 from Cassal in two payments during the early morning hours following the bond reduction. Although the bond had already been reduced, Swickle deliberately misled Cassal to believe that it had not. The referee found "that Sickle was attempting to secure full payment before delivering his part of the deal." *Id.* at 9. At 8 a.m., shortly following collection of the last payment by Cassal, Swickle met Gross in Gross's driveway and delivered $ 5,000 cash and other monies unrelated to the present case.

The referee found:

> Standing alone, the above outlined events would be sufficient to establish evidence of the offer and acceptance of a bribe by the Respondent. By presenting evidence that Judge Gross lowered a bond for an attorney's client in an emergency ex parte proceeding and then received a cash payment from that same attorney the very next morning, the Bar has met **[*444]** its burden of proof in establishing a prima facie case.

Id. at 10. [1]

> 1 Because Swickle had invoked his Fifth Amendment right not to testify, the Bar called agent Coffee to testify regarding Swickle's post-arrest statements. Swickle told Coffee that he had made arrangements with Gross to lower a bond on two occasions. He said he had paid Gross $ 5,000 for assisting in lowering a bond in 1986. The referee admitted the statements to show Swickle's state of mind that he had a continuing agreement to influence Gross for money. The referee indicated that the statements were not admitted for the truth of the matters asserted. Gross's argument that the admission of this testimony violated the rule in criminal cases which precludes the introduction of a codefendants custodial statement implicating the defendant is inapplicable to this case. Even if Swickle's state of mind was not pertinent, it appears that the testimony was admissible as a statement against penal interest under *section 90.804(2)(c), Florida Statutes* (1989). However, because the referee did not consider Swickle's statements for the truth of the matters asserted, we have also not done so in our evaluation of the sufficiency of the evidence.

[6]** To dispute the Bar's evidence, Gross testified that the exchange of money was partial payment for a $ 15,000 debt, past due more than ten years. The referee found Gross's evidence "implausible." Not only did Gross never list the alleged debt as an asset on his financial disclosure statement, [2] but he also failed to produce any personal records to evidence the debt save a single piece of paper with numbers alleged to be a record of repayments. The referee noted that the absence of records was particularly suspect when considering testimony of Gross's own witness relating to Gross's otherwise meticulous financial record-keeping.

> 2 Gross also complains that his due process rights were violated when the referee "became an advocate" and, sua sponte, ordered production of Gross's financial disclosure statements. The entry of such an order was well within the referee's discretion. *See The Fla. Bar v. Stillman, 401 So. 2d 1306 (Fla. 1981).*

Gross argues that the referee's findings are **[**7]** clearly erroneous and not supported by legally sufficient evidence. He contends that the Bar has failed to meet the clear and convincing standard of proof. [3] [HN1] While the Bar has the burden of proof in Bar disciplinary proceedings, *The Fla. Bar v. Hooper, 509 So. 2d 289, 290 (Fla. 1987)*, this Court has delegated the responsibility of fact finding to the referee. *The Fla. Bar v. Bajoczky, 558 So. 2d 1022 (Fla. 1990).* A referee's findings enjoy the same presumption of correctness as the judgment of a

trier of fact in a civil proceeding. *See Hooper, 509 So. 2d at 290-91*. [HN2] Upon review, this Court must sustain a referee's findings if they are supported by competent and substantial evidence. *Id. at 291*. *See also The Fla. Bar v. Bajoczky, 558 So. 2d 1022 (Fla. 1990)* ([HN3] a referee's findings will be upheld unless they are without support in the evidence). [HN4] Further, it is clear that misconduct as a judge may be grounds for attorney discipline. *The Fla. Bar v. McCain, 330 So. 2d 712 (Fla. 1976).*

3 Gross also suggests that he should prevail on the doctrine of collateral estoppel because in earlier disciplinary proceedings the same referee concluded that the evidence was insufficient to prove that Swickle had bribed Gross to lower Zirio's bond. There is no merit to this contention because of the lack of mutuality of parties. *Zeidwig v. Ward, 548 So. 2d 209 (Fla. 1989).*

[8]** There is competent and substantial evidence to support the referee's findings. The circumstantial evidence of guilt was strong. Moreover, the referee had a right not to believe Gross's explanation that the transfer of the $ 5,000 was for the repayment of a loan. Accordingly, we approve the referee's factual findings and accept the recommended discipline. Respondent Howard Gross is hereby disbarred. The disbarment will be effective thirty days from the filing of this opinion so that respondent can close out his practice and protect the interests of existing clients. If respondent notifies this court in writing that he is no longer practicing and does not need the thirty days to protect existing clients, this Court will enter an order making the disbarment effective immediately. Respondent shall accept no new business from the date this opinion is filed. Judgment for costs in the amount of $ 1,971.21 is hereby entered against respondent, for which sum let execution issue.

It is so ordered.

[*445] BARKETT, C.J., OVERTON, SHAW, GRIMES and HARDING, JJ., and JAMES E. JOANOS and DOUGLASS B. SHIVERS, Associate Justices, concur. McDONALD and KOGAN, JJ.,recused.

LEXSEE 607 SO. 2D 412

Positive
As of: Dec 22, 2008

THE FLORIDA BAR, Complainant, v. BRUCE LEE HOLLANDER, Respondent.

No. 78,896

SUPREME COURT OF FLORIDA

607 So. 2d 412*; *1992 Fla. LEXIS 1867*; *17 Fla. L. Weekly S 683

November 5, 1992, Decided

SUBSEQUENT HISTORY: **[**1]** Rehearing Denied February 16, 1993. Released for Publication February 16, 1993.

PRIOR HISTORY: Original Proceeding - The Florida Bar

CASE SUMMARY:

PROCEDURAL POSTURE: Respondent attorney petitioned the court to review a referee's finding of guilt and recommendation of discipline in a disciplinary hearing (Florida).

OVERVIEW: Petitioner state bar filed an action against respondent attorney alleging that his firm improperly terminated a relationship with a client. Petitioner alleged that respondent's firm entered into an agreement for, charged, or collected a clearly excessive fee in violation of Fla. *Bar R. 4-1.5(A)*; that respondent violated Fla. *Bar R. 4-8.4(a)* by violating the Rules of Professional Conduct; and that respondent violated Fla. *Bar R. 4-8.4(c)* by engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation. The referee found that respondent violated those rules and also found prior disciplinary violations for charging excessive fees, selfish or dishonest motive, and vulnerability of victims. Respondent argued that admission of his prior disciplinary conduct prejudiced him and that the contingency agreement conformed to the rules of professional conduct. The court affirmed the referee's holding and recommended sanctions because the contingency agreement impermissibly allowed respondent to exact a penalty for discharge because it called for immediate payment of all expenses incurred and permitted respondent to collect a percentage of plaintiff's recovery.

OUTCOME: The court affirmed the referee's findings of misconduct because respondent's contingency agreement permitted him to recover twice for the same work if the agreement was terminated before resolution of the case.

LexisNexis(R) Headnotes

Civil Procedure > Judicial Officers > General Overview
Legal Ethics > Sanctions > Disciplinary Proceedings > Appeals
Torts > Damages > Costs & Attorney Fees > Contingent Fees
[HN1] The Florida Supreme Court has jurisdiction based on *Fla. Const. art. V, § 15* to review a referee's decision and recommendation of discipline in a lawyer disciplinary hearing.

Legal Ethics > Client Relations > Accepting Representation
Legal Ethics > Client Relations > Billing & Collection
[HN2] An attorney cannot exact a penalty for a right of discharge. Moreover, any contingency fee contract which permits the attorney to withdraw from representation without fault on part of the client or other just reason, and purports to allow the attorney to collect a fee for services already rendered would be unenforceable and unethical.

Business & Corporate Law > General Partnerships > Dissolution & Winding Up > Dissolution > General Overview
Business & Corporate Law > General Partnerships > Management Duties & Liabilities > Rights of Partners > General Overview
Civil Procedure > Judicial Officers > Referees > General Overview
[HN3] Fla. *Bar R. 4-5.1(c)(2)* provides that a lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if the lawyer is a partner in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

COUNSEL: John F. Harkness, Jr., Executive Director and John T. Berry, Staff Counsel, Tallahassee, Florida; and Stephen C. Whalen, Bar Counsel, Fort Lauderdale, Florida, for Complainant.

Bruce L. Hollander, pro se, of Hollander & Associates, P.A., Hollywood, Florida, for Respondent.

JUDGES: BARKETT, C.J., and OVERTON, McDONALD, SHAW, GRIMES, KOGAN and HARDING, JJ., concur.

OPINION BY: PER CURIAM

OPINION

[*413] This is a lawyer disciplinary hearing in which Bruce Lee Hollander (Hollander) petitions this Court to review The referee's finding of guilt and recommendation of discipline. The referee recommended to this Court that Hollander receive a public reprimand and be placed on six months probation. [HN1] We have jurisdiction based on *article V, section 15 of the Florida Constitution.* For the reasons expressed, we approve the referee's findings and recommendation.

After reviewing the evidence, the referee found the following facts. Hollander is the sole shareholder and partner in his law firm Hollander and Associates, P.A., and that on April 9, 1989, he entered into a contingency fee agreement with Lygia C. Tschirgi **[**2]** (Tschirgi) for representation in a personal injury action. Hollander authorized and adopted the contingency fee agreement signed by Tschirgi. The attorney initially handling Tschirgi's case, Gladys Coia, left Hollander and Associates and the case was reassigned to another attorney in the firm, Scott Jontiff.

Hollander directed Jontiff to terminate the firm's representation of Tschirgi because he thought that the representation would not be successful or profitable. On February 12, 1990, Jontiff mailed Tschirgi a letter requesting that she execute a Notice of Termination discharging Hollander and Associates from representing her. Tschirgi returned the Notice of Termination form unsigned to Hollander and Associates indicating that she did not want to discharge the firm. In October 1990, Hollander made a motion to withdraw from representation which was granted by the court. Upon withdrawal, Hollander and Associates placed a lien on Tschirgi's court file for payment of fees and costs. The lien for services indicated that the court would determine the amount owed by Tschirgi. Before withdrawing, Hollander informed Tschirgi that his law firm had incurred $ 6,000 in attorney services. **[**3]** Tschirgi consulted with several other attorneys about representation; however, all declined to represent her.

Furthermore, the referee found that the termination-of-service clause in the fee agreement required Tschirgi to pay Hollander and Associates for all services rendered until the termination. In addition to the hourly fee for services, the termination clause entitled the firm to receive a pro rata share of any recovery obtained by new counsel. The referee also found that the withdrawal clause of the contingency fee agreement contained a similar provision. The withdrawal clause allowed Hollander's firm to receive prompt payment for all services and a percentage of any recovery made by new counsel. The referee concluded that the contingency fee agreement provided for the collection of an excessive fee and penalized Tschirgi for exercising her right to terminate Hollander's services.

The referee found Hollander guilty of violating the following *rules: Rules Regulating The Florida Bar 4-1.5(A)* (a lawyer shall not enter into an agreement for, charge, or collect a clearly excessive fee); *4-8.4(a)* (a lawyer shall not violate the Rules of Professional Conduct); and *4-8.4(c)* (a **[**4]** lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation). **[*414]** The referee also found three aggravating factors: 1) past disciplinary record for violating *Rule Regulating The Florida Bar 4-1.5(A)* (a lawyer shall not enter into an agreement for, charge, or collect a clearly excessive fee); 2) selfish or dishonest motive; and 3) vulnerability of victims. The referee found in mitigation the fact that Hollander had not sought to enforce the terms of the retainer agreement other than filing a charging lien with the court. In addition, the referee also found that Hollander expressed remorse for his actions.

The referee recommended that this Court give Hollander a public reprimand and that he be placed on six months' probation. The referee recommended that the

terms of Hollander's probation require that he immediately stop the use and enforcement of the termination-of-services and withdrawal clauses. The referee also recommended that Hollander's existing contingency fee cases which contain a termination-of-services and a withdrawal clause be modified in order to remove the excessive fee or penalty for the client's discharge of the firm. Finally, the **[**5]** referee recommended that Hollander notify each of the firm's clients of the modification, and that Hollander file a written certification with the Clerk of the Supreme Court of Florida that he has completed the terms of the probation.

Hollander first argues that the referee committed reversible error by allowing The Florida Bar to proffer evidence of Hollander's prior disciplinary conduct, involving a violation of *rule 4-1.5(A)*. Hollander argues that the proffer by The Florida Bar caused him prejudice by presenting bad character evidence. The record reflects that the referee rejected the proffered evidence and did not consider it, thus, we find that Hollander's contention is without merit.

Hollander also challenges the referees decision to qualify The Florida Bar's expert witness concerning personal injury cases and contingency fee agreements. The record shows that the expert witness had extensive experience with personal injury and contingency fee agreements. Thus, we find that Hollander failed to show that the referee abused his discretion in qualifying the expert witness.

Hollander challenges the referee's finding that the termination and withdrawal clauses of the contingency **[**6]** fee agreement violated *rule 4-1.5(A)*. Hollander argues that the contingency fee agreement read as a whole is intended to conform to The Florida Bar Rules of Professional Conduct and that the termination-of-services clause was not intended to allow the firm to collect for both the hourly rate and a pro rata fee for any recovery made by a new attorney. He further contends that the clause was intended to allow a trial court to award *quantum meruit* value for the firm's services and that the withdrawal clause was not intended to allow an excessive recovery. Finally, Hollander asserts that he is not guilty of any ethical violations because neither the termination nor the withdrawal clause has ever been enforced by his law firm.

The Florida Bar argues that both the termination-of-services clause and withdrawal clause on their face violate the rule that prohibits a lawyer from entering an agreement for, charging, or collecting a clearly excessive fee. We agree.

The termination-of-services clause at issue here provides:

Should this claim be abandoned by the client or any other lawsuit filed pursuant hereto be dismissed at the client's insistence or request, then and in that event, **[**7]** the client agrees to promptly pay the firm for all services rendered up through and including the date of termination along with any other fees, charges and/or expenses incurred to that date. The services rendered to that point shall be paid by client at the prevailing hourly rate for firm members at the time services were rendered.

The termination-of-services clause then further provides:

All expenses of the firm shall be immediately paid by the client. In addition, the firm shall be entitled to a fee based on the fee schedule stated herein and computed **[*415]** on a prorata [sic] basis comparing the time expended by this firm to the time expended by any new attorneys and the total recovery of the client.

The withdrawal clause provides in part that:

the client agrees to promptly pay the firm for all services rendered up through and including the date of withdrawal, and all other fees, charges and expenses incurred through the date of withdrawal.

The withdrawal clause further provides that in the event of withdrawal:

The client agrees that Hollander & Associates, P.A., shall continue to be entitled to a fee equal to the percentage of the amount received by the client as set forth **[**8]** in this agreement, unless and until a new and mutually agreeable fee agreement is worked out between the client, this firm, and any new counsel taking over representation of the client.

We uphold the referee's findings hat the termination and withdrawal clauses of the agreement violate *Rule Regulating The Florida Bar 4-1.5(A)*. Both clauses provided that Tschirgi promptly pay for all services, fees, charges, and expenses incurred through the date of either the termination or withdrawal. In addition, both clauses also provided that Hollander's law firm was entitled to a fee equal to the percentage amount stipulated in the contingency fee agreement until Tschirgi, Hollander's firm, and any new counsel worked out a mutually agreeable fee agreement. The agreement on its face allowed Hollander to collect twice for the same work, and thus, the agreement had the effect of intimidating a client from exercising the right to terminate representation. As we stated in *The Florida Bar v. Doe, 550 So. 2d 1111, 1113 (Fla. 1989)*, "[HN2] an attorney cannot exact a penalty for a right of discharge." Moreover, while not directly placed in issue by the parties, it is also **[**9]** the Court's view that any contingency fee contract which permits the attorney to withdraw from representation without fault on part of the client or other just reason, and purports to

allow the attorney to collect a fee for services already rendered would be unenforceable and unethical.

We reject Hollander's argument that this type of fee arrangement is harmonious with our decision in *Rosenberg v. Levin, 409 So. 2d 1016 (Fla. 1982)*. In *Rosenberg*, this Court held that an attorney, who was discharged by a client without cause, could pursue a fee on the basis of *quantum meruit* after the former client recovered damages. Unlike *Rosenberg*, the instant case involves an agreement between the client and attorney that allows the attorney to be paid twice for the same work. Additionally, the language of both clauses fails to support Hollander's argument that the agreement provided for a *quantum meruit* determination of fees between the client and his law firm. Neither clause contains language referring to a court determination of *quantum meruit* in setting fees with clients. Thus, we find that the instant case is distinguishable from this Court's **[**10]** decision in *Rosenberg*.

Finally, Hollander challenges the referee's findings that he violated *Rules Regulating The Florida Bar 4-8.4(a)* and *4-8.4(c)*. Testimony in the record indicated that Hollander directed an associate in his firm, Jontiff, to terminate the law firm's representation of Tschirgi. As Jontiff's supervisor, Hollander instructed Jontiff to terminate the firm's representation of Tschirgi. The referee correctly found that Hollander was responsible for the ethical violation resulting from the mailing of the termination notice. *See* [HN3] *Rule Regulating The Florida Bar 4-5.1(c)(2)* (a lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if the lawyer is a partner in law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action). Hollander has failed to show that the findings are clearly erroneous or lacking in evidentiary support. Thus, we uphold the referee's findings that Hollander violated *Rules Regulating The Florida Bar 4-8.4(a)* and *4-8.4(c)*.

[*416] Based **[**11]** on the record in this case, we adopt the referee's recommended discipline. Accordingly, we publicly reprimand Bruce Lee Hollander and place him on probation for six months. The terms of the probation are as follows: 1) Hollander shall immediately cease to use and enforce the termination-of-services and withdrawal clauses, which were the subject matter of this disciplinary hearing; 2) Hollander shall immediately modify all of his firm's existing contingency fee contracts that contain the termination-of-services clause and withdrawal clause to eliminate an excessive fee or penalty for the client's decision to discharge Hollander's firm; and 3) Hollander shall inform each of his firm's affected clients in writing. Hollander shall file a written certification with the Clerk of the Supreme Court of Florida that these conditions have been accomplished. Hollander is publicly reprimanded by publication of this opinion in *Southern Reporter*. Judgment for costs in the amount of $ 1,674.20 is entered against Hollander, for which sum let execution issue.

It is so ordered.

BARKETT, C.J., and OVERTON, McDONALD, SHAW, GRIMES, KOGAN and HARDING, JJ., concur.

LEXSEE 959 SO. 2D 150

Analysis
As of: Dec 22, 2008

THE FLORIDA BAR, Complainant, vs. FRANCISCO RAMON RODRIGUEZ, Respondent.

No. SC03-909

SUPREME COURT OF FLORIDA

959 So. 2d 150*; *2007 Fla. LEXIS 761*; *32 Fla. L. Weekly S 186

May 3, 2007, Decided

SUBSEQUENT HISTORY: Released for Publication June 5, 2007.
Companion case at *Fla. Bar v. St. Louis, 967 So. 2d 108, 2007 Fla. LEXIS 762 (Fla., May 3, 2007)*
Rehearing denied by *Fla. Bar v. Rodriguez, 2007 Fla. LEXIS 1098 (Fla., June 5, 2007)*

PRIOR HISTORY: *Fla. Bar v. Friedman, 940 So. 2d 428, 2006 Fla. LEXIS 2244 (Fla., 2006)*

CASE SUMMARY:

PROCEDURAL POSTURE: The court had for review a referee's report recommending that respondent attorney be found guilty of professional misconduct and that he receive a public reprimand and serve a four-year period of probation. The referee also recommended denying complainant Florida Bar's request that the attorney be ordered to forfeit prohibited fees to the Clients' Security Fund.

OVERVIEW: The attorney was engaged in a secret "engagement agreement" with an opposing corporation which he was suing on behalf of 20 clients. The corporation agreed to pay the attorney's law firm $ 6,445,000 in exchange for the firm's agreement not to pursue future claims against it and for the firm to possibly perform future work for the corporation on an hourly basis. Thus, the $ 59,000,000 offered to the law firm's clients and the $ 6,445,000 offered to the firm through the engagement agreement constituted separate funds. The referee found the attorney had become an agent of the corporation which created a conflict of interest. At a disciplinary hearing, the attorney did not tell the judge about the engagement agreement. The court held that suspension was appropriate in conflict of interest situations which rose above mere negligence. Further, the attorney potentially harmed the public by forming an agreement with the corporation not to pursue future lawsuits against it and potentially harmed the legal system by not disclosing the engagement agreement to the Bar during the previous disciplinary proceedings.

OUTCOME: The court imposed a two-year suspension and ordered the attorney to disgorge his portion of the prohibited fee to the Clients' Security Fund, including the taxes and interest on that fee. The matter was remanded to the referee to determine the appropriate amount for disgorgement.

LexisNexis(R) Headnotes

Civil Procedure > Judgments > Preclusion & Effect of Judgments > Res Judicata
[HN1] The doctrine of res judicata applies when all four of the following conditions are present: (1) identity of the thing sued for; (2) identity of the cause of action; (3) identity of persons and parties to the action; and (4) identity of quality in persons for or against whom claim is made. Thus, the causes of action must be closely related for the doctrine of res judicata to apply.

Civil Procedure > Judgments > Preclusion & Effect of Judgments > Estoppel > Collateral Estoppel

[HN2] Where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered.

Legal Ethics > Sanctions > Disciplinary Proceedings > Appeals
[HN3] In reviewing a referee's recommended discipline, the court's scope of review is broader than that afforded to the referee's findings of fact because it is the court's ultimate responsibility to order the appropriate sanction. Generally speaking, the court will not second-guess the referee's recommended discipline as long as it has a reasonable basis in existing caselaw and the Florida Standards for Imposing Lawyer Sanctions.

Legal Ethics > Sanctions > Suspensions
[HN4] See Fla. Stds. Imposing Law. Sancs. 4.32.

Legal Ethics > Client Relations > Conflicts of Interest
Legal Ethics > Sanctions > Suspensions
[HN5] A suspension is appropriate in conflict of interest situations which rise above mere negligence.

Legal Ethics > Client Relations > General Overview
Legal Ethics > Sanctions > Suspensions
[HN6] Fla. Stds. Imposing Law. Sancs. 7.2. provides for suspension when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system.

Legal Ethics > Client Relations > Conflicts of Interest
[HN7] See *R. Regulating Fla. Bar 4-5.6(b).*

Legal Ethics > Sanctions > General Overview
[HN8] *R. Regulating Fla. Bar 3-5.1(c)* permits probation for periods up to three years or for an indefinite period determined by conditions stated in the order.

Legal Ethics > Client Relations > Attorney Fees > General Overview
Legal Ethics > Sanctions > General Overview
[HN9] See *R. Regulating Fla. Bar 3-5.1(h).*

COUNSEL: [1]** John F. Harkness, Jr., Executive Director, Kenneth L. Marvin, Director of Lawyer Regulation, James A.G. Davey, Jr. and Donald M. Spangler, Bar Counsels, The Florida Bar, Tallahassee, Florida, for Complainant.

Michael Nachwalter and Lauren C. Ravkind of Kenny Nachwalter, P.A., Miami, Florida, for Respondent.

JUDGES: LEWIS, C.J., and WELLS, ANSTEAD, PARIENTE, QUINCE, CANTERO, and BELL, JJ., concur.

OPINION

Original Proceeding -- The Florida Bar

[*152] PER CURIAM.

We have for review a referee's report recommending that Francisco Ramon Rodriguez be found guilty of professional misconduct and that he receive a public reprimand and serve a four-year period of probation. The referee also recommends denying The Florida Bar's request that Rodriguez be ordered to forfeit prohibited fees to the Clients' Security Fund. We have jurisdiction. *See art. V, § 15, Fla. Const.*

For the reasons explained herein, we disapprove the referee's recommendation that Rodriguez receive a public reprimand and serve probation. Instead, we impose a two-year suspension. Further, we order Rodriguez to disgorge his portion of the prohibited fee to the Clients' Security **[*153]** Fund, including the taxes and interest on that fee. [1]

1 The referee did not make **[**2]** a clear finding as to the specific amount that he considered for disgorgement. There are some references in the referee's report to $ 1,440,000, and at other points the report states that the amount "was in excess of $ 1,600,000." We remand this issue to the referee to determine the appropriate amount for disgorgement.

BACKGROUND

Rodriguez was a shareholder in the law firm of Friedman, Rodriguez, Ferraro, and St. Louis. The firm was hired to represent twenty clients who sought to sue DuPont Corporation for damages allegedly resulting from use of the DuPont product Benlate, a fungicide that was suspected of causing severe crop damage and was recalled from the market in March 1991. The partners in the firm were Paul D. Friedman, Diane D. Ferraro, Roland R. St. Louis, and Francisco R. Rodriguez. The Florida Bar brought separate disciplinary actions against the four named partners of the firm alleging that they committed misconduct by engaging in a secret "engagement agreement" with the DuPont Corporation, solely for their

own financial benefit, while they were representing the clients in the Benlate cases against DuPont. Based on the partners' separate acts of misconduct, they received **[**3]** different sanctions.

Ferraro received a public reprimand and made restitution of $ 425,000 to the clients. *Fla. Bar v. Ferraro, 839 So. 2d 700 (Fla. 2003)* (table citation). The sanction was based on the referee's finding that Ferraro had "absolutely nothing to do with the settlement negotiations with DuPont" and did not even know about the engagement agreement until well after her former partners received the prohibited funds. Also, Ferraro agreed to testify against her former partners. Due to these facts, the referee ultimately recommended a public reprimand, after finding that a suspension or disbarment was not appropriate.

Friedman did not know about the engagement agreement until after it had been executed. Thus, he had a comparatively smaller role in the firm's misconduct than St. Louis and Rodriguez. Also, Friedman cooperated with the Bar and he paid restitution before his disciplinary case was reviewed by this Court. However, Friedman partook in the financial benefits of the unethical engagement agreement, exposed the Benlate clients to potential harm by engaging in the conflict of interest, and acquiesced in the firm lying to the clients. He did not take any measures to inform **[**4]** clients or repudiate the engagement agreement. In fact, as Secretary-Treasurer of the firm, Friedman received the prohibited funds from DuPont. Therefore, Friedman's misconduct merited a ninety-day suspension and payment of restitution in the amount of $ 910,000. *Fla. Bar v. Friedman, 940 So. 2d 428 (Fla. 2006)* (table citation).

St. Louis and Rodriguez were the firm's principal actors in developing and executing the secret engagement agreement. As will be discussed herein, Rodriguez's misconduct is less egregious than St. Louis's misconduct. St. Louis negotiated the engagement agreement for the firm, placed his financial interests above those of his clients with regard to DuPont, and lied to Judge Wilson and the Bar regarding the secret engagement agreement. This Court disbarred St. Louis. *Fla. Bar v. St. Louis, No. SC04-49, 967 So. 2d 108, 2007 Fla. LEXIS 762 (Fla. May 3, 2007).*

FACTS

With regard to Rodriguez, a referee made the following findings and recommendations.

[*154] *The Firm, DuPont, and the Engagement Agreement.* In 1996, the firm represented twenty different plaintiffs in property damages claims against DuPont arising from the use of Benlate. St. Louis, who was the lawyer who brought in the clients for the firm, had primary **[**5]** responsibility for communicating with the clients. Rodriguez's primary role in the Benlate cases was to act as first chair if any of the cases went to trial and to handle significant hearings.

The firm discovered that in the case for one of its clients, Davis Tree Farm, DuPont had concealed its testing of Benlate in Costa Rica. The test plants exhibited significant damage and DuPont ordered the plants to be destroyed. The firm subsequently filed a motion to strike DuPont's pleadings in the Davis Tree Farm case. The trial court judge orally ruled that she would enter an order striking DuPont's pleadings and entered a judgment in favor of Davis Tree Farm.

After the judge made this oral ruling, DuPont approached the firm to try to settle the Davis Tree Farm case, as well as the other Benlate cases the firm was handling. DuPont's attorney negotiated with Rodriguez and St. Louis. At this point, Rodriguez learned that DuPont was requesting as a condition of settlement a restriction on the firm's right to practice. DuPont's counsel stated that settlement of the firm's cases would include resolving the Davis Tree Farm case before the trial judge issued her written order, as well as requiring **[**6]** the firm not to use the fees earned to fund future litigation against DuPont. The firm engaged in research to determine whether it was ethical for the firm to engage in such an agreement. The firm's researcher informed Rodriguez that the law was unclear, but it appeared that DuPont's objective could be achieved by engaging the firm after the firm finished representing the twenty Benlate clients.

DuPont eventually made offers of settlement to nineteen of the Benlate plaintiffs, but not to Davis Tree Farm. The firm was prepared to recommend that the clients accept the offers because the firm believed the offers exceeded what the clients could have reasonably expected to recover if their respective cases had gone to trial. While Rodriguez initially rejected DuPont's request for the firm not to bring future Benlate cases against the corporation, St. Louis told DuPont that in order to have a restriction on the firm's right to practice, DuPont would have to pay the firm. DuPont made settlement of the nineteen Benlate plaintiffs' claims contingent on the settlement of the Davis Tree Farm case.

On August 7, 1996, the trial judge's written order striking DuPont's pleadings arrived in the mail. **[**7]** Settlement negotiations continued and when DuPont's offer reached $ 30,000,000, the spokeswoman for Davis Tree Farm agreed to accept the offer. Although Rodriguez believed settlement negotiations were complete, DuPont then made the settlement of the nineteen Benlate clients contingent on the firm agreeing to sign an "engagement agreement" that would preclude the firm from

bringing future cases against DuPont. Again, Rodriguez declined to enter into such an agreement until the firm's representation of the clients was complete. The firm resisted DuPont's condition until the appointed mediator made it clear that DuPont would retract the offer unless the firm signed such an engagement agreement. The mediator, who had substantial experience in mass tort cases and had been appointed as the Special Master to handle discovery disputes in Benlate-related litigation in Dade County, advised Rodriguez that in these situations, parties **[*155]** would sometimes make an engagement agreement.

After much discussion about the settlement amounts that the firm was going to recommend that the clients accept from DuPont, the firm and DuPont negotiated the restrictions on the right to practice. DuPont agreed to pay **[**8]** the firm $ 6,445,000 in exchange for the firm's agreement not to pursue future claims against DuPont and for the firm to possibly perform future work for DuPont on an hourly basis. Thus, the $ 59,000,000 offered to the Benlate plaintiffs and the $ 6,445,000 offered to the firm through the engagement agreement constituted separate funds. Rodriguez did not participate in drafting the engagement agreement. However, he did not object to the agreement, he agreed with its terms, and he testified that he "negotiated very hard for the $ 6,445,000." Further, language in the engagement agreement stated that it was contingent upon the effectiveness of the settlement agreement with the Benlate clients.

The referee found that, at this point, Rodriguez became an agent of DuPont, and his allegiance to both DuPont and his Benlate clients created a conflict of interest. Further, the referee found that the firm placed its interest above that of the Benlate clients because (1) the firm avoided the risks and expenses of protracted litigation and possible appeals; (2) the firm received fees from these cases, some of which had fatal flaws; (3) the firm received significant amounts of attorney's fees from **[**9]** the settlements; (4) the firm accepted a guaranteed $ 6,445,000 in exchange for not pursuing future cases against DuPont; and (5) the firm could return to the "very successful full time practice" of working on an hourly basis with DuPont as an added client.

The referee found that the attorneys of the firm knew or should have known that negotiations for settlements were not concluded until the clients had accepted DuPont's offers and, if the offers were rejected, they would have to resume negotiations. Yet, DuPont's agreement with the firm was conditioned on the consummation of the settlement agreement between DuPont and the firm's clients. The referee found that the statement in the engagement agreement that the firm had "completed the negotiations" indicated that the firm had a desire, if not an intent, not to have any further discussions with DuPont on behalf of its clients.

On August 8, 1996, the parties appeared before the trial judge and announced that a settlement for the Benlate clients had been reached and requested that the judge vacate and seal the order striking DuPont's pleadings. The parties did not inform the judge about the engagement agreement. Also, because all but two **[**10]** of the Benlate clients had the right to accept or reject the settlement, DuPont insisted that the clients only be told the amount that they were being offered to settle their respective cases. DuPont further insisted that the clients keep the amount they received confidential. To enforce these conditions, ten percent of the settlement amounts were to be held in escrow for two years and, should any breach of confidentiality occur, approximately $ 6,000,000 of the clients' settlement monies would be lost. Rodriguez never told the clients about the engagement agreement. He claimed that because DuPont had insisted on confidentiality, he believed a breach of that confidentiality would result in the clients losing ten percent of the settlement. However, because the settlement agreement between the clients and DuPont was separate from the engagement agreement between the firm and DuPont, the referee found that the confidentiality **[*156]** provisions of the settlement agreement were between the clients and DuPont, and did not bind the firm. Thus, disclosure of the engagement agreement to the clients would not have jeopardized the escrow funds.

The referee found that by not disclosing the agreement, **[**11]** Rodriguez was protecting the firm's interest in $ 6,445,000, "his own interest in $ 1,440,000," and DuPont's economic interests in "not having disclosed to the world that it had done some very bad things to its clientele and got caught doing them." Because there was ongoing Benlate litigation occurring around the nation, the latter information potentially could have caused DuPont serious harm.

Rodriguez testified that the money he would receive from the agreements never entered his mind. However, the referee found this to be unlikely because (1) Rodriguez admitted that he found the amounts offered to the clients to be "staggering"; (2) Rodriguez testified that the Benlate clients were clients with "no hope" and would obtain no money had their cases gone to trial; and (3) Rodriguez "received in excess of $ 4,700,000 from the settlements."

Aftermath of the Settlement and Engagement Agreements. After the terms of the settlement and engagement agreements were agreed upon, St. Louis traveled around the state to meet with clients and convince them to accept DuPont's settlement agreement. St. Louis told the clients that if they did not accept the settlement

offer, the firm would no longer represent **[**12]** them. On August 12, 1996, the firm received $ 6,445,000. Thereafter, on August 16, 1996, the firm received $ 59,000,000 from DuPont. When one client refused to settle, Rodriguez filed a motion to withdraw representation and a charging lien. At the hearing on this motion, Rodriguez did not tell the judge about the engagement agreement. Rather, he claimed that he wished to withdraw because the client wanted to eliminate Rodriguez's fee. Eventually, the client accepted DuPont's offer and Rodriguez resumed the attorney-client relationship with the client. Rodriguez did withdraw from representing Fred Haupt, another client who refused to settle. Haupt eventually settled with DuPont through his own means.

The referee found that no clients, other than Davis Tree Farm, were made aware of the engagement agreement. Thus, the clients believed that Rodriguez was representing only their interests. Further, the referee found that the firm also kept $ 393,933.21 of the clients' money. The authorization to settle contained a provision by which the firm kept the interest earned on the clients' settlement funds. The referee found that this provision was not in the best interest of the clients.

1997 Bar **[**13]** *Investigation.* In 1997, based on the complaint of one of the Benlate plaintiffs, the Bar conducted an investigation into allegations that the firm did not explain to its clients the $ 59,000,000 original settlement agreement, and that a possible conflict of interest had occurred between the various Benlate clients. The individual who filed the complaint, Robert L. Beasley, alleged that the firm was coercing clients into accepting DuPont's offers, the clients were being held hostage by the firm, and the firm was keeping the interest earned from the clients' settlement funds. Rodriguez contacted attorney Robert Batsel to represent him during this initial Bar investigation, which included a meeting with Bar representatives. Rodriguez and Batsel subsequently testified that the Bar did not ask any questions that called for them to disclose the engagement agreement to the Bar. Rodriguez and Batsel believed the meeting concerned whether there was an improper aggregate settlement **[*157]** with the Benlate clients. Eventually, this earlier disciplinary proceeding resulted in a consent judgment in 1998.

The Instant Complaint. The Bar filed the instant complaint in 2003. Before the referee in these proceedings, **[**14]** Batsel testified that during the 1997 meeting the Bar representatives never posed a question that required Rodriguez to disclose the engagement agreement. Batsel testified that if the Bar had asked questions regarding the engagement agreement during that 1997 investigation, Batsel would have counseled Rodriguez to disclose the agreement. The instant referee found Batsel's testimony credible. Further, the referee found that Rodriguez and Batsel did not conspire to deceive the Bar. The referee did find, however, that Rodriguez should have disclosed the engagement agreement on his own accord during the 1997 investigation.

Findings as to Guilt. Based on these facts, the referee recommended that Rodriguez be found guilty of violating *Rules Regulating the Florida Bar* *4-1.4(a)* (informing client of status of representation), *4-1.4(b)* (duty to explain matters to client), *4-1.5(a)* (prohibited fees), *4-1.7(a)* (representing a client whose interests are adverse to another client), *4-1.7(b)* (duty to avoid limitation on independent professional judgment), *4-1.8(a)* (business transaction with or acquiring interest adverse to client), *4-1.9(a)* (conflict of interest as to former clients), *4-1.16(a)(1)* **[**15]** (declining or terminating representation), *4-5.1(c)* (responsibilities of a partner for rules violations), *4-5.6(b)* (restriction on lawyer's right to practice), and *4-8.4(a)* (lawyer shall not violate or attempt to violate the Rules of Professional Conduct). In making these recommendations, the referee specifically rejected the following defenses raised by Rodriguez: (1) he was only following the advice of counsel; (2) he believed he was acting in his clients' best interests; (3) client confidentiality prevented him from disclosing the engagement agreement to the Benlate clients and the Bar; (4) the Bar is at fault in this matter; and (5) DuPont is responsible for these acts of misconduct.

Disciplinary Recommendations. In aggravation, the referee found the sole factor of multiple offenses. In mitigation, the referee found (1) Rodriguez's lack of a disciplinary history; (2) his remorse; (3) his inexperience in handling settlements of multiple-plaintiff mass tort cases; (4) his interim rehabilitation; (5) the length of time during which Rodriguez has had to deal with various proceedings and negative publicity arising out of the DuPont settlement; (6) the emotional, financial, and physical **[**16]** stress Rodriguez has suffered for over eight years as a result of his misconduct; (7) the excellent results Rodriguez obtained for the Benlate clients; [2] and (8) **[*158]** Rodriguez's character and outstanding reputation in the community.

> 2 In contrast to the referee's finding, this Court has repeatedly refused to find a mitigating factor based on a respondent's assertion that he engaged in misconduct in order to produce benefits for his client or a third party. *See Fla. Bar v. Kelner, 670 So. 2d 62, 63 (Fla. 1996)* (explaining that although an attorney has a duty to zealously represent his clients, this duty does not require that he violate a court order and produce a mistrial); *Fla. Bar v. Rendina, 583 So. 2d 314, 316 (Fla. 1991)* (disbarring attorney for attempting to bribe an official to obtain a lesser criminal sentence for his

client); *Fla. Bar v. Rambo, 530 So. 2d 926 (Fla.1988)* (sanctioning attorney for bribing county official to receive favorable rezoning of a client's property); *Fla. Bar v. Snow, 436 So. 2d 48, 49 (Fla. 1983)* (suspending attorney who, in attempting to effect a favorable settlement in a civil case for his clients, obtained evidence by false representations); *Fla. Bar v. Riccardi, 264 So. 2d 5 (Fla. 1972)* **[**17]** (disbarring attorney for bribing tax agent to influence the determination of tax liability of a third party). Thus, we disapprove the referee's finding of this factor in mitigation.

As to discipline, the referee recommended that Rodriguez (1) serve a four-year probationary period, during which he would perform 1000 hours of pro bono legal services; (2) receive a public reprimand; and (3) pay the Bar's costs. The referee stated that the recommended discipline is a constructive sanction that will help the less fortunate in the community and that "[s]uspending [Rodriguez] from the practice of law will not accomplish any worthy objective."

Before the referee, the Bar requested that Rodriguez be ordered to forfeit $ 1,600,000 from his prohibited fee to the Clients' Security Fund of The Florida Bar. The referee concluded that the Bar was seeking forfeiture of the funds more as a fine than as restitution for money taken from the Benlate clients. The referee stated that there is no authority in a Bar disciplinary proceeding to require payment that is not for restitution or payment of costs. Further, the referee found that payment of such an amount by Rodriguez would be punitive in nature.

On **[**18]** *Review*. Rodriguez petitioned this Court for review of the referee's report, alleging that the Bar's claims in the instant case are an impermissible collateral attack on the 1998 consent judgment entered into by Rodriguez and the Bar. The Bar filed a cross-petition, challenging the referee's recommended discipline and the referee's recommendation that Rodriguez not be required to forfeit money to the Clients' Security Fund.

ANALYSIS

First, Rodriguez asserts that The Florida Bar's claims in the instant case are barred by the doctrine of res judicata and, in turn, the referee's findings of certain rule violations should not be approved. He bases this claim on the 1998 consent judgment that he negotiated with the Bar. Rodriguez claims that the consent judgment resolved all disciplinary matters relating to the firm's twenty Benlate clients, and that it therefore prevents the Bar from bringing this case. Based on this premise, Rodriguez argues that the instant referee erred in denying Rodriguez's motion for summary judgment. Further, Rodriguez notes that the grievance that generated the first disciplinary proceeding raised the issue of the firm keeping the interest on the settlement monies **[**19]** that were to go to the clients. Therefore, Rodriguez concludes that the Bar could have alleged a violation of *rule 4-1.8(a)* at that time, so the referee's instant recommendation of a violation of the rule on that same basis is barred by res judicata.

Rodriguez's claim that the Bar was precluded from bringing a second complaint, based on the firm's secret engagement agreement with DuPont, is without merit.[HN1] The doctrine of res judicata applies when all four of the following conditions are present: (1) identity of the thing sued for; (2) identity of the cause of action; (3) identity of persons and parties to the action; and (4) "identity of quality in persons for or against whom claim is made." *McGregor v. Provident Trust Co. of Philadelphia, 119 Fla. 718, 162 So. 323, 328 (Fla. 1935)*; *see also Palm AFC Holdings, Inc. v. Palm Beach County, 807 So. 2d 703, 704 (Fla. 4th DCA 2002)*. Thus, the causes of action must be closely related for the doctrine of res judicata to apply. *See Hay v. Salisbury, 92 Fla. 446, 109 So. 617, 621 (Fla. 1926)*.

While both the previous and current disciplinary proceedings stem from Rodriguez's representation of the Benlate clients in a lawsuit against DuPont, the previous case focused on how **[**20]** the firm **[*159]** dealt with its clients and whether the firm improperly negotiated an aggregate settlement for the clients. In contrast, the current case is based on the engagement agreement that the firm arranged with DuPont.[HN2] Where "the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered." *Gray v. Gray, 91 Fla. 103, 107 So. 261, 262 (Fla. 1926)* (quoting *Cromwell v. County of Sac, 94 U.S. 351, 353, 24 L. Ed. 195 (1876)*). Thus, the current case is not barred by res judicata as it is based on a different cause of action, *i.e.*, Rodriguez's relationship with DuPont. [3] *See Fla. Bar v. Gentry, 447 So. 2d 1342 (Fla. 1984)* (holding that there was no identity of facts for res judicata to bar the proceedings where the subsequent Bar allegations were based on separate, additional, and continuing misconduct). Further, Rodriguez did not disclose or produce the secret engagement agreement in the course of the Bar's 1997-98 investigation. As this engagement agreement never came to light and the Bar did not suspect its existence, **[**21]** Rodriguez cannot be rewarded in this case for previously hiding this matter from the Bar and this Court. *See Fla. Bar v. Spears, 786 So. 2d 516, 520 (Fla. 2001)* (finding that the exclusion of the present disciplinary matter from a

prior judgment was solely attributable to Spears' failure to bring the matter to the Bar's attention).

> 3 Rodriguez argues that the language of the 1998 consent judgment precludes the subsequent disciplinary action against him. The consent judgment states that it "concludes any Bar investigation into all of the firm's twenty (20) Benlate clients." A plain reading of this language demonstrates that the consent judgment addressed matters regarding the firm's dealings with its Benlate clients and the settlement for those clients. The language does not refer to the firm's secret engagement agreement with DuPont.

Based on the doctrine of res judicata, however, we disapprove the referee's finding that Rodriguez violated *rule 4-1.8(a)* when the firm retained the interest earned on the clients' escrow funds. In its Answer Brief and Initial Brief on Cross Appeal in the instant case, the Bar admits that one of the main issues in the earlier proceedings was that Rodriguez **[**22]** "and his partners . . . [were] keeping interest earned on the clients' settlement proceeds." Thus, the Bar was aware of this issue, but failed to fully pursue it in the earlier case regarding the firm's dealings with its Benlate clients. Further, this rule violation is based on the firm's settlement agreement with the Benlate clients, rather than its engagement agreement with DuPont. Accordingly, based on res judicata, we disapprove the referee's finding of this rule violation.

Second, the Bar argues that the referee's recommended disciplinary sanctions are not supported by caselaw or the standards for imposing lawyer sanctions. [HN3] In reviewing a referee's recommended discipline, this Court's scope of review is broader than that afforded to the referee's findings of fact because it is the Court's ultimate responsibility to order the appropriate sanction. *See Fla. Bar v. Anderson, 538 So. 2d 852, 854 (Fla. 1989)*; *see also art. V, § 15, Fla. Const.* ("The supreme court shall have exclusive jurisdiction to regulate . . . the discipline of persons admitted [to the practice of law]."). Generally speaking, this Court will not second-guess the referee's recommended discipline as long as it has **[**23]** a reasonable basis in existing caselaw and the Florida Standards for Imposing Lawyer Sanctions. *See Fla. Bar v. Temmer, 753 So. 2d 555, 558 (Fla. 1999)*. In the instant case, we agree with the Bar **[*160]** that the referee's recommendations are not supported.

A two-year suspension, rather than a public reprimand, is the appropriate sanction under these circumstances. Florida Standard for Imposing Lawyer Sanctions 4.32 states that [HN4] "[s]uspension is appropriate when a lawyer knows of a conflict of interest and does not fully disclose to a client the possible effect of that conflict, and causes injury or potential injury to a client." Rodriguez violated this standard and exposed the Benlate clients to potential harm. He was a knowing party to the engagement agreement, he did not disclose the conflict of interest to his clients, and his interests were clearly divided. He protected his interest in the engagement agreement by engaging in actions that were contrary to the interests of his own clients. [HN5] A suspension is appropriate in conflict of interest situations which, as here, rise above mere negligence. *See e.g., Fla. Bar v. Dunagan, 731 So. 2d 1237 (Fla. 1999)* (upholding ninety-one-day suspension **[**24]** where, without wife's consent, lawyer represented husband in dissolution proceeding although the lawyer had previously represented both husband and wife in a business matter).

Additionally,[HN6] standard 7.2 provides for suspension "when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system." Fla. Stds. Imposing Law. Sancs. 7.2. Rodriguez's conflict of interest with respect to the Benlate clients caused the clients harm. Further, he potentially harmed the public by forming an agreement with DuPont not to pursue future lawsuits against DuPont. Also, he potentially harmed the legal system by not disclosing the engagement agreement to the Bar during the previous disciplinary proceedings.

Rodriguez's misconduct does not rise to the same level of egregiousness as that of his former partner St. Louis. *See Fla. Bar v. St. Louis, No. SC04-49, 2007 Fla. LEXIS 762 (Fla. May 3, 2007)* (disbarring St. Louis). St. Louis engaged in additional acts of misconduct, such as drafting the engagement agreement, signing the engagement agreement on behalf of the firm, deliberately lying to a circuit court judge, making **[**25]** dishonest written statements to Bar representatives, and specifically refusing to advise certain clients in response to their inquiries. Nevertheless, Rodriguez still engaged in extremely serious misdeeds. He was scheduled to serve as first chair if any of the Benlate cases went to trial and he was responsible for the significant hearings. Yet to satisfy his own greed, he engaged in actions that directly conflicted with the interests of his clients. He became an agent for DuPont while still representing his Benlate clients against DuPont. In fact, due to the funds that were held in escrow to prevent any breach of confidentiality, the firm represented the Benlate plaintiffs as a fiduciary (the escrow agent) for two years after signing the engagement agreement. Thus, Rodriguez was representing adverse interests because he was on retainer to DuPont during that two-year period.

Davis Tree Farm was the only client aware of the engagement agreement. The other nineteen clients believed that Rodriguez was representing only their inter-

ests. However, Rodriguez's interests were clearly divided. When one client refused to settle, Rodriguez filed a motion to withdraw and filed a charging lien. Rodriguez **[**26]** alleged that he wished to withdraw because the client wanted to eliminate Rodriguez's fee. Rodriguez did not disclose the engagement agreement to the judge. Further, **[*161]** Rodriguez withdrew from representing another client who refused to settle.

When Rodriguez entered into the engagement agreement, he violated *rule 4-5.6(b)*(restriction on the right to practice). The rule was adopted by this Court in 1986. *See Fla. Bar re Rules Regulating Fla. Bar, 494 So. 2d 977, 1069 (Fla. 1986)*. The rule was firmly established by the time Rodriguez entered into the engagement agreement ten years later in 1996. Further, the rule is clear and unambiguous in its language:

> [HN7] Restrictions on right to practice
>
> A lawyer shall not participate in offering or making . . .
>
> (b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a controversy between private parties.

R. Regulating Fla. Bar 4-5.6(b)(1986). Attorneys who engage in such engagement agreements receive severe sanctions, even when the misconduct is far less egregious than that in the instant case. *See In re Brandt, 331 Ore. 113, 10 P.3d 906 (Or. 2000)* (imposing thirteen- and twelve-month suspensions on two lawyers, one with a prior **[**27]** disciplinary record and the other without, for entering into a side agreement with the adversary to act as legal counsel); *In re Hager, 812 A.2d 904 (D.C. 2002)* (suspending for one year a lawyer who, while representing fifty clients against a manufacturer, secured a side agreement with the manufacturer involving restricting his right to practice, dropping the pending case, and maintaining confidentiality). In light of the severe sanctions imposed on attorneys who have engaged in side agreements and Rodriguez's serious misconduct, we conclude that a two-year suspension is the appropriate sanction.

In addition, we conclude that the referee's recommendation of a four-year period of probation is inconsistent with *Rule Regulating the Florida Bar 3-5.1(c)*. [HN8] The rule permits probation for periods up to three years "or for an indefinite period determined by conditions stated in the order." The referee's recommendation exceeds three years and is not based on "conditions stated in the order." Thus, the referee's recommendation of a four-year period of probation is impermissible under the rule. Further, in light of the two-year suspension, we disapprove the referee's recommendation of probation **[**28]** and the accompanying terms and conditions.

Third, the Bar asserts the referee's recommendation that Rodriguez not be required to forfeit the funds acquired through a prohibited fee (the engagement agreement) is erroneous pursuant to *rule 3-5.1(h)*. We agree. As we discussed in the companion case of *Florida Bar v. St. Louis, No. SC04-49, 2007 Fla. LEXIS 762 (Fla. May 3, 2007)*, the proceeds from the engagement agreement are a prohibited fee that are addressed by *rule 3-5.1(h)*. The rule provides, in pertinent part:

> [HN9] Forfeiture of Fees. An order of the Supreme Court of Florida or a report of minor misconduct adjudicating a respondent guilty of entering into, charging, or collecting a fee prohibited by the Rules Regulating The Florida Bar may order the respondent to forfeit the fee or any part thereof. . . . *[A] fee otherwise prohibited by the Rules Regulating The Florida Bar may be ordered forfeited to The Florida Bar Clients' Security Fund* and disbursed in accordance with its rules and regulations.

R. Regulating Fla. Bar 3-5.1(h) (emphasis added). This Court approved *rule 3-5.1(h)* in 1990. *See Fla. Bar Petition to Amend the Rules Regulating the Fla. Bar--Advertising Issues, 571 So. 2d 451, 472 (Fla. 1990)*. Thus, **[**29]** the clear language of the **[*162]** rule had been in effect for several years when Rodriguez entered into the engagement agreement in 1996.

Pursuant to *rule 3-5.1(h)*, it is appropriate for Rodriguez to disgorge the prohibited fee to the Clients' Security Fund. Further, permitting Rodriguez to retain his ill-gotten gains would fail to provide a deterrent and could actually encourage misconduct by greedy lawyers. *See In re Hager, 812 A.2d 904 (D.C. 2002)*; *In re Hager, 878 A.2d 1246 (D.C. 2005)*.

Based on the clear language in *rule 3-5.1(h)* and caselaw, we disapprove the referee's recommendation that Rodriguez be permitted to retain the prohibited fee. Instead, we require Rodriguez to disgorge the prohibited fee into the Clients' Security Fund. We direct that the total amount for disgorgement include the amount Rodriguez paid in taxes, as he can seek a refund of those taxes from the Internal Revenue Service. Further, we require Rodriguez to disgorge interest on the full amount of the prohibited fee. Interest shall be calculated as starting on August 12, 1996, the date the firm received the $ 6,445,000.

The referee stated that the amount he considered when examining the issue of disgorgement "was in **[**30]** excess of $ 1,600,000," yet the referee also stated that Rodriguez was protecting "his own interest in $ 1,440,000." Clearly, the referee did not make a finding as to a precise amount. Further, before this Court, the Bar has presented the amounts of $ 1,600,000 and $ 935,040. Thus, as this Court has not been presented with an ultimate specific amount, which includes taxes and interest, we remand this matter to the referee solely to determine the total amount for disgorgement. We direct the referee to consider *Florida Bar v. St. Louis, No. SC04-49, 2007 Fla. LEXIS 762 (Fla. May 3, 2007)*, in making this determination.

CONCLUSION

Accordingly, Francisco Ramon Rodriguez is suspended from the practice of law in Florida for two years. The suspension will be effective thirty days from the filing of this opinion so that Rodriguez can close out his practice and protect the interests of existing clients. If Rodriguez notifies this Court in writing that he is no longer practicing and does not need the thirty days to protect existing clients, this Court will enter an order making the suspension effective immediately. Rodriguez shall accept no new business from the date this opinion is filed until he is reinstated.

Further, **[**31]** as the referee did not find a specific amount for disgorgement that includes taxes and interest, this Court hereby remands that issue to the referee as the finder of fact to determine the total amount for disgorgement.

Judgment is entered for The Florida Bar, 651 East Jefferson Street, Tallahassee, Florida 32399-2300, for recovery of costs from Francisco Ramon Rodriguez in the amount of $ 45,258.88, for which sum let execution issue.

It is so ordered.

LEWIS, C.J., and WELLS, ANSTEAD, PARIENTE, QUINCE, CANTERO, and BELL, JJ., concur.

THE FILING OF A MOTION FOR REHEARING SHALL NOT ALTER THE EFFECTIVE DATE OF THIS SUSPENSION.

Go To FL Supreme Court Brief(s)

Supreme Court of Indiana.
In the Matter of Michael J. HELMAN.
No. 84S00-9403-DI-236.

Oct. 13, 1994.

After Disciplinary Commission charged attorney with violating rules of professional conduct, the Supreme Court held that failing to file suit after stating to employer and client that action has been taken, failing to respond to reasonable requests by client for information, and lying to client and to employer warrants reprimand.

Reprimand and admonishment issued.

Givan and Dickson, JJ., dissented, believing greater sanction should be imposed.

West Headnotes

[1] Attorney and Client 45 59.5(1)

45 Attorney and Client
45I The Office of Attorney
45I(C) Discipline
45k59.1 Punishment; Disposition
45k59.5 Factors Considered
45k59.5(1) k. In General. Most Cited Cases
(Formerly 45k58)
In assessment of proper sanction for attorney misconduct, Supreme Court generally examines nature of misconduct or disciplinary offense, actual or potential injury, state of mind of attorney, duty of Court to preserve integrity of profession, risk to public of allowing disciplined lawyer to continue in practice, and matters in aggravation and mitigation.

[2] Attorney and Client 45 38

45 Attorney and Client
45I The Office of Attorney
45I(C) Discipline
45k37 Grounds for Discipline
45k38 k. Character and Conduct. Most Cited Cases

Attorney and Client 45 44(1)

45 Attorney and Client
45I The Office of Attorney
45I(C) Discipline
45k37 Grounds for Discipline
45k44 Misconduct as to Client
45k44(1) k. In General. Most Cited Cases
Intent by attorney to deceive both client and employer demonstrates high level of culpability for professional misconduct by attorney.

[3] Attorney and Client 45 32(4)

45 Attorney and Client
45I The Office of Attorney
45I(B) Privileges, Disabilities, and Liabilities
45k32 Regulation of Professional Conduct, in General
45k32(4) k. Attorney's Conduct and Position in General. Most Cited Cases
Every individual who has taken oath of attorneys should be aware that lying is, at best, ethically irresponsible practice.

[4] Attorney and Client 45 59.8(1)

45 Attorney and Client
45I The Office of Attorney
45I(C) Discipline
45k59.1 Punishment; Disposition
45k59.8 Public Reprimand; Public Censure; Public Admonition
45k59.8(1) k. In General. Most Cited Cases
(Formerly 45k58)
Failing to file suit after stating to employer and client that action has been taken, failing to respond to reasonable requests by client for information, and lying to client and to employer warrants reprimand. Rules of Prof.Conduct, Rules 1.3, 1.4(a), 8.4(c).

***1063** Michael J. Helman, pro se.
Robert C. Shook, Staff Atty., Indianapolis, for Indiana Supreme Court Disciplinary Com'n.

DISCIPLINARY ACTION

PER CURIAM.
The Disciplinary Commission has charged Respondent Michael J. Helman, in a complaint for disciplinary action, with violating several provisions of the *Rules of Professional Conduct for Attorneys at Law*. The Commission and Respondent have tendered for this Court's approval their Statement of Circumstances and Conditional Agreement for Discipline, therein acknowledging that Respondent has engaged in misconduct, and agreeing that a public reprimand is an appropriate disciplinary measure for said misconduct. Respondent has submitted an affidavit,***1064** as contemplated by Ind.Admission and Discipline Rule 23, Section 17(a). We approve the tendered agreement, but here wish to set out more fully the facts and circumstances of this case.

Accordingly, we now find that the Respondent was admitted to the Bar of this state on October 25, 1991, and is thus subject to this Court's disciplinary jurisdiction. At all times relevant here, Respondent was employed as an associate of the Terre Haute law firm of Wright, Shagley & Lowrey. On May 15, 1992, an individual (hereinafter "client") met with attorney Robert L. Wright, a senior partner in Wright, Shagley & Lowery, to discuss alleged sexual harassment and discrimination on the part of the client's employer. Following an administrative hearing, the Indiana Department of Employment and Training Services ruled on July 10, 1992, that the employer's conduct toward the client violated state law, and that the client had good cause to voluntarily leave employment due to the treatment she had received. On July 13, 1992, Wright directed Respondent to investigate a possible civil claim the client might have against her former employer, and to assist Wright in otherwise handling the matter. During March, April, and May of 1993, Respondent demanded, via letter, that the client's former employer compensate her for her claims; otherwise, Respondent indicated he would file a claim for damages on his client's behalf. The employer declined to offer compensation. During the summer of 1993, Respondent told the client that he would file a complaint for damages on her behalf against her former employer, and, in early August, informed her that he had filed such a complaint in federal court. Later, in the fall of 1993, Respondent informed Wright that he had filed the case. In reality, Respondent had never filed any action on behalf of the client in any court. Throughout the summer and fall of 1993, the client was unable to obtain from Respondent truthful answers to her requests for information about the status of her case. She was never informed that the applicable statute of limitations would not run until May 15, 1994.

Wright eventually learned that the client had filed a grievance with the Disciplinary Commission alleging that Respondent had failed to file her case and to provide her with truthful information about the status of her case. On January 10, 1994, Wright confronted Respondent with the grievance, whereupon Respondent admitted to Wright that he had never filed an action on the client's behalf, and that he had lied to Wright. Wright terminated Respondent's employment with the law firm that day.

Based on the aforesaid facts, we find that Respondent violated Ind.Professional Conduct Rule 1.3 by failing to act with reasonable diligence and promptness in representing a client; that he violated Prof.Cond.R. 1.4(a) by failing to keep his client reasonably informed about the status of a matter and to promptly comply with reasonable requests for information; and that he violated Prof.Cond.R. 8.4(c) by engaging in conduct involving dishonesty, fraud, deceit, and misrepresentation.

[1][2] Now that we have found misconduct, we must assess an appropriate disciplinary measure. In this regard, we note that Respondent and the Commission have agreed that a public reprimand adequately addresses Respondent's misconduct. In its assessment of proper sanction, this Court generally examines the following factors: the nature of the misconduct or disciplinary offense; the actual or potential injury; the state of mind of the respondent; the duty of this Court to preserve the integrity of the profession; the risk to the public of allowing the disciplined lawyer to continue in practice; and matters in aggravation and mitigation. *In re Roemer* (1993), Ind., 620 N.E.2d 694; *In re Cawley, Jr.* (1992), Ind., 602 N.E.2d 1022. Relevant to the first factor above, we note that Respondent's misconduct reflects an episode of fundamental dishonesty involving both a client and Respondent's employer. Both had undoubtedly placed a

great deal of trust in Respondent, only to have him egregiously breach that trust. Thus, we view the nature of his misconduct as severe. Further, the agreed facts clearly indicate that Respondent intentionally sought to deceive both his client and his employer. Such intent demonstrates a high level of culpability. *In re Thompson* (1993), Ind., 624 N.E.2d 466.

***1065** [3] We also note several possible mitigating factors. Respondent had been practicing law in this state only about one year at the time of his misconduct. *See In re Burton* (1993), Ind., 625 N.E.2d 457 (inexperience a factor in mitigation for attorney neglect of clients' cases); *In re Matz* (1990), Ind., 560 N.E.2d 66 (inexperience a factor in mitigation in relation to attorney's conflict of interest). *Cf. In re Castello* (1980), 273 Ind. 136, 402 N.E.2d 970 (unfamiliarity with disciplinary rules should not excuse misconduct). Further, absent in this case is any indication of consistent careful supervision on the part of the more senior attorneys in Respondent's law firm, which, if present, may have corrected Respondent's actions before they rose to the level of misconduct. The *Rules of Professional Conduct* contain provisions addressing a lawyer's responsibilities of ensuring that subordinates properly discharge their duties and otherwise conduct themselves within applicable ethical constraints. *See, e.g.,* Prof.Cond.R. 5.1. We note also that the client discovered Respondent's inaction and attendant deception before the statutory period governing her action expired, and was presumably able to take actions to preserve her claim. Thus, Respondent's acts resulted in no tangible damage to the client. On the other hand, the fact that the statutory period had not run might be viewed as an aggravating circumstance, in that we cannot find any motivation for Respondent's deceptions, such as might exist had Respondent negligently allowed the statute to expire without filing the action. We note too that, although Respondent had been admitted to practice for only a brief time before the misconduct at issue here, we do not give that fact significant weight as a mitigating circumstance in this case. Every individual who has taken this Court's oath of attorneys should be aware that lying is, at best, an ethically irresponsible practice.

Although blatant deceit generally calls for a strong disciplinary response, we note that some of the factors above mitigate in Respondent's favor. We also consider the fact that Respondent's termination from employment might be viewed as some measure of discipline, and almost certainly made clear to him that deceit and inaction will not be tolerated by clients or employers.

[4] In light of the mitigating factors present here, the existence of the agreement, and the Commission's assessment of the violation, we accept the agreed sanction, that being a public reprimand. However, violations of this nature ordinarily warrant a harsher sanction. *See, e.g., In re Briscoe* (1994), Ind., 629 N.E.2d 851 (two year suspension imposed for misrepresentation of case status and neglect); *Roemer,* 620 N.E.2d 694 (ninety day suspension imposed where attorney told client he had filed client's action, when in fact he had not). Absent the mitigating factors noted above, this Court likely would have imposed a period of suspension. Accordingly, the Respondent, Michael J. Helman, is hereby reprimanded and admonished for the misconduct set out above.

Costs of this proceeding are assessed against Respondent.

GIVAN and DICKSON, JJ., dissent, believing a greater sanction should be imposed.
Ind.,1994.
Matter of Helman
640 N.E.2d 1063

END OF DOCUMENT

9 of 10 DOCUMENTS

Cited
As of: Dec 22, 2008

DENISE THERIAULT, Appellant/Cross-Appellee, v. J.S. & G. ASPHALT, INC., a Florida corporation, Appellee/Cross-Appellant.

CASE NO. 91-3543.

COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

617 So. 2d 437*; *1993 Fla. App. LEXIS 4666*; *18 Fla. L. Weekly D 1079

April 28, 1993, Filed

PRIOR HISTORY: **[**1]** Appeal and cross-appeal from the Circuit Court for Broward County; George A. Brescher, Judge. L.T. CASE NO. 87-26764(24).

DISPOSITION: AFFIRMED.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant victim challenged an order from the Circuit Court for Broward County (Florida) denying her motion for a new trial after the court awarded her $ 1,111.60 in damages for physical injuries sustained in a motor vehicle collision. Appellee corporation challenged the trial court's error in denying its motion for sanctions against appellant's attorney.

OVERVIEW: The appellate court affirmed the final judgment of the trial court including a damage award for appellant victim for $ 1,111.60, the denial of her motion for a new trial, and the denial of appellee corporation's motion for sanction against appellant's attorney. During appellant's trial for personal injuries incurred by appellant in a motor vehicle collision, appellee's counsel prepared a large poster listing prior accidents and injuries allegedly suffered by appellant. Appellee used the poster to read from, but never showed it to the jury. During a break in trial, appellant's attorney opened the zippered case where the poster was found and made notes from the information on it. The appellate court noted that the conduct of appellant's attorney had not occurred before the court. Appellee could petition the Florida Bar if he wanted to file a formal complaint, pursuant to Fla. *Bar Rule **4-8.3(a)***. As for appellant's challenge to her damage award, the appellate court held that appellant had failed to demonstrate error in the admission of a pre-accident "diagnostic interview report." Appellant also failed to demonstrate reversible error in the trial court's refusal to grant a new trial.

OUTCOME: The appellate court affirmed the trial court's denial of appellant's motion for a new trial after appellant was awarded minimal damages for personal injuries. The court found that appellant had failed to demonstrate error in the admission of a pre-accident "diagnostic interview report or find reversible error because of defense counsel's alleged improper statements. Denial of sanctions against appellant's attorney was affirmed.

LexisNexis(R) Headnotes

Legal Ethics > Professional Conduct > Illegal Conduct
[HN1] A lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects shall inform the appropriate professional authority. Fla. *Bar Rule **4-8.3(a)***.

COUNSEL: Joel S. Perwin of Podhurst, Orseck, Josefsberg, Eaton, Meadow, Olin & Perwin, P.A., Miami, and Sheldon J. Schlesinger, P.A., Fort Lauderdale, for appellant/cross-appellee.

David F. Cooney of Cooney, Haliczer, Mattson, Lance, Blackburn, Pettis & Richards, P.A., Fort Lauderdale, for appellee/cross appellant.

JUDGES: DELL, WARNER and POLEN, JJ., concur.

OPINION BY: PER CURIAM

OPINION

[*437] PER CURIAM.

Denise Theriault appeals a final judgment awarding her $ 1,111.60 in damages for physical injuries sustained in a motor vehicle collision. We affirm.

Appellant has failed to demonstrate error in the admission of a pre-accident "diagnostic interview report." *See Love v. Garcia, 611 So. 2d 1270 (Fla. 4th DCA 1992)*. Appellant has also failed to demonstrate reversible error in the trial court's refusal to grant a new trial because of defense counsel's **[*438]** alleged improper statements during opening and closing argument.

On cross-appeal, appellee contends the trial court erred in denying its **[**2]** motion for sanctions against appellant's attorney, Robert Kelley. Appellee prepared a 30" x 40" poster listing the chronology of prior accidents and injuries allegedly suffered by appellant. Appellee read from the poster during opening argument without showing it to the jury. The parties dispute whether Kelly had an opportunity to observe its contents at that time. Appellee's counsel kept the poster in a zippered carrying case. During a break in the trial, appellee's counsel witnessed Mr. Kelley crouched in front of the poster taking notes from it. Kelley admitted opening the case, removing the poster and copying information from it:

> When I opened that I had no idea it was his or mine. I have ten things like that in my office. It wasn't until I opened it up I saw what it was. I said Hell, I might as well write this down so I can go through it.

The trial court denied appellee's motion for sanctions finding:

> THE DEFENDANT'S MOTION FOR SANCTIONS against the Plaintiff's attorney Robert W. Kelley came on to be heard before the Court during several hearings, and the primary subject of said motion was an incident that occurred out of the presence of the Court during a time when **[**3]** the trial of this cause was in recess. The sworn testimony of each of the attorneys as to the facts which gave rise to the incident complained of are contained in the record of the hearings held on this matter.
>
> THE PRIMARY SANCTION sought by the Defense is for the Court to specifically refer this matter to the Florida Bar for further investigation and disciplinary action if appropriate. The Court finds that because the conduct complained of did not in fact occur before the Court and further that the Defendant may also directly petition the Florida Bar with reference to this matter, that it would be inappropriate for the Court to take further action.
>
> THE COURT also finds that other alleged discovery violations that occurred during the lengthy period in which this case was tried twice have not been sufficiently established so as to justify or require the imposition of sanctions against the attorney.

Appellee's motion for sanctions contains serious allegations of misconduct. However, we do not believe the trial court's failure to report this matter to the Florida Bar is subject to appellate review. We note Canon 3B(3) of the Code of Judicial Conduct provides:

> A judge should take **[**4]** or initiate appropriate disciplinary measures against a judge or lawyer for unprofessional conduct of which the judge may become aware.

On the other hand, the Rules of Professional Conduct of the Florida Bar make it equally clear:

> **Reporting Misconduct of Other Lawyers.** [HN1] A lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects shall inform the appropriate professional authority.

*R. Regulating Fla. Bar **4-8.3(a)***. We also note that unlike the trial judge, appellee's counsel observed Mr. Kelley's alleged misconduct. The trial court's determination neither prevents appellee's counsel from filing a complaint

with the Florida Bar nor presents an impediment to any investigation or further action the Bar may deem appropriate.

Finally, the record does not furnish a sufficient basis for us to conclude the trial court abused its discretion when it denied appellee's motion for sanctions.

AFFIRMED.

DELL, **[**5]** WARNER and POLEN, JJ., concur.

AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 08-453 **October 17, 2008**
In-House Counsulting on Ethical Issues

The desire to ensure that law firm members comply with their ethical obligations has given rise to the designation of "ethics counsel" within law firms to whom the firm and its members may turn for advice on ethics matters. Ethics consultations within law firms create client-lawyer relationships separate from those between law firms and their outside clients. A firm's ethics counsel typically represents the organization as a whole, and not individual firm lawyers, although simultaneous representation of an individual firm member is permitted where no conflict exists between the firm and the individual lawyer. A firm's ethics counsel may be obligated to disclose an individual lawyer's ethical violations to firm management. Whether ethical misconduct must be reported to disciplinary authorities will be determined under the principles that generally apply to lawyers advising clients. The obligation to disclose an individual lawyer's possible misconduct to the firm's client turns on the firm's duty fully to inform the client on matters related to the representation.

This opinion addresses the ethics issues that arise when a lawyer consults with another lawyer in the same firm about the ethics implications of the consulting lawyer's conduct.[1]

Several authors have explored the phenomenon of the emergence and benefits of in-house ethics consulting in law firms.[2] Courts in a few jurisdictions

1. This opinion is based on the Model Rules of Professional Conduct as amended by the ABA House of Delegates through February 2008. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in individual jurisdictions are controlling.

2. *See, e.g.*, Elizabeth Chambliss, *The Professionalization of Law Firm In-House Counsel*, 84 N.C. L. REV. 1515 (2006) (examining the structural evolution of the firm counsel position "from a volunteer, part-time position filled by an existing partner to a specialized, often full-time position increasingly filled by career in-house counsel"); Elizabeth Chambliss, *The Scope of In-Firm Privilege*, 80 Notre Dame L. Rev. 1721 (2005) (discussing law firms' increasing reliance on general counsel and noting firm counsels' contribution "to firm-wide compliance with professional regulation"); and Elizabeth Chambliss & David B. Wilkins, *The Emerging Role of Ethics Advisors, General Counsel, and Other*

have examined whether a law firm whose interests conflict with those of a client may claim the protection of the attorney-client privilege as to communications between lawyers in the firm about matters pertaining to the conflict.[3]

By contrast, there has been little analysis of other ethical considerations that can arise in conjunction with, or as a consequence of, in-house ethics consulting.[4] The Model Rules contemplate the existence of some structure or process within a firm for resolution of questions about professional conduct. Rule 5.1(a) makes law firm partners responsible to reasonably assure that "all lawyers in the firm conform to the Rules of Professional Conduct." The precise nature of the measures a firm must implement under Rule 5.1 necessarily will depend on the size of the firm, the experience of its members, and the nature and frequency of the ethical problems it encounters. Comment [3] to Rule 5.1 identifies in-house ethics counsel as one option: "[s]ome firms ... have a procedure whereby junior lawyers can make confidential referral of ethical problems directly to a designated senior partner or special committee." Increasingly, firms address their obligations under Rule 5.1 by doing what Comment [3] suggests, designating an individual lawyer or a committee to counsel the firm or any individual in the firm on questions of professional conduct as applied to the firm or to lawyers within the firm. This opinion will focus on responsibilities of such ethics counsel.

Disclosure of Confidential Information in Ethics Consultations

We begin by addressing the threshold issue of whether Model Rule 1.6, "Confidentiality of Information," permits disclosure of a client's information in the context of an in-house ethics consultation. As a general proposition, Rule 1.6 prohibits disclosure of information relating to the representation of a client except where it is impliedly authorized to carry out the representation or expressly permitted by paragraph (b) of the Rule. We believe that disclosures within a law firm are clearly "impliedly authorized." The client who chooses to be represented by a law firm, rather than by a sole practitioner, often does so precisely because of the breadth of expertise within the firm, and such a client expects that the firm will utilize all its available resources for the client's benefit. Moreover, Comment [5] to Rule 1.6 provides that lawyers in a firm may disclose to each other information relating to a client of the firm unless the client has instructed that particular information be confined to specific lawyers. Accordingly, unless a

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Compliance Specialists in Large Law Firms, 44 Ariz. L. Rev. 559 (2002) (investigating the emerging role of compliance specialists in large law firms).

3. *See* VersusLaw, Inc. v. Stoel Rives, 111 P.3d 866 (Wash. App. 2005), *review denied*, 132 P.3d 147 (Wash. 2006) (attorney-client privilege attaches to communications with in-house claims counsel, but firm's fiduciary duty to client can "trump" privilege and requires disclosure of internal law firm communications that took place while firm still was representing client), and cases cited therein.

4. To date, the only state ethics opinion on the subject is New York State Bar Ass'n. Comm. on Prof'l Eth. Op. 789 (Oct. 26, 2005) (Consultation with a Law Firm's In-House Counsel on Matters of Professional Ethics Involving One or More Clients of the Law Firm), analyzing the issues under the New York Code of Professional Responsibility.

client has expressly instructed that information be confined to specific lawyers within the firm, the lawyer handling the matter does not violate the duty of confidentiality by consulting within the firm about the client's matter.

In addition, Rule 1.6(b)(4) expressly permits a lawyer to disclose confidential client information to a lawyer who is not a partner or other employee of the firm, if the purpose is to obtain advice about the lawyer's compliance with rules of professional conduct. This provision, added to the Model Rules in 2002, accommodates a prudent lawyer's decision to seek ethical guidance. Rule 1.6(b)(4) also facilitates the compliance by a firm's partners, managers, and supervising lawyers with their Rule 5.1 obligation to ensure that all lawyers in the firm conform to the rules of professional conduct.

Duty to Inform the Client of an Ethics Consultation

Whether a client must be informed, before or after the fact, either of the consultation or its conclusions is governed by Rule 1.4, which defines a lawyer's duty of communication with her client. As relevant here, Rule 1.4 requires consultation with the client about the means by which the client's objectives will be accomplished and about any limitations on the lawyer's conduct. Rule 1.4 also requires a lawyer to explain matters sufficiently to permit the client to make informed decisions about the representation. Normally, there would be no need to explain that a conclusion as to the ethical propriety of a course of conduct was based on consultation within the firm or with an expert outside the firm.

That does not mean, however, that the conclusions of an ethics consultation never need to be communicated to the client. For example, if the conclusion of the ethics counsel is that the firm lawyer's assistance in a client's proposed course of action will constitute a violation of the rules of professional responsibility, Rule 1.4(a)(5) requires the firm to consult with the client about the legal limits of the firm's assistance, and Rule 1.4(b) requires an explanation to the client of the possible consequences of the proposed action, including the need of the firm to withdraw so as not to violate its own obligations. Compliance with Rule 1.4 would not *require* the firm to reveal that its opinions and advice are the result of an ethics consultation, but nothing in the Rule would prohibit disclosing the consultation as part of the firm's effort to fully counsel the client about the reason for its advice.

Ethics Consultation Not a Per Se Conflict with the Firm Client

Whether a consultation with a firm's ethics counsel creates a conflict of interest between the firm and its client depends on the nature of the consultation and on the respective interests of the firm and its client at the time. In the absence of the client's informed consent confirmed in writing, a lawyer may not represent the client if there is significant risk that the representation will be materially limited by a conflicting interest of the lawyer.[5] The Rule ensures that the lawyer's pursuit or protection of her own interests will not materially interfere with the representation of the client.

5. Rule 1.7(a)(2).

A lawyer's effort to conform her conduct to applicable ethical standards is not an interest that will materially limit the lawyer's ability to represent the client. On the contrary, "it is inherent in that representation and a required part of the work of carrying out the representation. It is, in other words, not an interest that 'affects' the lawyer's exercise of independent professional judgment, but rather is an inherent part of that judgment."[6] For example, a lawyer who is asked by a client to undertake a course of action that the lawyer fears might be criminal or fraudulent would be well-advised to consult with in-house ethics counsel on the propriety of following the client's direction. Although the lawyer has an interest in avoiding conduct that will violate her own ethical duties, the consultation also serves the legitimate purpose of enabling the lawyer to advise a firm client about the legality and wisdom of the proposed course of action and about other available options. In situations such as this, where the lawyer is seeking prophylactic advice to assist in her representation of the client, there is no significant risk that the lawyer's ability to consider, recommend, or carry out an appropriate course of action for the client will be materially limited by the lawyer's interest in avoiding ethical misconduct.[7]

By contrast, when the principal purpose of the consultation is to protect the interests of the consulting lawyer or the firm (typically for action already taken), the risk that the consulting lawyer's representation of the firm's client will be materially limited may be significant. For example, if the consulting lawyer has engaged in misconduct[8] in the course of the representation, it may be difficult or impossible for that lawyer (or anyone in the lawyer's firm) to give the client sufficiently detached advice as the matter progresses. In that circumstance, there is a significant risk that the representation of that client will be materially limited by the interests of the consulting lawyer and every lawyer in the firm.[9] Unless the client waives disqualification of the individual lawyer, all the lawyers in the firm are disqualified from continuing the representation, pursuant to Rule 1.10(a). Moreover, that consent may be sought only when the firm reasonably believes that one or more lawyers in the firm can provide competent and diligent representation to the client notwithstanding the consulting lawyer's conflict.[10]

Identifying Ethics Counsel's Client

With respect to any in-house ethics consultation, it is important to identify the relationship between the ethics counsel, the law firm, and the consulting lawyer. Rule 1.13(a) posits that a lawyer employed or retained by an organization represents the organization rather than any of its constituents. As a general proposition, an ethics counsel in the first instance represents the law firm, not

6. New York State Bar Ass'n. Comm. on Prof'l Eth. Op. 789, *supra* note 4.

7. *See* Rule 1.7, cmt. 8.

8. For purposes of this opinion, "misconduct" means a violation of the applicable rules of professional conduct. Similar analyses may apply to negligence or other breaches of duty to a client, but they are outside the scope of this opinion.

9. Rule 1.7, cmt. 10.

10. Rule 1.7(b)(1).

any of the individual lawyers in the firm. Rule 1.13(g) recognizes that an entity's lawyer also may represent constituents of the entity, provided the dual role does not present a concurrent conflict of interest in violation of Rule 1.7.

The existence of a client-lawyer relationship between the ethics counsel and a constituent of the law firm will be determined principally by the reasonable expectations of the consulting lawyer under the circumstances.[11] It is wise for the firm to make clear to its lawyers that the ethics counsel represents the firm and not any of the lawyers individually.[12] Under certain circumstances, the ethics counsel may agree (or may lead the consulting lawyer reasonably to believe) that the ethics counsel will represent the consulting lawyer individually. Such dual representation may be appropriate where the interests of the consulting lawyer and the firm are reasonably believed not to be in conflict. For instance, if the ethics counsel concludes that the consulting lawyer has not engaged in any misconduct, joint representation usually would be appropriate. To the extent that the ethics counsel's representation is limited to the firm, ethics counsel must be careful to explain to any individual firm member with whom she is dealing that only the firm is a client, particularly if she reasonably believes the interests of the firm and the individual member are or may be adverse.[13] These explanations are even more important when the ethics counsel believes the consulting lawyer may have engaged in misconduct and may, nevertheless, expect assistance from the firm.[14]

Disclosing Information Under Model Rule 1.13

We turn now to our final issues, relating to both permissive and mandatory disclosures of information by ethics counsel. The first of these is the ability or obligation to make disclosure of a consulting lawyer's misconduct according to the terms of Model Rule 1.13, "Organization as Client." In some circumstances, ethics counsel must disclose misconduct of a consulting lawyer to law firm management or to external regulatory authorities.[15] The principal

11. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §14 (2000); ABA Comm. on Ethics and Prof'l Responsibility Formal Op. 98-411 (Aug. 30, 1998) (Ethical Issues in Lawyer-to-Lawyer Consultation); Model Rules of Professional Conduct Scope [17] (whether a client-lawyer relationship exists "may be a question of fact.")

12. *See* Rule 4.3 ("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.")

13. *See* Rule 1.13(f).

14. As discussed above, this situation will trigger the firm's obligations under Rule 1.4 to explain the situation adequately to the client and, under Rule 1.7, to address the self-interest conflict that would arise if the firm were to continue the representation.

15. Notwithstanding any ethical consequences of failure to disclose, we note that a law firm's failure to disclose its own malpractice to a client may expose the firm to civil liability. *See* In re SRC Holding Corp., 364 BR 1, 37-40 (D. Minn. 2007) (law firm had a duty to advise client of the possibility of a substantial malpractice claim; client may know the facts but not appreciate their significance; failure to disclose was breach of fiduciary duty and required disgorgement of fees).

thrust of Rule 1.13 is that a lawyer representing an organization must take appropriate action to protect the organization when the lawyer has knowledge that a person associated with the organization is "engaged in action ... that is a violation of a legal obligation to the organization, or a violation of law that might be imputed to the organization,[16] and that is likely to result in substantial injury to the organization." Unless the lawyer believes it is not necessary in the best interest of the organization to do so, she must refer the matter to higher authority in the organization, "including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization."[17] If that referral is not effective to prevent a violation of law that the lawyer reasonably believes will result in substantial injury to the organization, the lawyer may reveal the information outside the organization, whether or not Rule 1.6 otherwise permits such disclosure.[18]

Lawyers in a law firm have a legal obligation to the firm not to engage in conduct, including a violation of ethical rules, that harms the firm. Rule 1.13(b) requires that the ethics counsel who becomes aware that the actions of a lawyer in the firm, unless corrected, could result in substantial injury to the firm, "proceed as is reasonably necessary in the best interest of the [firm]." A law firm normally will expect its ethics counsel to report to senior management any serious ethical violations the ethics counsel has discovered. In some situations, it would be reasonable for the ethics counsel to believe that the situation can be corrected simply by counseling the lawyer involved about the appropriate course of conduct and, if the lawyer complies, that such resolution is in the best interest of the organization.[19] If the ethics counsel's advice is rejected, however, or if the misconduct is sufficiently serious or urgent, referral to a higher authority in the firm will be required.[20]

Rule 1.13 Comment [4] suggests that the measures taken by an organization's lawyer in this situation should, "to the extent practicable," minimize the risk of revealing information relating to the representation to persons outside the organization. At the same time, Rule 1.13(c) permits the revelation, even of information otherwise protected by Rule 1.6, if the misconduct clearly is a violation of law, the highest authority within the organization fails to address the misconduct appropriately, and the lawyer reasonably believes it is necessary to prevent substantial injury to the organization. A law firm's ethics counsel thus could choose to reveal information to disciplinary authorities or to others if the firm management fails or refuses to correct clearly illegal con-

16. Rule 5.1(c) makes a lawyer who is a partner or who has comparable managerial authority in a firm responsible for the misconduct of another lawyer in the firm if the lawyer "knows of the conduct at a time when its consequences can be avoided or mitigated, but fails to take remedial action."

17. Rule 1.13(b).

18. *See* Rule 1.13(c).

19. Rule 1.13, cmt. 4.

20. *Id.*

duct that reasonably might be attributed to others in the firm and would cause substantial injury to the firm.

Reporting the Consulting Lawyer's Misconduct to Disciplinary Authorities

In contrast to Rule 1.13(c), which allows, but does not require, disclosure of misconduct outside the organization, Rule 8.3 mandates disclosure to the appropriate disciplinary authority when a lawyer knows that another lawyer has committed a violation of the rules "that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." It generally is agreed that reporting under this rule is required only when the conduct in question is egregious and "of a type that a self-regulating profession must vigorously endeavor to prevent." [21]

Even when this standard is reached, however, Rule 8.3 does not apply if the lawyer's knowledge of the misconduct is "information relating to the representation of a client" as protected by Rule 1.6. Whether the ethics counsel's only client is the firm or is both the firm and one or more constituent lawyers, in most cases the information the ethics counsel has about a constituent lawyer's misconduct will be information relating to the representation of the ethics counsel's client, the law firm, and therefore the mandatory reporting requirement of Rule 8.3(a) will be subject to the firm's consent. The knowledge might also be based on the confidential information of the firm's client, also protected by Rule 1.6, and thus subject to the client's consent.

Although the ethics counsel may not be required to report certain violations of professional conduct rules, Rule 8.3 Comment [2] exhorts a lawyer "to encourage a client to consent to disclosure where prosecution would not substantially prejudice the client's interests."[22] Accordingly, the ethics counsel should encourage the law firm and, if appropriate, the client, to report the misconduct of a firm member where doing so would not have a substantial adverse effect on their respective interests.[23] In the rare situation where the ethics counsel represents both the individual lawyer and the law firm, adherence to Comment [2] will be problematic, because encouraging the law firm to disclose the misconduct would conflict with the ethics counsel's duty to protect the interests of the consulting lawyer. Ethics counsel would be required in that situation by Rule 1.7(b)(1) to withdraw from continuing to represent either the law firm or the consulting lawyer in the matter, and, absent an exception to

21. Rule 8.3, cmt. 3.

22. *See also* ABA Comm. on Ethics and Prof'l Responsibility Formal Op. 04-433 (Aug. 26, 2004) (Obligation of a Lawyer to Report Professional Misconduct by a Lawyer Not Engaged in the Practice of Law) ("We believe it would be contrary to the spirit of the Model Rules for the lawyer not to discuss with the client the lawyer's ethical obligation to report violations of the Rules. In essence, this would allow the lawyer to circumvent them.")

23. *See* "Reporting Consulting Lawyer's Misconduct to Firm Management," *supra*, regarding the ethics counsel's discretion under Section 1.13(c) to report outside the firm.

Rule 1.6, would not be allowed to disclose the misconduct.[24]

The reporting exception for the ethics counsel does not apply to lawyers involved in the law firm's management or to other lawyers in the firm. They do not have a client-lawyer relationship with their errant colleague, and they are not excused from reporting to the disciplinary authority unless their knowledge is based on confidential information of a firm client. If the misconduct is sufficiently serious, under Rule 1.4(a)(1), the firm client should be informed that reporting one's colleague is required by Rule 8.3(a), subject to the client's consent as required by Rule 8.3(c). In Formal Op. 04-433,[25] we acknowledged the awkwardness and potential discomfort associated with reporting the misconduct of a colleague, particularly a superior. Despite the difficulty of reporting, the Preamble to the Model Rules, paragraph [12], reminds lawyers that: "Every lawyer is responsible for observance of the Model Rules of Professional Conduct. A lawyer should also aid in securing their observance by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest which its serves."

Conclusion

In-house ethics consulting is without question valuable, but it must be implemented with consideration of all ethical issues that may arise. Consent of the client is not required before a lawyer consults with in-house ethics counsel, nor must the client be informed of the consultation after the fact. The consultation does not give rise to a per se conflict of interest between the firm and its client, although a personal interest conflict will arise if the principal goal of the ethics consultation is to protect the interest of the consulting lawyer or law firm from the consequences of a firm lawyer's misconduct. In that event, the representation may continue only if the client gives informed consent. The ethics counsel may be obligated to disclose misconduct of the consulting lawyer to higher authority within the firm unless she reasonably believes the situation can be corrected without harm to the firm through counseling or other means. The ethics counsel may disclose the misconduct to others outside the firm if the partners or other management authority in the firm fail to take appropriate corrective action in regard to clearly illegal conduct that could significantly harm the firm. Reporting the misconduct to disciplinary counsel will not be required so long as the ethics counsel's information is information relating to the representation of her client or clients, but the ethics counsel should seek appropriate client consent to report where disclosure is not likely to harm the firm client.

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24. *See* ABA Comm. on Ethics and Prof'l Responsibility Formal Op. 08-450 (Apr. 9, 2008) (Confidentiality When Lawyer Represents Multiple Clients in the Same or Related Matters).

25. ABA Formal Op. 04-433, *supra* note 22.

Model Rules of Professional Conduct

Client-Lawyer Relationship
Rule 1.6 Confidentiality Of Information

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these Rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(6) to comply with other law or a court order.

Supreme Court of Rhode Island.
In re ETHICS ADVISORY PANEL OPINION NO. 92-1.
No. 93-41-M.P.

June 25, 1993.

Chief Disciplinary Counsel sought review of opinion of Supreme Court Ethics Advisory Panel. The Supreme Court, Murray, J., held that: (1) Chief Disciplinary Counsel suffered sufficient injury in fact to have standing to challenge ethics opinion, in light of opinion's limitation on ability to investigate and prosecute attorney misconduct by declaring that attorney could not report misconduct of another attorney without client's consent, and (2) Rules of Professional Conduct supported ethics opinion's declaration that duty of confidentiality prohibited inquiring attorney from reporting misconduct of another attorney without client's consent, where inquiring attorney learned of misconduct during course of representation of client.

Ordered accordingly.

West Headnotes

[1] Attorney and Client 45 32(13)

45 Attorney and Client
45I The Office of Attorney
45I(B) Privileges, Disabilities, and Liabilities
45k32 Regulation of Professional Conduct, in General
45k32(13) k. Client's Confidences, in General. Most Cited Cases
Chief Disciplinary Counsel suffered sufficient injury in fact to have standing to challenge opinion of Supreme Court Ethics Advisory Panel, in light of opinion's limitation on ability of Chief Disciplinary Counsel to investigate and prosecute attorney misconduct by declaring that attorney could not report misconduct of another attorney without client's consent.

[2] Attorney and Client 45 32(3)

45 Attorney and Client
45I The Office of Attorney
45I(B) Privileges, Disabilities, and Liabilities
45k32 Regulation of Professional Conduct, in General
45k32(3) k. Power and Duty to Control. Most Cited Cases
Supreme Court would rely on undisputed facts presented in parties' briefs in considering Chief Disciplinary Counsel's challenge of opinion of Supreme Court Ethics Advisory Panel, rather than relying solely upon facts set forth in opinion, although including copy of inquiring attorney's letter to Advisory Panel, sanitized of identifying information, would be appropriate in future.

[3] Attorney and Client 45 32(13)

45 Attorney and Client
45I The Office of Attorney
45I(B) Privileges, Disabilities, and Liabilities
45k32 Regulation of Professional Conduct, in General
45k32(13) k. Client's Confidences, in General. Most Cited Cases
Rules of Professional Conduct supported opinion of Supreme Court Ethics Advisory Panel declaring that inquiring attorney's duty of confidentiality prohibited him from reporting misconduct of another attorney without client's consent, where inquiring attorney learned of misconduct during course of representation of client, even though inquiring attorney learned of misconduct from admission of other attorney rather than from client. Sup.Ct.Rules, Rule 47, Rules of Prof.Conduct, Rules 1.6, 8.3.

[4] Attorney and Client 45 32(13)

45 Attorney and Client
45I The Office of Attorney
45I(B) Privileges, Disabilities, and Liabilities
45k32 Regulation of Professional Conduct, in General
45k32(13) k. Client's Confidences, in General. Most Cited Cases

Intent of drafters of Rules of Professional Conduct was not unclear or ambiguous on duty of confidentiality's superseding of duty to report misconduct and, thus, Supreme Court could not limit scope of confidentiality rule in order to strengthen rule governing duty to report misconduct of other attorneys, although Supreme Court would request further study on possible amendments to confidentiality rule out of concern that legal profession had failed to regulate itself effectively. Sup.Ct.Rules, Rule 47, Rules of Prof.Conduct, Rules 1.6, 8.3.

***317** Nina Igliozzi, Ethics Advisory Panel, Mary Lisi, Chief Disciplinary Counsel, David Curtin, Disciplinary Counsel, for plaintiff.
Stephen Rodio, Barbara Margolis, William Gosz, Michael Goldenberg, for defendant.
Lauren Jones, for amicus curiae RI Bar Ass'n. PameleeM. McFarland, for amicus curiae ACLU.

OPINION

MURRAY, Justice.
This matter came before us pursuant to a petition for review filed by the Rhode Island Chief Disciplinary Counsel (disciplinary counsel), requesting that this court review and rescind the Supreme Court Ethics Advisory Panel Opinion No. 92-1, issued January 14, 1992.

***318** The statement of the facts contained in the petition for review set forth that in 1991 the disciplinary counsel received an inquiry from a member of the Rhode Island Bar regarding the inquiring attorney's ethical obligations. According to the disciplinary counsel, the attorney reported that he was successor counsel on a case. During the course of his representation of his clients, he became aware that former counsel had embezzled a substantial amount of the clients' money. The inquiring attorney reported that he learned of this embezzlement by way of an admission from former counsel, not by way of a disclosure from the clients. The inquiring attorney then reported that former counsel repaid to the clients the embezzled funds and the clients directed the inquiring attorney not to report the embezzlement to the disciplinary authorities because of the clients' "friendly relationship with predecessor counsel."

After hearing these facts, the disciplinary counsel advised the inquiring attorney to seek an opinion from the Supreme Court Ethics Advisory Panel (Ethics Advisory Panel or panel) regarding whether the inquiring attorney may or must report the embezzling attorney to the disciplinary authorities when the client has directed the attorney not to disclose the embezzlement.

The Ethics Advisory Panel provided this court with a more detailed version of these events. According to the panel, it received a letter from an attorney requesting ethical advice. The letter stated that another attorney, "attorney X," had represented a corporation on various legal and business matters since 1987. Attorney X referred a litigation matter to the inquiring attorney regarding a lease agreement that attorney X had negotiated previously on behalf of the client. Pursuant to the lease agreement, attorney X held client funds in an escrow account. After several years of litigation the inquiring attorney negotiated a settlement of the dispute and the client agreed to the settlement. The inquiring attorney then called attorney X to arrange for the release of the funds from the escrow account. During that conversation, attorney X told the inquiring attorney that the funds were not available because attorney X had used the funds without the client's authorization.

The inquiring attorney then advised the client of the criminal nature of attorney X's conduct and stated that he or she had a duty to report the ethical violation to the disciplinary authorities. According to the brief submitted by the panel, "[t]he client would not authorize a disclosure and expressed a concern to have the client funds replaced. The client believed that to report the misconduct would interfere with the likelihood of the funds being replaced."

Subsequently, attorney X replaced the client's funds. The client was satisfied with the restoration of the funds and refused to authorize disclosure of the misconduct. According to the panel, the client continued to use attorney X's services on other legal matters.

The aforementioned facts implicate two of the most fundamental ethical obligations of attorneys engaged in the practice of law. The first is the lawyer's duty of confidentiality. This duty is set forth in Rule 1.6 of the Rules of Professional Conduct, adopted by this court and set forth under Rule 47 of the Supreme Court Rules, which states:

"Confidentiality of Information.-(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).

(b) A lawyer may, but is not obligated to, reveal such information to the extent the lawyer reasonably believes necessary:

(1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or

(2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in ***319** any proceeding concerning the lawyer's representation of the client."

The second fundamental duty triggered by these facts is an attorney's duty to report to disciplinary authorities the professional misconduct of another attorney. Rule 8.3 of the Rules of Professional Conduct states in pertinent part:

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

* * * * * *

(c) This rule does not require disclosure of information otherwise protected by Rule 1.6."

The Ethics Advisory Panel reviewed these rules and issued the following opinion:

"An attorney seeks Panel advice as to whether or not an attorney may report another lawyer's professional misconduct without the client's consent when the professional misconduct was discovered during the course of representation of a client.

"The Panel notes that pursuant to Rule 1.6, an attorney is given discretion to reveal information relating to the representation of a client in only two situations. If neither of these situations arise, the attorney is prohibited from making a disclosure. The Panel also notes the comment to Rule 1.6 which states in part, 'The confidentiality rule applies not merely to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source.'

"Assuming the information the attorney received is confidential and within the attorney-client privilege, the Panel is of the opinion that absent the consent of the client, the attorney is prohibited by Rule 1.6 of the Rhode Island Rules of Professional Conduct from revealing it, even in the context of reporting another attorney's misconduct. See also Rule 8.3(c) which states that a report regarding another attorney's misconduct is not required where it would involve violating Rule 1.6."

In this petition for review the disciplinary counsel argues that the Rules of Professional Conduct do not prohibit a lawyer from reporting the serious ethical misconduct of another attorney without client consent when the reporting attorney learned of the misconduct by way of an admission by the accused attorney and not by way of disclosure from the client. In the alternative, in the event we find that the panel properly interpreted Rule 1.6 and Rule 8.3, the disciplinary counsel suggests that we amend the Rules of Professional Conduct to clarify an attorney's duty to report the ethical misconduct of another attorney.

Pursuant to an order issued by this court, we invited "all interested members of the Bar" to file briefs as amicus curiae. The Rhode Island Bar Association, as amicus curiae, has argued that the disciplinary counsel lacks standing to seek review of an opinion of the Ethics Advisory Panel. In addition the Rhode Island Bar Association requests that we address the "lack of a real record" in this case. Thus, before considering whether the Ethics Advisory Panel correctly interpreted the Rules of Professional Conduct in this controversy, we address these preliminary matters.

I

STANDING

[1] Article III, Rule 5, of the Rhode Island Supreme Court Rules (formerly Rule 42-5) lists the duties and powers of the disciplinary counsel. Included among these powers and duties is the obligation of the disciplinary counsel "to investigate all matters involving alleged misconduct which come to his/her attention whether by complaint or otherwise." Absent from this list, however, is the enumerated power to seek review by this court of opinions issued by the Ethics Advisory Panel. Similarly, the Rules of the Ethics Advisory Panel do not provide a method for this court's review of ***320** opinions the panel issues. The Rhode Island Bar Association argues that absent a rule change granting the disciplinary counsel the authority to seek review of Ethics Advisory Panel opinions, the disciplinary counsel lacks standing.

We believe that the disciplinary counsel does have standing to seek review of this ethics opinion in this case. Certainly parties can satisfy the standing requirement by demonstrating that a court rule or legislative enactment expressly grants them standing to appear before this court. However, the general rule for standing, in the absence of a court rule or statute, requires that a party prove injury in fact. *Rhode Island Ophthalmological Society v. Cannon*, 113 R.I. 16, 26, 317 A.2d 124, 129 (1974).

In the present case the disciplinary counsel satisfies the injury-in-fact requirement. Two of the functions of the disciplinary counsel are (1) to investigate all matters involving alleged misconduct and (2) to prosecute all disciplinary proceedings before the disciplinary board. *See*Article III, Rule 5, of the Supreme Court Rules. In this controversy the Ethics Advisory Panel's interpretation of the Rules of Professional Conduct limited the ability of the disciplinary counsel to investigate and prosecute attorney misconduct. In this manner the disciplinary counsel did suffer an injury in fact sufficient to satisfy the standing requirement.

Our conclusion on the standing issue also is consistent with our opinion in *In re Ethics Advisory Panel Opinion*, 554 A.2d 1033 (R.I.1989). We held in that case that although "it would only be in the rarest of circumstances that this court would respond to a request that we review one of the panel's opinions," we would review panel opinions in cases wherein the issue addressed is of extreme importance to the legal profession. *Id.* at 1034. This controversy meets this standard because it involves two of the core ethical obligations of attorneys.

Moreover, by considering this question, we fulfill our constitutional obligation to exercise our supervisory power over the legal profession under article X, section 2, of the Rhode Island Constitution and our statutory obligation to "issue * * * all other * * * processes necessary for the furtherance of justice and the due administration of the law." General Laws 1956 (1985 Reenactment) § 8-1-2. We conclude that the disciplinary counsel does have standing and that this matter is properly before us.

II

THE RECORD IN THIS CASE

[2] The Rhode Island Bar Association raises an important argument regarding the factual record on petitions to review opinions of the Ethics Advisory Panel. These petitions do not come before us following an adversary proceeding in which adjudicative facts are established. The disciplinary counsel in this matter provided this court with her statement of the facts, supported by an affidavit. Similarly, the Ethics Advisory Panel provided its statement of the facts. The panel, however, did not provide us with a copy of the letter it received from the inquiring attorney. The Rhode Island Bar Association maintains that there is an inherent bias in a party's rendition of the facts as provided in a party's brief, which ultimately may be significant to our resolution of these matters.

The Rhode Island Bar Association suggests two possible resolutions to this problem: (1) that we rely solely upon the facts set forth in the panel's opinion or (2) that we require the panel to provide a version of the inquiring attorney's letter, sanitized of identifying characteristics. This version would have to be sanitized in order to keep confidential the "name and letter of an inquiring attorney" in accordance with Rule 6 of the Rules of the Ethics Advisory Panel.

We decline to rely solely on the facts set forth in the advisory panel opinions. Often, as in this case, the opinions provide little factual basis underlying their rulings, and an opinion may make a number of legal assumptions based on factual predicates. In order to make our review effective, we require a more de-

tailed statement ***321** of the facts. We agree, however, that in the future the Ethics Advisory Panel should provide this court with a version of the inquiring attorney's letter, sanitized of all identifying information.

Regarding this controversy, we rely on the undisputed facts set forth in the parties' briefs. Our review of the factual assertions of the parties reveals only two inconsistencies between the version of events as set forth by the disciplinary counsel and the version of events as set forth by the Ethics Advisory Panel. First, the disciplinary counsel uses the plural "clients," indicating that there may have been more than one client in this case. The Ethics Advisory Panel uses the singular "client," thereby indicating that there was only one client. This difference has no bearing on our review and we adopt the panel's version that there was one client.

The second factual difference between the disciplinary counsel's version of the facts and the Ethics Advisory Panel's version concerns the reason the client refused to authorize disclosure of the misconduct to the proper authorities. The disciplinary counsel, relying upon her initial conversation with the inquiring attorney, stated that the client's refusal to authorize disclosure was based upon the friendly relationship between the client and attorney X. In contrast, the Ethics Advisory Panel stated that the client withheld consent because the client was concerned that reporting attorney X would interfere with the client's efforts to convince attorney X to restore the embezzled funds. Rhode Island's version of Rule 1.6 does not authorize an attorney to second guess a client's decision to refuse disclosure of otherwise confidential information. This factual discrepancy also has no bearing on our decision.

Thus, relying on the undisputed facts, we address the content of Ethics Advisory Panel Opinion 92-1.

III

ETHICS ADVISORY PANEL OPINION 92-1

[3] Our analysis of the Rules of Professional Conduct begins with Rule 8.3(a), which requires "[a] lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects" to inform the proper authorities.

In this case none of the parties disputes the suggestion that attorney X's embezzlement of client funds is a violation of the Rules of Professional Conduct that raises a substantial question regarding attorney X's fitness to practice law. In addition, it is clear that on the basis of the admission by attorney X, the inquiring attorney had "knowledge" of the violation as required by Rule 8.3. Thus, absent a confidentiality issue, it is clear that the inquiring attorney would be under an ethical obligation to report the embezzlement and indeed would be subject to discipline if the inquiring attorney failed to report the embezzlement.

Rule 8.3(c), however, expressly exempts Rule 1.6 confidences from disclosure. Pursuant to Rule 1.6, an attorney "shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized." The official comment to Rule 1.6 helps define the phrase "shall not reveal information relating to the representation of a client." The comment states:

"The principle of confidentiality is given effect in two related bodies of law, the attorney-client privilege (which includes the work product doctrine) in the law of evidence and the rule of confidentiality established in professional ethics. The attorney-client privilege applies in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. *The confidentiality rule applies not merely to matters communicated in confidence by the client but also to all information relating to the* ***322** *representation, whatever its source.*" (Emphasis added.)

Rule 1.6 permits but does not require disclosure of otherwise confidential information in two limited circumstances: (1) "to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm" or (2) in controversies between the lawyer and the client or when the lawyer needs the information to establish a defense to a criminal or a civil charge involving the lawyer's representation of the client.

Applying these rules, the Ethics Advisory Panel concluded that the inquiring attorney's knowledge of attorney X's embezzlement was confidential information because the inquiring attorney learned of the embezzlement during the course of his representation of a client. Moreover, the panel noted that neither of the two exceptions to Rule 1.6 applied, and accordingly Rule 1.6 required the inquiring attorney to keep his or her knowledge of the embezzlement confidential.

The disciplinary counsel maintains that the Ethics Advisory Panel interpreted Rule 1.6 too broadly. The disciplinary counsel asserts that we are not bound by the comment to Rule 1.6 and that in order to give strength to the reporting requirement under Rule 8.3, we should find that the inquiring attorney's knowledge of the embezzlement falls outside the scope of Rule 1.6.

The disciplinary counsel also suggests that because the admission by attorney X was not a "privileged" communication pursuant to the rules regarding the attorney-client evidentiary privilege, the admission was not a protected communication pursuant to Rule 1.6. In support of this argument, the disciplinary counsel cites *In re Himmel*, 125 Ill.2d 531, 127 Ill.Dec. 708, 533 N.E.2d 790 (1988). In *Himmel* the Illinois Supreme Court interpreted Rule 1-103(a) of the Illinois Code of Professional Responsibility, which states:

" 'A lawyer possessing unprivileged knowledge of a violation of Rule 1-102(a)(3) or (4) shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation'." *Himmel*, 125 Ill. 2d at 540, 127 Ill.Dec. 708, 533 N.E.2d at 793.

The *Himmel* court concluded that attorney Himmel did have knowledge of a communication that fell outside the attorney-client privilege. The fact that the communication was not "privileged," combined with the court's finding that Himmel stood to gain financially from the nondisclosure of the violation led the Illinois Supreme Court to discipline Himmel for failing to comply with the reporting requirements. *Himmel*, 125 Ill.2d at 542, 545, 127 Ill.Dec. 708, 533 N.E.2d at 794-96.

The disciplinary counsel's reliance on *Himmel* in this case is misplaced. Unlike Illinois' rule, Rule 1.6 of the Rhode Island Rules of Professional Conduct protects from disclosure a broader range of information than would be protected under the attorney-client privilege.[FN1] Even though the attorney-client evidentiary privilege may not protect this information, Rule 1.6 prevents the inquiring attorney from disclosing it because it relates to the representation of a client.

> FN1. We note that in *In re Himmel*, 125 Ill.2d 531, 127 Ill.Dec. 708, 533 N.E.2d 790 (1988), the court's reliance on the evidentiary attorney-client privilege to determine the scope of the ethical standard for viewing privileged information has been the subject of controversy in scholarly writings. *See, e.g.*, Ronald D. Rotunda, *The Lawyer's Duty to Report Another Lawyer's Unethical Violations in the Wake of Himmel*, 1988 U. Ill. L.Rev. 977, 987 (1988).

[4] Turning to the disciplinary counsel's suggestion that in order to strengthen Rule 8.3, we should limit the scope of Rule 1.6, we note that this is not a situation in which the intent of the drafters of the Rules of Professional Conduct is unclear or ambiguous. Attorney X's admission falls within the scope of the broad definition of confidential communication under Rule 1.6 because the admission was related to his or her representation of his or her client. This broad confidentiality rule reflects the drafter's belief that confidentiality is central to the attorney-client relationship because it encourages clients to seek early legal assistance and "facilitates the full development of facts essential to proper ***323** representation of the client." Comment to Rule 1.6; *see also* 1 Geoffrey C. Hazard, Jr. & W. William Hodes, *The Law of Lawyering*, § 1.6 at 127-33 (2d ed. 1992 Supp.) (discussing the drafting of Rule 1.6 by the American Bar Association).

In addition Rule 8.3 expressly exempts from the reporting requirement confidential information under Rule 1.6. The drafters of the rules anticipated this conflict between Rule 1.6 and Rule 8.3 and concluded that a lawyer's duty of confidentiality owed his or her client supersedes a lawyer's obligation to report attorney misconduct. The text of the Rules of Professional Conduct clearly supports the opinion of the Ethics Advisory Panel.

This is not to say that we are not concerned with the ramifications of this decision. In this case a lawyer has engaged in criminal conduct as well as violated the Rules of Professional Conduct. The failure of the Rules of Professional Conduct to facilitate the investigation and prosecution of attorney X is correspondingly a failure of the legal profession to regulate itself effectively. This failure fuels the perception that under a cloak of confidentiality, the legal profession is engaged in a coverup of attorney misconduct. *See* David C. Olsson, *Reporting Peer Misconduct: Lip Service To Ethical Standards Is Not Enough*,31 Ariz. L.Rev. 657, 658, 675 (1989).

Our research in this area, as guided by the briefs of the parties and the briefs filed by amicus curiae, reveals that some states have promulgated a confidentiality rule that allows disclosure of information in a broader set of circumstances than would be allowed under Rule 1.6 of Rhode Island's Rules of Professional Conduct. *See* 2 Geoffrey C. Hazard, Jr. & W. William Hodes, §§ AP4:103-AP4:105 at 1259-1266 (outlining the manner in which states have adopted variations of Rule 1.6). The Minnesota rules, for example, would allow an attorney to report to disciplinary authorities the misconduct of another attorney even without client consent, in a limited set of circumstances. *See*Rule 1.6(b)(6) of the Minnesota Rules of Professional Conduct. In addition some states have expanded the future crimes exception to Rule 1.6 in order to permit an attorney to disclose a client's intention to commit "any crime." 2 Geoffrey C. Hazard, Jr. & W. William Hodes, § AP4:103 at 1261.

We believe these amendments to Rule 1.6 of the Rules of Professional Conduct are worth considering. We therefore request the Supreme Court Committee to Study the Rules of Professional Conduct to canvass other jurisdictions' versions of the confidentiality principle, consider amending Rhode Island's version of Rule 1.6, and report the committee's findings to this court.[FN2] However, as the rules currently exist, we conclude that Ethics Advisory Panel Opinion 92-1 must stand.

> FN2. This court established the Committee to Study the Rules of Professional Conduct in January 1984. Its mandate was to study the American Bar Association Model Rules of Professional Conduct and to make recommendations to this court regarding their adoption. In 1987 the committee completed a final report to this court and we adopted the proposed rules, effective November 15, 1988. Since that time the committee has had an ongoing role regarding suggested changes and amendments to the rules. We are apprised of the fact that the committee already has considered amendments to Rule 1.6 and Rule 8.3. We request, however, further study and a report on the suggested amendments.

We wish to thank Pamelee M. McFarland on behalf of the American Civil Liberties Union, Rhode Island Affiliate; Lauren E. Jones on behalf of the Rhode Island Bar Association; and Stephen A. Rodio on behalf of the Committee to Study the Rules of Professional Conduct for their excellent amicus briefs. Their work contributed greatly to a meaningful discussion of these ethical issues and assisted this court in fulfilling its obligation to supervise the legal profession in Rhode Island and to foster public trust in its operation.

For the reasons set forth in this opinion, we deny the petition for review and affirm the opinion of the Ethics Advisory Panel.

LEDERBERG, J., did not particpate.
R.I.,1993.
In re Ethics Advisory Panel Opinion No. 92-1
627 A.2d 317

END OF DOCUMENT

1 of 1 DOCUMENT

FLORIDA RULES OF COURT SERVICE

*** This document reflects changes received by October 1, 2008 ***
*** Annotations current through October 17, 2008. ***

Rules Regulating The Florida Bar
Chapter 4. Rules of Professional Conduct
4-1. CLIENT-LAWYER RELATIONSHIP

GO TO FLORIDA STATUTES ARCHIVE DIRECTORY

Fla. Bar Reg. R. 4-1.5 (2008)

Review Court Orders which may amend this Rule.

Rule 4-1.5. Fees and Costs for Legal Services

(a) *Illegal, Prohibited, or Clearly Excessive Fees and Costs.* --An attorney shall not enter into an agreement for, charge, or collect an illegal, prohibited, or clearly excessive fee or cost, or a fee generated by employment that was obtained through advertising or solicitation not in compliance with the Rules Regulating The Florida Bar. A fee or cost is clearly excessive when:

(1) after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee or the cost exceeds a reasonable fee or cost for services provided to such a degree as to constitute clear overreaching or an unconscionable demand by the attorney; or

(2) the fee or cost is sought or secured by the attorney by means of intentional misrepresentation or fraud upon the client, a nonclient party, or any court, as to either entitlement to, or amount of, the fee.

(b) *Factors to Be Considered in Determining Reasonable Fee and Costs.*

(1) Factors to be considered as guides in determining a reasonable fee include:

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

(B) the likelihood that the acceptance of the particular employment will preclude other employment by the lawyer;

(C) the fee, or rate of fee, customarily charged in the locality for legal services of a comparable or similar nature;

(D) the significance of, or amount involved in, the subject matter of the representation, the responsibility involved in the representation, and the results obtained;

(E) the time limitations imposed by the client or by the circumstances and, as between attorney and client, any additional or special time demands or requests of the attorney by the client;

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

(G) the experience, reputation, diligence, and ability of the lawyer or lawyers performing the service and the skill, expertise, or efficiency of effort reflected in the actual providing of such services; and

(H) whether the fee is fixed or contingent, and, if fixed as to amount or rate, then whether the client's ability to pay rested to any significant degree on the outcome of the representation.

(2) Factors to be considered as guides in determining reasonable costs include:

(A) the nature and extent of the disclosure made to the client about the costs;

(B) whether a specific agreement exists between the lawyer and client as to the costs a client is expected to pay and how a cost is calculated that is charged to a client;

(C) the actual amount charged by third party providers of services to the attorney;

(D) whether specific costs can be identified and allocated to an individual client or a reasonable basis exists to estimate the costs charged;

(E) the reasonable charges for providing in-house service to a client if the cost is an in-house charge for services; and

(F) the relationship and past course of conduct between the lawyer and the client.

All costs are subject to the test of reasonableness set forth in subdivision (a) above. When the parties have a written contract in which the method is established for charging costs, the costs charged thereunder shall be presumed reasonable.

(c) *Consideration of All Factors.* --In determining a reasonable fee, the time devoted to the representation and customary rate of fee need not be the sole or controlling factors. All factors set forth in this rule should be considered, and may be applied, in justification of a fee higher or lower than that which would result from application of only the time and rate factors.

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

(e) *Duty to Communicate Basis or Rate of Fee or Costs to Client.* --When the lawyer has not regularly represented the client, the basis or rate of the fee and costs shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.

The fact that a contract may not be in accord with these rules is an issue between the attorney and client and a matter of professional ethics, but is not the proper basis for an action or defense by an opposing party when fee-shifting litigation is involved.

(f) *Contingent Fees.* --As to contingent fees:

(1) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by subdivision (f)(3) or by law. A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial, or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

(2) Every lawyer who accepts a retainer or enters into an agreement, express or implied, for compensation for services rendered or to be rendered in any action, claim, or proceeding whereby the lawyer's compensation is to be dependent or contingent in whole or in part upon the successful prosecution or settlement thereof shall do so only where such fee arrangement is reduced to a written contract, signed by the client, and by a lawyer for the lawyer or for the law firm representing the client. No lawyer or firm may participate in the fee without the consent of the client in writing. Each participating lawyer or law firm shall sign the contract with the client and shall agree to assume joint legal responsibility to the client for the performance of the services in question as if each were partners of the other lawyer or law

firm involved. The client shall be furnished with a copy of the signed contract and any subsequent notices or consents. All provisions of this rule shall apply to such fee contracts.

(3) A lawyer shall not enter into an arrangement for, charge, or collect:

(A) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof; or

(B) a contingent fee for representing a defendant in a criminal case.

(4) A lawyer who enters into an arrangement for, charges, or collects any fee in an action or claim for personal injury or for property damages or for death or loss of services resulting from personal injuries based upon tortious conduct of another, including products liability claims, whereby the compensation is to be dependent or contingent in whole or in part upon the successful prosecution or settlement thereof shall do so only under the following requirements:

(A) The contract shall contain the following provisions:

(i) "The undersigned client has, before signing this contract, received and read the statement of client's rights and understands each of the rights set forth therein. The undersigned client has signed the statement and received a signed copy to refer to while being represented by the undersigned attorney(s)."

(ii) "This contract may be cancelled by written notification to the attorney at any time within 3 business days of the date the contract was signed, as shown below, and if cancelled the client shall not be obligated to pay any fees to the attorney for the work performed during that time. If the attorney has advanced funds to others in representation of the client, the attorney is entitled to be reimbursed for such amounts as the attorney has reasonably advanced on behalf of the client."

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

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

a. Before the filing of an answer or the demand for appointment of arbitrators or, if no answer is filed or no demand for appointment of arbitrators is made, the expiration of the time period provided for such action:

1. 33 1/3% of any recovery up to $ 1 million; plus

2. 30% of any portion of the recovery between $ 1 million and $ 2 million; plus

3. 20% of any portion of the recovery exceeding $ 2 million.

b. After the filing of an answer or the demand for appointment of arbitrators or, if no answer is filed or no demand for appointment of arbitrators is made, the expiration of the time period provided for such action, through the entry of judgment:

1. 40% of any recovery up to $ 1 million; plus

2. 30% of any portion of the recovery between $ 1 million and $ 2 million; plus

3. 20% of any portion of the recovery exceeding $ 2 million.

c. If all defendants admit liability at the time of filing their answers and request a trial only on damages:

1. 33 1/3% of any recovery up to $ 1 million; plus

2. 20% of any portion of the recovery between $ 1 million and $ 2 million; plus

3. 15% of any portion of the recovery exceeding $ 2 million.

d. An additional 5% of any recovery after institution of any appellate proceeding is filed or post-judgment relief or action is required for recovery on the judgment.

(ii) If any client is unable to obtain an attorney of the client's choice because of the limitations set forth in subdivision (f)(4)(B)(i), the client may petition 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 ap-

proval of any fee contract between the client and an attorney of the client's choosing. Such authorization shall be given if the court determines the client has a complete understanding of the client's rights and the terms of the proposed contract. The application for authorization of such a contract can be filed as a separate proceeding before suit or simultaneously with the filing of a complaint. Proceedings thereon may occur before service on the defendant and this aspect of the file may be sealed. A petition under this subdivision shall contain a certificate showing service on the client and, if the petition is denied, a copy of the petition and order denying the petition shall be served on The Florida Bar in Tallahassee by the member of the bar who filed the petition. Authorization of such a contract shall not bar subsequent inquiry as to whether the fee actually claimed or charged is clearly excessive under subdivisions (a) and (b).

(iii) Subject to the provisions of 4-1.5(f)(4)(B)(i) and (ii) a lawyer who enters into an arrangement for, charges, or collects any fee in an action or claim for medical liability whereby the compensation is dependent or contingent in whole or in part upon the successful prosecution or settlement thereof shall provide the language of *article I, section 26 of the Florida Constitution* to the client in writing and shall orally inform the client that:

a. Unless waived, in any medical liability claim involving a contingency fee, the claimant is entitled to receive no less than 70% of the first $ 250,000.00 of all damages received by the claimant, exclusive of reasonable and customary costs, whether received by judgment, settlement, or otherwise, and regardless of the number of defendants. The claimant is entitled to 90% of all damages in excess of $ 250,000.00, exclusive of reasonable and customary costs and regardless of the number of defendants.

b. If a lawyer chooses not to accept the representation of a client under the terms of *article I, section 26 of the Florida Constitution*, the lawyer shall advise the client, both orally and in writing of alternative terms, if any, under which the lawyer would accept the representation of the client, as well as the client's right to seek representation by another lawyer willing to accept the representation under the terms of *article I, section 26 of the Florida Constitution*, or a lawyer willing to accept the representation on a fee basis that is not contingent.

c. If any client desires to waive any rights under *article I, section 26 of the Florida Constitution* in order to obtain a lawyer of the client's choice, a client may do so by waiving such rights in writing, under oath, and in the form provided in this rule. The lawyer shall provide each client a copy of the written waiver and shall afford each client a full and complete opportunity to understand the rights being waived as set forth in the waiver. A copy of the waiver, signed by each client and lawyer, shall be given to each client to retain, and the lawyer shall keep a copy in the lawyer's file pertaining to the client. The waiver shall be retained by the lawyer with the written fee contract and closing statement under the same conditions and requirements provided in 4-1.5(f)(5).

WAIVER OF THE CONSTITUTIONAL RIGHT PROVIDED IN *ARTICLE I, SECTION 26 OF THE FLORIDA CONSTITUTION*

On November 2, 2004, voters in the State of Florida approved The Medical Liability Claimant's Compensation Amendment that was identified as Amendment 3 on the ballot. The amendment is set forth below:

The Florida Constitution
Article I, Section 26 is created to read 'Claimant's right to fair compensation." In any medical liability claim involving a contingency fee, the claimant is entitled to receive no less than 70% of the first $ 250,000 in all damages received by the claimant, exclusive of reasonable and customary costs, whether received by judgment, settlement or otherwise, and regardless of the number of defendants. The claimant is entitled to 90% of all damages in excess of $ 250,000, exclusive of reasonable and customary costs and regardless of the number of defendants. This provision is self-executing and does not require implementing legislation.
The undersigned client understands and acknowledges that (initial each provision):

I have been advised that signing this waiver releases an important constitutional right; and

I have been advised that I may consult with separate counsel before signing this waiver; and that I may request a hearing before a judge to further explain this waiver; and

By signing this waiver I agree to an *increase in the attorney fee* that might otherwise be owed if the constitutional provision listed above is not waived. Without prior court approval, the increased fee that I agree to may be up to the maximum contingency fee percentages set forth in Rule Regulating The Florida Bar 4-1.5(f)(4)(B)(i). Depending on the circumstances of my case, the maximum agreed upon fee may range from 33 1/3% to 40% of any recovery up to $ 1 million; plus 20% to 30% of any portion of the recovery between $ 1 million and $ 2 million; plus 15% to 20% of any recovery exceeding $ 2 million; and

I have three (3) business days following execution of this waiver in which to cancel this waiver; and

I wish to engage the legal services of the lawyers or law firms listed below in an action or claim for medical liability the fee for which is contingent in whole or in part upon the successful prosecution or settlement thereof, but I am unable to do so because of the provisions of the constitutional limitation set forth above. In consideration of the lawyers' or law firms' agreements to represent me and my desire to employ the lawyers or law firms listed below, I hereby knowingly, willingly, and voluntarily waive any and all rights and privileges that I may have under the constitutional provision set forth above, as apply to the contingency fee agreement only. Specifically, I waive the percentage restrictions that are the subject of the constitutional provision and confirm the fee percentages set forth in the contingency fee agreement; and

I have selected the lawyers or law firms listed below as my counsel of choice in this matter and would not be able to engage their services without this waiver; and I expressly state that this waiver is made freely and voluntarily, with full knowledge of its terms, and that all questions have been answered to my satisfaction.

ACKNOWLEDGMENT BY CLIENT FOR PRESENTATION TO THE COURT

The undersigned client hereby acknowledges, under oath, the following:

I have read and understand this entire waiver of my rights under the constitutional provision set forth above.

I am not under the influence of any substance, drug, or condition (physical, mental, or emotional) that interferes with my understanding of this entire waiver in which I am entering and all the consequences thereof.

I have entered into and signed this waiver freely and voluntarily.

I authorize my lawyers or law firms listed below to present this waiver to the appropriate court, if required for purposes of approval of the contingency fee agreement. Unless the court requires my attendance at a hearing for that purpose, my lawyers or law firms are authorized to provide this waiver to the court for its consideration without my presence.

DATED this day of , .

By:

CLIENT

Sworn to and subscribed before me this day of , by , who is personally known to me, or has produced the following identification:

Notary Public

My Commission Expires:

Dated this day of , .

By:

Attorney

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

(D) As to lawyers not in the same firm, a division of any fee within subdivision (f)(4) shall be on the following basis:

(i) To the lawyer assuming primary responsibility for the legal services on behalf of the client, a minimum of 75% of the total fee.

(ii) To the lawyer assuming secondary responsibility for the legal services on behalf of the client, a maximum of 25% of the total fee. Any fee in excess of 25% shall be presumed to be clearly excessive.

(iii) The 25% limitation shall not apply to those cases in which 2 or more lawyers or firms accept substantially equal active participation in

the providing of legal services. In such circumstances counsel shall apply 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, or within 10 days of execution of a contract for division of fees when new counsel is engaged. 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, if the application is denied, a copy of the petition and order denying the petition shall be served on The Florida Bar in Tallahassee by the member of the bar who filed the petition. Counsel may proceed with representation of the client pending court approval.

(iv) The percentages required by this subdivision shall be applicable after deduction of any fee payable to separate counsel retained especially for appellate purposes.

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

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

(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.

(h) *Credit Plans.* --A lawyer or law firm may accept payment under a credit plan. No higher fee shall be charged and no additional charge shall be imposed by reason of a lawyer's or law firm's participation in a credit plan.

STATEMENT OF CLIENT'S RIGHTS FOR CONTINGENCY FEES.

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

1. There is no legal requirement that a lawyer charge a client a set fee or a percentage of money recovered in a case. You, the client, have the right to talk with your lawyer about the proposed fee and to bargain about the rate or percentage as in any other contract. If you do not reach an agreement with 1 lawyer you may talk with other lawyers.

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

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

4. Before signing a contingent fee contract with you, a lawyer must advise you whether the lawyer intends to handle your case alone or whether other lawyers will be helping with the case. If your lawyer intends to refer the case to other lawyers, the lawyer should tell you what kind of fee sharing arrangement will be made with the other lawyers. If lawyers from different law firms will represent you, at least 1 lawyer from each law firm must sign the

contingent fee contract.

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

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

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

8. You, the client, have the right to receive and approve a closing statement at the end of the case before you pay any money. The statement must list all of the financial details of the entire case, including the amount recovered, all expenses, and a precise statement of your lawyer's fee. Until you approve the closing statement your lawyer cannot pay any money to anyone, including you, without an appropriate order of the court. You also have the right to have every lawyer or law firm working on your case sign this closing statement.

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

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

11. If at any time you, the client, believe that your lawyer has charged an excessive or illegal fee, you have the right to report the matter to The Florida Bar, the agency that oversees the practice and behavior of all lawyers in Florida. For information on how to reach The Florida Bar, call 850/561-5600, or contact the local bar association. Any disagreement between

you and your lawyer about a fee can be taken to court and you may wish to hire another lawyer to help you resolve this disagreement. Usually fee disputes must be handled in a separate lawsuit, unless your fee contract provides for arbitration. You can request, but may not require, that a provision for arbitration (under chapter 682, Florida Statutes, or under the fee arbitration rule of the Rules Regulating The Florida Bar) be included in your fee contract.

Client Signature

Date

Attorney Signature

Date

(i) *Arbitration Clauses.* --A lawyer shall not make an agreement with a potential client prospectively providing for mandatory arbitration of fee disputes without first advising that person in writing that the potential client should consider obtaining independent legal advice as to the advisability of entering into an agreement containing such mandatory arbitration provisions. A lawyer shall not make an agreement containing such mandatory arbitration provisions unless the agreement contains the following language in bold print:

NOTICE: This agreement contains provisions requiring arbitration of fee disputes. Before you sign this agreement you should consider consulting with another lawyer about the advisability of making an agreement with mandatory arbitration requirements. Arbitration proceedings are ways to resolve disputes without use of the court system. By entering into agreements that require arbitration as the way to resolve fee disputes, you give up (waive) your right to go to court to resolve those disputes by a judge or jury. These are important rights that should not be given up without careful consideration.

NOTES:

COMMENT

Bases or rate of fees and costs

When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee. The conduct of the lawyer and client in prior relationships is relevant when analyzing the requirements of this rule. In a new client-lawyer relationship, however, an understanding as to the fee should be promptly established. It is not necessary to recite all the factors that underlie the basis of the fee but only those that are directly involved in its computation. It is sufficient, for example, to state the basic rate is an hourly charge or a fixed amount or an estimated amount, or to identify the factors that may be taken into account in finally fixing the fee. Although hourly billing or a fixed fee may be the most common bases for computing fees in an area of practice, these may not be the only bases for computing fees. A lawyer should, where appropriate, discuss alternative billing methods with the client. When developments occur during the representation that render an earlier estimate substantially inaccurate, a revised estimate should be provided to the client. A written statement concerning the fee reduces the possibility of misunderstanding. Furnishing the client with a simple memorandum or a copy of the lawyer's customary fee schedule is sufficient if the basis or rate of the fee is set forth.

General overhead should be accounted for in a lawyer's fee, whether the lawyer charges hourly, flat, or contingent fees. Filing fees, transcription, and the like should be charged to the client at the actual amount paid by the lawyer. A lawyer may agree with the client to charge a reasonable amount for in-house costs or services. In-house costs include items such as copying, faxing, long distance telephone, and computerized research. In-house services include paralegal services, investigative services, accounting services, and courier services. The lawyer should sufficiently communicate with the client regarding the costs charged to the client so that the client understands the amount of costs being charged or the method for calculation of those costs. Costs appearing in sufficient detail on closing statements and approved by the parties to the transaction should meet the requirements of this rule.

Rule 4-1.8(e) should be consulted regarding a lawyer's providing financial assistance to a client in connection with litigation.

Terms of payment

A lawyer may require advance payment of a fee but is obliged to return any unearned portion. See rule 4-1.16(d). A lawyer is not, however, required to return retainers that, pursuant to an agreement with a client, are not refundable. A lawyer may accept property in payment for services, such as an ownership interest in an enterprise, providing this does not involve acquisition of a proprietary interest in the cause of action or subject matter of the litigation contrary to rule 4-1.8(i). However, a fee paid in property instead of money may be subject to special scrutiny because it involves questions concerning both the value of the services and the lawyer's special knowledge of the value of the property.

An agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client. Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction. However, it is proper to define the extent of services in light of the client's ability to pay. A lawyer should not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures. When there is doubt whether a contingent fee is consistent with the client's best interest, the lawyer should offer the client alternative bases for the fee and explain their implications. Applicable law may impose limitations on contingent fees, such as a ceiling on the percentage.

Prohibited contingent fees

Subdivision (f)(3)(A) prohibits a lawyer from charging a contingent fee in a domestic relations matter when payment is contingent upon the securing of a divorce or upon the amount of alimony or support or property settlement to be obtained. This provision does not preclude a contract for a contingent fee for legal representation in connection with the recovery of post-judgment balances due under support, alimony, or other financial orders because such contracts do not implicate the same policy concerns.

Contingent fee regulation

Subdivision (e) is intended to clarify that whether the lawyer's fee contract complies with these rules is a matter between the lawyer and client and an issue for professional disciplinary enforcement. The rules and subdivision (e) are not intended to be used as procedural weapons or defenses by others. Allowing opposing parties to assert noncompliance with these rules as a defense, including whether the fee is fixed or contingent, allows for potential inequity if the opposing party is allowed to escape responsibility for their actions solely through application of these rules.

Rule 4-1.5(f)(4) should not be construed to apply to actions or claims seeking property or other damages arising in the commercial litigation context.

Rule 4-1.5(f)(4)(B) is intended to apply only to contingent aspects of fee agreements. In the situation where a lawyer and client enter a contract for part noncontingent and part contingent attorney's fees, rule 4-1.5(f)(4)(B) should not be construed to apply to and prohibit or limit the noncontingent portion of the fee agreement. An attorney could properly charge and retain the noncontingent portion of the fee even if the matter was not successfully prosecuted or if the noncontingent portion of the fee exceeded the schedule set forth in rule 4-1.5(f)(4)(B). Rule 4-1.5(f)(4)(B) should, however, be construed to apply to any additional contingent portion of such a contract when considered together with earned noncontingent fees. Thus, under such a contract a lawyer may demand or collect only such additional contingent fees as would not cause the total fees to exceed the schedule set forth in rule 4-1.5(f)(4)(B).

The limitations in rule 4-1.5(f)(4)(B)(i)c are only to be applied in the case where all the defendants admit liability at the time they file their initial answer and the trial is only on the issue of the amount or extent of the loss or the extent of injury suffered by the client. If the trial involves not only the issue of damages but also such questions as proximate cause, affirmative defenses, seat belt defense, or other similar matters, the limitations are not to be applied because of the contingent nature of the case being left for resolution by the trier of fact.

Rule 4-1.5(f)(4)(B)(ii) provides the limitations set forth in subdivision (f)(4)(B)(i) may be waived by the client upon approval by the appropriate judge. This waiver provision may not be used to authorize a lawyer to charge a client a fee that would exceed rule 4-1.5(a) or (b). It is contemplated that this waiver provision will not be necessary except where the client wants to retain a particular lawyer to represent the client or the case involves complex, difficult, or novel questions of law or fact that would justify a contingent fee greater than the schedule but not a contingent fee that would exceed rule 4-1.5(b).

Upon a petition by a client, the trial court reviewing the waiver request must grant that request if the trial court finds the client: (a) understands the right to have the limitations in rule 4-1.5(f)(4)(B) applied in the specific matter; and (b) understands and approves the terms of the proposed contract. The consideration by the trial court of the waiver petition is not to be used as an opportunity for the court to inquire into the merits or details of the particular action or claim that is the subject of the contract.

The proceedings before the trial court and the trial court's decision on a waiver request are to be confidential and not subject to discovery by any of the parties to the action or by any other individual or entity except The Florida Bar. However, terms of the contract approved by the trial court may be subject to discovery if the contract (without court approval) was subject to discovery under applicable case law or rules of evidence.

Rule 4-1.5(f)(4)(B)(iii) is added to acknowledge the provisions of *article 1, section 26 of the Florida Constitution*, and to create an affirmative obligation on the part of an attorney contemplating a contingency fee contract to notify a potential client with a medical liability claim of the limitations provided in that constitutional provision. This addition to the rule is adopted prior to any judicial interpretation of the meaning or scope of the constitutional provision and this rule is not intended to make any substantive interpretation of the meaning or scope of that provision. The rule also provides that a client who wishes to waive the rights of the constitutional provision, as those rights may relate to attorney's fees, must do so in the form contained in the rule.

Rule 4-1.5(f)(6) prohibits a lawyer from charging the contingent fee percentage on the total, future value of a recovery being paid on a structured or periodic basis. This prohibition does not apply if the lawyer's fee is being paid over the same length of time as the schedule of payments to the client.

Contingent fees are prohibited in criminal and certain domestic relations matters. In domestic relations cases, fees that include a bonus provision or additional fee to be determined at a later time and based on results obtained have been held to be impermissible contingency fees and therefore subject to restitution and disciplinary sanction as elsewhere stated in these Rules Regulating The Florida Bar.

Fees that provide for a bonus or additional fees and that otherwise are not prohibited under the Rules Regulating The Florida Bar can be effective tools for structuring fees. For example, a fee contract calling for a flat fee and the payment of a bonus based on the amount of property retained or recovered in a general civil action is not prohibited by these rules. However, the bonus or additional fee must be stated clearly in amount or formula for calculation of the fee (basis or rate). Courts have held that unilateral bonus fees are unenforceable. The test of reasonableness and other requirements of this rule apply to permissible bonus fees.

Division of fee

A division of fee is a single billing to a client covering the fee of 2 or more lawyers who are not in the same firm. A division of fee facilitates association of more than 1 lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist. Subject to the provisions of subdivision (f)(4)(D), subdivision (g) permits the lawyers to divide a fee on either the basis of the proportion of services they render or by agreement between the participating lawyers if all assume responsibility for the representation as a whole and the client is advised and does not object. It does require disclosure to the client of the share that each lawyer is to receive. Joint responsibility for the representation entails the obligations stated in rule 4-5.1 for purposes of the matter involved.

Disputes over fees

Since the fee arbitration rule (chapter 14) has been established by the bar to provide a procedure for resolution of fee disputes, the lawyer should conscientiously consider submitting to it. Where law prescribes a procedure for determining a lawyer's fee, for example, in representation of an executor or administrator, a class, or a person entitled to a reasonable fee as part of the measure of damages, the lawyer entitled to such a fee and a lawyer representing another party concerned with the fee should comply with the prescribed procedure.

Referral fees and practices

A secondary lawyer shall not be entitled to a fee greater than the limitation set forth in rule 4-1.5(f)(4)(D)(ii) merely because the lawyer agrees to do some or all of the following: (a) consults with the client; (b) answers interrogatories; (c) attends depositions; (d) reviews pleadings; (e) attends the trial; or (f) assumes joint legal responsibility to the client. However, the provisions do not contemplate that a secondary lawyer who does more than the above is necessarily entitled to a larger percentage of the fee than that allowed by the limitation.

The provisions of rule 4-1.5(f)(4)(D)(iii) only apply where the participating lawyers have for purposes of the specific case established a co-counsel relationship. The need for court approval of a referral fee arrangement under rule 4-1.5(f)(4)(D)(iii) should only occur in a small percentage of cases arising under rule 4-1.5(f)(4) and usually occurs prior to the commencement of litigation or at the onset of the representation. However, in those cases in which litigation has been commenced or the representation has already begun, approval of the fee division should be sought within a reasonable period of time after the need for court approval of the fee division arises.

In determining if a co-counsel relationship exists, the court should look to see if the lawyers have established a special partnership agreement for the purpose of the specific case or matter. If such an agreement does exist, it must provide for a sharing of services or responsibility and the fee division is based upon a division of the services to be rendered or the responsibility assumed. It is contemplated that a co-counsel situation would exist where a division of responsibility is

based upon, but not limited to, the following: (a) based upon geographic considerations, the lawyers agree to divide the legal work, responsibility, and representation in a convenient fashion. Such a situation would occur when different aspects of a case must be handled in different locations; (b) where the lawyers agree to divide the legal work and representation based upon their particular expertise in the substantive areas of law involved in the litigation; or (c) where the lawyers agree to divide the legal work and representation along established lines of division, such as liability and damages, causation and damages, or other similar factors.

The trial court's responsibility when reviewing an application for authorization of a fee division under rule 4-1.5(f)(4)(D)(iii) is to determine if a co-counsel relationship exists in that particular case. If the court determines a co-counsel relationship exists and authorizes the fee division requested, the court does not have any responsibility to review or approve the specific amount of the fee division agreed upon by the lawyers and the client.

Rule 4-1.5(f)(4)(D)(iv) applies to the situation where appellate counsel is retained during the trial of the case to assist with the appeal of the case. The percentages set forth in subdivision (f)(4)(D) are to be applicable after appellate counsel's fee is established. However, the effect should not be to impose an unreasonable fee on the client.

Credit Plans

Credit plans include credit cards. If a lawyer accepts payment from a credit plan for an advance of fees and costs, the amount must be held in trust in accordance with chapter 5, Rules Regulating The Florida Bar, and the lawyer must add the lawyer's own money to the trust account in an amount equal to the amount charged by the credit plan for doing business with the credit plan.

HISTORY: *Amended eff. March 23, 2006 (933 So.2d 417); Sept. 28, 2006 (939 So.2d 1032); March 1, 2008 (978 So.2d 91)*

CASE NOTES

1. Where an attorney had a valid retaining lien on a client's file, it was not to be disregarded simply because the client sought discovery in a different suit; thus the attorney's petition for certiorari was granted and the client's motion to compel discovery was quashed. *Foreman v. Behr, 866 So. 2d 705, 2003 Fla. App. LEXIS 18337, 28 Fla. L. Weekly D 2756 (Fla. Dist. Ct. App. 2d Dist. 2003).*

2. Trial court erred in awarding a fee split between two attorneys, as the substituted attorney was entitled to the full contingency fee provided for in the contract; hence, the substituted attorney was entitled to an agreed-upon, but reduced contingency fee, and the client could not complain on appeal about paying both her discharged and substituted attorney, as the substituted attorney notified her that this was a possibility when she retained him. *Lubell v. Martinez, 901 So. 2d 951, 2005 Fla. App. LEXIS 6491, 30 Fla. L. Weekly D 1145 (Fla. Dist. Ct. App. 3d Dist. 2005).*

3. Trial court's award of attorney's fees to a first attorney under a contingent fee agreement with a client was affirmed, as infirm clauses in the agreement could be severed, and the contingent fee clauses in the agreement did not violate the rules governing contingent fees set forth in Fla. R. Bar 4-1.5(f); the second and third attorneys who participated in the case, but who did not have a retainer agreement with the client, could only recover under quantum meruit, and the fees awarded to them were reversed as the second attorney did not testify as to the time he expended on the case or his hourly rate, and the third attorney did not appear at the hearing and was not represented. *Lackey v. Bridgestone/Firestone, Inc., 855 So. 2d 1186, 2003 Fla. App. LEXIS 15083, 28 Fla. L. Weekly D 2306 (Fla. Dist. Ct. App. 3d Dist. 2003),* review denied by *870 So. 2d 822, 2004 Fla. LEXIS 385 (Fla. 2004).*

4. Trial court did not sufficiently articulate the criteria enumerated in Fla. R. Bar 4-1.5 in its determination of the reasonableness of the attorney's fee award in an inverse condemnation case and did not set forth specific findings to support the application of a fee multiplier, which should not have been used in an inverse condemnation case in which the

property owners prevailed. *City of N. Miami Beach v. Reed, 863 So. 2d 351, 2003 Fla. App. LEXIS 14358, 28 Fla. L. Weekly D 2219 (Fla. Dist. Ct. App. 3d Dist. 2003).*

5. Attorney who was hired by decedent's children from a prior marriage to protect their interests in a wrongful death action filed by the decedent's estate was entitled to compensation paid out of settlement proceeds paid to the estate. *Wiggins v. Estate of Wright, 850 So. 2d 444, 2003 Fla. LEXIS 822, 28 Fla. L. Weekly S 409 (Fla. 2003).*

6. Where attorney representing three survivors in wrongful death action negotiated settlement in favor of all survivors but his proposed distribution plan did not compensate all survivors equally, and the attorney representing the other two survivors successfully opposed the plan and obtained an order providing for equal distribution, the trial court erred in awarding the first attorney a full fee but determining that the second attorney's fee should come solely from her clients' net share of proceeds, reduced by payment of the first attorney's fee; the award may have violated the limitation on fees in Fla. R. Bar 4-1.5, and it ignored the potential conflict of interest created when separate survivors hire separate counsel to prosecute a claim for damages that each was entitled to under *Fla. Stat. ch. 768.22*. *Wiggins v. Estate of Wright, 850 So. 2d 444, 2003 Fla. LEXIS 822, 28 Fla. L. Weekly S 409 (Fla. 2003).*

7. Where the contingency fee agreement between the prevailing parties and their attorney was reduced to writing after the trial but before the final judgment was entered, the prevailing parties were entitled to an award of attorney's fees pursuant to *Fla. Stat. ch. 501.2105* because *Fla. Bar R. 4-1.5(f)(2)* was not intended to shield a nonprevailing party from the payment of attorney's fees. *Corvette Shop & Supplies, Inc. v. Coggins, 779 So. 2d 529, 2000 Fla. App. LEXIS 16328, 25 Fla. L. Weekly D 2852 (Fla. Dist. Ct. App. 2d Dist. 2000),* review denied by *794 So. 2d 604, 2001 Fla. LEXIS 1756 (Fla. 2001).*

8. Evidentiary hearing should have been held before attorney's fee was assessed against defendants because the fee issue was decided solely on the basis of an affidavit and over defendants objection; plaintiff's argument that there was no record evidence that defendants objected to a fee determination based on the affidavit, was not viable in light of the supplemental record filed. *Morgan v. South Atl. Prod. Credit Ass'n, 528 So. 2d 491, 1988 Fla. App. LEXIS 3052, 13 Fla. L. Weekly 1623 (Fla. Dist. Ct. App. 1st Dist. 1988).*

9. When a single representation agreement included one fee agreement pertaining to a negligence case against a tortfeasor and a separate and independent fee agreement pertaining to a breach of contract case against the client's insurance carrier, the court had to enforce those fee agreements as written, and could not rewrite the parties' agreement by intermingling the terms of the independent fee provisions and limiting an award of fees against the client's insurer to the percentage of recovery that would apply in a successful case against the tortfeasor; further, there was no need for the agreement itself to specify what was meant by a "reasonable fee," as whatever a reasonable fee was would be determined by the court. *Moore v. State Farm Mut. Auto. Ins. Co., 916 So. 2d 871, 2005 Fla. App. LEXIS 17220, 30 Fla. L. Weekly D 2513 (Fla. Dist. Ct. App. 2d Dist. 2005).*

10. To properly determine a lodestar amount, a trial court should consider the criteria in *R. Regulating Fla. Bar 4-1.5(b),* except the time and labor required, the novelty and difficulty of the question involved, the results obtained, and whether the fee is fixed or contingent; the novelty and difficulty of the question should be considered in determining the number of hours reasonably expended on the litigation. *Zunde v. International Paper Co., 13 Fla. L. Weekly Fed. D 346, 2000 U.S. Dist. LEXIS 14754* (July 20, 2000).

11. Where, on behalf of decedent's estate in her capacity as personal representative, widow hired law firm to pursue a wrongful death claim on contingency, but, due to a conflict in interest, daughter from a prior marriage had to retain separate counsel for the damages part of the suit, *Fla. Stat. ch. 768.26* provided for payment of first law firm from the entire award, but the contingency fee arrangement was reduced to allow payment to other counsel because the maximum contingency fee permitted by *Fla. Bar R. 4-1.5* was one-third of the recovery, and *Fla. Bar R. 4-1.5(g)* required a reasonable total fee in order to divide a fee between lawyers who were not in the same firm. *Catapane v. Catapane (In re Estate of Catapane), 759 So. 2d 9, 2000 Fla. App. LEXIS 2300, 25 Fla. L. Weekly D 584 (Fla. Dist. Ct. App. 4th Dist. 2000),* review denied by *779 So. 2d 270, 2000 Fla. LEXIS 2384 (Fla. 2000).*

12. Although where the legislature is silent on the factors it considers important in determining a reasonable fee, courts may look to the criteria enumerated in Fla. R. Bar 4-1.5, in the instant case, the legislature essentially decided that a percentage of the benefits was a reasonable fee; thus, only the statutory factors under *Fla. Stat. ch. 73.092* could be considered. *Seminole County v. Coral Gables Fed. S&l Ass'n, 691 So. 2d 614, 1997 Fla. App. LEXIS 4345, 22 Fla. L. Weekly D 994 (Fla. Dist. Ct. App. 5th Dist. 1997).*

13. Rowe rule did not apply to a claim for reasonable attorney's fees asserted by an attorney against the party contracting with the attorney, as distinguished from a claim for fees against a third party. *Faro v. Romani, 629 So. 2d 872, 1993 Fla. App. LEXIS 10325, 18 Fla. L. Weekly D 2206 (Fla. Dist. Ct. App. 4th Dist. 1993),* quashed by *641 So. 2d 69, 1994 Fla. LEXIS 1009, 19 Fla. L. Weekly S 358 (Fla. 1994),* criticized by *Searcy, Denney, Scarola, Barnhart & Shipley, P.A. v. Poletz by & Through Poletz, 646 So. 2d 209, 1994 Fla. App. LEXIS 1663, 19 Fla. L. Weekly D 503 (Fla. Dist. Ct. App. 2d Dist. 1994).*

14. Trial court did not abuse its discretion in using a multiplier of 2.5 in establishing the attorney's fees awarded to appellee because the trial court fully analyzed the factors under *R. Regulating Fla. Bar 4-1.5*, and made detailed findings of fact which were supported by competent substantial evidence in the unrebutted testimony of both appellee's counsel and appellee's expert witness. *Bank of N.Y. v. Williams, 979 So. 2d 347, 2008 Fla. App. LEXIS 5415, 33 Fla. L. Weekly D 1005 (Fla. Dist. Ct. App. 1st Dist. 2008).*

15. Although an employer was entitled to appellate attorneys' fees after being successful in a former employee's discrimination action, based on the factors listed in *R. Regulating Fla. Bar 4-1.5(B),* many of the facts and law were developed before appeal, were duplicative, and/or unnecessary; therefore, pursuant to *Fla. R. App. P. 9.400(b),* the fees were limited, inter alia, to putting the findings in the correct format. *Phillips v. Fla. Comm'n on Human Rels., 846 So. 2d 1221, 2003 Fla. App. LEXIS 8323, 28 Fla. L. Weekly D 1351 (Fla. Dist. Ct. App. 5th Dist. 2003).*

16. Although where the legislature is silent on the factors it considers important in determining a reasonable fee, courts may look to the criteria enumerated in Fla. R. Bar 4-1.5, in the instant case, the legislature essentially decided that a percentage of the benefits was a reasonable fee; thus, only the statutory factors under *Fla. Stat. ch. 73.092* could be considered. *Seminole County v. Coral Gables Fed. S&l Ass'n, 691 So. 2d 614, 1997 Fla. App. LEXIS 4345, 22 Fla. L. Weekly D 994 (Fla. Dist. Ct. App. 5th Dist. 1997).*

17. Trial court erred in dismissing attorney's claim against another attorney to recover monies on a fee-splitting contract; although Fla. Bar. R. 4-1.5 prohibited such fee-splitting arrangements, the rule did not operate to bar plaintiff from pursuing his contract claim. *Kaufman v. Davis & Meadows, P.A., 600 So. 2d 1208, 1992 Fla. App. LEXIS 6215, 17 Fla. L. Weekly D 1428 (Fla. Dist. Ct. App. 1st Dist. 1992).*

18. Alleged fee-sharing agreement between a Florida lawyer and a Georgia law firm and lawyer was unenforceable because it was not reduced to writing or communicated to the client, as required by *R. Regulating Fla. Bar 4-1.5(g)(2),* and because it was intended to last more than one year and therefore was barred by the statute of frauds, *Fla. Stat. ch. 725.01. Marcus v. Garland, Samuel & Loeb, P.C., 441 F. Supp. 2d 1227, 2006 U.S. Dist. LEXIS 52535, 19 Fla. L. Weekly Fed. D 831 (S.D. Fla. 2006).*

19. Trial court's setting of a rate for appellate counsel's services in a capital case under *Fla. Bar R. 4-1.5* was erroneous where the rate was reduced on the theory that appointed counsel was, or should have been, working on a pro bono basis. *Zelman v. Metropolitan Dade County, 622 So. 2d 6, 1993 Fla. App. LEXIS 5750, 18 Fla. L. Weekly D 1324 (Fla. Dist. Ct. App. 3d Dist. 1993),* amended by *1993 Fla. App. LEXIS 8801* (Fla. Dist. Ct. App. 3d Dist. Aug. 10, 1993).

20. Where a decedent's father, but not the mother, who was the other co-personal representative, signed a contingency fee agreement in a wrongful death case, the lawyer was not entitled to recover his contingency fee from the mother's share of the recovery because he did not have a contract with her as required by Fla. *R. Reg. Fla. Bar 4-1.5(f)(2). Costello v. Davis, 890 So. 2d 1179, 2004 Fla. App. LEXIS 20014, 30 Fla. L. Weekly D 86 (Fla. Dist. Ct. App. 2d Dist. 2004).*

21. Attorneys of a personal representative whose letters of administration were later voided were entitled to recover a percentage of a settlement they recovered on behalf of the estate; they were not restricted to an hourly lodestar fee, but were entitled to recover under their contingency agreement because the fact that the personal representative signed the agreement before letters were issued did not render it void under Fla. R. Reg. Fla. Bar. 4-1.5(f). *Cooper v. Ford & Sinclair, P.A., 888 So. 2d 683, 2004 Fla. App. LEXIS 17339, 29 Fla. L. Weekly D 2607 (Fla. Dist. Ct. App. 4th Dist. 2004).*

22. Attorneys of a personal representative whose letters of administration were later voided were entitled to recover a percentage of a settlement they recovered on behalf of the estate; they were not restricted to an hourly lodestar fee, but were entitled to recover under their contingency agreement because there was no attempt to discharge them until after they negotiated the settlement. *Cooper v. Ford & Sinclair, P.A., 888 So. 2d 683, 2004 Fla. App. LEXIS 17339, 29 Fla. L. Weekly D 2607 (Fla. Dist. Ct. App. 4th Dist. 2004).*

23. Where an attorney was to receive a percentage of each payment equivalent to his earned percentage on the entire recovery gained for his ex-client, said method of payment was consistent with *R. Regulating Fla. Bar 4-1.5(f)(6). Freedman v. Fraser Eng'g & Testing, Inc., 927 So. 2d 949, 2006 Fla. App. LEXIS 3616, 31 Fla. L. Weekly D 789 (Fla. Dist. Ct. App. 4th Dist. 2006).*

24. Because the evidence supported a finding that an attorney failed to get prior court approval for an increased fee, in violation of *R. Regulating Fla. Bar 4-1.5(a),* a public reprimand under Fla. Stand. Imposing Law. Sanctions 7.0 and 7.3 was appropriate. *Fla. Bar v. Kavanaugh, 915 So. 2d 89, 2005 Fla. LEXIS 1761, 30 Fla. L. Weekly S 630 (Fla. 2005).*

25. Contracts providing for payment at an indefinite time in the future are enforceable under Florida law; where a law firm, hired by a Chapter 11 debtor prepetition under an oral contract to perform nonbankruptcy services, agreed to defer payment of a portion of their fee until the debtor was financially able to pay, the deferred fee was due and payable because more than three years had passed since the law firm performed any services for the debtor, and the debtor had successfully reorganized under Chapter 11. *In re Ellsworth, 326 B.R. 867, 2005 Bankr. LEXIS 1310, 18 Fla. L. Weekly Fed. B 322 (Bankr. M.D. Fla. 2005).*

26. Where a decedent's father, but not the mother, who was the other co-personal representative, signed a contingency fee agreement in a wrongful death case, the lawyer was not entitled to recover his contingency fee from the mother's share of the recovery because he did not have a contract with her as required by Fla. *R. Reg. Fla. Bar 4-1.5(f)(2). Costello v. Davis, 890 So. 2d 1179, 2004 Fla. App. LEXIS 20014, 30 Fla. L. Weekly D 86 (Fla. Dist. Ct. App. 2d Dist. 2004).*

27. Attorneys of a personal representative whose letters of administration were later voided were entitled to recover a percentage of a settlement they recovered on behalf of the estate; they were not restricted to an hourly lodestar fee, but were entitled to recover under their contingency agreement because the fact that the personal representative signed the

agreement before letters were issued did not render it void under Fla. R. Reg. Fla. Bar. 4-1.5(f). *Cooper v. Ford & Sinclair, P.A., 888 So. 2d 683, 2004 Fla. App. LEXIS 17339, 29 Fla. L. Weekly D 2607 (Fla. Dist. Ct. App. 4th Dist. 2004).*

28. Attorneys of a personal representative whose letters of administration were later voided were entitled to recover a percentage of a settlement they recovered on behalf of the estate; they were not restricted to an hourly lodestar fee, but were entitled to recover under their contingency agreement because there was no attempt to discharge them until after they negotiated the settlement. *Cooper v. Ford & Sinclair, P.A., 888 So. 2d 683, 2004 Fla. App. LEXIS 17339, 29 Fla. L. Weekly D 2607 (Fla. Dist. Ct. App. 4th Dist. 2004).*

29. Lawyer who charged client $ 3,340 for looking up the names of out-of-state attorneys in a legal directory and drafting and mailing two form letters to fourteen attorneys, and who obtained no results for the client, was suspended for 91 days for charging a clearly excessive fee. *The Fla. Bar v. Carlon, 820 So. 2d 891, 2002 Fla. LEXIS 830, 27 Fla. L. Weekly S 369 (Fla. 2002).*

30. Lawyer who charged a client $ 11,080 for handling a simple estate, and who charged for unnecessary research and other inappropriate activities, was suspended for 91 days, where a probate expert testified that any fee over $ 6,000 would have been clearly excessive. *The Fla. Bar v. Carlon, 820 So. 2d 891, 2002 Fla. LEXIS 830, 27 Fla. L. Weekly S 369 (Fla. 2002).*

31. An attorney's fee of $11,080 for a simple estate matter involving an estate valued at $114,500 was clearly excessive in light of *Fla. Stat. ch. 733.6171*, which would have allowed an approximate fee of $3435. *The Fla. Bar v. Carlon, 2001 Fla. LEXIS 1925, 26 Fla. L. Weekly S 655 (Fla. Oct. 4 2001).*

32. Where the contingency fee agreement between the prevailing parties and their attorney was reduced to writing after the trial but before the final judgment was entered, the prevailing parties were entitled to an award of attorney's fees pursuant to *Fla. Stat. ch. 501.2105* because *Fla. Bar R. 4-1.5(f)(2)* was not intended to shield a nonprevailing party from the payment of attorney's fees. *Corvette Shop & Supplies, Inc. v. Coggins, 779 So. 2d 529, 2000 Fla. App. LEXIS 16328, 25 Fla. L. Weekly D 2852 (Fla. Dist. Ct. App. 2d Dist. 2000),* review denied by *794 So. 2d 604, 2001 Fla. LEXIS 1756 (Fla. 2001).*

33. To properly determine a lodestar amount, a trial court should consider the criteria in *R. Regulating Fla. Bar 4-1.5(b),* except the time and labor required, the novelty and difficulty of the question involved, the results obtained, and whether the fee is fixed or contingent; the novelty and difficulty of the question should be considered in determining the number of hours reasonably expended on the litigation. *Zunde v. International Paper Co., 13 Fla. L. Weekly Fed. D 346, 2000 U.S. Dist. LEXIS 14754* (July 20, 2000).

34. Lawyers who performed services for a corporate defendant in a replevin action did not violate *Fla. Bar R. 4-1.5* by failing to provide their client with a statement of rights delineating the parties' contingent fee arrangement because the rule did not apply to actions seeking property or other damages arising in a commercial litigation context; the fact that the client's counter suit included claims for assault and defamation did not invoke application of the rule. *Guetzloe v. Hartley, 710 So. 2d 1044, 1998 Fla. App. LEXIS 5997, 23 Fla. L. Weekly D 1305 (Fla. Dist. Ct. App. 5th Dist. 1998).*

35. Bonus fee awarded to law firm upon its securing a final dissolution for client was improper because *Fla. Bar R. 4-1.5*provided that a lawyer could not enter into an agreement to collect any fee in a domestic relations matter that amounted to a contingency fee; thus, the bonus clause was void. King v. Young, Berkman, Berman & *Karpf, P.A., 709 So. 2d 572, 1998 Fla. App. LEXIS 2287, 23 Fla. L. Weekly D 670 (Fla. Dist. Ct. App. 3d Dist. 1998),* review denied by *725 So. 2d 1111, 1998 Fla. LEXIS 2023 (Fla. 1998).*

36. *Fla. Bar R. 4-1.5(g)(2)* required a written agreement with the client before lawyers could divide fees and the failure to comply with Rule 4-1.5(g) could not be used to shield a referring attorney from a legal malpractice claim made by a client. *Noris v. Silver, 701 So. 2d 1238, 1997 Fla. App. LEXIS 13364, 22 Fla. L. Weekly D 2708 (Fla. Dist. Ct. App. 3d Dist. 1997).*

37. Termination agreement providing for client fee split was enforceable by a law firm against a former associate because Fla. Bar. R. 4-1.5 that prohibited attorneys from entering into an agreement to collect excessive fees, could not be

used to invalidate or render void fee splitting agreements. Miller v. Jacobs & *Goodman, P.A., 699 So. 2d 729, 1997 Fla. App. LEXIS 8497, 22 Fla. L. Weekly D 1805 (Fla. Dist. Ct. App. 5th Dist. 1997),* review denied by *717 So. 2d 533, 1998 Fla. LEXIS 712 (Fla. 1998).*

38. Where attorney discharged client's medical bills at discount from the proceeds of injury settlement, his surreptitious appropriation of the savings exceeded the allowable contingency fee in violation of *Fla. Bar R. 4-1.5(f)(4)* and warranted suspension. *The Fla. Bar v. Thomas, 698 So. 2d 530, 1997 Fla. LEXIS 1015, 22 Fla. L. Weekly S 425 (Fla. 1997).*

39. Where attorney converted an estate's money to attorney's operating account without having earned the entire fee, attorney's violation of 4-1.5(a) warranted more than a 30 day suspension, but instead a 90 day suspension and thereafter for an indefinite period until attorney paid the cost of the disciplinary proceedings and repaid the estate with interest. *The Fla. Bar v. Forrester, 656 So. 2d 1273, 1995 Fla. LEXIS 1066, 20 Fla. L. Weekly S 311 (Fla. 1995).*

40. Attorney who, representing the mother of a daughter killed in an automobile accident, obtained a settlement from the automobile manufacturer, was not entitled to an award of attorney fees based on the portion of the settlement payable to his client's former husband, the deceased child's father, where there was no signed contract between the attorney and the father as required by *Fla. Bar R. 4-1.5(f)(2).* Perez v. George, Hartz, Lundeen, Flagg & *Fulmer, 662 So. 2d 361, 1995 Fla. App. LEXIS 6712, 20 Fla. L. Weekly D 1437 (Fla. Dist. Ct. App. 3d Dist. 1995),* review denied by *666 So. 2d 143, 1995 Fla. LEXIS 2175 (Fla. 1995).*

41. Client was not at fault in dealings with attorney where the sole controversy between them was attorney's desire to settle the claim and client's desire to proceed to trial or obtain a larger settlement; while attorney's opinion of the value of a case was lower than the settlement offer, attorney could express that opinion strongly to client, but, under *Fla. Bar R. 4-1.5,* the final decision was client's; trial court's final judgment dividing a contingent fee after attorney withdrew from the case was vacated to the extent that it awarded any attorney's fees to attorney; costs were the responsibility of client and attorney was entitled to a charging lien for costs upon the settlement proceeds from client's claim. *Kay v. Home Depot, 623 So. 2d 764, 1993 Fla. App. LEXIS 8445, 18 Fla. L. Weekly D 1800 (Fla. Dist. Ct. App. 5th Dist. 1993),* review denied sub nomine *Driscoll v. Kay, 632 So. 2d 1026, 1994 Fla. LEXIS 246 (Fla. 1994).*

42. Trial court erroneously refused to consider the risk multiplier in fixing a fee based upon an oral contingency fee agreement between the attorney and the client, although the trial court determined that a contingency fee agreement existed. *Harvard Farms v. National Casualty Co., 617 So. 2d 400, 1993 Fla. App. LEXIS 4479, 18 Fla. L. Weekly D 1039 (Fla. Dist. Ct. App. 3d Dist. 1993),* overruled by *Chandris, S.A. v. Yanakakis, 668 So. 2d 180, 1995 Fla. LEXIS 2037, 20 Fla. L. Weekly S 603, 1995 Fla. L. Weekly S 603, 1996 A.M.C. 2668 (Fla. 1995).*

43. Written referral agreement between a referring attorney and a law firm, which provided for a division of fees of 25 percent and 75 percent, respectively, was proper pursuant to *Fla. Bar R. 4-1.5(g)*; where the agreement was signed by the client, disclosed the division of fees, and included the referrring attorney's legal responsibility to the client, language that fees "may" be adjusted to reflect actual work performed did not implicate the mandatory provisions of *Fla. Bar R. 4-1.5(g). Halberg v. Chanfrau, 613 So. 2d 600, 1993 Fla. App. LEXIS 1654, 18 Fla. L. Weekly D 474 (Fla. Dist. Ct. App. 5th Dist. 1993).*

44. Fee agreement which required a client to pay an attorney twice for the same work in the event the client terminated the representation violated Fla. Bar. R. 4-1.5(A) by exacting a penalty for right of discharge. *The Fla. Bar v. Hollander, 607 So. 2d 412, 1992 Fla. LEXIS 1867, 17 Fla. L. Weekly S 683 (Fla. 1992).*

45. In a divorce action, fees awarded to wife's second attorney were not proper because *Fla. Bar R. 4-1.5,* provided the factors upon which a reasonable fee could be based, and did not provide for flat rates per task; the practice of unit billing was abusive in that fees were charged for less than routine matters, such as folding paper, stuffing envelopes, and sealing them, without regard for the actual time spent on true legal work. *Browne v. Costales, 579 So. 2d 161, 1991 Fla. App. LEXIS 3169, 16 Fla. L. Weekly D 969 (Fla. Dist. Ct. App. 3d Dist. 1991),* review denied by *593 So. 2d 1051, 1991 Fla. LEXIS 2015 (Fla. 1991).*

46. Pursuant to former Fla. Bar Code of Professional Responsibility, Disciplinary Rule 2-106 (now Fla. Bar Reg. R. 4-1.5), an attorney was suspended from the practice of law for 91 days for charging clients excessive fees; and it was not

proper to bill clients for pro bono services rendered to others or to charge fees without regard to actual time spent. *The Fla. Bar v. Richardson, 574 So. 2d 60, 1990 Fla. LEXIS 551, 15 Fla. L. Weekly S 237 (Fla. 1990),* cert. denied, *502 U.S. 811, 112 S. Ct. 57, 116 L. Ed. 2d 33 (1991).*

47. Where a referee heard the witnesses, judged their demeanor and credibility, reviewed all of the evidence, and properly resolved any conflicts, the court held that that the record showed a course of conduct on attorney's part involving deceit and misrepresentation and the charging of illegal or excessive fees in violation of former Fla. Bar Rules 1-102(A)(4) (now Fla. Bar Reg. R. 4-1.5) and 2-106(A) (now Fla. Bar Reg. R. 4-1.5), and the court approved the referee's findings of guilt, and, given that attorney had already ceased practicing law, ordered immediate suspension for three years and thereafter until rehabilitation was proven and restitution of $ 7,500 made to attorney's client. *The Fla. Bar v. Lowe, 508 So. 2d 6, 1987 Fla. LEXIS 1925, 12 Fla. L. Weekly 275 (Fla. 1987).*

48. Use of a multiplier failed as there was no evidence that the insured had any difficulty obtaining competent counsel to represent him in the PIP suit and it was a fairly unremarkable contract case involving a dispute over $ 1,315; thus, the circuit court erred in affirming the use of a fee multiplier and awarding attorney's fees of $ 193,750. *Progressive Express Ins. Co. v. Schultz, 948 So. 2d 1027, 2007 Fla. App. LEXIS 2611, 32 Fla. L. Weekly D 548 (Fla. Dist. Ct. App. 5th Dist. 2007),* review denied by *966 So. 2d 968, 2007 Fla. LEXIS 1726 (Fla. 2007).*

49. Where attorney sued his former client's sons for fees and costs allegedly owed, and the sons had corresponded with him and demanded details of the litigation, suggested trial strategy, and aggressively negotiated his fees, whether these facts established the formation of a contract was a question of fact; therefore, the trial court erred in granting the sons summary judgment. *Richard E. Basha, P.A. v. Dorelien, 937 So. 2d 304, 2006 Fla. App. LEXIS 15468, 31 Fla. L. Weekly D 2418 (Fla. Dist. Ct. App. 4th Dist. 2006).*

50. Lawyer's lien against his co-counsel was effective under *R. Regulating Fla. Bar 4-1.5(f)(4)(D)* to enforce the lawyer's claim as secondary attorney for 25 percent of a total contingency fee under *R. Regulating Fla. Bar 4-1.4*, as the attorneys orally agreed to their duties in representing their client after they entered into a written contingency fee agreement with their client. *Jay v. Trazenfeld, 952 So. 2d 635, 2007 Fla. App. LEXIS 4905, 32 Fla. L. Weekly D 898 (Fla. Dist. Ct. App. 4th Dist. 2007).*

51. That a contractual provision requiring a partner to pay revenues to his former wife as part of an agreement in which the wife sold her shares in the firm to the partner might have been inconsistent with the fee-splitting provisions of *R. Regulating Fla. Bar 4-1.5* did not invalidate the agreement because *R. Regulating Fla. Bar 4-1.5* could not serve as a basis to invalidate this provision, which was in a private contract between private parties. *Viles & Beckman v. Lagarde, 2006 U.S. Dist. LEXIS 62659 (M.D. Fla. Sept. 1 2006).*

52. Because nothing in the record indicated that $ 5,000 from a Georgia lawyer was anything other than a gift to a Florida lawyer, it did not provide a basis for the Florida lawyer to argue that it was an initial payment of a contract to participate in fee-sharing agreement. *Marcus v. Garland, Samuel & Loeb, P.C., 441 F. Supp. 2d 1227, 2006 U.S. Dist. LEXIS 52535, 19 Fla. L. Weekly Fed. D 831 (S.D. Fla. 2006).*

53. Attorney's request under quantum meruit for attorney fees from clients he represented in an arbitration was properly denied as the clients reasonably believed that the attorney would be paid through a fee awarded by the arbitration panel against the defendant; Fla. R. Bar 4-1.5(b) was only a starting point, but the totality of the circumstances had to be considered as there was no controlling contract between the lawyer and the clients. *Hallowes v. Bedard, 877 So. 2d 953, 2004 Fla. App. LEXIS 11319, 29 Fla. L. Weekly D 1736 (Fla. Dist. Ct. App. 5th Dist. 2004).*

54. Although a trial court properly concluded that an attorney was entitled to a charging lien, the wording of the charging lien judgment was overly broad inasmuch as it did not limit the lien to property recovered by the client as a result of the attorney's efforts. *Mitchell v. Coleman, 868 So. 2d 639, 2004 Fla. App. LEXIS 3252, 29 Fla. L. Weekly D 685 (Fla. Dist. Ct. App. 2d Dist. 2004).*

55. Attorney violated *Fla. Bar R. 4-1.5* in failing to sign the contingency fee agreement and failing to have the client sign the closing statement. *Afrazeh v. Miami Elevator Co., 769 So. 2d 399, 2000 Fla. App. LEXIS 10164, 25 Fla. L. Weekly D 1863 (Fla. Dist. Ct. App. 3d Dist. 2000),* review denied by *786 So. 2d 580, 2001 Fla. LEXIS 532 (Fla. 2001).*

56. Trial court erred in granting summary judgment in favor of an attorney who sued to recover on a contract for legal services rendered, where regardless of the wording of the fee agreement, issues of material fact existed as to whether it was reasonably necessary for the attorney to have expended the number of hours billed in accordance with *Fla. Bar Rule 4-1.5. Elser v. Law Offices of James M. Russ, P.A., 679 So. 2d 309, 1996 Fla. App. LEXIS 8838, 21 Fla. L. Weekly D 1870 (Fla. Dist. Ct. App. 5th Dist. 1996).*

57. Client was not at fault in dealings with attorney where the sole controversy between them was attorney's desire to settle the claim and client's desire to proceed to trial or obtain a larger settlement; while attorney's opinion of the value of a case was lower than the settlement offer, attorney could express that opinion strongly to client, but, under *Fla. Bar R. 4-1.5*, the final decision was client's; trial court's final judgment dividing a contingent fee after attorney withdrew from the case was vacated to the extent that it awarded any attorney's fees to attorney; costs were the responsibility of client and attorney was entitled to a charging lien for costs upon the settlement proceeds from client's claim. *Kay v. Home Depot, 623 So. 2d 764, 1993 Fla. App. LEXIS 8445, 18 Fla. L. Weekly D 1800 (Fla. Dist. Ct. App. 5th Dist. 1993),* review denied sub nomine *Driscoll v. Kay, 632 So. 2d 1026, 1994 Fla. LEXIS 246 (Fla. 1994).*

58. Pursuant to former Fla. Bar Code of Professional Responsibility, Disciplinary Rule 2-106 (now Fla. Bar Reg. R. 4-1.5), an attorney was suspended from the practice of law for 91 days for charging clients excessive fees; and it was not proper to bill clients for pro bono services rendered to others or to charge fees without regard to actual time spent. *The Fla. Bar v. Richardson, 574 So. 2d 60, 1990 Fla. LEXIS 551, 15 Fla. L. Weekly S 237 (Fla. 1990),* cert. denied, *502 U.S. 811, 112 S. Ct. 57, 116 L. Ed. 2d 33 (1991).*

59. Attorney's conduct in charging an excessive hourly and contingent fee, in violation of former Fla. Bar R. 2-106 (now Fla. Bar Reg. R. 4-1.5) and failing to advise client to obtain independent counsel, in violation of former Fla. Bar R. 5-104 (now Fla. Bar Reg. R. 4-1.8), resulted in a 60 day suspension. *The Fla. Bar v. Barley, 541 So. 2d 606, 1989 Fla. LEXIS 268, 14 Fla. L. Weekly 199 (Fla. 1989).*

60. Trial court's order denying a lawyer's client's motion seeding return of settlement monies was reversed where the lawyer had not perfected a charging lien and could not hold a retaining lien for fees in unrelated litigation because set-offs for past legal services rendered in unrelated litigation cases cannot be imposed on an attorney's trust account under former Fla. Bar Integration Rule, art. XI, Rule 11.02(4) (now *Rules Regulating The Florida Bar, Rule 4-1.5*). *Smith v. Daniel Mones, P.A., 458 So. 2d 796, 1984 Fla. App. LEXIS 15543, 9 Fla. L. Weekly 2204 (Fla. Dist. Ct. App. 3d Dist. 1984),* quashed in part by *486 So. 2d 559, 1986 Fla. LEXIS 1784, 11 Fla. L. Weekly 114, 70* A.L.R.4th 817 (Fla. 1986).

61. Where an attorney had accepted a retainer from a client, had failed to repay the retainer to the client as agreed when the attorney's fees were recovered, had made false statements, and had engaged in deceitful conduct in an effort to defeat the former client's claim, the attorney violated former Fla. Rules of Professional Responsibility Rules 1-102(A)(4) and (A)(6) (now *Rules Regulating The Florida Bar, Rule 4-1.5*); because the attorney had already been disbarred, there was no need for a formal order of disbarment. *The Fla. Bar v. Clark, 517 So. 2d 15, 1987 Fla. LEXIS 2624, 12 Fla. L. Weekly 615 (Fla. 1987).*

62. Where a referee heard the witnesses, judged their demeanor and credibility, reviewed all of the evidence, and properly resolved any conflicts, the court held that that the record showed a course of conduct on attorney's part involv-

ing deceit and misrepresentation and the charging of illegal or excessive fees in violation of former Fla. Bar Rules 1-102(A)(4) (now *Rules Regulating The Florida Bar, Rule 4-1.5*) and former 2-106(A) (now *Rules Regulating The Florida Bar, Rule 4-1.5*), and the court approved the referee's findings of guilt, and, given that attorney had already ceased practicing law, ordered immediate suspension for three years and thereafter until rehabilitation was proven and restitution of $ 7,500 made to attorney's client. *The Fla. Bar v. Lowe, 508 So. 2d 6, 1987 Fla. LEXIS 1925, 12 Fla. L. Weekly 275 (Fla. 1987).*

63. Where an attorney had no legal or personal basis for charging his legal aid client a fee he violated former Fla. Bar R. 2-106(C) (now Fla. Bar Reg. R. 4-1.5) and was properly privately reprimanded. *The Fla. Bar v. W.H.P., 384 So. 2d 28, 1980 Fla. LEXIS 4234 (Fla. 1980).*

64. Referee's recommendation that the attorney be disbarred for violating *Fla. Bar R. 4-1.1*, *4-1.3*, *4-1.4(a)* and (b), *4-1.5(a)(1)*, *4-1.7(a)*, *4-1.15*, *4-3.4(c)*, and *4-8.4(c)* and (d) for faulty representation in several bankruptcy cases was an appropriate sanction because the referee's findings were supported by the evidence and the attorney had previously been disciplined for lack of diligence and communication, trust accounting violations, and neglecting a client matter. *The Fla. Bar v. McAtee, 674 So. 2d 734, 1996 Fla. LEXIS 892, 21 Fla. L. Weekly S 239 (Fla. 1996).*

65. Where attorney abandoned practice without notice to clients, and violated *Fla. Bar R. 4-1.3*, failure to act with reasonable diligence and promptness in representing a client, *Fla. Bar R. 4-1.4(a)*, failure to keep a client reasonably informed about the status of a matter, *Fla. Bar R. 4-1.16(d)*, failure to protect a client's interests upon termination of representation, *Fla. Bar R. 4-3.2*, failure to make reasonable efforts to expedite litigation, *Fla. Bar R. 4-1.5(a)*, charging or collecting clearly excessive fees, *Fla. Bar R. 4-8.4(c)*, conduct involving dishonesty, fraud, deceit, or misrepresentation, *Fla. Bar R. 4-8.4(d)*, conduct prejudicial to the administration of justice, and *Fla. Bar R. 4-8.4(b)*, conduct reflecting adversely on honesty or fitness to practice law, attorney was disbarred, effective immediately. *The Fla. Bar v. Walker, 530 So. 2d 305, 1988 Fla. LEXIS 963, 13 Fla. L. Weekly 552 (Fla. 1988).*

66. Referee's recommendation that the attorney be disbarred for violating *Fla. Bar R. 4-1.1*, *4-1.3*, *4-1.4(a)* and (b), *4-1.5(a)(1)*, *4-1.7(a)*, *4-1.15*, *4-3.4(c)*, and *4-8.4(c)* and (d) for faulty representation in several bankruptcy cases was an appropriate sanction because the referee's findings were supported by the evidence and the attorney had previously been disciplined for lack of diligence and communication, trust accounting violations, and neglecting a client matter. *The Fla. Bar v. McAtee, 674 So. 2d 734, 1996 Fla. LEXIS 892, 21 Fla. L. Weekly S 239 (Fla. 1996).*

67. Attorney was disbarred for neglecting a legal matter and for misuse of client funds because he had a history of neglecting cases, which was the cause of his license being suspended at the time of this proceeding; attorney failed to diligently prosecute a claim on behalf of clients, failed to respond to client's repeated inquiries about the status of her case, and an internal audit of his client trust account revealed several accounting violations. *The Fla. Bar v. Knowles, 572 So. 2d 1373, 1991 Fla. LEXIS 42, 16 Fla. L. Weekly S 39 (Fla. 1991).*

68. In a disciplinary proceeding by the Florida Bar, the referee recommended that an attorney be found guilty of violating former Fla. Bar Integration Rule 11.02(3)(a) (now *Rules Regulating The Florida Bar, Rule 3-4.3*) and former Fla. Code of Professional Responsibility DR 1-102(A)(4) (now *Rules Regulating The Florida Bar, Rule 4-1.5*), 1-102(A)(6) (now *Rules Regulating The Florida Bar, Rule 4-1.5*); the court adopted the referee's findings that attorney was guilty of deceptive billing, but it agreed with the Florida Bar that a one-month suspension was the appropriate sanction. *The Fla. Bar v. Herzog, 521 So. 2d 1118, 1988 Fla. LEXIS 372, 13 Fla. L. Weekly 219 (Fla. 1988).*

69. Attorney who violated Fla. Bar. R. 4-1.5(f)(2) by participating in a contingent fee without the consent of the client in writing and without agreeing to assume joint legal responsibility to the client was properly reprimanded by the Board of Governors of the Florida Bar and ordered to complete the *Bar's Practice and Professionalism Enhancement Program. The Fla. Bar v. Rubin, 709 So. 2d 1361, 1998 Fla. LEXIS 616, 23 Fla. L. Weekly S 228 (Fla. 1998).*

70. Public reprimand was the appropriate sanction where an attorney was not zealous in avoiding fee controversies with clients in violation of former Fla. Bar R. 1-102(A)(5) (now *Rules Regulating The Florida Bar, Rule 4-1.5*). *The Fla. Bar v. Winter, 505 So. 2d 1337, 1987 Fla. LEXIS 1792, 12 Fla. L. Weekly 206 (Fla. 1987).*

71. Public reprimand, restitution, and costs was the proper penalty for an attorney who violated former Fla. R. Bar 2-106(A) (now Fla. Bar Reg. R. 4-1.5) by refusing to refund that portion of a retainer fee unearned under the terms of the fee agreement. *The Fla. Bar v. Hipsh, 441 So. 2d 617, 1983 Fla. LEXIS 3116 (Fla. 1983).*

72. Where an attorney was found to have violated *R. Regulating Fla. Bar 4-1.4*, *4-1.5(a)*, *4-1.7(a)* and (b), *4-1.8(a)*, *4-1.9(a)*, *4-1.16(a)(1)*, *4-5.1(c)*, *4-5.6(b)*, and *4-8.4(a)*, in regard to entering into an "engagement agreement" with an opposing corporation which he was suing on behalf of 20 clients in a mass tort case, and the attorney did not tell a judge about the engagement agreement, the court imposed a two-year suspension and ordered the attorney to disgorge his portion of the prohibited fee to the *Clients' Security Fund. Fla. Bar v. Rodriguez, 959 So. 2d 150, 2007 Fla. LEXIS 761, 32 Fla. L. Weekly S 186 (Fla. 2007).*

73. Attorney who was found guilty by a referee of numerous violations of the disciplinary rules based upon the attorney's representation of seven clients in five cases, including a violation of *R. Regulating Fla. Bar 4-1.5(a)* and (e) regarding illegal, prohibited, or clearly excessive fees and costs, and the duty to communicate the basis or rate of fee or costs to client, respectively, was suspended from the practice of law for three years because of the serious evidence of client neglect and the lawyer's history of disciplinary misconduct. *Fla. Bar v. Feige, 937 So. 2d 605, 2006 Fla. LEXIS 1401, 31 Fla. L. Weekly S 434 (Fla. 2006).*

74. Disciplinary referee's factual findings regarding an attorney's violations of *R. Regulating Fla. Bar 4-1.1*, *R. Regulating Fla. Bar 4-1.3*, *R. Regulating Fla. Bar 4-1.4*, and *R. Regulating Fla. Bar 4-8.4*, were accepted by the Florida Supreme Court, with a single exception regarding an alleged violation of *R. Regulating Fla. Bar 4-1.5(a)* prohibiting the collection of an excessive fee. The sanction of a three-year suspension, as opposed to disbarment as the Bar recommended, was entered, based on: (1) evidence that supported the reason she failed to notify her clients of a prior suspension order was that she did not know she was suspended; (2) her failure to open her mail during this period, based on her well-documented depression; and (3) after she did open her mail, she undertook efforts to comply with the suspension order and she sought medical help. *Fla. Bar v. Shoureas, 913 So. 2d 554, 2005 Fla. LEXIS 2041, 30 Fla. L. Weekly S 697 (Fla. 2005).*

75. Where attorney converted an estate's money to attorney's operating account without having earned the entire fee, attorney's violation of 4-1.5(a) warranted more than a 30 day suspension, but instead a 90 day suspension and thereafter for an indefinite period until attorney paid the cost of the disciplinary proceedings and repaid the estate with interest. *The Fla. Bar v. Forrester, 656 So. 2d 1273, 1995 Fla. LEXIS 1066, 20 Fla. L. Weekly S 311 (Fla. 1995).*

76. Attorney violated Fla. R. Bar 4-1.5 in failing to provide the clients with a written fee agreement and failing to itemize the costs in the closing statement; appropriate discipline was suspension for one year, to run consecutive to a currrent two-year suspension. *The Fla. Bar v. Rood, 633 So. 2d 7, 1994 Fla. LEXIS 36, 19 Fla. L. Weekly S 51 (Fla. 1994).*

77. Pursuant to former Fla. Bar Code of Professional Responsibility, Disciplinary Rule 2-106 (now Fla. Bar Reg. R. 4-1.5), an attorney was suspended from the practice of law for 91 days for charging clients excessive fees; and it was not proper to bill clients for pro bono services rendered to others or to charge fees without regard to actual time spent. *The Fla. Bar v. Richardson, 574 So. 2d 60, 1990 Fla. LEXIS 551, 15 Fla. L. Weekly S 237 (Fla. 1990),* cert. denied, *502 U.S. 811, 112 S. Ct. 57, 116 L. Ed. 2d 33 (1991).*

78. Attorney was suspended from the practice of law for a 3 year period and thereafter until he proved rehabilitation because he was found guilty of violating his oath as an attorney and of violating former Disciplinary Rules 2-106(A) and (E) (now Fla. Bar Reg. R. 4-1.5), former 2-110(A)(3) (now Fla. Bar Reg. R. 4-1.16), and former 9-102(B)(3) and (4) (now Fla. Bar Reg. R. 4-1.5); attorney collected a clearly excessive fee, failed to protect the interest of his client upon withdrawal, failed to refund unearned fees, and failed to maintain complete records. *The Fla. Bar v. Berger, 394 So. 2d 415, 1981 Fla. LEXIS 2543 (Fla. 1981).*

79. Although where the legislature is silent on the factors it considers important in determining a reasonable fee, courts may look to the criteria enumerated in Fla. R. Bar 4-1.5, in the instant case, the legislature essentially decided that a percentage of the benefits was a reasonable fee; thus, only the statutory factors under *Fla. Stat. ch. 73.092* could be considered. *Seminole County v. Coral Gables Fed. S&l Ass'n, 691 So. 2d 614, 1997 Fla. App. LEXIS 4345, 22 Fla. L. Weekly D 994 (Fla. Dist. Ct. App. 5th Dist. 1997).*

80. Attorneys of a personal representative whose letters of administration were later voided were entitled to recover a percentage of a settlement they recovered on behalf of the estate; they were not restricted to an hourly lodestar fee, but were entitled to recover under their contingency agreement because the fact that the personal representative signed the agreement before letters were issued did not render it void under Fla. R. Reg. Fla. Bar. 4-1.5(f). *Cooper v. Ford & Sinclair, P.A., 888 So. 2d 683, 2004 Fla. App. LEXIS 17339, 29 Fla. L. Weekly D 2607 (Fla. Dist. Ct. App. 4th Dist. 2004).*

81. Attorneys of a personal representative whose letters of administration were later voided were entitled to recover a percentage of a settlement they recovered on behalf of the estate; they were not restricted to an hourly lodestar fee, but were entitled to recover under their contingency agreement because there was no attempt to discharge them until after they negotiated the settlement. *Cooper v. Ford & Sinclair, P.A., 888 So. 2d 683, 2004 Fla. App. LEXIS 17339, 29 Fla. L. Weekly D 2607 (Fla. Dist. Ct. App. 4th Dist. 2004).*

82. Where attorney representing three survivors in wrongful death action negotiated settlement in favor of all survivors but his proposed distribution plan did not compensate all survivors equally, and the attorney representing the other two survivors successfully opposed the plan and obtained an order providing for equal distribution, the trial court erred in awarding the first attorney a full fee but determining that the second attorney's fee should come solely from her clients' net share of proceeds, reduced by payment of the first attorney's fee; the award may have violated the limitation on fees in Fla. R. Bar 4-1.5, and it ignored the potential conflict of interest created when separate survivors hire separate counsel to prosecute a claim for damages that each was entitled to under *Fla. Stat. ch. 768.22. Wiggins v. Estate of Wright, 850 So. 2d 444, 2003 Fla. LEXIS 822, 28 Fla. L. Weekly S 409 (Fla. 2003).*

83. Attorney who, representing the mother of a daughter killed in an automobile accident, obtained a settlement from the automobile manufacturer, was not entitled to an award of attorney fees based on the portion of the settlement payable to his client's former husband, the deceased child's father, where there was no signed contract between the attorney and the father as required by *Fla. Bar R. 4-1.5(f)(2).* Perez v. George, Hartz, Lundeen, Flagg & *Fulmer, 662 So. 2d 361, 1995 Fla. App. LEXIS 6712, 20 Fla. L. Weekly D 1437 (Fla. Dist. Ct. App. 3d Dist. 1995),* review denied by *666 So. 2d 143, 1995 Fla. LEXIS 2175 (Fla. 1995).*

84. Where attorney representing three survivors in wrongful death action negotiated settlement in favor of all survivors but his proposed distribution plan did not compensate all survivors equally, and the attorney representing the other two survivors successfully opposed the plan and obtained an order providing for equal distribution, the trial court erred in awarding the first attorney a full fee but determining that the second attorney's fee should come solely from her clients' net share of proceeds, reduced by payment of the first attorney's fee; the award may have violated the limitation on fees in Fla. R. Bar 4-1.5, and it ignored the potential conflict of interest created when separate survivors hire separate counsel to prosecute a claim for damages that each was entitled to under *Fla. Stat. ch. 768.22. Wiggins v. Estate of Wright, 850 So. 2d 444, 2003 Fla. LEXIS 822, 28 Fla. L. Weekly S 409 (Fla. 2003).*

85. Where, on behalf of decedent's estate in her capacity as personal representative, widow hired law firm to pursue a wrongful death claim on contingency, but, due to a conflict in interest, daughter from a prior marriage had to retain separate counsel for the damages part of the suit, *Fla. Stat. ch. 768.26* provided for payment of first law firm from the entire award, but the contingency fee arrangement was reduced to allow payment to other counsel because the maximum contingency fee permitted by *Fla. Bar R. 4-1.5* was one-third of the recovery, and *Fla. Bar R. 4-1.5(g)* required a reasonable total fee in order to divide a fee between lawyers who were not in the same firm. *Catapane v. Catapane (In re Estate of Catapane), 759 So. 2d 9, 2000 Fla. App. LEXIS 2300, 25 Fla. L. Weekly D 584 (Fla. Dist. Ct. App. 4th Dist. 2000),* review denied by *779 So. 2d 270, 2000 Fla. LEXIS 2384 (Fla. 2000).*

86. Judge of Compensation Claims correctly awarded claimant's counsel $ 229.70 in attorney's fees, as said amount equaled the fee percentage allowed under *Fla. Stat. ch. 440.34*, and neither the parties' stipulation nor the Florida Rules of Professional Conduct, under *R. Regulating Fla. Bar 4-1.5(b)* could trump that determination. *Wood v. Fla. Rock Indus., 929 So. 2d 542, 2006 Fla. App. LEXIS 1752, 31 Fla. L. Weekly D 463 (Fla. Dist. Ct. App. 1st Dist. 2006),* modified by *929 So. 2d 545, 2006 Fla. App. LEXIS 8245, 31 Fla. L. Weekly D 1458 (Fla. Dist. Ct. App. 1st Dist. 2006).*

87. 1-5A Florida Estates Practice Guide § 5A.08, CHAPTER 5A PERSONAL REPRESENTATIVE'S COMMISSIONS, ATTORNEY'S FEES AND COMPENSATION OF OTHER AGENTS FOR THE PERSONAL REPRESENTATIVE, PART I. LEGAL BACKGROUND, Ethical Considerations.

88. 1-5A Florida Estates Practice Guide § 5A.100, CHAPTER 5A PERSONAL REPRESENTATIVE'S COMMISSIONS, ATTORNEY'S FEES AND COMPENSATION OF OTHER AGENTS FOR THE PERSONAL REPRESENTATIVE, PART II. PRACTICE GUIDE, Facts.

89. 1-5A Florida Estates Practice Guide § 5A.220, CHAPTER 5A PERSONAL REPRESENTATIVE'S COMMISSIONS, ATTORNEY'S FEES AND COMPENSATION OF OTHER AGENTS FOR THE PERSONAL REPRESENTATIVE, PART III. FORMS, Petition for Order Authorizing Payment of Attorney's Fees.

90. 1-5A Florida Estates Practice Guide § 5A.221, CHAPTER 5A PERSONAL REPRESENTATIVE'S COMMISSIONS, ATTORNEY'S FEES AND COMPENSATION OF OTHER AGENTS FOR THE PERSONAL REPRESENTATIVE, PART III. FORMS, Affidavit Substantiating Request for Attorney's Fees.

91. 1-5A Florida Estates Practice Guide § 5A.222, CHAPTER 5A PERSONAL REPRESENTATIVE'S COMMISSIONS, ATTORNEY'S FEES AND COMPENSATION OF OTHER AGENTS FOR THE PERSONAL REPRESENTATIVE, PART III. FORMS, Order Awarding Attorney's Fees.

92. 2-37 Florida Family Law § 37.02, A Substantive Law, Establishment of Right to Fee.

93. 2-37 Florida Family Law § 37.04, A Substantive Law, Determination of Amount of Fee.

94. 2-37 Florida Family Law § 37.10, A Substantive Law, Kinds of Agreements.

95. 2-37 Florida Family Law § 37.11, A Substantive Law, Establishment of Agreement.

96. 2-37 Florida Family Law § 37.12, A Substantive Law, Contents of Fee Agreement.

97. 2-37 Florida Family Law § 37.13, A Substantive Law, Division of Fees.

98. 2-37 Florida Family Law § 37.22, A Substantive Law, Criteria for Award Pursuant to Specific Statutes.

99. 2-37 Florida Family Law § 37.30, A Substantive Law, Monthly Procedures.

100. 2-37 Florida Family Law § 37.32, A Substantive Law, Enforcement of Contract.

101. 2-37 Florida Family Law § 37.33, A Substantive Law, Quantum Meruit Actions.

102. 2-37 Florida Family Law § 37.51, A Substantive Law, Cost Agreements.

103. 2-37 Florida Family Law § 37.52, A Substantive Law, Court Award.

104. 2-50 Florida Family Law § 50.01, B Procedure, Attorney-Client Relationship.

105. 2-50 Florida Family Law § 50.02, B Procedure, Attorneys' Fees.

106. 2-50 Florida Family Law § 50.03, B Procedure, Retainer Agreements.

107. 2-50 Florida Family Law § 50.201, B Procedure, Retainer Agreement.

108. 3-54 Florida Family Law § 54.05, B Procedure, Amount of Award.

109. 4-74 Florida Family Law § 74.24, C Enforcement, Attorneys' Fees and Costs.

USER NOTE: For more generally applicable notes, see notes under the first section of this group or subgroup.

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FLORIDA RULES OF COURT SERVICE

*** This document reflects changes received by October 1, 2008 ***
*** Annotations current through October 17, 2008. ***

Rules Regulating The Florida Bar
Chapter 4. Rules of Professional Conduct
4-1. CLIENT-LAWYER RELATIONSHIP

GO TO FLORIDA STATUTES ARCHIVE DIRECTORY

Fla. Bar Reg. R. 4-1.6 (2008)

Review Court Orders which may amend this Rule.

Rule 4-1.6. Confidentiality of Information

(a) *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 gives informed consent.

(b) *When Lawyer Must Reveal Information.* --A lawyer shall reveal such information to the extent the lawyer reasonably believes necessary:

(1) to prevent a client from committing a crime; or

(2) to prevent a death or substantial bodily harm to another.

(c) *When Lawyer May Reveal Information.* --A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) to serve the client's interest unless it is information the client specifically requires not to be disclosed;

(2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and client;

(3) to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved;

(4) to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(5) to comply with the Rules of Professional Conduct.

(d) *Exhaustion of Appellate Remedies.* --When required by a tribunal to reveal such information, a lawyer may first exhaust all appellate remedies.

(e) *Limitation on Amount of Disclosure.* --When disclosure is mandated or permitted, the lawyer shall disclose no more information than is required to meet the requirements or accomplish the purposes of this rule.

NOTES:
COMMENT

The lawyer is part of a judicial system charged with upholding the law. One of the lawyer's functions is to advise clients so that they avoid any violation of the law in the proper exercise of their rights.

This rule governs the disclosure by a lawyer of information relating to the representation of a client during the lawyer's representation of the client. See rule 4-1.18 for the lawyer's duties with respect to information provided to the lawyer by a prospective client, rule 4-1.9(b) for the lawyer's duty not to reveal information relating to the lawyer's prior representation of a former client, and rules 4-1.8(b) and 4-1.9(b) for the lawyer's duties with respect to the use of such information to the disadvantage of clients and former clients.

A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. See terminology for the definition of informed consent. This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

The principle of confidentiality is given effect in 2 related bodies of law, the attorney-client privilege (which includes the work product doctrine) in the law of evidence and the rule of confidentiality established in professional ethics. The attorney-client privilege applies injudicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule applies not merely to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or by law. However, none of the foregoing limits the requirement of disclosure in subdivision (b). This disclosure is required to prevent a lawyer from becoming an unwitting accomplice in the fraudulent acts of a client. See also Scope.

The requirement of maintaining confidentiality of information relating to representation applies to government lawyers who may disagree with the policy goals that their representation is designed to advance.

Authorized disclosure

A lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation, except to the extent that the client's instructions or special circumstances limit that authority. In litigation, for example, a lawyer may disclose information by admitting a fact that cannot properly be disputed or in negotiation by making a disclosure that facilitates a satisfactory conclusion.

Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

Disclosure adverse to client

The confidentiality rule is subject to limited exceptions. In becoming privy to information about a client, a lawyer may foresee that the client intends serious harm to another person. However, to the extent a lawyer is required or permitted to disclose a client's purposes, the client will be inhibited from revealing facts that would enable the lawyer to counsel against a wrongful course of action. While the public may be protected if full and open communication by the client is encouraged, several situations must be distinguished.

First, the lawyer may not counsel or assist a client in conduct that is criminal or fraudulent. See rule 4-1.2(d). Similarly, a lawyer has a duty under rule 4-3.3(a)(4) not to use false evidence. This duty is essentially a special instance of the duty prescribed in rule 4-1.2(d) to avoid assisting a client in criminal or fraudulent conduct.

Second, the lawyer may have been innocently involved in past conduct by the client that was criminal or fraudulent. In such a situation the lawyer has not violated rule 4-1.2(d), because to "counsel or assist" criminal or fraudulent conduct requires knowing that the conduct is of that character.

Third, the lawyer may learn that a client intends prospective conduct that is criminal. As stated in subdivision (b)(1), the lawyer shall reveal information in order to prevent such consequences. It is admittedly difficult for a lawyer to "know" when the criminal intent will actually be carried out, for the client may have a change of mind.

Subdivision (b)(2) contemplates past acts on the part of a client that may result in present or future consequences that may be avoided by disclosure of otherwise confidential communications. Rule 4-1.6(b)(2) would now require the attorney to disclose information reasonably necessary to prevent the future death or substantial bodily harm to another, even though the act of the client has been completed.

The lawyer's exercise of discretion requires consideration of such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction, and

factors that may extenuate the conduct in question. Where practical the lawyer should seek to persuade the client to take suitable action. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to the purpose.

Withdrawal

If the lawyer's services will be used by the client in materially furthering a course of criminal or fraudulent conduct, the lawyer must withdraw, as stated in rule 4-1.16(a)(1).

After withdrawal the lawyer is required to refrain from making disclosure of the client's confidences, except as otherwise provided in rule 4-1.6. Neither this rule nor rule 4-1.8(b) nor rule 4-1.16(d) prevents the lawyer from giving notice of the fact of withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation, or the like.

Where the client is an organization, the lawyer may be in doubt whether contemplated conduct will actually be carried out by the organization. Where necessary to guide conduct in connection with the rule, the lawyer may make inquiry within the organization as indicated in rule 4-1.13(b).

Dispute concerning lawyer's conduct

A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer's personal responsibility to comply with these rules. In most situations, disclosing information to secure such advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized, subdivision (b)(5) permits such disclosure because of the importance of a lawyer's compliance with the Rules of Professional Conduct.

Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. The lawyer's right to respond arises when an assertion of such complicity has been made. Subdivision (c) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend, of course, applies where a proceeding has been commenced. Where practicable and not prejudicial to the lawyer's ability to establish the defense, the lawyer should advise the client of the third party's assertion and request that the client respond appropriately. In any event, disclosure should be no greater than the lawyer reasonably believes is necessary to vindicate innocence, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it, and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

If the lawyer is charged with wrongdoing in which the client's conduct is implicated, the rule of confidentiality should not prevent the lawyer from defending against the charge. Such a charge can arise in a civil, criminal, or professional disciplinary proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person; for example, a person claiming to have been defrauded by the lawyer and client acting together. A lawyer entitled to a fee is permitted by subdivision (c) to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary. As stated above, the lawyer must make every effort practicable to avoid unnecessary disclosure of information relating to a representation, to limit disclosure to those having the need to know it, and to obtain protective orders or make other arrangements minimizing the risk of disclosure.

Disclosures otherwise required or authorized

The attorney-client privilege is differently defined in various jurisdictions. If a lawyer is called as a witness to give testimony concerning a client, absent waiver by the client, rule 4-1.6(a) requires the lawyer to invoke the privilege when it is applicable. The lawyer must comply with the final orders of a court or other tribunal of competent jurisdiction requiring the lawyer to give information about the client.

The Rules of Professional Conduct in various circumstances permit or require a lawyer to disclose information relating to the representation. See rules 4-2.3, 4-3.3, and 4-4.1. In addition to these provisions, a lawyer may be obligated or permitted by other provisions of law to give information about a client. Whether another provision of law supersedes rule 4-1.6 is a matter of interpretation beyond the scope of these rules, but a presumption should exist against such a supersession.

Former client

The duty of confidentiality continues after the client-lawyer relationship has terminated. See rule 4-1.9 for the prohibition against using such information to the disadvantage of the former client.

HISTORY: *Amended eff. March 23, 2006 (933 So.2d 417)*

CASE NOTES

1. Because an attorney representing the estate which was suing a nursing home was never sworn at a hearing regarding the disqualification of a law firm representing the nursing home, and thus, his representations did not qualify as testimony, and the representative's motion to disqualify the law firm was unsworn, there was no evidence as to the actual knowledge of the former partner on which to disqualify the firm. *Bon Secours-Maria Manor Nursing Care Ctr. v. Seaman, 959 So. 2d 774, 2007 Fla. App. LEXIS 9283, 32 Fla. L. Weekly D 1488 (Fla. Dist. Ct. App. 2d Dist. 2007).*

2. Where a brother's threat to kill his sister, communicated to his attorney, was an extraneous statement and not a communication incident or necessary to obtaining legal advice, the attorney-client privilege did not prohibit discovery through interrogatories seeking information surrounding the alleged threat. . *Hodgson Russ, LLP v. Trube, 867 So. 2d 1246, 2004 Fla. App. LEXIS 3310, 29 Fla. L. Weekly D 656 (Fla. Dist. Ct. App. 4th Dist. 2004).*

3. Because conflicting evidence created a dispute which required the trial court to determine whether a conflict of interest existed which prohibited a challenged attorney from representing a minor and her parents in their medical malpractice action, as it was alleged that he acquired protected information protected by *R. Regulating Fla. Bar 4-1.6* and *R. Regulating Fla. Bar 4-1.9(b)*, and because the trial court applied *R. Regulating Fla. Bar 4-1.9* rather than *R. Regulating Fla. Bar 4-1.10(b)* in disqualifying the attorney, the minor and her parents were granted certiorari relief from the order disqualifying their attorney, the disqualification order was quashed, and the matter was remanded for a determination of the motion to disqualify under *R. Regulating Fla. Bar 4-1.10*. *Solomon v. Dickison, 2005 Fla. App. LEXIS 15989, 30 Fla. L. Weekly D 2363 (Fla. Dist. Ct. App. 1st Dist. Oct. 6 2005).*

4. Defendant's court-appointed counsel was not required to withdraw from representing defendant, who had filed a malpractice complaint against the attorney, because the trial court deemed defendant's claim of ineffective assistance of counsel to be frivolous and the trial court ordered the attorney to continue to represent defendant. *Boudreau v. Carlisle, 549 So. 2d 1073, 1989 Fla. App. LEXIS 5132, 14 Fla. L. Weekly 2242 (Fla. Dist. Ct. App. 4th Dist. 1989).*

5. Grant of certiorari review in favor of a client and quashing of an order in favor of an attorney authorizing certain depositions that the attorney maintained he needed to prove his case was proper where the client's waiver of the attorney-client privilege was limited to the malpractice action and the attorney could reveal confidential information relating to his representation only to the extent necessary to defend himself. *Ferrari v. Vining, 744 So. 2d 480, 1999 Fla. App. LEXIS 12213, 24 Fla. L. Weekly D 2118 (Fla. Dist. Ct. App. 3d Dist. 1999).*

6. The disclosure of information, that general counsel received while employed by defendant company, in general counsel's whistleblower action, was not improper under Fla. R. Bar 4-1.6(c)(2), because the disclosure was necessary to establish her claim, and disqualification of her counsel for receipt of the disclosed information was therefore improper. *Alexander v. Tandem Staffing Solutions, Inc., 881 So. 2d 607, 2004 Fla. App. LEXIS 9947, 29 Fla. L. Weekly D 1610, 21 I.E.R. Cas. (BNA) 1148 (Fla. Dist. Ct. App. 4th Dist. 2004).*

7. Grant of certiorari review in favor of a client and quashing of an order in favor of an attorney authorizing certain depositions that the attorney maintained he needed to prove his case was proper where the client's waiver of the attorney-client privilege was limited to the malpractice action and the attorney could reveal confidential information relating to his representation only to the extent necessary to defend himself. *Ferrari v. Vining, 744 So. 2d 480, 1999 Fla. App. LEXIS 12213, 24 Fla. L. Weekly D 2118 (Fla. Dist. Ct. App. 3d Dist. 1999).*

8. Attorney in a criminal case, who filed a motion to notice actual potential conflict of interest between himself and a previous client listed as a government witness, thereby disclosing confidential communications in which the previous client confessed to uncharged crimes, violated *Fla. Bar R. 4-1.6. The Fla. Bar v. Lange, 711 So. 2d 518, 1998 Fla. LEXIS 862, 23 Fla. L. Weekly S 263 (Fla. 1998).*

9. Rule of attorney-client confidentiality comes to an end when an attorney knows that a client is engaging in crime or fraud. *The Fla. Bar v. Calvo, 630 So. 2d 548, 1993 Fla. LEXIS 1946, 18 Fla. L. Weekly S 641 (Fla. 1993),* cert. denied, *513 U.S. 809, 115 S. Ct. 58, 130 L. Ed. 2d 16 (1994).*

10. Under *Fla. Bar R. 4-1.6(c)(2),* former client who sued her former lawyer for legal malpractice, did not waive her attorney-client privilege with that lawyer as to the entire world, as such waiver was limited solely to the legal malpractice action; the ex-lawyer could only reveal confidential information relating to his representation of the client to the extent necessary to defend himself against the malpractice claim. *Adelman v. Adelman, 561 So. 2d 671, 1990 Fla. App. LEXIS 3491, 15 Fla. L. Weekly D 1369 (Fla. Dist. Ct. App. 3d Dist. 1990).*

11. Where lawyer used information relating to his earlier representation of a client against her in a divorce proceeding where he represented former client's husband, he violated *Fla. Bar R. 4-1.6. The Fla. Bar v. Dunagan, 731 So. 2d 1237, 1999 Fla. LEXIS 159, 24 Fla. L. Weekly S 83 (Fla. 1999).*

12. Attorney in a criminal case, who filed a motion to notice actual potential conflict of interest between himself and a previous client listed as a government witness, thereby disclosing confidential communications in which the previous client confessed to uncharged crimes, violated *Fla. Bar R. 4-1.6. The Fla. Bar v. Lange, 711 So. 2d 518, 1998 Fla. LEXIS 862, 23 Fla. L. Weekly S 263 (Fla. 1998).*

13. Defendant's court-appointed counsel was not required to withdraw from representing defendant, who had filed a malpractice complaint against the attorney, because the trial court deemed defendant's claim of ineffective assistance of counsel to be frivolous and the trial court ordered the attorney to continue to represent defendant. *Boudreau v. Carlisle, 549 So. 2d 1073, 1989 Fla. App. LEXIS 5132, 14 Fla. L. Weekly 2242 (Fla. Dist. Ct. App. 4th Dist. 1989).*

14. Where state attorney was not involved in the prosecution of defendant and had not revealed any confidential information about defendant known to him prior to his hire to other assistant state attorneys, the court refused to disqualify the state attorney's office from prosecution because it was not a law firm and there was no conflict of interest under former Fla. Code of Professional Responsibility DR 4-101 (now *Rules Regulating The Florida Bar, Rule 4-1.6*), former 5-105 (now *Rules Regulating The Florida Bar, Rule 4-1.7*), or former 9-101(B) (now *Rules Regulating The Florida Bar, Rule 4-1.10*). *State v. Fitzpatrick, 464 So. 2d 1185, 1985 Fla. LEXIS 3276, 10 Fla. L. Weekly 141 (Fla. 1985).*

15. Where lawyer used information relating to his earlier representation of a client against her in a divorce proceeding where he represented former client's husband, he violated *Fla. Bar R. 4-1.6. The Fla. Bar v. Dunagan, 731 So. 2d 1237, 1999 Fla. LEXIS 159, 24 Fla. L. Weekly S 83 (Fla. 1999).*

16. Previously disciplined attorney was suspended for one year, followed by three years of probation, for neglect of three clients' cases by violating: (1) Fla. R. Bar 1-3.3, by failing to notify the executive director of changes in his mail-

ing address and business telephone; (2) Fla. R. Bar 4-1.3, by failing to diligently represent the client; (3) Fla. R. Bar 4-1.4(a), by failing to keep the client reasonably informed; (4) Fla. R. Bar 4-1.4(b), by failing to permit the client to make informed decisions; and (5) Fla. R. Bar 4-1.3, 4-1.4(a), 4-1.4(b), and 4-1.6(a)(2), by failing to withdraw when his mental condition impaired his ability to represent a client. *The Fla. Bar v. Cimbler, 840 So. 2d 955, 2002 Fla. LEXIS 2409, 27 Fla. L. Weekly S 963 (Fla. 2002).*

17. Although *R. Regulating Fla. Bar 4-1.6, 4-1.9(b)* provided that an attorney had a continuing duty to the client not to disclose confidences even past the termination of the matter for which representation was sought, the client failed to allege the breach with particularity; however, the client was given an opportunity to describe the information in an amended legal malpractice complaint. *Elkind v. Bennett, 958 So. 2d 1088, 2007 Fla. App. LEXIS 9508, 32 Fla. L. Weekly D 1526 (Fla. Dist. Ct. App. 4th Dist. 2007).*

18. 2-37 Florida Family Law § 37.04, A Substantive Law, Determination of Amount of Fee.

19. 2-50 Florida Family Law § 50.01, B Procedure, Attorney-Client Relationship.

20. 2-50 Florida Family Law § 50.11, B Procedure, Purpose and Scope of Initial Interview.

21. 3-58 Florida Family Law § 58.20, B Procedure, Limitations on Discovery.

USER NOTE: For more generally applicable notes, see notes under the first section of this group or subgroup.

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FLORIDA RULES OF COURT SERVICE

*** This document reflects changes received by October 1, 2008 ***
*** Annotations current through October 17, 2008. ***

Rules Regulating The Florida Bar
Chapter 4. Rules of Professional Conduct
4-3. ADVOCATE

GO TO FLORIDA STATUTES ARCHIVE DIRECTORY

Fla. Bar Reg. R. 4-3.3 (2008)

Review Court Orders which may amend this Rule.

Rule 4-3.3. Candor Toward The Tribunal

(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.

(c) *Evidence Believed to Be False.* --A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

(d) *Ex Parte Proceedings.* --In an ex parte proceeding a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

NOTES:
COMMENT
The advocate's task is to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client is qualified by the advocate's duty of candor to the tribunal. However, an advocate does not vouch for the evidence submitted in a cause; the tribunal is responsible for assessing its probative value.
Representations by a lawyer

An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein, for litigation documents ordinarily present assertions by the client, or by someone on the client's behalf, and not assertions by the lawyer. Compare rule 4-3.1. However, an assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in rule 4-1.2(d) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. Regarding compliance with rule 4-1.2(d), see the comment to that rule. See also the comment to rule 4-8.4(b).

Misleading legal argument

Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore, as stated in subdivision (a)(3), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction that has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.

False evidence

When evidence that a lawyer knows to be false is provided by a person who is not the client, the lawyer must refuse to offer it regardless of the client's wishes.

When false evidence is offered by the client, however, a conflict may arise between the lawyer's duty to keep the client's revelations confidential and the duty of candor to the court. Upon ascertaining that material evidence is false, the lawyer should seek to persuade the client that the evidence should not be offered or, if it has been offered, that its false character should immediately be disclosed. If the persuasion is ineffective, the lawyer must take reasonable remedial measures.

Except in the defense of a criminally accused, the rule generally recognized is that, if necessary to rectify the situation, an advocate must disclose the existence of the client's deception to the court. Such a disclosure can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperate in deceiving the court, thereby subverting the truth-finding process that the adversary system is designed to implement. See rule 4-1.2(d). Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. Thus, the client could in effect coerce the lawyer into being a party to fraud on the court.

Perjury by a criminal defendant

Whether an advocate for a criminally accused has the same duty of disclosure has been intensely debated. While it is agreed that the lawyer should seek to persuade the client to refrain from perjurious testimony, there has been dispute concerning the lawyer's duty when that persuasion fails. If the confrontation with the client occurs before trial, the lawyer ordinarily can withdraw. Withdrawal before trial may not be possible if trial is imminent, if the confrontation with the client does not take place until the trial itself, or if no other counsel is available.

The most difficult situation, therefore, arises in a criminal case where the accused insists on testifying when the lawyer knows that the testimony is perjurious. The lawyer's effort to rectify the situation can increase the likelihood of the client's being convicted as well as opening the possibility of a prosecution for perjury. On the other hand, if the lawyer does not exercise control over the proof, the lawyer participates, although in a merely passive way, in deception of the court.

Although the offering of perjured testimony or false evidence is considered a fraud on the tribunal, these situations are distinguishable from that of a client who, upon being arrested, provides false identification to a law enforcement officer. The client's past act of lying to a law enforcement officer does not constitute a fraud on the tribunal, and thus does not trigger the disclosure obligation under this rule, because a false statement to an arresting officer is unsworn and occurs prior to the institution of a court proceeding. If the client testifies, the lawyer must attempt to have the client respond to any questions truthfully or by asserting an applicable privilege. Any false statements by the client in the course of the court proceeding will trigger the duties under this rule.

Remedial measures

If perjured testimony or false evidence has been offered, the advocate's proper course ordinarily is to remonstrate with the client confidentially. If that fails, the advocate should seek to withdraw if that will remedy the situation. Subject to the caveat expressed in the next section of this comment, if withdrawal will not remedy the situation or is impossible and the advocate determines that disclosure is the only measure that will avert a fraud on the court, the advocate should make disclosure to the court. It is for the court then to determine what should be done--making a statement about the

matter to the trier of fact, ordering a mistrial, or perhaps nothing. If the false testimony was that of the client, the client may controvert the lawyer's version of their communication when the lawyer discloses the situation to the court. If there is an issue whether the client has committed perjury, the lawyer cannot represent the client in resolution of the issue and a mistrial may be unavoidable. An unscrupulous client might in this way attempt to produce a series of mistrials and thus escape prosecution. However, a second such encounter could be construed as a deliberate abuse of the right to counsel and as such a waiver of the right to further representation.

Constitutional requirements

The general rule--that an advocate must disclose the existence of perjury with respect to a material fact, even that of a client--applies to defense counsel in criminal cases, as well as in other instances. However, the definition of the lawyer's ethical duty in such a situation may be qualified by constitutional provisions for due process and the right to counsel in criminal cases.

Refusing to offer proof believed to be false

Generally speaking, a lawyer has authority to refuse to offer testimony or other proof that the lawyer believes is untrustworthy. Offering such proof may reflect adversely on the lawyer's ability to discriminate in the quality of evidence and thus impair the lawyer's effectiveness as an advocate. In criminal cases, however, a lawyer may, in some jurisdictions, be denied this authority by constitutional requirements governing the right to counsel.

A lawyer may not assist the client or any witness in offering false testimony or other false evidence, nor may the lawyer permit the client or any other witness to testify falsely in the narrative form unless ordered to do so by the tribunal. If a lawyer knows that the client intends to commit perjury, the lawyer's first duty is to attempt to persuade the client to testify truthfully. If the client still insists on committing perjury, the lawyer must threaten to disclose the client's intent to commit perjury to the judge. If the threat of disclosure does not successfully persuade the client to testify truthfully, the lawyer must disclose the fact that the client intends to lie to the tribunal and, per 4-1.6, information sufficient to prevent the commission of the crime of perjury.

The lawyer's duty not to assist witnesses, including the lawyer's own client, in offering false evidence stems from the Rules of Professional Conduct, Florida statutes, and caselaw.

Rule 4-1.2(d) prohibits the lawyer from assisting a client in conduct that the lawyer knows or reasonably should know is criminal or fraudulent.

Rule 4-3.4(b) prohibits a lawyer from fabricating evidence or assisting a witness to testify falsely.

Rule 4-8.4(a) prohibits the lawyer from violating the Rules of Professional Conduct or knowingly assisting another to do so.

Rule 4-8.4(b) prohibits a lawyer from committing a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer.

Rule 4-8.4(c) prohibits a lawyer from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation.

Rule 4-8.4(d) prohibits a lawyer from engaging in conduct that is prejudicial to the administration of justice.

Rule 4-1.6(b) requires a lawyer to reveal information to the extent the lawyer reasonably believes necessary to prevent a client from committing a crime.

This rule, 4-3.3(a) (2), requires a lawyer to reveal a material fact to the tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client, and 4-3.3(a) (4) prohibits a lawyer from offering false evidence and requires the lawyer to take reasonable remedial measures when false material evidence has been offered.

Rule 4-1.16 prohibits a lawyer from representing a client if the representation will result in a violation of the Rules of Professional Conduct or law and permits the lawyer to withdraw from representation if the client persists in a course of action that the lawyer reasonably believes is criminal or fraudulent or repugnant or imprudent. Rule 4-1.16(c) recognizes that notwithstanding good cause for terminating representation of a client, a lawyer is obliged to continue representation if so ordered by a tribunal.

To permit or assist a client or other witness to testify falsely is prohibited by *section 837.02, Florida Statutes* (1991), which makes perjury in an official proceeding a felony, and by *section 777.011, Florida Statutes* (1991), which proscribes aiding, abetting, or counseling commission of a felony.

Florida caselaw prohibits lawyers from presenting false testimony or evidence. *Kneale v. Williams, 30 So. 2d 284 (Fla. 1947),* states that perpetration of a fraud is outside the scope of the professional duty of an attorney and no privilege attaches to communication between an attorney and a client with respect to transactions constituting the making of a false claim or the perpetration of a fraud. *Dodd v. The Florida Bar, 118 So. 2d 17 (Fla. 1960),* reminds us that "the courts are... dependent on members of the bar to... present the true facts of each cause... To enable the judge or the jury to [decide the facts] to which the law may be applied. When an attorney... allows false testimony... [the attorney]... makes it impossible for the scales [of justice] to balance." See *The Fla. Bar v. Agar, 394 So. 2d 405 (Fla. 1981),* and *The Fla. Bar v. Simons, 391 So. 2d 684 (Fla. 1980).*

The United States Supreme Court in *Nix v. Whiteside, 475 U.S. 157 (1986),* answered in the negative the constitutional issue of whether it is ineffective assistance of counsel for an attorney to threaten disclosure of a client's (a criminal defendant's) intention to testify falsely.

Ex parte proceedings

Ordinarily, an advocate has the limited responsibility of presenting 1 side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in an ex parte proceeding, such as an application for a temporary injunction, there is no balance of presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision.

CASE NOTES

1. Attorney violated Fla. R. App. 9.350(a) and *Fla. Bar R. 4-3.3* by not notifying the appellate court that he had settled with the opposing party, thereby rendering his appeal moot; he was sanctioned for improperly seeking an advisory opinion so as to gain a tactical advantage in other cases. *Merkle v. Jacoby, 912 So. 2d 595, 2005 Fla. App. LEXIS 2232, 30 Fla. L. Weekly D 548 (Fla. Dist. Ct. App. 2d Dist. 2005).*

2. Pursuant to *Fed. R. Civ. P. 23(h),* class counsel for motor fuel dealers who prevailed in a suit alleging that a corporation breached its contractual obligation to reduce the price of motor fuel to offset fees under a discount for cash program were entitled to an attorneys' fee of 31 and 1/3 percent from a common fund; however, an attorney who violated his ethical obligations under *R. Regulating Fla. Bar 4-3.3* by not revealing that he had borrowed money from a class member as part of a fee-splitting agreement, was deemed to have forfeited 25 percent of the award he was to have received, and was required to pay from his share of fees an incentive award that was made to his client. *Allapattah Servs. v. Exxon Corp., 454 F. Supp. 2d 1185, 2006 U.S. Dist. LEXIS 45702, 19 Fla. L. Weekly Fed. D 841 (S.D. Fla. 2006).*

3. Attorney violated Fla. R. App. 9.350(a) and *Fla. Bar R. 4-3.3* by not notifying the appellate court that he had settled with the opposing party, thereby rendering his appeal moot; he was sanctioned for improperly seeking an advisory opinion so as to gain a tactical advantage in other cases. *Merkle v. Jacoby, 912 So. 2d 595, 2005 Fla. App. LEXIS 2232, 30 Fla. L. Weekly D 548 (Fla. Dist. Ct. App. 2d Dist. 2005).*

4. A referee erroneously recommended that an attorney violated Fla. R. Bar 4-3.3, where the referree's recommendation was not supported by any evidence of the attorney making false statements in a court proceeding; the evidence only supported the contention that the attorney's misconduct occurred in the course of his communications with the bar and the grievance committee, not a court. *The Fla. Bar v. Rotstein, 835 So. 2d 241, 2002 Fla. LEXIS 2380, 27 Fla. L. Weekly S 934 (Fla. 2002).*

5. Florida's supreme court adopted the referee's findings that the attorney violated *Fla. Bar R. 4-3.3(a)(1), 4-8.4(b), 4-8.4(c),* and *4-8.4(d)*; however, due to the fact that the attorney made knowingly false statements to a judge and submitted false documents to the court, the court increased the attorney's discipline to a 30-day suspension. *The Fla. Bar v. Kravitz, 694 So. 2d 725, 1997 Fla. LEXIS 680, 22 Fla. L. Weekly S 276 (Fla. 1997).*

6. The conduct of plaintiff's counsel in a negligence suit, by knowingly permitting his client to conceal the fact that his injuries were caused by a separate accident, violated the prohibition of *Fla. Bar Rule 4-3.3* of failure to disclose a material fact to a tribunal when disclosure was necessary to avoid assisting a fraudulent act by a client. *Southern Trenching, Inc. v. Diago, 600 So. 2d 1166, 1992 Fla. App. LEXIS 5349, 17 Fla. L. Weekly D 1278, 17 Fla. L. Weekly D 1401 (Fla. Dist. Ct. App. 3d Dist. 1992),* review denied by *613 So. 2d 3, 1992 Fla. LEXIS 2385 (Fla. 1992).*

7. Because an attorney knew that a statement he made to a judge was false, the statements were misrepresentations that violated *R. Regulating Fla. Bar 4-3.3* and *R. Regulating Fla. Bar 4-8.4(c). Fla. Bar v. St. Louis, 967 So. 2d 108, 2007 Fla. LEXIS 762, 32 Fla. L. Weekly S 191 (Fla. 2007).*

8. Given an attorney's disciplinary history, the fact that two separate disciplinary actions were up for review by the Florida Supreme Court, and the lack of reasonable basis in the case law or in the Florida Standards for Imposing Lawyer Sanctions for the referee's recommendation of a one-year suspension, disbarment was ordered where the attorney's actions consisted of violating: (1) *R. Regulating Fla. Bar 4-3.3(a)* by making a knowingly false statement of a material fact or law to a tribunal; (2) *R. Regulating Fla. Bar 4-8.4(c)* and (d) by engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation which was prejudicial to the administration of justice; and (3) *R. Regulating Fla. Bar 3-6.1(c)* by not acting within the parameters for suspended attorneys to work as paralegals during the period of their suspension. *Fla. Bar v. Forrester, 916 So. 2d 647, 2005 Fla. LEXIS 1753, 30 Fla. L. Weekly S 623 (Fla. 2005).*

9. *R. Regulating Fla. Bar 4-3.3(a)(3)* specifically prohibits an attorney from knowingly failing 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, and *Fla. Stat. ch. 57.105* warns that counsel must be governed by considerations other than mere zealous advocacy for the client; therefore, the code and rules require counsel to concede error on appeal when appropriate. *Boca Burger, Inc. v. Forum, 912 So. 2d 561, 2005 Fla. LEXIS 1449, 30 Fla. L. Weekly S 649 (Fla. 2005).*

10. Attorney violated Fla. R. App. 9.350(a) and *Fla. Bar R. 4-3.3* by not notifying the appellate court that he had settled with the opposing party, thereby rendering his appeal moot; he was sanctioned for improperly seeking an advisory opinion so as to gain a tactical advantage in other cases. *Merkle v. Jacoby, 912 So. 2d 595, 2005 Fla. App. LEXIS 2232, 30 Fla. L. Weekly D 548 (Fla. Dist. Ct. App. 2d Dist. 2005).*

11. Petitioners' action for certiorari review of the denial of a motion to compel discovery pursuant to *Fla. R. Civ. P. 1.350* was granted, and respondents were compelled to produce the privileged document log sought by petitioners pursuant to *Fla. R. Civ. P. 1.280(b)(5),* as their dilatory tactics warranted such action, and the trial court was ordered to award attorneys fees to petitioner, based on respondents violation of R. Regulating Fla. Bar § 4-3.3. *Kaye Scholer LLP v. Zalis, 878 So. 2d 447, 2004 Fla. App. LEXIS 10825, 29 Fla. L. Weekly D 1671 (Fla. Dist. Ct. App. 3d Dist. 2004).*

12. A referee erroneously recommended that an attorney violated Fla. R. Bar 4-3.3, where the referree's recommendation was not supported by any evidence of the attorney making false statements in a court proceeding; the evidence only supported the contention that the attorney's misconduct occurred in the course of his communications with the bar and the grievance committee, not a court. *The Fla. Bar v. Rotstein, 835 So. 2d 241, 2002 Fla. LEXIS 2380, 27 Fla. L. Weekly S 934 (Fla. 2002).*

13. Defendant's attorney breached his duty of candor under *R. Regulating Fla. Bar 4-3.3* and the attorney and defendant were ordered to pay plaintiff's attorney fees under *Fla. Stat. ch. 57.105*, where the attorney failed to advise a trial judge that plaintiff had a right under *Fla. R. Civ. P. 1.190(a)* to file an amended complaint and to have additional counsel without leave of court the instant it became apparent that the trial judge was acting under a misimpression that plaintiff did not have those rights. *Forum v. Boca Burger, Inc., 788 So. 2d 1055, 2001 Fla. App. LEXIS 6945, 26 Fla. L. Weekly D 1250 (Fla. Dist. Ct. App. 4th Dist. 2001),* reversed in part by *912 So. 2d 561, 2005 Fla. LEXIS 1449, 30 Fla. L. Weekly S 649 (Fla. 2005).*

14. Under *R. Regulating Fla. Bar 4-3.3*, the heart of all legal ethics is a lawyer's duty of candor to a tribunal. *Forum v. Boca Burger, Inc., 788 So. 2d 1055, 2001 Fla. App. LEXIS 6945, 26 Fla. L. Weekly D 1250 (Fla. Dist. Ct. App. 4th Dist. 2001),* reversed in part by *912 So. 2d 561, 2005 Fla. LEXIS 1449, 30 Fla. L. Weekly S 649 (Fla. 2005).*

15. Even if it hurts the strategy and tactics of a party's counsel, even if it prepares the way for an adverse ruling, even though the adversary has himself failed to cite the correct law, a lawyer is required by *R. Regulating Fla. Bar 4-3.3* to disclose law favoring his adversary when a court is obviously under an erroneous impression as to the law's requirements. *Forum v. Boca Burger, Inc., 788 So. 2d 1055, 2001 Fla. App. LEXIS 6945, 26 Fla. L. Weekly D 1250 (Fla. Dist. Ct. App. 4th Dist. 2001),* reversed in part by *912 So. 2d 561, 2005 Fla. LEXIS 1449, 30 Fla. L. Weekly S 649 (Fla. 2005).*

16. Defendant's convictions for burglary and fleeing or attempting to flee a police officer were proper where, although the prosecuter violated former Fla. Bar R. 7-106(C)(4) (now Fla. Bar Reg. R. 4-3.3) by personally vouching for the veracity of the police officer, the primary state witness, the defense failed to object and there was no fundamental error. *Blackburn v. State, 447 So. 2d 424, 1984 Fla. App. LEXIS 12354 (Fla. Dist. Ct. App. 5th Dist. 1984).*

17. Defendant was denied a fair trial where the prosecutor improperly attested to his own belief regarding defendant's guilt and the witnesses' lack of credibility, and made an unsupported assertion about defendant's conduct in violation of former Fla. Bar R. 7-106(C)(4) (now Fla. Bar Reg. R. 4-3.3). *Jones v. State, 449 So. 2d 313, 1984 Fla. App. LEXIS 12353 (Fla. Dist. Ct. App. 5th Dist. 1984),* review denied by *456 So. 2d 1182, 1984 Fla. LEXIS 3495 (Fla. 1984).*

18. There was sufficient evidence to support the referee's finding that the attorney violated *Fla. Bar R. 4-1.2(a), 4-1.4(b), 4-3.1, 4-1.3, 4-1.8(a),* and *4-3.3* because it was uncontroverted that the attorney filed a petition with the bankruptcy court on behalf of a client whom he had never met or advised, which resulted in his allowing a forged signature to be filed with the court and there was no evidence that the client's former wife was acting as that client's agent; furthermore, the attorney failed to timely file a bankruptcy petition for another client, did not disclose to the court that he purchased his clients' property, and filed documents containing misleading information. *The Fla. Bar v. Jasperson, 625 So. 2d 459, 1993 Fla. LEXIS 1633, 18 Fla. L. Weekly S 531 (Fla. 1993).*

19. Attorney was properly found guilty of violating *Fla. Bar R. 4-3.3(d), 4-4.1(a), 4-8.4(e),* and *4-8.4(a),* (c), and (d) because the attorney was provided with fair notice of the disciplinary proceedings as the notice identified the rules allegedly violated, the attorney was aware of the conduct under investigation, was represented by counsel at the grievance committee hearing, and was given an opportunity to cross examine the state bar's witnesses. *The Fla. Bar v. Swickle, 589 So. 2d 901, 1991 Fla. LEXIS 1984, 16 Fla. L. Weekly S 737 (Fla. 1991).*

20. Court granted the state bar association's request and disbarred the attorney for violations of Fla. Bar Reg. R. 3-5.1(e) and (h), 3-6.1(c), 4-3.3(a)(1), and 4-8.4(c) because the attorney continued to engage in the practice of law after the effective date of the suspension and the attorney misrepresented his compliance with the suspension order in his pleadings filed with the court. *The Fla. Bar v. Jones, 571 So. 2d 426, 1990 Fla. LEXIS 1673, 15 Fla. L. Weekly S 627 (Fla. 1990).*

21. Where attorney disobeyed a court order because attorney believed the order was erroneous in that to permit a client to testify perjuriously by way of the free narrative approach was in direct conflict with former Disciplinary Rules 1-102(A)(4) (now *Rules Regulating The Florida Bar, Rule 4-1.1*), 4-101(D)(2) (now *Rules Regulating The Florida Bar, Rule 4-1.6*), former 7-102(A)(4), (6), (7) and (B)(1) (now *Rules Regulating The Florida Bar, Rule 4-1.2*), but, on writ of certiorari, a district court provided a procedure to be followed and assured attorney that attorney would carry out the ethical obligations, attorney was not permitted to ignore and refuse to follow the trial court order based upon a personal belief in the invalidity of that order, and attorney's deliberate failure to do so constituted a violation of former Disciplinary Rule 7-106(A)(now *Rules Regulating The Florida Bar, Rule 4-3.3*), and attorney's effective withdrawal from the case without permission of the trial court constituted a violation of former Disciplinary Rules 1-102(A)(5) (now *Rules Regulating The Florida Bar, Rule 4-1.1*) and former 2-110(A)(1) (now *Rules Regulating The Florida Bar, Rule 4-1.16*),

so attorney was publicly reprimanded. *The Fla. Bar v. Rubin, 549 So. 2d 1000, 1989 Fla. LEXIS 835, 14 Fla. L. Weekly 426 (Fla. 1989).*

22. Where an attorney made false statements to a judge, made a false representation and committed an omission to two Florida Bar representatives, and deliberately did not tell his clients about an engagement agreement with an opposing corporation, the attorney engaged in an extensive pattern of intentional deceit; disbarment was appropriate because the attorney intentionally engaged in misrepresentations, violating the duties he owed as a professional, in order to preserve his portion of a $ 6,445,000 engagement agreement. *Fla. Bar v. St. Louis, 967 So. 2d 108, 2007 Fla. LEXIS 762, 32 Fla. L. Weekly S 191 (Fla. 2007).*

23. Where evidence showed that attorney operated his trust account as a "ponzi" type of operation, signed client's names to settlement checks, made misrepresentations to the bar about the contents of his trust account, fabricated letters for clients' files purportedly memorializing clients' consent to attorney's actions, and attempted to suborn perjury by telling a client to lie about a check if anyone asked about it, the referee did not err in concluding that attorney had violated the following Rules Regulating The Florida Bar: *Fla. Bar R. 4-3.3(a)(1)* (knowingly making a false statement of material fact or law to a tribunal); *Fla. Bar R. 4-3.4(a)* (obstructing access to evidence by altering a document); *Fla. Bar R. 4-3.4(c)* (knowingly disobeying an obligation under the rules of a tribunal); *Fla. Bar R. 4-8.4(a)* (violating the Rules of Professional Conduct); *Fla. Bar R. 4-8.4(b)* (committing a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer); *Fla. Bar R. 4-8.4(c)* (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation); *Fla. Bar R. 4-8.4(d)* (engaging in conduct prejudicial to the administration of justice); and *Fla. Bar R. 5-1.1(a)* (money or other property entrusted to an attorney for a specific purpose is held in trust and must be applied only for that purpose), and a minimum ten year disbarment for these cumulative acts was allowed under *Fla. Bar R. 3-7.10(a). The Fla. Bar v. De La Puente, 658 So. 2d 65, 1995 Fla. LEXIS 1064, 20 Fla. L. Weekly S 309 (Fla. 1995).*

24. Attorney who lied under oath and failed to properly represent client in a divorce action deserved to be disbarred. *The Fla. Bar v. Merwin, 636 So. 2d 717, 1994 Fla. LEXIS 737, 19 Fla. L. Weekly S 263 (Fla. 1994).*

25. Court granted the state bar association's request and disbarred the attorney for violations of Fla. Bar Reg. R. 3-5.1(e) and (h), 3-6.1(c), 4-3.3(a)(1), and 4-8.4(c) because the attorney continued to engage in the practice of law after the effective date of the suspension and the attorney misrepresented his compliance with the suspension order in his pleadings filed with the court. *The Fla. Bar v. Jones, 571 So. 2d 426, 1990 Fla. LEXIS 1673, 15 Fla. L. Weekly S 627 (Fla. 1990).*

26. Attorney in a medical malpractice action who made deliberate misrepresentations regarding the location of a patient's medical records was guilty of the following: (1) unlawful or dishonest conduct, in violation of *Fla. Bar R. 3-4.3*; (2) knowingly making false statements to a tribunal, in violation of *Fla. Bar R. 4-3.3(a)(1)*; (3) failing to disclose a material fact to a tribunal, in violation of *Fla. Bar R. 4-3.3(a)(2)*; (4) both the unlawful obstruction of another party's access to evidence and the unlawful concealment of relevant material, in violation of *Fla. Bar R. 4-3.4(a)*; (5) intentional failure to comply with discovery requests, in violation of *Fla. Bar R. 4-3.4(d)*; (6) false statements to third persons while representing a client, in violation of *Fla. Bar R. 4-4.1(a)*; (7) obtaining evidence by methods that violate rights of third persons, in violation of *Fla. Bar R. 4-4.4*; and (8) conduct involving dishonesty, fraud, deceit, or misrepresentations, in violation of *Fla. Bar R. 4-8.4(c). The Fla. Bar v. Hmielewski, 702 So. 2d 218, 1997 Fla. LEXIS 1966, 22 Fla. L. Weekly S 736 (Fla. 1997).*

27. Attorney was properly found guilty of violating *Fla. Bar R. 4-3.3(d)*, *4-4.1(a)*, *4-8.4(e)*, and *4-8.4(a)*, (c), and (d) because the attorney was provided with fair notice of the disciplinary proceedings as the notice identified the rules allegedly violated, the attorney was aware of the conduct under investigation, was represented by counsel at the grievance committee hearing, and was given an opportunity to cross examine the state bar's witnesses. *The Fla. Bar v. Swickle, 589 So. 2d 901, 1991 Fla. LEXIS 1984, 16 Fla. L. Weekly S 737 (Fla. 1991).*

28. Attorney who indicated to a federal court that he and his client had never received a first notice to sue from the Equal Employment Opportunity Commission in the client's employment discrimination and sexual harassment action, wherein the client's employer had sought summary judgment due to untimely filing of the action, was found to have violated Fla. R. Bar 4-3.3(a)(1), 4-3.4(a), and 4-8.4(c), where it appeared that the first notice to sue was in fact in the attorney's file and he had reviewed it and noted that suit was to be filed by a set date; however, the court found that the referee's recommended sanction of a two-year suspension was too severe and reduced it to a one-year suspension, based on the fact that this was the attorney's first disciplinary violation and the federal court had already sanctioned him in the matter. *Fla. Bar v. Miller, 863 So. 2d 231, 2003 Fla. LEXIS 1709, 28 Fla. L. Weekly S 749 (Fla. 2003).*

29. Attorney was properly found guilty of violating *Fla. Bar R. 4-3.3(d)*, *4-4.1(a)*, *4-8.4(e)*, and *4-8.4(a)*, (c), and (d) because the attorney was provided with fair notice of the disciplinary proceedings as the notice identified the rules allegedly violated, the attorney was aware of the conduct under investigation, was represented by counsel at the grievance committee hearing, and was given an opportunity to cross examine the state bar's witnesses. *The Fla. Bar v. Swickle, 589 So. 2d 901, 1991 Fla. LEXIS 1984, 16 Fla. L. Weekly S 737 (Fla. 1991).*

30. There was sufficient evidence to support the referee's finding that the attorney violated *Fla. Bar R. 4-1.2(a)*, *4-1.4(b)*, *4-3.1*, *4-1.3*, *4-1.8(a)*, and *4-3.3* because it was uncontroverted that the attorney filed a petition with the bankruptcy court on behalf of a client whom he had never met or advised, which resulted in his allowing a forged signature to be filed with the court and there was no evidence that the client's former wife was acting as that client's agent; furthermore, the attorney failed to timely file a bankruptcy petition for another client, did not disclose to the court that he purchased his clients' property, and filed documents containing misleading information. *The Fla. Bar v. Jasperson, 625 So. 2d 459, 1993 Fla. LEXIS 1633, 18 Fla. L. Weekly S 531 (Fla. 1993).*

31. Publication of the court's opinion against an attorney as public reprimand for his violations was proper where attorney violated former Fla. Bar. R. 7-106(C)(1) (now Fla. Bar Reg. R. 4-3.3) and former Fla. Bar. R. 7-108(D) (now Fla. Bar Reg. R. 4-3.5) by referring irrelevant or unsupported matters before a tribunal and improperly communicating with jurors without first obtaining leave of the trial judge, as required in *Fla. R. Civ. P. 1.431*, and questioning them concerning why they decided against his clients. *The Fla. Bar v. Newhouse, 498 So. 2d 935, 1986 Fla. LEXIS 2891, 11 Fla. L. Weekly 645 (Fla. 1986).*

32. As an attorney who violated *R. Regulating Fla. Bar 4-3.1*, *4-3.3(a)(1)*, and *4-8.4(d)* by filing meritless petitions for injunctions for protection against repeat violence had lied under oath, and such conduct warranted severe discipline, he was suspended for one year instead of the 91 days recommended by a referee. *Fla. Bar v. Germain, 957 So. 2d 613, 2007 Fla. LEXIS 860, 32 Fla. L. Weekly S 249 (Fla. 2007).*

33. Attorney who indicated to a federal court that he and his client had never received a first notice to sue from the Equal Employment Opportunity Commission in the client's employment discrimination and sexual harassment action, wherein the client's employer had sought summary judgment due to untimely filing of the action, was found to have violated Fla. R. Bar 4-3.3(a)(1), 4-3.4(a), and 4-8.4(c), where it appeared that the first notice to sue was in fact in the attorney's file and he had reviewed it and noted that suit was to be filed by a set date; however, the court found that the referee's recommended sanction of a two-year suspension was too severe and reduced it to a one-year suspension, based on the fact that this was the attorney's first disciplinary violation and the federal court had already sanctioned him in the matter. *Fla. Bar v. Miller, 863 So. 2d 231, 2003 Fla. LEXIS 1709, 28 Fla. L. Weekly S 749 (Fla. 2003).*

34. Referee's recommendation that the attorney be suspended for 91 days for violation of *Fla. Bar R. 3-4.3*, *4-3.3(a)(1)*, and *4-8.4(c)* and *4-8.4(d)* was adopted because the attorney's blatant misconduct of intentionally misrepresenting to a judge on two separate occasions that the attorney would be unable to attend a deposition because another judge had ordered him to attend a pretrial conference and the attorney's refusal to comply with sanctions imposed by the judge posed a serious threat to the judicial system and could not be dealt with lightly. *The Florida Bar v. Lathe, 774 So. 2d 675, 2000 Fla. LEXIS 2324, 25 Fla. L. Weekly S 1093 (Fla. 2000).*

35. Three-year suspension was appropriate discipline for a lawyer who forged the signatures of debtors on settlement stipulations and submitted them to the court in violation of *Fla. Bar R. 3-4.3*, *4-3.3(a)(1)*, *4-3.4(b)*, *4-8.4(b)*, (c), and (d). *The Fla. Bar v. Klausner, 721 So. 2d 720, 1998 Fla. LEXIS 2204, 23 Fla. L. Weekly S 602 (Fla. 1998).*

36. Florida's supreme court adopted the referee's findings that the attorney violated *Fla. Bar R. 4-3.3(a)(1)*, *4-8.4(b)*, *4-8.4(c)*, and *4-8.4(d)*; however, due to the fact that the attorney made knowingly false statements to a judge and submitted false documents to the court, the court increased the attorney's discipline to a 30-day suspension. *The Fla. Bar v. Kravitz, 694 So. 2d 725, 1997 Fla. LEXIS 680, 22 Fla. L. Weekly S 276 (Fla. 1997).*

37. There was sufficient evidence to support the referee's finding that the attorney violated *Fla. Bar R. 4-1.2(a)*, *4-1.4(b)*, *4-3.1*, *4-1.3*, *4-1.8(a)*, and *4-3.3* because it was uncontroverted that the attorney filed a petition with the bankruptcy court on behalf of a client whom he had never met or advised, which resulted in his allowing a forged signature to be filed with the court and there was no evidence that the client's former wife was acting as that client's agent; furthermore, the attorney failed to timely file a bankruptcy petition for another client, did not disclose to the court that he purchased his clients' property, and filed documents containing misleading information. *The Fla. Bar v. Jasperson, 625 So. 2d 459, 1993 Fla. LEXIS 1633, 18 Fla. L. Weekly S 531 (Fla. 1993).*

38. 2-50 Florida Family Law § 50.01, B Procedure, Attorney-Client Relationship.

USER NOTE: For more generally applicable notes, see notes under the first section of this group or subgroup.

1 of 1 DOCUMENT

*** This document reflects changes received by October 1, 2008 ***
*** Annotations current through October 17, 2008. ***

Rules Regulating The Florida Bar
Chapter 4. Rules of Professional Conduct
4-5. LAW FIRMS AND ASSOCIATIONS

GO TO FLORIDA STATUTES ARCHIVE DIRECTORY

Fla. Bar Reg. R. 4-5.1 (2008)

Review Court Orders which may amend this Rule.

Rule 4-5.1. Responsibilities of a Partner or Supervisory Lawyer

(a) *Duties Concerning Adherence to Rules of Professional Conduct.* --A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers therein conform to the Rules of Professional Conduct.

(b) *Supervisory Lawyer's Duties.* --Any lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

(c) *Responsibility for Rules Violations.* --A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

(1) the lawyer orders the specific conduct or, with knowledge thereof, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

NOTES:
COMMENT
Subdivisions (a) applies to lawyers who have managerial authority over the professional work of a firm. See terminology. This includes members of a partnership, the shareholders in a law firm organized as a professional corporation, and members of other associations authorized to practice law; lawyers having comparable managerial authority in a legal services organization or a law department of an enterprise or government agency, and lawyers who have intermediate managerial responsibilities in a firm. Subdivision (b) applies to lawyers who have supervisory authority over the work of other lawyers in a firm.
Subdivision (a) requires lawyers with managerial authority within a firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that all lawyers in the firm will conform to the Rules of Professional Conduct. Such policies and procedures include those designed todetect and resolve conflicts of interest, identify dates by which actions must be taken in pending matters, account for client funds and property, and ensure that inexperienced lawyers are properly supervised.

Other measures that may be required to fulfill the responsibility prescribed in subdivisions (a) can depend on the firm's structure and the nature of its practice. In a small firm of experienced lawyers, informal supervision and periodic review of compliance with the required systems ordinarily will suffice. In a large firm, or in practice situations in which difficult ethical problems frequently arise, more elaborate measures may be necessary. Some firms, for example, have a procedure whereby junior lawyers can make confidential referral of ethical problems directly to a designated supervising lawyer or special committee. See rule 4-5.2. Firms, whether large or small, may also rely on continuing legal education in professional ethics. In any event the ethical atmosphere of a firm can influence the conduct of all its members and the partners may not assume that all lawyers associated with the firm will inevitably conform to the rules.

Subdivision (c) expresses a general principle of personal responsibility for acts of another. See also rule 4-8.4(a).

Subdivision (c)(2) defines the duty of a partner or other lawyer having comparable managerial authority in a law firm, as well as a lawyer having supervisory authority over performance of specific legal work by another lawyer. Whether a lawyer has such supervisory authority in particular circumstances is a question of fact. Partners and lawyers with comparable authority have at least indirect responsibility for all work being done by the firm, while a partner or manager in charge of a particular matter ordinarily also has supervisory responsibility for the work of other firm lawyers engaged in the matter. Appropriate remedial action by a partner or managing lawyer would depend on the immediacy of that lawyer's involvement and the seriousness of the misconduct. A supervisor is required to intervene to prevent avoidable consequences of misconduct if the supervisor knows that the misconduct occurred. Thus, if a supervising lawyer knows that a subordinate misrepresented a matter to an opposing party in negotiation, the supervisor as well as the subordinate has a duty to correct the resulting misapprehension.

Professional misconduct by a lawyer under supervision could reveal a violation of subdivision (b) on the part of the supervisory lawyer even though it does not entail a violation of subdivision (c) because there was no direction, ratification, or knowledge of the violation.

Apart from this rule and rule 4-8.4(a), a lawyer does not have disciplinary liability for the conduct of a partner, shareholder, member of a limited liability company, officer, director, manager, associate, or subordinate. Whether a lawyer may be liable civilly or criminally for another lawyer's conduct is a question of law beyond the scope of these rules.

The duties imposed by this rule on managing and supervising lawyers do not alter the personal duty of each lawyer in a firm to abide by the Rules of Professional Conduct. See rule 4-5.2(a). EDITOR'S NOTE.

The Rules Regulating The Florida Bar were adopted effective January 1, 1987, *see 494 So.2d 977;* this compilation includes amendments received through October 1, 2008.

HISTORY: *Amended eff. March 23, 2006 (933 So.2d 417)*

CASE NOTES

1. Attorney who directed a subordinate attorney to terminate a client in violation of *Fla. Bar R. 4-8.4* was himself vicariously responsible for the ethics breach, pursuant to *Fla. Bar R. 4-5.1(c)(2). The Fla. Bar v. Hollander, 607 So. 2d 412, 1992 Fla. LEXIS 1867, 17 Fla. L. Weekly S 683 (Fla. 1992).*

2. Where the record supported a referee's findings that an attorney violated Fla. *R. Reg. Fla. Bar 4-5.1(c)(1)* and six other sections of the ethical rules through improper client solicitation schemes, which involved solicitation at a hospital and a chiropractor's office, disbarment was the appropriate discipline; disbarment was warranted given, inter alia, the nature of the solicitation schemes, the number of clients improperly solicited, and the attorney's dishonesty during the disciplinary proceedings. *Fla. Bar v. Barrett, 897 So. 2d 1269, 2005 Fla. LEXIS 486, 30 Fla. L. Weekly S 169 (Fla. 2005).*

3. Where the record supported a referee's findings that an attorney violated Fla. *R. Reg. Fla. Bar 4-5.1(c)(1)* and six other sections of the ethical rules through improper client solicitation schemes, which involved solicitation at a hospital and a chiropractor's office, disbarment was the appropriate discipline; disbarment was warranted given, inter alia, the nature of the solicitation schemes, the number of clients improperly solicited, and the attorney's dishonesty during the disciplinary proceedings. *Fla. Bar v. Barrett, 897 So. 2d 1269, 2005 Fla. LEXIS 486, 30 Fla. L. Weekly S 169 (Fla. 2005).*

4. Where an attorney was found to have violated *R. Regulating Fla. Bar 4-1.4*, *4-1.5(a)*, *4-1.7(a)* and (b), *4-1.8(a)*, *4-1.9(a)*, *4-1.16(a)(1)*, *4-5.1(c)*, *4-5.6(b)*, and *4-8.4(a)*, in regard to entering into an "engagement agreement" with an opposing corporation which he was suing on behalf of 20 clients in a mass tort case, and the attorney did not tell a judge about the engagement agreement, the court imposed a two-year suspension and ordered the attorney to disgorge his portion of the prohibited fee to the *Clients' Security Fund. Fla. Bar v. Rodriguez, 959 So. 2d 150, 2007 Fla. LEXIS 761, 32 Fla. L. Weekly S 186 (Fla. 2007).*

NOTES APPLICABLE TO ENTIRE GROUP

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*** This document reflects changes received by October 1, 2008 ***
*** Annotations current through October 17, 2008. ***

Rules Regulating The Florida Bar
Chapter 4. Rules of Professional Conduct
4-5. LAW FIRMS AND ASSOCIATIONS

GO TO FLORIDA STATUTES ARCHIVE DIRECTORY

Fla. Bar Reg. R. 4-5.2 (2008)

Review Court Orders which may amend this Rule.

Rule 4-5.2. Responsibilities of a Subordinate Lawyer

(a) *Rules of Professional Conduct Apply.* --A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.

(b) *Reliance on Supervisor's Opinion.* --A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

NOTES:
COMMENT
Although a lawyer is not relieved of responsibility for a violation by the fact that the lawyer acted at the direction of a supervisor, that fact may be relevant in determining whether a lawyer had the knowledge required to render conduct a violation of the rules. For example, if a subordinate filed a frivolous pleading at the direction of a supervisor, the subordinate would not be guilty of a professional violation unless the subordinate knew of the document's frivolous character.
When lawyers in a supervisor-subordinate relationship encounter a matter involving professional judgment as to ethical duty, the supervisor may assume responsibility for making the judgment. Otherwise a consistent course of action or position could not be taken. If the question can reasonably be answered only 1 way, the duty of both lawyers is clear and they are equally responsible for fulfilling it. However, if the question is reasonably arguable, someone has to decide upon the course of action. That authority ordinarily reposes in the supervisor, and a subordinate may be guided accordingly. For example, if a question arises whether the interests of 2 clients conflict under rule 4-1.7, the supervisor's reasonable resolution of the question should protect the subordinate professionally if the resolution is subsequently challenged.

USER NOTE: For more generally applicable notes, see notes under the first section of this group or subgroup.

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*** This document reflects changes received by October 1, 2008 ***
*** Annotations current through October 17, 2008. ***

Rules Regulating The Florida Bar
Chapter 4. Rules of Professional Conduct
4-8. MAINTAINING THE INTEGRITY OF THE PROFESSION

GO TO FLORIDA STATUTES ARCHIVE DIRECTORY

Fla. Bar Reg. R. 4-8.3 (2008)

Review Court Orders which may amend this Rule.

Rule 4-8.3. Reporting Professional Misconduct

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

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

(c) *Confidences Preserved.* --This rule does not require disclosure of information otherwise protected by rule 4-1.6 or information gained by a lawyer or judge while participating in an approved lawyers assistance program. Provided further, however, that if a lawyer's participation in an approved lawyers assistance program is part of a disciplinary sanction this limitation shall not be applicable and a report about the lawyer who is participating as part of a disciplinary sanction shall be made to the appropriate disciplinary agency.

(d) *Limited Exception for LOMAS Counsel.* --A lawyer employed by or acting on behalf of the Law Office Management Assistance Service (LOMAS) shall not have an obligation to disclose knowledge of the conduct of another member of The Florida Bar that raises a substantial question as to the other lawyer's fitness to practice, if the lawyer employed by or acting on behalf of LOMAS acquired the knowledge while engaged in a LOMAS review of the other lawyer's practice. Provided further, however, that if the LOMAS review is conducted as a part of a disciplinary sanction this limitation shall not be applicable and a report shall be made to the appropriate disciplinary agency.

NOTES:
COMMENT
Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of the Rules of Professional Conduct. Lawyers have a similar obligation with respect to judicial misconduct. An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Reporting a violation is especially important where the victim is unlikely to discover the offense.
A report about misconduct is not required where it would involve violation of rule 4-1.6. However, a lawyer should encourage a client to consent to disclosure where prosecution would not substantially prejudice the client's interests.

If a lawyer were obliged to report every violation of the rules, the failure to report any violation would itself be a professional offense. Such a requirement existed in many jurisdictions, but proved to be unenforceable. This rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of this rule. The term "substantial" refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware.

The duty to report professional misconduct does not apply to a lawyer retained to represent a lawyer whose professional conduct is in question. Such a situation is governed by the rules applicable to the client-lawyer relationship.

Information about a lawyer's or judge's misconduct or fitness may be received by a lawyer in the course of that lawyer's participation in an approved lawyers or judges assistance program. In that circumstance, providing for an exception to the reporting requirements of subdivisions (a) and (b) of this rule encourages lawyers and judges to seek treatment through such a program. Conversely, without such an exception, lawyers and judges may hesitate to seek assistance from these programs, which may then result in additional harm to their professional careers and additional injury to the welfare of clients and the public. These rules do not otherwise address the confidentiality of information received by a lawyer or judge participating in an approved lawyers assistance program; such an obligation, however, may be imposed by the rules of the program or other law.

HISTORY: *Amended eff. March 23, 2006 (933 So.2d 417)*

1. Judges' report to the state bar of perceived attorney unprofessionalism in a motion for rehearing of an appeal, as required under *Fla. Bar R. 4-8.3(a),* was legally insufficient to support the judges' disqualification from hearing a related appeal. 5-*H Corp. v. Padovano, 708 So. 2d 244, 1997 Fla. LEXIS 1963, 22 Fla. L. Weekly S 724 (Fla. 1997).*

USER NOTE: For more generally applicable notes, see notes under the first section of this group or subgroup.