2015 FLORIDA LEGAL ETHICS REVIEW

By:

Timothy P. Chinaris
Associate Dean and Professor
Belmont University College of Law
Nashville, Tennessee

Vice Chair, Florida Bar Committee on Professionalism
Past Chair, Florida Bar Professional Ethics Committee

Lawyers are busier than ever before. Many things compete for their time and attention. Not only must lawyers stay on top of developments in their own fields of practice, they must keep up with changes in legal ethics that potentially affect *all* lawyers.

These materials are designed to highlight significant developments in Florida legal ethics. The following summaries of rule changes, cases, and ethics opinions reflect developments that occurred during 2015. The summaries are arranged by subject.

For continuing updates on Florida legal and judicial ethics developments, please visit the "sunEthics" website (www.sunEthics.com).

Subjects addressed in this edition of the *Florida Legal Ethics Review* are:

References to rules or a "Rule" are to the Rules Regulating The Florida Bar, unless otherwise noted. (The Rules of Professional Conduct are in Chapter 4.)

References to "F.S." are to the Florida Statutes.

References to "Supreme Court" are to the Florida Supreme Court, unless otherwise noted.

References to "Board of Governors" are to the Florida Bar Board of Governors.

References to the "Bar" are to The Florida Bar.

RULE CHANGES (AND PROPOSED CHANGES)

Supreme Court amends Rules Regulating The Florida Bar concerning lawyer discipline, confidentiality, trust accounting, and professionalism. *In re: Amendments to the Rules Regulating The Florida Bar (Biennial Petition)*, 167 So.3d 412 (Fla. 2015).

Responding to a petition from the Bar as part of its biennial rules filing, the Supreme Court approved a number of changes to the Rules Regulating The Florida Bar. The Court also declined to approve some proposed changes. The changes took effect October 1, 2015. Below is a summary of significant rule amendments.

Rule 3-5.1(e) (duration of suspension period). The amended rule deletes language referring to suspension for an indefinite period of time, instead authorizing suspension for a definite time period or "until further order of the court."

Rule 3-5.2(c)-(e) (funds frozen in trust account). The amended rule sets out procedures authorizing referees to determine entitlement to, and oversee disbursement of, funds frozen in a lawyer's trust account pursuant to an emergency suspension or interim probation order.

Rule 3-5.3(c) (expansion of diversion in disciplinary cases). Previously a lawyer could have only one case every 7 years diverted out of the disciplinary system to a practice and professionalism program (e.g., advertising school, trust accounting school). The amended rule permits one diversion every 5 years "for the same type of rule violation." A second diversion for a different type of violation can occur, but not until at least one year after the first diversion.

Rule 3-7.9(d) (consent judgments). Adopted on the Court's own motion, the amended rule provides that a conditional plea entered into "may not permit a respondent to begin serving a suspension or disbarment until the Supreme Court of Florida issues an order or opinion approving the recommended discipline."

Rule 3-7.10(b) (reinstatement procedures). The amended rule specifies that a suspended lawyer may not file a petition for reinstatement before serving at least 80% of the suspension.

Rule 4-1.6(c)(6) (exception to confidentiality rule). This new exception to the lawyer-client confidentiality rule allows lawyers to reveal confidential information to "detect and resolve conflicts of interest between lawyers in different firms" that can arise when lawyers change employers or when the composition or ownership of a firm changes. It applies only if revealing the information "would not comprise the attorney-client privilege or otherwise prejudice the client."

Rule 4-1.6(e) (inadvertent disclosure of confidential information). This new rule requires a lawyer to make reasonable efforts to prevent inadvertent or unauthorized disclosure of, or unauthorized access to, confidential information. The Court noted that, "as technology continues to evolve, lawyers must make reasonable efforts to prevent the unauthorized or inadvertent disclosure of confidential information." The amended Comment identifies factors to consider in determining whether a lawyer has acted reasonably under the circumstances.

Rule 4-5.3, Comment (duties regarding nonlawyer assistants). A lawyer must make reasonable efforts to ensure that their nonlawyer assistants' conduct is compatible with the lawyer's professional obligations. The amended Comment specifies that this duty applies regardless of whether the nonlawyer assistant is an employee or someone *outside* of the law firm, such as an investigative service, a document management company, or a cloud-based data storage provider.

Rule 5-1.1(a)(1) (depositing own money into trust account). The amended rule authorizes a lawyer to deposit his or her personal funds into the trust account to cover a shortage in the account. A lawyer who does this must immediately notify the Bar of the shortage, the cause for the shortage, and the amount deposited.

Rule 5-1.2(f) (trust account records of dissolved or sold firms). The amended rule specifies that the partners are responsible for retaining the trust account records when a firm dissolves. When a firm is sold the seller must make arrangement for retention of the firm's trust account records.

Rule 6-12.3 (basic skills professionalism requirement). The professionalism component of the Basic Skills Course Requirement for newly admitted lawyers now may be completed online.

REJECTED proposal; Rule 5-1.2 (annual trust accounting compliance certificate). The Court rejected a proposal to eliminate the requirement that lawyers file an annual trust accounting certificate with the Bar. "We believe that the requirement that lawyers submit a yearly trust account certificate is an important and useful tool in ensuring that lawyers are aware of the trust accounting requirements, and that they affirm their compliance with those requirements. Accordingly, we take this opportunity to make clear that, as required in Bar Rule 5-1.2(d)(5), every member of The Florida Bar must file each year a trust accounting certificate showing his or her compliance with the trust accounting rules. The failure to file the trust accounting certificate will result in the lawyer being deemed delinquent and ineligible to practice."

Supreme Court approves rule defining retainers, flat fees, and advance fees and specifying how they are handled for trust accounting purposes. *In re: Amendments to Rule Regulating The Florida Bar 4-1.5 – Fees and Costs for Legal Services*, 175 So.3d 276 (Fla. 2015).

In October 2014 the Bar filed a petition asking the Supreme Court to approve changes to Rule 4-1.5 regarding attorney's fees. On September 17, 2015, the Court approved one aspect of the Bar's proposals effective October 1, 2015. The amended Rule provides definitions for "retainer," "flat fee," and "advance fee," and the revised Comment specifies how each of these types of fees should be treated for trust accounting purposes.

New Rule 4-1.5(e)(2)(A) defines a "retainer" as "a sum of money paid to a lawyer to guarantee the lawyer's future availability." It is "not payment for past legal services and is not payment for future services."

New Rule 4-1.5(e)(2)(B) defines "flat fee" as "a sum of money paid to a lawyer for all legal services to be provided in the representation." Consistent with the existing Comment, a flat fee may be designated as "non-refundable" but remains subject to the rule against excessive fees.

New Rule 4-1.5(e)(2)(C) defines an "advance fee" as "a sum of money paid to the lawyer against which the lawyer will bill the client as legal services are provided."

As for trust account treatment of these fees, the revised Comment to Rule 4-1.5 specifies: "A nonrefundable retainer or nonrefundable flat fee is the property of the lawyer and should not be held in trust. If a client gives the lawyer a negotiable instrument that represents both an advance on costs plus either a nonrefundable retainer or a nonrefundable flat fee, the entire amount should be deposited into the lawyer's trust account, then the portion representing the earned nonrefundable retainer or nonrefundable flat fee should be withdrawn within a reasonable time. An advance fee must be held in trust until it is earned."

Supreme Court approves "housekeeping" changes to Rules of Professional Conduct regarding duties to prospective clients, misdirected electronic communications, and unauthorized practice of law. *In re: Amendments to Rules Regulating The Florida Bar (Biennial Petition Housekeeping)*, 164 So.3d 1217 (Fla. 2015).

Responding to the Bar's biennial rules petition, the Supreme Court approved some "housekeeping" changes to the Rules Regulating The Florida Bar. The changes took effect October 1, 2015. Below is a summary of significant rule amendments.

Rule 4-1.18, Comment (consultation with prospective client). The amended rule adds examples to help determine when a "consultation" with a prospective client has occurred. This is important because a lawyer who "consults" with and learns information from a prospective client can be conflicted out of representing someone adverse to the prospective client. One example is a lawyer whose advertising "specifically requests or invites the submission of information about a potential client" without cautionary disclaimers.

Rule 4-4.4(b) (inadvertently sent electronically stored information). The amendment clarifies that a lawyer who receives documents "or electronically stored information" that were inadvertently sent must promptly notify the sending lawyer. The Comment addresses duties regarding "metadata" embedded in electronic documents.

Rule 4-5.5, Comment (practice of law in Florida by out-of-state lawyers). An out-of-state lawyer engages in the unlicensed practice of law by having "an office or other regular presence in Florida for the practice of law." The amended Comment expands on the meaning of "regular presence." For example, a lawyer licensed only in another state cannot open an office in Florida, even if the office is limited to the practice of the law of the state where the lawyer is licensed. Also, a lawyer licensed in another state who is admitted pro hac vice for a Florida case may not open an office in Florida to work on the case while it is pending. Additionally, an out-of-state lawyer's presence in Florida "may be regular even if the lawyer is not physically present here."

Supreme Court rejects Bar's proposed amendments to rule regarding lawyer referral services. *In re: Amendments to Rule Regulating The Florida Bar 4-7.22 – Lawyer Referral Services*, 175 So.3d 779 (Fla. 2015).

In October 2014 the Bar filed a petition asking the Court to amend Rule 4-7.22. The proposals would have added requirements applicable to lawyers who participate in lawyer referral

services. The Bar's petition resulted from recommendations by the Bar's Special Committee on Lawyer Referral Services and mostly related to private (i.e., not bar-sponsored) services.

The amendments rejected by the Court would have provided that a lawyer could not accept referrals from a lawyer referral service unless: the service does not require, or economically pressure, lawyers to refer clients to anyone for other services (e.g., medical services); and does not use a misleading name (e.g., one indicating that the service can provide legal services). The rejected proposal also provided that lawyers who accept referrals from a referral service must: designate a lawyer in the firm responsible for answering Bar inquiries; pay an administrative fee to the Bar; not make initial contact with a prospective client referred by the service in violation of advertising or solicitation rules; not refer clients to anyone in exchange for referrals from the service; not accept referrals that interfere with the lawyer's independence of professional judgment; not refer clients to the service or its owners without complying with conflict of interest rules; and provide written disclosure to clients that they were referred from the service and that the lawyer paid to receive referrals (if that is the case).

The Court appeared to base its concerns about "potential harm" to the public "from for-profit lawyer referral services that also refer clients to other businesses" on what it described as "anecdotes" from the Report of the Bar's Special Committee on Lawyer Referral Services.

The Court directed the Bar "to propose amendments to rule 4-7.22 that preclude Florida lawyers from accepting referrals from any lawyer referral service that is not owned or operated by a member of the Bar. We further instruct the Bar to review any other rules or regulations that address lawyer referral services to determine whether new rules are necessary to implement our direction today. Based upon this review, the Bar may conclude that amendments to, or repeal of, other rules are required." The Bar's proposal is to be submitted to the Court on or before May 24, 2016.

Supreme Court approves stay and directs Bar to submit new proposal for rule regarding fees for extraordinary lien resolution services. *In re: Amendments to Rule Regulating The Florida Bar 4-1.5 – Fees and Costs for Legal Services*, 175 So.3d 276 (Fla. 2015).

In 2012 the Supreme Court rejected a Bar proposal to allow a personal injury lawyer handling a case that required "extraordinary subrogation or lien resolution services" to refer that matter to someone outside the lawyer's law firm for these services, with that person or entity charging the client a separate fee (not shared in by the referring lawyer). The Court disagreed with the underlying premise. "After considering the concerns raised in the comment and the discussion at oral argument, we decline to adopt new subdivision (f)(4)(E). Indeed, we take this opportunity to clarify that lawyers representing a client in a personal injury, wrongful death, or other such case charging a contingent fee should, as part of the representation, also represent the client in resolving medical liens and subrogation claims related to the underlying case." *In re: Amendments to the Rules Regulating The Florida Bar (Biannual Report)*, 101 So.3d 807 (Fla. 2012).

The Bar reworked the lien resolution services proposal and submitted the revised version to the Court in in October 2014. After oral argument in May 2015, the Bar petitioned the Court for a stay to allow the Bar to submit a third proposal on the subject.

On September 17, 2015, the Court granted the Bar's motion for stay, directing the Bar "to file a new petition with its alternative proposal on or before January 15, 2016."

Supreme Court denies petition to authorize Bar to raise membership fees by up to $100 per year to be used for legal aid to poor. *In re: Amendments to Rule Regulating The Florida Bar 1-7.3*, 175 So.3d 250 (Fla. 2015).

Using a procedure in Rule 1-12.1(f), 522 Bar members petitioned the Supreme Court to amend the Rules Regulating The Florida Bar. The proposed amendment to Rule 1-7.3 would have authorized the Board of Governors to raise annual membership fees by up to $100 in order to provide additional funding for the Florida Bar Foundation's Legal Aid to the Poor Program. The Board opposed the proposed amendment.

The Supreme Court denied the petition "because we believe this issue requires further study and a more comprehensive approach." The proposal "does not present the type of comprehensive solution that is needed to address the crisis in funding for legal aid."

Justice Pariente wrote a concurring opinion, joined by Chief Justice Labarga, explaining that she concurred in the majority's decision to deny the petition "at this time" because "the petition does not require The Florida Bar to raise the annual membership fee, and the Bar has steadfastly opposed the approach suggested by the Petitioners."

Justice Quince and Justice Lewis each wrote dissenting opinions.

Federal court strikes down Bar rule prohibiting non-certified lawyers from claiming specialization or expertise in particular areas of law. *Searcy v. Florida Bar*, __ F.Supp.3d __ (N.D. Fla., No. 4:13cv664-RH/CAS, 9/30/2015), 2015 WL 5769238.

See discussion in "Advertising" section.

Supreme Court holds that right to counsel in termination of parental rights cases includes right to effective assistance of counsel. *J.B. v. Dept. of Children and Families*, 170 So.3d 780 (Fla. 2015).

See discussion in "Ineffective Assistance of Counsel" section.

On own motion, Supreme Court amends Rules of Judicial Administration to prescribe proper attire for judges during court proceedings. *In re: Amendments to the Florida Rules of Judicial Administration – New Rule 2.340,* 174 So.3d 991 (Fla. 2015).

On its own motion, the Supreme Court amended the Rules of Judicial Administration to prescribe proper attire for judges during court proceedings. New Rule 2.340 provides: "During any judicial proceeding, robes worn by a judge must be solid black with no embellishment." The new rule was effective immediately.

The Court explained: "Presiding judges wearing different colored robes or robes with varying embellishments could result in uncertainty for those coming before our courts and serve to counter the efforts the branch has employed to gain the public's trust. . . . The public should not have to guess as to the meaning of different colored, patterned, or embellished robes. Promoting uniformity in judicial attire, by requiring all judges to wear unembellished, solid black robes, will

no doubt avoid these concerns and promote public trust and confidence. The people of Florida have a right to expect equal justice every day, in every court in this state, and should not have to question whether equal justice is being dispensed based on the color of a judge's robe."

Supreme Court amends Rules of Appellate Procedure to implement mandatory statewide electronic records on appeal. *In re: Amendments to Rule of Appellate Procedure 9.200,* 164 So.3d 668 (Fla. 2015).

The Supreme Court, on its own motion, amended Fla.R.App.P. 9.200 to implement mandatory statewide electronic records on appeal. The amendment took effect October 1, 2015.

The Court explained some of the amended rule's provisions: "The transcript of the trial must be kept separate from the remainder of the record on appeal. All pages of the remainder of the record, including the cover page, index, and progress docket, must be consecutively numbered. The entire record, except for the trial transcript, must be compiled into a single text searchable PDF file that must be bookmarked as provided in the rule and paginated to exactly match the pagination of the index of the record on appeal. All filings must be included in the PDF file in their unredacted form. The transcript of the trial must be converted into a second text searchable PDF file that must be paginated to exactly match the pagination of the index of the transcript of the trial filed under subdivision (b)(2) of rule 9.200."

The clerk of the lower court "must transmit the PDF files containing the record and trial transcript to the appellate court via the Florida Courts E-Filing Portal or in accordance with the appellate court's administrative order governing transmission of the record."

Supreme Court adopts new Rule of Juvenile Procedure regarding appointing counsel to dependent children with special needs. *In re: Amendments to the Florida Rules of Juvenile Procedure*, 158 So.3d 523 (Fla. 2015).

See discussion in "Ineffective Assistance of Counsel" section.

Supreme Court amends "Code for Resolving Professionalism Complaints." *In re: Amendments to the Code for Resolving Professionalism Complaints*, 174 So.3d 995 (Fla. 2015).

See discussion in "Professionalism" section.

Board of Governors approves "Professionalism Expectations" to replace Ideals and Goals of Professionalism.

In January 2015 the Board of Governors approved a new compilation of professionalism expectations designed to apply in the new age of instant electronic communication. The new "Professionalism Expectations" replace the former Ideals and Goals of Professionalism, which were adopted almost 25 years ago and had not been changed.

The Professionalism Expectations incorporate both aspirational goals and ethical standards, and are broken down into 7 sections: Commitment to Equal Justice Under the Law and to the Public Good; Honest and Effective Communication; Adherence to a Fundamental Sense of Honor, Integrity, and Fair Play; Fair and Efficient Administration of Justice; Decorum and Courtesy; Respect for the Time and Commitments of Others; and Independence of Judgment.

Board of Governors votes to add technology-related amendments to Rules of Professional Conduct and to adopt CLE requirements in technology.

In July 2015 the Board of Governors approved 2 rule changes relating to lawyers and their knowledge of technology. To become effective, these changes must be approved by the Supreme Court. Both proposed rule changes will be submitted to the Court.

The Board overwhelmingly approved changes to the Comment to Rule 4-1.1, regarding competence in the practice of law. A new provision of the Comment would provide: "Competent representation may also involve the association or retention of a non-lawyer advisor of established technological competence in the field in question. Competent representation also involves safeguarding confidential information relating to the representation, including, but not limited to, electronic transmissions and communications." A sentence in the existing Comment would be amended to add the underscored phrase: "To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, engage in continuing study and education, <u>including an understanding of the benefits and risks associated with the use of technology</u>, and comply with all continuing legal education requirements to which the lawyer is subject."

A more controversial rule change also was narrowly approved by the Board. If approved by the Court, Bar members will be required to take 3 hours of CLE in technology every 3 years. To accommodate the new technology hours, the total number of CLE hours required for Florida lawyers would be increased to 33 hours every 3 years (from the present 30).

Board of Governors votes unanimously to reject admission on motion to Florida Bar, with or without reciprocity.

In October 2015 the Board of Governors voted on a recommendation made by a subcommittee of the Bar's Vision 2016 Commission. After studying the issue, the subcommittee recommended that the Board consider approving some form of admission on motion to the Florida Bar. The Board voted unanimously to reject admission on motion, with or without reciprocity.

CASES AND ETHICS OPINIONS (BY SUBJECT)

ADVERTISING

Federal court strikes down Bar rule prohibiting non-certified lawyers from claiming specialization or expertise in particular areas of law. *Searcy v. Florida Bar*, __ F.Supp.3d __ (N.D. Fla., No. 4:13cv664-RH/CAS, 9/30/2015), 2015 WL 5769238.

A law firm filed a federal suit challenging 2 lawyer advertising rules. The first, Rule 4-7.13, bans deceptive and inherently misleading advertisements, including "references to past results unless such information is objectively verifiable." Plaintiffs argued that this rule violated the First Amendment on its face and as applied, and was unconstitutionally vague. (The vagueness challenge was rejected in an earlier order.) The court ruled that the challenge to Rule 4-7.13 was not ripe because Plaintiffs failed to appeal the Standing Committee on Advertising's adverse interpretation of the rule to the Board of Governors.

The second, Rule 4-7.14, prohibits a lawyer from advertising that he or she is "a specialist, and expert, or other variations of those terms" unless the lawyer is certified by the Florida Bar, another bar's comparable certification program, or an organization accredited by the ABA.

The prohibition on the use of "specialist" or "expert" was ripe for challenge. "[Law Firm] cannot say it specializes or has expertise in mass-tort or unsafe-product cases, or even in personal injury cases, even though the firm undeniably has expertise in these areas. Nor can any individual attorney" in the firm make such a claim, "even if the attorney handles only cases of that kind, and even if the attorney has successfully handled many such cases."

Applying the First Amendment framework of analysis from *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York*, 447 U.S. 557 (1980), the court concluded that "the Bar's ban on truthful statements about a lawyer's or law firm's specialty or expertise, at least as applied to websites, fails all three prongs of the *Central Hudson* test."

Although the challenge was brought in the context of Law Firm's website, the Bar has since announced that its advertising review program will no longer find non-compliance when an ad makes truthful claims of specialization or expertise. See "Court strikes rule on who may call themselves experts," in the October 15, 2015, issue of the *Florida Bar News*.

Board of Governors rules that text messaging to prospective clients is permitted as advertising rather than prohibited solicitation.

In July 2015 the Board of Governors overturned a Standing Committee on Advertising decision on lawyers' use of text messaging in an effort to obtain clients.

The Committee had concluded that sending text messages to prospective clients was "solicitation" rather than a form of advertising. Solicitation is prohibited by Rule 4-7.18(a). The Board of Governors overruled the advertising committee's decision. Text messages are a form of advertising and, as such, are permissible if the sending lawyer follows the Rules governing direct written communication to prospective clients. These regulations in Rule 4-7.18(b) include requirements such as: stating in the first line of the text that the text is an advertisement; filing copies for review with the Bar; and keeping a record of the texts and who their recipients.

ATTORNEY-CLIENT RELATIONSHIP

Lawyer hired to represent trustee does not owe fiduciary duty to trust beneficiaries, per Eleventh Circuit. *Bain v. McIntosh*, 597 Fed.Appx. 623 (11th Cir. 2015).

Lawyer was retained to represent Trustee. Two beneficiaries later sued Lawyer for breach of fiduciary duty. Lawyer moved for summary judgment, asserting that a trustee's lawyer owes no duty to the beneficiaries. The court granted Lawyer's summary judgment motion.

The Eleventh Circuit affirmed, deciding that Lawyer "owed no fiduciary duty to" the beneficiaries. The court cited 3 authorities for support. First, under F.S. 90.5021(2), regarding attorney-client privilege and communications between a lawyer and a client acting as a fiduciary, "only the person or entity acting as a fiduciary is considered to be a client of the lawyer." Second, the Comment to Rule 4-1.7 states: "In Florida, the personal representative is the client rather than the estate or the beneficiaries." Third, ABA Formal Ethics Opinion 94-380 states: "The majority of jurisdictions consider that a lawyer who represents a fiduciary does not also represent the beneficiaries."

In this case, the beneficiaries "have not identified any contrary legal authority in Florida establishing a fiduciary relationship between a lawyer representing a trustee and the beneficiaries of a trust." The court rejected the beneficiaries' reliance on *In re Estate of Gory*, 570 So.2d 1381 (Fla. 4th DCA 1990), which held that there was no attorney-client relationship between the law firm hired to represent the personal representative of an estate and the estate beneficiaries, *even if* the law firm owed a fiduciary duty to the beneficiaries.

Court erred in holding that, as matter of law, lawyer representing ward's court-appointed emergency temporary guardian owed ward no duty under third-party beneficiary theory. *Saadeh v. Connors*, 166 So.3d 959 (Fla. 4th DCA 2015).

See discussion in "Legal Malpractice" section.

Lawyer is presumed to be authorized to act for client and accept service on client's behalf. *Horton v. Horton*, 179 So.3d 459 (Fla. 1st DCA 2015).

In a domestic relations case, the court determined that it had personal jurisdiction over Former Husband and ordered him to pay Former Wife's fees. Former Husband's then-counsel had filed an Acceptance of Service on his behalf. On appeal Former Husband asserted that the court erred in ruling that it had personal jurisdiction over him.

The First DCA affirmed. Former Husband argued that there was no evidence in the record to show that his counsel had authority to accept service. Such a showing was not necessary. "[T]here exists a presumption that an attorney, as an officer of the court, is duly authorized to act for a client whom he or she professes to represent. See *Chancelor v. BWC Invs.*, 57 So.3d 969, 971 (Fla. 4th DCA 2011). The Former Husband acknowledges on appeal that his affidavit filed in support of his motion to dismiss did not directly address his relationship with [his counsel] or her authority to accept or waive personal service on his behalf. Based upon such, the presumption that [counsel] had authority to accept service on the Former Husband's behalf is conclusive."

Court erred in imputing statements of counsel to client and finding fraud on court based on those statements. *In re M.W.*, __ So.3d __ (Fla. 2d DCA, No. 2D15-3073, 12/30/2015), 2015 WL 9487595.

Birth mother C.B. moved to withdraw consent to adoption of her child. She was represented by privately retained counsel, Lawyer. At a case management conference, Lawyer "orally asserted that C.B. was not permitted to see the child until she signed the consent paperwork." After an evidentiary hearing, the court "found that C.B. committed fraud on the court based solely on [Lawyer's] allegations at the earlier case management conference" and dismissed C.B.'s motion to withdraw consent.

The Second DCA quashed the order. "The only basis for the court's finding that C.B. perpetrated fraud on the court was private counsel's representation that the adoption entity denied C.B. access to her child in order to pressure her into signing the consent form. . . . The statements made by private counsel during the case management conference should not have been imputed to C.B. without a proper evidentiary hearing. See, e.g., *Traylor v. State*, 596 So.2d 957, 979 (Fla. 1992) (Kogan, J., concurring in part, dissenting in part) (explaining that the acts of an attorney may be imputed to the client except in circumstances involving fraud or violations of professional ethics). The record does not reflect that there was any evidentiary support for the trial court's finding that private counsel made the statements in reliance on information she received from C.B."

Board of Governors affirms Florida Ethics Opinion 14-1 regarding duties of lawyers in advising clients to "clean up" their social media pages before litigation is filed.

In October 2015 the Board of Governors affirmed Florida Ethics Opinion 14-1, which addresses a lawyer's ethical obligations in advising clients to "clean up" their social media pages before suit is filed in order to remove embarrassing information that the lawyer believes is not material to the likely litigation. The opinion was published in February 2015 and affirmed by the Professional Ethics Committee in June 2015.

The essential principles of Opinion 14-1 are summarized in its closing paragraph: "[T]he inquirer may advise that a client change privacy settings on the client's social media pages so that they are not publicly accessible. Provided that there is no violation of the rules or substantive law pertaining to the preservation and/or spoliation of evidence, the inquirer also may advise that a client remove information relevant to the foreseeable proceeding from social media pages as long as the social media information or data is preserved."

CANDOR TOWARD THE TRIBUNAL

Supreme Court increases lawyer's suspension to one year for knowingly violating discovery obligations, failing to correct false testimony at deposition, and failing to notify opponent that she possessed property in which opponent claimed interest. *Fla. Bar v. Dupee*, 160 So.3d 838 (Fla. 2015).

See discussion in "Disciplinary Proceedings" section.

Party's "foolish" and "astounding negligence" regarding missing promissory note might warrant sanctions, but does not rise to level of fraud upon court. *Deutsche Bank National Trust Co. v. Avila-Gonzalez*, 164 So.3d 90 (Fla. 3d DCA 2015).

Bank sued Borrower to foreclose a note and mortgage. Bank proceeded through extensive discovery alleging that the note was lost. In reality, the note was in the possession of Bank's servicing agent. Bank discovered this more than a year and a half after filing suit. The Bank then served responses to discovery revealing this.

The court issued an order to show cause why Bank's action should not be dismissed for fraud upon the court. When neither party appeared for trial (apparently assuming the case had been removed from the calendar), the court dismissed the action without prejudice. The court nevertheless went forward with the show cause hearing. The court vacated its prior dismissal order, dismissed the case with prejudice, and canceled the note and mortgage. Bank appealed.

The Third DCA reversed. Bank's "astounding negligence" regarding possession of the note wasted the time of the court and opposing counsel. Despite this, the court erred in dismissing the case with prejudice. "A party's negligence that undermines the party's own case may be maddeningly foolish; it may test the limits of the best trial judge's patience; but it does not rise to a fraud upon the court. When such negligence causes the opposing side to incur unnecessary attorney's fees, the proper and normal remedy for that injury is a compensating award of attorney's fees, not a lottery-like windfall to a party like the cancellation of the note and mortgage."

COMMUNICATION

First DCA upholds constitutionality and validity of medical malpractice presuit notice statutes allowing for ex parte interviews between potential defendants and claimant's health care providers. *Weaver v. Myers*, 170 So.3d 873 (Fla. 1st DCA 2015).

Appellant filed a complaint for declaratory judgment and injunction, alleging that changes to the medical malpractice presuit notice sections of F.S. 766.106 and 766.1065 violated the Florida Constitution and HIPPA (Health Insurance Portability Accountability Act of 1996). Under the amended statutes a claimant "cannot institute a medical malpractice lawsuit without authorizing ex parte interviews between the claimant's health care providers and the potential defendant."

Specifically, Appellant contended that the statutory amendments: "(1) violate the separation of powers doctrine; (2) violate the constitutional limitation on special legislation; (3) impermissibly burden the constitutional guarantee of free access to the courts; (4) violate the decedent's constitutional right to privacy; and (5) are preempted by" HIPAA.

The trial court determined that the statutes were valid. The First DCA affirmed.

Court abused discretion in denying motion for post-trial juror interview. *Barrios v. Locastro,* 166 So.3d 863 (Fla. 4th DCA 2015).

Plaintiff sued Defendant for neck injuries allegedly sustained in an auto accident. During voir dire the jury panel was asked whether they or an immediate family member had been a plaintiff in a personal injury suit, had made a claim for money damages without filing suit, had been diagnosed with a herniated disc, or had made a claim to recover Social Security benefits. Juror Diaz did not respond to any of these questions.

The jury found Defendant 25% at fault and Plaintiff 75% at fault for the accident. After the verdict, Defendant's investigator discovered that Juror Diaz "was listed as a possible witness in her mother's case. Additionally, her mother had undergone surgery on her spine as a result of the fall. The investigation also revealed that Juror Diaz's father had received Social Security disability benefits." Defendant's motion for juror interview was denied because Defendant "failed to demonstrate how Juror Diaz's failure to disclose this information was material."

The Fourth DCA reversed and remanded for the requested interview. "The information Juror Diaz concealed about her mother's lawsuit was material. It pertained to a lawsuit similar enough to the instant case that not knowing this information prevented appellant's trial counsel from making an informed decision."

Court erred in granting motion for post-trial juror interviews, where information in question was immaterial and irrelevant to jury service in case. *Penalver v. Masomere*, __ So.3d __ (Fla. 3d DCA, No. 3D14-2193, 11/4/2015), 2015 WL 6738845.

Defendant physician prevailed in a medical malpractice suit after a 3-week jury trial. Plaintiff moved for post-trial interview of jurors, alleging that court records showed 3 jurors had litigation history that was not disclosed during voir dire. The court granted the motion.

The Third DCA granted Defendant's certiorari petition and quashed the order granting the interviews. *De La Rosa v. Zequeira*, 659 So.2d 239 (Fla. 1995), established a 3-part test to determine whether a juror's nondisclosure of information during voir dire warrants a new trial. The first part requires the movant to show that the undisclosed litigation history was "relevant and material to their jury service." Plaintiff failed to make that showing. Several of the prior cases in question were more than a decade old, and none were material to the current litigation.

CONFIDENTIALITY AND PRIVILEGES

Joint defense agreement does not have to be in writing for communication to be protected by attorney-client privilege. *AG Beaumont 1, LLC v. Wells Fargo Bank, N.A.*, 160 So.3d 510 (Fla. 2d DCA 2015).

Twenty-five limited liability companies ("LLCs") were joint defendants in a foreclosure case. The plaintiff dropped one defendant, "Adler," and then subpoenaed it for "correspondence between Adler and the LLCs." The LLCs objected to production of certain emails, asserting attorney-client privilege. The LLCs argued that they coordinated their defense with Adler while the emails were exchanged, and filed an affidavit to that effect. One LLC member filed an affidavit

stating that she did not have an email account and used her investment advisor's email address. Without conducting an in camera review, the court ordered production.

The Second DCA quashed the production order. Ordinarily the attorney-client privilege is waived when the holder makes a voluntary disclosure to a third party. "But an exception to the waiver rule permits litigants who share unified interests in litigation to exchange privileged information in order to adequately prepare their cases without losing the protection afforded by the privilege. . . . In this case, the LLCs and Adler did not have a written agreement for a joint defense. But we have found no case requiring a written agreement. If an in camera review were to reveal that the LLCs and Adler intended to maintain confidentiality while sharing information in pursuit of their common interests, the LLCs would be entitled to protect the communications by asserting the attorney-client privilege. Thus, review is necessary to resolve the privilege claim . . ."

The court also addressed the LLC member's use of a third party's email account. A communication involving a third party nevertheless may be considered confidential if it is made through a privileged person's agent who is "necessary for the transmission of the communication." F.S. 90.502(1)(c)(2). The member's investment advisor could be considered such an agent; in light of the member's affidavit, "the use of the third party's e-mail address thus presents a question for the circuit court's determination" and does not automatically foreclose the claim of privilege.

Attorney-client privilege might not be waived when person within ambit of privilege uses outside person in order to receive emailed communication. *AG Beaumont 1, LLC v. Wells Fargo Bank, N.A.*, 160 So.3d 510 (Fla. 2d DCA 2015).

See summary above.

Court erred ruling that corporation waived its attorney-client privilege by disclosing documents to corporation's agents, where court failed to conduct in camera inspection of documents. *Las Olas River House Condominium Ass'n, Inc. v. Lorh, LLC*, __ So.3d __ (Fla. 4th DCA, No. 4D15-2289, 12/9/2015), 2015 WL 8347977.

Plaintiff and his related entity sued a condominium association and its officers "after years of contention." Plaintiff sought production of communications within the past 5 years that mentioned the plaintiffs and were made between the defendants "and either (1) the attorney who served as the association's general counsel during this period, or (2) the attorney whom the association retained during this period to advise it concerning [plaintiff's] repeated threats to sue." The defendants filed privilege logs, objecting on the ground of attorney-client privilege.

The plaintiff asserted that any privilege was waived because the documents were received by or copied to 2 individuals who were employees of the association's community association manager. The defendants responded that under F.S. 90.502(2) there was no waiver "because the individuals were agents of the association whose contractual duties required them to communicate with the association's counsel on the association's behalf."

Without reviewing the documents in camera, the court ordered production. It ruled that the privilege was waived "because the two individuals were not 'employees' of the association within the meaning of *Southern Bell Telephone & Telegraph Co. v. Deason*, 632 So.2d 1377 (Fla. 1994)

(adopting a subject-matter test to determine whether corporate communications with counsel are privileged)."

The Fourth DCA quashed the order compelling production and remanded for an in camera inspection of the documents, "applying the [5-part] test set forth in *Deason* to determine whether the attorney-client privilege was waived by disclosure to third parties."

The appeals court also rejected the plaintiff's argument that the defendants "waived any right to an in camera inspection by suggesting to the judge that he could *uphold* their privilege claims without conducting one" (emphasis by court). Further, the court rejected the argument that the privilege was waived by the insufficiency of the privilege log descriptions.

Attorney-client privilege may not protect client from being compelled to disclose whether lawyer referred her to treating doctors. *Worley v. Central Florida YMCA,* 163 So.3d 1240 (Fla. 5th DCA 2015).

Client was injured in a "relatively routine trip-and-fall" in Defendant's parking lot. She did not see a specialist immediately. A month or two later, after retaining Law Firm, she was treated by doctors from several medical facilities. Those doctors' bills appeared to Defendant to be "unusually high," and Client conceded that it could be argued that the bills were "unreasonable."

Defendant sought to discover financial and referral information regarding what it termed a "cozy agreement" between Law Firm and Client's treating physicians. At deposition all of the treating physicians testified that they were unsure who referred Client to them. The court ultimately ordered Client to produce documents reflecting direct and indirect referral arrangements or understandings between Law Firm and the physicians. "If the health care provider doesn't have it, then the law firm is to produce it."

Client petitioned the Fifth DCA, seeking to quash the order for reasons including that it "requires production of information protected by attorney-client privilege." The appellate court denied the petition.

A financial relationship between a law firm and a treating physician is not privileged and is relevant to show bias. But to protect the privacy of the physicians and patients, before detailed financial bias information about a treating physician's relationship with a law firm is discoverable, there must be some evidence of a referral relationship between them. In seeking to establish that there was a referral relationship, discovery "should first be sought from the party, the treating doctor, or other witnesses – not the party's legal counsel." (Citation omitted.) Defendant took all the available steps "and has exhausted its inquiry as to how [Client] was referred to the treating physicians in this case. . . . Thus, in order to establish that a referral has occurred, [Defendant] had no choice but to ask [Client] herself."

The appeals court recognized that the trial court's ruling was supported by an older Second DCA case, *Burt v. GEICO*, 603 So.3d 125 (Fla. 2d DCA 1992). However, it questioned whether the *Burt* holding was eroded by subsequent case law approving discovery regarding financial relationships and potential bias. The Fifth DCA concluded: "Having exhausted all other avenues without success, we find – contrary to the trial court's preliminary ruling and to *Burt* – that it was appropriate for [Defendant] to ask [Client] if she was referred to the relevant treating physicians by her counsel or her counsel's firm."

The court certified conflict with *Burt* "to the extent that it holds that the disclosure of a referral of a client by an attorney to a healthcare provider is always protected by attorney-client privilege."

Amendment 7 does not require production of external peer review reports of hospital's adverse medical incidents that are otherwise privileged. *Bartow HMA, LLC v. Edwards*, 175 So.3d 820 (Fla. 2d DCA 2015).

Plaintiff sued Hospital for alleged medical negligence by a Hospital surgeon. Plaintiff sought discovery of all documents relating to Hospital's investigation or review of her care and treatment. Hospital asserted privilege as to certain documents, including "attorney requested external peer review" reports.

The court found the external peer review reports to be privileged, but ordered production on the ground that the privileges were preempted by Amendment 7 (Fla.Constit. Art. X, Sec. 25).

The Second DCA quashed the production order, concluding that the reports "are not within the ambit of Amendment 7." Amendment 7 preempts the statutory discovery protections for the peer review process "by providing patients a right of 'access to any records made or received *in the course of business* by a health care facility or provider relating to any adverse medical incident.'" (Emphasis added.) The attorney-requested external peer review reports were not created "in the course of business;" rather, they were prepared for litigation purposes. "Records created by an expert retained for purposes of litigation are not kept in the course of regularly conducted business activity. [Citation omitted.] Accordingly, the external peer review reports were not 'made or received in the course of business' under Amendment 7."

Court correctly overruled attorney-client privilege objections to questions asked at hearing to enforce alleged settlement, because privilege was waived when objecting party put at issue question of its lawyer's authority to settle. *Lender Processing Services, Inc. v. Arch Ins. Co.*, __ So.3d __ (Fla. 1st DCA, No. 1D14-4161, 4/22/2015), 2015 WL 1809318.

Petitioner, an insured under a directors' and officers' liability policy, sued Respondent, its primary insurer, over coverage. Respondent moved to enforce an alleged settlement agreement. Respondent argued that, despite an agreement clearly memorialized in emails, Petitioner attempted to unilaterally change material terms. Respondent contended that "Petitioner's in-house counsel, Robert Pinder, was involved in the settlement negotiations and that Petitioner could not in good faith unilaterally alter the terms of the agreed-upon settlement in its favor."

Petitioner moved to strike the motion to enforce, arguing that Pinder had only limited authority and that he did not have authority to make the alleged settlement.

At the hearing on the motion to enforce, both the vice president of the entity that bought Petitioner and Petitioner's in-house counsel, Pinder, testified. Petitioner objected to questions about its communications involving Pinder on the basis of attorney-client privilege. The court continued the hearing. Respondent filed a motion in support of its right to cross-examine Petitioner's witnesses, arguing that "a party cannot inject an issue into litigation and then preclude inquiry into that issue by asserting the protection of the attorney-client privilege. It further argued that while the communications at issue may have been privileged at one point, 'once [Petitioner] raised them as a

basis to avoid settlement, any privilege as to the subject matter of those communications, as well as the communications themselves, was waived.'" Petitioner denied that the privilege was waived.

The court overruled the privilege objections, then stayed the proceedings to allow Petitioner to seek a writ of certiorari regarding "whether the privilege was waived by Petitioner given its argument that it and 'its counsel were not authorized to release the rights of [its] directors and officers under [Respondent's] policy' . . ."

The First DCA denied certiorari. The court did not depart from the essential requirements of law in overruling the privilege objections. "By arguing a lack of authority to settle and by relying upon attorney Pinder's representations while at the same time arguing that any communications Mr. Pinder may have had concerning the settlement and individual insureds were privileged, Petitioner attempted to limit Respondent's ability to advocate in favor of its motion to enforce. However, a party 'may not use the [attorney-client] privilege to prejudice his opponent's case or to disclose some selected communications for self-serving purposes.' " *U.S. v. Bilzerian*, 926 F.2d 1285, 1292 (2d Cir. 1991). The privilege may be 'implicitly . . . waived when defendant asserts a claim that in fairness requires examination of protected communications.' *Id.* . . . If an insurer who wants to defend against a claim of bad faith may waive privileges by attempting to show good faith on its part . . . we see no reason why a corporation that wishes to defend against allegations of a settlement agreement by claiming lack of authority to bind its officers and directors and by relying on its in-house counsel's representations does not waive its attorney-client privilege as to the issue of authority to settle."

Mental health evaluation report prepared by criminal defendant's privately retained expert is protected by attorney-client privilege despite Fla.R.Crim.P. 3.220. *Manuel v. State*, 162 So.3d 1157 (Fla. 5th DCA 2015).

Criminal Defendant was represented by the Public Defender's office. Defendant's counsel was concerned about Defendant's competency to stand trial. Through his counsel, Defendant privately retained a confidential expert to conduct a psychiatric evaluation. Defendant elected to participate in discovery. The state sought production of the expert's report, arguing that the reciprocal discovery provision in Fla.R.Crim.P. 3.220(d)(1)(B)(ii) applied. The court granted the motion based on the rule and *Kidder v. State*, 117 So.3d 1166 (Fla. 2d DCA 2013).

The Fifth DCA quashed the order. The court relied on Fla.R.Crim.P. 3.216(a) and F.S. 916.115(2), which it were "far more specific on the issue of whether the reports of mental health experts are protected by the attorney-client privilege." The court distinguished *Kidder*.

Court erred in ordering production of portions of expert's written opinion that were not relevant to claims at issue in suit. *SCI Funeral Services of Florida, Inc. v. Walthour*, 165 So.3d 861 (Fla. 1st DCA 2015).

Husband and wife ("Respondents") sued Petitioner for injuries allegedly suffered in an auto accident caused by Petitioner's employee. Wife had surgery, which she claimed was a direct result of the accident. Although Respondents filed a separate medical malpractice action against the surgeon, in the personal injury case they did not allege medical malpractice nor seek damages from complications arising from the surgery.

Petitioner retained an expert, Dr. Hyde, and specified that "his testimony would be limited to the causal connection, if any, between the accident and surgery." Petitioner gave Respondents a copy of Dr. Hyde's report, but redacted 4 paragraphs "purportedly containing his standard of care opinion, asserting work product privilege." (Petitioner sought the standard of care opinion from Dr. Hyde to use in an equitable subrogration case against the surgeon in the event the jury found the surgery related to the collision.)

The trial court ordered productioin of an unredacted copy of the expert report. The First DCA quashed the order to the extent it required disclosure of Dr. Hyde's standard of care opinion.

"Parties are entitled to discovery regarding any matter, *not privileged*, that is *relevant* to the subject matter of the pending action. See Fla.R.Civ.P. 1.280(b)(1) (emphases [by court]). . . . Discovery of opinions held by experts, *otherwise discoverable* under subdivision (b)(1), and acquired or developed in anticipation of litigation, may be obtained by interrogatories or deposition. Fla.R.Civ.P. 1.280(b)(5) (emphasis [by court])."

The portion of Dr. Hyde's report regarding causal connection between the accident and the surgery was relevant to the personal injury action. Because Petitioner intended to use that opinion, it "is not privileged and is discoverable." In contrast, the portion of the report with the standard of care opinion was *not* relevant to the personal injury case and so was not discoverable under Fla.R.Civ.P. 1.280(b)(5).

The court rejected Respondents' contention that the redacted paragraphs were discoverable so that they could explore the expert's possible motive and bias, stating that "offering an expert's unpresented opinions simply to attack the expert's credibility is improper."

Court departed from essential requirements of law by ordering production of document based on crime-fraud exception without holding evidentiary hearing. *Brannon v. Palcu*, 177 So.3d 693 (Fla. 4th DCA 2015).

Over attorney-client privilege objections, Petitioners were ordered to produce an email string. The court had reviewed the document in camera and concluded that the crime-fraud exception applied.

The Fourth DCA quashed the production order and directed the trial court to hold an evidentiary hearing. "[T]he failure to afford petitioners an evidentiary hearing to address that document and argue why that exception should not apply is a departure from the essential requirements of law."

Court erred in ordering production of claims management services company's case file over work product and attorney-client privilege objections; work product retains qualified protection applies regardless of whether subsequent litigation is related. *Sedgwick Claims Management Services, Inc. v. Feller,* 163 So.3d 1252 (Fla. 5th DCA 2015).

A claims management services company ("Petitioner") faced a discovery request for parts of its case file. Petitioner objected on work product and attorney-client privilege grounds, but the trial court ordered production. The Fifth DCA quashed the order, finding error in 4 respects.

"First, the trial court erred by finding the work product privilege to be inapplicable

on grounds that the current case between these parties involves issues different than those presented in the prior litigation for which the documents were prepared." Work product retains its protection after the original litigation is over, regardless of whether it is related to subsequent litigation.

"Second, the trial court erred by finding the attorney-client privilege inapplicable without ever reviewing the documents at issue."

"Third, the trial court erred by finding that the attorney-client privilege was waived by counsel's statement at a hearing." The privilege belongs to the client, who decides whether to waive it.

"Finally, the trial judge erred by finding that the privilege was waived by counsel's filing of a privilege log which the judge viewed as insufficient due to its lack of detail." The log was not produced in response to any court order and could have been amended.

Court departed from essential requirements of law by ordering production of photos over work product objections without holding evidentiary hearing. *City of Port St. Lucie v. Follano,* 177 So.3d 301 (Fla. 4th DCA 2015).

Follano sued City after stepping into an uncovered sewer valve access pipe. She was extracted by the fire department. City took photographs of the scene on the day of the incident. City's photos show the uncovered pipe. Follano took photos the next day, but her photos showed the pipe to be covered.

City resisted production of its photos on work product grounds. Follano argued that she was entitled to the photos because they were the only available evidence of how the scene looked on the day of the incident. Without reviewing the photos, the court granted Follano's motion to compel production, "simply finding that 'the photographs cannot be obtained by any other measure'."

The Fourth DCA quashed the production order and remanded for further proceedings. "[Fla.R.Civ.P.] 1.280(b)(4) provides that a party may be ordered to produce privileged work product 'only upon a showing that the party seeking discovery has need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means.' In *Snyder v. Value Rent-A-Car*, 736 So.2d 780 (Fla. 4th DCA 1999), this Court held that when a work product privilege is asserted, the trial court must conduct an in camera inspection of the material at issue in order to determine whether the privilege applies."

The trial court failed to conduct an in camera review before ruling that the photos were discoverable under rule 1.280. "Such a review is necessary to determine whether the City's photographs provide the evidentiary value Follano claims and whether Follano could obtain substantially equivalent photographs without undue hardship.

Court erred in compelling production of work product photos where there was no showing that party seeking discovery diligently tried to get substantial equivalent through other means. *Seaboard Marine Ltd. v. Clark*, 174 So.3d 626 (Fla. 3d DCA 2015).

Plaintiff, a stevedoring company employee, was seriously injured while working at a Port of Miami terminal operated by Seaboard Marine. Right after the accident, Seaboard's lawyers and others took 91 photographs of the scene. Plaintiff sued Seaboard and sought discovery of the photos. Seaboard refused on work product grounds and filed a privilege log. Plaintiff moved to

compel production. At the hearing, Plaintiff presented no evidence indicating that he had attempted to obtain any post-accident photos taken by the County or by his employer.

The court granted Plaintiff's motion to compel production, "finding that the photographs are relevant to the issues in the lawsuit, and that [Plaintiff] has no other means of obtaining" them.

The Third DCA quashed the production order. "No doubt the photographs are relevant; they might be highly probative to the critical issues in the case. [Fla.R.Civ.P.] 1.280(b)(4), however, establishes a much higher bar than mere relevancy to obtain such privileged work-product materials developed by an adversary. A party must first diligently exhaust other means of obtaining the substantial equivalent. In this case, the record is devoid of evidence of such diligence."

Quarterly Safety Committee Reports prepared by mall where slip-and-fall occurred protected from discovery as work product. *Millard Mall Services, Inc. v. Bolda*, 155 So.3d 1272 (Fla. 4th DCA 2015).

A slip-and-fall Plaintiff sued Defendants, who owned and operated a shopping mall. Plaintiff sought to discover documents relating to similar incidents at the mall, including Quarterly Safety Committee Reports. Defendants objected that the documents "included incident reports that contained photographs, discussions surrounding the incidents, and mental impressions regarding the incidents that occurred during the relevant quarter." After reviewing the documents in camera, the judge ordered production "of defendants' Quarterly Safety Committee Reports from 2008 up to the date of the incident, but sustained the privilege objection concerning the incident report generated as a result of plaintiff's event."

The Fourth DCA quashed the production order, agreeing with Defendants that the documents were prepared in anticipation of litigation and so constituted work product. "Work-product protection extends to information gathered in anticipation of litigation by corporate non-attorney employees, including employees of a corporation's risk management department." The court pointed out that "even a report that is routinely prepared may still qualify as work product."

Plaintiff did not show that she was unable to obtain the substantial equivalent of the requested information by other means (see Fla.R.Civ.P. 1.280(b)(4)); in fact, Plaintiff had "a list of incidents on defendants' premises for three years predating plaintiff's accident, including the dates, times, locations, and a detailed description of those incidents." The court concluded: "Because the information sought by plaintiff were documents created in the course of its investigations, and because plaintiff has not made a sufficient showing of need or undue hardship, the trial court's order compelling disclosure was a departure from the essential requirements of law."

One judge dissented, asserting that the Quarterly Safety Committee Reports were not protected work product because they were used to promote safety and proper maintenance, rather than made in anticipation of litigation.

Litigation privilege cannot be used to bar claim of malicious prosecution that is otherwise viable. *Fischer v. Debrincat*, 169 So.3d 1204 (Fla. 4th DCA 2015).

Appellees sued a number of defendants, later adding appellant as a party defendant and then dropping him. Appellant sued for malicious prosecution. Appellees raised the litigation privilege as an affirmative defense and moved for summary judgment, "arguing that the litigation privilege

afforded them immunity for their conduct of joining appellant as a defendant in the underlying lawsuit. Appellees relied upon *Wolfe v. Foreman*, 128 So.3d 67 (Fla. 3d DCA 2013), a case holding that the litigation privilege applies to a cause of action for malicious prosecution." The court granted appellees' motion for summary judgment.

Appellant appealed the grant of summary judgment solely based on the litigation privilege. He contended that "the tort of malicious prosecution is based upon the unfounded prior civil proceeding itself and not the acts taken in the course of that proceeding." Appellees argued that joining appellant as a defendant in the underlying suit was "protected by the litigation privilege because they were performing an 'act required or permitted by law in the due course of the judicial proceedings or as necessarily preliminary thereto.'"

The Fourth DCA agreed with appellant and reversed, holding that "the litigation privilege cannot be applied to bar the filing of a claim for malicious prosecution" where all of the elements of a malicious prosecution action are satisfied. The court concluded that "*Wolfe* went too far in its application of the litigation privilege." The court explained: "Because the commencement or continuation of an original criminal or civil judicial proceeding is an act 'occurring during the course of a judicial proceeding' and having 'some relation to the proceeding,' malicious prosecution could never be established if causing the commencement or continuation of an original proceeding against the plaintiff were afforded absolute immunity under the litigation privilege. If the litigation privilege could apply to bar a malicious prosecution action, this would mean that the tort of malicious prosecution would be effectively abolished in Florida – or, at the very least, eviscerated beyond recognition."

The appeals court certified conflict with the Third DCA's decision in *Wolfe*.

(See also *Rivernider v. Meyer*, 174 So.3d 602 (Fla. 4th DCA 2015) (concluding that court erred in granting summary judgment for defendant lawyer but affirming on alternative ground that there was no material dispute that lawyer had probable cause to pursue underlying action).)

Statements in affidavit filed in pending judicial proceeding were protected from defamation claim by absolute privilege. *Zuccarelli v. Barfield*, 165 So.3d 830 (Fla. 4th DCA 2015).

In a dispute between a town's mayor and some residents, mayor Zuccarelli "alleged that Barfield published false and defamatory statements in an affidavit filed in support of a verified motion for temporary injunction." Barfield asserted that the statement was absolutely privileged "because the affidavit was filed in a pending judicial proceeding and the statement was connected to the pending judicial proceeding." The court granted Barfield's motion for summary judgment on the relevant counts, ruling that those counts "rely on affidavits filed in a court proceeding. The affidavits were related to pending litigation and are privileged as a matter of law."

The Fourth DCA affirmed. The court relied on *DelMonico v. Traynor*, 116 So.3d 1205 (Fla. 2013), in determining that the doctrine of absolute immunity – rather than a qualified privilege – applied. "Unlike in *DelMonico* where the statements were made during an out-of-court, informal investigation, in the present case the statement at issue was made in an affidavit filed in court. . . . The harmed party could seek sanctions against the individual filing the affidavit with the objected to allegation. Further, the harmed party could move to strike the defamatory matter from the affidavit. In this case, like envisioned in *DelMonico*, the fact that the offending statement was filed in a manner where the harmed party had an opportunity to object was the clear distinction between

statements that had sufficient safeguards, on the one hand, and those made ex parte and where the harmed party did not have an opportunity to object such as in *DelMonico*, on the other hand."

In paternity and child support action, court erred in ordering production of settlement agreements involving non-party clients of law firm employing lawyer/mother. *Medina v. Haddad*, 156 So.3d 1113 (Fla. 3d DCA 2015).

Mother and Father litigated a paternity and child support action. Mother was a lawyer employed by a personal injury law firm. The firm paid her an annual draw of $75,000 against 30% of net fees received by the firm in cases she handled. At issue was the question of how much in excess of $75,000 Lawyer would earn during the current fiscal year.

The court ordered production of all documents – including settlement agreements of the firm's clients – reflecting any commissions that Mother would collect at the end of the year. Mother sought clarification, balking "at providing copies of settlement agreements, many of which she represented contained confidentiality clauses between the [law] firm's clients and third parties." The court ordered Mother to produce "documents from her law firm, her own personal documents and any settlement agreements or judgments from which she might receive any income."

The Third DCA quashed the order. The documents at issue belong to the law firm and its clients, who have privacy and other interests in them. "More to the point, no showing has been made either here or below that the information [Father] seeks cannot otherwise be obtained from" Mother or the law firm "In short, it was improper to require [Mother] to disclose information which was the property of a non-party law firm or its non-party clients, and moreover which might result in a breach of confidences."

Court erred in ordering party's in-house counsel deposed. *Eller-I.T.O. Stevedoring Co., LLC v. Pandolfo*, 167 So.3d 495 (Fla. 3d DCA 2015).

See discussion in "Trial Conduct" section.

CONFLICTS OF INTEREST (INCLUDING DISQUALIFICATION)

Per Supreme Court, postconviction court did not abuse discretion in denying motion to disqualify State Attorney's Office based on appearance of impropriety. *Hayward v. State*, __ So.3d __ (Fla., Nos. SC12-1386, 13-1787, 6/25/2015), 2015 WL 3887692.

Defendant was convicted of first-degree murder and sentenced to death. His motion for postconviction relief under Fla.R.Crim.P. 3.851 was denied, and he sought Supreme Court review.

Defendant alleged that the postconviction court erred in denying his motion to disqualify the State Attorney's Office ("SAO"). Defendant's trial counsel had deposited his files with the SAO. Defendant contended that this warranted disqualification because the SAO "was in possession of the files for several weeks and thus had the opportunity to review, copy, disseminate, or alter the files." Defendant had no proof of actual prejudice.

In the Supreme Court, Defendant urged an additional ground for disqualification. He claimed that lawyers in the SAO had provided financial contributions to his trial counsel, who had financial problems after being disbarred (for matters unrelated to Defendant's case). The lawyers anonymously donated money for Publix gift cards. Defendant argued "that 'the fact that State [Attorneys] gave money to a potential witness is a significant conflict of interest' and that the 'relationship alone jeopardized [Defendant]'s right to fair postconviction proceedings, warranting the State Attorney's disqualification.'"

The Supreme Court rejected Defendant's contentions, ruling that the postconviction court did not abuse its discretion in denying the motion to disqualify. "To the extent that the transfer simply provides an 'appearance of impropriety,' this does not rise to the level necessary to require disqualification. The postconviction court did not specifically address the added factor that some personnel at the State Attorney's office donated funds toward the gift card for [trial counsel], who was struggling financially after his disbarment, but [Defendant] has failed to provide any proof that the anonymous donations influenced [trial counsel's] testimony or prejudiced [Defendant] in any way. Moreover, the record shows that Assistant State Attorney Butler, who handled the postconviction proceeding in this case, did not donate any of those funds."

Supreme Court holds that court not required to obtain conflict of interest waiver when criminal codefendants are represented by same lawyer but there is no actual conflict of interest between them. *State v. Alexis*, __ So.3d __ (Fla., No. SC14-1341, 7/9/2015), 2015 WL 4112372.

Two suspects were charged after a victim was accosted at gunpoint. One codefendant allegedly made a post-arrest statement adverse to the other. He later denied the statement. The codefendants were jointly represented by retained counsel. At a severance hearing, defense counsel brought up the dual representation issue. The court noted there was a potential conflict and asked both codefendants if they wished to be represented by the same counsel. They both did.

The codefendants were tried together. Alexis ("Respondent") was convicted. Respondent moved for postconviction relief, alleging that he was given ineffective assistance of counsel because the court did not conduct a sufficient inquiry regarding the joint representation and so his waiver was invalid. The First DCA agreed and granted Respondent a new trial.

The State petitioned for Supreme Court review. The Court quashed the First DCA's decision. A trial court is *not* required to obtain a conflict of interest waiver when criminal codefendants are represented by the same lawyer but there is no actual conflict of interest between them. Here, only a potential conflict was presented by the multiple representation.

The Court explained: "[D]efense counsel in the instant case did not object, nor did he claim he could not effectively represent both defendants. He represented to the court that there was no impediment to joint representation. In *Cuyler* [*v. Sullivan*, 446 U.S. 35 (1980)], the Court stated that unless a court knows or should know of a conflict, the Sixth Amendment does not require a state court to initiate inquiry into the issue of a conflict of interest from multiple representation. Multiple representation alone does not violate the Sixth Amendment, and in the absence of an objection, a court can presume there is no conflict of interest. When the defendant does not object, only an actual conflict of interest violates a defendant's Sixth Amendment rights; courts should not presume that a possible conflict will violate the Sixth Amendment."

Law firm disqualified for opposing former client in substantially related matter despite passage of 10 years. *ASI Holding Co., Inc. v. Royal Beach & Golf Resorts, LLC*, 163 So.3d 668 (Fla. 1st DCA 2015).

During negotiations with Royal Beach & Golf Resorts ("Royal") in 2009, ASI Holding Company ("ASI") disclosed proprietary information about ASI's amenities program. Royal executed a non-disclosure agreement ("NDA"). The negotiations ended.

ASI later learned that Royal was operating an amenities program very similar to ASI's. In 2010 ASI sued Royal for breach of the NDA. In 2014 Royal changed counsel, hiring the same Law Firm that had represented ASI in NDA-related matters 10 years earlier. When Law Firm declined to withdraw, ASI moved to disqualify the firm. The court denied disqualification, stating: "The time that separates the [prior] representation and the current [representation] and the circumstances [of the NDA] are such that the Court is not persuaded that the disqualification is proper."

The First DCA ordered Law Firm disqualified. Rule 4-1.9 prohibits a law firm from opposing a former client in a matter that is "substantially related" to the firm's representation of the former client. Matters are "substantially related" if the current matter "would involve the lawyer attacking work that the lawyer performed for the former client." Comment, Rule 4-1.9. The court observed: "Notably, nothing in the rule or caselaw suggests that questions regarding conflicting representations turn on the passage of time."

Law Firm represented ASI in seeking to enforce "the identical NDA" at issue in the present case. For Royal, however, Law Firm was contending that the NDA was not valid and enforceable. "With this defense, [Law Firm] would be taking a position exactly contrary to the professional opinion and advice it gave earlier on ASI's behalf. Again, it is undisputed that the terms of the NDA haven't changed in all these years. As such, [Law Firm] would be placed in a position of attacking its prior legal opinion and advice regarding the NDA were it to represent [Royal] in this case." See *Lane v. Sarfati*, 676 So.2d 475 (Fla. 3d DCA 1996).

The court distinguished *Health Care & Ret. Corp. of Am., Inc. v. Bradley*, 961 So.2d 1071 (Fla. 4th DCA 2007), noting that the present case "not only involves the same 'type' of representation (i.e., breach of contract), but would have [Law Firm] attacking the validity of the very document that it had previously represented to be valid and legally binding."

Appellate court disqualifies law firm because one of its lawyers had confidential information about opposing party that was material to appeal. *ATC Logistics Corp. v. Jackson*, 168 So.3d 292 (Fla. 1st DCA 2015).

While an associate at "Old Firm," Parker worked with Dore, a partner who represented Old Firm's client, Toyota. Parker left Old Firm to join "New Firm." New Firm represented Toyota's opponent in the appeal of a case that Parker worked on while with Old Firm. Parker "drafted and filed the summary judgment motion" that was on appeal. Old Firm's client, Toyota, moved to disqualify Parker and New Firm. The First DCA relinquished jurisdiction to the trial court for the purpose of an evidentiary hearing, after which the trial court prepared a report and recommendation on the merits of the disqualification motion.

The First DCA applied Rule 4-1.10(b). Because Parker acquired material confidential information regarding Old Firm's client, Parker and New Firm were disqualified.

Parker "discussed legal strategy with Mr. Dore, analyzed the legal issues involved, and actually drafted the summary judgment motion for Mr. Dore's review. Clearly, as part of this work, Ms. Parker was privy to the work product of Mr. Dore – who represents Toyota in this appeal – and this work product is information relating to the representation of Toyota. This was sufficient to show that Ms. Parker acquired confidential information."

The appeals court rejected New Firm's argument that all of Parker's information "is now public knowledge" that any competent lawyer could access because it was used to prepare the summary judgment motion. "We cannot agree with this argument. Surely Ms. Parker and Mr. Dore discussed more than the arguments actually written in the motion for summary judgment, and Ms. Parker's testimony does not necessarily support Appellant's position that they did not. While any lawyer may be able to attempt to determine the relative strengths and weaknesses of Toyota's case, Ms. Parker and Mr. Dore *actually discussed* the strengths and weaknesses of Toyota's case. As [the lower court] found, this information could certainly be used against Toyota at this stage of the proceedings. See *Rombola v. Botchey*, 149 So.3d 1138, 1144 (Fla. 1st DCA 2014) ('[O]ftentimes it is what is not in the record that is critical in making strategic decisions. Information shared in confidential after-hours trial preparation sessions – that unveil litigation strategies and test their strengths and weaknesses – is oftentimes far more potentially harmful if disclosed to adversaries (or used against a former client) than what is in the record.')" (emphasis by court).

Law firm properly disqualified from 2 cases involving former clients despite delay by former clients in moving for disqualification. *Steinberg v. Marlin*, __ So.3d __ (Fla. 3d DCA, No. 3D14-2587, 10/14/2015), 2015 WL 5965207.

Attorney Buchbinder and his law firm (collectively, "Law Firm") represented a general partnership ("FBK") and some partners, including Robert Marlin. Marlin and several other partners transferred their interests to Robyn Marlin (Robert's wife) and withdrew from the partnership.

Law Firm represented FBK and Robert Marlin in a Broward County case in 1997-1999, and during that time also represented FBK in a collection action in Miami-Dade County. "In 2012, Robert Marlin moved to disqualify [Law Firm] in the collections case from representing the defendants in that case . . . because it was a matter adverse to Robert Marlin involving issues relating to FBK. The trial court disqualified [Law Firm]."

In 2009 Steinberg, a FBK partner, sued the Marlins to prohibit them from acting for FBK. In 2014 FBK sued Steinberg to recover damages for alleged failure to contribute capital to FBK. The 2 suits were consolidated. Steinberg was represented by Law Firm.

Robert and Robyn Marlin moved to disqualify Law Firm from the consolidated cases, "claiming that Buchbinder formerly represented Robert Marlin and FBK in substantially related matters in the Broward County case and the Miami-Dade collections case." The court disqualified Law Firm on conflict grounds (Rule 4-1.9, 4-1.10) and because Buchbinder would be a material fact witness in the suits (Rule 4-3.7).

The Third DCA upheld the disqualification. "Buchbinder and his law firm represented Robert Marlin and FBK in substantially related matters when Buchbinder and his firm represented Marlin and FBK in the previously mentioned Broward County case and the Miami-Dade county collection case. Respondents thus satisfied the requirement for disqualification based on a conflict of interest relating to former clients. See R. Regulating Fla. Bar 4-1.9."

Relying on cases such as *Zayas-Bazan v. Marcelin*, 40 So.3d 870 (Fla. 3d DCA 2010), Steinberg argued that the Marlins waived the right to seek disqualification due to the delay in filing their motion. The court rejected that argument. The court distinguished *Zayas-Bazan*, noting that Buchbinder and his firm "were previously disqualified from representing interests adverse to the Marlins in an action relating to FBK," and that the Marlins learned that Buchbinder would be a key witness right before filing their motion. "Steinberg's waiver argument fails because none of the other cases he cites involve an attorney that was previously disqualified from representing clients adverse to the moving party, nor do they involve a disqualified counsel being a material fact witness."

Actual prejudice to defendant not required before public defender will be permitted to withdraw during pretrial phase due to conflict involving another client. *Smith v. State*, 156 So.3d 1119 (Fla. 1st DCA 2015).

The Public Defender's Office ("PD") represented Deviney and Smith in two different murder cases, with the same judge presiding over both. The PD filed substantially similar motions to withdraw in each case, asserting that the representation of each client "would be materially limited by her responsibilities of loyalty and confidentiality to another unnamed client, pursuant to Rule 4-1.7."

At the motion hearing in Deviney's case, the PD stated that she could not disclose the nature of the conflict in detail without breaching her duty to one or both clients. The state responded that it would waive any interest it had in using information from Deviney against another defendant. At the hearing in Smith's case, the state asserted that it had no interest in using information from another criminal defendant at Smith's trial.

The court denied the motions in both cases, ruling that the PD had 'not presented sufficient evidence of "an actual conflict.'" The order noted that "'the State is not using any other public defender client as a State witness during trial and the State has no intention on seeking to learn the information at issue from the other public defender client.'"

The PD petitioned for a writ of certiorari, arguing that the finding that the PD did not present sufficient evidence of an actual conflict went beyond what is required for withdrawal under F.S. 27.5303(1)(a). This statute provides that, when the public defender files a motion to withdraw due to conflict between its clients, the court "may inquire or conduct a hearing into the adequacy of the public defender's representations regarding a conflict of interest *without requiring the disclosure of any confidential communications*" (emphasis by court). The state argued that, per *Cuyler v. Sullivan*, 446 U.S. 335 (1980), the PD must show an actual conflict of interest that affected counsel's performance.

The First DCA quashed the orders denying withdrawal. "We disagree with the State's premise that actual prejudice to the defendant is required before withdrawal of counsel will be permitted in the pretrial context." In the *pretrial* stage, the court has broad discretion in determining whether a conflict exists. Furthermore, "[v]iewed prospectively, any substantial risk of harm is deemed prejudicial."

The appellate court summarized: "Once a public defender has certified a conflict, and where it becomes clear that the trial court cannot learn the basis for the conflict 'without requiring the disclosure of . . . confidential communications,' the trial court must grant the motion under section 27.5303(1)(a)." The lower court's requirement that the PD disclose information to establish an

actual conflict "runs contrary to section 27.5303(1)(a), because for the public defender's office to present such evidence, it would be forced to reveal confidential and privileged client information."

The state's offer to not use the information did not eliminate the conflict. The offer was too narrow; it seemed to apply only to the "*current* charges" against Smith and "did not cover the use of information against Mr. Smith relating to a new and uncharged crime." (Emphasis by court.)

The appeals court certified this question to the Supreme Court: "In cases where a public defender moves to withdraw from the representation of a criminal defendant on the basis of a client conflict, but certifies to the trial court, as an officer of the court, that he or she is unable to reveal the circumstances surrounding the conflict without revealing privileged communications, is a trial judge required to grant the motion to withdraw?"

Court erred in denying full evidentiary hearing to party seeking disqualification of opposing counsel. *Flaig v. Coquina Palms Homeowner's Ass'n, Inc.*, 153 So.3d 968 (Fla.5th DCA 2015).

Flaig moved to disqualify counsel for opposing party Coquina. Flaig testified and established a prima facie case for disqualification. Before any other witnesses were called, Coquina asked the court to deny the disqualification motion. The court did so.

The appellate court quashed the order and remanded for a full evidentiary hearing. "[T]he the trial court erred in depriving Flaig of a full evidentiary hearing and thereby departed from the essential requirements of the law, causing material injury that cannot be remedied on appeal."

DISCIPLINARY PROCEEDINGS

Supreme Court suspends, rather than reprimanding, lawyer for lack of diligence despite no harm to client. *Florida Bar v. Cohen*, 157 So.3d 283 (Fla. 2015).

Lawyer was hired to represent Client at a criminal resentencing hearing. The court set the hearing for March 28. Lawyer filed a "Motion to Continue Resentencing Hearing and Notice of Unavailability" stating that the notice was not reasonable and that he was unavailable on March 28 because he was working on another client's case. "Significantly, [Lawyer] did not indicate in the motion whether the State agreed to the continuance, he did not submit a copy directly to the presiding judge, and he did not set the motion for a hearing."

On the day of the hearing, the presiding judge traveled from another county to be present, the prosecutor was there, the client was there – but Lawyer did not appear. The judge reported Lawyer to the Florida Bar, which initiated disciplinary proceedings.

The referee found that Lawyer violated Rule 4-1.3 (diligence) and 4-8.4(d) (conduct prejudicial to administration of justice). The referee recommended that Lawyer be publicly reprimanded, be evaluated by Florida Lawyer's Assistance, Inc. ("FLA"), and have his law practice reviewed by the Bar's LOMAS service.

Lawyer challenged the guilt findings, but the Supreme Court approved them. Lawyer argued that he did not violate 4-1.3 because there was no evidence of harm to his client. The Court disagreed: "[W]e have previously explained there is no requirement that a client suffer actual harm as a result of an attorney's lack of diligence in order to find a violation of rule 4-1.3. See *Florida*

Bar v. Solomon, 711 So.2d 1141, 1146 (Fla. 1998) (stating that 'actual harm or prejudice is not an element of incompetence or lack of diligence under the Rules Regulating the Florida Bar.')."

As to the violation of Rule 4-8.4(d), the Court explained that, regardless of whether the hearing was properly scheduled, "the hearing had not been continued by the presiding judge and thus [Lawyer] was required to appear on his client's behalf." Lawyer's failure to appear was harmful to the legal system and "such conduct cannot be tolerated by an officer of the Court."

The Court increased the level of discipline recommended by the referee, suspending Lawyer for 10 days (in addition to the public reprimand, FLA evaluation, and LOMAS review).

Supreme Court increases lawyer's suspension to one year for knowingly violating discovery obligations, failing to correct false testimony at deposition, and failing to notify opponent that she possessed property in which opponent claimed interest. *Florida Bar v. Dupee*, 160 So.3d 838 (Fla. 2015).

Lawyer represented Wife in a contested dissolution. The Bar charged Lawyer with ethical violations. The referee found that Lawyer filed affidavits that knowingly failed to disclose $480,000 Wife withdrew from an account via a cashier's check made out to a non-existent charity. Lawyer provided interrogatory answers that she knew were false. Lawyer failed to produce requested items for production. When Wife testified falsely about the cashier's check during her deposition, Lawyer "failed to take any action to correct her client's false testimony so as to prevent the possibility of committing a fraud on the court."

The referee recommended that Lawyer be found guilty of violating: 3-4.3 (act unlawful or contrary to honesty and justice); 4-3.3(a)(1) (knowingly making false statement to tribunal or failing to correct false statement); 4-3.3(b) (reasonable remedial measures required when person engages in fraudulent conduct); 4-3.4(a)-(d) (obstructing access to evidence, concealing relevant evidence, fabricating evidence or assisting witness to testify falsely, disobeying obligation under rules of tribunal, or failing to comply with proper discovery request); 4-4.1 (false statement or failing to disclose facts when necessary to avoid assisting in criminal or fraudulent act); 4-8.4(a) (violating Rules or knowingly assisting another to do so); 4-8.4(c) (dishonesty, fraud, deceit, or misrepresentation); and 5-1.1(e)-(f) (handling property in which another person claims interest).

The Supreme Court rejected Lawyer's argument that her discovery violations were "inconsequential" because Wife's financial information ultimately was disclosed before the trial. "[C]oncealing a document even temporarily, and even when the information may be available to opposing counsel by other means or from other sources, has been held to be misconduct."

As for the failure to correct Wife's false testimony, the Court acknowledged that the duty of candor to the tribunal imposed by Rule 4-3.3 can put a lawyer in the "difficult position" of betraying the client's confidence by taking the "reasonable remedial measures" as outlined in the Comment to the Rule: "If perjured testimony or false evidence has been offered, the advocate's proper course ordinarily is to remonstrate with the client if circumstances permit. In any case, the advocate should ensure disclosure is made to the court."

(The Court distinguished the situation that can sometimes arise in criminal cases "in circumstances where a lawyer's duty of candor to the tribunal must be 'balanced with competing obligations.' *United States v. Stewart*, 931 F.Supp. 2d 1199, 1215 (S.D. Fla. 2013).")

At Wife's request, Lawyer also took possession of a coin collection that Husband claimed belonged to him. "[E]ven though ownership was disputed by her client, [Lawyer] had a clear duty

to notify opposing counsel that she had received and had custody of the coins. She did not do so until she was ordered to in connection with a postjudgment contempt proceeding."

The Court suspended Lawyer for 1 year instead of the recommended 90 days.

Supreme Court suspends lawyer for one year (rather than recommended 91 days) for bad faith conduct in violating court orders. *Florida Bar v. Rosenberg*, 169 So.3d 1155 (Fla. 2015).

Lawyer represented businesses being sued for breach of contract. During contentious discovery, Lawyer raised objections that the court had already considered and ruled against. The court found that Lawyer violated multiple court orders and sanctioned him for bad faith conduct.

The Bar charged Lawyer with violating Rules 4-1.1 (competent representation), 4-3.4(d) (violating court orders), and 4-8.4(d) (conduct prejudicial to administration of justice). The referee found Lawyer guilty and recommended a 91-day suspension.

The Supreme Court affirmed the guilt findings but increased Lawyer's suspension to one year due to Lawyer's "repeated failures to comply with court orders and his bad faith conduct, together with the aggravating factors found by the referee." It was "particularly significant that [Lawyer] has refused to accept the wrongful nature of his misconduct."

The Court again emphasized that in recent years it "has moved toward imposing stronger sanctions for unethical and unprofessional conduct. See *Fla. Bar v. Adler*, 126 So.3d 244, 247 (Fla. 2013) (noting that 'this Court has moved towards stronger sanctions for attorney misconduct'); *Fla. Bar v. Rotstein*, 835 So.2d 241, 246 (Fla. 2002) (noting that many of the cases cited by the respondent were inapplicable 'because the cited cases are dated and do not reflect the evolving views of this Court' and that '[i]n recent years, this Court has moved towards stronger sanctions for attorney misconduct')."

Rejecting referee's report, Supreme Court finds lawyer guilty of misrepresentation and trust account violations and remands for sanctions hearing. *Florida Bar v. Marrero*, 157 So.3d 1020 (Fla. 2015).

Lawyer was officer of a title company and acted as an escrow agent in real estate financing transactions. He failed to report certain information to a lender (e.g., that the loan proceeds were not being used to purchase the house instead of for repairs to a house that supposedly was already owned by the borrowers). Lawyer also failed to record the loan closing documents until 6 months after the transaction. Eventually the borrowers stopped paying on the loan.

The Bar charged Lawyer with ethical violations, but the referee concluded that no violations occurred. The Supreme Court rejected the referee's conclusions and ruled that Lawyer's conduct constituted 3 violations of Rule 4-8.4(c) (dishonesty, deceit, misrepresentation or fraud). One violation was "drafting, executing, and witnessing a mortgage loan document containing the misrepresentation that the borrowers had the legal authority to encumber the property" and the second occurred due to Lawyer's "deliberate omissions and knowing failures to report important information" to the individual lender. The third violation related to Lawyer's failure to disclose the loan to the institutional lender by not including it on the list of encumbrances in the title insurance policy. Lawyer also violated Rule 5-1.1(b) (trust accounting). The Court remanded for a hearing on the appropriate sanction.

Regarding a lawyer's duty as escrow agent, the Court stated: "[A] a lawyer receiving funds from a third party and depositing the funds into his escrow account has a duty to exercise reasonable diligence to determine for what purpose that third party had provided the funds, before disbursing the funds. Respondent violated these requirements."

Supreme Court disbars lawyer who had prior discipline for unprofessional conduct. *Florida Bar v. Norkin*, __ So.3d __ (Fla., Nos. SC11-1356, SC13-2480, 10/8/2015), 2015 WL 5853915.

See discussion in "Professionalism" section.

In postconviction proceeding appeal, Supreme Court rules that lower court did not abuse discretion in refusing to admit trial counsel's disciplinary record to support allegations of ineffective assistance. *Hernandez v. State*, __ So.3d __ (Fla., Nos. SC13-718, SC13-2330, 9/17/2015), 2015 WL 5445655.

A Defendant sentenced to death for first-degree murder sought postconviction relief. He claimed that the postconviction court "erred in refusing to admit trial counsel Ted Stokes' professional disciplinary history in order to support allegations that Stokes' performance was deficient in this case and to support the contention that penalty phase counsel was unjustified in relying on Stokes as lead guilt phase counsel." Prior discipline had been imposed for counsel's "failure to file notices of appeal in two criminal cases, failure to maintain a law office trust account and trust account records, failure to timely file documents in a probate matter and failure to properly communicate with the client, failure to file a petition for adoption for which he was retained, and failure to properly investigate and diligently represent a defendant in a criminal case."

The Supreme Court affirmed. Admission of the prior disciplinary actions is a matter within the trial court's discretion, and was not directly relevant to the lawyers' performance in representing Defendant in this case. "Further, such matters are not the proper subject of impeachment under [F.S.] 90.608."

Circuit court did not depart from essential requirements of law in staying litigation pending results of Bar disciplinary case against one party's lawyer filed by other party. *Florida Wellness & Rehab Center, Inc. v. Libman*, 178 So.3d 977 (Fla. 3d DCA 2015).

Lawyer was a Plaintiff in a suit against Defendants seeking payment of legal fees. Defendants counter-claimed for legal malpractice and, 2 years into the litigation, filed a Bar grievance against Lawyer. Lawyer filed a motion in circuit court to stay proceedings until the Bar grievance was resolved. The court granted the motion to stay.

The Third DCA ruled that the trial court did not abuse its discretion. Defendants did not cite "any clearly established principle of law preventing a trial court from staying civil proceedings related to a pending bar grievance." Rule 3-7.4(e) "contemplates the situation presented when civil litigation and a bar grievance are interrelated" and "requires the grievance process to move forward (absent express approval from the Bar's Board of Governors), during the pendency of litigation."

Defendants "cited no correlated authority that would prevent the trial court from exercising its discretion to stay proceedings during the pendency of Bar grievance proceedings."

EXPERT WITNESSES

Order requiring broad disclosure of expert witness's financial information relating to testimony for insurance company and defense counsel is quashed. *Grabel v. Sterrett*, 163 So.3d 704 (Fla. 4th DCA 2015).

Personal injury Plaintiffs sought to compel disclosure of financial information relating to the expert witness who performed the compulsory medical examination and testified for Insurer. The court ordered production of 3 years' worth of records to show: "all billing invoices" submitted by the expert to Insurer or the defense law firm; the "total amount of money paid by or on behalf of" defendants, Insurer, or defense counsel; and all "documents evidencing the amount or percentage of work performed by [the expert] on behalf of any Defendant and/or defense law firm and/or insurance carrier."

The Fourth DCA quashed the order as broader than permitted by Fla.R.Civ.P. 1.280(b)(5). "Rule 1.280 limits discovery from experts who are obviously hired by one party to the litigation. The limitations were deemed necessary to prevent overly intrusive and harassing financial discovery which serves 'only to emphasize in wholly unnecessary detail what everyone knows to be the case and what would be apparent to the jury on the simplest cross-examination[.]' *LeJeune v. Aikin*, 624 So.2d 788, 789–90 (Fla. 3d DCA 1993) (Schwartz, C.J., specially concurring)."

The court further noted that, although *Brown v. Mittelman*, 152 So.3d 602 (Fla. 4th DCA 2014) held that Rule 1.280 does not apply to discovery from a treating doctor, in this case the expert witness was not a treating doctor.

Court erred in ordering production of portions of expert's written opinion that were not relevant to claims at issue in suit. *SCI Funeral Services of Florida, Inc. v. Walthour*, 165 So.3d 861 (Fla. 1st DCA 2015).

See discussion in "Confidentiality and Privileges" section.

FEES

Attorney's Liens:

Charging lien cannot include expenses incurred in prosecuting lien, and may not enforced against alimony award if that would deprive former spouse of daily sustenance or minimal necessities of life. *Tucker v. Tucker*, 165 So.3d 798 (Fla. 4th DCA 2015).

Lawyer represented Wife in a divorce. Lawyer withdrew and filed a notice of charging lien. When the case was over the court entered an order imposing a charging lien. The lien amount included Lawyer's unpaid fees ($6713.40) as well as additional attorney's fees ($1400.00) and expert witness fees ($1137.50) incurred in prosecuting the lien.

The Fourth DCA court affirmed imposition of the charging lien for Lawyer's unpaid fees in representing Wife. The court reversed inclusion of fees and expenses incurred by Lawyer in prosecuting the charging lien. "[A]n attorney may not use a charging lien to secure fees incurred in enforcing the lien. . . . [T]he actions of an attorney in enforcing a charging lien does nothing to contribute to a positive judgment or settlement for the client."

Wife also argued that the court improperly ordered Lawyer's charging lien to be enforced against her award of permanent periodic alimony. A lawyer's charging lien "'may not be enforced against an award of permanent periodic alimony if to do so would deprive a former spouse of daily sustenance or the minimal necessities of life.'" The case was remanded for determination of whether enforcement of the lien against the alimony award would deprive Wife of daily sustenance or the minimal necessities of life.

Charging lien does not apply to award of past due undifferentiated support accruing during pendency of divorce proceedings. *Jaeger v. Jaeger*, __ So.3d __ (Fla. 4th DCA, No. 4D15-1243, 12/16/2015), 2015 WL 8950258.

During a divorce case the court made a lump sum award to Wife of "undifferentiated family support for arrearages not paid during the course of the proceedings." Wife's lawyers sought to impose charging liens on the award, while Wife moved for immediate release of the funds to her. The general magistrate and recommended that the funds be released to Wife.

The lawyers filed objections and the court held a hearing. The court granted the lawyers' objections, "finding that the 'magistrate made a legal error in concluding charging liens do not apply to undifferentiated support arrears.'" The court granted the charging lien.

The Fourth DCA reversed. Relying on *Dyer v. Dyer*, 438 So.2d 954 (Fla. 4th DCA 1983), and 2 out-of-state cases, the court concluded: "We agree with the conclusion of these courts, particularly where the award, as in this case, includes only back-due amounts for temporary child support and alimony pending the final judgment, and therefore would not include any amounts other than what was established as the needs and necessities of the spouse and children."

(The court further stated: "Even if the charging lien could have been enforced against that portion of the undifferentiated award which constituted alimony, the magistrate also found that the award was for the necessities of life for the spouse.")

Enforcement of charging lien in contingent fee case should take place in court where underlying action is pending, but not until contingency has occurred. *CK Regalia, LLC v. Thornton*, 159 So.3d 358 (Fla. 3d DCA 2015).

Law Firm represented Former Clients under 3 contingent fee agreements. Former Clients discharged Law Firm and hired new counsel, who filed suit against several entities from which Former Clients claimed they were due lost profits. Law Firm filed a notice of charging lien in one of the cases (the "Ongoing Action").

Former Clients filed a separate declaratory judgment suit against Law Firm to have the charging lien discharged and declared invalid. Law Firm moved to dismiss, asserting that the declaratory judgment action "was premature and improper under Florida law because the Ongoing Action – to which the notice of charging lien related – remained pending." Alternatively, Law Firm sought to transfer the action to the court where the Ongoing Action was pending. The court dismissed the dec action.

In affirming, the Third DCA discussed charging lien law. Law Firm perfected its charging lien by giving timely notice to the client. A lawyer's ability to enforce a charging lien under a contingent fee agreement depends on the occurrence of the contingency. Unless and until the contingency occurs, "there is nothing to which the charging lien can attach." The court concluded: "[T]he proper forum for adjudicating the validity, enforceability and amount of a charging lien is with the trial judge before whom the underlying action is pending . . . Any claims the Former Clients may have regarding the validity or enforceability of the charging lien can be presented (at the appropriate time) to the trial court judge presiding over the Ongoing Action."

Lawyer added as co-counsel in contingent fee case fails in claim for portion of fee, which was awarded in full to first lawyer because first lawyer's contract with client was never modified. *Anderson v. 50 State Security Service, Inc.*, 178 So.3d 915 (Fla. 3d DCA 2015).

Anderson, age 82, was injured in an altercation with a security guard and sued the security company ("50 State"). Anderson was represented by lawyer Carbonell. Her fee agreement with Carbonell provided that, if additional lawyers were associated on the case, "[a] new fee contract, which includes the new attorneys, will be executed." Several months later attorney Allen was hired as co-counsel. Anderson and her son (who was represented by Allen pro bono in an unrelated matter) signed a contingent fee agreement with Allen. The original fee agreement between Anderson and Carbonell was never modified or terminated, nor did it "otherwise specify an allocation of responsibility or fees in the case against 50 State." Both lawyers worked on the case.

The case settled at mediation. Carbonell moved to have the full 40% contingent fee paid to him, with no payment to Allen. The court granted the motion, holding "that it was Allen's responsibility to have obtained a written arrangement with Carbonell before entering the case as co-counsel and performing services."

The Second DCA affirmed "because Allen's second 40% contingency would not adhere to the Rules Regulating The Florida Bar and would be unenforceable. *Chandris, S.A. v. Yanakakis,* 668 So.2d 180, 186 (Fla.1995). Rule 4–1.5(f)(4)(D) of those Rules contemplates a division of contingency fees when there are attorneys from separate firms, but it is incumbent on the lawyers to come to an agreement for that allocation and to obtain client and court consent before the fees are disbursed. The comments to Rule 4–1.5 provide guidance regarding that process."

The court noted, however, that "there is authority" for a separate quantum meruit claim by Allen ("an attorney providing services but lacking a contingent fee agreement") directly against Carbonell. See *Lackey v. Bridgestone/Firestone, Inc.*, 855 So.2d 1186 (Fla. 3d DCA 2003).

Law firm's charging lien does not take priority over fee indemnification provision in spousal agreement entered into before law firm was hired. *Christopher N. Link, P.A. v. Rut*, 165 So.3d 768 (Fla. 4th DCA 2015).

Husband and Wife were in divorce proceedings. They reconciled, entering into an Agreement with a right of indemnification to either of them for fees if one prevailed in a challenge to the Agreement. When the reconciliation failed, Husband filed for divorce. Law Firm represented Wife and sought to have the Agreement set aside. Subsequently Law Firm withdrew and filed a charging lien.

The court upheld the Agreement. Husband was awarded $207,000 in fees. Law Firm argued that its charging lien had priority over the fee award to Husband. The court disagreed, ruling that the Agreement, entered into in March 2007, had priority over Law Firm's charging lien. Law Firm's representation of Wife did not begin until September 2008.

The Second DCA affirmed. A charging lien is an equitable right, and "[i]t would be inequitable to give priority to a charging lien that became effective a year and a half after the agreement, and arose out of efforts to attack the very agreement upon which the former husband's right to indemnification arose. Although the former husband was awarded indemnification for his attorney's fees after the date of the law firm's retainer agreement with the former wife, the former husband's right to indemnification arose prior to the entry of the retainer agreement. The court did not abuse its discretion in finding the former husband's claim 'superior in time and first in right to those of' the law firm."

To give the charging lien priority "would encourage lawyers to challenge marital settlement agreements containing indemnification rights to prevailing party attorney's fees with impunity, knowing that even if they lose, their charging lien would take priority over the agreement they challenged. This would defeat the very equity that liens were designed to protect."

Order imposing charging lien reversed and remanded because court failed to make necessary findings as to amount and reasonableness of fees. *San Pedro v. Law Office of Paul Burkhart,* 168 So.3d 299 (Fla. 4th DCA 2015).

Lawyer represented Clients in a condo association dispute. Lawyer withdrew and filed a notice of charging lien. At the hearing, Lawyer relied on exhibits attached to his motion to enforce the lien. "Both parties, as well as the trial court, referred to the exhibits during the hearing. Notably, however, neither the actual attorneys who performed the work in [Clients'] case nor a fee expert testified at the hearing." The court entered an order imposing the charging lien in the amount of $8463.18, but "made no findings as to the reasonable hourly rate or the amount of hours reasonably expended."

The Fourth DCA affirmed Lawyer's entitlement to the charging lien, but ruled that the evidence was insufficient to establish the amount of fees. The court remanded for an evidentiary hearing on the amount of fees due on the charging lien and for an order "containing the necessary findings and conclusions based upon such evidence."

Court erred in granting former client's motion to strike law firm's charging and retaining lien without holding evidentiary hearing. *Parrish & Yarnell, P.A. v. Spruce River Ventures, LLC*, __ So.3d __ (Fla. 2d DCA, No. 2D14-3239, 12/11/2015), 2015 WL 8519438.

Law firm Parrish & Yarnell represented Spruce River, the plaintiff in a long-running real estate dispute. A defendant moved to disqualify lawyer Parrish. A few months later Parrish moved to withdraw, telling the court that he "had a conflict of interest but that he could not reveal the details." The court granted the motion. About 6 months later Parrish & Yarnell filed a notice asserting a charging and retaining lien on any proceeds that Spruce River received in the case. Spruce River moved to strike the charging and retaining lien.

Parrish & Yarnell petitioned to enforce the charging and retaining lien, stating that Spruce River received $221,000 pursuant to an agreed stipulation for dismissal of the underlying case and that Spruce River owed the firm $102,000. Although both the law firm and the former client indicated that an evidentiary hearing would be needed, the court held a hearing at which argument was made but no evidence was presented. The court granted the motion to strike the lien, "reasoning that Parrish & Yarnell was not entitled to a charging lien because there was no recovery and Attorney Parrish had withdrawn from the case."

The Second DCA reversed and remanded for an evidentiary hearing. "[W]hether Parrish & Yarnell is entitled to a charging and retaining lien turns on several factual questions, such as whether there was a recovery in this case, whether the fee agreement provided for a contingent or hourly fee, whether Attorney Parrish withdrew from the case voluntarily, and whether the allegations of misconduct against Attorney Parrish should effect his entitlement to fees. The court made factual determinations based on the record before it and addressed the merits of Parrish & Yarnell's claim that it was entitled to a charging and retaining lien – as well as Spruce River's affirmative defenses – without giving the parties the opportunity to present evidence. This was inappropriate on a motion to strike, where the only issue should have been the legal sufficiency of Parrish & Yarnell's claim to the lien."

Court departed from essential requirements of law in ordering law firm to give former client immediate access to firm's files despite firm's assertion of retaining liens on files. *Conde & Cohen, P.L. v. Grandview Palace Condominium Ass'n, Inc.*, __ So.3d __ (Fla. 3d DCA, No. 3D15-1109, 8/5/2015), 2015 WL 4637285.

See discussion in "Files" section.

Domestic Relations Cases:

Court erred in denying fees on ground that party seeking fees did not introduce testimony from lawyer who actually performed services. *Cozzo v. Cozzo*, __ So.3d __ (Fla. 3d DCA, No. 3D15-133, 11/25/2015) (on rehearing), 2015 WL 7709435.

Former Wife moved for fees. At evidentiary hearings she presented testimony of a fee expert to support the reasonableness of the claimed fees and testimony of the records custodian in her lawyer's law firm to authenticate the lawyer's time sheets. But the court denied fees, agreeing with Former Husband's contention that the evidence was insufficient because the lawyer who actually performed the legal services did not testify directly.

The Third DCA reversed. "Florida law requires a party seeking attorney's fees to provide proof (a) 'detailing the nature and extent of the services performed and … [(b)] expert testimony regarding the reasonableness of the fees.' [Citations omitted.] Where a party has provided sufficient, admissible proof of these two components, no court has further mandated direct testimony from the attorney who performed the services."

Court abused discretion in ordering former husband to pay former wife's fees after equitably distributing property and equalizing incomes through alimony award. *Hutchinson v. Hutchinson*, __ So.3d __ (Fla. 1st DCA, No. 1D15-232, 10/2/2015), 2015 WL 5779387.

The court adopted the parties' agreement for equitable distribution of marital property. The court awarded Former Wife alimony of $2100 per month for 12 years. The alimony award had the effect of equalizing the parties' incomes. The court also ordered that Former Husband pay $6000 of Former Wife's fees.

The First DCA reversed the fee award. "Where marital property has been equitably distributed and the parties' incomes have been equalized through an alimony award, the trial court abuses its discretion by awarding attorney's fees."

Court erred in not awarding fees to husband based on wife's unsuccessful challenge of prenuptial agreement that provided for fees if party sought to have agreement voided. *Berg v. Young*, 175 So.3d 863 (Fla. 4th DCA 2015).

Wife sought to have a prenuptial agreement declared invalid. Trial was bifurcated. After the first part, the judge entered an order upholding the agreement and interpreting it. Both parties moved for fees. Husband's motion was based on a provision in the prenuptial agreement stating that "the party seeking to avoid the terms of this agreement shall be liable for all of the attorneys [sic] fees and costs incurred by the other party." The judge "denied both parties' requests for fees, finding the husband prevailed on validity and the wife prevailed on interpretation."

The Fourth DCA reversed. "The Florida Supreme Court has held that 'prenuptial agreement provisions awarding attorney's fees and costs to the prevailing party in litigation regarding the validity and enforceability of a prenuptial agreement are enforceable.' *Lashkajani v. Lashkajani*, 911 So.2d 1154, 1160 (Fla. 2005). Any such provisions control the issue of fees in a dissolution case over the parameters of section 61.16, subject to the limitations of disclosure outlined in Florida case law." Wife sought to void the agreement, but failed. "The clear, unambiguous terms of the agreement do not provide for an award of fees to the party prevailing on the 'interpretation' of the agreement. Thus, the husband, as the prevailing party in the wife's action 'seeking to void this agreement' was entitled to an award of fees against the wife who was 'the party seeking to avoid the terms of this agreement.'"

Fee award under F.S. 61.16 requires specific factual findings as to financial need and ability to pay. *Beckstrom v. Beckstrom*, __ So.3d __ (Fla. 4th DCA, No. 4D14-929, 4/29/2015), 2015 WL 1934574.

The court entered a fee award for Wife. Husband appealed, contending that the order did not contain "the requisite factual findings on his ability to pay, the reasonableness of the hours expended and hourly rate, and the basis for the court's payment plan." Wife argued that F.S. 61.16 "does not require specific factual findings regarding attorney's fees."

The Fourth DCA reversed and remanded, noting that it "previously reversed a final judgment that included an 'award of attorney's fees because the trial court did not make findings concerning the former wife's need and the former husband's ability to pay fees and costs.'"

Fees may not be assessed against non-prevailing *obligee* in Title IV-D child support enforcement action. *Florida Dept. of Revenue v. James*, 159 So.3d 973 (Fla. 3d DCA 2015).

In a child support case Mother was the obligee (i.e., the person to whom child support payments are made). Mother brought an action against obligor Father for non-payment. The Department of Revenue intervened on behalf of Mother. The parties settled in an agreed order stating that Father had complied with his child support obligation. Father sought fees from Mother, claiming that she instituted the proceeding just to harass him. The court granted fees to Father.

The Third DCA reversed. This became a Title IV-D action by virtue of the Department's intervention. F.S. 61.16(1) limits fee awards in Title IV-D actions: "In Title IV-D cases, attorney's fees . . . shall be assessed only against the nonprevailing obligor after the court makes a determination of the nonprevailing obligor's ability to pay such costs and fees. . ." Fees cannot be assessed against an *obligee*, and so the trial court erred in assessing fees against Mother.

Insurance Cases:

Insured entitled to statutory fees after insurer first disputed, then later paid, full claim under "stacked" uninsured motorist coverage. *Shirtcliffe v. State Farm Mutual Auto. Ins. Co*., 160 So.3d 555 (Fla. 5th DCA 2015).

Insured claimed entitlement to "stacked" uninsured motorist coverage under his parents' policy. Insurer disputed coverage. The determinative issue was whether Insured was a resident relative under the policy. Insurer tendered what it claimed was policy limits of $100,000. After Insured filed suit and was examined under oath, Insurer paid additional proceeds of $200,000. The court denied statutory attorney's fees to Insured.

The Fifth DCA reversed. Because Insurer initially disputed Insured's entitlement to stacked uninsured motorist benefits and its later concession on that issue "was tantamount to a confession of judgment," Insured was statutorily entitled to reasonable fees.

Court properly awarded fees to insured under F.S. 627.428 after auto insurer voluntarily dismissed dec action, but erred in awarding fees to insured's passenger who was treated for injuries. *Explorer Ins. Co. v. Cajusma*, 178 So.3d 923 (Fla. 5th DCA 2015).

Cajusma was insured by Explorer under an auto policy. Cajusma and his passengers, Philogene and Pade, were hurt in an accident and sought treatment. When Explorer denied claims by persons in the vehicle that collided with Cajusma's, those persons sued Cajusma. Explorer filed a declaratory judgment action seeking to be relieved from paying benefits and providing liability coverage. Cajusma sued Explorer for breach of contract. That matter settled.

In the still-pending dec action, Cajusma and Pade filed motions for summary judgment seeking fees and costs under F.S. 627.428. Explorer moved to dismiss the dec action and the court granted the motion. The court then awarded fees to Cajusma and Pade.

The Fifth DCA affirmed the award to Cajusma. "Cajuma received a benefit and was entitled to recover his attorney fees and costs upon Explorer's dismissal of its declaratory judgment suit."

The appeals court reversed the fee award to Pade. Unlike Cajusma, "Pade did not receive a recovery or any other benefit, did not receive a defense from Explorer, and Explorer did not pay anyone on behalf of Pade."

Court did not err in awarding fees to insureds who prevailed against insurer's counterclaim despite losing on breach of contract claim. *Citizens Property Ins. Corp. v. Bascuas*, 178 So.3d 902 (Fla. 3d DCA 2015).

Insureds filed a claim for a property damage loss from a broken plumbing system. Insurer paid $28,000. Insureds sued, alleging their loss was $330,000. Insurer counterclaimed for fraud and unjust enrichment.

The jury found for Insurer on Insureds' breach of contract claim, but found for Insureds on Insurer's unjust enrichment counterclaim. The court awarded fees to Insureds under F.S. 627.428.

The Third DCA affirmed. "A judgment was entered in favor of [Insureds] on [Insurer's] counterclaim, satisfying the provisions of section 627.428(1) that there be a 'rendition of a judgment . . . against an insurer and in favor of any . . . insured . . . under a policy or contract executed by the insurer. . . .' [Insureds were] therefore entitled to attorney's fees for the successful defense of, and favorable judgment on, [Insurer's] counterclaim, and the trial court properly awarded attorney's fees and costs to [Insureds]."

Insurer argued that applying F.S. 627.428 to award fees to Insureds was "contrary to public policy, namely: (1) Florida's public policy against material misrepresentations during the claims process; and (2) the public policy behind section 627.428, which is to discourage insurers from contesting valid claims." The court rejected that argument: "This Court has already spoken to this issue and has made clear that 'we believe that modification of [section 627.428] to address false statements by an insured is best left to the legislature.' *Mercury Ins. Co. of Fla. v. Cooper*, 919 So.2d 491, 493 (Fla. 3d DCA 2005). [Insurer] seeks the very same remedy requested by the appellant in *Cooper* and rejected by our opinion in that case: 'a judicially crafted exemption to section 627.428(1) in cases where there is insurance fraud.'" Any such change "must be effectuated legislatively, not judicially."

Miscellaneous Fee Cases:

Supreme Court approves rule defining retainers, flat fees, and advance fees and specifying how they are handled for trust accounting purposes. *In re: Amendments to Rule Regulating The Florida Bar 4-1.5 – Fees and Costs for Legal Services*, 175 So.3d 276 (Fla. 2015).

See discussion in "Rule Changes (and Proposed Changes)" section.

Supreme Court approves stay and directs Bar to submit new proposal for rule regarding fees for extraordinary lien resolution services. *In re: Amendments to Rule Regulating The Florida Bar 4-1.5 – Fees and Costs for Legal Services*, 175 So.3d 276 (Fla. 2015).

See discussion in "Rule Changes (and Proposed Changes)" section.

Supreme Court addresses calculation of fees in eminent domain cases where condemning authority causes excessive litigation, ruling that application of formula in F.S. 73.092(1) is constitutionally deficient. *Joseph B. Doerr Trust v. Central Florida Expressway Authority*, 177 So.3d 1209 (Fla. 2015).

Fee awards to landowners in eminent domain cases are governed by F.S. 73.092. Section (1) provides for fees on the basis of "benefits achieved for the client" as defined in the statute. Section (2) sets out other factors to be considered by the court in awarding fees.

Landowners were in eminent domain litigation with Condemning Authority. Authority used tactics that caused Landowners to incur additional fees. Authority sought to limit the fee award to that calculated under section (1). Landowners argued that they were entitled to fees under section (2), "which requires a trial court to consider qualitative and quantitative factors in determining the amount of a fee award."

The court held that section (1) was unconstitutional as applied and awarded Landowners fees of $816,000 using factors listed in sections (2) and (3). The Fifth DCA reversed, limiting the fee to that called for under section (1). The appeals court certified a question to the Supreme Court. *Orlando/Orange County Expressway v. Tuscan Ridge, LLC (Tuscan Ridge II)*, 137 So.3d 1154 (Fla. 5th DCA 2014).

The Supreme Court rephrased the certified question as: "In an eminent domain proceeding, when the condemning authority engages in tactics that cause excessive litigation, is the benefits achieved formula in section 73.092(1), Florida Statutes, unconstitutional as applied to calculated attorney's fees for the hours incurred in defending against the excessive litigation?"

Answering in the affirmative, the Court quashed the Fifth DCA's decision and remanded for an evidentiary hearing "to determine the total attorney's fees based on both the benefit and the portion of the work attributable to the excessive litigation and actions." The Court concluded: "We hold that when a condemning authority engages in tactics that cause excessive litigation, section 73.092(2) shall be used separately and additionally to calculate a reasonable attorney's fee for the hours expended which are attributable to defending against the excessive litigation or actions. This will result in an amount that must be added to the remainder of the fee calculated utilizing the

benefits achieved formula delineated in section 73.092(1). This is a two-step process that results in a total fee that is based both on benefit and any excessive litigation."

Fourth DCA rejects law firm's contention that $100,000 fee limitation in $10 million claims bill for client was unconstitutional impairment of attorney-client contract. *Searcy Denney Scarola Barnhart & Shipley, P.A. v. State*, __ So.3d __ (Fla. 4th DCA, No. 4D13-3497, 7/15/2015), 2015 WL 4269031.

Law Firm represented Clients in a contingent fee medical malpractice case arising from a catastrophic brain injury sustained at birth. The jury returned a verdict for $30 million. Sovereign immunity limited the judgment against the defendant hospital to $200,000. Law Firm pursued a claims bill in the Florida Legislature. The legislature passed a $10 million claims bill, but limited the amount of additional attorneys' fees to $100,000.

Law Firm (and others who worked on the case with the Firm) petitioned the guardianship court seeking $2.5 million in fees. Law Firm argued that the fees and costs limitation in the claims bill was unconstitutional.

The Fourth DCA affirmed. The court was "sympathetic to the fact that the legislatively enacted attorneys' fees cap in this case failed to cover even the $500,000 in Appellants' costs advanced by [Law Firm] during their representation of [Clients]. But our responsibility in this matter is to ensure that the claims bill passed by the legislative branch of government meets constitutional muster. As noted above, the Florida Supreme Court, in no uncertain terms, has held that the limitation of attorneys' fees in a private relief act/claims bill 'is a constitutionally permissible exercise of legislative authority and does not constitute an impairment of contractual obligations proscribed by article I, section 10 of the Florida Constitution.'"

The court also rejected Law Firm's contentions that the $100,000 limitation violated the separation of powers doctrine, was an unconstitutional taking, a violation of the due process clause, or a denial of equal protection.

Fourth DCA addresses definition of "contingency fee" in rejecting argument that no fee was due law firm under agreement for payment of earned fees. *Wright v. Guy Yudin & Foster, LLP*, 176 So.3d 368 (Fla. 4th DCA 2015).

Law Firm had an ongoing relationship with Client, often working on multiple matters at a time. One matter (the "URGOS matter") involved a federal maritime case, with Client incurring fees of $47,837 prior to settlement. A second matter involved real property (the "TDL property"). Client's sister sought to foreclose on a mortgage and force a sale of the TDL property.

Concerned about getting paid for the URGOS matter, in March 2007 Law Firm had Client sign a letter agreeing to pay the fees owed from the URGOS matter "at the closing of the [TDL] property." In October 2007 Client entered into a contract to sell the TDL property. In February 2008 Client fired Law Firm. In September 2008 the sale of the TDL property fell through.

Two years later Law Firm learned that Client's sister sold her interest in the TDL property for a substantial sum. Law Firm sued Client for its fees. The court entered judgment for Law Firm.

The Fourth DCA affirmed. Client argued that the letter was a contingent fee agreement and that the contingency never occurred. The court rejected this argument. The letter agreement was

not a contingency fee agreement. The "letter was drafted solely to memorialize the amounts that were *already due and owed* to the law firm in order to assure [Client] agreed to those amounts before further legal services continued. At the time [Client] incurred the fees memorialized in the letter, there was no consideration by the parties that payment of the fees depended on some successful action by the law firm." (Emphasis by court.)

The court explained: "A contingency fee arrangement occurs when a law firm does not bill or expect payment until and unless the contingency is achieved. Contingency fee arrangements are typically contingent upon a successful outcome. See R. Regulating Fla. Bar 4-1.5(f)(1) ('A fee may be contingent on the outcome of the matter for which the service is rendered.'). Here, the law firm already had performed legal services for which it clearly expected to receive payment, regardless of the outcome of the case or any other contingency." The letter was not a contingency fee agreement but "was instead an admission by [Client] for legal fees already owed."

Court erred in awarding guardian's lawyer less than full fee on gross recovery as specified in contingent fee contract. *Hensley Chalfant, P.A. v. Guardianship of Flannigan*, __ So.3d __ (Fla. 2d DCA, No. 2D13-3077, 11/18/2015), 2015 WL 7273373.

Lawyer was retained by a ward's guardian to pursue recovery for a serious injury suffered by the ward after a fall. The contingent fee agreement was approved by the court. Lawyer negotiated settlements with 3 defendants totaling $2.5 million.

When the guardian and the ward repudiated the settlement, the defendants moved to enforce it. The guardian's prior counsel had negotiated a settlement with 2 of the defendants for less than the amount Lawyer obtained. "In spite of disavowing the original settlement, the guardian took the position that [Lawyer] was only entitled to a contingency fee based on the amount he obtained that exceeded the amount of the original settlement." The trial court ruled for the guardian.

The Second DCA reversed. "The guardian's argument is flawed in several respects. First, it is contradicted by the language of the fee agreement which plainly requires a fee based on the 'gross recovery.' Second, the guardian's argument that the fee is excessive is premised on the contention that there were two valid settlements, only one of which came through [Lawyer]'s efforts. This is inconsistent with the guardian's position throughout the proceedings below that there was no enforceable settlement."

Offer made by DOT under "Early Acquisition Program" was offer made outside eminent domain power and so cannot be used as basis for calculating fees under F.S. 73.092. *General Commercial Properties, Inc. v. Florida Dept. of Transportation*, 178 So.3d 439 (Fla. 4th DCA 2015).

The Department of Transportation ("DOT") anticipated a future need to acquire a parcel of property for a road project. DOT offered to buy the parcel under its "Early Acquisition Program" ("EAP"), which offers "property owners the opportunity, without any obligation, to sell their property to DOT prior to any formal agency decision being made to initiate eminent domain proceedings." In 2005 DOT made an EAP offer of $400,000. No agreement was reached.

In 2013 DOT began eminent domain proceedings to acquire the parcel. DOT's first offer was $699,000, which was rejected. The ultimate judgment awarded $800,000 for the parcel.

The property owner sought fees under F.S. 73.092, using the statute's "benefits achieved" standard. The owner claimed that the EAP offer amount of $400,000 should be the basis for fees, while DOT asserted that the proper amount to use was $699,000. The court agreed with DOT.

The Fourth DCA affirmed because "(1) DOT made the 2005 offer in an attempt to acquire the property as a voluntary acquisition and (2) DOT expressly conditioned that offer as not being usable in calculating attorney's fees if an eminent domain proceeding was subsequently necessary."

Guardianship statute does not authorize court to order payment of fees from alleged incapacitated person when guardianship not established. *Steiner v. Guardianship of Steiner*, 159 So.3d 253 (Fla. 2d DCA 2015).

In good faith, Children petitioned for involuntary guardianship and incapacity proceedings for Parents. The court appointed counsel for Parents, and an examining committee conducted incapacity proceedings. The committee determined that Parents were not incapacitated, and the court dismissed the proceedings. Parents' counsel petitioned for fees under F.S. 744.331. The court entered orders authorizing payment of fees.

The Second DCA reversed, relying on *In re Guardianship of Klatthaar*, 129 So.3d 482 (Fla. 2d DCA 2014) (statute does not require alleged incapacitated person to pay fees when petition to determine guardianship and incapacity brought in good faith but incapacity not found and guardianship not established). The court went on to "emphasize the importance of correcting the statutory gap that gives rise to the issues presented." The court explained the problems: F.S. 744.331 "does not address situations wherein good faith incapacity petitions are ultimately dismissed, court-appointed attorneys are left with a right without a remedy. This puts the trial court in a bind as it is forced to appoint attorneys and examining committees knowing that if a petition is brought in good faith but is ultimately dismissed, the attorneys will not be paid. Similarly, recognizing the risks associated with court appointment in incapacity and guardianship proceedings, attorneys will be hesitant to make themselves available for such appointment." These problems must be corrected by the legislature, not the courts.

Fifth DCA addresses meaning of "settled" in fee division agreement among law firms. *Burlington & Rockenbach, P.A. v. Law Offices of E. Clay Parker*, 160 So.3d 955 (Fla. 5th DCA 2015).

An appellate law firm ("Burlington") and trial law firms ("Trial Attorneys") agreed that Burlington would assist Trial Attorneys during the trial of a case involving wrongful death, medical malpractice, and products liability. A substantial verdict was rendered for the plaintiffs. One of the defendants settled for an amount less than the verdict. The other 2 defendants appealed, and the judgment was affirmed except for a setoff amount to be deducted from the judgment. But instead of returning to the trial court for a corrected judgment to reflect the setoff, the 2 defendants "agreed to pay the judgment minus the setoff amount and obtain a satisfaction of judgment to end the matter without further court proceedings."

The law firms litigated in a separate action over the fee division agreement. The key provision dealt with the amount of the fee when the case "settled." The court ruled that the amount in dispute belonged to Trial Attorneys, reasoning that "the word 'settled' means voluntary

resolution of the dispute between the parties via a settlement agreement and that a trial with its attendant verdict and judgment does not equate to a settlement agreement."

The Fifth DCA reversed. After discussing the meaning of "settle" in *Black's Law Dictionary*, the court concluded: "Within the context of the entire agreement, and, in particular, the specific paragraph quoted earlier in this opinion, we believe that the word 'settled' was not intended by the parties to mean a mutual agreement of the parties that resolves the lawsuit. Rather, we agree with Burlington that it means resolution of the lawsuit by final decision or payment or satisfaction of the judgment previously rendered."

Offers of Judgment and Proposals for Settlement:

Supreme Court holds that apportionment of settlement amount is required where offer of judgment is made by or to multiple parties. *Pratt v. Weiss*, 160 So.3d 1268 (Fla. 2015).

Exercising its conflict jurisdiction, the Supreme Court held that apportionment of a settlement amount is required where an offer of judgment is made by or to multiple parties.

Plaintiff filed a medical malpractice suit against defendants that included FMC Hospital, Ltd. and FMC Medical, Inc. Plaintiff alleged that these 2 defendants owned and operated Florida Medical Center, and were "responsible for the negligence of a *single entity*, Florida Medical Center." (Emphasis by court.) The 2 defendants made a $10,000 proposal for settlement. Plaintiff did not accept. The case was tried and the parties stipulated that the proper party in interest was FMC Hospital, Ltd. d/b/a Florida Medical Center. The jury found for this defendant, which then moved for fees pursuant to the rejected settlement offer. The court granted the motion.

Plaintiff appealed, arguing that the proposal was unenforceable because it did not apportion the offer between 2 separately named defendants. The defendants responded that apportionment was not required because Florida Medical Center was the single hospital entity alleged to be responsible. The Fourth DCA affirmed, viewing the offer as having been from "the single hospital entity allegedly responsible." *Pratt v. Weiss*, 92 So.3d 851 (Fla. 4th DCA 2012).

The Supreme Court quashed the DCA's decision. "[T]he plain language of the settlement offer in this case demonstrates it was a joint proposal. Although the offer was titled 'Defendant, Florida Medical Center's, Proposal for Settlement/Offer of Judgment,' the text of the proposal unambiguously refers to the defendant offerors *in the plural*. Thus, under the clear wording of the proposal, two offerors – FMC Hospital and FMC Medical – presented the offer. Accordingly, under section 768.79 and rule 1.442 the proposal was invalid because it failed to apportion the settlement amount between FMC Hospital and FMC Medical." (Emphasis by Court.) The Court emphasized that, "[e]ven where no logical apportionment can be made, it is nonetheless required where more than one offeror or offeree is involved."

Supreme Court holds that settlement proposal by single offeror to single offeree that resolves claims of or against other parties is joint proposal subject to apportionment requirement of Fla.R.Civ.P. 1.442. *Audiffred v. Arnold*, 161 So.3d 1274 (Fla. 2015).

Exercising its conflict jurisdiction, the Supreme Court held that "when a single offeror submits a settlement proposal to a single offeree pursuant to section 768.79 and rule 1.442, and the offer resolves pending claims by or against additional parties who are neither offerors nor offerees, it constitutes a joint proposal that is subject to the apportionment requirement in subdivision (c)(3) of the rule."

Audiffred brought a personal injury suit against Defendant that included a loss of consortium claim for Audiffred's husband, Kimmons. Audiffred served Defendant with a proposal for settlement under F.S. 768.79 and Fla.R.Civ.P. 1.442. It was not accepted. After a favorable verdict Audiffred moved for fees based on the rejected proposal. The court granted the motion.

Defendant appealed, contending that the proposal for settlement was invalid because it was a joint proposal that did not apportion the amount attributable to each party. The First DCA agreed and reversed. Although the proposal stated it was made by Audiffred, it included this condition: "Both Plaintiffs will dismiss this lawsuit, with prejudice, as to the Defendant." Fla.R.Civ.P. 1.442(c)(3) requires that a "joint proposal" for settlement "shall state the amount and terms attributable to each party." This requirement is strictly construed and can be especially important in cases with a loss of consortium claim. The First DCA concluded that the proposal was a joint one and so should have apportioned the settlement amount between plaintiffs. *Arnold v. Audiffred*, 98 So.3d 746 (Fla. 1st DCA 2012).

The Supreme Court approved the DCA's decision. The complaint made separate claims by Audiffred and Kimmons. Although Audiffred was the sole offeror, if accepted the offer would have resolved all pending claims by both Audiffred and Kimmons. "[T]he proposal had the effect of settling claims by two plaintiffs against one defendant. Under the required strict construction of the rule and the statute, this ultimate effect of the offer requires that it be treated as a joint proposal."

Court erred in denying fees under offer of judgment statute on ground that another party actually paid offeror's fees. *Key West Seaside, LLC v. Certified Lower Keys Plumbing, Inc.*, __ So.3d __ (Fla. 3d DCA, No. 3D13-2589, 9/2/2015), 2015 WL 5132383.

Plaintiff, the subcontractor on a building project, sued 5 defendants including the general contractor and Seaside. One law firm represented all 5 defendants. Each defendant served a proposal for settlement on Plaintiff. None were accepted. The court entered a judgment against the general contractor but found no liability for Seaside. Seaside moved for fees based on its proposal for settlement. The court denied fees, "basing its ruling in part on the testimony of Seaside's attorney . . . that the attorney's fees 'were billed to and paid by or on behalf of [the general contractor] pursuant to an indemnification agreement between Seaside and [the general contractor]" and the fact that the defendants' lawyer, "while advocating for [other defendants], made arguments adverse to" Seaside. The court made no findings that Seaside's offer was made in bad faith.

The Third DCA reversed. "The fact that another party or a nonparty may have paid the offeror's attorney's fees is of no consequence to the question of whether the offeror is entitled to fees and costs pursuant to the offer of judgment statute or rule."

Proposal for settlement under F.S. 768.79 not deficient although it failed to address loss of consortium claim maintained by offeree's spouse and failed to apportion amount attributable to party who was solely vicariously liable. *Miley v. Nash*, 174 So.3d 145 (Fla. 2d DCA 2015).

Wife sued an owner and the driver of a car after a collision. Wife's Husband asserted a loss of consortium claim. Defendants served a proposal for settlement on Wife that offered to pay $58,590 "in 'an attempt to resolve all claims and causes of action resulting from the incident or accident giving rise to this lawsuit brought by Plaintiff [Wife] against Defendant [driver].'" Wife did not accept the offer, but recovered only $17,955 at trial. Defendants moved for fees under F.S. 768.79 and Fla.R.Civ.P. 1.442. The court denied the motion, reasoning that the proposal was deficient for (1) failing to address Husband's consortium claim and (2) failing to apportion the amounts between the 2 defendants, one of whom (owner) was only vicariously liable.

The Second DCA reversed. Regarding the consortium claim, the court stated: "[T]he rule requires that a proposal identify the claims it is 'attempting to resolve,' not every claim related to the suit brought by either plaintiff. Although the loss of consortium claim was pending against [Defendants] at the time of the proposal, that claim was not affected by the proposal for settlement because it was [Husband]'s separate and distinct claim, despite its derivative nature. . . . [Husband] was still free to pursue his loss of consortium claim even if [Wife] accepted the proposal because it would only dismiss her claims; the proposal required no action or input on the part of [Husband] whatsoever because his cause of action was his own."

As to the apportionment issue, the court stated: "[T]he proposal did not need to apportion any amount attributable to [owner] despite the fact that the proposal required [Wife] to dismiss her claims against him because he was solely vicariously liable." The court distinguished *Audiffred v. Arnold*, 161 So.3d 1274 (Fla. 2015), on the basis that *Audiffred* concerned a prior version of Fla.R.Civ.P. 1.442. The relevant subsection now "provides 'when a party is alleged to be solely vicariously . . . liable . . . a joint proposal made by or served on such a party need not state the apportionment or contributions as to that party.' Fla. R. Civ. P. 1.442(c)(4). Therefore, while [Defendants'] proposal was a joint one, because [owner] was solely vicariously liable no apportionment was necessary."

Certifying conflict, First DCA rules that offer of judgment was ambiguous because it failed to state whether it included fees, even though fees were not sought in complaint. *Borden Dairy Co. of Alabama, LLC v. Kuhajda*, 174 So.3d 242 (Fla. 1st DCA 2015).

Plaintiff prevailed in a negligence case against 2 defendants. Plaintiff moved for fees pursuant to F.S. 768.79 and Fla.R.Civ.P. 1.442. Plaintiff had served Defendants with identical offers of judgment that proposed to settle all of the claims for one lump sum. Defendants contended that the offers "were invalid because they failed to 'state whether the proposal includes attorneys' fees and whether attorneys' fees are part of the legal claim' as required by [Fla.R.Civ.P.] 1.442(c)(2)(F). The trial court granted the motion, concluding that the failure to include the attorneys' fees language did not create an ambiguity in this case because [Plaintiff] never sought attorneys' fees in her complaint."

The First DCA reversed. Offers of judgment must strictly comply with the statute and rule. In this case, Plaintiff "failed to strictly comply with rule 1.442(c)(2)(F) when she failed to state in the offers of judgment whether the offers included attorneys' fees and whether attorneys' fees were part of the legal claim."

In *Diamond Aircraft Indus., Inc. v. Horowitch*, 107 So.3d 362, 377 (Fla. 2013), the Supreme Court held that an offer of judgment did not comply with the rule because it did not state that the

offer included fees and whether fees were part of the legal claim. The court stated that "we can see no reason why this holding would not apply equally to a case where attorneys' fees were not sought in the complaint."

The First DCA certified conflict with the Fourth DCA's decision in *Bennett v. American Learning Systems of Boca Delray, Inc.*, 857 So.2d 986 (Fla. 4th DCA 2003).

If words and numerals in rejected proposal for settlement do not match, proposal is ambiguous and will not support fee award. *Government Employees Ins. Co. v. Ryan*, 165 So.3d 674 (Fla. 4th DCA 2015).

After an accident Insured sued her Insurer based on her policy's uninsured/underinsured coverage. Insured served a proposal for settlement "in the total amount of *One Hundred Thousand Dollars ($50,000.00)* inclusive of all costs and fees and in full and final settlement of all pending claims. The total amount of this settlement *shall not exceed $50,000.00*." (Emphasis by court.) Policy limits were $50,000. Despite the discrepancy in amounts, the court granted Insured's motion for fees because it was "sufficiently clear and definite and not susceptible to more than one reasonable interpretation."

The Fourth DCA reversed. In *Stasio v. McManaway*, 936 So.2d 676 (Fla. 5th DCA 2006), the court held that "even if 'the reference to $59,000 [in words, while $60,000 appeared in numerals] was a mere typographical error, the consequences of that error' fell on the party seeking to enforce the proposal." Here, Insured's proposal had "a patent ambiguity – spelling out $100,000 in words but also referring to $50,000 in numerals."

Fee award resulting from rejected offer for settlement reversed, where offer was ambiguous as to whether it applied to potential contract claims related to tort claim at issue. *Vogan v. Cruz*, 159 So.3d 921 (Fla. 5th DCA 2015).

Plaintiff sued Defendant for injuries from an auto accident. Plaintiff rejected Defendant's offer for settlement for $5001 but obtained a jury verdict for only $1258. Plaintiff moved to strike the offer as "ambiguous as to whether it would extinguish her potential uninsured motorist and health insurance claims." The court awarded fees and costs of $36,000 to Defendant.

The Fifth DCA reversed. The offer provided that it would resolve "all actions, causes of action, demands for damages of whatever name or nature and tort, contract or by statute, in any matter arisen, arising" out of the subject accident. The court concluded: "[T]his language constitutes a general release implicating claims extrinsic to the litigation. The fact that the Offer did not require a separate document entitled release is immaterial because the only claim involved in the underlying suit was a tort claim. Nevertheless, the Offer expressly proposes to resolve contractual and statutory claims. For that reason, the Offer is ambiguous as to whether it would preclude [the] potential uninsured motorist and health insurance claims, and thus, is unenforceable."

Offer of judgment not ambiguous although mutual releases contain names of individual lawyers who are members of law firms that are parties to action. *Michele K. Feinzig, P.A. v. Deehl & Carlson, P.A.*, 176 So.3d 305 (Fla. 3d DCA 2015).

Two law firms sued a third law firm over a fee-division agreement. Each plaintiff served a proposal for settlement, including a "Mutual Release," on the defendant firm. After a favorable judgment, plaintiffs moved for fees pursuant to the rejected proposals for settlement. The defendant firm argued that the proposals were ambiguous because "the language contained in each mutual release, specifically identifying each individual attorney within the firms involved, contradicted that portion of the proposal for settlement that identified each proposal's offeror and offeree." The court agreed, ruling that "the inclusion of the names of the individual attorneys in the mutual releases' prefatory language created an ambiguity that rendered each proposal for settlement unenforceable."

The Third DCA reversed. The case was controlled by *Jessla Construction Corp. v. Miami-Dade County School Board*, 48 So.3d 127 (Fla. 3d DCA 2010). "In *Jessla*, we concluded that a proposal for settlement conditioned upon the execution of a standard release identifying typical affiliates of a party does not create an ambiguity rendering the proposal for settlement unenforceable. *Id*. at 130. In other words, the inclusion of these non-parties as releasees created no inconsistency between the releasee and the offeree identified in the body of the proposal for settlement. *Id*." Specifically identifying persons who were employees or shareholders of the parties "in no way creates an ambiguity, broadens the scope of the mutual releases, or contradicts to whom the proposals are being made." The defendant was "unable to suggest how the inclusion of the names of the individual attorneys might confuse the parties executing mutual releases."

Proposal for settlement was not ambiguous just because it recited that offeror was willing to consider suggested changes to release attached to proposal. *Wallen v. Tyson*, 174 So.3d 1058 (Fla. 5th DCA 2015).

Plaintiff sued Defendant after an auto accident. Defendant served a proposal for settlement, which Plaintiff did not accept. One condition in the proposal was that Plaintiff execute a release for all claims against Defendant arising from the accident. A release was attached; however, the proposal further stated that "Defendant is willing to consider any suggested changes to the release."

Following trial, Defendant moved for fees and costs pursuant to F.S. 768.79. The court granted Plaintiff's motion to strike the proposal, ruling that it was ambiguous and unenforceable because of the language indicating that Defendant would consider changes to the release.

The Fifth DCA reversed. "Generally, proposals for settlement are unenforceable only where an existing ambiguity 'creates a necessity for interpretation or a choice among two or more possible meanings' – rather than potential ambiguities that might occur in future revisions of the proposals. . . . No case suggests that the mere offer to negotiate terms of an otherwise-acceptable settlement proposal – or an attached general release – renders the proposal unenforceably vague."

Motion for extension of time to accept settlement proposal that was never set for hearing did not toll time for acceptance of proposal. *Three Lions Construction, Inc. v. the Namm Group, Inc*., __ So.3d __ (Fla. 3d DCA, No. 3D14-880, 7/22/2015), 2015 WL 4464494.

Three Lions Construction served a proposal for settlement on The Namm Group. Namm timely filed a motion for extension of time to accept the settlement proposal. Three Lions did not agree to an extension. Namm took no steps to have the motion heard.

More than 3 months later, Namm attempted to accept the settlement proposal. Three Lions informed Namm that the purported acceptance was untimely. Namm voluntarily dismissed the suit. Within 30 days after the voluntary dismissal, Three Lions moved for fees and costs pursuant to its proposal for settlement. The court denied the motion.

The Third DCA reversed, "because Namm's Motion for Extension of Time to Accept Settlement Proposal was ineffective to toll the time for acceptance of the proposal, where Three Lions did not agree to the extension and Namm did not obtain a hearing on the motion prior to the expiration of the time for acceptance of the Proposal."

Prevailing Party:

Litigation between condo association and unit owner is not subject to "only one prevailing party" rule for purposes of fee awards, per Fourth DCA. *Environ Towers I Condominium Ass'n, Inc. v. Hokenstrom*, __ So.3d __ (Fla. 4th DCA, No. 4D14-3376, 11/18/2015), 2015 WL 7273418.

A suit filed by a condominium association against a unit owner for injunctive relief resulted in the association prevailing. While that appeal was pending, the association sought to hold the unit owner's daughter in contempt. A contempt order was entered, but the daughter prevailed on appeal. The court ultimately awarded prevailing party fees to both the association (for the injunction proceeding) and to the unit owner and her daughter (for the contempt proceeding).

The association appealed, contending that there can be only one prevailing party in enforcement litigation between a condo association and a unit owner. "The Association contends that unit owner-association disputes are essentially breach of contract cases subject to the 'one prevailing party' rule set forth in *Hutchinson v. Hutchinson*, 687 So.2d 912 (Fla. 4th DCA 1997). For this argument, the Association relies upon *Khodam v. Escondido Homeowner's Ass'n*, 87 So.3d 65 (Fla. 4th DCA 2012), and *Hawkins v. Condominium Owners Ass'n of Sand Cay, Inc.*, No. 8:10–cv–650–T–30TBM, 2012 WL 4761357 (M.D. Fla. Oct. 5, 2012)."

The appeals court rejected this argument. "[B]oth of these cases were initiated by unit owners as breach of contract cases. Neither case involved an injunction action or multiple claims arising from separate facts. More on point are cases holding that each prevailing party on separate and distinct claims between a unit owner and an association may be entitled to an award of attorney's fees in connection with that claim."

Court erred in granting prevailing party fees to party who secured voluntary dismissal of complaint by paying amount in dispute. *Blue Infiniti, LLC v. Wilson*, 170 So.3d 136 (Fla. 4th DCA 2015).

A loan between sisters went to litigation. The loan was secured by a mortgage on real property. Plaintiffs sued to foreclose, adding a civil RICO (Racketeer Influenced and Corrupt Organizations) count. In September 2012 Defendants sent a letter to Plaintiffs claiming that the foreclosure count was premature because the note had not yet become fully due, and enclosed a check for the amount of the note (but did not include the amount claimed as late charges).

Litigation continued. In January 2013 Defendants moved for sanctions under F.S. 57.105 as to the RICO count. In May 2013 Plaintiffs filed a notice of voluntary dismissal with prejudice on all counts.

At the hearing on Defendants' fee motion, Defendants argued that they were the prevailing party since the litigation ended in a voluntary dismissal of the complaint. Plaintiffs countered that they were the prevailing party because Defendants responded to the suit by paying the amount owed. The court granted Defendants' motion for prevailing party fees.

The Fourth DCA reversed. Although prevailing party fees generally are awarded against the party that filed the voluntary dismissal, this rule is not automatic. See *Padow v. Knollowood Club Ass'n,* 839 So.2d 744 (Fla. 4th DCA 2003). "The exception to the general rule discussed in *Padow* applies to this case. Two of the three counts that [Plaintiffs] filed against the [Defendants] were for the amount that the [Defendants] owed on the note, with one of the counts seeking foreclosure. . . . [Plaintiffs] clearly recovered the majority of what it sought by filing suit. Having received most of what it sought, [Plaintiffs] dismissed all three counts, bringing litigation to an end."

Prevailing party fees may not be awarded when party successfully argues that contract was void and unenforceable as a result of forged signatures. *Bank of New York Mellon v. Mestre*, 159 So.3d 953 (Fla. 5th DCA 2015).

Bank sued the Mestres to foreclose a mortgage allegedly executed by them. The Mestres contended that their signatures were forged. The court agreed and dismissed Bank's complaint. The Mestres were awarded fees under the contract as the prevailing party.

The Fifth DCA reversed. "Bank correctly asserts that no contractual authority exists to support the attorney's fees award because, notwithstanding the prevailing party attorney's fees provision in the mortgage, the court, at the urging of the Mestres, found that the signatures on the mortgage were fraudulently executed." Consequently, the forged document became void and unenforceable. Because the Mestres' signatures were not the signatures on the loan documents, no legal obligations were ever created between the parties. "Thus, the Mestres were not entitled to attorney's fees based on any agreement between the parties."

Defendant who successfully defeated claim on ground that she had no contract with plaintiff cannot claim fees based on contract. *HFC Collection Center, Inc. v. Alexander*, __ So.3d __ (Fla. 5th DCA, No. 5D15-1177, 10/30/2015), 2015 WL 6554404.

See discussion in "Fees: Section 57.105 and Other Sanctions" section.

Section 57.105 and Other Sanctions:

Defendant who successfully defeated claim on ground that she had no contract with plaintiff cannot claim fees based on contract. *HFC Collection Center, Inc. v. Alexander*, __ So.3d __ (Fla. 5th DCA, No. 5D15-1177, 10/30/2015), 2015 WL 6554404.

Alleging that it was the assignee of a credit card agreement, collection agency HFC sued Alexander. Alexander admitted having an agreement with the original credit card company, but denied that she signed the copy of the credit card agreement attached to HFC's complaint. She argued that HFC lacked standing to enforce the contract between her and the credit card company. The county court granted summary judgment for Alexander.

The county court granted Alexander's motion for fees under the reciprocal provisions of F.S. 57.105(7). HFC appealed. The circuit court, in its appellate capacity, affirmed. "HFC was estopped from challenging the award of attorney fees by arguing that no contract existed between it and Alexander."

On second-tier certiorari review, the Fifth DCA quashed the fee order. The circuit court applied the wrong law. The absence of a contract between the parties meant that Alexander could not employ section 57.105(7) to enforce the fee provision of the credit card agreement against HFC, after proving that HFC never became a party to that contract.

The circuit court's reliance on estoppel was also incorrect. "HFC did not *successfully* maintain that there was a contract between it and Alexander, and thus HFC is 'not estopped from thereafter maintaining that since there is no contract, no attorneys' fees can be awarded.'" (Emphasis by court; citation omitted.)

Twice-served motion for F.S. 57.105 sanctions complied with 21-day safe harbor provision, despite certificate of service facially indicating non-compliance. *Lopez v. Department of Revenue*, __ So.3d __ (Fla. 3d DCA, No. 3D14-399, 9/30/2015), 2015 WL 5714695.

The Department of Revenue ("DOR") informed Lopez that he was accused of fathering a child. Lopez denied paternity, stating that he did not even know the mother. DOR filed a motion to establish paternity and served it on Lopez. The purported father had the same first and last names as Lopez, but had a different middle initial. "DOR had misidentified Lopez."

On March 7, 2012, Lopez's counsel sent DOR a letter and attached a motion for fees pursuant to F.S. 57.105. Lopez did not file the 57.105 motion at that time. After the statutory 21-day "safe harbor" period expired, Lopez filed the motion on April 13, 2012. The certificate of service filed with the court, however, indicated "that Lopez mailed the copy of the motion to DOR on April 10, 2012."

The general magistrate held a hearing on the 57.105 motion and found for Lopez, ruling that he was entitled to $4257 in fees. The magistrate "specifically found that DOR had failed to conduct due diligence prior to serving Lopez with DOR's petition, and further found that DOR had not acted in good faith in continuing to prosecute its paternity action against Lopez." DOR filed exceptions. The court granted DOR's exceptions and denied Lopez's motion (and another motion seeking fees for defending against the exceptions).

The Third DCA reversed. DOR argued that Lopez had failed to comply with the 21-day safe harbor provision, pointing to the certificate of service that showed April 10. The court rejected this contention: "In this instance, however, when a document is both (i) served before it is filed, and (ii) served again contemporaneously with its filing, nothing precludes a discrete inquiry as to whether the document, in fact, was served twice. Ample evidence supported the general magistrate's conclusion that Lopez's 57.105 Motion was enclosed with Lopez's March 7th letter, despite having been served a second time contemporaneously with its filing."

The court also agreed that Lopez was entitled to fees incurred in defending against DOR's exceptions, which "simply continue the parties' dispute. Because DOR's Exceptions were inextricably intertwined with Lopez's 57.105 Motion, it was not necessary for Lopez to serve and file a separate 57.105 motion in order to obtain fees in defending the general magistrate's Report and Recommendations on the exact same 57.105 Motion Lopez had previously served and filed."

Current version of F.S. 57.105 does not require express finding of lawyer's bad faith before fees can be imposed as sanction. *Pronman v. Styles*, 163 So.3d 535 (Fla. 4th DCA 2015).

A court awarded fees and costs under F.S.57.105 against Appellants and their original lawyer. On appeal, the lawyer argued that it was error to award fees "without making an express finding that that there was no justiciable issue and that the attorney was not acting in good faith based upon the representations of his client."

Receding from prior cases decided under a pre-1999 version of the statute, the Fourth DCA affirmed. The earlier version did require bad faith, but the current version does not. There simply has to be a finding that the counsel or party "knew or should have known" that the claim or defense in question "was not supported by the materials facts necessary to establish" it. F.S. 57.105(1) (2010).

Requirement that court make express findings of bad faith when awarding fees as sanction under inherent authority applies regardless of whether award is against party or party's lawyer. *Goldman v. Estate of Goldman*, 166 So.3d 927 (Fla. 3d DCA 2015).

In a guardianship case, the court awarded fees as a sanction against Appellants, who had received confidential information that was inadvertently sent to their lawyer. The court made no findings of bad faith against Appellants or their lawyer.

The Third DCA reversed, citing *Moakley v. Smallwood*, 826 So.2d 221 (Fla. 2002). A fee sanction imposed under a court's inherent power must be supported by express findings of bad faith. In this case, no findings of bad faith were made.

The appeals court rejected Appellee's argument "that *Moakley* only requires a finding of bad faith when the award of attorney's fees is against counsel, rather than against a party. . . . We disagree. As the Fourth District Court of Appeal held in *T/F Systems, Inc. v. Malt*, 814 So.2d 511, 513 (Fla. 4th DCA 2002), '[a]lthough *Moakley* involved the imposition of fees against an attorney, the procedures described in the case are equally applicable to the assessment of fees against a party.' Thus, the trial court's failure to make specific findings regarding bad faith conduct as to each party or attorney against sanctions are to be imposed requires reversal."

Law firm hit with F.S. 57.105 sanctions for trying to collect fee against homestead property of client's former spouse. *Law v. Law*, 163 So.3d 553 (Fla. 3d DCA 2015).

A marital home titled solely in Husband's name was homestead property. A foreclosure suit was filed against Husband, who hired Law Firm. The fee agreement provided that Law Firm could seek its foreclosure case fees from the proceeds of the sale of the marital home.

While the foreclosure case was pending, Wife sued for divorce. She asked the court to partition and sell the marital home. She argued that the net proceeds were homestead property.

They were escrowed. Law Firm moved to intervene to collect the fees due from Husband. Wife argued that Law Firm "had no claim against the escrow funds because they were 'the proceeds of the sale of the parties' homestead property,' and because the firm had no enforceable claim against her or her funds." The court awarded the escrowed funds to Wife.

Wife moved for fees from Law Firm under F.S. 57.015, asserting that the proceeds from the sale of the marital home were exempt from the firm's claim for fees because the home was homestead property, and that Law Firm had no legal basis to seek fees from her after the court determined the proceeds from the home's sale were hers. The court denied Wife's motion for fees on the ground that Law Firm "had a 'good faith legal and factual basis to bring its claim'" for fees.

The Third DCA reversed. Protections of homestead property cannot be waived in an attorney-client fee agreement. "[T]here being nothing new or questionable in long established protections afforded homestead property or the immutable principles of contract law, the firm should have known, either from the start or at the latest shortly after it was allowed to intervene, that the promise made by [Husband] could only be enforced against him and any of his non-exempt property. Having ignored these verities, the firm should rightly be held accountable for the fees [Wife] incurred in defending against the untenable claim it continued to advance."

Lawyer and client sanctioned under F.S. 57.105 and Fla.R.App.P. 9.140 for making baseless assertions in brief. *Aspen Air Conditioning, Inc. v. Safeco Ins. Co. of America*, 170 So.3d 892 (Fla. 3d DCA 2015).

Insurer Safeco issued payment and performance bonds on a construction project. The general contractor ("DooleyMack") was principal and the owner and developer ("Victoria") was an obligee. Claiming that it was owed money, another subcontractor ("Aspen") served DooleyMack and Safeco with a notice of claim on the bond.

Safeco sued Aspen in federal court, and Aspen counterclaimed. Safeco, Aspen, and DooleyMack entered a tolling agreement under which Safeco agreed to dismiss its suit. Although the tolling agreement specified that any further litigation would be filed in federal court, Aspen sued Safeco and DooleyMack in state court. The state court dismissed Aspen's complaint, ruling that it should have been filed in federal court. Aspen appealed. The Third DCA affirmed.

In Section III of its initial brief, Aspen gad "asserted that Safeco's counsel made misleading statements to the trial court at the hearing on the Motion to Dismiss." Specifically, Aspen alleged that Safeco's counsel made statements that "misled the trial court about the substance and status of the 'Parallel Action' [another state court case involving the construction project]." Safeco complied with the safe harbor provisions of F.S. 57.105 and Fla.R.App.P. 9.140, but Aspen declined to withdraw the offending statements in its brief. Safeco filed a motion for sanctions with the Third DCA.

The appellate court granted the motion and imposed sanctions. The statements were supported by documentation and correspondence between the parties, and so Aspen's claims in its brief were wholly without factual or legal support. The statements were frivolous under the standard set forth in *Visoly v. Sec. Pac. Credit Corp*., 768 So.2d 482, 490 (Fla. 3d DCA 2000).

First DCA imposes sanctions against lawyer under F.S. 57.105(1) and Fla.R.App.P. 9.410(a) for filing frivolous appeal and failing to timely respond to show-cause order. *In re A.T.H.*, __ So.3d __ (Fla. 1st DCA, No. 1D14-3370, 12/14/2015), 2015 WL 8558301.

See discussion under "Professionalism" section.

Workers' Compensation Cases:

Statutory formula for computing fees in workers' compensation cases can apply separately to more than one "claim" handled in a claimant's case. *Cortes-Martinez v. Palmetto Vegetable Co., LLC*, 159 So.3d 934 (Fla. 1st DCA 2015).

Lawyer represented Claimant in a workers' compensation case. The parties agreed to settle the case in its entirety for $28,500. Claimant was to pay Lawyer a fee of $3,600 based on the formula in F.S. 440.34(1) (". . . Any attorney's fee approved by a judge of compensation claims for benefits secured on behalf of a claimant must equal to 20 percent of the first $5,000 of the amount of benefits secured, 15 percent of the next $5,000 of the amount of the benefits secured, 10 percent of the remaining amount of the benefits secured to be provided during the first ten years after the date the claim is filed, and 5 percent of the benefits secured after ten years. . . .").

The parties also agreed that the Employer/Carrier would pay a fee to Lawyer based on Lawyer's having secured $4,940.54 in past benefits that was paid in the same case as a result of litigation. The Judge of Compensation Claims ("JCC") approved the fee to be paid by Claimant but declined to approve the fee for the benefits secured in the past litigation. "The JCC reasoned that there can be only one $5,000 in benefits secured for which a 20% fee can be approved and only one $5,000 in benefits for which a 15% fee can be approved. Once the $10,000 threshold is reached in the life of the case, any additional fee would be limited to 10% of the benefits secured."

The First DCA reversed, holding that the "plain language of section 440.34" did not support the JCC's ruling. "The section makes reference to "the" claim, suggesting that there can be more than one claim that would qualify for application of the full formula."

Payment of attorney's fees alone does not extend statute of limitations applicable to workers' compensation claims. *Sanchez v. American Airlines,* 169 So.3d 1197 (Fla. 1st DCA 2015).

Claimant filed a petition for workers' compensation benefits ("PBF") in April 2014, which was more than 2 years after the date of injury and more than 1 year after the last provision of medical or disability benefits. The Judge of Compensation Claims ("JCC") denied the PFB as barred by the statute of limitations in F.S. 440.19.

Claimant appealed, arguing that the statute of limitations was tolled because the PFB was filed within 1 year after the JCC dismissed a prior petition for benefits and ordered the employer/ carrier to pay a fee to Claimant's counsel.

The First DCA affirmed. Payment of fees to Claimant's counsel – with no other medical or disability benefits being paid simultaneously to Claimant and no PFBs pending – was not sufficient to extend the statute of limitations under F.S. 440.19(2). "[I]t is well-settled that the payment of an

attorney's fee is neither a payment of compensation nor the furnishing of medical treatment – the only two events that will extend the statute of limitations under subsection 440.19(2)."

JCC erred in denying motion to strike employer/carrier's response to claimant's motion fees and so had no basis on which to reduce amount of fees awarded. *Nelson v. Pharmerica*, __ So.3d __ (Fla. 1st DCA, No. 1D15-1582, 10/29/2015), 2015 WL 6388023.

Lawyer represented Claimant. Lawyer moved for fees. The Employer/Carrier ("E/C") filed an untimely response. Lawyer moved to strike the response, but the Judge of Compensation Claims ("JCC") denied the motion. The JCC then reduced the amount of fees claimed by Lawyer.

The First DCA reversed. The E/C's excuse for the late filing was that its assistant failed to file the response with the court or serve it on Lawyer, and instead just placed it in the E/C's file. The court concluded that the E/C had not demonstrated the required "good cause" for its untimely filing. "Mere inadvertence" does not equate to "good cause," and so the JCC erred in denying the motion to strike. Consequently, the JCC "had no discretion to reduce the amount of [Lawyer]'s legally sufficient claim for attorney's fees and costs."

Claimant entitled to appellate fees after E/C filed appeal, obtained extension to file initial brief, then dismissed appeal without filing brief. *Thyssenkrupp Elevator Corp. v. Blackmon*, __ So.3d __ (Fla. 1st DCA, No. 1D15-2515, 12/31/15), 2015 WL 9590330.

Employer/Carrier ("E/C") filed a notice of appeal. E/C obtained an extension of time to file the initial brief. E/C "assured" Claimant's counsel that the brief would be filed by the extended deadline – but it was not. Under F.S. 440.34(5), Claimant moved for fees "expended in anticipation of receiving and responding to the initial brief."

The First DCA granted the motion for appellate fees. "Ordinarily, entitlement is not established where an appellant files a notice of appeal and soon thereafter seeks dismissal, leaving little doubt about whether the appeal will be pursued. In sharp contrast, the facts here show that the Appellant received an extension of time for filing its initial brief, missed the extended deadline, and told Appellee's counsel that the brief was almost done and the he intended to file it. Even after this Court issued a show cause order, a brief never materialized; instead, a voluntary dismissal was filed. Under these circumstances, Appellee's appellate counsel was justified in undertaking typical appellate tasks that required the expenditure of attorney time."

FILES

Court departed from essential requirements of law in ordering law firm to give former client immediate access to firm's files, despite firm's assertion of retaining liens. *Conde & Cohen, P.L. v. Grandview Palace Condominium Ass'n, Inc.*, __ So.3d __ (Fla. 3d DCA, No. 3D15-1109, 8/5/2015), 2015 WL 4637285.

Law Firm represented Condominium Association. When the Association's board of directors changed members, the Association hired new counsel. Law Firm asserted retaining liens over its files in 5 matters. The Association sued for access to the files. "Following a five minute motion calendar hearing at which no testimony was taken and during which the parties disputed that the law firm had been paid, the court below entered an order granting immediate access to all of the files being held by the firm."

The First DCA quashed the order. A lawyer has a right to a retaining lien on all of the client's property in the lawyer's possession until the attorney is paid. A law firm asserting a valid retaining lien may retain the property in question until it has been paid "or, if the if the client can demonstrate a pressing need for the property, until adequate security for the payment has been posted." The trial court, however, made no determination regarding the validity of Law Firm's retainer agreements or its retaining liens, nor did it determine whether the firm had been paid. "[A]bsent such determinations, no order compelling the law firm to hand over its files may be entered without the requisite showing of pressing necessity and the posting of adequate security. Anything less amounts to a departure from the essential requirements of the law which will cause irreparable harm by nullifying the law firm's retaining liens."

INEFFECTIVE ASSISTANCE OF COUNSEL AND RIGHT TO COUNSEL

Supreme Court holds that right to counsel in termination of parental rights cases includes right to effective assistance of counsel. *J.B. v. Dept. of Children and Families*, 170 So.3d 780 (Fla. 2015).

Responding to certified questions from the First DCA, the Supreme Court addressed questions of ineffective assistance of counsel in termination of parental rights ("TPR") proceedings.

The Court first "expressly recognize[d] that indigent parents not only have a right to counsel, but that under our state constitution, they are afforded the right to effective assistance of counsel in TPR proceedings."

The Court then addressed the standard for ineffective assistance. The *Strickland v. Washington* standard applicable in criminal cases does not apply; the right to effective assistance of counsel in TPR cases is not derived from the Sixth Amendment, but from the state constitution's due process clause. The standard in TPR cases includes the following: "There is a strong presumption that the attorney representing a parent, as a professional subject to the standards of the legal profession, has provided reasonable, professional assistance. Accordingly, to overcome that presumption and obtain relief from a TPR order, a parent must identify specific errors of commission or of omission made by the parent's counsel that under the totality of the circumstances evidence a deficiency in the exercise of reasonable, professional judgment in the case. Moreover, the parent must establish that, cumulatively, this deficient representation so prejudiced the outcome of the TPR proceeding that but for counsel's deficient representation the parent's rights would not have been terminated. If the parent establishes that the result of the TPR proceeding would have been different absent the attorney's deficient performance, the order terminating parental rights should be vacated, and the case returned to the circuit court for further proceedings. This requires a showing of prejudice that goes beyond the *Strickland* requirement that confidence in the outcome is undermined."

Finally, the Court set out a "temporary process" for bringing ineffective assistance claims, which will be used until a special committee proposed a permanent process and attendant rules that are adopted by the Court.

Supreme Court holds that trial court is not required to obtain conflict of interest waiver when criminal codefendants are represented by same lawyer but there is no actual conflict of interest between them. *State v. Alexis*, __ So.3d __ (Fla., No. SC14-1341, 7/9/2015), 2015 WL 4112372.

See discussion in "Conflicts of Interest" section.

In postconviction proceeding appeal, Supreme Court rules that lower court did not abuse its discretion in refusing to admit trial counsel's disciplinary record to support allegations of ineffective assistance. *Hernandez v. State*, __ So.3d __ (Fla., Nos. SC13-718, SC13-2330, 9/17/2015), 2015 WL 5445655.

See discussion in "Disciplinary Proceedings" section.

Third DCA declines to extend *Padilla v. Kentucky* to require counsel to advise defendant of immigration-related consequences of guilty plea short of deportation. *Rosario v. State.*, 165 So.3d 672 (Fla.4th DCA 2015).

Defendant pleaded guilty to a misdemeanor. She later alleged that she had ineffective assistance of counsel. Defendant, who was in this country illegally, had a separate lawyer representing her in an immigration matter. The ineffective assistance motion alleged that defense counsel had agreed to consult with the immigration lawyer before any plea, that Defendant "assumed" this occurred, and that she "reasonably believed" that a withhold of adjudication would not adversely affect her ongoing immigration matter. The postconviction court denied the motion.

The Fourth DCA affirmed. Defendant "essentially seeks to expand the Sixth Amendment duty recognized by *Padilla* [*v. Kentucky*, 559 U.S. 356 (2010)] to include an affirmative duty for criminal defense counsel to advise an undocumented immigrant whether a plea will have a negative impact on the possibility of avoiding removal or being able to reenter. The possibility for an adjustment in status, a matter within the exclusive discretion of federal officials, is too speculative and not a proper basis to support prejudice for a *Padilla* claim. [Citation omitted.] *Padilla* involved a defendant who was lawfully present in the country and not otherwise subject to removal. The deportation consequence he faced was clear and automatic from the face of the statute. That is not the situation here. We decline to extend *Padilla*'s holding."

Because Sixth Amendment right to effective counsel is offense-specific, lawyer did not provide ineffective assistance by allowing client to confess to uncharged murder on which lawyer did not represent him. *Wyne v. State*, __ So.3d __ (Fla. 4th DCA, No. 4D13-1940, 7/29/2015), 2015 WL 4549489.

A Defendant in federal custody was represented by Lawyer on federal charges. Unknown to Lawyer, Defendant had participated in an unsolved murder that was being investigated by state law enforcement officials. Defendant had not been charged in that murder case. While in federal custody, Defendant asked to speak with the police. Lawyer was present during the interview. Defendant confessed that he was hired to murder the victim. Defendant was charged and convicted in state court of the murder.

Defendant appealed, contending that Lawyer "was ineffective, on the face of the record, for having allowed him to make a statement in the hopes of obtaining leniency on the federal charges without first obtaining immunity for him." The Fourth DCA affirmed.

The Sixth Amendment right to effective assistance of counsel is "offense specific" and so applies only to an offense with which a defendant has actually been charged. At the time of the police interview, Defendant had not been charged with the murder and Lawyer did not represent him regarding the murder. (In fact, prior to the interview, Defendant would not talk to Lawyer about what he intended to say.)

"Because he had not been charged with these offenses at the time of the statement for which he sought suppression, [Defendant] cannot claim ineffective assistance of counsel. [Lawyer] was not representing him in connection with the charges in [the state court] case."

Criminal defendant's conviction reversed because counsel was ineffective for failing to object to prosecution's comments on defendant's post-arrest silence. *Floyd v. State*, 159 So.3d 987 (Fla. 1st DCA 2015).

Convicted Criminal Defendant moved for postconviction relief under Fla.R.Crim.P. 3.850 alleging that trial counsel was ineffective for failing to object to the prosecution's comments regarding his post-arrest silence. Defendant had claimed that he acted in self-defense. The First DCA reversed. "[Defendant] relied on a theory of self-defense. His credibility was key to the jury's determination whether he acted in self-defense. Even trial counsel testified that his client was prejudiced because the prosecutor was allowed to ask him 'Why not talk to the police if what you are saying is true' and emphasize that [Defendant] did not want to talk to the police at the time of his arrest (or afterward)."

Counsel ineffective because he incorrectly advised defendant regarding proper way to challenge court's ruling that defendant was competent to stand trial. *Anderson v. State*, __ So.3d __ (Fla. 5th DCA, No. 5D14-2625, 12/31/2015), 2015 WL 9491860.

Defendant was charged with DUI manslaughter arising from an accident that occurred in 2000. For a 10-year period Defendant was evaluated and treated for mental issues. Defense counsel believed Defendant was incompetent to stand trial, but the court found Defendant competent. "Defense counsel steadfastly maintained that his client was not competent to proceed and advised [Defendant] that the proper way to challenge the trial court's ruling on his competency was to enter a 'conditional' plea of no contest that 'reserve[ed] his right to appeal the competency determination made by the [trial court].' This advice was patently wrong. To make matters worse,

counsel for the State agreed that [Defendant] would have the right following the plea to appeal the court's competency determination."

Defendant was convicted and appealed. The conviction was affirmed without reaching the competency issue. After a guilty plea, the competency issue can be reviewed only if the defendant timely files a motion to withdraw the plea. Defendant failed to do that.

Defendant moved for postconviction relief, alleging ineffective assistance of counsel. The motion was denied. The Fifth DCA reversed. "Defense counsel recommended that [Defendant] enter a 'conditional' plea of no contest in order to appeal the trial court's competency determination. Ineffectiveness does not get much clearer than that."

Cases involving right-to-counsel and self-representation issues included:

Supreme Court adopts new Rule of Juvenile Procedure regarding appointing counsel to dependent children with special needs. *In re: Amendments to the Florida Rules of Juvenile Procedure*, 158 So.3d 523 (Fla. 2015).

The Supreme Court amended the Rules of Juvenile Procedure in response to a report from the Florida Bar Juvenile Court Rules Committee. Most of the changes implemented statutory changes that took effect July 1, 2014.

One change was the adoption of new rule 8.231, concerning provision of counsel to dependent children with special needs. Subdivision (a) prescribes the procedure a court is to use in appointing a lawyer for the child. Subdivision (b) sets out the statutory requirements for determining that a dependent child has special needs. Subdivision (c) gives the lawyer for the child these duties: "The attorney shall provide the child the complete range of legal services, from the removal from the home or from the initial appointment through all available appellate proceedings. With permission of the court, the attorney may arrange for supplemental or separate counsel to represent the child in appellate proceedings."

Court applied wrong legal standard in ruling that criminal defendant could not represent himself. *Williams v. State*, 163 So.3d 694 (Fla. 4th DCA 2015).

Criminal Defendant wanted to discharge his counsel and represent himself at trial. After questioning Defendant, the court ruled that Defendant was "just . . . not qualified to represent" himself. Defendant was convicted. He appealed, contending that the court denied his right to self-representation.

The Fourth DCA reversed and remanded for a new trial. The trial court "applied the wrong legal standard, finding that Defendant was incapable of adequately representing himself, rather than lacking competence to waive his right to counsel." This error "is structural and not subject to harmless error review."

See also *Williams v. State*, 163 So.3d 740 (Fla. 1st DCA 2015).

LAW FIRMS

Court erred in dismissing tort claims against law firm on basis of economic loss rule. *Bornstein v. Marcus*, 169 So.3d 1239 (Fla. 4th DCA 2015).

In a fee dispute, Former Client sued Law Firm and its principal for breach of contract, breach of fiduciary duty, conversion, and civil theft. Law Firm "moved to dismiss the tort claims under the economic loss rule because they were based on a duty created solely by contract." The court granted the motion as to the claims against Law Firm for breach of fiduciary duty, conversion, and civil theft.

The Fourth DCA reversed. In *Tiara Condominium Ass'n v. March & McLennan Cos*., 110 So.3d 399 (Fla. 2013), the Supreme Court limited the scope of the economic loss rule by concluding that it applies only in the products liability context. "Because the instant case does not involve products liability, the trial court erred in dismissing the tort claims against the firm under the economic loss rule."

Court departed from essential requirements of law in ordering law firm to give former client immediate access to firm's files, despite firm's assertion of retaining liens on files. *Conde & Cohen, P.L. v. Grandview Palace Condominium Ass'n, Inc.*, __ So.3d __ (Fla. 3d DCA, No. 3D15-1109, 8/5/2015), 2015 WL 4637285.

See discussion in "Files" section.

LEGAL MALPRACTICE

Court erred in holding that, as matter of law, lawyer representing ward's court-appointed emergency temporary guardian owed ward no duty under third-party beneficiary theory. *Saadeh v. Connors*, 166 So.3d 959 (Fla. 4th DCA 2015).

Adult children of a wealthy elderly man were concerned about his conduct. They contacted Lawyer, who worked with a professional guardian. The guardian filed an incapacitation petition. The court appointed the guardian because of an "emergency" and Lawyer became the guardian's attorney. In an effort to "settle" the guardianship, the ward agreed to establish a trust.

The ward later got an order setting aside the trust and sued Lawyer for legal malpractice, alleging the following. The guardian, while acting as court-appointed emergency guardian for the ward, was represented by Lawyer. The guardian, Lawyer, and the ward's court-appointed attorney agreed that the ward would establish a trust in exchange for dismissal of the incapacity proceedings. They took steps to have the ward execute the trust documents. Lawyer "was aware [the ward] was elderly, lacked a formal education, and spoke English as a second language, yet she advised [the ward] regarding the mechanics of the trust. She led [the ward] to believe he would remain in control of the trust and its contents, and would be able to make decisions regarding the trust. Although [the ward] initially refused to sign the document, he succumbed to the pressure. . . .

[Lawyer] failed to advise [the ward] of the significant negative tax consequences of establishing such a trust."

Lawyer moved for summary judgment asserting that there was no privity of contract between her and the ward and that, consequently, she owed no duty to the ward. The court granted Lawyer's motion.

The Fourth DCA reversed. During a temporary guardianship, the emergency temporary guardian is the ward's fiduciary to the extent defined by the court. "Even though there is no lawyer-client relationship between the alleged incapacitated person who is a temporary ward and the lawyer for the emergency temporary guardian, counsel for the emergency temporary guardian owes a duty of care to the temporary ward."

The appeals court relied on *Rushing v. Bosse*, 652 So.2d 689 (Fla. 4th DCA 1995), an incapacitation case involving adoption of a minor. "Here, as in *Rushing*, the proceedings were rooted in a Florida statute that involves the protection of incapacitated persons. . . . [The ward] was the apparent intended beneficiary of the guardian's attorney's services. It would be antithetical to suggest that a guardian – appointed for the sacrosanct reason of providing protection to the ward and at the ward's expense – could *ever* take *any* action which would knowingly be adverse to the alleged incapacitated person." (Emphasis by court.)

The court concluded: "[W]e find that [the ward] and everything associated with his well-being is the very essence i.e. the exact point, of our guardianship statutes. As a matter of law, the ward in situations as this, is both the primary *and* intended beneficiary of *his* estate. To tolerate anything less would be nonsensical and would strip the ward of the dignity to which the ward is wholly entitled." (Emphasis by court.)

Lawyer need not research specific issue in order to successfully defend legal malpractice case on ground of judgmental immunity. *Air Turbine Technology, Inc. v. Quarles & Brady, LLC*, 165 So.3d 816 (Fla. 4th DCA 2015).

Law Firm was sued by Former Client for legal malpractice in connection with advice given about Former Client's potential contractual exposure to an attorney's fee claim by the opposing party. Law Firm's motion for summary judgment was granted. The Fourth DCA affirmed. Because the advice "was in accord with the weight of Florida law," there was no malpractice.

The court then addressed judgmental immunity. For Law Firm to prevail on this issue, it had to show that: (1) the legal authority supporting its advice was fairly debatable or "unsettled;" and (2) it acted in good faith and made a diligent inquiry into the legal issue. Law Firm satisfied both requirements.

As to the second requirement, Former Client did not argue bad faith but alleged that Law Firm "did not research or look into the issue until after litigation had ended." This was not fatal to Law Firm's claim of judgmental immunity. "An attorney need not perform research on every issue during the course of litigation, but rather can rely on his honest belief and experience." The court commented that "[a]ny experienced Florida commercial lawyer worth his salt would know this state of the law without extensive research or memoranda. Horn [the lawyer handling the case for Law Firm] was not required to research an area of law with which he was familiar. In any event, an associate at [Law Firm] confirmed Horn's belief with legal research after litigation had commenced. . . . Horn reasonably believed there was no exposure to attorney's fees and subsequent research confirmed his belief."

Court erred by granting summary judgment for legal malpractice defendant on ground that plaintiff could not prove that alleged conflict caused plaintiff's damages. *Pitcher v. Zappitell*, 160 So.3d 145 (Fla. 4th DCA 2015).

Law Firm represented Father and Mother in a wrongful death case. The jury awarded $200,000 to Father and $4 million to Mother for past and future pain and suffering. Father sued Law Firm for legal malpractice, alleging that the firm's "conflict of interest and divided loyalty resulted in the disparate verdicts." Father alleged that Law Firm did not obtain his informed consent to joint representation, as required by Rule 4-1.7(b)(4).

The court granted Law Firm's motion for summary judgment, "finding that 'the alleged conflict of interest cannot in and of itself form the basis of the legal malpractice lawsuit.' The court also based its ruling on the element of causation, finding that there was no evidence that the alleged conflict caused the disparate awards. The court found that 'as a matter of law,' it would require speculation and inference stacking to establish causation."

The Fourth DCA reversed. Father argued that the trial court erred in finding that violation of a rule of professional conduct can never be the sole basis of a legal malpractice suit. Had the court actually ruled that way, it would have erred. But the appeals court read the lower court's decision more broadly: "[T]he trial court was merely recognizing that a violation of a rule of professional conduct does not constitute negligence per se; rather, it may be evidence of negligence. Causation and the other elements of a negligence action must still be established."

The trial court improperly shifted the burden to the non-movant (Father) to establish causation at the summary judgment stage. It also erred in concluding that, as a matter of law, Father would not be able to prove causation. "The Father's theory of causation was not so attenuated that it required speculation or inference stacking. . . . He is instead making the simple argument that his attorney's conflict of interest compromised his attorney's preparation and presentation of his case, which led to the hugely disparate awards."

Court erred in dismissing tort claims against law firm on basis of economic loss rule. *Bornstein v. Marcus*, 169 So.3d 1239 (Fla. 4th DCA 2015).

See discussion in "Law Firms" section.

PROFESSIONALISM

Supreme Court:

Supreme Court amends Code for Resolving Professionalism Complaints to grant immunity from civil liability to Local Professionalism Panels and Circuit Committees on Professionalism. *In re Amendment to the Code for Resolving Professionalism Complaints*, 156 So.3d 1034 (Fla. 2015).

In 2013 the Supreme Court adopted the Code for Resolving Professionalism Complaints, which established Local Professionalism Panels and Circuit Committees on Professionalism throughout the state. *In re Code for Resolving Professionalism Complaints*, 116 So.3d 280 (Fla. 2013). The Court subsequently amended the Code for Resolving Professionalism Complaints by adding new Section 4, titled "Immunity," which provides: "**4.1. Local Professionalism Panels and Circuit Committees on Professionalism:** The members of the Local Professionalism Panels, staff persons assisting those panels, members of the Circuit Committees on Professionalism, and staff persons assisting those committees, shall have absolute immunity from civil liability for all acts in the course and scope of their official duties."

Supreme Court amends "Code for Resolving Professionalism Complaints" following Bar's adoption of "Professionalism Expectations." *In re: Amendments to the Code for Resolving Professionalism Complaints*, 174 So.3d 995 (Fla. 2015).

On its own motion, the Supreme Court amended the "Code for Resolving Professionalism Complaints" as a consequence of the adoption of the "Professionalism Expectations" by the Bar's Board of Governors. The Professionalism Expectations were drafted by the Bar's Committee on Professionalism and approved by the Board in January 2015. The Professionalism Expectations replaced the Ideals and Goals of Professionalism. The Court's amendments to the Code recognize this change and took effect immediately.

Supreme Court reverses murder conviction based in part on "patently improper comments in the closing argument" by prosecutor who had "pushed the envelope" before. *Evans v. State*, 177 So.3d 1219 (Fla. 2015).

The Supreme Court reversed a murder conviction based in part on "patently improper" preserved and unpreserved errors in closing argument by the prosecutor. During guilt-phase closing arguments the prosecutor "improperly commented on [the defendant's] right to a jury trial, misstated the law, and denigrated [the defendant] and his defense."

The Court pointed out that the prosecutor had "pushed the envelope" in other cases, referring to the Second DCA's criticism of the prosecutor for "arrogance and inappropriate comments" in *Sheridan v. State*, 799 So.2d 223 (Fla. 2d DCA 2001).

Supreme Court affirms conviction despite improper argument, but cautions prosecutors against comments that "cross the line from zealous advocacy to improper." *Orme v. State*, __ So.3d __ (Fla., Nos. SC13-819, SC14-22, 12/10/2015), 2015 WL 8469221.

Convicted Defendant moved to vacate his death sentence pursuant to Fla.R.Crim.P. 3.851. The circuit court denied the motion. Defendant appealed to the Supreme Court, asserting that his counsel was ineffective for failing to object to certain arguments at the sentencing hearing. The Supreme Court affirmed. Although several arguments were improper and should not have been made, Defendant failed to demonstrate prejudice.

The Court cautioned against unprofessionalism in closing argument: "We take this opportunity to again caution prosecutors about such impassioned closing arguments. We understand that often comments are made in the heat of the moment that with hindsight should not be made because they cross the line from zealous advocacy to improper. However, prosecutors should be ever mindful that in cases where the evidence supporting guilt or the aggravating circumstances is not strong, such comments could and have caused this Court to find that improper comments materially contributed to either the finding of guilt or the recommendation for a sentence of death."

Supreme Court disbars lawyer who had prior discipline for unprofessional conduct. *Florida Bar v. Norkin*, __ So.3d __ (Fla., Nos. SC11-1356, SC13-2480, 10/8/2015), 2015 WL 5853915.

Lawyer previously was suspended from practice for 2 years and appeared before the Supreme Court to receive a public reprimand for seriously unprofessional conduct. (In that opinion, the Court suggested that "[m]embers of The Florida Bar, law professors, and law students should study the instant case as a glaring example of unprofessional behavior." *Florida Bar v. Norkin*, 132 So.3d 77, 93 (Fla. 2013).)

The suspension order directed Lawyer to notify clients of his suspension and furnish Bar counsel with an affidavit certifying compliance. The Bar alleged that Lawyer did not submit the required affidavit and practiced law after being suspended. The Bar also sought sanctions for offensive and threatening emails allegedly sent by Lawyer.

The referee granted summary judgment for the Bar, found Lawyer in contempt, and recommended that Lawyer be disbarred.

The Supreme Court approved granting summary judgment for the Bar. ". . . Norkin's e-mails to bar counsel referred to bar counsel as 'evil' and 'despicable'; called the proceedings against him 'the most unjust act in judicial history'; stated that bar counsel had no conscience; and stated, 'I'm preparing the lawsuit against you. Keep an eye out.' At the hearing on the motion for sanctions, the referee questioned Norkin about the e-mails and his behavior during the public reprimand administered by this Court. In response, Norkin asserted his 'right to speak freely and to express his beliefs in the manner of his choosing,' and freely admitted that during the public reprimand, he intentionally smirked and stared down each Justice one by one. We have disciplined attorneys for similar conduct as a violation of rule 4-8.4(d), including Norkin himself. See *Norkin*, 132 So.3d at 86; *Fla. Bar v. Martocci*, 791 So.2d 1074, 1075, 1078 (Fla. 2001) (finding that making insulting facial gestures at opposing counsel, making sexist comments, and disparaging opposing counsel violated rule 4-8.4(d)); *Fla. Bar v. Buckle*, 771 So.2d 1131, 1132 (Fla. 2000) (finding that humiliating and intimidating letter, sent by attorney to alleged victim of his client, violated rule 4-8.4(d))."

Permanent disbarment was warranted. "[G]iven Norkin's continuation of his egregious behavior following his suspension and during the administration of the public reprimand, we conclude that he will not change his pattern of misconduct. Indeed, his filings in the instant case continue to demonstrate his disregard for this Court, his unrepentant attitude, and his intent to continue his defiant and contemptuous conduct that is demeaning to this Court, the Court's processes, and the profession of attorneys as a whole. Such misconduct cannot and will not be tolerated as it sullies the dignity of judicial proceedings and debases the constitutional republic we serve. We conclude that Norkin is not amenable to rehabilitation, and as argued by the Bar, is

deserving of permanent disbarment."

Supreme Court removes judge from office for conduct relating to physical altercation with assistant public defender. *Inquiry Concerning a Judge, No. 14-255 re: John C. Murphy*, __ So.3d __ (Fla., No. SC14-1582, 12/17/2015), 2015 WL 9258254.

The Judicial Qualifications Commission ("JQC") charged Judge with misconduct based on his "alleged misconduct of threatening violence against an assistant public defender, leaving the bench to meet the assistant public defender in the hall to engage in a physical scuffle, returning to the bench to call cases in which defendants were represented by the Public Defender's Office and were without the presence of their attorney, and inducing some of the defendants to waive speedy trial rights." The JQC found Judge guilty of violating the Code of Judicial Conduct and Rule of Professional Conduct 4-1.1. The JQC recommended that Judge be publicly reprimanded, suspended without pay for 60 days, required to continue in mental health therapy, and required to attend judicial education courses.

The Supreme Court agreed that Judge was guilty, but rejected the proposed discipline as too lenient and removed Judge from office. Judge's "egregious conduct demonstrates his present unfitness to remain in office. Furthermore, where a judge's actions erode public faith in the courts, removal is appropriate. Judge Murphy's grievous misconduct became a national spectacle and an embarrassment to Florida's judicial system. We conclude that, through his misconduct, Judge Murphy surrendered his privilege to serve in our court system."

Board of Governors adopts "Professionalism Expectations" for Florida lawyers.

In January 2015 the Board of Governors adopted a set of "Professionalism Expectations" for Florida lawyers. The Professionalism Expectations were prepared by the Bar's Committee on Professionalism. The Expectations draw from the Rules of Professional Conduct as well as "long-standing customs of fair play, civil, and honorable legal practice in Florida." The Professionalism Expectations provide guidance to lawyers in seven key areas: (1) Commitment to Equal Justice Under the Law and to the Public Good; (2) Honest and Effective Communication; (3) Adherence to a Fundamental Sense of Honor, Integrity, and Fair Play; (4) Fair and Efficient Administration of Justice; (5) Decorum and Courtesy; (6) Respect for the Time and Commitments of Others; and (7) Independence of Judgment.

First DCA:

First DCA imposes sanctions against lawyer under F.S. 57.105(1) and Fla.R.App.P. 9.410(a) for filing frivolous appeal and failing to timely respond to show-cause order. *In re A.T.H.*, __ So.3d __ (Fla. 1st DCA, No. 1D14-3370, 12/14/2015), 2015 WL 8558301.

A minor ("A.T.H.") was the center of a decade-long custody dispute. At some point the father allegedly arranged for A.T.H. to marry his step-sister in Missouri, following which the father

filed a notice of emancipation with the court. The mother objected that the marriage was a sham. The court agreed and, by order dated May 22, 2013, refused to recognize the marriage. A.T.H. did not appeal.

The parents filed a second settlement agreement with the court in February 2014, in which both parties "specifically agreed that A.T.H. was not legally married and not emancipated" because the Missouri marriage was invalid. The parties also agreed to entry of an order giving the mother sole parental responsibility for A.T.H. But before that order could be entered, Lawyer filed a notice of appearance "purportedly on behalf of A.T.H., together with a motion to confirm A.T.H.'s emancipation, asserting that the Missouri marriage is valid and must be recognized as such by the trial court." A.T.H.'s court-appointed attorneys moved to strike the appearance and filings, asserting that Lawyer violated Fla.R.Jud.Admin. 2.505(e) by appearing for a party who was already represented without first contacting counsel of record. They also sought sanctions for Lawyer's attempt to relitigate the validity of the Missouri marriage, despite A.T.H.'s failure to appeal.

The trial court granted the motion to strike and the motion for sanctions. The First DCA affirmed and ordered Lawyer to show cause within 10 days why sanctions should not be imposed against him pursuant to F.S. 57.105(1) and Fla.R.App.P. 9.410(a) for filing a frivolous appeal.

The appellate court concluded that the appeal was frivolous. Further, the court noted that Lawyer had failed to timely respond to the show-cause order (his response was 16 days late). The court ordered Lawyer to pay A.T.H.'s court-appointed attorney's fees for defending the appeal.

Second DCA:

Second DCA imposes sanctions on lawyer, refers her to Bar, and orders her to self-report to local Circuit Professionalism Panel for failure to follow proper appellate procedures. *Garcia v. State,* 170 So.3d 23 (Fla. 2d DCA 2015).

Lawyer "attempted to commence criminal appeals on behalf of" appellants in 3 separate cases. The Second DCA was not pleased with Lawyer's efforts, noting that she "is unfamiliar with some of the basic terminology and concepts associated with the commencement of an appeal," that she "seems unable to comply with the requirements of [Fla.R.App.P.] 9.140(d), which addresses the process by which a trial counsel commences an appeal and thereafter successfully withdraws after appellate counsel has been appointed," and that she "seems, at best, indifferent to the requirement that the notice of appeal be accompanied by a filing fee" or certificate of indigency.

Hoing that Lawyer's shortcomings were due to limited experience rather than willful disobedience, the Second DCA chose not to impose "more penal" sanctions and instead ordered Lawyer "to self-report to the Sixth Judicial Circuit's Professionalism Implementation Panel requesting that it appoint an 'intermediary' to assist in providing her with access to an attorney who can privately train and mentor her in the process of filing notices of appeal and obtaining orders of withdrawal in criminal cases."

The court sent a copy of its opinion to the Bar "for such action as it may deem appropriate."

Following 3 show-cause proceedings, Second DCA refers lawyer to Bar for conduct including apparent lack of candor to court. *Cooper v. State*, 174 So.3d 554 (Fla. 2d DCA 2015).

The Second DCA referred a lawyer to the Florida Bar "for such proceedings as may be appropriate." The court's order detailed 3 show-cause proceedings instituted against Lawyer within 18 months. All involved criminal judgment and sentence appeals. Noting its order in a prior case, the court observed: "Suffice it to say that [Lawyer] appears to take at best a cavalier approach to orders issued by this court. See *Garcia v. State*, [discussed above] (noting that, in response to this court's order directing her appearance to show cause, [Lawyer] filed a paper several days before the hearing in which she informed the court that she could not attend because of a scheduled trial and to which she attached her trial calendar to aid this court in rescheduling her show-cause appearance)."

The court went on: "When this or any court issues an order directing an attorney to respond within *x* number of days, the attorney is obligated to file a response within *x* number of days, not within *x* + 10 days or whatever other period of time happens to suit the attorney's schedule. This specific principle may not have been covered in law school or tested on the bar exam, but it would seem to be axiomatic." A grievance committee had so cautioned Lawyer in another case referred by the Second DCA, *Allen v. State*, 2D13-3954, Order (Jan. 21, 2014).

Lawyer's response to questions at the show-cause hearing indicated a possible lack of candor to the court – her responses "did not, in the final analysis, make sense, a circumstance that raises the issue of [Lawyer's] candor toward the court." Regarding candor, the court noted that, although she reported at the hearing that she had sent the Second DCA a copy of the self-report to the local professionalism panel that was required by the appeals court in the *Garcia* case, the "record reflects no such filing."

Second DCA reverses verdict for defendants in personal injury case and remands for new trial, refusing to reward defense counsel's "'gotcha' tactics." *Andreaus v. Impact Pest Management, Inc*., 157 So.3d 442 (Fla. 2d DCA 2015).

Plaintiffs (Wife and Husband) sued over a slip-and-fall by Wife allegedly caused by spilled pesticide. Plaintiffs filed a motion in limine to exclude any references in Wife's medical records to her slipping on spilled water. The court granted the motions, and 1500 pages of redacted medical records were admitted.

By mistake, 2 references in the medical records were not redacted. Defense counsel spotted them and argued that he should be able to mention them in closing argument. The court allowed him to do so because the records had been admitted. The jury returned a verdict for the defendants.

The Second DCA reversed. "There is no question that the trial court abused its discretion in allowing this inadmissible evidence to go to the jury and that the error was extremely prejudicial to [Plaintiffs'] case. It is even more troubling to us that counsel requested to introduce inadmissible evidence under these circumstances." Defense counsel should have drawn the court's attention to the error so that it could be corrected, rather than compounding it by using it before the jury. "The trial court should not have rewarded this 'gotcha' tactic, and we will not do so here."

In closing, the court commented on the professionalism of defense counsel's conduct: "We also note that lawyers, as officers of the court, have a special duty 'to avoid conduct that undermines the integrity of the adjudicative process.' R. Regulating Fla. Bar 4-3.3 cmt. The Oath of Admission to The Florida Bar obligates attorneys to respect the court as well as act with fairness and integrity toward opposing parties and their counsel at all times. See Oath of Admission to The Fla. Bar ('I will maintain the respect due to courts of justice and judicial officers . . . . To opposing

parties and their counsel, I pledge fairness, integrity, and civility, not only in court, but also in all written and oral communications.'); see also R. Regulating Fla. Bar 4-3.3 (addressing candor toward the tribunal); 4-3.4 (addressing fairness to opposing party and counsel). Further, The Florida Bar's Creed of Professionalism makes clear that lawyers should be guided by a sense of fair play and never allow their silence to mislead anyone. Fla. Bar Creed of Prof'lism ('I will strictly adhere to the spirit as well as the letter of my profession's code of ethics, to the extent that the law permits and will at all times be guided by a fundamental sense of honor, integrity, and fair play. . . . I will not knowingly misstate, distort, or improperly exaggerate any fact or opinion and will not improperly permit my silence or inaction to mislead anyone.')."

Counsel criticized for not doing the "professional and civil thing to do" and simply stipulating to entry of an order rather than litigating. *Leichester Trust, Turst Number 1920 v. Federal National Mortgage Ass'n*, __ So.3d __ (Fla. 2d DCA, No. 2D15-1390, 12/23/2015), 2015 WL 9311434.

In foreclosure litigation with Fannie Mae, a Trust moved to vacate an order on the ground that it was not served by the court with a copy of the order. When that motion was denied, the Trust appealed. The Second DCA reversed, ruling that the Trust was entitled to relief under Fla.R.Civ.P. 1.540(b). The court also criticized Fannie Mae's counsel: "Frankly, based on these undisputed facts, we are somewhat surprised that counsel for Fannie Mae did not simply stipulate to the entry of a new order on the motion for rehearing for purposes of preserving the Trust's appellate rights. Given the facts here, this would have been the professional and civil thing to do."

Third DCA:

Lawyer whose failure to timely file appellate brief due to non-payment resulted in court dismissing appeal is referred to Local Professionalism Panel. *Beckles v. Brit*, 176 So.3d 387 (Fla. 3d DCA 2015).

Lawyer filed a notice of appeal. When Lawyer failed to timely file the initial brief, Appellee moved to dismiss. The Third DCA ordered Appellants to show cause why their appeal should not be dismissed. Lawyer was granted an extension, but then missed the second deadline. After Appellee again moved to dismiss, the court gave Appellants 10 days to file a brief. The brief was not filed. The court dismissed the appeal and ordered Lawyer to show cause why sanctions should not be imposed for failure to comply with court orders and the Rules of Appellate Procedure.

Lawyer responded by arguing, in a manner that was "not entirely clear," that he did not prosecute the appeal because he was not being paid.

The court suggested Lawyer may have violated Rule 4-1.3 (acting with reasonable diligence and promptness). "In our view, the rule requires that, when faced with such a situation (a client lacks the resources to pay for an attorney's appellate services), it is incumbent on the attorney of record to respond appropriately to Court orders, seek enlargements of time, or file a motion to withdraw from representation." Rule 4-3.1 "does not contemplate the attorney simply doing nothing, so that the client's appeal is dismissed."

Nevertheless, the court decided not to sanction Lawyer or refer him to the Bar. Instead, the "[u]nder the facts and circumstances of this case, we conclude that referral of [Lawyer] to The Eleventh Circuit's Local Professionalism Panel is the proper course of action."

In dismissing appeal, Third DCA cautions lawyer and his law firm regarding ethical obligations of diligence and candor to court. *Andros Development Corp. v. Benitez*, 178 So.3d 918 (Fla. 3d DCA 2015).

Lawyer filed an appeal from a non-final order in August 2015. He did not file an initial brief or seek an enlargement of time. Further, the order appealed from did not appear to meet the jurisdictional requirement of Fla.R.App.P. 1.930(a)(3)(c)(ii). The Third DCA granted the opposing party's motion to dismiss the appeal for lack of jurisdiction and awarded appellate fees.

Although the court declined to pursue further sanctions, it was concerned about Lawyer's conduct: "[Opposing party] has directed this Court to a number of prior appeals filed by [Lawyer] and his law firm that have been dismissed by this Court for lack of jurisdiction and/or failure to comply with this Court's orders. Although our investigation has led us to share [opposing party]'s concern, we decline to take such action at this time. We, however, caution [Lawyer] and his law firm that there is an ethical obligation to use due diligence and candor in all filings with this Court."

Lawyer ordered to personally pay appellate fees as sanction under F.S. 57.105 for prosecuting frivolous appeal. *Faddis v. City of Homestead*, 157 So.3d 447 (Fla. 3d DCA 2015).

The Third DCA *sua sponte* ordered Lawyer and his Client to show cause why they should not be ordered to compensate their opponents for appellate fees and costs incurred "defending against the prosecution of a frivolous appeal" of an order awarding the opponents $166,000 as a sanction for a fraud on the court perpetrated by Lawyer and Client. The appeals court ordered "[Lawyer] alone to compensate appellees further" and remanded for determination of the amount.

Lawyer alone was responsible for the additional fees under F.S. 57.105(1)(b), which provides for imposition of fees as a sanction for pursing a claim that Lawyer knew or should have known "would not be supported by the application of then-existing law to those material facts." The points raised by Lawyer in the appeal were "clearly meritless" and lacked "any basis in reality." The court also pointed out Lawyer's probable violations of Rules 4-3.3(a)(4) (proffering false evidence) and 4-8.2(a) (impugning integrity of judges).

In concurring opinion, Third DCA judge criticizes lawyer who prosecuted "frivolous appeal." *Barnsdale Holdings, LLC v. PHH Mortgage Corp.*, 170 So.3d 863 (Fla. 3d DCA 2015).

The Third DCA affirmed per curiam, with a concurring opinion criticizing appellant's counsel. The concurring judge stated that, in addition to affirming, he would issue an order to show cause why appellant's counsel should not be sanctioned under F.S. 57.105(1)(b) "for maintaining a frivolous appeal."

Counsel's client was a corporate non-party that acquired an interest in property that was the subject of the litigation *after* a lis pendens was filed. Counsel had not timely filed a motion for his

client to intervene. The judge sharply rejected counsel's argument that his client was an "unknown defendant" named in the complaint. "To allow a party to file pleadings as an 'unknown defendant' despite having no interest in the subject property at the time the suit began and obtaining interest to the subject property only after the filing of a lis pendens, would render the intervention rule meaningless. The mere existence of the rules requiring intervention should have been sufficient to guide the Appellant below, and counsel's failure to either grasp or adhere to the simplicity of this procedure does not excuse the baseless nature of this appeal."

Fourth DCA:

Fourth DCA questions professionalism of 2 lawyers who litigated and appealed award of fees arising from failure of one lawyer to remove other from service list. *Houston v. McKnought-Smith*, __ So.3d __ (Fla. 4th DCA, No. 4D14-4927, 12/16/2015), 2015 WL 9263817.

In a domestic relations case, Former Husband's lawyer claimed that Former Wife's lawyer failed to remove him from the service list, thus requiring him to file a motion to compel his removal. Former Husband's lawyer sought and was awarded fees.

The Fourth DCA reversed, noting that the trial court "failed to make the necessary finding that the wife's attorney acted in bad faith in serving the husband's previous attorney."

The appeals court commented that it was "difficult to believe" that a bad faith showing could be made by Former Wife's lawyer's "service of two pleadings on the previous attorney (who had not withdrawn on the record). However, because there was no evidentiary hearing, all of the facts are not present. Nevertheless, it appears that professionalism has eluded these attorneys, burdening both the trial court and this court."

Fourth DCA imposes appellate fees as sanction under F.S. 57.105 for filing frivolous appeal, criticizing counsel for "extremely misleading assertion." *Cosner v. Park*, 178 So.3d 964 (Fla. 4th DCA 2015).

The Fourth DCA affirmed a judgment and awarded appellate fees as a sanction under F.S. 57.105 for filing a frivolous appeal. "Not only was the underlying matter without merit, this appeal is without merit as well."

The appeals court rejected counsel's contention that the appellant did not have an opportunity to present argument to the lower court on a motion to award fees: "This is an extremely misleading assertion because the record reveals that the trial court held a hearing on the appellee's motion for attorney's fees on March 18, 2014. The appellant, however, has not provided a transcript of the hearing."

Fifth DCA:

Fifth DCA criticizes improper prosecutorial argument, urging lawyers to avoid "'win at all costs' mentality." *Brinson v. State*, 153 So.3d 972 (Fla.5th DCA 2015).

The Fifth DCA reversed a felony battery conviction, concluding that "the cumulative effect of the State's improper comments in both its opening statement and closing argument deprived [defendant] of a fair trial."

The objectionable comments referred to facts not in evidence, implied that that the State only charges the guilty, bolstered the credibility of police witnesses, stated improper personal opinions of the prosecutor, and sought to arouse sympathy for the victim. The court concluded with a cautionary comment: "We remind counsel that unprofessionalism not only affects the parties in the immediate proceeding but adversely affects the perception of justice itself. Our profession has never been and should never devolve into a 'win at all costs' mentality. If it does, we all lose."

Lawyer's "abuse of the rehearing process" prompts Fifth DCA to refer lawyer to Bar and issue order to show cause why he should not be monetarily sanctioned for filing "meritless and insulting" motion. *McDonnell v. Sanford Airport Authority*, __ So.3d __ (Fla. 5th DCA, No. 5D13-3850, 5/15/2015), 2015 WL 2259430.

Lawyer filed a motion for rehearing after the Fifth DCA issued a per curium affirmance opinion. The court expressed its displeasure at the "29-page motion, the tone and tenor of which is, at best, disparaging, and at worst, contemptuous, rearguing the same points previously raised in his briefs and discussed at oral argument." The court was "compelled to comment on conduct that common sense should dictate is inappropriate."

The rehearing motion did not, as required by Fla.R.App.P. 9.330, call the court's attention to some fact, precedent, or rule of law overlooked in its opinion. Instead, "in open defiance of rule 9.330, it expresses displeasure with our ruling and, in the process, minces no words in attacking the trial judge, Appellee, opposing counsel, and this panel. Some of the most egregious comments refer to opposing counsel's arguments as misleading, self-serving, absurd, red-herrings, fabricated, bogus, convoluted, illogical, confusing, and spurious."

The court had a copy of its opinion sent to the Florida Bar and ordered Lawyer to show cause why "monetary or other sanctions should not be imposed."

Fifth DCA imposes fees and fines on 2 lawyers as sanctions for filing frivolous notice of lis pendens and baseless motion for extension of lis pendens. *Massa v. McNutt*, 172 So.3d 516 (Fla. 5th DCA 2015).

Two lawyers, Tolbert and Withers, represented clients before the Fifth DCA. The court ordered the lawyers to show cause why they should not be sanctioned under Fla.R.App.P. 9.410(a) for "fil[ing] a frivolous notice of lis pendens and a baseless motion for extension of lis pendens."

The court published an opinion imposing sanctions and expressing "concern" about counsels' conduct. "Commendably, Appellants' counsel both apologized to the Court and to Appellee's counsel, and we took that into consideration in determining sanctions. First, Appellants'

counsel shall, jointly and severally, pay the reasonable fees incurred by Appellee responding to Appellants' frivolous pleadings. The trial court shall determine the amount of those fees if counsel are unable to reach an agreement. Second, this Court imposes a $1,000 fine on Attorney Joanna Tolbert that shall be paid to the Clerk of this Court within thirty days. Third, as this Court has sanctioned him once before in *Hagood v. Wells Fargo, N.A.*, 125 So. 3d 1012 (Fla. 5th DCA 2013), we impose a $2,000 fine on Attorney Richard W. Withers that shall be paid to the Clerk of this Court within thirty days."

Fifth DCA cautions lawyer about duty to court to properly describe status of law being argued. *Florida Peninsula Ins. Co. v. Ken Mullen Plumbing, Inc.*, 171 So.3d 194 (Fla. 5th DCA 2015).

An equitable subrogation issue was appealed to the Fifth DCA. The Third DCA had one approach to the issue, while the Second and Fourth DCAs had a different approach. Despite this conflict, appellees' counsel argued that "Florida courts have *consistently* held that a party may not purse [sic] a claim for equitable subrogation until said party pays the entire debt owed" (emphasis added by court). In a footnote, the Fifth DCA chided the lawyer: "We remind counsel of her professional obligation and duty to the court to apprise the court of the correct status of the law."

Lawyer's failure to file proper notice of withdrawal eventually mushroomed into sanctions and referral to Bar for not maintaining reliable address. *Belkova v. Russo*, __ So.3d __ (Fla. 5th DCA, No. 5D14-2201, 12/18/2015), 2015 WL 9239810.

See discussion in "Withdrawal" section.

PUBLIC OFFICIAL ETHICS AND PUBLIC RECORDS

Public Records:

At least some information in Facebook post that sparked criminal investigation is public record and should be disclosed, notwithstanding ongoing investigation. *Barfield v. City of Tallahassee*, 171 So.3d 239 (Fla. 1st DCA 2015).

University's general counsel sent an email with an attached screenshot of a Facebook post to the City's police chief, asking the police to investigate a possible domestic violence incident. The Facebook post included the date and time of the alleged incident and photos of bruised body parts. The police began a criminal investigation into the matter, which involved a University football player. The police issued a press release acknowledging that an investigation was opened but declining to release details other than the name of the football player and the date of the incident.

Barfield filed a public records request for records involving the matter. Barfield filed suit 4 days later seeking the records. The court denied Barfield's petition for writ of mandamus, ruling

that the information sought was "was "the subject of an active and ongoing criminal investigation and therefore exempt from production pursuant to [F.S.] 119.071(2)(c)1."

The First DCA reversed. The information sought clearly was part of a public record. Although the public records law has an exemption for "active criminal investigation information," the statute expressly excludes '[t]he time, date, location, and nature of a reported crime' from the exemption." The police department was required to disclose this information.

Public hospital violated Public Records Act by placing unreasonable restrictions on requester's access to records. *Lake Shore Hospital Authority v. Lilker*, 168 So.3d 332 (Fla. 1st DCA 2015).

A public hospital appealed a summary judgment in favor of the appellee, who had requested public records in the hospital's custody. The First DCA affirmed, agreeing that the hospital violated the Public Records Act by placing "unreasonable restrictions" on appellee's access to the records.

The hospital argued on appeal that it complied with the Act by referring appellee to a website. Appellee had asked for paper copies. The court pointed out that, under the statute, electronic records are only "an *additional* means of inspecting or copying public records" (emphasis by court). "This additional means of access, however, is insufficient where the person requesting the records specifies the traditional method of access via paper copies."

The hospital also violated the statute by restricting appellee's right to inspect and copy the records to one hour each morning, on 24-hour notice. The one-hour restriction was not reasonable, and "there is no authority allowing appellants to automatically delay production of records for inspection by imposing a twenty-four-hour notice requirement."

County's delay in providing public records in response to anonymous request from generic email address was not unlawful refusal and so would not support fee award to requestor. *Consumer Rights, LLC v. Union County*, 159 So.3d 882 (Fla. 1st DCA 2015).

County got an email request for public records on behalf of an unidentified Florida company. The sender's email address was "ask4records@gmail.com." The requestor did not disclose his or her identity or provide any other contact information. County did not respond. Four months later the requestor filed suit seeking the records and a fee award under F.S. 119.12. County provided the records.

Litigation continued regarding fees. The court found that County "had not acted in bad faith by failing to provide the records sooner. . . . [T]he court reasoned that plaintiff's request was 'intentionally designed to appear to be deceptive.' This finding was based on the testimony of a county official who explained that he did not respond to the records request immediately because it appeared to constitute 'phishing,' a term that refers to a scam to dupe an email recipient into revealing personal or confidential information that can later be used illicitly." The delay in providing the records did not amount to an unlawful refusal and thus did not support a fee award.

The First DCA affirmed. While a delay in providing public records sometimes equates to an unlawful refusal, "a delay does not in and of itself create liability under section 119.12." The constitutional and statutory right to public records can only be exercised by a "person," and there is

"no law that requires a governmental entity to provide public records to a generic email address, at least not until such time as it is made clear that the address belongs to a person."

The court noted the problems that could occur if a public entity was required to respond to an essentially anonymous email request. "The email from the sender could have contained a virus. It might have been a computer-generated message sent out from a computer-created email account. The sender might have intended to initiate a series of electronic communications that would have caused the disclosure of exempt materials or created difficulties for the county's information technology officers." The court concluded: "The county provided the records to the plaintiff soon after it learned that the request had been made by person on behalf of a Florida corporation that did, in fact, exist. . . . [T]he delay in responding to the email was not tantamount to a refusal and that the trial court correctly denied the plaintiff's request for attorney fees."

First DCA addresses question with "no clear answer" – whether state attorney's office is legally required to coordinate ongoing discovery review for trial with public records request review regarding same records. *Morris Publishing Group, LLC v. State*, 154 So.3d 528 (Fla. 1st DCA 2015).

Media outlets ("the Media") sought access to recorded phone conversations of a high-profile criminal defendant while he was in custody awaiting trial. After much litigation over discovery orders in the criminal case, the court denied the defendant's request to keep the discovery confidential. At that point the state attorney's office ("the SAO") required advance payment for its expected costs in reviewing and redacting the recorded calls for confidential and exempt information. Public records litigation followed when the Media balked at paying the deposit.

A magistrate recommended that the financial deposit requirement was not an unlawful refusal of access, but recommended that the SAO begin releasing a certain amount of the calls each business day. The trial judge entered an order to this effect.

The Media petitioned the First DCA for a writ of certiorari. The appellate court denied the petition due to "the unusual facts of this case and the novel legal issue presented," but certified a question of great public importance to the Supreme Court.

The First DCA summarized: "[T]he ultimate question here is whether the application of the SAO's public records policy is unreasonable because it failed to take steps to avoid repetition and duplication with its review of the recordings for use at trial. Coordinating trial review efforts with pending public records requests (and perhaps even anticipated requests in the highest profile cases) makes sense, but in the absence of clear legislative intent requiring it, we are unable to conclude that the SAO is legally required to do so."

The court certified this question to the Supreme Court as one of great public importance: "Does a custodian of criminal discovery have a legal obligation to, where possible, combine its review of discovery for trial with a public records request if doing so will be economically efficient and result in less delay?"

Fee award against Department of Economic Opportunity for failing to timely respond to public records request reversed because requestor did not give timely notice to Department of Financial Services as required by F.S. 284.30. *Dept. of Economic Opportunity v. Consumer Rights, LLC*, __ So.3d __ (Fla. 1st DCA, No. 1D15-0383, 12/18/2015), 2015 WL 9258293.

Consumer Rights, LLC ("CR"), sent a public records request to the Department of Economic Opportunity. When the Department did not respond, CR filed a complaint seeking enforcement of the Public Records Act. The Department then produced the records. Ten months later CR served a copy of the complaint on the Department of Financial Services. CR moved for fees. The court "determined that the [Department] had unjustifiably delayed in producing the records, which violated the Act, and as such, CR was entitled to reasonable attorney's fees."

The Department appealed, contending that CR failed to comply with the condition precedent set by F.S. 284.30, which states that a requestor seeking fees for a state agency's failure to comply with a public records request "serve a copy of the pleading claiming the fees on the Department of Financial Services; and thereafter the department shall be entitled to participate with the agency in defense of the suit . . ."

The First DCA agreed and reversed. "CR's argument that [F.S. 284.30] is inapplicable to suits brought under the [Public Records] Act is belied by the plain language of the statute. The statute explicitly excludes eminent domain, inverse condemnation, or Public Employees Relations Commission suits from this statute's requirements. If the Legislature sought to exclude public records cases from these requirements, it would have listed it with the other exclusions. . . . The trial court's decision to carve out a public policy exception for public records cases was in error."

RULES AND ETHICS OPINIONS

Rule changes generally.

See "Rule Changes (Adopted and Proposed)" section at beginning of materials.

Supreme Court amends Rules Regulating The Florida Bar concerning lawyer discipline, confidentiality, trust accounting, and professionalism. *In re: Amendments to the Rules Regulating The Florida Bar (Biennial Petition)*, 167 So.3d 412 (Fla. 2015).

See discussion in "Rule Changes (Adopted and Proposed)" section.

Supreme Court approves rule defining retainers, flat fees, and advance fees and specifying how they are handled for trust accounting purposes. *In re: Amendments to Rule Regulating The Florida Bar 4-1.5 – Fees and Costs for Legal Services*, 175 So.3d 276 (Fla. 2015).

See discussion in "Rule Changes (and Proposed Changes)" section.

Supreme Court approves "housekeeping" changes to Rules of Professional Conduct regarding duties to prospective clients, misdirected electronic communications, and unauthorized practice of law. *In re: Amendments to Rules Regulating The Florida Bar (Biennial Petition Housekeeping)*, 164 So.3d 1217 (Fla. 2015).

See discussion in "Rule Changes (Adopted and Proposed)" section.

Supreme Court rejects Bar's proposed amendments to rule regarding lawyer referral services. *In re: Amendments to Rule Regulating The Florida Bar 4-7.22 – Lawyer Referral Services*, 175 So.3d 779 (Fla. 2015).

See discussion in "Rule Changes (Adopted and Proposed)" section.

Supreme Court approves stay and directs Bar to submit new proposal for rule regarding fees for extraordinary lien resolution services. *In re: Amendments to Rule Regulating The Florida Bar 4-1.5 – Fees and Costs for Legal Services*, 175 So.3d 276 (Fla. 2015).

See discussion in "Rule Changes (and Proposed Changes)" section.

Supreme Court denies petition to authorize Bar to raise membership fees by up to $100 per year to be used for legal aid to poor. *In re: Amendments to Rule Regulating The Florida Bar 1-7.3*, 175 So.3d 250 (Fla. 2015).

See discussion in "Rule Changes (Adopted and Proposed)" section.

Supreme Court rejects proposed advisory opinion filed by Bar's Unlicensed Practice of Law Committee as not addressing "specified conduct" as required by *Goldberg*. *Florida Bar re: Advisory Opinion – Scharrer v. Fundamental Administrative Services*, 176 So.3d 1273 (Fla. 2015).

See discussion in "Unauthorized Practice of Law" section.

On own motion, Supreme Court amends Rule Regulating The Florida Bar 10-9.1 regarding advisory opinions in connection with civil suits alleging UPL. *In Re: Amendments to Rule Regulating The Florida Bar 10-9.1*, 176 So.3d 1273 (Fla. 2015).

See discussion in "Unauthorized Practice of Law" section.

Supreme Court holds that right to counsel in termination of parental rights cases includes right to effective assistance of counsel. *J.B. v. Dept. of Children and Families*, 170 So.3d 780 (Fla. 2015).

See discussion in "Ineffective Assistance of Counsel" section.

Supreme Court amends Rules of Appellate Procedure to implement mandatory statewide electronic records on appeal. *In re: Amendments to Rule of Appellate Procedure 9.200,* 164 So.3d 668 (Fla. 2015).

See discussion in "Rule Changes (Adopted and Proposed)" section.

Supreme Court adopts new Rule of Juvenile Procedure regarding appointing counsel to dependent children with special needs. *In re: Amendments to the Florida Rules of Juvenile Procedure*, 158 So.3d 523 (Fla. 2015).

See discussion in "Ineffective Assistance of Counsel" section.

Supreme Court amends "Code for Resolving Professionalism Complaints." *In re: Amendments to the Code for Resolving Professionalism Complaints*, 174 So.3d 995 (Fla. 2015).

See discussion in "Professionalism" section.

Board of Governors affirms Florida Ethics Opinion 14-1 regarding duties of lawyers in advising clients to "clean up" social media pages before litigation is filed.

See discussion in "Attorney-Client Relationship" section.

Board of Governors approves "Professionalism Expectations" to replace Ideals and Goals of Professionalism.

See discussion in "Rule Changes (Adopted and Proposed)" section.

Board of Governors votes to add technology-related amendments to Rules of Professional Conduct and to adopt CLE requirements in technology.

See discussion in "Rule Changes (Adopted and Proposed)" section.

Board of Governors rules that text messaging to prospective clients is permitted as advertising rather than prohibited solicitation.

See discussion in "Advertising" section.

Board of Governors votes unanimously to reject admission on motion to the Florida Bar, with or without reciprocity.

See discussion in "Rule Changes (and Proposed Changes)" section.

TRIAL CONDUCT

Court erred in ordering deposition of party's lawyer who was not counsel of record. *Eller-I.T.O. Stevedoring Co., LLC v. Pandolfo*, 167 So.3d 495 (Fla. 3d DCA 2015).

Lawyer was not counsel of record but was "directly involved" in his employer/client's litigation, "having both directed and overseen 'various aspects of [his client's] investigation of the accident on which [the opposing parties] . . . premised their allegations and claims *sub judice*, as well as [having] prepar[ed] and receiv[ed] documentation [including attorney-client privileged communications and work product documents] related to the investigation.'" The court ordered Lawyer's deposition taken.

The Third DCA quashed the order. Taking the deposition of opposing counsel in a pending case is an extraordinary step. The deposition was not justified under the test announced in *Shelton v. American Motors Corp*., 805 F.2d 1323 (8th Cir. 1986) (such depositions limited to where party seeking to take deposition "has shown that (1) no other means exist to obtain the information than to depose opposing counsel; (2) the information sought is relevant and non-privileged; and (3) the information is crucial to the preparation of the case.").

Second DCA reverses verdict for defendants in personal injury case and remands for new trial, refusing to reward defense counsel's "'gotcha' tactics." *Andreaus v. Impact Pest Management, Inc*., 157 So.3d 442 (Fla. 2d DCA 2015).

See discussion in "Professionalism" section.

UNAUTHORIZED PRACTICE OF LAW

Supreme Court concludes that most "Medicaid planning" activities conducted by nonlawyers are UPL. *Florida Bar re: Advisory Opinion – Medicaid Planning Activities by Nonlawyers.*, __ So.3d __ (Fla., No. SC-14-211, 1/15/2015), 2015 WL 174994.

The Supreme Court approved an advisory opinion prepared by the Bar's Unlicensed Practice of Law Committee concerning "Medicaid planning" activities engaged in by nonlawyers. Formal Advisory Opinion 2011-4 concludes that "it constitutes the unlicensed practice of law for a nonlawyer to draft a personal service contract and to determine the need for, prepare, and execute a Qualified Income Trust including gathering the information necessary to complete the trust." Distinguishing the situation in *Florida Bar v. Brumbaugh*, 355 So. 2d 1186 (Fla. 1978), the opinion further concluded that "a nonlawyer should not be authorized to sell personal service or Qualified Income Trust forms or kits in the area of Medicaid planning." The opinion explains: "The use of

the internet, the complexity of Medicaid planning and the harm that can result from nonlawyers giving improper advice, more fully discussed below, leads the Standing Committee to the conclusion that the use of legal kits and forms should not be allowed in this area."

A nonlawyer's enlistment of attorney assistance will not render the activities permissible: "It is the opinion of the Standing Committee that unless the client establishes an independent attorney-client relationship with the attorney, payment from the client is directly to the attorney, and the initial determination that the particular legal document or Medicaid planning strategy is appropriate for the client given the client's particular factual circumstances is the determination of the attorney, then the company would be engaged in the unlicensed practice of law."

Supreme Court issues UPL advisory opinion concerning activities of community association managers. *Florida Bar re: Advisory Opinion – Activities of Community Association Managers,* 164 So.3d 650 (Fla. 2015).

The Bar's Real Property, Probate, and Trust Law Section sought a formal advisory opinion from the UPL Committee regarding activities engaged in by non-lawyer community association managers ("CAMs"). After holding a hearing and taking comments, the Committee promulgated an opinion for review by the Supreme Court. The Court approved the opinion, giving it "the force and effect of an order of this Court." See Rule 10-9.1(g)(4), Rules Regulating The Florida Bar.

The opinion first concluded that certain activities found to be UPL in a 1996 opinion of the Court are still UPL when engaged in by non-lawyer CAMs. See *Florida Bar re: Advisory Opinion – Activities of Community Association Managers*, 681 So2d 1119 (Fla. 1996).

The opinion then addressed 14 additional activities. The Court agreed that the following 4 activities *are* UPL when engaged in by non-lawyer CAMs:

- Drafting of amendments (and certificates of amendment that are recorded in the official records) to declaration of covenants, bylaws, and articles of incorporation when such documents are to be voted upon by the members;
- Preparation of construction lien documents (e.g. notice of commencement, lien waivers);
- Preparation, review, drafting and/or substantial involvement in the preparation/execution of contracts, including construction contracts, management contracts, cable television contracts, etc.; and
- Any activity that requires statutory or case law analysis to reach a legal conclusion.

The following 4 activities are *not* UPL when engaged in by non-lawyer CAMs:

- Preparation of a Certificate of assessments due once the delinquent account is turned over to the association's lawyer;
- Preparation of a Certificate of assessments due once a foreclosure against the unit has commenced;
- Preparation of Certificate of assessments due once a member disputes in writing to the association the amount alleged as owed; and
- Drafting of pre-arbitration demand letters required by F.S. 718.1255.

Whether the following 6 activities are UPL when engaged in by non-lawyer CAMs depends on the specific circumstances involved:

- Determination of number of days to be provided for statutory notice (UPL if determination requires interpretation of statutes, administrative rules, governing documents, or rules of civil procedure);
- Modification of limited proxy forms promulgated by the State (UPL if question involves discretion in phrasing or involves interpretation of statutes or legal documents);
- Preparation of documents concerning the right of the association to approve new prospective owners (UPL if preparation involves exercise of discretion or interpretation of statutes or legal documents);
- Determination of affirmative votes needed to pass a proposition or amendment to recorded documents (UPL if determinations involve interpretation and application of statutes and association's governing documents);
- Determination of owners' votes needed to establish quorum (UPL if determinations involve interpretation and application of statutes and association's governing documents); and
- Identifying, through review of title instruments, the owners to receive pre-lien letters (UPL if CAM makes legal determination of who needs to receive a pre-lien letter).

Supreme Court rejects proposed advisory opinion filed by Bar's Unlicensed Practice of Law Committee as not addressing "specified conduct" as required by *Goldberg*. *Florida Bar re: Advisory Opinion – Scharrer v. Fundamental Administrative Services*, 176 So.3d 1273 (Fla. 2015).

Petitioners sought an advisory opinion from the Bar's UPL Committee, presenting 6 broad, multi-faceted questions regarding whether activities of a nonlawyer company and its in-house counsel (not licensed in Florida) constitute UPL. The Committee consolidated Petitioners' questions into a single question and promulgated a proposed advisory opinion that was filed with the Supreme Court.

The proposed opinion concluded that it does not constitute the unlicensed practice of law for a nonlawyer company or its in-house counsel who is not licensed to practice law in Florida to control, direct, and manage Florida litigation on behalf of a nonlawyer company's third party customers when the control, direction, and management is directed to a Florida Bar member who represents the customer in litigation. The proposed opinion further stated that, while generally the conduct is not the unlicensed practice of law, there are circumstances in which the activity of the nonlawyer company or its in-house counsel could constitute UPL depending on the level of the Florida lawyer's involvement. Ultimately, the proposed opinion stated that whether the practice is or is not UPLwould depend on the facts and circumstances of the particular case.

The Supreme Court disapproved the proposed opinion. In *Goldberg v. Merrill Lynch Credit* Corp., 35 So.3d 905 (Fla. 2010), the Court "held that a civil complaint alleging a cause of action for damages based on the unlicensed practice of law must allege that this Court has ruled that the specified conduct at issue is the unlicensed or unauthorized practice of law." If a question has not been ruled upon by the Court, Rule 10-9.1 of the Rules Regulating The Florida Bar authorizes a petitioner to seek an advisory opinion addressing that question. "[W]e conclude that Petitioners' request for an advisory opinion did not allege the type of specific facts that, if assumed true, the Standing Committee could use to evaluate whether FAS [the nonlawyer company] and Zack [the in-

house counsel not licensed in Florida] engaged in the unlicensed practice of law. The Standing Committee then consolidated Petitioners' six questions into a single and more general question. As a result, we conclude that the proposed advisory opinion does not adhere to the process the Court established in *Goldberg*, in that it does not offer meaningful guidance as to whether the specified conduct at issue would constitute the unlicensed practice of law. Accordingly, we disapprove the advisory opinion; however, our decision is without prejudice to Petitioners submitting a revised petition for an advisory opinion, and to the Standing Committee conducting further proceedings consistent with our opinion in this case."

On own motion, Supreme Court amends Rule Regulating The Florida Bar 10-9.1 regarding advisory opinions in connection with civil suits alleging UPL. *In Re: Amendments to Rule Regulating The Florida Bar 10-9.1*, 176 So.3d 1273 (Fla. 2015).

The Supreme Court, on its own motion, amended Rule 10-9.1, which sets out the procedures for issuance of UPL advisory opinions. Paragraph (c) of the rule addresses when an advisory opinion may be rendered in connection with a civil suit alleging UPL.

"In our opinion in *The Florida Bar Re: Advisory Opinion – Scharrer v. Fundamental Administrative Services*, No. SC14-1730 (Fla. Oct. 15, 2015), we clarified that the decision in *Goldberg v. Merrill Lynch Credit Corp.*, 35 So. 3d 905 (Fla. 2010), requires that a civil complaint alleging a cause of action for damages based on the unlicensed practice of law must allege that this Court has ruled that the specified conduct at issue is the unlicensed or unauthorized practice of law, and that, if this Court has not yet ruled that the actions at issue constitute unlicensed practice, the civil case may be dismissed without prejudice or stayed until the parties can seek such a determination. We also concluded that the language in Bar Rule 10-9.1(c), requiring that a civil suit be 'voluntarily dismissed' without prejudice, is inconsistent with *Goldberg*. Accordingly, we hereby amend Rule Regulating the Florida Bar 10-9.1(c) as set forth in the appendix to this opinion, to remove the requirement for a 'voluntary' dismissal."

Fact that someone was subject of direct criminal contempt proceeding will not bar UPL based on same underlying facts. *Marino v. State*, 165 So.3d 60 (Fla. 2d DCA 2015).

Marino was being prosecuted in circuit court on 2 counts of UPL. He petitioned the Second DCA for a writ of prohibition, seeking to block the UPL prosecution. He argued that the UPL prosecution was barred by double jeopardy because the circuit court had "initiated a direct criminal contempt proceeding against him based on the same facts that give rise to" the UPL charges.

The appellate court denied the petition. "Jeopardy does not attach in direct criminal contempt proceedings."

WITHDRAWAL

Lawyer's failure to file proper notice of withdrawal eventually mushroomed into sanctions and referral to Bar for not maintaining reliable address. *Belkova v. Russo*, __ So.3d __ (Fla. 5th DCA, No. 5D14-2201, 12/18/2015), 2015 WL 9239810.

Lawyer filed a "Notice of Withdrawal" advising the Fifth DCA that he was immediately withdrawing as the appellant's legal representative. The notice was not served on the appellant. The court ordered Lawyer to file a motion to withdraw that complied with Fla.R.App.P. 9.440 within 10 days. Lawyer failed to do so.

Lawyer was ordered to show cause and served with follow-up orders, by certified mail and email. Lawyer argued that email service violated due process "because the internet does not provide a reliable medium for proper legal notice." The court noted that Fla.R.Jud.Admin. 2.516(h)(1) "provides that the court 'may serve any order or judgment by e-mail to attorneys who have not been excused from e-mail service.'"

The court imposed sanctions on Lawyer. When he failed to pay, the court ordered Lawyer to appear to show cause why he should not be further sanctioned. The court's attempts to personally serve lawyer were unsuccessful; the process server went to the address on file for Lawyer but found it was not an office but the residence of Lawyer's parents. Attempts to find an alternative address for Lawyer were unavailing.

In view of the circumstances, the court stated: "We find it a grievable offense that an attorney appearing before a court does not have a reliable address. See R. Regulating Fla. Bar 4-1.3 ('A lawyer shall act with reasonable diligence and promptness in representing a client.'). By copy of this Order, the Florida Bar is requested to investigate Attorney John T. Jenkins, Jr. for his apparent violations of the Rules of Professional Conduct and to provide a report to this Court. We reserve jurisdiction to rule on the sanctions matter, which will be held in abeyance pending receipt of the Florida Bar's report."

Actual prejudice to defendant not required before public defender will be permitted to withdraw during pretrial phase due to conflict involving another client. *Smith v. State*, 156 So.3d 1119 (Fla. 1st DCA 2015).

See discussion in "Conflicts of Interest" section.