Thomas S. Biggs Chapter
Inns of Court Team 4 Presentation
January 21, 2014

Your Reputation: Building and Defending It

Courtroom Materials

- Twentieth Judicial Circuit, Standards of Courtroom Decorum, Administrative Order No. 2.13
- Twentieth Judicial Circuit, Standards of Professional Courtesy and Conduct and Establishment of Peer Review Program, Administrative Order No. 2.20, amended
- Candor Toward the Tribunal, The Florida Bar Ethics Department
- Court administration websites
    - Administrative orders: http://www.ca.cjis20.org/home/main/ao_index.asp
    - Collier Judges and Court information: http://www.ca.cjis20.org/home/collier/collhome.asp

IN THE TWENTIETH JUDICIAL CIRCUIT IN AND FOR THE STATE OF FLORIDA

IN RE: STANDARDS OF COURTROOM DECORUM	)	ADMINISTRATIVE ORDER NO: 2.13

WHEREAS the Judges of the Circuit and County Courts of the Twentieth Judicial Circuit have agreed that certain basic principles of courtroom decorum and behavior should be formally stated for the benefit and guidance of those unfamiliar with local traditions, the following standards of decorum are hereby adopted:

AS TO COUNSEL

When appearing in any court of the Twentieth Judicial Circuit, unless excused by the presiding judge, all counsel shall abide by the following:

(1) Stand as Court is opened, recessed or adjourned.

(2) Stand when the jury enters or retires from the courtroom.

(3) Stand when addressing, or being addressed by, the Court.

(4) Stand at the lectern while examining any witness; except that counsel may approach the Clerk's desk or the witness for purposes of handling or tendering exhibits.

(5) Stand at the lectern while making opening statements or closing arguments.

(6) Address all remarks to the Court, not to opposing counsel.

(7) Avoid disparaging personal remarks or acrimony toward opposing counsel and remain wholly detached from any ill-feeling between the litigants or witnesses.

(8) Refer to all persons, including witnesses, other counsel and the parties by their surnames and not by their first or given names.

(9) Only one attorney for each party shall examine or cross examine each witness. The attorney stating objections (if any) during direct examination shall be the attorney recognized for cross examination.

(10) Request permission before approaching the bench.

(11) Any paper or exhibit not previously marked for identification should first be submitted to the Clerk for marking before it is tendered to a witness; and any exhibit offered into evidence should, at the time of such offer, be handed to opposing counsel.

(12) In making objections, counsel should briefly state only the legal grounds therefore without further elaboration unless such is requested by the Court.

(13) In examining a witness, counsel shall not repeat or echo the answer given by the witness.

(14) Offers or requests for stipulations shall be made out of the presence or hearing of the jury.

(15) In opening statements and in arguments to the jury, counsel shall not express personal knowledge or opinion concerning any matter in issue.

(16) Counsel shall instruct all persons at counsel table that gestures, facial expressions, audible comments, or the like, as manifestations of approval or disapproval during the testimony of witnesses, or at any other time, are absolutely prohibited.

(17) All counsel shall dress in an appropriate manner consistent with the requirements of decorum and dignity appropriate to courtroom proceedings.

The standards set forth above are minimal, not all-inclusive, and are intended to supplement, not supplant or limit, the ethical obligations of counsel under the Rules of Professional Conduct. Individual judges may announce and enforce additional requirements or prohibitions, or may excuse compliance with any one or more of these standards.

AS TO NON-LAWYERS

(1) All persons appearing before the Court shall endeavor to dress in a reasonably conservative manner consistent with the requirements of decorum and dignity appropriate to courtroom proceedings. Generally, shorts, tank-tops and other beach attire are not appropriate as courtroom attire.

(2) All persons attending court proceedings shall refrain from making gestures, facial expressions, audible comments, applause, or the like, as manifestations of approval or disapproval during the testimony of a witness or during the oral presentation of counsel, or at any other time.

(3) In presentations before the Court, unrepresented parties shall observe the same rules of decorum which apply to attorneys.

WHEREFORE these standards are hereby adopted by the judges of the Circuit and County Courts of Lee County, Florida, this 9th day of November, 1992.

Thomas S. Reese
Chief Circuit Judge

History. - New.

IN THE TWENTIETH JUDICIAL CIRCUIT IN AND FOR THE STATE OF FLORIDA

IN RE: STANDARDS OF PROFESSIONAL COURTESY AND CONDUCT AND ESTABLISHMENT OF PEER REVIEW PROGRAM

ADMINISTRATIVE ORDER NO. 2.20
- Amended -

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In an effort to foster and promote professionalism among lawyers practicing in the Twentieth Judicial Circuit, and in accordance with recommendations made by the Twentieth Judicial Circuit Court's Committee on Professionalism and this Court's inherent authority as prescribed by Fla. R. Jud. Admin. 2.215 and Florida Statute § 43.26, it is

ORDERED AND ADJUDGED as follows:

1. The Standards of Professional Courtesy and Conduct for lawyers practicing in the Twentieth Judicial Circuit were adopted by the original version of this Administrative Order entered May 8, 2000, and are still applicable to all lawyers practicing in this jurisdiction. A copy of the Standards of Professional Courtesy and Conduct are attached to this order as Attachment A and made a part hereof.

2. However, paragraph three of the Preamble on page one, column three of Attachment A, entitled "Standards of Professional Courtesy and Conduct for Lawyers Practicing in the Twentieth Judicial Circuit," is hereby eliminated. Attorneys for Plaintiffs/Petitioners are not required to furnish a copy of Attachment A to attorneys of record in any given case. It shall be the responsibility of attorneys practicing within the Twentieth Judicial Circuit to be aware of Administrative Orders governing practice within the Twentieth Judicial Circuit and to comply with all standards of professionalism.

3. The Standards of Professional Courtesy and Conduct for Lawyers Practicing in the Twentieth Judicial Circuit are designed to supplement and are not to supplant the Standards of Courtroom Decorum set forth in Administrative Order 2.13.

4. The Peer Review Program of the Twentieth Judicial Circuit and a Peer Review Committee were established by the original version of this Administrative Order entered May 8, 2000, within the parameters set forth in the peer review program document attached to this order as Attachment B and made a part hereof.

5. The operation of the Peer Review Committee, including referrals to and review by the committee of allegedly noncompliant behavior, shall be as set forth in Attachment B, subject to the amendments set forth below:

a. Paragraph IV.A of Attachment B entitled "Peer Review Program of the Twentieth Judicial Circuit of Florida," is hereby amended to read as follows:

"A. MEMBERS OF THE COMMITTEE

The Peer Review Committee will consist of the non-judicial members of the Twentieth Judicial Circuit Professionalism Committee as defined by Administrative Order 2.34. The Chairperson of the Peer Review Committee shall be a President (or designee) of one of the local bar associations, to be selected by the members of the Peer Review Committee. A quorum of the Peer Review Committee at any meeting shall consist of a majority of the members of the committee; a vote by the committee shall not occur unless a quorum is obtained."

b. Paragraph V.B is hereby amended to read as follows:

"B. COMMITTEE MEMBERS

The Peer Review Committee:

1) Shall consist of the non-judicial members of the Twentieth Judicial Circuit Professionalism Committee as defined by Administrative Order 2.34.

2) Shall have a Chairperson, who shall be a President (or designee) of one of the local bar associations, to be selected by the members of the Peer Review Committee.

3) A sub-panel may be formed by the Committee to consider whether conduct has been alleged which does not comply with the Standards of Professional Courtesy and Conduct for the Twentieth Judicial Circuit ("Standard"). The sub-panel shall recommend an appropriate response to the Committee, which may include a referral to a Mentor Program of the Twentieth Judicial Circuit, if one exists. A further discussion of the sub-panel is contained within the pages of this publication.

4) A quorum at a Committee meeting shall consist of a majority of the Committee members.

6. No judge shall serve on the Peer Review Committee nor be privy to any referrals to the Peer Review Committee nor any documents generated by the Peer Review Committee, until such time as, or if, those documents may be made public by the Peer Review Committee. The Peer Review Committee shall remain independent of the Twentieth Judicial Circuit Professionalism Committee and of the Courts of the Twentieth Judicial Circuit. Neither the Chief Judge nor the Courts of the Twentieth Judicial Circuit shall retain custody of any referrals or documents generated by the Peer Review Committee. Referrals and documents generated by the Peer Review Committee shall be under the sole control and custody of the President, or Presidents, of the respective local voluntary bar associations.

7. The Peer Review Program is not a disciplinary process and is not intended to deal specifically with alleged violations of the Rules Regulating the Florida Bar. Violations of the Rules Regulating the Florida Bar remain solely within the jurisdiction of the grievance process of the Florida Bar.

8. The amendments to this Administrative Order shall take effect immediately.

9. To the extent that this Administrative Order may conflict with any rule, statute, or law, the rule, statute or law, shall prevail.

DONE AND ORDERED in Chambers at Fort Myers, Lee County, Florida, this 1st day of Feb., 2013.

STATE OF FLORIDA, COUNTY OF LEE
FILED FOR RECORD
This 4 Day of FEB 2013 Recorded In CIRCUIT
Book 57 Page 13-28 and Record Verified.
LINDA DOGGETT By
Clerk Circuit Court Deputy Clerk

Jay B. Rosman
Chief Judge

I certify this document to be a true and correct copy of the record on file in my office, Linda Doggett, Clerk Circuit/County Court, Lee County, FL
Dated: 2-4-13
By
Deputy Clerk

CLERK OF CIRCUIT AND COUNTY COURTS LEE COUNTY

History. – Administrative Order 2.20 (May 8, 2000); Administrative Order 2.20 (July 24, 2012).

Attachment A

STANDARDS OF PROFESSIONAL COURTESY AND CONDUCT FOR LAWYERS PRACTICING IN THE TWENTIETH JUDICIAL CIRCUIT

I. FOREWORD

In 1989, the Florida Bar established a task force to study the course of professionalism among lawyers in Florida. The study addressed issues regarding civility among lawyers, public perception of lawyers and lawyers' satisfaction and fulfillment with their profession. The work performed by the task force resulted in the creation of the Florida Bar's Standing Committee on Professionalism. In July, 1996, the Honorable Chief Justice Gerald Kogan signed an administrative order that created the Florida Supreme Court Commission on Professionalism.

In January, 1998, Justice Kogan requested that the Chief Judge of each Judicial Circuit appoint and be involved in a Circuit Committee on Professionalism charged with the overall responsibility of initiating and coordinating professionalism activities within their respective Circuit. Accordingly, in early 1998, the Twentieth Judicial Circuit's Committee on Professionalism was formed. In November, 1999, a subcommittee of the Twentieth Judicial Circuit's Committee was appointed to prepare a practical set of standards of professional courtesy and conduct for lawyers to adhere to in their practice in the Twentieth Judicial Circuit. These Standards of Professional Courtesy and Conduct for Lawyers Practicing in the Twentieth Judicial Circuit ("Standards") were drafted in coordination with the formation of the Peer Review Program of the Twentieth Judicial Circuit. The Peer Review Program is an educational, voluntary, informal and non-punitive enhancement program designed to correct behavioral performance which, although not so serious as to invoke formal disciplinary proceedings or other sanctions, nevertheless fell below the high standards expected of attorneys. In February, 2000, the Standards were adopted and approved by the Twentieth Judicial Circuit's Committee on Professionalism.

In preparing and approving the Standards, the Committee reviewed numerous model guidelines for professional conduct. The Committee utilized the Guidelines for Professional Conduct approved by the Executive Council of the Trial Lawyers Section of the Florida Bar, as endorsed by the Florida Conference of Circuit Judges in 1995. The Committee also utilized the standards adopted by the Fourth, Sixth, Eighth and Fifteenth Judicial Circuit's of Florida.

II. PREAMBLE

The practice of law is a privilege, not a right. In exercising this privilege, lawyers must not pursue victory at the expense of justice nor at the risk of the loss of the lawyer's reputation for honesty and professionalism within the legal community. Clients are best represented by attorneys who exhibit professional conduct at all times. The Bar must protect the honor and integrity of the judicial system and improve the public trust and perception of the legal profession. Lawyers must work to enhance communication, respect and courtesy among members of the Bar.

Every attorney practicing law or appearing in judicial proceedings within the Twentieth Judicial Circuit is expected to be entirely familiar with, and practice according to, (a) the Standards of Professional Courtesy and Conduct for Lawyers Practicing in the Twentieth Judicial Circuit, (b) The Florida Bar Trial Lawyers Section Guidelines for Professional Conduct, and (c) the Handbook of Discovery Practice published by the Joint Committee of the Trial Lawyers Section of The Florida Bar and Conference of Circuit and County Court Judges.

It is the responsibility of the attorney for the Plaintiff/Petitioner, in any given case filed after July 1, 2000, in the County or Circuit Courts of the Twentieth Judicial Circuit, to furnish as soon as practicable a copy of the Standards of Professional Courtesy and Conduct for Lawyers Practicing in the Twentieth Judicial Circuit to each attorney who files an appearance in that case, and to file a Certificate of Compliance thereto.

For most lawyers, the Standards will simply reflect their current practice. However, it is hoped that the widespread dissemination and implementation of the Standards will result in an overall increase in the level of professionalism in the practice of law within the Twentieth Judicial Circuit.

III. INTRODUCTION

The effective administration of justice requires the interaction of many professionals and disciplines, but none is more critical than the role of the lawyer. In fulfilling that role, a lawyer performs many tasks, few of which are easy, most of which are exacting. In the final analysis, a lawyer's duty is always to the client. But in striving to fulfill that duty, a lawyer must be ever conscious of his or her broader duty to the judicial system that serves both attorney and client. To the judiciary, a lawyer owes candor,

diligence and utmost respect. To the administration of justice, a lawyer unquestionably owes the fundamental duties of personal dignity and professional integrity. Coupled with those duties, however, is a lawyer's duty of courtesy and cooperation with other lawyers for the efficient administration of justice.

The Standards reflect an effort to emphasize decency and courtesy in our professional lives without intruding unreasonably on a lawyer's choice of style or tactic. (Some of the guidelines may not apply in criminal proceedings, or where a specific judge has a different rule.)

The Standards have been codified with the hope that their dissemination will educate attorneys and others who may be unfamiliar with customary local practices. Compliance with the Standards, unlike the "Oath of Admission" and the "Rules of Professional Conduct" adopted by the Florida Supreme Court, is intended to be voluntary. The Standards have received the approval of the Twentieth Judicial Circuit Committee on Professionalism as well as the County and Circuit judges of the Twentieth Judicial Circuit.

IV. STANDARDS

A. CONDUCT TOWARD OTHER ATTORNEYS, THE COURT AND PARTICIPANTS

1. Attorneys should refrain from criticizing or denigrating the court, opposing counsel, parties or witnesses.

2. Attorneys should be, and should impress upon their clients and witnesses to be, courteous and respectful. No one should be rude or disruptive with the court, opposing counsel, parties or witnesses.

3. Attorneys should make an effort to explain to witnesses the purpose of their required attendance at depositions, hearings or trials. They should further attempt to accommodate the schedules of witnesses when setting or resetting their appearance and promptly notify them of any cancellations.

4. Attorneys should respect and abide by the spirit and letter of all rulings of the court.

5. Attorneys should not show marked attention or unusual informality to any judge, except if outside of court and supported by a personal relationship. Attorneys should avoid anything calculated to gain, or having the appearance of gaining, special consideration or favor from a judge.

6. Attorneys should adhere strictly to all express promises and agreements with opposing counsel, whether oral or in writing. Attorneys should adhere in good faith to all agreements implied by the circumstances or by local custom.

7. Attorneys should not knowingly misstate, misrepresent, distort, or exaggerate any fact, opinion, or legal authority to anyone. Attorneys should not mislead by inaction or silence.

B. SCHEDULING

1. Except in emergency situations, attorneys should provide opposing counsel, parties, witnesses, and other affected persons, sufficient notice of depositions, hearings and other proceedings. As a general rule, notice should be provided (not including time for service) no less than five (5) business days for in-state depositions, ten (10) business days for out-of-state depositions and five (5) business days for hearings.

2. Except in emergency situations, attorneys should make a good faith effort to communicate with opposing counsel prior to scheduling depositions, hearings and other proceedings, so as to schedule them at times that are mutually convenient for all interested persons. Further, a sufficient time should be reserved to permit a complete presentation by counsel for all parties.

3. Attorneys should notify opposing counsel of any hearing time reserved as soon as practicable.

4. When hearing time is obtained, attorneys should promptly prepare and serve all counsel of record with notice of the hearing. Do not delay in providing such notice.

5. The notice of hearing should indicate on its face whether the date and time have been coordinated with opposing counsel. If the attorney has been unable to coordinate the hearing with opposing counsel, the notice should state the specific good faith efforts the attorney undertook to coordinate or why coordination was not obtained.

6. Attorneys should not use the hearing time obtained by opposing counsel for other motion practice.

7. Attorneys should notify opposing counsel, the court, and others affected, of scheduling conflicts as soon as they become apparent. Further, attorneys should cooperate with one another regarding all reasonable re-scheduling requests that do not prejudice their clients or unduly delay a proceeding.

8. Attorneys should promptly notify the court or other tribunal of any resolution between the parties that renders a scheduled court appearance unnecessary.

9. Attorneys should grant reasonable requests by opposing counsel for extensions of time within which to respond to pleadings, discovery and other matters when such an extension will not prejudice their client or unduly delay a proceeding.

10. Attorneys should cooperate with opposing counsel during trials and evidentiary hearings by disclosing the identities of all witnesses reasonably expected to be called and the length of time

needed to present their entire case, except when a client's material rights would be adversely affected. They should also cooperate with the calling of witnesses out of turn when the circumstances justify it.

11. When scheduling a deposition, attorneys should make a good faith effort to schedule enough time to complete the deposition without adjournment, unless otherwise stipulated with opposing counsel.

12. Attorneys should call potential scheduling problems to the attention of those affected, including the court, as soon as they become apparent and should avoid last minute cancellations.

13. Attorneys should make requests for scheduling changes only when necessary and should not request reschedulings, cancellations, extensions or postponements solely for the purpose of delay or obtaining unfair advantage.

14. First requests for reasonable extensions of time to respond to litigation deadlines relating to pleadings, discovery, or motions, should be granted as a matter of courtesy unless time is of the essence or other circumstances prohibit same.

15. Attorneys should not attach unfair or extraneous conditions to extensions. However, attorneys may impose conditions required to preserve a client's rights and may seek reciprocal scheduling concessions. When considering an extension request, an attorney should not seek to prohibit an adversary's assertion of substantive rights.

16. Attorneys should advise clients against the strategy of granting no time extensions for the sake of appearing "tough", especially when such extensions will not prejudice their client or unduly delay the proceeding.

17. After a first extension, any additional requests for time should be dealt with by balancing the need for expedition against the deference one should ordinarily give to an adversary, and whether it is likely a court would grant the extension if asked to do so.

C. SERVICE OF PAPERS

1. The timing and manner of service should not be used to the disadvantage of the party receiving the papers.

2. Papers and memoranda of law should not be served at court appearances without advance notice to opposing counsel and should not be served so close to a court appearance so as to inhibit the ability of opposing counsel to prepare for that appearance or to respond to the papers. Should the attorney do so, the court is urged to take appropriate action in response, including continuing the matter to allow opposing counsel to prepare, and respond.

3. Papers should not be served in order to take advantage of an opponent's known absence from the office or at a time or in a manner designed to inconvenience an adversary, such as late on Friday afternoon or the day preceding a secular or religious holiday.

4. Service should be made personally or by courtesy copy facsimile transmission when it is likely that service by mail, even when allowed, will prejudice the opposing party or will not provide the opposing party with a reasonable time to respond.

D. COMMUNICATION WITH ADVERSARIES

1. Attorneys should at all times be civil and courteous in communicating with adversaries, whether in writing or orally.

2. Attorneys should not write letters to ascribe to one's adversary a position he or she has not taken or to create "a record" of events that have not occurred.

3. Letters intended only to make a record should be used sparingly and only when necessary under all the circumstances.

4. Unless specifically permitted or invited by the court, letters between counsel should not be sent to the judge.

5. During the course of representing a client, attorneys should not communicate on the subject of the representation with a party known to be represented by another lawyer in the same matter without having obtained the prior consent of the lawyer representing such other party or unless authorized by law.

E. DISCOVERY

1. Attorneys should pursue discovery requests that are reasonably related to the matter at issue.

2. Attorneys should not use discovery for the purpose of causing undue delay or obtaining unfair advantage.

3. Attorneys should use discovery to ascertain information, to perpetuate testimony, or to obtain documents or things necessary for the prosecution or defense of an action. Attorneys should never use discovery as a means of harassment, intimidation or to impose an inordinate burden or expense.

4. Attorneys should file motions for protective orders as soon as possible and notice them for hearing as soon as practicable.

5. Prior to filing a motion to compel or for protective order, attorneys should confer with opposing counsel in a good faith effort to resolve the issues raised. Attorneys shall file with the motion a statement certifying that the moving counsel so complied and has been unable to resolve the dispute with opposing counsel.

F. DEPOSITIONS

1. In scheduling depositions, reasonable consideration should be given to accommodating schedules of opposing counsel and of the deponent, where it is possible to do so without prejudicing the client's rights.

2. When a deposition is noticed by another party in the reasonably near future, counsel should ordinarily not notice another deposition for an earlier date without the agreement of opposing counsel.

3. Counsel should not attempt to delay a deposition for dilatory purposes. Delays should occur only if necessary to meet real scheduling problems.

4. Counsel should not inquire into a deponent's personal affairs or finances or question a deponent's integrity where such inquiry is irrelevant to the subject matter of the deposition.

5. Counsel should not conduct questioning in a manner intended to harass the witness, such as by repeating questions after they have been answered, by raising the questioner's voice, by pointing at or standing over the witness, or by appearing angry at the witness.

6. Counsel should not interrupt the answer of the witness once the question has been asked because the answer is not the one which counsel was seeking or the answer is not responsive to the question. The witness should be allowed to finish his or her answer.

7. Counsel defending a deposition should limit objections to those that are well founded and permitted by the Rules of Civil Procedure or applicable case law. Counsel should bear in mind that most objections are preserved and need to be interposed only when the form of a question is defective or privileged information is sought. When objecting to the form of a question, counsel should simply state "I object to the form of the question." The grounds should not be stated unless asked for by the examining attorney. When the grounds are then stated they should be stated succinctly.

8. While a question is pending, counsel should not, through objections or otherwise, coach the deponent or suggest answers. Should any lawyer do so, the courts are urged to sanction such practices.

9. Counsel for all parties should refrain from self-serving speeches during depositions.

10. Counsel should not engage in any conduct during a deposition that would not be allowed in the presence of a judicial officer.

G. DOCUMENT DEMANDS

1. Demands for document production should not be so broad as to encompass documents clearly not relevant to the subject matter of the case.

2. In responding to document demands, counsel should not strain to interpret the request in an artificially restrictive manner just to avoid disclosure.

3. Documents should be withheld on the grounds of privilege only where appropriate.

4. Counsel should not produce documents in a disorganized or unintelligible fashion, or in a way calculated to hide or obscure the existence of other relevant documents.

5. Document production should not be delayed to prevent opposing counsel from inspecting documents prior to scheduled depositions or for an improper tactical reason.

H. INTERROGATORIES

1. Interrogatories should not be read by lawyers in a strained or an artificial manner designed to assure that answers are not truly responsive.

2. Interrogatories should be answered by the party, and not solely by the party's lawyer.

3. Objections to interrogatories should be based on a good faith belief in their merit and not be made for the purpose of withholding relevant information. If an interrogatory is objectionable only in part, the unobjectionable portion should be answered.

I. MOTION PRACTICE

1. Before setting a motion for hearing, counsel should make a good faith effort to resolve the issue with opposing counsel.

2. Except in emergency situations, before filing any motion in a civil case, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a cause of action, to dismiss for lack of prosecution, or to otherwise involuntarily dismiss an action, the moving party shall confer with counsel for the opposing party in a good faith effort to resolve the issues raised by the motion, and shall file with the motion a statement certifying that the moving counsel has conferred with opposing counsel and that counsel have been unable to agree on the resolution of the motion.

3. A lawyer should not force his or her adversary to make a motion and then not oppose it.

4. Unless otherwise instructed by the court, or agreed to by counsel, all proposed orders shall be provided to other counsel with a reasonable time for approval or comment prior to submission to the court. Opposing counsel should promptly communicate any objections thereto. Thereafter, the drafting attorney should promptly submit a copy of the proposed order to the court and advise the court as to whether or not it has been approved by opposing counsel.

5. Orders prepared by counsel must fairly and adequately represent the ruling of the court, and counsel shall make a good faith effort to agree upon the form of the order prior to submitting it to the court. Attorneys should not submit controverted orders to the court with a copy to opposing counsel for "objections within ___ days". Courts prefer to know that the order is either agreed upon or opposed.

6. Attorneys should not use post-hearing submissions of proposed orders as a guise to reargue the merits of the matter.

J. EX-PARTE COMMUNICATIONS WITH THE COURT AND OTHERS

1. Attorneys should avoid ex-parte communication about a pending case with the judge, magistrate or arbitrator before whom such case is pending.

2. Even where applicable laws or rules permit an ex-parte application or communication to the court, attorneys should make diligent efforts to notify the opposing party or the lawyer known to represent the opposing party in order to permit the opposing party to be represented in connection with the application or communication. Attorneys should not make such application or communication unless there is a bona fide emergency and the client will be seriously prejudiced if the application or communication is made on regular notice.

3. Counsel should notify opposing counsel of dates and times obtained from the court for future hearings on the same day that the hearing date is obtained from the court, or as soon as practicable thereafter.

4. Copies of any submissions to the court (such as correspondence, memoranda of law, motions, case law, etc.) should simultaneously be provided to opposing counsel by substantially the same method of delivery by which they are provided to the court. For example, if a memorandum of law is hand-delivered to the court, at substantially the same time a copy should be hand-delivered or faxed to opposing counsel. If asked by the court to prepare an order, counsel should furnish a copy of the order, and any transmitted letter, to opposing counsel at the time the material is submitted to the court.

K. TRIAL CONDUCT AND COURTROOM DECORUM

1. Attorneys should always deal with parties, counsel, witnesses, jurors or prospective jurors, court personnel and the judge with courtesy and civility and avoid undignified or discourteous conduct.

2. Examination of jurors and witnesses should be conducted from a suitable distance. A lawyer should not crowd or lean over the witness or jury and should avoid blocking opposing counsel's view of the witness.

3. Counsel should address all public remarks to the court, not to opposing counsel.

4. Counsel should request permission before approaching the witness or bench. Any documents counsel wish to have the court examine should be handed to the clerk.

5. Any paper or exhibit not previously marked for identification should first be handed to the clerk to be marked before it is tendered to a witness for examination. Any exhibit offered in evidence should, at the time of such offer, be handed to opposing counsel.

6. Generally, in examining a witness, counsel shall not repeat or echo the answer given by the witness.

7. Counsel shall admonish all persons at counsel table that gestures, facial expressions, audible comments, manifestations of approval or disapproval during the testimony of a witness, or at any other time, is prohibited.

8. During trials and evidentiary hearings the lawyers should mutually agree to disclose the identities, and duration of witnesses anticipated to be called that day, including depositions to be read, and should cooperate in sharing with opposing counsel all visual-aid equipment.

9. Counsel should not mark on or alter exhibits, charts, graphs, and diagrams without opposing counsel's knowledge or leave of court.

10. A lawyer's word should be his or her bond. The lawyer should not knowingly misstate, distort, or improperly exaggerate any fact or opinion and should not improperly permit the lawyer's silence or inaction to mislead anyone.

11. A charge of impropriety by one lawyer against another should never be made in the course of litigation except when relevant to the issues of the case.

12. A question should not be interrupted by an objection unless the question is patently objectionable or there is reasonable ground to believe that matter is being included which cannot properly be disclosed to the jury.

13. A lawyer should address objections, requests and observations to the court, and not engage in undignified or discourteous conduct which is degrading to court procedure.

14. In civil cases, attorneys should stipulate to all facts and principles of law which are not in dispute.

15. A lawyer should accede to reasonable requests for waivers of procedural formalities when the client's legitimate interests are not adversely affected.

16. In opening statements and in arguments to the jury, counsel should not express personal knowledge or opinion concerning any matter in issue.

17. In appearing in his or her professional capacity before a tribunal, a lawyer should not (a) state or allude to any matter that he or she has no reasonable basis to believe is relevant to the case or that will not be supported by admissible evidence; (b) ask any question that he or she has no reasonable basis to believe is relevant to the case or that is intended to degrade a witness or other person; (c) assert one's

personal knowledge of the facts in issue, except when testifying as a witness; (d) assert one's personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant, or as to the guilt or innocence of an accused; but may argue, on the lawyer's analysis of the evidence, for any position or conclusion with respect to matters stated herein.

18. A lawyer should never attempt to place before a tribunal, or jury, evidence known to be clearly inadmissible, nor make any remarks or statements which are intended to improperly influence the outcome of any case.

L. EFFICIENT ADMINISTRATION

1. Attorneys should refrain from actions intended primarily to harass or embarrass and should refrain from actions which cause unnecessary expense or delay.

2. Attorneys should, whenever possible, prior to filing or upon receiving a motion, contact opposing counsel to determine if the matter can be resolved in whole or in part. This may alleviate the need for a hearing on the motion or allow submission of an agreed order in lieu of a hearing.

3. Attorneys should, whenever appropriate, stipulate to all facts and legal authority not reasonably in dispute.

4. Attorneys should encourage principled negotiations and efficient resolution of disputes on their merits.

M. TRANSACTIONAL PRACTICE

1. Attorneys should draft letters of intent, memorializations of oral agreements, and written contracts and documents reflecting agreements in concept so that they fairly reflect the agreement of the parties.

2. Attorneys should point out to opposing counsel that changes have been made from one draft to another draft. If requested to do so, attorneys should identify those changes.

N. SETTLEMENT AND RESOLUTION

1. Unless there are strong and overriding issues of principle, attorneys should raise and explore the issue of settlement as soon as enough is known to make settlement discussions meaningful.

2. Attorneys should not falsely hold out the possibility of settlement to adjourn discovery or delay trial.

3. Attorneys are encouraged to utilize arbitration, mediation or other forms of alternative dispute resolution if economically feasible.

V. STANDARDS FOR THE JUDICIARY

A. DUTIES OF JUDGES TO LAWYERS, PARTIES AND WITNESSES

1. Judges should be courteous, respectful, and civil to lawyers, parties, and witnesses. Judges should maintain control of the proceeding, recognizing that judges have both the obligation and the authority to insure that all litigation, including the actions of the lawyers, parties and the witnesses, is conducted in a civil manner.

2. Judges should not employ hostile, demeaning or humiliating words in opinions or in written or oral communications with lawyers, parties or witnesses.

3. Judges should be punctual in convening all hearings, meetings and conferences.

4. In scheduling hearings, meetings and conferences, judges should be considerate of the time schedules of the lawyers, the parties and the witnesses.

5. Judges should make all reasonable efforts to decide promptly all matters presented to them for decision.

6. Judges should give the issues in controversy deliberate, impartial and studied analysis.

7. Judges should not impugn the integrity or professionalism of a lawyer, based on his or her client or the cause represented by the lawyer.

8. Judges should encourage court personnel to act civilly toward lawyers, parties and witnesses.

9. Judges should not adopt procedures that needlessly increase litigation expense.

B. DUTIES OF JUDGES TO OTHER JUDGES

1. In all written and oral communications, judges should abstain from disparaging personal remarks or criticisms of another judge.

2. Judges should endeavor to work with each other in an effort to foster a spirit of cooperation in the administration of justice.

VI. AMENDMENTS

The Standards may be amended from time to time by an Administrative Order of the Chief Judge of the Twentieth Judicial Circuit.

VII. PEER REVIEW

Any judge or lawyer who observes conduct by an attorney occurring after July 1, 2000, which is inconsistent with the Standards, may confidentially refer such conduct and the identity of the attorney to any member of the Peer Review Committee of the Twentieth Judicial Circuit. The Circuit has formed a Peer Review Program to foster and improve professionalism in the Circuit. Every attorney practicing law or appearing in judicial proceedings within the Twentieth Judicial Circuit is expected to be entirely familiar with the Peer Review Program of the Twentieth Judicial Circuit.

Attachment B

PEER REVIEW PROGRAM
OF THE TWENTIETH JUDICIAL CIRCUIT OF FLORIDA

I. FOREWORD

In 1989, The Florida Bar established a task force to study the course of professionalism among lawyers in Florida. The study addressed issues regarding the lack of civility among lawyers, the public's poor perception of lawyers and the steady decline in lawyers' satisfaction and fulfillment with their profession. The work performed by the task force resulted in the creation of The Florida Bar's Standing Committee on Professionalism. In July, 1996, the Honorable Chief Justice Gerald Kogan signed an administrative order that created the Florida Supreme Court Commission on Professionalism. In January, 1998, Justice Kogan requested that the Chief Judge of each Judicial Circuit appoint a Circuit Committee on Professionalism charged with the overall responsibility of initiating and coordinating professionalism activities within the Circuit. Accordingly, in early 1998, the Twentieth Judicial Circuit Committee on Professionalism was formed.

In November, 1999, a subcommittee of the Twentieth Judicial Circuit Committee on Professionalism was appointed at the direction of the Chief Judge of the Circuit to prepare a practical set of standards of professional courtesy and conduct for lawyers and to explore the formation of a peer review program for lawyers practicing law in the Twentieth Judicial Circuit. The subcommittee, with the guidance, insight and participation of the Circuit Committee on Professionalism, prepared this Peer Review Program as well as the Standards of Professional Courtesy and Conduct for Lawyers Practicing in the Twentieth Judicial Circuit, a copy of which is attached hereto. In February, 2000, the Standards of Professional Courtesy and Conduct for Lawyers Practicing in the Twentieth Judicial Circuit and this Peer Review Program were approved and adopted by the Twentieth Judicial Circuit Committee on Professionalism.

II. INTRODUCTION

The Twentieth Judicial Circuit Committee on Professionalism believes that a system of peer review would be beneficial to foster and promote professionalism among lawyers practicing in the Twentieth Judicial Circuit. The following program of peer review was created upon a review of other peer review programs, including programs approved by the Orange County Bar Association, Palm Beach County Bar Association and the Hillsborough County Bar Association, as well as the standards of professional conduct adopted by the Fourth, Sixth, Eighth and Fifteenth Judicial Circuits. This Peer Review Committee Program has been endorsed by the Charlotte County Bar Association, the Collier County Bar Association, the Hendry-Glades County Bar Association, the Lee County Bar Association, and the Circuit and County Judges of the Twentieth Judicial Circuit.

III. PURPOSE OF PEER REVIEW

The general purpose of Peer Review is to improve the level of professional performance and competence of lawyers who practice in the Twentieth Judicial Circuit. The Peer Review Program is not a disciplinary proceeding. Instead, the Peer Review Program is intended to be a voluntary, educational, informal, non-punitive and confidential enhancement program for the practice of law in the Twentieth Judicial Circuit. The original concept was suggested in a January 1993 Report of the Bench/Bar Commission which was created by the Supreme Court of Florida and The Florida Bar. That Report recommended that a compulsory diversionary skills enhancement program be created as an alternative to the punitive option existing under the current grievance procedures. The Peer Review Program is not intended to deal specifically with violations of ethics or the Rules Regulating The Florida Bar which remain solely within the jurisdiction of the grievance process of The Florida Bar.

IV. PEER REVIEW COMMITTEE

A. MEMBERS OF THE COMMITTEE

The Peer Review Committee will consist of a board of a minimum of 9 members, all of whom must be members in good standing of The Florida Bar and regularly practice and reside in the Twentieth Judicial Circuit. At a minimum, the board shall include 2 members who regularly practice and reside in Charlotte County, 2 members who regularly practice and reside in Collier County, 2 members, either or both, who regularly practice and reside in either Glades County or Hendry County, and 3 members who regularly practice and reside in Lee County. The board members will be appointed by the Chief Judge of the Twentieth Judicial Circuit with input from the Twentieth Judicial Circuit Committee on Professionalism, the Chair of the Professionalism Committee of each County Bar Association if such a committee exists, and the President of each County Bar Association. The Board should consist of experienced lawyers who have distinguished themselves in their fields and who come from all areas of practice. Board members will serve a 2 year term, with appointments to be made each year for staggered terms so that there is some consistency and experience on the Board from year to year. Board members may serve more than one term upon reappointment by the Chief Judge, but such members can only serve 2 consecutive terms. A quorum of the Peer Review Committee at any meeting shall consist of a majority of the members of the board; a vote by the committee shall not occur unless a quorum is obtained. In the event that a board member fails to demonstrate a sufficient interest in the committee or carry out his or her duties on a regular basis, the Chief Judge may remove and replace that member at any time during his or her term.

B. INITIAL REFERRAL TO THE COMMITTEE

Referrals will be strictly confidential. Names of the members of the Peer Review Committee will be forwarded periodically to each County Bar Association within the Twentieth Judicial Circuit with a request for publication so that lawyers practicing within the Circuit and judges will know who they should contact to refer an attorney into the program. It is recommended that the complainant use the written Referral Form created by the Committee, but using such a form is not mandatory. A copy of the Referral Form which is recommended for use is attached hereto.

Any judge within the Twentieth Judicial Circuit or any lawyer who observes conduct by an attorney, occurring after July 1, 2000, which is inconsistent with the Standards of Professional Courtesy and Conduct for the Twentieth Judicial Circuit ("complainant"), may confidentially refer such conduct and the identity of the attorney to any member of the Peer Review Committee. The member shall then promptly forward the referral to the Chairperson of the Peer Review Committee ("Committee"). At its next meeting, the Committee shall, by a majority vote of the quorum, determine how to respond to the referral. A response may include informal and confidential discussions, either by telephone or in person, with the attorney who has been referred to the Committee. If the attorney refuses to discuss the matter, the Committee shall still discuss the conduct and determine how best to proceed. The Committee has the discretion to direct the referral back to the complainant for clarification or additional information.

C. REVIEW BY COMMITTEE OR SUB-PANEL

The Committee may decide to forward the referral to a sub-panel of the Committee to consider whether conduct has been alleged which does not comply with the Standards of Professional Courtesy and Conduct for the Twentieth Judicial Circuit ("Standards"). The sub-panel shall recommend an appropriate response to the Committee, which may include a referral to a member of the Mentor Program of the Twentieth Judicial Circuit. The sub-panel members shall outline the perceived problem and ask the subject attorney whether he or she can assist the sub-panel in finding a solution. If the attorney refuses to discuss the matter, the sub-panel shall still discuss the conduct of the attorney and determine whether the alleged conduct warrants a referral to the Committee. There will be no sanctions or other enforcement mechanism associated with the consultation. Finally, the identity of the complaining parties and attorney referred into the program shall remain confidential except to those who need to know in order to carry out the program's goals.

D. PROCEDURE IF CONDUCT DOES NOT COMPLY WITH THE STANDARDS

In the event that a referral to the Committee reflects conduct which does not comply with the Standards of Professional Courtesy and Conduct for the Twentieth Judicial Circuit ("Standards"), the Committee shall (i) contact the lawyer either by telephone, in person or by letter, (ii) describe the alleged noncompliance or enclose the written referral form with the complainant's identity redacted, and (iii) request a response from the subject attorney to be provided within 30 days. The subject attorney's response shall be provided by the Committee to the complainant. Upon receipt of the response the Committee shall consider the referral and response, or it may direct the referral and response to a sub-panel for review and recommendation to the Committee. The sub-panel or Committee may thereafter contact the subject attorney and the complainant to further discuss the referral and response. The sub-panel or Committee thereafter shall determine by majority vote whether conduct has occurred which does not comply with the Standards. The determination of the Committee shall be communicated to the subject lawyer as well as the complainant. An appointee of the Committee shall discuss the matter with the lawyer in an attempt to educate the lawyer about the noncompliance and hopefully avoid other or similar conduct in the future which does not comply with the Standards. It is recommended that the entire review process be accomplished within 90 days from the date that the alleged conduct was referred by the complainant to the Committee; however, failure to adhere to this recommended time limit is not fatal to the referral.

In the event that the Committee determines that conduct has occurred which does not comply with the Standards, a redacted summary shall be provided by the Committee to each County Bar Association within the Twentieth Judicial Circuit with a request for it to be published in the newsletters or other regular periodic publications of each bar association. The summary should be forwarded to each County Bar Association by the Committee within 60 days of the Committee's determination. The summary shall briefly and concisely inform the bar of the referral, the alleged facts giving rise to the referral and the determination of the Committee. The summary shall not identify the complainant, the lawyer, or the members of the Committee or sub-panel who voted. All such identities shall be anonymous and strictly confidential. It is the hope that members of the bar will learn from these publications and misunderstandings of the Standards will be reduced.

E. REFERRALS ARE STRICTLY CONFIDENTIAL AND PRIVILEGED

All referrals to the Committee shall remain strictly confidential. All such referrals, related statements and discussions, whether verbal or in writing, are to be considered opinions, absolutely privileged and immune from liability. All findings, summaries, determinations and resolutions by the Committee shall likewise be absolutely privileged and immune from liability. Referrals to the Committee and resulting findings, summaries and determinations are to be considered as allegations and not factual statements of wrongful conduct.

F. PROCEEDINGS ARE NOT PUBLIC RECORDS

The records of the Committee's proceedings, including the referral and all documents related thereto, are not public records. All such records and documents do not have archival value. Furthermore, all records of the Committee's proceedings, including the referral and all documents related thereto, shall be immune from and not subject to process, civil discovery or public access, and such records and documents are not admissible in a judicial or quasi-judicial proceeding.

G. DESTRUCTION OF RECORDS

All records of the Committee's proceedings, including the referral and all documents related thereto, shall be destroyed within 30 days of the Committee's determination or disposition. The Committee may maintain its redacted summary which was forwarded to each County Bar Association for publication and which does not identify the complainant, the lawyer, or the members of the Committee or sub-panel who voted.

V. OUTLINE OF THE PEER REVIEW COMMITTEE

A. BRIEF SUMMARY

It is intended that the Peer Review Committee provide a confidential and informal methodology for judges and lawyers to refer allegations of unprofessional or discourteous conduct by attorneys, with the goal of addressing and resolving such referrals. The Peer Review Committee is intended to be a voluntary, educational, informal, non-punitive and confidential enhancement program for the practice of law in the Twentieth Judicial Circuit. It is not a disciplinary proceeding.

Any judge within the Twentieth Judicial Circuit or any lawyer who observes conduct by an attorney, occurring after July 1, 2000, which is inconsistent with the Standards of Professional Courtesy and Conduct for the Twentieth Judicial Circuit ("complainant"), may confidentially refer such conduct and the identity of the attorney to a member of the Peer Review Committee who will then forward the referral to the Chairperson of the Peer Review Committee ("Committee"). If at any time a Committee member believes that there is a conflict of interest concerning that member's evaluation of a referral, then the Committee member may excuse himself or herself from further proceedings by advising the Chairperson of the conflict and taking no further part in the proceedings.

The Peer Review Program of the Twentieth Judicial Circuit and procedures of the Committee may be amended from time to time by an Administrative Order of the Chief Judge of the Twentieth Judicial Circuit. Below is an outline of the Peer Review Committee. A further discussion of the procedures of the Committee and Peer Review Program is contained in the foregoing pages of this publication.

B. COMMITTEE MEMBERS

The Peer Review Committee:

1) Shall be appointed by the Chief Judge of the Twentieth Judicial Circuit, with input from the Twentieth Judicial Circuit Committee on Professionalism, the Chair of the Professionalism Committee of each County Bar Association if such a committee exists, and the President of each County Bar Association.

2) Shall have a Chairperson, who will be appointed by the Chief Judge and serve a 2 year term.

3) Shall consist of a minimum of 9 members, all of whom must be members in good standing of The Florida Bar and regularly practice and reside in the Twentieth Judicial Circuit. The Board may consist of more than 9 members; however, the board shall include at least 2 members who regularly practice and reside in Charlotte County, 2 members who regularly practice and reside in Collier County, 2 members, either or both, who regularly practice and reside in either Glades County or Hendry County, and 3 members who regularly practice and reside in Lee County.

4) Board members will serve a 2 year term, with appointments to be made each year for staggered terms so that there is some consistency and experience on the Board from year to year. Board members may serve more than one term upon reappointment by the Chief Judge, but such members can only serve 2 consecutive terms.

5) In the event that a board member fails to demonstrate a sufficient interest in the Committee or carry out his or her duties on a regular basis, the Chief Judge may remove and replace that member at any time during his or her term.

6) A sub-panel may be formed by the Committee to consider whether conduct has been alleged which does not comply with the Standards of Professional Courtesy and Conduct for the Twentieth Judicial Circuit ("Standards"). The sub-panel shall recommend an appropriate response to the Committee, which may include a referral to a Mentor Program of the Twentieth Judicial Circuit, if one exists. A further discussion of the sub-panel is contained within the foregoing pages of this publication.

7) A quorum at a Committee meeting shall consist of a majority of the Committee members.

C. PROCEDURE

1) Any judge within the Twentieth Judicial Circuit or any lawyer who observes conduct by an attorney, occurring after July 1, 2000, which does not comply with the Standards, may confidentially refer such conduct and the identity of the attorney to any member of the Peer Review Committee. The member shall thereafter promptly forward the referral to the Chairperson of the Committee.

2) The Peer Review Committee shall informally address the referral at the next scheduled meeting of the Committee or a sub-panel of the Committee may be appointed to review the referral. The sub-panel shall recommend an appropriate response to the Committee, which may include a referral to a Mentor Program of the Twentieth Judicial Circuit, if one exists.

3) The Committee shall, by majority vote of the quorum, respond to the referral in an expeditious and confidential manner. The Committee should meet, by telephone or in person, at least bi-monthly if there are pending referrals.

4) The Committee may resolve referrals through informal and confidential discussions, either by telephone or in person, with the subject attorney.

5) It is recommended that the complainant use a written referral form, which is preferable but not required. The form is attached hereto.

6) In the event that a referral to the Committee reflects conduct which does not comply with the Standards, the Committee shall (a) contact the lawyer either by telephone, in person or by letter, (b) describe the alleged noncompliance or enclose the written referral form with the complainant's identity redacted, and (c) request a response from the subject attorney to be provided within 30 days. The subject attorney's response shall be provided by the Committee to the complainant.

7) Upon receipt of the response, the Committee shall consider the referral and response, or it may direct the referral and response to a sub-panel for review and recommendation to the Committee. The sub-panel or Committee may thereafter contact the subject attorney and the complainant to further discuss the referral and response. The sub-panel or Committee thereafter shall determine by majority vote whether conduct has occurred which does not comply with the Standards. The determination of the Committee shall be communicated to the subject lawyer as well as the complainant. An appointee of the Committee shall discuss the matter with the lawyer in an attempt to educate the lawyer about the noncompliance.

8) It is recommended that the entire review process be accomplished within 90 days from the date that the alleged conduct was referred by the complainant to the Committee; however, failure to adhere to this recommended time limit is not fatal to the referral.

9) In the event that the Committee determines that conduct has occurred which does not comply with the Standards, a redacted summary shall be provided by the Committee within 60 days thereafter to each County Bar Association within the Twentieth Judicial Circuit with a request for it to be published in the newsletters or other regular periodic publications of each bar association. The summary shall briefly and concisely inform the bar of the referral, the alleged facts giving rise to the referral and the determination of the Committee. The summary shall not identify the complainant, the lawyer, or the members of the Committee or sub-panel who voted. All such identities shall be anonymous and strictly confidential. It is the hope that members of the bar will learn from these publications and misunderstandings of the Standards will be reduced.

10) All referrals to the Committee, related statements and discussions, whether verbal or in writing, are to be considered opinions, absolutely privileged and immune from liability. All findings, summaries, determinations and resolutions by the Committee shall be absolutely privileged and immune from liability. Referrals to the Committee and resulting findings, determinations and summaries are to be considered as allegations and not factual statements of wrongful conduct. This section and its privilege shall be interpreted as broadly as possible.

11) After the review process has been completed, the Committee may refer the subject lawyer to a Mentor Program of the Twentieth Judicial Circuit, if one exists, or to Florida Lawyers Assistance, Inc., which provides assistance to lawyers who are struggling with problems of chemical dependency, alcoholism, addiction and other issues. The participation of the lawyer in the foregoing programs is voluntary; it is not mandatory.

D. LIMITATIONS

1) No complaints that rise to the level of a formal grievance shall be handled or resolved by the Peer Review Committee. The Peer Review Program is not a disciplinary proceeding.

2) The Peer Review Committee shall not resolve any written complaints concerning Judges, but may refer such complaints to the Bench/Bar Committee or the Chief Judge of the Twentieth Judicial Circuit.

3) The Committee shall not engage in any discussions concerning complaints of actual conduct which would violate the professional rules of ethical conduct. Those complaints should be forwarded to the local grievance committee of The Florida Bar.

4) The records of the Committee's proceedings, including the referral and all documents related thereto, are not public records. In addition, all such records and documents do not have archival value. This section is to be interpreted as broadly as possible against retention and against public review of records.

5) All records of the Committee's proceedings, including the referral and all documents related thereto, shall be immune from and not subject to process, civil discovery or public access. All such records and documents shall not be admissible in a judicial or quasi-judicial proceeding. The section is to be interpreted as broadly as possible against disclosure and discovery, and in favor of strict confidentiality.

6) All records of the Committee's proceedings, including the referral and all documents related thereto, shall be destroyed within 30 days of the Committee's findings or disposition. The Committee may maintain its redacted summary which was forwarded to each County Bar Association for publication and which does not identify the complainant, the lawyer, or the members of the Committee or sub-panel who voted.

REFERRAL FORM
TO THE PEER REVIEW COMMITTEE
OF THE TWENTIETH JUDICIAL CIRCUIT

1. Referring Attorney or Judge:

Your Name: _____

Bar Number: _____

Your Address: _____
_____
_____

Telephone: _____
Facsimile: _____

2. Attorney Being Referred:

Name of Attorney: _____

Bar Number: _____
(If known of attorney being referred)

Address: _____
_____
_____

Telephone: _____
Facsimile: _____

NOTE: THIS IS NOT A DISCIPLINARY PROCEEDING

3. Alleged Noncompliance (check one):

_____ Twentieth Judicial Circuit's Standards of Professional Courtesy and Conduct for Lawyers.
Standards involved: _____
_____
_____

_____ The Florida Bar's Ideals and Standards of Professionalism.
Ideals or Standards Involved: _____
_____
_____

Briefly describe the facts and circumstances of the alleged conduct which does not, in your opinion, comply with the above Standards. Please use the back of this form or attach additional pages if necessary. Please try to be brief and non-judgmental. Please list and attach any papers requiring consideration or needed for clarification of the allegations discussed. Please state the specific provision(s) involved.

Signed: _____ Date: _____

INFORMATIONAL PACKET

CANDOR TOWARD THE TRIBUNAL

COURTESY OF

THE FLORIDA BAR ETHICS DEPARTMENT

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.

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.

PROFESSIONAL ETHICS OF THE FLORIDA BAR
OPINION 04-1
June 24, 2005

A lawyer whose client has repeatedly stated that the client will commit perjury must withdraw from the representation and inform the court of the client's intent to lie under oath. When the withdrawal and disclosure occur depends on the circumstances and may be made ex parte in camera if permitted by the court.

Note: This opinion was approved by The Florida Bar Board of Governors on October 21, 2005.

RPC: 4-1.2(d), 4-1.6, 4-1.7, 4-1.16, 4-3.3
Statutes: 837.02 and 777.011, Florida Statutes

A member of The Florida Bar has inquired about the appropriate course of conduct in the representation of a client who has stated his intent to commit perjury at his upcoming criminal trial. The client has repeatedly expressed the client's intent to commit perjury and, despite the lawyer's repeated warnings, insists upon testifying falsely. The client has been warned that the lawyer must and will advise the court if a fraud is made upon the court. The lawyer has questioned the lawyer's ethical obligations under this scenario. This inquiry addresses the circumstances when a lawyer definitely knows that the client intends to commit perjury. This is distinct from the many other situations where the lawyer may suspect but does not know that the client intends to commit perjury. This opinion only addresses this specific inquiry.

Many ethics rules relate to this inquiry. Rule 4-1.2(d), Rules Regulating The Florida Bar, prohibits a lawyer from assisting a client in conduct the lawyer knows or reasonably should know is criminal or fraudulent. Rule 4-1.6, the confidentiality rule, which is very broad, applies "to all information relating to the representation, whatever its source." Comment, Rule 4-1.6. However, there are exceptions to the confidentiality rule. Rule 4-1.6(b)(1) requires a lawyer to reveal information necessary to prevent a client from committing a crime. While interpretation of statutes is beyond the scope of an ethics opinion, it appears that it is a crime for a lawyer to permit or assist a client or other witness to testify falsely. See Florida Statutes §§ 837.02 and 777.011.

The "Candor Towards the Tribunal" rule, Rule 4-3.3, provides in pertinent part:

> **(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;

* * *

(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 paragraph (a) continue beyond the conclusion of the proceeding and apply even if compliance requires disclosure of information otherwise protected by rule 4-1.6 [concerning lawyer-client confidentiality]. [Emphasis added.]

A lawyer's obligation to make disclosures under Rule 4-3.3 is triggered when the lawyer knows that a client or a witness for the client will make material false statements to a tribunal. Under the facts presented, the lawyer knows the client will make a misrepresentation to the court because the client has repeatedly expressed his intent to commit perjury.

The comment to Rule 4-3.3 provides the following guidance:

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.

A lawyer is required to reveal information that is necessary to prevent a client from committing a crime, including the crime of perjury. Rule 4-1.6(b)(1), Rules Regulating The Florida Bar. The comment to Rule 4-1.6 provides:

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.

* * *

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.

If the lawyer knows that the client will testify falsely, withdrawal does not fulfill the lawyer's ethical obligations, because withdrawal alone does not prevent the client from committing perjury. Rather, a lawyer must disclose to the court a client's intention to commit perjury. Timing of the disclosure may vary based on the facts of the case and, in some cases, may be made ex parte in camera. Ultimately, the method of disclosure is subject to the discretion of the court. This disclosure causes a conflict of interest between the lawyer's ethical obligation to disclose and the client's interest. Rule 4-1.7, Rules Regulating The Florida Bar. Due to the conflict, the lawyer must move to withdraw. Rule 4-1.16(a), Rules Regulating The Florida Bar. Notwithstanding good cause to withdraw, if the court requires the lawyer to continue the representation, the lawyer must comply with the court's order. Rule 4-1.16(c), Rules Regulating The Florida Bar. A lawyer may offer the client's testimony in the narrative only if the court orders the lawyer to do so. Rule 4-3.3(a)(4), Rules Regulating The Florida Bar.

In the event that the client does not give advance notice to the lawyer prior to testifying falsely, Rule 4-3.3(a)(2) and the comment require the lawyer to take reasonable remedial measures to rectify the fraud. The comment to Rule 4-3.3 states:

> 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.
> * * *
> 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....[I]f 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.

In conclusion, when a lawyer is representing a criminal client who has stated an intention to commit perjury, the lawyer is obligated, pursuant to Rules 4-1.2(d), 4-1.6(b)(1) and 4-3.3(a)(4), to disclose the client's intent to the court. If the lawyer is not given advance notice of the client's intent to lie, and the client offers false testimony, then the lawyer must convince the client to agree to disclosure and remediation of the false testimony; failing that, the lawyer must disclose to the court anyway. Absent client consent, the lawyer's disclosure of the client's false testimony or intent to offer false testimony will create a conflict between the lawyer and the client requiring the lawyer to move to withdraw from representation pursuant to Rule 4-1.16(a). If the court requires the lawyer to remain in the case, despite good cause for withdrawal, the

lawyer must do so. Rule 4-1.16(c). It is then up to the court to determine what should be done with the information. This opinion is limited to the situation presented when a lawyer knows that his or her client is going to commit perjury. This opinion does not address the situation when a lawyer merely suspects but does not know that the client intends to commit perjury.

PROFESSIONAL ETHICS OF THE FLORIDA BAR
OPINION 90-6 (Reconsideration)
May 29, 2009

A lawyer who learns that a criminal defendant is proceeding under a false name before the lawyer agrees to represent the criminal defendant who cannot persuade the client to correct the name must decline representation. A lawyer who learns that a criminal defendant who is an existing client is proceeding under a false name must withdraw from representation and must admonish the client not to commit perjury, but cannot disclose the client's use of the false name to the court unless the client makes an affirmative misrepresentation to the court regarding the name.

Note: This opinion was approved by The Florida Bar Board of Governors on May 29, 2009.

RPC: 4-1.2(d), 4-1.4, 4-1.6(b), 4-1.16(a), 4-3.3, 4-3.4(c), 4-4.1, 4-8.4(d)
Opinions: 90-6 (withdrawn)

In former Florida Ethics Opinion 90-6, a criminal defense attorney inquired about an attorney's obligation upon discovering that a client who is a defendant in a pending criminal proceeding gave an alias when arrested, and proceedings have been brought under the alias. The attorney asked whether this information must be revealed to the court and, if so, whether the attorney must inform the court of the client's true identity. Former Florida Ethics Opinion 90-6 concluded that a criminal defense attorney who learns that his or her client is proceeding under a false name may not inform the court of this fact due to the attorney-client privilege, the client's constitutional right to effective assistance of counsel, or the client's constitutional privilege against self-incrimination, but that the attorney may not assist the client in perpetrating or furthering a crime or a fraud on the court. The opinion further concluded that if the court requests information about the client's identity or record, "the client and defense counsel may answer truthfully (if the client, after consultation with counsel, decides that doing so is in his or her best interests) or may decline to answer on the basis of any applicable privilege."

The Committee withdrew Florida Ethics Opinion 90-6 at its March 16, 2007 meeting. In order to provide guidance to Florida Bar members on this issue, the Board of Governors issues this opinion.

Rule of Professional Conduct 4-3.3(a) states in pertinent part:

(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[.]

Additionally, Rule 4-1.2(d) prohibits a lawyer from assisting a client in criminal or fraudulent conduct, while Rule 4-8.4(c) prohibits a lawyer from "dishonesty, fraud, deceit, or misrepresentation."

The mere act of filing pleadings under the false name used by the client or responding to the alias when called at a docket sounding does not involve misrepresentation to the court. However, the lawyer cannot permit the client to lie and therefore, if asked, the client must give his or her true name or invoke a privilege in refusing to respond.

The Board will address the following scenarios: 1) the lawyer learns in the initial consultation before the lawyer accepts representation that a criminal defendant is being charged and proceeding under a false name; and 2) the lawyer learns after representation begins that a criminal defendant client is being charged and proceeding under a false name.

If the lawyer learns that the client has given a false name at the outset of the representation, before the lawyer has accepted representation of the criminal defendant in the case, the lawyer must decline to represent the client on the basis of the false name unless the prospective client agrees to disclose to the court that the client is proceeding under a false name. See Rules 4-1.2(d), 4-1.4, 4-1.16(a), 4-3.3 (a)(2) and (b), 4-3.4(c), 4-4.1, and 4-8.4, Rules of Professional Conduct.

If the lawyer learns of the false name after representation has begun, the lawyer should inform the client that the lawyer cannot assist the client in misleading the court regarding the client's identity, and the lawyer should attempt to persuade the client to disclose that the client is proceeding under a false name. Rules 4-1.2(d), 4-1.4, 4-1.6(b)(1), 4-3.3(a)(2) and (b), 4-3.4(c), and 4-8.4, Rules of Professional Conduct. If the client refuses to disclose the information and insists that the client will maintain the false name throughout the case, the lawyer must move to withdraw from the client's representation. Rules 4-1.2(d), 4-1.4, 4-1.16(a), 4-3.3(a)(2) and (b), 4-3.4(c), and 4-8.4, Rules of Professional Conduct. The lawyer must counsel the client not to commit perjury. Rules 4-1.2(d), 4-1.14, 4-3.3(a)(2) and (b), 4-3.4(c), and 4-8.4, Rules of Professional Conduct.

If the court declines to permit withdrawal, the lawyer must continue the representation. Rule 4-1.16(c), Rules of Professional Conduct. The lawyer may not inform the court of the false name except when the client affirmatively lies to the court concerning his or her true name.

All of the above scenarios presuppose that there is nothing in the court file to indicate that the client has been charged and is proceeding under a false name. If the client has been charged as a "John Doe" or "Jane Doe" and clearly is openly refusing to disclose his or her identity, there

is no misrepresentation to the court and the above rules are not applicable. See Rule 4-3.4(c). Under this circumstance, the lawyer need not specifically disclose to the court that the client is proceeding under a false name. Rule 4-3.3, Rules of Professional Conduct. Additionally, if the court file clearly indicates that the client is known by multiple names, then the court is on notice that the client may be proceeding under a false name and no remedial measures by the criminal defense lawyer are required.

PROFESSIONAL ETHICS OF THE FLORIDA BAR
OPINION 90-1
(July 15, 1990)

A criminal defense counsel who learns that his or her client has left the state for the purpose of avoiding a court appearance may not, under most circumstances, divulge such information until required by the court at the time of the scheduled appearance.

Statute: F.S. §843.15

When an attorney tells the court his or her client has left the state with the intent to jump bail, it puts attorney and client at cross-purposes; it makes the attorney a potential witness against the client in a potential criminal prosecution for the separate crime of bail jumping; and it effectively destroys the attorney-client relationship.

Avoiding interference with, or at least preserving, the Constitutionally created and Constitutionally protected attorney-client relationship is fundamental to a correct interpretation of what is, in this situation, ethical conduct.

For an attorney, based on anything less than verified and certain facts, to tell the court a client is out of state for purpose of avoiding a court appearance, would violate the attorney's obligation to give that client zealous representation, would destroy the attorney-client relationship, and would be unethical.

The crime of jumping bail is defined by Florida Statutes, Section 843.15, which says the crime occurs when a defendant in a criminal case is on release pre-trial, or pending sentencing, or pending appeal, and the defendant "willfully fails to appear before any court or judicial officer as required. . . ." The crime occurs when the defendant is required to be before the court and, willfully, fails to be there. By statutory definition, the offense occurs when the defendant fails to appear in court as required—not before then. So a distinction must be made as to counsel's ethical obligations at the time of the required court appearance, and counsel's ethical obligations prior to the required court appearance.

At the time of the required court appearance, when the case is called and the defendant fails to appear, and the judge turns to counsel and asks about the defendant's whereabouts, defense counsel owes an explanation to the court, to the extent counsel has one, and to the extent that giving it does not violate attorney-client privilege. If the attorney is able to tell the court where the client is, and why the client is there rather than in court, then the attorney is obliged to tell the court those things—but only to the extent that the lawyer can give up that information without violating attorney-client confidentiality. Barring other facts not present here, an attorney's actual knowledge of where a client is located, at the present moment, is not privileged information.

The following appears to be the proper way to handle it. Counsel may give the court such answers as counsel has, to the extent is does not violate confidential communications between attorney and client, and if that information is all the attorney has, then it is an easy matter to tell the court counsel has no further information, privileged or otherwise. But if some of the information counsel has is privileged, counsel may tell the court what information counsel has that is not privileged, and then advise the court that counsel does have additional information but believes it privileged and so invokes that privilege on the client's behalf— leaving it up to the court to make such further inquiry and such rulings on the extent of the privilege as it deems necessary.

Turning now to the question of counsel's ethical obligations prior to that required court appearance: What is criminal defense counsel's obligation when counsel first learns, in advance of the next scheduled court appearance, that the client has fled the state already, with intent to avoid future court appearances in the case?

On some subjects—and this is one—ethics opinions are of little real guidance to practicing attorneys unless they take into account the realities of how clients deal with lawyers and lawyers with clients. Drawing on the experiences of lawyers on the Professional Ethics Committee who now handle and/or have handled criminal defense cases, the following practical observation is made. Criminal defendants when talking with their lawyers (in the attorney's office or by telephone, and especially when clients call from out of state or out of the country) often think out loud about skipping out, or come right out and say they plan not to show up for court again; and yet, in a great majority of these cases, when the time comes, they do show up for court, in spite of what they have said. One may assume they show up based at least in part on the urgings of their lawyers in response to what they said. But, regardless the reasons why they usually show up for court, it is a result that would not be obtained if lawyers, upon hearing clients say they are going to skip future court appearance, were required to immediately tell the court what their clients have just said in that regard. Such conduct by counsel would quickly destroy the attorney-client relationship, and it would be doing so in situations that, in reality, most often do not turn out to be a problem—which would serve the interest of neither the clients nor the administration of justice.

Adding to the balance the Constitutionally created and protected attorney-client relationship, and the practicalities of how attorneys and clients deal with each other, and the Rules Regulating the Florida Bar, the following appears to be the proper response to this part of the inquiry.

So long as there remains any possibility that counsel may be able to effect a court appearance by a client, in spite of the client's claims and anybody else's claims that the client will not be going to court when required, experience teaches and ethics requires that effectuating the client's appearance is what counsel must spend his or her energies trying to accomplish. Working towards resolving the anticipated problem by effectuating the client's appearance, rather than telling the court about the anticipated problem, is what is ethically required of the lawyer.

Prior to the date of the required court appearance, only when it reaches the point where counsel knows with reasonable certainty that the client's avoidance of the court's authority is a willful and, for all practical purposes, an irreversible fact—only then would counsel be ethically obliged to step forward and advise the Court of the situation.

As to the question of counsel's ethical obligation to advise the bail bondsman, no such obligation is imposed by the Rules Regulating the Florida Bar. As a practical matter, however, if there is a bail bondsman on the case, to accomplish the client's appearance in court it may be necessary to consider calling on the client's bail bondsman for assistance.

A situation similar to the one inquired about, but which should not be confused with it, is where the court makes it a special condition of bond that the defendant not leave the state. That special condition of pre-trial release make the mere act of leaving the state a completed violation of bond, whether or not the defendant intends to return in time for his or her next court appearance. If that special condition is imposed, then a criminal defense lawyer is under obligation to report a client is out of state, when counsel is certain the client is, in fact, out of state in violation of that special condition, at the time of reporting. If, instead, the client advises counsel of this violation after it is completed—after leaving the state in violation of bond and returning again—then what the client tells counsel is privileged attorney-client communication about past acts, which the attorney may not reveal.

The question posed and answer given also have nothing to do with any obligation a court specifically imposes on defense counsel as a special condition of a client's release on bond—as, for example, when the court makes it a special condition that the defendant telephone his attorney once each day and that counsel immediately advise the court if the defendant fails to comply. (Such conditions are sometimes sought by defendants and their attorneys, to avoid having to report instead to probation officers or court officials as a condition of bond.)

PROFESSIONAL ETHICS OF THE FLORIDA BAR
OPINION 86-3
December 15, 1986

A defense lawyer has no obligation to disclose a client's record of prior convictions in order to prevent a court from imposing sentence on the basis of incomplete or inaccurate information about the client's record, provided that neither the defense lawyer nor the defendant affirmatively misrepresented to the court that there was no priors.

CPR: DR 4-101, EC 4-4, DR 7-101(A), DR 7-102
Opinion: 75-19
Case: *Meehan v. State*, 397 So.2d 1214 (Fla. 2d DCA 1981)

Numerous defense attorneys have requested an advisory opinion concerning their obligation to disclose, or not to disclose, before a client is sentenced for a criminal offense, that the client has a record of prior convictions. The question usually arises in DUI cases. It appears that prosecutors sometimes do not discover the defendant's out-of-state prior convictions. The defense attorney knows of the priors either because the client volunteered the information or because the attorney independently discovered the priors in the course of the representation. Repeat DUI offenders are sentenced more harshly than first-time offenders.

Defense counsel's information about the client's prior convictions, volunteered by the client or independently discovered by the attorney in the course of the representation, is either a confidence or a secret of the client within the meaning of DR 4-101. DR 4-101(A) defines "confidence" as "information protected by the attorney-client privilege under applicable law." "Secrets" are defined as "other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be *likely to be detrimental to the client.*" EC 4-4 explains that an attorney's ethical obligation to guard the confidences and secrets of a client "exists without regard to the nature or source of information or the fact that others share the knowledge."

With certain limited exceptions, DR 4-101 forbids an attorney to reveal confidences or secrets except with the consent of the client. The exception that may be applicable to information about prior convictions is DR 4-101(C)(2), which permits a lawyer to reveal confidences or secrets "when permitted under disciplinary rules."

An attorney's conduct in judicial proceedings is governed by Canon 7 of the Code of Professional Responsibility. DR 7-101(A) forbids an attorney to intentionally:

> (3) Prejudice or damage his client during the course of the professional relationship, except as required under DR 7-102(B)."

DR 7-102 provides in pertinent part:

(A) In his representation of a client, a lawyer shall not:

(3) Conceal or knowingly fail to disclose that which he is required by law to reveal;

(4) Knowingly use perjured testimony or false evidence;

(5) Knowingly make a false statement of fact; . . .

(B) A lawyer who receives information clearly establishing that:

(1) His client has, in the course of the representaiton, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to reveal the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the affected person or tribunal."

With reference to DR 7-102(A)(3), the Committee is unaware of any law that places an affirmative obligation upon criminal defense counsel to disclose his client's criminal record. Under DR 7-102(A)(4), a lawyer should not permit his client to falsely state to the court that the client has no prior convictions. Under DR 7-102(A)(5), a lawyer could not himself falsely state to the court that the client had no priors. DR 7-102(B)(1), in conjunction with DR 4-101(C)(2), would require a lawyer whose client had falsely stated to the court that there were no priors to call upon his client to rectify such fraud on the court and to do so himself if the client refused. Opinion 75-19.

On the basis of the disciplinary rules and the ethical obligations discussed above, the Committee reaches the following conclusions: (1) When it appears to the lawyer that the court is about to impose sentence based on incomplete or inaccurate information as to the defendant's record of prior convictions, the lawyer has no duty to correct that information, provided that the lawyer or the client had not affirmatively misrepresented to the court that there were no priors. (2) If asked directly by the court whether the client has any prior convictions, the attorney must protect his client's constitutional guarantees. See, *e.g., Meehan v. State*, 397 So.2d 1214 (Fla. 2d DCA 1981).

PROFESSIONAL ETHICS OF THE FLORIDA BAR
OPINION 82-3
May 20, 1982

An attorney who learns that his former client has committed a fraud upon a person or tribunal during the attorney's representation may reveal the fraud to the court only if the client's fraud is clearly established under the guidelines of DR 7-102(B).

CPR: DR 4-101, DR 7-102, EC 8-5
Opinion: 75-19

Chairman Ervin stated the opinion of the committee:

A Florida attorney inquires whether he has received information clearly establishing that his former client has committed a fraud upon a person or tribunal during the attorney's representation, so as to give rise to a duty of the attorney to take further action pursuant to DR 7-102(B), Florida Code of Professional Responsibility.

The attorney recites that during the course of his representation of two clients, he prepared for execution by one client, and by an employee-witness, affidavits reciting the facts and date of resignation of the client as a director and officer of a corporation. As a part of pending proceedings, the other client, a relative of first client, testified at deposition as to fact and date of resignation. The affidavits were submitted to the court during pretrial proceedings. The fact of resignation and time of same were of significant importance to the ongoing litigation.

The attorney has, with approval of the court, withdrawn from representation of the clients. He recites his present doubt as to the truthfulness of the prior affidavits and depositions based upon undescribed "credibility problems" he experienced with the clients prior to withdrawal, together with the fact that the client signed one written communication to the lawyer in a form indicating corporate officer status long after the purported date of resignation, and later fabricated and attempted to persuade the attorney to accept a backdated, substitute written communication not so indicating.

The attorney recites that his two former clients and the employee-witness have steadfastly maintained that the affidavits and depositions are true.

Since the information which has caused the attorney's doubt was secured from the client during the course of representation, DR 4-101 of the Florida Code must be first considered. That rule provides, in pertinent part, that:

DR 4-101 Preservation of Confidences and Secrets of a Client.

(A) "Confidence" refers to information protected by the attorneyclient privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

(B) Except when permitted under DR 4-101(C) and (D), a lawyer shall not knowingly:

(1) Reveal a confidence or secret of his client.

* * *

(C) A lawyer *may* reveal:

* * *

(2) Confidences or secrets when permitted under disciplinary rules.

* * *

(D) A lawyer *shall* reveal:

(1) Confidences or secrets when required by law provided that a lawyer required by a tribunal to make such a disclosure may first avail himself of all appellate remedies available to him.

(2) The intention of his client to commit a crime and the information necessary to prevent the crime.

* * *

(Emphasis supplied.)

The information possessed by the inquiring attorney was gained in the professional relationship and its disclosure would be embarrassing or detrimental to the client, so it is clearly a "secret," and may be a "confidence" as well, under the terms of DR 4-101(A). Under the terms of subsection (B), the information may not be disclosed by the attorney unless disclosure is authorized, or required, by one of the exceptions set forth in subsections (C) or (D).

Subsection (D) would appear inapplicable in that no law has been cited compelling an attorney to disclose past untruthfulness of his client; no tribunal seeks to compel disclosure; and an attorney is not required under subsection (2) to reveal a completed crime (i.e., perjury) by his

client. It is noted that DR 4-101(D)(2) of the Florida Code is substantially broader than the corresponding American Bar Association provision in requiring an attorney to disclose his client's intention to commit any crime.

The Florida provision is, however, prospective in operation and applies only to intended, but not yet committed, crimes of a client.

Subsection (C) of DR 4-101 requires further analysis. That provision authorizes an attorney to reveal confidences or secrets of a client "when permitted under disciplinary rules." This provision, in turn, makes pertinent DR 7-102(B) of the Florida Code, which provides:

> DR 7-102 Representing a Client Within the Bounds of the Law.
>
> * * *
>
> (B) A lawyer who receives information *clearly establishing* that:
>
> (1) His client *has*, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the affected person or tribunal.
>
> (2) A person other than his client has perpetrated a fraud upon a tribunal shall promptly reveal the fraud to the tribunal.
>
> (Emphasis supplied.)

The above-quoted provision was considered at length in prior Advisory Opinion 75-19 wherein it was noted that the corresponding provision of the American Bar Association Code had been amended to except from the duty of disclosure information protected as privileged communication.

Guided by the absence of such an exception in the Florida Code, in Advisory Opinion 75-19 this Committee expressed its opinion that an attorney, upon learning from his client that the client had deliberately lied at a deposition, was required to withdraw from the representation and to reveal the fraud to the court if the client refused to rectify the false testimony.

A contrary conclusion as to duty of disclosure is at least arguably suggested by EC 8-5 of the Florida Code, which provides as follows:

> EC 8-5 Fraudulent, deceptive, or otherwise illegal conduct by a participant in a proceeding before a tribunal or legislative body is inconsistent with fair administration of justice, and it should never be participated in or condoned by lawyers. *Unless constrained by his obligation to preserve the confidences and secrets of his client*, a lawyer should reveal to appropriate authorities any knowledge he may have of such improper conduct.

(Emphasis supplied.)

The Committee is of the opinion, however, that there is no real conflict or inconsistency between DR 7-102(B) and EC 8-5. Where the circumstances required by DR 7-102(B) are present, the attorney is not constrained by an obligation to preserve the confidences or secrets of his client (as to the fraud) and disclosure must be made. This is, of course, consistent with the aspirational guideline of EC 8-5.

On the other hand, where the requirements of DR 7-102(B) are not met, then pursuant to DR 4-101(B), the attorney is so constrained and should not make disclosure. This circumstance is excepted from the aspirational guideline of EC 8-5. Properly viewed, EC 8-5 is merely reflective of the commands of DR 4-101(B) and exceptions recognized in that subsection.

The Committee, therefore, adheres to its prior Advisory Opinion 75-19, to the effect that under the circumstances described in DR 7-102(B) of the Florida Code, an attorney is required to disclose even confidences or secrets of his client. The Supreme Court of Florida, in adopting the Florida Code in its present form, has recognized and mandated this limited exception to the ordinary attorney-client relationship in order to preserve the integrity of the system of administration of justice.

The exception is, however, limited by its own terms. DR 7-102(B) requires disclosure only where the attorney:

> . . . receives information *clearly establishing* that:
>
> (1) his client has, *in the course of the representation*, perpetrated a fraud upon a person or tribunal. . . .
>
> (Emphasis supplied.)

Thus, the Supreme Court has commanded that the confidentiality of the attorney-client relationship will be sacrificed only where the client's fraud is clearly established to have occurred during the representation.

In prior Advisory Opinion 75-19 the client had expressly confirmed to the attorney that he (the client) knew the true facts and had deliberately lied under oath to conceal his assets. Thus, the attorney possessed more than adequate information "clearly establishing" the client's fraud on the tribunal during the lawyer's representation and disclosure was required.

No such definitive factual situation is presented in this inquiry, in that: (1) The inquiring attorney's former clients, and a third party, steadfastly maintain that the prior statements regarding corporate resignation were true; (2) the form of signature indicating to the contrary

could conceivably have been simple mistake; (3) the attempt to substitute communications to the attorney could have been intended to correct a potentially embarrassing mistake rather than conceal evidence of perjury; and (4) the inquiry is based in part on undescribed "credibility problems" experienced between the clients and inquiring attorney during the representation.

Under such circumstances, this Committee is of the opinion that it can provide guidance only in the form of emphasizing that under DR 7-102(B) the test or standard is that the information possessed must "clearly establish" fraud on the tribunal. The Committee is not a fact-finding body, nor is it able to glean from limited correspondence, and then weigh, all the subjective factors and factual considerations which would enter into the determination of whether fraud is "clearly" established.

The responsibility for this factual determination must remain with the inquiring lawyer.

The foregoing is the opinion of a majority of the Professional Ethics Committee and is hereby adopted as the Committee's proposed advisory opinion. One member of the Committee would agree with the "clear establishment" test as set forth above, but would apply a continuing wrong principle if the subject litigation was not concluded. One member of the Committee is of the opinion that the facts as presented fall short of "clearly establishing" fraud on a tribunal, and that the Committee's opinion should proscribe disclosure.

PROFESSIONAL ETHICS OF THE FLORIDA BAR
OPINION 75-19
March 15, 1977

An attorney who learns from his client that the client deliberately lied at a deposition must withdraw from the representation and must reveal the fraud to the court if the client refuses to rectify it.

Note: This opinion was affirmed by the Professional Ethics Committee at its meeting on June 18, 1998. The Committee affirmed that a material misrepresentation during a deposition, regardless of whether the deposition has been filed with the court, requires that the attorney take remedial measures under Rule 4-3.3.

CPR: EC 7-6, EC 7-26; DR 4-101(B),(C) and (D), DR 7-102(B)(1) *[DR 7-102(B)(1) superseded by Rule 4-3.3]*
Opinions: ABA Formal 268, 274. 341; ABA Informal 1314, 1318
Case: *McKissick v. United States*, 379 F.2d 754 (5th Cir. 1967)
Misc.: Drinker, *Legal Ethics*, p. 141

Vice Chairman Lehan stated the opinion of the committee:

A lawyer inquires as to whether he has a duty to disclose perjury committed by his client in a divorce proceeding deposition wherein the client lied as to certain assets. The lawyer was aware of the true facts during the deposition but was not aware that the client had deliberately lied until after the deposition when the lawyer, in private conversation with the client, asked whether the client knew the true facts and the client responded that he did and that he had deliberately lied to conceal assets. In the inquiry, the lawyer recognizes his duty to withdraw from the employment, and the Committee unanimously agrees.

DR 7-102(B)(1) provides that "A lawyer who receives information clearly establishing that . . . his client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the affected person or tribunal." The majority of the Committee feels that a fraud has been perpetrated upon the court and the opposing party by such perjury in a deposition and that further fraud would be perpetrated by permitting use in litigation of a perjured deposition, such as the one referred to in the inquiry, or by later testimony in like fashion before the court if the deposition itself should not be used in evidence.

The inquiry is silent as to whether the lawyer, upon learning of the perjury, specifically called upon the client to rectify same. Certainly the lawyer has a duty to do so. For the purpose of this opinion the Committee finds implicit in the inquiry the facts that the lawyer did so call upon the client and that the client refused to rectify the perjury.

DR 7-102(B)(1) does not specifically refer to information received from the lawyer's client; however, neither does it purport to limit in any way the sources from which information of the type described may be received. Therefore the Committee majority feels that that provision of the CPR is inclusive of information from clients. By referring to the requirement that the lawyer call upon the client to rectify the fraud and, if the client refuses, the lawyer shall reveal the fraud to the court, the provision may contemplate implicitly that such revelation to the court will necessarily involve the client as a source of at least part of such information.

Under Canon 4, relating to confidences of a client, DR 4-101(D)(2) provides that "A lawyer shall reveal . . . the intention of his client to commit a crime and the information necessary to prevent the crime." Although under the circumstances indicated in the inquiry the perjury had already been committed when the lawyer ascertained positively that the client had deliberately lied, the inquiry would seem to involve either further use of the deposition, which would involve at least furtherance of the crime, or, if the client were to testify in court, information concerning the intention of the client to perjure himself before the court. Therefore, 4-101(D)(2) would appear applicable. See also *McKissick v. United States*, 379 F. 2d 754, 761 (5th Cir. 1967), saying that perjury is a continuing offense so long as allowed to remain in the record to influence the outcome.

Other provisions of Canon 4 are relevant. DR 4-101(B) provides that a lawyer shall not reveal confidences of his client "except when permitted under DR 4-101(C) and (D)." Under 4-101(C), "a lawyer may reveal . . . confidences or secrets when permitted under disciplinary rules."

EC 7-26 provides that "The law and disciplinary rules prohibit the use of fraudulent, false, or perjured testimony or evidence," and EC 7-6 states that a lawyer "may not do anything furthering the creation or preservation of false evidence."

In short, the Committee majority feels that the attorney-client privilege is not to be preserved at all costs, or at the cost of the principles represented by DR 7-102(B); that the Code of Professional Responsibility has specific application to the present inquiry; and that the attorney must disclose the fraud to the court. It may be that in most such situations the lawyer's action in calling upon the client to rectify the fraud would dispose of the problem so that the lawyer need not himself make disclosure to the court.

In *McKissick v. United States*, 379 F. 2d 754, 761, 762 (5th Cir. 1967), which involved a lawyer's report to the court of a client's admission to the lawyer of perjury, the Fifth Circuit took the strong position that the lawyer fulfilled his duty in so reporting to the court and that if he had not done so, he would have been subject to discipline. In a footnote the Fifth Circuit said:

> Drinker, *Legal Ethics* 141 (1953): "A lawyer learning of fraud practiced by his client on a court * * * which the client declines to disclose must inform the injured parties, and withdraw from the case, despite Canon 37 [of the Canons of Professional Ethics of the American Bar Association, this Canon covering the lawyer's duty to preserve his client's confidence]." See also Canon 29 which

> provides in part: "The counsel upon the trial of cause in which perjury has been committed owe it to the profession and to the public to bring the matter to the knowledge of the prosecuting authorities." We feel this duty may be equally discharged by disclosure to the court itself. Disciplinary measures have been successfully taken against attorneys who have continued with a civil case knowing that their clients had presented perjured testimony . . . *In re King*, 7 Utah 2d 258, 322 P. 2d 1095 (1958) the court commented, "We cannot permit a member of the bar to exonerate himself from failure to disclose known perjury by a * * * statement * * * he had a duty of nondisclosure so as to protect his client which is paramount to his duty to disclose the same to the court, of which he is an officer, and to which he in fact, owes a primary duty under circumstances such as are evidenced in this case." 322 P. 2d at 1097. But compare Gold, Split Loyalty: An Ethical Problem for the Criminal Defense Lawyer, 14 Clev.-Mar. L. Rev. 65, 69-70(1965).

379 F. 2d at p. 761, N.2.

This Committee opinion has reference only to such crime and type of fraud committed by the client in the course of the lawyer's representation of the client.

The Committee recognizes that the current ABA version of the Code of Professional Responsibility includes amendment of DR 7-102(B) to specifically provide for the conflict under these circumstances between a lawyer's duty to the court and his duty to his client. That ABA version differs from the Florida CPR in having, by such amendment, added the following proviso to DR 7-102(B): "except when the information is protected as privileged communication." See ABA Formal Opinion 341 and ABA Informal Opinions 1314 and 1318. Whether the Florida Code of Professional Responsibility should also be so amended would be a matter for the consideration of the Supreme Court of Florida.

Two members of the Committee feel that disclosure of some type by the lawyer is necessary but that the lawyer should simply advise the Court that use of the deposition in favor of the client would, for reasons which the lawyer cannot disclose, constitute a fraud upon the court.

A substantial minority of the Committee feels that the protection of the confidences of a client is of paramount importance; that Canon 4 specifically concerns protection of confidential information received from a client whereas Canon 7 does not specifically relate to information from the client; that under the inquiry the perjury had already been committed, therefore DR 4-101(D)(2) does not apply; and that the attorney should resign from the employment and take no further action. See ABA Formal Opinion 268 and ABA Formal Opinion 274, both written under the Canons of Professional Ethics. Opinion 268 states: "While ordinarily it is the duty of a lawyer, as an officer of the court, to disclose to the court any fraud that he believes is being practiced on the court, this duty does not transcend that to preserve the client's confidences." Also, the Committee minority feels that the exception added to the ABA version of DR 7-102(B) should be found implicit in Florida DR 7-102(B) and that, in any event, the Florida Supreme

Court should be asked to so amend the Florida Code of Professional Responsibility for the reasons stated in ABA Formal Opinion 341.

Thomas S. Biggs Chapter
Inns of Court Team 4 Presentation
January 21, 2014

Your Reputation: Building and Defending It

Social Media Materials

- Fla. Rule Prof. Conduct 4-1.6 Confidentiality of Information
- Rule 4-7.14 Potentially Misleading Advertisements
- Rule 4-8.2 Judicial and Legal Official
- Rule 4-7.13 Deceptive and Inherently Misleading Advertisements
- Guidelines for Professional Conduct, General (A)(4)
- *In Re: Betty Tsamis*, Illinois Attorney Registration and Disciplinary Commission, No. 2013PR00095
- Minnesota Ethics Update—Minnesota Lawyering, October 2013

4 RULES OF PROFESSIONAL CONDUCT
4-1 CLIENT-LAWYER RELATIONSHIP

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.

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(c) 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 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 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 (c)(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.

[Revised: 10/01/2011]

RULE 4-7.14

4 RULES OF PROFESSIONAL CONDUCT
4-7 INFORMATION ABOUT LEGAL SERVICES

RULE 4-7.14 POTENTIALLY MISLEADING ADVERTISEMENTS

A lawyer may not engage in potentially misleading advertising.

(a) Potentially Misleading Advertisements. Potentially misleading advertisements include, but are not limited to:

(1) advertisements that are subject to varying reasonable interpretations, 1 or more of which would be materially misleading when considered in the relevant context;
(2) advertisements that are literally accurate, but could reasonably mislead a prospective client regarding a material fact;

(3) references to a lawyer's membership in, or recognition by, an entity that purports to base such membership or recognition on a lawyer's ability or skill, unless the entity conferring such membership or recognition is generally recognized within the legal profession as being a bona fide organization that makes its selections based upon objective and uniformly applied criteria, and that includes among its members or those recognized a reasonable cross-section of the legal community the entity purports to cover;

(4) a statement that a lawyer is board certified, a specialist, an expert, or other variations of those terms unless:

(A) the lawyer has been certified under the Florida Certification Plan as set forth in chapter 6, Rules Regulating the Florida Bar and the advertisement includes the area of certification and that The Florida Bar is the certifying organization;
(B) the lawyer has been certified by an organization whose specialty certification program has been accredited by the American Bar Association or The Florida Bar as provided elsewhere in these rules. A lawyer certified by a specialty certification program accredited by the American Bar Association but not The Florida Bar must include the statement "Not Certified as a Specialist by The Florida Bar" in reference to the specialization or certification. All such advertisements must

include the area of certification and the name of the certifying organization; or

(C) the lawyer has been certified by another state bar if the state bar program grants certification on the basis of standards reasonably comparable to the standards of the Florida Certification Plan set forth in chapter 6 of these rules and the advertisement includes the area of certification and the name of the certifying organization.

In the absence of such certification, a lawyer may communicate the fact that the lawyer limits his or her practice to 1 or more fields of law; or

(5) information about the lawyer's fee, including those that indicate no fee will be charged in the absence of a recovery, unless the advertisement discloses all fees and expenses for which the client might be liable and any other material information relating to the fee. A lawyer who advertises a specific fee or range of fees for a particular service must honor the advertised fee or range of fees for at least 90 days unless the advertisement specifies a shorter period; provided that, for advertisements in the yellow pages of telephone directories or other media not published more frequently than annually, the advertised fee or range of fees must be honored for no less than 1 year following publication.

(b) Clarifying Information. A lawyer may use an advertisement that would otherwise be potentially misleading if the advertisement contains information or statements that adequately clarify the potentially misleading issue.

Comment

Awards, Honors, and Ratings

Awards, honors and ratings are not subjective statements characterizing a lawyer's skills, experience, reputation or record. Instead, they are statements of objectively verifiable facts from which an inference of quality may be drawn. It is therefore permissible under the rule for a lawyer to list bona fide awards, honors and recognitions using the name or title of the actual award and the date it was given. If the award was given in the same year that the advertisement is disseminated or the advertisement references a rating that is current at the time the advertisement is disseminated, the year of the award or rating is not required.

For example, the following statements are permissible:

"John Doe is AV rated by Martindale-Hubbell. This rating is Martindale-Hubbell's highest rating."
"Jane Smith was named a 2008 Florida Super Lawyer by Super Lawyers Magazine."

Claims of Board Certification, Specialization or Expertise

This rule permits a lawyer or law firm to indicate areas of practice in communications about the lawyer's or law firm's services, provided the advertising lawyer or law firm actually practices in those areas of law at the time the advertisement is disseminated. If a lawyer practices only in certain fields, or will not accept matters except in such fields, the lawyer is permitted to indicate that. A lawyer who is not certified by The Florida Bar, by another state bar with comparable standards, or an organization accredited by the American Bar Association or The Florida Bar may not be described to the public as a "specialist," "specializing," "certified," "board certified," being an "expert," having "expertise," or any variation of similar import. A lawyer may indicate that the lawyer concentrates in, focuses on, or limits the lawyer's practice to particular areas of practice as long as the statements are true.

Certification is specific to individual lawyers; a law firm cannot be certified, and cannot claim specialization or expertise in an area of practice per subdivision (c) of rule 6-3.4. Therefore, an advertisement may not state that a law firm is certified, has expertise in, or specializes in any area of practice.

A lawyer can only state or imply that the lawyer is "certified," a "specialist," or an "expert" in the actual area(s) of practice in which the lawyer is certified. A lawyer who is board certified in civil trial law, may so state that, but may not state that the lawyer is certified, an expert in, or specializes in personal injury. Similarly, a lawyer who is board certified in marital and family law may not state that the lawyer specializes in divorce.

Fee and Cost Information

Every advertisement that contains information about the lawyer's fee, including a contingent fee, must disclose all fees and costs that the client will be liable for. If the client is, in fact, not responsible for any costs in addition to the fee, then no disclosure is necessary. For example, if a lawyer charges a flat fee to create and execute a will and there are no costs associated with the services, the lawyer's advertisement may state only the flat fee for that service.

However, if there are costs for which the client is responsible, the advertisement must disclose this fact. For example, if fees are contingent on the outcome of the matter, but the client is responsible for costs regardless of the matter's outcome, the following statements are

permissible: "No Fee if No Recovery, but Client is Responsible for Costs," "No Fee if No Recovery, Excludes Costs," "No Recovery, No Fee, but Client is Responsible for Costs" and other similar statements.

On the other hand, if both fees and costs are contingent on the outcome of a personal injury case, the statements "No Fees or Costs If No Recovery" and "No Recovery - No Fees or Costs" are permissible.

[Revised: 05/01/2013]

RULE 4-8.2 JUDICIAL AND LEGAL OFFICIALS

4 RULES OF PROFESSIONAL CONDUCT
4-8 MAINTAINING THE INTEGRITY OF THE PROFESSION

RULE 4-8.2 JUDICIAL AND LEGAL OFFICIALS

(a) Impugning Qualifications and Integrity of Judges or Other Officers. A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, mediator, arbitrator, adjudicatory officer, public legal officer, juror or member of the venire, or candidate for election or appointment to judicial or legal office.

(b) Candidates for Judicial Office; Code of Judicial Conduct Applies. A lawyer who is a candidate for judicial office shall comply with the applicable provisions of Florida's Code of Judicial Conduct.

Comment

Assessments by lawyers are relied on in evaluating the professional or personal fitness of persons being considered for election or appointment to judicial office and to public legal offices, such as attorney general, prosecuting attorney, and public defender. Expressing honest and candid opinions on such matters contributes to improving the administration of justice. Conversely, false statements by a lawyer can unfairly undermine public confidence in the administration of justice.

False statements or statements made with reckless disregard for truth or falsity concerning potential jurors, jurors serving in pending cases, or jurors who served in concluded cases undermine the impartiality of future jurors who may fear to execute their duty if their decisions are ridiculed. Lawyers may not make false statements or any statement made with the intent to ridicule or harass jurors.

When a lawyer seeks judicial office, the lawyer should be bound by applicable limitations on political activity.

To maintain the fair and independent administration of justice, lawyers are encouraged to continue traditional efforts to defend judges and courts unjustly criticized.

RULE 4-7.13

4 RULES OF PROFESSIONAL CONDUCT
4-7 INFORMATION ABOUT LEGAL SERVICES

RULE 4-7.13 DECEPTIVE AND INHERENTLY MISLEADING ADVERTISEMENTS

A lawyer may not engage in deceptive or inherently misleading advertising.

(a) Deceptive and Inherently Misleading Advertisements. An advertisement is deceptive or inherently misleading if it:

(1) contains a material statement that is factually or legally inaccurate;
(2) omits information that is necessary to prevent the information supplied from being misleading; or

(3) implies the existence of a material nonexistent fact.

(b) Examples of Deceptive and Inherently Misleading Advertisements. Deceptive or inherently misleading advertisements include, but are not limited to advertisements that contain:

(1) statements or information that can reasonably be interpreted by a prospective client as a prediction or guaranty of success or specific results;
(2) references to past results unless such information is objectively verifiable, subject to rule 4-7.14;

(3) comparisons of lawyers or statements, words or phrases that characterize a lawyer's or law firm's skills, experience, reputation or record, unless such characterization is objectively verifiable;

(4) references to areas of practice in which the lawyer or law firm does not practice or intend to practice at the time of the advertisement;

(5) a voice or image that creates the erroneous impression that the person speaking or shown is the advertising lawyer or a lawyer or employee of the advertising firm. The following notice, prominently displayed would resolve the erroneous impression: "Not an employee or member of law firm";

An example of a material omission is stating "over 20 years' experience" when the experience is the combined experience of all lawyers in the advertising firm. Another example is a lawyer who states "over 20 years' experience" when the lawyer includes within that experience time spent as a paralegal, investigator, police officer, or other nonlawyer position.

Implied Existence of Nonexistent Fact

An example of the implied existence of a nonexistent fact is an advertisement stating that a lawyer has offices in multiple states if the lawyer is not licensed in those states or is not authorized to practice law. Such a statement implies the nonexistent fact that a lawyer is licensed or is authorized to practice law in the states where offices are located.

Another example of the implied existence of a nonexistent fact is a statement in an advertisement that a lawyer is a founding member of a legal organization when the lawyer has just begun practicing law. Such a statement falsely implies that the lawyer has been practicing law longer than the lawyer actually has.

Predictions of Success

Statements that promise a specific result or predict success in a legal matter are prohibited because they are misleading. Examples of statements that impermissibly predict success include: "I will save your home," "I can save your home," "I will get you money for your injuries," and "Come to me to get acquitted of the charges pending against you."

Statements regarding the legal process as opposed to a specific result generally will be considered permissible. For example, a statement that the lawyer or law firm will protect the client's rights, protect the client's assets, or protect the client's family do not promise a specific legal result in a particular matter. Similarly, a statement that a lawyer will prepare a client to effectively handle cross-examination is permissible, because it does not promise a specific result, but describes the legal process.

Aspirational statements are generally permissible as such statements describe goals that a lawyer or law firm will try to meet. Examples of aspirational words include "goal," "strive," "dedicated," "mission," and "philosophy." For example, the statement, "My goal is to achieve the best possible result in your case," is permissible. Similarly, the statement, "If you've been injured through no fault of your own, I am dedicated to recovering damages on your behalf," is permissible.

Modifying language can be used to prevent language from running afoul of this rule. For example, the statement, "I will get you acquitted of the pending charges," would violate the rule as it promises a specific legal result. In contrast, the statement, "I will pursue an acquittal of your pending charges," does not promise a specific legal result. It merely conveys that the lawyer will

The prohibition against comparisons that cannot be factually substantiated would preclude a lawyer from representing that the lawyer or the lawyer's law firm is "the best," or "one of the best," in a field of law.

On the other hand, statements that the law firm is the largest in a specified geographic area, or is the only firm in a specified geographic area that devotes its services to a particular field of practice are permissible if they are true, because they are comparisons capable of being factually substantiated.

Characterization of Skills, Experience, Reputation or Record

The rule prohibits statements that characterize skills, experience, reputation, or record that are not objectively verifiable. Statements of a character trait or attribute are not statements that characterize skills, experience, or record. For example, a statement that a lawyer is aggressive, intelligent, creative, honest, or trustworthy is a statement of a lawyer's personal attribute, but does not characterize the lawyer's skills, experience, reputation, or record. Such statements are permissible.

Descriptive statements characterizing skills, experience, reputation, or a record that are true and factually verified are permissible. For example, the statement "Our firm is the largest firm in this city that practices exclusively personal injury law," is permissible if true, because the statement is objectively verifiable. Similarly, the statement, "I have personally handled more appeals before the First District Court of Appeal than any other lawyer in my circuit," is permissible if the statement is true, because the statement is objectively verifiable.

Descriptive statements that are misleading are prohibited by this rule. Descriptive statements such as "the best," "second to none," or "the finest" will generally run afoul of this rule, as such statements are not objectively verifiable and are likely to mislead prospective clients as to the quality of the legal services offered.

Aspirational statements are generally permissible as such statements describe goals that a lawyer or law firm will try to meet. Examples of aspirational words include "goal," "dedicated," "mission," and "philosophy." For example, the statement, "I am dedicated to excellence in my representation of my clients," is permissible as a goal. Similarly, the statement, "My goal is to provide high quality legal services," is permissible.

Areas of Practice

This rule is not intended to prohibit lawyers from advertising for areas of practice in which the lawyer intends to personally handle cases, but does not yet have any cases of that particular type.

Dramatizations

This rule prohibits use of a judicial, executive, or legislative branch title, unless accompanied by clear modifiers and placed subsequent to the person's name, when used to refer to a current or former officer of the judicial, executive, or legislative branch. Use of a title before a name is inherently misleading in that it implies that the current or former officer has improper influence. Thus, the titles Senator Doe, Representative Smith, Former Justice Doe, Retired Judge Smith, Governor (Retired) Doe, Former Senator Smith, and other similar titles used as titles in conjunction with the lawyer's name are prohibited by this rule. This includes, but is not limited to, use of the title in advertisements and written communications, computer-accessed communications, letterhead, and business cards.

However, an accurate representation of one's judicial, executive, or legislative experience is permitted if the reference is subsequent to the lawyer's name and is clearly modified by terms such as "former" or "retired." For example, a former judge may state "Jane Doe, Florida Bar member, former circuit judge" or "Jane Doe, retired circuit judge."

As another example, a former state representative may not include "Representative Smith (former)" or "Representative Smith, retired" in an advertisement, letterhead, or business card. However, a former representative may state, "John Smith, Florida Bar member, former state representative."

Further, an accurate representation of one's judicial, executive, or legislative experience is permitted in reference to background and experience in biographies, curriculum vitae, and resumes if accompanied by clear modifiers and placed subsequent to the person's name, For example, the statement "John Jones was governor of the State of Florida from [. . . years of service . . .]" would be permissible.

Also, the rule governs attorney advertising. It does not apply to pleadings filed in a court. A practicing attorney who is a former or retired judge shall not use the title in any form in a court pleading. If a former or retired judge uses her previous title in a pleading, she could be sanctioned.

[Revised: 05/01/2013]

Guidelines for Professional Conduct from the Florida Bar (General (A)(4))

"A lawyer should be courteous and civil in all professional dealings with other persons. Lawyers should act in a civil manner regardless of the ill feelings that their clients may have toward others. Lawyers can disagree without being disagreeable. Effective and zealous representation does not require antagonistic or acrimonious behavior. Whether orally or in writing, lawyers should avoid vulgar language, disparaging personal remarks, or acrimony toward other counsel, parties, or witnesses."

BEFORE THE HEARING BOARD
OF THE
ILLINOIS ATTORNEY REGISTRATION
AND
DISCIPLINARY COMMISSION

In the Matter of:

BETTY TSAMIS,

Attorney-Respondent,

No.6288664.

Commission No. 2013PR00095

FILED --- August 26, 2013

COMPLAINT

Jerome Larkin, Administrator of the Attorney Registration and Disciplinary Commission, by his attorney, Gina M. Abbatemarco, pursuant to Supreme Court Rule 753(b), complains of Respondent, Betty Tsamis, who was licensed to practice law in Illinois on May 4, 2006, and alleges that Respondent has engaged in the following conduct which tends to defeat the administration of justice or to bring the courts or the legal profession into disrepute and which subjects Respondent to discipline pursuant to Supreme Court Rule 770:

COUNT I

(Conversion of $2,057.54 from Kris Klimek's settlement proceeds)

1. On January 17, 2011, Kris Klimek ("Klimek") was involved in an incident in which she was injured as a result of an accident on the premises of Malibu East Condominiums in Chicago, Illinois. As a result of the incident, Klimek sustained various injuries and incurred medical expenses.

2. On or about February 27, 2011, Respondent agreed to represent Klimek in a claim against Malibu East Condo Association and Sudler & Company (Malibu's management company) relating to the January 17, 2011 incident. At that time, Respondent and Klimek agreed that Respondent's receipt of a fee would be contingent upon Respondent recovering a settlement or award on behalf of Klimek, and that Respondent would receive as her fee an amount equal to one-third of any such recovery, plus costs.

3. On or about August 2, 2011, Klimek agreed to release her claims against Sudler & Company and Malibu East Condo Association and its insurer, Hartford Fire Insurance Company ("Hartford Insurance"), in exchange for the payment of $14,142.68.

4. On or about August 22, 2011, Respondent received Hartford draft numbers 1053652470, 1053661975, and 1053652488 in the respective amounts of $4,713.75, $5,486.25 and $3,942.68. Draft number 1053652470 represented Respondent's fee under the fee agreement described in paragraph two, above. Draft number 1053661975 represented Klimek's portion of the settlement of her claims. Draft number 1053652488 represented the proceeds owed to Medicare, Medicaid/HFS Bureau of Collections in satisfaction of their respective liens.

5. On September 7, 2011, Respondent sent draft number 1053661975 to Klimek. Respondent deposited draft number 1053652488 into an account ending in the four digits "5051" at PNC Bank, N.A. That account (hereinafter "client fund account") was entitled "Tsamis Law Firm P.C. IOLTA Account" and was used by Respondent as a depository of funds belonging to Respondent's clients, to third parties, or, presently or potentially, to Respondent.

6. Between August 22, 2011 and December 30, 2011, Respondent negotiated an agreed reduction of the Medicaid lien but the Medicare lien remained unresolved. On or about December 30, 2011, Respondent drew check number 1081 on account number 5051, which she made payable to HFS Collections, in the amount of $197.24 in payment of Medicaid's lien.

7. After paying the Medicaid lien on December 30, 2011, as set forth in paragraph six, above, Respondent was obligated to hold for Klimek's or Medicare's benefit, the remaining $3,745.44 from the proceeds of draft number 1053652488.

8. On February 14, 2012, prior to any distribution of settlement funds to Medicare and Klimek, the balance in Respondent's client fund account fell to $1,687.90 as Respondent drew checks on the account in payment of her business and personal obligations.

9. Between September 7, 2011, and February 14, 2012, Respondent used for Respondent's own business or personal purposes at least $2,057.54 of the settlement proceeds owed to Medicare and Klimek.

10. At no time did Klimek, Medicare, or anyone on their behalf, authorize Respondent to use any portion of the proceeds of draft number 1053652488 for Respondent's own business or personal use.

11. On or about April 17, 2012, Medicare agreed to accept $717.63 from the proceeds of Klimek's settlement in satisfaction of its lien.

12. Between April 20, 2012 and April 26, 2012, Respondent paid $717.63 to Medicare in payment of its lien and $3,027.81 to Klimek, which represented the balance of the settlement proceeds due to Klimek after payment of the Medicare and Medicaid liens.

13. By reason of the conduct described above, Respondent has engaged in the following misconduct:

a. conversion;

b. failure to promptly pay or deliver funds to a client which the client was entitled to receive, in violation of Rule 1.15(d) of the Illinois Rules of Professional Conduct (2010);

c. conduct involving dishonesty, fraud, deceit or misrepresentation, in violation of Rule 8.4(c) of the Illinois Rules of Professional Conduct (2010); and

d. conduct prejudicial to the administration of justice, in violation of Rule 8.4(d) of the Illinois Rules of Professional Conduct (2010).

COUNT II
(Revealing client information involving Richard Rinehart)

14. On or about September 6, 2012, Respondent agreed to represent Richard Rinehart ("Rinehart") in matters related to Rinehart's securing unemployment benefits from his former employer, American Airlines. Shortly before hiring Respondent, American Airlines had terminated Rinehart's employment as a flight attendant because Rinehart allegedly assaulted a fellow flight attendant during a flight. At that time, Rinehart paid Respondent $1,500 towards her fee.

15. Between September 6, 2012 and January 16, 2013, Respondent met with Rinehart on at least two occasions and obtained information from Rinehart concerning his employment history at American Airlines and information concerning the alleged incident involving the other flight attendant. Respondent also reviewed Rinehart's personnel file, which she had obtained from American Airlines.

16. On or about January 16, 2013, Respondent represented Rinehart at a telephonic hearing before the Illinois Department of Employment Security ("IDES"), which resulted in the IDES denying Rinehart unemployment benefits. Shortly thereafter, Rinehart terminated Respondent's representation of him.

17. On or about February 5, 2013, Rinehart posted a client review of Respondent's services on the legal referral website AVVO, in which he discussed his dissatisfaction with Respondent's services. Rinehart stated in the posting that "She only wants your money, claims "always on your side" is a huge lie. Paid her to help me secure

unemployment, she took my money knowing full well a certain law in Illinois would not let me collect unemployment. [N]ow is billing me for an additional $1500 for her time."

18. Between February 7, 2013 and February 8, 2013, Respondent contacted Rinehart by email and requested that Rinehart remove the February 5, 2013 posting about her on AVVO. Rinehart responded that he refused to remove the posting unless he received a copy of his files and a full refund of the $1,500 he had paid.

19. Sometime between February 5, 2013 and April 10, 2013, AVVO removed Rinehart's posting from its online client reviews of Respondent.

20. On or about April 10, 2013, Rinehart posted a second client review of Respondent on AVVO. In the April 10, 2013 posting, Rinehart stated that "I paid Ms. Tsamis $1500 to help me secure unemployment while she knew full well that a law in Illinois would prevent me from obtaining unemployment benefits."

21. On or about April 11, 2013, Respondent posted a reply to Rinehart's April 10, 2013 client review. In that reply Respondent stated that:

> "This is simply false. The person did not reveal all the facts of his situation up front in our first and second meeting. [*sic*] When I received his personnel file, I discussed the contents of it with him and informed him that he would likely lose unless the employer chose not to contest the unemployment (employers sometimes do is [*sic*]). Despite knowing that he would likely lose, he chose to go forward with a hearing to try to obtain benefits. I dislike it very much when my clients lose but I cannot invent positive facts for clients when they are not there. I feel badly for him but his own actions in beating up a female coworker are what caused the consequences he is now so upset about."

22. By stating in her April 11, 2013 AVVO posting that Rinehart beat up a female coworker, Respondent revealed information that she had obtained from Rinehart about the termination of his employment. Respondent's statements in the posting were designed to intimidate and embarrass Rinehart and to keep him from posting additional information about her on the AVVO website.

23. By reason of the conduct described above, Respondent has engaged in the following misconduct:

a. revealing information relating to the representation of a client without the client's informed consent, in violation of Rule 1.6(a) of the Illinois Rules of Professional Conduct (2010);

b. using means in representing a client that have no substantial purpose other than to embarrass, delay, or burden a third person, in violation of Rule 4.4 of the Illinois Rules of Professional Conduct (2010); and

c. conduct which is prejudicial to the administration of justice or which tends to defeat the administration of justice or to bring the courts or the legal profession into disrepute.

WHEREFORE, the Administrator requests that this matter be assigned to a panel of the Hearing Board, that a hearing be held, and that the panel make findings of fact, conclusions of fact and law, and a recommendation for such discipline as is warranted.

Respectfully submitted,

Jerome Larkin, Administrator
Attorney Registration and
Disciplinary Commission

By: Gina M. Abbatemarco

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William Wernz 10-1-2013

This month's blog post addresses three cases involving ratings of lawyers by online postings, through sites such as Avvo or Yelp. In two cases, lawyers used false identities, either to trash an opponent or to promote the lawyer. In the third case, a former client posted an on-line review of the lawyer's services that includes accusations the lawyer regarded as false. The lawyer's response disclosed confidential client information, raising the issue of how far a lawyer may make disclosures in self-defense.

A. Facts. Carlson represented the husband in a contentious divorce. Carlson had a difficult relationship with opposing counsel, S.L. Posing as a fictitious former client of S.L., Carlson posted a very negative review of S.L. on the lawyer review site, Avvo. Avvo shared the review with S.L. At S.L.'s request, Avvo determined the review came from Carlson's computer. S.L. shared the facts with Carlson's employer. After initially claiming innocence, Carlson confessed to the employer, removed the Avvo posting and apologized to S.L.

B. Consequences. Carlson resigned her employment. Carlson also stipulated to a public reprimand, imposed by the court. Carlson's conduct involved dishonesty and gratuitously burdening a third person, in violation of Rules 4.4(a) and 8.4(c). *In re Carlson,* 833 N.W.2d 402 (Minn. 2013).

C. Related Cases. *Thrashing* (5th degree assault) opposing counsel, has the same result as *trashing* - a public reprimand. *In re Stafford*, 373 N.W.2d 275 (Minn. 1985). Other cases in which attorneys have assumed false identities, or caused agents to do so, have resulted in public or private discipline, depending on the facts. William J. Wernz, *"Pretexting," Prevaricating and Getting the Facts,* MINN. LAW. (Oct. 30, 2006).

A. Old Self-Laudation. Decades ago, when ethics rules were more dominantly aimed at distinguishing the profession of lawyering from the lower standards of business, "self-laudation" was an offense. It meant unduly calling attention to oneself, as by advertising, or using blue stationery, or conniving to receive favorable notice in the media. Since the late 1970s, when the U.S. Supreme Court began applying First Amendment commercial speech standards to lawyer ads, few vestiges of the self-laudation prohibitions remain.

B. New Self-Laudation: Yelp. Some who are the subjects of online ratings are tempted to inflate ratings with their own opinions. A recently-filed lawsuit alleges that a San Diego firm surrendered to temptation. Allegedly, the firm caused employees and a spouse to post laudatory pseudo-client ratings. Whether the suit has merit and whether discipline proceedings may follow is to be determined.

A. Discipline Complaint. On August 26, 2013, the Illinois Attorney Registration and Discipline Commission (ARDC) filed an ethics complaint against a lawyer, Betty Tsamis. The second count alleged a malicious breach of confidentiality. *In re Tsamis,* Commission File No. 2013PR00095.

B. The Underlying Case. Tsamis represented Rinehart in an unemployment compensation case. The case was lost. A bad fact for Rinehart was that, as Tsamis later disclosed, Rinehart had been fired for beating up a female coworker. Rinehart did not pay all of Tsamis' fees.

C. The Client's Online Attacks. Rinehart posted a client review of Respondent's services on the legal referral website Avvo in which he discussed his dissatisfaction with Tsamis' services. Rinehart stated in the posting, "She only wants your money, claims 'always on your side' is a huge lie. Paid her to help me secure unemployment, she took my money knowing full well a certain law in Illinois would not let me collect unemployment. [N]ow is billing me for an additional $1500 for her time."

D. The Lawyer's Defense and Offense. Tsamis responded to Rinehart's second critical review. "This is simply false. The person did not reveal all the facts of his situation up front in our first and second meeting. [*sic*] When I received his personnel file, I discussed the contents of it with him and informed him that he would likely lose unless the employer chose not to contest the unemployment (employers sometimes do is [*sic*]). Despite knowing that he would likely lose, he chose to go forward with a hearing to try to obtain benefits. I dislike it very much when my clients lose but I cannot invent positive facts for clients when they are not there. I feel badly for him but his own actions in beating up a female coworker are what caused the consequences he is now so upset about." The ARDC Complaint alleged Tsamis' last sentence violated Rule 1.6.

E. The Minnesota Confidentiality Exception Rule – Disclosure in a "Controversy." Rule 1.6(b)(8) provides, "(b) A lawyer may reveal information relating to the representation of a client if: ... (8) the lawyer reasonably believes the disclosure is necessary to establish a claim or defense on behalf of the lawyer in an actual or potential controversy between the lawyer and the client, to establish a defense in a civil, criminal, or disciplinary proceeding against the lawyer based upon conduct in which the client was involved, or to respond in any proceeding to allegations by the client concerning the lawyer's representation of the client."

F. The Illinois (and Model Rule) Confidentiality Exception Rule. The ABA Model Rule, and Illinois Rule 1.6(b)(5) differ slightly from the Minnesota counterpart: "A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary: ... (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."

G. Longstanding Tradition Permitted a Lawyer to Disclose to "Defend. . .Against an Accusation" in Minnesota. From 1985 to 2005, Minnesota Rule 1.6(b) allowed a lawyer to reveal client information needed to "defend... against an accusation of wrongful conduct." Before 1985, the Minnesota Code of Professional Responsibility likewise allowed disclosure to defend against such an accusation. *Minn. Code. Prof. Resp.,* DR 4-101. Before the Code, an ABA opinion and a leading commentary likewise found, "The lawyer may make such disclosures as are necessary to protect himself against false accusations,...." Henry S. Drinker, *Legal Ethics* 138 (1953), citing ABA Op. 202 and other authorities. Thus, the traditional view was that a lawyer could disclose confidential client information as needed to defend the lawyer against an accusation of wrongful conduct, regardless of whether the debate occurred outside of litigation.

H. Necessary Disclosure Permitted Without Litigation Context. Some of the confidential information Tsamis revealed to defend herself was *not* the basis of any charge of wrongful disclosure. Tsamis' public disclosure of her advice to Rinehart, "he would likely lose" was *not* alleged to be improper. The ARDC thereby apparently took the position that information needed for defense in a "controversy," outside the litigation context, could be disclosed.

I. Allegedly Unnecessary Disclosure – "Beating Up a Female Coworker." Tsamis went a step farther in defending herself. She stated that Rinehart's "own actions in beating up a female coworker are what caused the consequences he is now so upset about." The ARDC charged this disclosure violated both Rule 1.6 and Rule 4.4(a). In the ARDC's view, the disclosure was unnecessary and was made to intimidate and embarrass Rinehart.

J. Analysis. Rinehart had twice posted that Tsamis sought fees rather than Rinehart's welfare, because Tsamis "took my money knowing full well a certain law in Illinois would not let me collect unemployment." The ARDC citations from Rinehart's postings do not include any claim by Rinehart that he had a meritorious case that had been lost by Tsamisis' incompetence. Thus, it may appear that the "beating up a coworker" disclosure was unnecessary for self-defense. However, Tsamis could argue that her disclosure was necessary to rebut Rinehart's claim that Tsamis' failure to disclose a law was the problem with his case, rather than his own conduct. Tsmasis might also be able to argue that she did not make any disclosure, because the filings in Rinehart's case are public records.

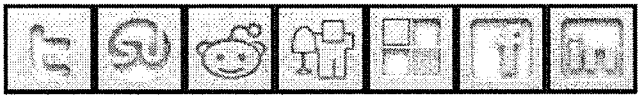
K. Are Reports From Public Records Disclosures of Client Information? Assume that Rinehart's unemployment compensation file was a public record. In Minnesota, does a lawyer's disclosure of client information in a public record fall within the protection of Rule 1.6? The only reported case gives a negative, but not fully authoritative, answer. OLPR charged Fuller, a lawyer, with violating Rule 1.6 by disclosing his client's criminal record. A Supreme Court referee rejected this charge, reasoning, "A similar check by any member of the public would show that Hanson had been convicted of the bad check charge." *In re Fuller*, 621 N.W.2d 460 (Minn. 2001). OLPR did not appeal this finding, and so the issue was not presented to the Supreme Court. Most authorities hold that Rule 1.6 is violated by a lawyer's unnecessary disclosure of negative information about clients found in public records, at least when the records are not readily available or well known.

L. Does "Defense in a Controversy" Require Actual or Looming Litigation? In the author's opinion, "controversy" extends beyond actual or looming litigation, to situations such as Rinehart's attack on Tsamis' reputation. Without deciding whether all of Tsamis' disclosures were "necessary," the author agrees with the ARDC that disclosures necessary for defense may be made in an online controversy, such as that involving Tsamsis and Rinehart. For approximately before 2005, when the current Rule 1.6 was adopted, disclosures necessary to defend against an "accusation of wrongful conduct" were permitted, outside the litigation context. There was no intent, with the 2005 Rule amendments, to alter this permission, by using "controversy," rather than "accusation." In addition, a lawyer is permitted to make necessary disclosures "to respond in any proceeding to allegations by the client concerning the lawyer's representation of the client." Rule 1.6(b)(8). If "controversy" were restricted to a "proceeding," these provisions would be duplicative.

M. A Problem in Ethics Jurisprudence. Whether Tsamis might make the arguments above, and whether they might prevail, are compromised by Count I of the Complaint against her. That count alleges she converted client funds. If Count I is sustained, it may well eclipse any fine distinctions regarding a lawyer's right of disclosure in self-defense.

In response to an inquiry whether OLPR has taken a position regarding whether the "defense in a controversy" exception to confidentiality applies only in litigation, OLPR reported it "does not yet have a specific policy or position that addresses this question."

Categories: Latest Revisions *Tags:* Avvo, Confidentiality, Dishonesty, Internet, Online Ratings, reviews, Rule 1.6, Rule 4.4, Rule 8.4, self-laudation, Yelp



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