2013 FLORIDA LEGAL ETHICS REVIEW

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Lawyers are busier than ever before. Many things compete for their time and attention. Throughout it all, lawyers must remain on top of developments in their particular fields of practice – and must keep abreast of changes in legal ethics, which can 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 2013. The summaries are arranged by subject.

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

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References to rules or a "Rule" are to the Florida Rules of Professional Conduct unless otherwise noted.

RULE CHANGES (AND PROPOSED CHANGES)

Supreme Court approves major revisions to lawyer advertising rules, including websites. *In re: Amendments to the Rules Regulating The Florida Bar - Subchapter 4-7, Lawyer Advertising Rules*, 108 So.3d 609 (Fla. 2013).

The Supreme Court approved extensive revisions to the lawyer advertising rules effective May 1, 2013. Among other things, the proposed rules subject lawyer and law firm *websites* to the regulations that govern other forms of lawyer advertising.

The Court adopted the rules as proposed by the Bar, with two exceptions. First, instead of using the existing rule numbers, the Court gave new numbers to the rules as revised. The Court was concerned that "use of the same rule numbers could create confusion in case law for many years" because the new rules "are substantially different from the current rules."

Second, the Court modified the language proposed by the Bar in Rule 4-7.13(b)(10), dealing with use of "a judicial, executive, or legislative branch title by a current, former, or retired judicial, executive, or legislative branch official who is currently engaged in the practice of law." The Court explained: "[U]se of such a title is not inherently misleading if it is accompanied by clear modifiers and the title is placed subsequent to the person's name. For example, a former judge may not state 'Judge Doe (retired)' or 'Judge Doe, former circuit judge.' However, she may state 'Jane Doe, Florida Bar member, former circuit judge' or 'Jane Doe, retired circuit judge.'"

Rule 4-7.11 (Application of Rules). The advertising rules apply to "all forms of communication in any print or electronic forum," including "websites, social networking, and video sharing media." However, the Comment explains that the Florida advertising rules do not apply "to portions of a multistate firm's website that relate to the provision of legal services in jurisdictions other than Florida."

The advertising rules apply to all lawyers, whether or not admitted in Florida, "who advertise that the lawyer provides legal services in Florida or who target advertisements for legal employment at Florida residents." For ads in "national media" (e.g., cable TV), the rules do not apply "if the disclaimer 'cases not accepted in Florida' is plainly noted " in the ad.

Rule 4-7.12 (Required Content). All ads must have the name of the lawyer, law firm, lawyer referral service, or lawyer directory responsible for the ad, as well as the "city, town, or county of 1 or more bona fide office locations of the lawyer who will perform the services advertised." If the cases being advertised for will be referred to another lawyer or firm, the ad must so state. Any required information must appear in each language used in the ad. (These requirements are in the superseded rules.)

Rule 4-7.13 (Deceptive and Inherently Misleading Advertisements). The Rule defines deceptive or inherently misleading ads, and provides a non-exclusive list of deceptive or inherently misleading statements. The list is significant primarily because of what the rule *permits*.

References to past results are permitted if "objectively verifiable." The Comment states that the affected client must give informed consent, even where "some or all of the information a lawyer may wish to advertise is in the public record."

Comparisons or characterizations of the advertiser's "skills, experience, reputation or record" are permitted if "objectively verifiable."

The requirement that non-lawyer spokespersons be identified in ads was replaced by a rule requiring a "prominently displayed" notice ("Not an employee or member of law firm") where the

person's voice or image "creates the erroneous impression that the person speaking or shown is the advertising lawyer or a lawyer or employee" of the advertiser.

Ads with "dramatizations" of actual or fictitious events must contain a "prominently displayed" disclaimer, and a disclaimer must be "prominently displayed" when an actor "acting as a spokesperson" for the advertiser portrays someone "purporting to be engaged in a particular profession or occupation."

The rule allows testimonials that meet certain requirements. The testimonial must: regard matters on which the person making it is qualified to evaluate; be the actual experience of the person making it; be representative of what clients of that lawyer or law firm generally experience; not have been written or drafted by the lawyer; not have been given in exchange for something of value; and include a disclaimer that a prospective client may not obtain the same or similar results.

Finally, ads may not contain an advertising lawyer's "judicial, executive or legislative branch title, unless accompanied by clear modifiers and placed subsequent to the person's name, in reference to a current, former or retired judicial, executive, or legislative branch official currently engaged in the practice of law." The Comment clarifies that "an accurate representation of one's judicial, executive, or legislative experience is permitted in reference to background and experience in bios, curriculum vitae and resumes, if accompanied by clear modifiers and placed subsequent to the person's name."

Rule 4-7.14 (Potentially Misleading Advertisements). For the first time, the rules explicitly regulate "potentially misleading" ads. The non-exclusive list of such ads includes:

-- Ads subject to "varying reasonable interpretations, 1 or more of which would be materially misleading when considered in the relevant context;"

-- Ads "that are literally accurate, but could reasonably mislead a prospective client regarding a material fact;" and

-- Ads with references to "membership in or recognition by an entity that purports to base such membership or organization on a lawyer's ability or skill, unless the entity conferring such membership or recognition is generally recognized within the legal profession as being a bona fide organization that makes its selections based upon objective and uniformly applied criteria" and draws from "a reasonable cross-section of the legal community the entity purports to cover."

Significantly, the Rule provides that an ad may be rendered permissible through the inclusion of "information or statements that adequately clarify the potentially misleading issue."

Rule 4-7.15 (Unduly Manipulative or Intrusive Advertisements). The Rule prohibits ads that are "unduly manipulative or intrusive." An ad is "unduly manipulative" if it: (a) has features designed to "solicit legal employment by appealing to a prospective client's emotions rather than to a rational evaluation of a lawyer's suitability to represent the prospective client;" (b) uses an "authority figure such as a judge or law enforcement officer, or an actor portraying an authority figure, to endorse or recommend the lawyer or act as spokesperson for the lawyer;" (c) uses the voice of image of a "celebrity" (except a local announcer who regularly records ads and does not endorse the advertiser); or (d) "offers consumers an economic incentive to employ the lawyer or review the lawyer's advertising" (except for discounted fees).

Neither the Rule nor its Comment define what is considered "intrusive" or "unduly intrusive." Similarly, "authority figure" is not defined.

Rule 4-7.16 (Presumptively Valid Content). The Rule lists information "presumed not to violate" the advertising rules. The list is almost identical to that in the superseded rules. A notable addition allows inclusion of membership in and positions held in *any* state bar (not just Florida).

Rule 4-7.17 (Payment for Advertising and Promotion). The Rule continues prohibitions against (a) paying the costs of ads by a lawyer not in the same firm (but firms may advertise jointly if all required information is included) and (b) giving anything of value in exchange for a recommendation of the lawyer's services. Subdivision (c) is new: "A lawyer may not permit a nonlawyer to pay all or a part of the cost of an advertisement by that lawyer."

Rule 4-7.18 (Direct Contact with Prospective Clients). Most in-person solicitation is still prohibited. The rules governing direct mail (including email) communication with prospective clients are extended to all written communications seeking professional employment (not just "unsolicited" ones). Most of the specific requirements for direct mail communications are the same. The biggest change is that the word "Advertisement" must appear on *each* page of the communication (instead of only the first page).

Rule 4-7.19 (Evaluation of Advertisements). All ads (except websites) must be filed with the Bar 20 days in advance of their first use. The Rule expressly prohibits filing "an entire website" for review, but a lawyer may get an advisory opinion "concerning the compliance of a specific page, provision, statement, illustration, or photograph on a website."

The old rule stated that the Bar's finding of compliance was binding on the Bar in a grievance proceeding. Significantly, the new Rule allows the Bar to retract a finding of compliance at its pleasure, even when the underlying rules have not changed. Continued dissemination of the disapproved ad would subject the advertiser to discipline.

The Rule adds a "take-down" period for websites that violate Rules 4-7.14 and 4-7.15. A lawyer is subject to discipline for a non-complying website "only after 15 days have elapsed since the date" that the Bar sent a notice of noncompliance to the lawyer's official Bar address.

Ad review fees remain at $150 per timely-filed ad and $250 per late-filed ad.

Rule 4-7.20 (Exemptions From the Filing and Review Requirement). Exemptions are substantially unchanged. A "written or recorded communication requested by a prospective client" is exempt. Although this communication is exempt from filing, the content of any such requested communication is subject to the rules. (This is a change from the old rule, which provided that the ad rules did not apply to requested information.)

Additionally, the new Rule specifies that websites are *not* required to be filed for review.

Rule 4-7.21 (Firm Names and Letterhead). The standards governing firm names and letterhead are unchanged. The Comment adds that a sole practitioner's use of "and Associates," "Group," or "Team" is impermissible because it "implies that more than one lawyer is employed in the advertised firm and is therefore misleading."

Rule 4-7.22 (Lawyer Referral Services). The Rule imposes a new requirement on the operation and advertising of lawyer referral services by mandating that all referral service ads affirmatively state "that lawyers who accept referrals from it pay to participate in the lawyer referral service." (This is in addition to the required "lawyer referral service" disclosure.)

Rule 4-7.23 (Lawyer Directory). This Rule recognizes, for the first time, a "lawyer directory," defined as: "[A]ny person, group of persons, association, organization, or entity that receives any consideration, monetary or otherwise, given in exchange for publishing a listing of lawyers together in one place, such as a common Internet address, a book or pamphlet, a section of a book or pamphlet, in which all the participating lawyers and their advertisements are provided and the viewer is not directed to a particular lawyer or lawyers." Telephone directories, and voluntary bar associations that list members on a website or in a publication, fall outside this definition.

Many of the regulations that apply to lawyer referral service ads also apply to "lawyer directories;" notable exceptions are: there is no requirement for lawyers listed in a "lawyer

directory" to be covered by malpractice insurance; and there is no requirement that the "lawyer directory" provide the Bar with a list of participating lawyers.

Bar's Board of Governors adopts "Guidelines" that severely restrict lawyers' ability to advertise their past results.

On December 13, 2013, the Board of Governors adopted "Guidelines for Advertising Past Results." In May 2013 the Supreme Court had approved Bar-proposed rules allowing lawyers to advertise their past results. See Rules of Professional Conduct 4-7.13(b)(2) and 4-7.14 (adopted in *In re: Amendments to the Rules Regulating The Florida Bar – Subchapter 4-7, Lawyer Advertising Rules*, 108 So.3d 609 (Fla. 2013). But by adopting the "Guidelines" the Bar effectively banned past results from "indoor and outdoor display and radio and television media." For billboard, radio, and TV advertising, the Guidelines state that "the Bar generally will not approve advertisements in such media that include references to past results."

Website advertising may include references to past results, but the Guidelines now mandate how those results may be used. If an ad indicates that a client received a specific dollar amount, the ad may list only the "net amount" received by the client. The "net" amount is defined as the amount after deductions for attorneys' fees and litigation-related expenses, but "[m]edical expenses that are reimbursed to the client or paid on behalf of the client may be included in the net amount." The ad may have this disclaimer: "After deduction of attorneys' fees and expenses."

If the ad includes a dollar amount that is not linked to a specific client, the dollar amount may be the "gross amount" before deductions. The ad must have this disclaimer: "Before deduction for attorneys' fees and expenses."

All ads listing have dollar amounts recovered "must include the following prominently disclaimer prominently displayed unless objectively verifiable documentation to the contrary can be produced: 'Most cases result in a lower recovery. It should not be assumed that your case will have as beneficial a result.'"

The Guidelines prohibit advertising "collective or aggregate results" under the rationale that they are inherently misleading under Rule 4-7.13. They also specify how structured settlement amounts may be advertised.

The Bar gave advertisers 30 days to discontinue using previously-approved ads that no longer comply in light of the new Guidelines. See Rule 4-7.19(f)(4).

Supreme Court adopts rules regulating use of electronic devices by jurors and others in court. *In re: Amendments to the Florida Rules of Judicial Administration – Rule 2.451 (Use of Electronic Devices)*, 118 So.3d 193 (Fla. 2013).

Addressing a growing concern about use of electronic devices in the courtroom and jury room, the Supreme Court adopted a new rule of judicial administration regulating their use. Rule of Judicial Administration 2.451 was effective October 1, 2013.

Under subdivision (a), an electronic device is "any device capable of making or transmitting still or moving photographs, video recordings, or images of any kind; any device capable of creating, transmitting, or receiving text or data; and any device capable of receiving, transmitting, or recording sound." This includes "film cameras, digital cameras, video cameras, any other type of

camera, cellular telephones, tape recorders, digital voice recorders, any other type of audio recorders, laptop computers, personal digital assistants, or other similar technological devices with the ability to make or transmit video recordings, audio recordings, images, text, or data."

Under subdivision (b), the judge *may* direct that electronic devicesbe removed from all members of a jury panel at any time before deliberations and *must* direct that they be removed from all members of a jury panel before jury deliberations begin. The judge may allow for return of electronic devices during recesses. Subdivision (b)(3) lists prohibited uses of electronic devices by jurors, and subdivision (b)(4) recognizes a judge's authority to permit jurors to retain electronic devices during trial proceedings.

Subdivision (c) concerns use of electronic devices in the courtroom by non-jurors. "Subdivision (c)(1) recognizes the authority of the presiding judge or quasi-judicial officer to control the use of electronic devices in the courtroom. Subdivision (c)(2) recognizes the general authority of the chief judge to control the use of electronic devices in a courthouse or court facility." Subdivision (c) parallels rule 2.450(a) regarding use of electronic devices by the media.

Supreme Court amends criminal and appellate procedure rules relating to postconviction proceedings. *In re: Amendments to the Florida Rules of Criminal Procedure and the Florida Rules of Appellate Procedure*, 112 So.3d 1234 (Fla. 2013).

The Supreme Court adopted amendments to the Rules of Criminal Procedure along with conforming amendments to the Rules of Appellate Procedure, most of which were proposed by the Court's Criminal Court Steering Committee and the Subcommittee on Postconviction Relief. The amendments were effective July 1, 2013.

The Court rejected the proposed deletion of Fla.R.Crim.P. 3.170(l), which allows a defendant to file a motion to withdraw a guilty or nolo contendere plea within 30 days of rendition of the sentence. The Steering Committee and the Subcommittee asserted that "most motions brought under this rule are pro se and allege ineffective assistance of counsel, and as such, present issues that would be better addressed on appeal or pursuant to rule 3.850." The Court disagreed, stating that "adjudication of a motion to withdraw the plea is preferable in the trial court and closer in time to entry of the plea."

The Court also amended Fla.R.Crim.P. 3.850 to require that the motion be made under oath and that the motion state whether the judgment resulted from a plea or a trial. Additionally, claims of newly discovered evidence must be supported by affidavits attached to the motion. New subdivision (n) sets out a detailed "sanction mechanism to deter frivolous postconviction motions, thus protecting the courts and other litigants from abuse of the postconviction process."

Supreme Court adopts "Code for Resolving Professionalism Complaints." *In re: Code for Resolving Professionalism Complaints*, 116 So.3d 280 (Fla. 2013).

See discussion in "Professionalism" section.

Supreme Court amends offer of judgment rule to clarify that partial proposals for settlement are not authorized. *In re: Amendments to the Florida Rules of Civil Procedure*, 112 So.3d 1209 (Fla. 2013).

See discussion in "Fees" section.

CASES AND ETHICS OPINIONS (BY SUBJECT)

ADVERTISING

Supreme Court approves major revisions to lawyer advertising rules, including websites. *In re: Amendments to the Rules Regulating The Florida Bar - Subchapter 4-7, Lawyer Advertising Rules*, 108 So.3d 609 (Fla. 2013).

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

Bar's Board of Governors adopts "Guidelines" that severely restrict lawyers' ability to advertise their past results.

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

Federal suit filed against Florida Bar challenging constitutionality of advertising rules.

A Florida law firm and its partners sued the Florida Bar in U.S. District Court (Northern District) alleging that the Bar's advertising rules are unconstitutional. The suit was prompted by application of the lawyer advertising rules to law firm websites and blogs, as well as by the controversy over listing law firms on LinkedIn. (Regarding the LinkedIn issue, see "LinkedIn's Headings Conflict with Ad Rules," *Florida Bar News*, November 15, 2013).

The plaintiffs asked the court to declare unconstitutional and enjoin enforcement of Rule 4-7.13's requirement that statements in lawyer ads be "objectively verifiable" and Rule 4-7.14's prohibition on stating or implying that a lawyer specializes or has expertise in an area of law.

ATTORNEY-CLIENT RELATIONSHIP

Supreme Court rules that criminal defendant's lawyer, not defendant, has final authority to call or not call witnesses at trial. *Puglisi v. State*, 110 So.3d 1196 (Fla. 2013).

Resolving a conflict among DCAs, the Supreme Court addressed whether a criminal defendant or defense counsel makes the decision to present witnesses at trial. The Court held that defense counsel, rather than the defendant, "has the final authority as to whether or not the defense will call a particular witness to testify at the criminal trial."

The Court approved the Fourth DCA's decision in *Puglisi v. State*, 56 So.3d 787 (Fla. 4th DCA 2010) and disapproved the Fifth DCA's decision in *Cain v. State*, 565 So.2d 875 (Fla. 5th DCA 1990). Recognizing some potential confusion as a result of its opinion in *Blanco v. State*, 452 So.2d 520 (Fla. 1984), the Court receded from *Blanco* "to the extent that we held that the ultimate decision rests with the defendant as to the presentation of witnesses."

The Court explained: "We hold that the decision to present witnesses is not a fundamental decision resting exclusively with a criminal defendant when he or she is represented by counsel. Defense counsel must have the ultimate authority in exercising his or her client's constitutional right to present witnesses as such is a tactical, strategic decision within counsel's professional judgment. Therefore, if a criminal defendant disagrees with his or her attorney as to whether to have a witness testify at trial, it is the defense counsel who has the ultimate authority on the matter so long as he or she continues to represent the defendant. The decision ultimately made by counsel is and must be binding on his or her client." (Citations and footnotes omitted.)

Rejecting respondent lawyer's arguments as to client identity, Supreme Court suspends him for 1 year instead of 90 days as recommended by referee. *Florida Bar v. Whitney*, 132 So.3d 1095 (Fla. 2013).

The Bar charged Lawyer with ethical violations involving an immigration matter and a subsequent malpractice suit brought against him a client. The referee recommended that Lawyer be found guilty of violating Rule 4-1.3 (diligence), 4-1.4(a) (communication), 4-1.4(b) (explaining matters), 4-1.16(d) (protecting client's interest upon termination), 4-3.3(a)(1), (a)(2), (a)(4) (candor toward tribunal), 4-3.4(a) (obstructing access to evidence), 4-3.4(b) (fabricating evidence); 4-3.4(c) (knowingly disobeying obligation under court rules), 4-3.4(d) (intentionally failing to comply with discovery request), and 4-8.4(d) (conduct prejudicial to administration of justice).

Although the referee recommended that Lawyer be suspended for 90 days, the Supreme Court suspended him for 1 year.

Lawyer was hired by Dr. Hill to provide immigration advice regarding Ms. de Oliveira, a Brazilian who was planning to marry Dr. Hill but was in the country illegally. The written fee agreement referred to Dr. Hill as the client and stated that Lawyer would represent Ms. de Oliveira in matters regarding her immigration status. Lawyer was paid a flat fee of $15,000 plus a $5,000 cost deposit. He took possession of Ms. de Oliveira's documents.

After a year with no communication, Dr. Hill contacted Lawyer. Lawyer told Dr. Hill that he had not initiated the process to have Ms. de Oliveira become legally resident in the U.S. and stated that he would proceed further only after Dr. Hill paid an additional fee. Dr. Hill fired Lawyer and demanded a refund and return of the documents. Lawyer didn't return any money and failed to timely return the documents.

Dr. Hill sued Lawyer for legal malpractice, breach of contract, and unjust enrichment. During the suit Lawyer was found to be uncooperative and to have testified falsely at deposition.

In the Supreme Court, Lawyer argued that he could not be found guilty of several rules violations because Dr. Hill was not his client. The Court rejected this contention. "[Lawyer] admits that he had two meetings with Dr. Hill and Ms. de Oliveira, as well as five or six telephone conversations with Dr. Hill. Also, the retainer agreement identified Dr. Hill as the client, so [Lawyer]'s argument that Dr. Hill was not the client is without merit."

Eleventh Circuit concludes that law firm did not ghostwrite bankruptcy documents in violation of Rules of Professional Conduct. *In re Hood*, 727 F.3d 1360 (11th Cir. 2013).

See discussion in "Candor Toward the Tribunal" section.

Fee award to receiver's lawyer is reversed because lawyer lacked standing to pursue receiver's claim for fees and costs. *Saga Bay Gardens Condominium Ass'n, Inc. v. For the Appointment of Blanket Receiver*, 127 So.3d 800 (Fla. 2013).

See discussion in "Fees" section.

CANDOR TOWARD THE TRIBUNAL

Eleventh Circuit concludes that law firm did not ghostwrite bankruptcy documents in violation of Rules of Professional Conduct. *In re Hood*, 727 F.3d 1360 (11th Cir. 2013).

A law firm was sanctioned for "ghostwriting" a Chapter 13 bankruptcy petition for an ostensibly pro se debtor and thereby committing fraud on the court. The lower court ruled that this violated Rule 4-3.3(a)(1) and Rule 4-8.4(c), as well as 18 U.S.C. sec. 157(3).

The Eleventh Circuit reversed. The lower court should have focused on Rule 4-1.2(c), which expressly permits a lawyer to provide limited assistance to a client. Such assistance can include "drafting" a document to be submitted to a court, although the Comment states that the lawyer must indicate on the document that it was prepared with the assistance of counsel. The Eleventh Circuit stated: "It is apparent to us that under the plain language of the rule, [the law firm] did not 'draft' a document for" the debtor. "To the contrary, [the law firm] recorded answers on a standard fill-in-the-blank Chapter 13 petition based on [the debtor]'s verbal responses." This was not drafting, and could not support a finding that the law firm perpetrated a fraud on the court.

Lack of candor toward tribunal thrusts "dagger into the heart of the rule of law." *Briarwood Capital v. Lennar Corp.*, 125 So.3d 291 (Fla. 3d DCA 2013).

The Lennar parties sued Marsch, Minkow, and affiliated companies. The Marsch defendants were represented by a firm partner and his associate. The Minkow defendants entered into a stipulated final judgment, which the Marsch defendants were not involved in and did not know about until after it was entered. Despite this, Marsch defendants' counsel moved to dismiss for lack of subject matter jurisdiction "on the ground the Final Judgment did not expressly reserve jurisdiction in the Lennar plaintiffs to proceed against the Marsch defendants."

After the motion to dismiss was denied, the Marsch defendants petitioned for a writ of prohibition on the same ground asserted in the motion. This "frivolous" petition was denied, with the Third DCA imposing sanctions on the Marsch defendants and their counsel in equal shares.

In a footnote, the court cautioned that subordinate lawyers are responsible for their conduct even when working for a senior lawyer: "We pause to bring to the attention of young lawyers Rule 4-5.2 of the Rules Regulating the Florida Bar, which states '[a] lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.'"

The court also criticized counsel for statements made to the trial court regarding what the final judgment really stated. "This patently false assertion by Marsch counsel is antithetical to the

ethical obligation lawyers with the privilege to pass before the bar to address a court have to the judges before whom they appear. Marsch counsel might as well have cast a dagger into the heart of the rule of law. See R. Regulating Fla. Bar 4-3.3(a)(1) ('A lawyer shall not knowingly . . . make a false statement of fact or law to a tribunal . . . .')."

Third DCA finds fundamental error and reverses judgment obtained through material misrepresentations by defendants' counsel. *BAC Home Loans Servicing, Inc. v. Headley*, 130 So.3d 703 (Fla. 3d DCA 2013).

The Third DCA reversed a judgment in favor of mortgage foreclosure defendants because their counsel's "material misrepresentations" led to a judgment granting relief that was not pleaded. The court quoted from the ethics rules: "'A lawyer shall not knowingly: (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer'; or '(4) offer evidence that the lawyer knows to be false. . . .' R. Regulating Fla. Bar 4-3.3(a)(1), (4). Despite the clear and unambiguous directive of Rule 4-3.3(a), counsel representing the defendants . . . ('the Headleys') in this foreclosure action, made material misrepresentations in the Headleys' motion for final judgment, resulting in the issuance of a final judgment that granted relief which was not pled. Because the due process rights of ['BAC'] were violated, and the trial court committed fundamental error, we reverse."

The Headleys were sued by BAC in a foreclosure action. They filed counterclaims. When BAC failed to respond to the counterclaims, the Headleys obtained a default. In their motion for a final judgment, the Headleys and their counsel stated that they were not seeking money damages but wanted the equitable relief requested in their counterclaims. The court entered "an extraordinary order" that declared the note and mortgage "'null and void,' 'cancelled,' and 'satisfied'; and ordering that the subject property be declared free of all encumbrances and liens, and that the Headleys be deemed the rightful owners of the property."

However, "[t]he representations made by the Headleys and their counsel in the motion for entry of a final judgment were, in fact, misrepresentations, as the Headleys' counterclaims never sought 'specific in rem relief' or 'equitable relief quieting title to real property'" as they claimed.

The appeals court criticized the Headley's lawyer: "We also remind counsel for the Headleys of his duty of candor to the tribunal. Not only did he file a misleading pleading, which led the trial court to err, he compounded the error by defending an indefensible appeal."

Fourth DCA affirms dismissal of case for fraud on the court. *Herman v. Intracoastal Cardiology Center*, 121 So.3d 583 (Fla. 4th DCA 2013) (on rehearing).

Reversing its original opinion, on rehearing the Fourth DCA affirmed dismissal of a wrongful death medical malpractice case for fraud on the court. The case was brought by the decedent's husband, who was also personal representative of her estate. Husband testified extensively about the decedent's health, activities, and quality of life before the incident occurred. Husband also kept a diary, which was not disclosed to the defense in discovery. The defense later learned of the diary from Husband's daughter, apparently after a falling out. The defense moved to compel production of the diary. The diary contradicted Husband's testimony in key respects.

The trial court granted the defense's motion to dismiss the case for fraud on the court. Husband appealed. On rehearing, the appeals court affirmed the dismissal. "[W]here 'repeated fabrications undermine[] the integrity of' a party's entire case, 'the trial court has the right and obligation to deter fraudulent claims from proceeding in court.' [Citation omitted.] The trial court's finding of clear and convincing evidence of the requisite calculated, unconscionable scheme allowing it to dismiss this case for fraudulent conduct is supported by competent, substantial evidence in the record."

COMMUNICATION

Supreme Court adopts rules regulating use of electronic devices by jurors and others in court. *In re: Amendments to the Florida Rules of Judicial Administration – Rule 2.451 (Use of Electronic Devices)*, 118So.3d 193 (Fla. 2013).

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

Rejecting recommended 1-year suspension, Supreme Court suspends lawyer for 2 years for undisclosed communications with judge during murder trial. *Florida Bar v. Scheinberg*, 129 So.3d 315 (Fla. 2013).

See discussion in "Disciplinary Proceedings" section.

Court did not abuse its discretion by denying post-trial motion to interview juror in tobacco liability case where information was not "newly discovered." *Lorillard Tobacco Co. v. Alexander*, 123 So.3d 67 (Fla. 3d DCA 2013).

In a hotly contested tobacco liability case, a juror failed to disclose that she was acquainted with the plaintiff's daughter. Not long after trial began, however, the juror recognized the plaintiff's daughter upon seeing her in the hallway. The plaintiff's lawyer immediately informed the court. Defense counsel unsuccessfully sought to have the juror removed. After the trial ended with a large verdict for the plaintiff, the defendant filed a motion seeking to interview the juror.

The Third DCA affirmed denial of the motion. Post-trial juror interviews are "highly disfavored and rarely granted," and the defendant's motion to interview the juror was based on post-trial research that the defendant "could, and should, have conducted prior to entry of the verdict." The information about the juror that the defendant obtained post-trial was not really "newly discovered" at that time; rather it was "publicly and easily available, and thus it should have been obtained prior to the entry of the verdict."

Court erred in denying motion for new trial based on alleged juror misconduct without conducting juror interview. *Hillsboro Management, LLC v. Pagono*, 112 So.3d 620 (Fla. 4th DCA 2013).

After trial, Defendant's counsel discovered that a juror had a significant history of involvement in litigation that the juror did not disclose during voir dire. Defendant moved for a new trial based on juror misconduct. The court denied the motion without interviewing the juror.

The Fourth DCA reversed and remanded so the trial court could "permit a juror interview and then reconsider the motion based upon the total circumstances presented." The trial court should have applied the 3-part test of *De La Rosa v. Zequeira*, 659 So.2d 239, 241 (Fla. 1995) to determine if the juror's non-disclosure required a new trial: "First, the complaining party must establish that the information is relevant and material to jury service in the case. Second, that the juror concealed the information during questioning. Lastly, that the failure to disclose the information was not attributable to the complaining party's lack of diligence." There was reasonable ground for a juror interview, particularly in view of the fact that the Plaintiff disputed the connection between the undisclosed litigation history and the present case.

The court concluded by noting the "growth of post-trial juror interview requests based upon juror non-disclosure of prior litigation information." Pointing out recent advances in technology, the court stated: "The time may have come to rethink how the courts handle juror nondisclosure so as to prevent so much litigation over the issue and so many retrials of cases to the detriment of the entire judicial system."

CONFIDENTIALITY AND PRIVILEGES

Per Supreme Court, only qualified litigation privilege applies to statements made by lawyer during ex parte, out-of-court questioning of potential witness. *DelMonico v. Traynor*, 116 So.3d 1205 (Fla. 2013).

Lawyer Traynor represented Donovan Marine and its sales representative in a defamation filed against them by DelMonico. During his investigation Traynor allegedly made defamatory ex parte, out-of-court statements about DelMonico to potential witnesses. DelMonico sued Traynor and his law firm ("Traynor") for defamation. The court granted Traynor's motion for summary judgment based on *Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, P.A. v. U.S. Fire Ins. Co.*, 639 So.2d 606 (Fla. 1994). The Fourth DCA affirmed, holding that statements made by a lawyer while interviewing a witness in preparation for pending litigation are absolutely privileged. *DelMonico v. Traynor*, 50 So.3d 4, 7 (Fla. 4th DCA 2010). The court concluded that a lawyer who questioned a witness out of court should receive the same absolute immunity that would attach to the statements if they were made at deposition or in court.

The Supreme Court granted review "because the Fourth District misapplied this Court's long established precedent, of which *Levin* is a part, regarding the proper scope of Florida's absolute privilege." The Court quashed the Fourth DCA's decision in a 4-3 decision. The Court concluded: "We hold that Florida's absolute privilege, as this Court has developed the common law doctrine, was never intended to sweep so broadly as to provide absolute immunity from liability to an attorney for alleged defamatory statements the attorney makes during ex-parte, out-of-court questioning of a potential, nonparty witness in the course of investigating a pending lawsuit. In this narrow scenario, we conclude that a qualified privilege instead should apply to ex-parte, out-of-court statements, so long as the alleged defamatory statements bear some relation to or connection

with the subject of inquiry in the underlying lawsuit. A qualified privilege requires the plaintiff to establish express malice. However, where the statements do not bear some relation to or connection with the subject of inquiry in the underlying lawsuit, the defendant is not entitled to the benefit of any privilege – either absolute or qualified."

Litigation privilege applies to protect lawyers from claims for abuse of process and malicious prosecution. *Wolfe v. Foreman*, 126 So.3d 67 (Fla. 3d DCA 2013).

Client hired Lawyers to bring a federal court suit against Client's former business partners. Two months after filing suit, Lawyers learned that Client's claims were previously raised and settled in a state court action. Lawyers "immediately notified [Client] that they could not ethically pursue his claims and must withdraw." A week later the court granted Lawyers' motion to withdraw. Six months later the court dismissed Client's suit.

Opposing parties in the federal suit ("Wolfe") sued Lawyers for abuse of process and malicious prosecution. The court granted Lawyers' motion for judgment on the pleadings, concluding that their actions were "taken in the course of and related to the litigation and were thus absolutely privileged under Florida law."

The Third DCA affirmed, making short work of the abuse of process claim: "Because it is undisputed that the acts relating to abuse of process complained of here occurred after the complaint was filed and were related to the judicial proceedings, the litigation privilege applies to Wolfe's cause of action for abuse of process."

Regarding the malicious prosecution claim, the court relied on *Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, P.A. v. U.S. Fire Ins. Co.*, 639 So.2d 606 (Fla. 1994), and *Echevarria, McCalla, Raymer, Barrett & Frappier v. Cole*, 950 So.2d 380 (Fla. 2007). After noting that it would be "difficult to imagine any act that would fit more firmly within the parameters of *Levin* and *Echevarria* than the actual filing of a complaint," the court concluded: "Because the Florida Supreme Court has clearly and unambiguously stated, not once, but twice, that the litigation privilege applies to *all* causes of actions, and specifically articulated that its rationale for applying the privilege so broadly was to permit the participants to be 'free to use their best judgment in prosecuting or defending a lawsuit without fear of having to defend their actions in a subsequent civil action for misconduct,' we are obligated to conclude that the act complained of here – the filing of the complaint – is protected by the litigation privilege." (Emphasis by court.)

Per Third DCA, there is no "dependency exception" to attorney-client privilege to justify requiring minor's attorneys ad litem to disclose his whereabouts. *R.L.R. v. State*, 116 So.3d 570 (Fla. 3d DCA 2013).

Attorneys Ad Litem ("AAL") were appointed to represent a minor ("R.L.R.") in a dependency action. The court learned that R.L.R. ran away from the attempt to place him in the care of the Department of Children and Families ("DCF"), and ordered AAL to disclose R.L.R.'s whereabouts. In response, AAL "asserted that R.L.R. disclosed his location to them in confidence, in connection with their ongoing representation of him in his dependency proceedings, and his disclosures to them were clearly encompassed by the attorney-client privilege." Although it

recognized that "there appeared to be no precedent in Florida's child welfare law on this issue," the court ordered AAL to disclose the information.

(The trial court expressly found that the exceptions to the attorney-client privilege in Rule 4-1.6(b)(2) did not apply. These provisions relate to disclosure to prevent commission of a crime or to prevent death or substantial bodily harm "to another." However, Rule 4-1.6 is inapplicable to a question of whether the attorney-client privilege applies; the Comment distinguishes the legal doctrine of privilege and the ethical rule of confidentiality and explains when each applies: "The attorney-client privilege applies in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law.")

The Third DCA quashed the disclosure order. AAL had an attorney-client relationship with R.L.R. Even though the representation was limited, ethical obligations (including confidentiality) applied. See Comment, Rule 4-1.2. The court concluded that the communication from R.L.R. to AAL met the test for an attorney-client privileged communication under F.S. 90.502: "R.L.R. did not disclose his location for any purpose other than giving his attorneys the ability to locate him in furtherance of their representation, and not in the usual course of retaining the attorneys or for mere informational purposes." (Footnote omitted.)

Finally, no exception to the attorney-client privilege applied to the facts of this case. "We are mindful of the lower court's, DCF's and the GAL's commitment to the safety and well-being of children within DCF's care; there is no exception, however, statutory or otherwise, to the attorney-client privilege under the facts presented in this case. To find that there is a 'dependency exception' or, as specifically put forth in this case, that there is an exception where the client may be a danger to himself, would require this court to carve out an altogether new exception to the attorney-client privilege. That, however, is the rule-making function of the legislature or, possibly, the Florida Bar – not of this Court." (Footnotes omitted.)

"Unfair informational advantage" standard for disqualification does not apply where lawyer represents different clients against same opposing party in unrelated matters. *Miccosukee Tribe of Indians v. Lehtinen*, 114 So.3d 319 (Fla. 3d DCA 2013).

See discussion in "Conflicts of Interest" section.

Former client whose disqualification motion was denied cannot obtain certiorari relief where lawyer "adamantly denied receiving any confidences." *McCormack v. Russell*, 114 So.3d 456 (Fla. 4th DCA 2013).

See discussion in "Conflicts of Interest" section.

Court erred in ordering production of documents over attorney-client privilege objection without first reviewing them in camera to determine if privilege applied. *Patrowicz v. Wolff*, 110 So.3d 973 (Fla. 2d DCA 2013).

Wolff filed a Notice of Intent to Subpoena Third Party Records from Patrowicz's lawyer pursuant to Fla.R.Civ.P. 1.351(b). Documents sought included "the entire estate planning file relating to the decedent's estate." Patrowicz raised an attorney-client privilege objection. At the hearing the court did not take evidence or argument regarding whether the documents were privileged, and then overruled the objection and ordered production.

The Second DCA quashed the order. "[T]he trial court ordered production of the documents without first reviewing them and determining whether the attorney-client privilege applied. Not only did [Patrowicz's counsel] specify that his objection was based on the attorney-client privilege, but the subpoena on its face explicitly requested communications between an attorney and his client. Consequently, the trial court was required to conduct an in camera inspection of the documents prior to ordering their disclosure."

Court applied wrong legal standard regarding who had authority to waive corporation's attorney-client privilege. *Rogan v. Oliver*, 110 So.3d 980 (Fla. 2d DCA 2013).

Oliver, past president of a Homeowner's Association, sued 3 individuals ("Petitioners") for defamation. Petitioners asserted that the statements regarding Oliver's abuse of his position were true. Oliver testified at deposition that he had relied on the advice of the Association's then-counsel. Petitioners sought to depose the 2 former counsel about the advice that they gave to Association board members, including Oliver. Oliver objected due to attorney-client privilege, "contending that the communications between the Association's board and [the 2 lawyers] were protected by attorney/client privilege and asserting that neither he nor the prior board would waive that privilege." The court denied the motion to compel the lawyers' depositions.

The Second DCA quashed the order. The 2 lawyers were material witnesses; they passed the "jurisdictional test in this type of case" because they possessed information about which no other witnesses could testify. As to the merits, the trial court "departed from the essential requirements of the law by concluding that Oliver – a 'displaced manager' – had the authority to waive or assert the attorney/client privilege on behalf of the Association. This ruling placed the authority at issue in the incorrect hands. It is the Association, through its current board of directors, which is the entity with the authority to waive or assert attorney/client privilege as to communications between the Association's prior board and its counsel." On remand the trial court must consider whether the current Association board members waived the privilege on behalf of the Association and, if so, whether the waiver was valid in light of the current composition of the board.

Court's order allowing party to depose opposing party's lawyers did not depart from essential requirements of law. *Allstate Ins. Co. v. Total Rehab and Medical Centers, Inc.*, 123 So.3d 1162 (Fla. 4th DCA 2013).

Insurance companies ("Petitioners") sued medical and rehabilitation centers ("Respondents"). Petitioners' lawyers created a master summary chart to be used as a trial exhibit. The chart was "a combination of personal injury protection files generated by Petitioners, and medical and billing charts generated by Respondents." After the chart was introduced into evidence, Respondents moved to depose the lawyers who created it. The motion was granted.

The Fourth DCA denied Petitioners' petition for a writ of certiorari. "While it is true that the attempt to depose a party's attorney during ongoing litigation has been rejected when irrelevant or privileged information was sought from the attorney, attorneys are not per se exempt from the reach of Florida Rule of Civil Procedure 1.310(a), which allows the taking of the deposition of *any* person." (Emphasis by court.) The trial court has the authority "to prohibit inquiry of genuinely privileged materials" and so its order did not depart from the essential requirements of law.

Defendant in high-profile murder case permitted to take deposition of lawyer who interviewed "potentially crucial" witness. *Zimmerman v. State*, 114 So.3d 446 (Fla. 5th DCA 2013).

Defendant in a high-profile murder case sought to depose Lawyer, who was retained by the victim's family and interviewed "Witness 8" (described as a "potentially crucial" witness). Lawyer agreed to submit to a deposition, but later changed his mind. Defendant's motion to compel Lawyer's deposition was denied. The court "found that [Lawyer] was 'an opposing counsel' and, pursuant to the test enunciated in *Shelton v. American Motors Corp*., 805 F.2d 1323, 1327 (8th Cir. 1986), could only be required to submit to deposition upon a showing that: 1. No means existed to obtain the desired information other than to depose opposing counsel; 2. The information sought was relevant and nonprivileged; 3. The information was crucial to preparation of the case." Defendant failed to meet this burden. Also, Lawyer "could not be compelled to disclose any information regarding his interview of Witness 8 because the information constituted protected work product obtained by [Lawyer] in his capacity as an attorney for the [victim's] family preparing for possible future civil litigation against" Defendant.

The Fifth DCA granted Defendant's petition for a writ of certiorari. Lawyer was *not* "an opposing counsel;" he did not represent the state or the defendant, and his interview of the witness could not constitute trial preparation in the criminal case. Furthermore, the *Shelton* test does not apply where, as here, "an attorney has knowledge of facts relevant to the subject matter of the litigation and is merely advising a client with respect to a related matter." (Citation omitted.)

The court also concluded that Lawyer's testimony would not violate the work product privilege "because any privilege that may have existed was waived when [Lawyer] conducted the interview in the presence of two media representatives who subsequently aired portions of the interview on national television."

Finally, the court cautioned that the deposition of Lawyer was strictly limited to "inquiry of circumstances surrounding the interview of Witness 8 and the contents of such interview. Defense counsel may not inquire into [Lawyer]'s mental impressions regarding Witness 8, nor may counsel inquire as to the reasons why [Lawyer] conducted the interview in the manner in which he did." Also, "the work product privilege precludes defense counsel from making inquiry as to the reason(s) [Lawyer] attempted to locate Witness 8 and the methods employed to do so."

Criminal defendant unsuccessful in asserting that results of blood alcohol test are protected as work product. *Kidder v. State*, 117 So.3d 1166 (Fla. 2d DCA 2013).

Defendant was in an auto accident resulting in someone's death. Two blood samples were taken from her. One sample was analyzed by the Department of Law Enforcement and showed a blood alcohol level above the legal limit. She was charged with DUI manslaughter.

Defendant elected to participate in pretrial discovery under Fla.R.Crim.P. 3.220. She filed a motion to send the second blood sample out to Wuesthoft lab for testing. The court granted the motion. The state later moved to compel Defendant to turn over the results of that test under the reciprocal discovery provisions of rule 3.220. She refused, arguing that it was protected as work product. The court ordered production.

Defendant petitioned the Second DCA to quash the order, contending that the results of the Wuesthoft test were protected work product. "However, [Defendant] does not assert that Wuesthoft's report contains the opinions, theories, or conclusions of her attorney or members of the attorney's legal staff." The appellate court denied the petition.

The court rejected Defendant's argument that the rule requires disclosure of a test only when a defendant intends to call the expert who conducted the test as a witness. That interpretation would be contrary to the rule's plain language: "the rule is clear and unambiguous in requiring a defendant to disclose the results of a scientific test like the one at issue in the present case, regardless of whether the defendant anticipates calling the person who conducted the test as a witness."

The court concluded that the test results were not opinion work product. The report was generated by the testing lab, not by defense counsel. Defendant "does not allege that the report contains the opinions, theories, or conclusions of her attorney or members of her attorney's legal staff." Nor was the report protected as fact work product.

Statement taken by investigator for defendant's insurer in negligence case was work product and court erred in ordering its production. *International House of Pancakes (IHOP) v. Robinson*, 124 So.3d 1004 (Fla. 4th DCA 2013).

Plaintiffs were eating at an IHOP restaurant when one of them, M. Robinson, "found a severed fingertip in a salad." Allegedly the fingertip belonged to a cook, Neilly. An investigator for IHOP's insurer took a statement from Neilly a few weeks after the incident.

Plaintiffs sought production of the statement. IHOP objected that the statement was taken "in anticipation of litigation" and was protected from disclosure as work product. The trial court ordered the statement produced.

The Fourth DCA quashed the production order. The statement was protected as work product. "In this case, the amended complaint alleges negligence, which accrues 'at the time the injury is first inflicted.' [Citations omitted.] Here, the 'injury was inflicted' on November 23, 2008, when M. Robinson allegedly consumed a salad at IHOP containing some portion of Neilly's severed fingertip. The statement that Neilly gave IHOP's insurer on January 2, 2009 was 'in anticipation of litigation' that was 'reasonably foreseeable.'" (Citations omitted.)

The allegation that Neilly gave multiple prior inconsistent statements about the extent of his finger injury "would not justify invading the work product protection. Reviewing courts have uniformly rejected the notion that a party is entitled to the other's work product merely because of the possibility of generating multiple contradictory statements for use as impeachment at a subsequent trial." (Citations omitted.)

Order compelling production over work product objection is quashed due to absence of findings justifying production. *Magical Cruise Co. Ltd. v. Turk*, 114 So.3d 233 (Fla. 5th DCA 2013).

The Fifth DCA quashed an order requiring production of materials over a work product objection because the trial court made no findings to justify ordering production of work product.

Court correctly ruled that inadvertent disclosure did not waive work product privilege but was premature in disqualifying recipient. *Construction Systems of America, Inc. v. Travelers Casualty & Surety Co. of America*, 118 So.3d 342 (Fla. 3d DCA 2013).

"MKC," a party to commercial litigation, arranged for counsel for opposing party "CSA" to conduct a discovery review of documents. CSA's counsel marked documents and requested copies. MKC provided the copies. Upon later realizing that some of the documents were privileged, MKC filed motions to compel return of the privileged documents and to disqualify CSA's counsel.

The magistrate found that the documents were fact work product but that MKC had waived the privilege, and recommended denial of both motions. Instead, the trial court instead granted both motions. The court concluded that MKC had not waived the privilege "and that the possibility that CSA had gained an unfair informational advantage from the disclosure required disqualification." The Third DCA granted CSA's certiorari petition in part and denied it in part.

The appeals court first considered the waiver of privilege issue. The court quoted the 5-factor relevant circumstances test it adopted in *Abamar Housing & Development, Inc. v. Lisa Daly Lady Decor, Inc.*, 698 So.2d 276 (Fla. 3d DCA 1997), to determine whether a party waived privilege through inadvertent disclosure: "(1) The reasonableness of the precautions taken to prevent inadvertent disclosure in view of the extent of the document production; (2) the number of inadvertent disclosures; (3) the extent of the disclosure; (4) any delay and measures taken to rectify the disclosures; and (5) whether the overriding interests of justice would be served by relieving a party of its error." The trial court did not exceed its authority in concluding that the privilege was not waived, and so the Third DCA left standing the order compelling return of the documents.

Disqualification of CSA's counsel, however, was premature. *Moriber v. Dreiling*, 95 So.2d 449 (Fla. 3d DCA 2012), provided the 2-part test for determining whether receipt of an inadvertent disclosure warrants disqualification. "The movant must establish that 'the inadvertently disclosed information is protected, either by privilege or confidentiality' and that 'there is a 'possibility' that the receiving party has obtained an 'unfair' 'informational advantage' as a result of the inadvertent disclosure.'" (Citations omitted.) The magistrate, however, "made no made no findings regarding the extent of [counsel]'s review of the privileged documents or the possibility that his firm received an 'unfair informational advantage' from the disclosure." The trial court erred by making credibility determinations based on the testimony before the magistrate.

Court erred in ruling that party waived work product and attorney-client privilege objections to discovery request by not filing privilege log. *DLJ Mortgage Capital, Inc. v. Fox*, 112 So.3d 644 (Fla. 4th DCA 2013).

Respondent served Petitioner with a discovery request. Petitioner raised privilege and non-privilege objections but did not file a privilege log. The court ruled that Petitioner waived the right to raise work product and attorney-client privilege objections because it failed to file a privilege log.

The Fourth DCA granted the petition for certiorari. Petitioner was not obligated to file a privilege log on claims that included non-privilege objections. The court had not yet ruled on the non-privilege objections. "Petitioner did not have a duty to file a privilege log for those items on which other objections were raised until the court had determined that those items were otherwise discoverable. Accordingly, Petitioner did not waive its right to assert privilege on the items described by failing to file a privilege log, because the time for filing the log was tolled until the court ruled on the other objections."

Court erred in excluding from evidence portion of public record containing investigator's "mental impressions." *City of Avon Park v. State*, 117 So.3d 470 (Fla. 2d DCA 2013).

See discussion in "Public Official Ethics and Public Records" section.

Professional Ethics Committee publishes Proposed Advisory Opinion 12-3, concluding that it is ethical for lawyers to use "cloud computing" if they take reasonable steps to protect confidentiality.

See discussion in "Law Firms" section.

CONFLICTS OF INTEREST (INCLUDING DISQUALIFICATION)

Per Supreme Court, trial courts may consider "excessive caseload conflict" issue in deciding motions to withdraw on systemic rather than case-by-case basis. *Public Defender, Eleventh Judicial Circuit of Florida v. State*, 115 So.3d 261 (Fla. 2013).

See discussion in "Ineffective Assistance of Counsel" section.

Lawyers whose bookkeeper embezzled millions in client funds are disbarred rather than suspended for trust accounting violations and other conduct, including conflicts, in responding to the problem. *Florida Bar v. Rousso*, 117 So.3d 756 (Fla. 2013).

See discussion in "Disciplinary Proceedings" section.

Gifts to lawyers that violate Rule of Professional Conduct 4-1.8(c) are void per new Probate Code provision.

As of October 1, 2013, the Probate Code effectively voids written instruments purporting to make gifts to lawyers that violate Rule of Professional Conduct 4-1.8(c).

Subsection (a) of new F.S. 732.806 provides: "Any part of a written instrument which makes a gift to a lawyer or a person related to the lawyer is void if the lawyer prepared or

supervised the execution of the written instrument, or solicited the gift, unless the lawyer or other recipient of the gift is related to the person making the gift." (Rule 4-1.8(c) bars a lawyer from "solicit[ing] any substantial gift from a client, including a testamentary gift, or prepar[ing]e on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. . . .")

Subsection (b) provides: "This section is not applicable to a provision in a written instrument appointing a lawyer, or a person related to the lawyer, as a fiduciary." (The Comment to Rule 4-1.8 provides that Rule 4-1.8(c) "does not prohibit a lawyer from seeking to have the lawyer or a partner or associate of the lawyer named as personal representative of the client's estate or to another potentially lucrative fiduciary position.")

The new statute defines terms like "related," "written instrument," and "gift."

Law firm hired by insurer to represent 2 co-defendants has conflict requiring separate counsel when it must argue conflicting legal positions on behalf of each client. *University of Miami v. Great American Assurance Co.*, 112 So.3d 504 (Fla. 3d DCA 2013).

Insurer hired Law Firm to represent its insureds, University of Miami ("UM") and MagiCamp, which ran a summer swim camp at UM. A child attending MagiCamp drowned in the pool and his parents sued both insureds. Law Firm filed an answer and affirmative defenses for MagiCamp stating that the injury and damages were caused by persons or entities other than MagiCamp. UM was the only other defendant.

UM advised Insurer that there was a conflict in defense counsel's representation of both MagiCamp and UM and demanded independent counsel. Insurer saw no conflict and refused to provide separate counsel, so UM hired its own counsel. After the case was settled UM filed an action seeking indemnification for legal costs and alleging breach of contract because Insurer did not provide separate counsel. Insurer "took the position that, because MagiCamp was contractually bound to indemnify and hold harmless UM for any liability arising out of the use of its facilities by MagiCamp, there could be no conflict of interest in its single representation by counsel." The trial court ruled for Insurer.

The Third DCA reversed. "[T]he question presented is whether in this factual scenario, where both the insured and the additional insured have been sued, and the allegations claim that each is directly negligent for the injuries sustained, a conflict between the insured and the additional named insured exists that would require the insurer to provide separate and independent counsel for each. We answer the question affirmatively." Even though there were no questions of coverage or excess limit liability, "the pleadings and record evidence on summary judgment create a conflict, not on coverage, but on legal defenses based upon the record facts." The hold harmless agreement between MagiCamp and UM did not negate the conflict.

Theconflict problem was a result of one counsel representing 2 co-defendants who were pointing fingers at each other. One defense counsel was provided to defend both MagiCamp and UM and to present adverse legal theories. "There exists no factual dispute . . . that, in defense of both co-defendants, [Insurer]'s counsel would have had to argue conflicting legal positions, that each of its clients was not at fault, and the other was, even to the extent of claiming indemnification and contribution for the other's fault. In so doing, legal counsel would have had to necessarily imply blame to one co-defendant to the detriment of the other. On these facts, we believe this legal

dilemma clearly created a conflict of interest between the legal defenses of the common insureds sufficient to qualify for indemnification for attorney's fees and costs for independent counsel."

First DCA upholds order disqualifying law firm from concurrently representing tort case defendants and client with lien against recovery in that suit. *Anheuser-Busch Co., Inc. v. Staples*, 125 So.3d 309 (Fla. 1st DCA 2013).

Plaintiff was injured while working for his Employer, but was not on Employer's premises. Plaintiff received worker's compensation benefits from self-insured Employer. He also sued Defendants for negligence and premises liability (he was injured on their property).

Law Firm entered an appearance for Defendant. Law Firm also represented Employer in filing a notice of lien in the tort action under F.S. 440.39(3), seeking reimbursement for the money paid to Plaintiff as workers' compensation benefits.

Law Firm planned to appear for Defendants at a mediation in the tort case and to have Employer's "non-lawyer claims manager" appear for Employer. Plaintiff moved to disqualify Law Firm based on its alleged conflict of interest in simultaneously representing Defendants and Employer. The asserted conflict arose from Law Firm's obligations to help Defendants minimize or avoid liability in the tort suit while at the same time helping Employer maximize recovery on the lien claim. Defendants and Employer filed written consents to Law Firm's representation.

The court disqualified Law Firm. Regardless of whether Plaintiff had standing to raise the conflict issue, the court would have raised it sua sponte. The court ruled that under Rule 4-1.7 "the conflict could not be waived because it was unreasonable for the firm to believe that it would be able to provide competent and diligent representation to each affected client and because the representation of [Defendants] involved the assertion of a position adverse to [Employer]."

Defendants unsuccessfully moved for rehearing, claiming "for the first time that an indemnity agreement existed between themselves and the employer and that, as a result, the trial court's conclusion that their interests were fundamentally antagonistic to the employer's interests was erroneous."

The First DCA upheld the disqualification. The majority took a narrow view of the issues presented: "[T]he only issues [Defendants] have raised before us are whether [Plaintiff] had standing to seek disqualification of the law firm and whether, if [Plaintiff] had the requisite standing to do so, the existence of the indemnity agreement that was not brought to the trial court's attention until the filing of [Defendants'] motion for rehearing established that [Defendants'] interests were not fundamentally antagonistic to [Employer's] interest."

The majority pointedly observed that Defendants did not argue the merits of the rulings applying Rule 4-1.7. Even if those issues had been raised, "we would still deny the certiorari petition." The majority agreed with 2 conclusions reached by the trial court: (1) that Law Firm did not comply with Rule 4-1.7(b)(1) because it was not reasonable for Law Firm to believe that it could provide competent and diligent representation to Defendants and to Employer; and (2) that the mediation was a "proceeding before a tribunal," making the dual representation impermissible under Rule 4-1.7(b)(3).

"Unfair informational advantage" standard for disqualification does not apply where lawyer represents different clients against same opposing party in unrelated matters. *Miccosukee Tribe of Indians v. Lehtinen*, 114 So.3d 319 (Fla. 3d DCA 2013).

Lawyer Lehtinen ("Respondent") had represented the Miccosukee Tribe ("Petitioners"). Petitioners filed a class action suit against Respondent alleging legal malpractice and other claims. Respondent was defended by his long-time lawyer, Klock. Petitioners moved to disqualify Klock from representing Respondent in the class action because Klock also represented other clients against Petitioners in litigation "in other, unrelated matters and that Klock's representation of respondent in the underlying case would give Klock access to confidential, attorney-client privileged information that he would then be able to use in those other unrelated cases." Petitioners also alleged that Respondent "possibly could divulge substantial, confidential information to Klock that would permit Klock to gain an unfair informational advantage against petitioners in the other, unrelated cases, in which Klock represents clients against petitioners."

The court denied disqualification, "finding that the unfair informational standard did not apply and cited a lack of proof that any confidential information had been divulged." The Third DCA denied the petition for certiorari, concluding "that the unfair informational advantage standard does not apply where the same attorney represents adverse clients against the same party in cases that are not reasonably related, and that any claim that the respondent's attorney has received confidential information is purely speculative at this time."

Cases relied on by Petitioners were inapposite because the litigation in those case was between *related* parties regarding *related* issues. That was not the situation here. Further, it was not alleged that Klock obtained any kind of unfair advantage in his representation of Respondent in Petitioners' case against Respondent.

The court also addressed the issue of Respondent's disclosure of confidential information to Klock in his case. Any claim that such a disclosure would violate the confidentiality rule was "unfounded." Rule 4-1.6 permits a lawyer to disclose otherwise-confidential information to the extent reasonably necessary to defend himself in a claim brought against the lawyer by a former client. "[P]etitioners waive their right to attorney confidentiality because they level a claim against their former attorney for legal malpractice. Respondent may disclose whichever confidential information that is necessary to defend himself or establish a claim against his former client to the extent that he discloses no more information than is required . . ."

Former client whose disqualification motion was denied cannot obtain certiorari relief where lawyer "adamantly denied receiving any confidences." *McCormack v. Russell*, 114 So.3d 456 (Fla. 4th DCA 2013).

"Petitioner" moved to disqualify her former lawyer, who had been hired by the opposing law firm. Petitioner alleged that her former lawyer provided confidences to the lawyer's new employer. The court denied the motion after an evidentiary hearing.

The Fourth DCA denied Petitioner's petition for certiorari: "[P]etitioner cannot show that the order departs from the essential requirements of law, since the attorney adamantly denied receiving any confidences from petitioner, who testified to the contrary at an evidentiary hearing below." (Citations omitted.)

Disqualification of law firm not warranted where lesser alternative could alleviate harm caused by firm's access to non-privileged information. *Caruso v. Knight*, 124 So.3d 962 (Fla. 4th DCA 2013).

Two former Publix employees ("Plaintiffs") sued 3 current Publix managers who allegedly conspired to have them fired. Publix was not a party. Publix hired Law Firm to represent its interests and the managers. Plaintiffs successfully moved to disqualify Law Firm, alleging that the firm "had access to private or confidential information in Publix's personnel files for the former employees and access to the confidential FCHR (Fla. Comm'n on Human Relations] file."

The Fourth DCA quashed the disqualification order, pointing out that "[d]isqualification is not appropriate if lesser alternatives can alleviate the harm." (Citations omitted.)

The information at issue was not equivalent to attorney-client privileged information. "This case does not involve attorney-client confidences or work product concerns which serve as the grounds for many of the attorney disqualification cases. Counsel's access to private information in the FCHR file and the personnel files did not warrant disqualification. Although Publix is not a party in this suit, its interests are aligned with those of the managers. Information in the personnel files is relevant to this litigation. . . . Counsel's access to any irrelevant private information in the personnel files and FCHR complaint is not equivalent to disclosure of privileged attorney-client information. Thus, the privacy rights of the former employees could have been protected by less drastic means, such as the issuance of a protective order to prevent use or dissemination of irrelevant personal information."

Disqualification of law firm based on informational advantage reversed because court decided issue on affidavits without evidentiary hearing. *Gutierrez v. Rubio*, 126 So.3d 320 (Fla. 3d DCA 2013).

Plaintiffs sued entertainer Rubio for breach of contract. They were represented by Lawyer and his Law Firm. Two years later Rubio hired Restrepo as her personal assistant. Rubio fired Restrepo less than 2 months later. Restrepo hired Law Firm to represent him in a claim against Rubio in federal court.

Rubio moved to disqualify Law Firm in Plaintiffs' suit against her, alleging that during his brief employment as personal assistant Restrepo "was present during litigation strategy meetings between Rubio and her attorney, had access to papers that are attorney-client privileged, and that he divulged the contents of these conversations and documents to" Lawyer." Although Lawyer denied the allegations, the court disqualified Lawyer and Law Firm.

The Third DCA quashed the disqualification. The court departed from the essential requirements of law by not holding an evidentiary hearing to resolve conflicting factual issues. "Disqualification cases require the court to make a factual determination that 1) there is proof that confidential information was actually disclosed and, 2) that this information gave the non-moving party an unfair tactical advantage." (Citations omitted.) The trial court did not take testimony regarding the allegations, but decided the issue based on affidavits that "disagree on such material issues as whether Restrepo had access to and did obtain any proprietary information, whether such information was passed on to [Lawyer], and if so, whether that information gave [Lawyer] an unfair tactical advantage in the litigation between the plaintiffs and Rubio."

Lawyer who joined firm opposing her former client should not be disqualified without evidentiary hearing to determine her knowledge of material confidential information. *AGIC, Inc. v. North American Risk Services*, 120 So.3d 189 (Fla. 5th DCA 2013).

Lawyer Novoseletsky represented IBGA in drafting an amendment to a Managing General Agreement between her client IBGA and another entity, AGIC. She spent about 5 billable hours on the work. Novoseletsky later joined the firm of Shutts & Bowen as a partner.

IBGA became involved in litigation against AGIC and North American Risk Services ("NARS"). Shutts & Bowen represented AGIC. IBGA moved to disqualify Shutts & Bowen on the basis that Novoseletsky had represented IBGA in drafting the amended Agreement and so acquired confidential information that would be material to the litigation.

IBGA and Novoseletsky submitted affidavits. Without conducting an evidentiary hearing, the court entered an order disqualifying Shutts & Bowen.

The Fifth DCA quashed the disqualification order. The situation was governed by Rule 4-1.10(b), which applies when lawyers move between private law firms. The moving lawyer's new firm is disqualified when the moving lawyer has *actual knowledge* of material confidential information. That actual knowledge is imputed to the new firm, which requires its disqualification.

Novoseletsky's affidavit indicated that she did not have knowledge of confidential information about her former client, IBGA, that would be material to the current case. On the other hand, the affidavit of IBGA's executive vice-president alleged that Novoseletsky did have such knowledge. The trial court should have held an evidentiary hearing to resolve this factual issue before ruling on the disqualification motion.

Court erred in disqualifying party's lawyer who was not a "necessary witness on behalf of" his client. *Steinberg v. Winn-Dixie Stores, Inc*., 121 So.3d 622 (Fla. 4th DCA 2013).

Steinberg sued a grocery store, the property owner, and the property manager after tripping on a hole in the ground near the store's entrance. Steinberg's lawyer, Anchell, interviewed the store manager. Anchell's investigator was also present during the interview.

The manager later offered a materially different version of his conversation with Anchell and the underlying events. The store moved to disqualify Anchell on the ground that he "was a necessary witness on the subject of a disputed admission by" the store manager and so was barred from representing Steinberg by Rule 4-3.7 (lawyer shall not act as advocate at trial in which lawyer "is likely to be a necessary witness on behalf of the client"). The court ordered disqualification.

The Fourth DCA quashed the disqualification. Steinberg did not intend to call Anchell as a witness on her behalf, nor was Anchell a necessary witness. The court noted that "[a] lawyer is not a necessary witness when there are other witnesses available to testify to the same information." (Citations omitted.) Anchell's investigator was present during the interview.

The store also argued that disqualification was warranted even through the client's opponent would be calling Anchell, because his testimony allegedly would be adverse to his own client. The court disagreed. Defendants "have not shown that [Anchell]'s testimony would be sufficiently adverse to Steinberg's position." Even if such a showing was made, however, the court pointed out

that Steinberg "has agreed to waive any conflict to have her chosen counsel represent her. See R. Regulating Fla. Bar 4-1.7(b)(4) . . ."

Fact that lawyer will be material witness disqualifies him from representing client at trial but not from pre- and post-trial proceedings. *KMS Restaurant Corp. v. Searcy, Denney, Scarola, Barnhart & Shipley, P.A.*, 107 So.3d 552 (Fla. 4th DCA 2013).

Lawyer was disqualified from representing his client in a litigated matter "solely because he is a material witness in the underlying case." Lawyer's client ("KMS") petitioned the Fourth DCA for a writ of certiorari. In granting the petition, the appellate court stated: "The trial court's order departs from the essential requirements of law because it is not limited to disqualifying counsel from representing KMS at trial. . . . The fact that counsel will be a material witness does not preclude him from participating in proceedings before and after trial." (Citations omitted.)

Lawyer did not improperly act as "surety" by filing nonresident case bond on behalf of client. *US Bank, N.A. v. Boyer*, 125 So.3d 997 (Fla. 2d DCA 2013).

Lawyer's client, Bank, filed an action to foreclose a mortgage. Defendant filed a request for Bank to post a nonresident cost bond per F.S. 57.011. Lawyer "advanced his own funds and posted the nonresident cost bond of $100 by submitting a check" to the court clerk. Defendant moved to strike the bond and dismiss the case, contending that "the nonresident cost bond was defective because it violated the rules against an attorney's acting as a surety for his or her client. See [F.S. 454.20]; Fla. R. Jud. Admin. 2.505(c)." The court granted the motion to dismiss.

The Second DCA reversed. The court examined F.S. 57.011 and concluded that Lawyer's posting of the bond did not violate F.S. 454.20, which prohibits lawyers from becoming sureties for their clients. Lawyer "simply advanced the nonresident $100 cost deposit required by section 57.011, along with the $8.50 processing fee. Attorneys routinely advance their client's costs and in doing so do not violate section 454.20. Rule 4-1.8(e)(1) of the Rules Regulating the Florida Bar specifically provides that 'a lawyer may advance court costs and expenses of litigation,' even where, unlike in the instant case, 'the repayment of which may be contingent on the outcome of the matter.' And according to the language of section 57.011, [Lawyer] could have been personally responsible for this amount if [Bank] had not posted the bond and defendants had obtained a judgment against" Bank. (Citation omitted.)

DISCIPLINARY PROCEEDINGS

Supreme Court disbars rather than suspends lawyer whose gross negligence regarding trust account was insufficient to prove intent to misappropriate funds. *Florida Bar v. Johnson*, 132 So.3d 32 (Fla. 2013).

Lawyer was suspended on an emergency basis after his bank reported a trust account overdraft. The referee recommended that Lawyer be found guilty of various rule violations, but

found Lawyer not guilty of violating Rule 4-8.4(c) (dishonesty, fraud, deceit, misrepresentation) because he "lacked the necessary element of intent to support a violation." Contempt proceedings for violating Court orders during the emergency suspension were also filed, and the referee recommended a guilty finding. As a sanction, the referee recommended a 6 month suspension nunc pro tunc in the trust account case and an additional one-year suspension in the contempt cases.

The Bar sought Supreme Court review. The Court disbarred Lawyer.

As for Rule 4-8.4(c), the Court noted that "intent under this rule is proven by establishing that 'the [attorney] deliberately or knowingly engaged in the activity in question.'" (Citations omitted.) The Bar relied on *Florida Bar v. Riggs*, 944 So.2d 167 (Fla. 2006), in arguing that the lawyer's deliberate delegation of responsibility for the trust account to a nonlawyer employee who ended up stealing trust funds without the lawyer's knowledge constituted the requisite intent. The Court disagreed. Unlike in *Riggs*, the nonlawyer employee mismanaged the trust account and stole money without the lawyer's knowledge. "Given these factual findings, we conclude that [Lawyer]'s deliberate and knowing actions in delegating responsibilities to [the employee] and then failing to properly supervise her is insufficient under these specific circumstances to prove intent to misappropriate client funds in violation of rule 4-8.4(c)."

Nevertheless, the Court disbarred Lawyer. Suggesting but not deciding that disbarment was warranted for trust account negligence alone (see *Florida Bar v. Rousso*, 117 So.3d 756 (Fla. 2013), the Court also considered the contempt cases and concluded: "[R]egardless of whether we conclude that a lengthy suspension or disbarment is the appropriate sanction in [the trust account case], when considered together with [the] contempt cases, disbarment is the overall appropriate sanction."

Lawyers whose bookkeeper embezzled millions in client funds are disbarred rather than suspended for trust accounting violations and other conduct in responding to the problem. *Florida Bar v. Rousso*, 117 So.3d 756 (Fla. 2013).

Two partners ("Lawyers") had a law firm trust account through which "100's of millions of dollars passed." By the end of 2008 the trust account was short $4.38 million. The Bar charged Lawyers with ethical violations. Lawyers claimed that a firm bookkeeper embezzled the missing money. The referee found "no clear and convincing evidence" that Respondents misappropriated the money or received any direct benefit from its disappearance.

Lawyers had tried to cover the trust account deficits by various means, including their own money, malpractice insurance coverage, loans from family members, and a loan from a firm client. The Bar claimed this was "too little, too late."

The referee recommended that Lawyers be found guilty of violating: Rule 5-1.2 (trust account procedures); Rule 4-1.7 (conflict between clients' and lawyers' personal interests); Rule 4-1.8(a) (business transactions with clients); and Rule 4-8.4(c) (dishonesty, fraud, deceit, or misrepresentation). The referee recommended that Lawyers be found not guilty of violating Rule 5-1.1(a)(1) (commingling trust funds with lawyer's own funds).

The Supreme Court agreed with the guilty recommendations and also concluded that Lawyers had commingled funds in violation of Rule 5-1.1(a)(1). Rejecting the referee's recommendation of 12- and 15-month suspensions, the Court disbarred Lawyers.

As for the trust account shortages, the Court stated that "[m]isappropriation by office staff does not relieve the lawyer from the requirements of the minimum standards regarding a trust account" and ruled that Lawyers' conduct in depositing their own funds and loans from others into

the trust account and then writing trust account checks to clients in an attempt to cover the losses caused by the embezzlement "demonstrates that Respondents knowingly engaged in commingling."

As for Rule 4-1.8(a), Lawyers borrowed more than $230,000 from a firm client (Yordi) without following the rule. Lawyers did not provide Yordi with the required written disclosures, which should have included that: "(a) funds from outside sources were needed to cover embezzling from the trust account; (b) the measure of trust account imbalance was unknown (the investigation was still ongoing and Respondents were covering deficits as they emerged); (c) there was a risk that the firm might not survive the calamity and consequently a risk whether Respondents could pay back any loan; (d) Yordi should engage an independent lawyer for legal advice on the transaction; and (e) the loan could not consummate unless the client gave his informed consent."

The Court offered an interesting analysis of the Rule 4-1.7 personal interest conflict. In trying to resolve the trust account shortages, Lawyers were able to pay back some clients back but not others, and the timing of payments varied. "The referee found that certain trust payees benefited by Respondents' 'preference for early payment,' while other payees had to wait longer. In addition, there was 'galling evidence' that Respondents distributed earned trust money to the firm's operating account before distributing funds to clients. Thus, Respondents had conflicts of interest in representing their clients. . . . Despite the conflicts of interest between Respondents and their clients as to how and when clients would receive preference in payment, Respondents continued to represent them." In other words, continuing to represent clients while failing to inform them of the firm's financial difficulties violated the conflict rules. Lawyers could have continued representing the clients if they had obtained informed consent, but this was not done.

Rule 4-8.4(c) was violated when Respondents "continued representing clients, and continued taking clients' money and depositing it into the trust account, when Respondents knew the account was seriously underfunded." Respondents also violated the rule by "engaging in business transactions with a client at a time when there was a possibility – a possibility that was realized – that it would be difficult if not impossible to repay the debt owed to Yordi."

The Court's opinion did not mention a charge or finding regarding failure to properly supervise nonlawyer personnel pursuant to Rule 4-5.3.

Rejecting recommended 1-year suspension, Supreme Court suspends lawyer for 2 years for undisclosed communications with judge during murder trial. *Florida Bar v. Scheinberg*, 129 So.3d 315 (Fla. 2013).

During a murder trial the prosecutor "engaged in substantial personal communications by phone or text message" with the presiding judge. The two "exchanged 949 cell phone calls and 471 text messages" from March 23 (four days before the jury returned a guilty verdict) to August 24 (when the judge imposed the death penalty as sought by the state). It was undisputed that the communications were personal and "did not pertain to the pending case."

The prosecutor did not disclose these communications to the defense, but the defense learned of them and the state agreed to a new trial. The Bar brought charges and the prosecutor was found guilty of violating Rule 4-8.4(d) (prohibiting lawyers from engaging in conduct "prejudicial baptito the administration of justice"). The referee recommended a one-year suspension. The Supreme Court, however, imposed a 2-year suspension.

Citing *Florida Bar v. Mason*, 334 So.2d 1 (Fla. 1976), the Court stated that the prosecutor's conduct "similarly created an appearance of impropriety and caused harm to the judicial process."

The conduct "occurred in the context of a capital first-degree murder case where the judge had to rule on motions made by and against the respondent and where the judge could, and did, impose the ultimate sentence of death." The communications ultimately resulted in the case being retried, "a process which consumed court resources, as well as the resources of opposing counsel."

Supreme Court ups lawyer's suspension to 2 years for unprofessional conduct toward judges and opposing counsel. *Florida Bar v. Norkin*, 132 So.3d 77 (Fla. 2013).

See discussion in "Professionalism" section.

Rejecting respondent lawyer's arguments as to client identity, Supreme Court suspends him for 1 year instead of 90 days as recommended by referee. *Florida Bar v. Whitney*, 132 So.3d 1095 (Fla. 2013).

See discussion in "Attorney-Client Relationship" section.

Lawyer's false and misleading statements regarding filing tax return for client result in 90-day suspension rather than recommended sanction of probation. *Florida Bar v. MacNamara*, 132 So.3d 165 (Fla. 2013).

Lawyer represented a client in a probate matter. The Bar charged Lawyer with ethical violations regarding 2 issues involving filing of federal income tax returns for the estate ("whether [Lawyer] actually filed an estate tax return and whether [Lawyer] attempted to cover up his alleged failure to file an estate tax return"). Lawyer made false statements to the Bar and had made a misrepresentation to the probate court. The referee recommended that Lawyer be found guilty of violating Rule 4-1.4 (communicating with client), Rule 4-8.1 (false statements to Bar in responding to disciplinary matter), and 2 violations of Rule 4-8.4(c) (dishonesty, fraud, deceit, misrepresentation). The referee recommended a 2-year probation. The Bar sought disbarment.

The Supreme Court approved the guilt findings but imposed a 90-day suspension with a 2-year probation. Lawyer committed "serious acts of misconduct," although "[t]his misconduct represents a single isolated incident in [Lawyer's] thirty-seven-year history as a Florida lawyer."

The misconduct involved Lawyer falsely stating to the IRS that he sent in a "duplicate" of a previously-filed estate tax return, misrepresenting to the probate court that he had properly "filed" a valid return, and knowingly making false statements about the tax return to the Bar in responding to the disciplinary complaint.

Supreme Court disbars rather than suspends lawyer for "extensive misconduct" of "often egregious nature" in personal matters. *Florida Bar v. Swann*, 116 So.3d 1225 (Fla. 2013).

The Supreme Court disbarred Lawyer for multiple violations, including improper business dealings with clients, using his then-girlfriend to help exploit an elderly client, and defrauding a lender in his own divorce proceedings. The referee recommended a 91-day suspension. The Court,

however, determined that Lawyer's "extensive and egregious misdeeds warrant a more severe sanction" – disbarment. The fact "that much of the misconduct in this case involves [Lawyer]'s personal affairs does not change our conclusion that disbarment is warranted."

Rejecting recommended discipline, Supreme Court suspends lawyer for 91 days for misconduct related to personal loan and for improper client closing statements. *Florida Bar v. Adler*, 126 So.3d 244 (Fla. 2013).

Lawyer was employed by the Rothstein firm. Although titled as a firm "shareholder," Lawyer testified that he never had any equity shares. To finance purchase of a co-op apartment in New York City, Lawyer took a mortgage loan for 90% of the purchase price and borrowed the other 10% through a payroll advance from the law firm. He disclosed the mortgage loan but not the payroll loan to the apartment board. Lawyer also falsely stated to the broker that he had a 20% equity share in the law firm. He asked Rothstein to write a letter misrepresenting Lawyer's status as a shareholder and his financial situation. The Bar charged Lawyer with violating Rules Regulating Fla. Bar 3-4.3 (misconduct), 4-8.4(a) (violating or attempting to violate ethics rules, or assisting or inducing another to do so), and 4-8.4(c) (dishonesty, fraud, deceit, or misrepresentation).

Lawyer was also charged with violating Rule 4-1.5(f)(5) by failing to properly execute closing statements in client matters. "None of the settlement statements prepared by [Lawyer]'s department contained a space or line for a lawyer to sign the settlement statement."

The referee recommended that Lawyer be found guilty and recommended a 30-day suspension. Seeking a harsher sanction, the Bar took the case to the Supreme Court. The Court rejected the referee's recommendation and instead suspended Lawyer for 91 days.

Supreme Court increases discipline imposed on lawyer for negligent representation in postconviction proceeding. *Florida Bar v. Polk*, 126 So.3d 240 (Fla. 2013).

The Bar charged Lawyer with misconduct in representing a client in a postconviction proceeding. The referee recommended that Lawyer be found guilty of violating Rules 4-1.3 (diligence); 4-1.4 (communication), 4-1.16(d) (protecting client's interest upon termination), and 4-8.4(g) (not responding to Bar inquiry). The referee recommended that Lawyer be suspended for 10 days and be placed on 3 years probation.

The Supreme Court rejected the proposed discipline as too lenient and suspended Lawyer for 90 days followed by 3 years probation. Lawyer's misconduct in representing his client included "failing to communicate for nearly two years with the client and failing to return documents to the client despite numerous requests by the client. With respect to the disciplinary proceedings, [Lawyer] failed to respond to The Florida Bar for several months and then only after the client's complaint had been referred to the grievance committee and Bar counsel had contacted [Lawyer] about his failure to respond. [Lawyer] failed to timely respond to the Bar's complaint and failed to respond to the Bar's Request for Admissions. [Lawyer] failed to respond to the Bar's Motion for Summary Judgment and failed to appear at the motion hearing by telephone as permitted by the referee. Finally, [Lawyer]'s testimony at the sanction hearing contradicted what he had previously represented to the referee and Bar counsel with respect to his request for a continuance on the motion for summary judgment."

Supreme Court holds disbarred lawyer who continued to practice in contempt and orders him jailed for 60 days. *Florida Bar v. Palmer*, __ So.3d __, 38 Fla.L.Weekly S312 (Fla., No. SC10-543, 5/9/2013), 2013 WL 1908405.

Lawyer was disbarred in 1991. The Bar later petitioned to hold him in contempt on the ground that he practiced law while disbarred, and in 1995 the Court permanently enjoined him from practicing. Lawyer apparently continued to practice. In 2005 the Court held him in indirect criminal contempt and sentenced him to 60 days in jail, with all but 10 days suspended.

Despite all of this, the Bar alleged that Lawyer continued to practice law through an entity he owned called "All Florida Legal Clinic." The referee concluded that Lawyer was in contempt and recommended he be incarcerated for 60 days. Noting that it had the power to hold Lawyer in contempt under rule 3-7.11(f)(1)(F) and its "inherent authority to enforce its orders to ensure compliance with those orders" the Court ordered Lawyer jailed for 60 days.

Court lacked authority to impose monetary sanctions on party for filing Bar complaints against opponent's lawyers. *Kass Shuler, P.A. v. Barchard*, 120 So.3d 165 (Fla. 2d DCA 2013).

During contentious litigation in county court, mortgage foreclosure defendant Barchard filed Bar complaints against 4 lawyers in the plaintiff's law firm. Barchard also sued the plaintiff under consumer protection statutes. The suit was dismissed with prejudice, and the plaintiff's law firm sought a fee award in county court. The court awarded fees to the firm as a sanction for Barchard's filing of Bar grievances against the 4 lawyers. The circuit court sitting in its appellate capacity reversed the fee award on the ground that the trial court "lacked authority" to impose that sanction.

On second-tier certiorari review, the Second DCA agreed. "We deny the petition insofar as it challenged the circuit court's reversal of the $5000 sanction imposed against Barchard for filing Bar grievances. An individual who files a Bar complaint against an attorney and makes no public announcement of the complaint enjoys absolute immunity. *Tobkin v. Jarboe*, 710 So.2d 975, 977 (Fla. 1998)."

Supreme Court revokes lawyer's bar admission for lack of candor in amending application. *Florida Board of Bar Examiners re: Daniel Mark Zavadil*, 123 So.3d 550 (Fla. 2013).

The Supreme Court revoked Lawyer's admission to the bar for lack of candor in the application process. Rule 5-14 of the Rules Relating to Admissions to the Bar authorizes the Board of Bar Examiners to seek to revoke admission within 12 months after an applicant was admitted to the Bar if the Board "determines that a material misstatement or material omission in the application process of the applicant may have occurred." The Board and the Court decided that Lawyer failed to amend his application to update answers to questions that had changed since he answered them on the initial application. Lawyer did not amend even after being noticed to appear at an investigative hearing. The Court agreed that Lawyer's "failures to timely update his Bar application amount to material omissions in the application process that warrant revoking his admission."

Lawyer did amend answers after the Board initiated proceedings to revoke his admission, stating that he amended "of my own volition." The Board concluded, and the Court agreed, that this statement was false, misleading, or lacking in candor.

The Court emphasized: "Whether or not the Board would have determined that the events were disqualifying is not the issue. Rather, the crucial point is that [Lawyer] had an obligation to disclose this information to the Board. The admissions process relies on applicants making accurate and timely disclosures of relevant information. It is essential that applicants be totally candid. Here, [Lawyer] failed to inform the Board of material information and events. We have consistently held that 'no moral character qualification for Bar membership is more important than truthfulness and candor.'" (Citations omitted.)

The Court disqualified Lawyer from reapplying for admission for 18 months.

EXPERT WITNESSES

Letter of protection between plaintiff and her treating physician who testified as expert is admissible to show physician's potential bias. *Pack v. Geico General Ins. Co*., 119 So.3d 1284 (Fla. 4th DCA 2013).

Plaintiff sued her uninsured motorist insurer. The judge allowed the defense to introduce a letter of protection between Plaintiff and her treating physician for the purpose of showing potential bias. Plaintiff appealed after a zero verdict, contending it was error to admit the letter of protection.

The Fourth DCA affirmed regarding admissibility of the letter of protection. "Evidence pertaining to a letter of protection between a plaintiff and her treating physician, when that treating physician testifies as an expert on the plaintiff's behalf, is relevant to show potential bias." Additionally, the appeals court rejected Plaintiff's argument that a letter of protection is not relevant "absent a referral relationship from the lawyer to the doctor." (Citations omitted.)

FEES

Arbitration Cases:

Court has discretion to deny fees to party who prevailed in trial de novo after arbitration hearing. *Saltzman v. Hadlock*, 112 So.3d 772 (Fla. 5th DCA 2013).

Doctor, a medical malpractice defendant, was ordered to non-binding arbitration. Doctor was dissatisfied with the outcome and requested a trial de novo. After the jury returned a defense verdict, Doctor moved for fees under F.S. 44.103(6) ("[t]he party having filed for a trial de novo *may* be assessed . . . reasonable costs of the party, including attorney's fees, . . . incurred after the arbitration hearing if the judgment upon the trial de novo is not more favorable than the arbitration decision."). (Emphasis by court; footnote omitted.) The court denied Doctor's motion for fees.

The Fifth DCA affirmed. "Given the overriding principles that statutes awarding attorney's fees are to be strictly construed and that the plain language of a statute controls, we find that by

using the permissive term 'may' in section 44.103(6), the Legislature vested the trial court with discretion to award or deny attorney's fees."

Third DCA affirms fee award of $62,000 in FDUTPA arbitration where plaintiff was awarded less than $6000. *Bull Motors, LLC v. Borders*, 132 So.3d 1158 (Fla. 3d DCA 2013).

Borders pursued arbitration against a car dealership ("Maroone"). The arbitrator found that Maroone violated the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA") and that Borders was the prevailing party for purposes of FDUTPA's fee provision. The court awarded Borders $62,000 in fees, although her recovery in the arbitration was $5626.

The Third DCA affirmed. "As Maroone did not assert any affirmative claims, and only Ms. Borders obtained a significant benefit sought in her lawsuit, she was the 'prevailing party' under *Moritz v. Hoyt Enterprises, Inc*., 604 So.2d 807, 809-10 (Fla. 1992). . . . There is no express requirement of proportionality between the amount of the FDUTPA judgment and the attorney's fees and costs incurred in obtaining that judgment."

The appeals court rejected Maroone's contention that the lower court erred by refusing to consider an early settlement proposal Maroone made. "Maroone's offers of judgment addressed Ms. Borders' claim for equitable relief as well as her claims for damages. The offer of judgment statute [F.S. 768.79], does not apply to cases that, as here, involve a general offer seeking release of all claims in the case, both equitable and monetary. *Diamond Aircraft Indus., Inc*. [*v. Horowitch*], 107 So.3d [362] at 374 [(Fla. 2013)]."

Attorney's Liens:

Hours billed by client's successor counsel could be relevant to fees awarded to former counsel under charging lien claim. *Smith v. Schryver*, 115 So.3d 450 (Fla. 1st DCA 2013).

In a workers' compensation case, claimant's former counsel moved to compel production of the hours billed by successor counsel in working toward claimant's lump-sum settlement. The Judge of Compensation Claims denied the motion.

The First DCA reversed. "The discovery would result in evidence that could be relevant to valuation of former counsel's fee lien under *Rosenthal, Levy & Simon, P.A., v. Scott*, 17 So.3d 872, 876 (Fla. 1st DCA 2009) ('In cases where the discharged attorney successfully proves entitlement to a charging lien, the JCC is required to apportion the fee between the discharged attorney and the successor attorney.'), *Law Office of James E. Dusek, P.A. v. T.R. Enterprises*, 644 So.2d 509, 510 (Fla. 1st DCA 1994) (stating quantum meruit fee will be 'the reasonable value of the services which he [the former attorney] performed prior to discharge'), and *Searcy, Denney, Scarola, Barnhart & Shipley, P.A. v. Poletz*, 652 So.2d 366, 368 (Fla. 1995) (reversing award of quantum meruit fee calculated as straight hourly fee, and remanding for consideration of 'the totality of the circumstances surrounding the professional relationship between the attorney and client,' and holding '[f]actors such as time, the recovery sought, the skill demanded, the results obtained, and the attorney-client contract itself will necessarily be relevant considerations')."

Court erred in striking law firm's charging lien after firm withdrew without cause from part-hourly, part-contingent fee matter. *Greenspoon Marder, P.A. v. Moscoso*, 114 So.3d 327 (Fla. 3d DCA 2013).

Ruden McClosky law firm was hired to represent a litigation client on an hourly fee basis. When the client fell behind in paying hourly fees, the firm and the client executed an amended retainer agreement. The amended agreement provided for a contingent fee for fees incurred after execution of that amended agreement, but specifically stated that the previously billed but unpaid hourly fees were to be paid by the client at the conclusion of the case. About a year later the firm withdrew and filed a claim of charging lien for the unpaid hourly fees.

The client's new counsel moved to strike Ruden McClosky's charging lien, arguing that it was not entitled to a lien because it voluntarily withdrew without cause before the contingency occurred and did not produce any positive judgment or contribute to the settlement. The court granted the motion. Greenspoon Marder, successor to the bankrupt Ruden McClosky, appealed.

The Third DCA reversed. "[E]ven though Ruden McClosky withdrew without cause, the trial court erred by striking the charging lien filed by Ruden McClosky where the charging lien was for hourly fees billed prior to the execution of the amended retainer agreement, and where the amended retainer agreement provides that these previously billed, but unpaid, hourly fees were payable upon conclusion of" the underlying litigation. The firm was not seeking payment of a contingent fee (see *Faro v. Romani*, 641 So.2d 69 (Fla. 1994), but of the unpaid hourly fees.

Lawyer's efforts did not produce "tangible fruits" to support imposition of charging lien where property was "upside down." *Joel M. Weissman, P.A. v. Abou-Sayed*, 107 So.3d 1163 (Fla. 4th DCA 2013).

The Fourth DCA affirmed denial of Lawyer's motion to impose a charging lien on Client's property. Lawyer did not prove that his efforts resulted in "tangible fruits" for Client. Other than accounts statutorily protected from creditors' liens, his efforts "produced only valueless assets, thus leaving no 'tangible fruits' to which a charging lien may attach." The court noted that the marital home was "upside down" (i.e., more was owed on the home than it was worth and so it had a negative value), and stated that "the trial court did not err by determining that the marital home was not a *positive* result of the litigation on which a charging lien may attach." (Emphasis by court.)

Despite lack of express language, reservation of jurisdiction to determine amount of fees to be awarded reserved jurisdiction to address lawyer's charging lien. *Card v. Card*, 122 So.3d 436 (Fla. 2d DCA 2013).

Former Wife appealed an award of fees and costs. The trial court had reserved judgment to determine the amount of the fee award and, because the amount had not yet been determined, that portion of the final judgment was "nonfinal and nonappealable."

Former Wife's counsel also argued that the trial court erred "by not reserving jurisdiction in the amended final judgment to address his timely filed charging lien." The Second DCA concluded that the trial court retained jurisdiction to address the charging lien, despite the lack of an express

reservation for that purpose in the judgment. "Notwithstanding a lack of express reservation of jurisdiction over the charging lien, the trial court is not foreclosed from considering the charging lien in this action because the issue of attorney's fees and costs has not been finalized and the trial court reserved jurisdiction for that purpose." (Citation omitted.)

Third DCA supports lawyers' claim of retaining lien on client papers, rejecting argument that claim should fail because there were other avenues for payment. *Fox v. Widjaya*, __ So.3d __ (Fla. 3d DCA, No. 3D13-2548, 11/6/2013), 2013 WL 5927583.

See discussion in "Files" section.

Domestic Relations Cases:

Court properly denied motion filed by former husband's lawyer seeking to enforce fee award directly against former wife. *Coppola v. Coppola*, 122 So.3d 474 (Fla. 2d DCA 2013).

Lawyer represented Former Husband in litigation over a change in circumstances that resulted in the court reducing his alimony obligation. Former Wife was ordered to pay about $31,000 of Former Husband's fees; the order stated that "the former wife shall . . . pay to the former husband $31,163.36" and that the payment "shall be made to the former husband's legal counsel."

Lawyer filed pleadings seeking payment of the $31,000 in fees. The court concluded that the fee payment was supposed to be made to Lawyer, finding that the judgment "was not in favor of the Former Husband; rather it was in favor of his attorneys." Former Husband had "no standing or right to collect a judgment for fees that was ordered to be paid directly to his attorneys."

The Second DCA reversed. The lower court's "finding that the fee award was made directly to the Former Husband's attorney and not to the Former Husband is not supported by the record."

Court erred in ordering Husband to pay 100% of Wife's attorney's fees as sanction for his "litigation misconduct." *Heiny v. Heiny*, 113 So.3d 897 (Fla. 2d DCA 2013).

Husband appealed an order requiring him to pay 100% of Wife's fees as a sanction for his litigation misconduct. Husband argued that the court should have considered the amount of increased litigation due to his alleged misconduct. Agreeing, the Fifth DCA reversed. Imposition of fees as a sanction for litigation misconduct must be based on additional work that resulted from the misbehavior.

Court abused discretion in ordering husband to make temporary support and fee payments consuming more than 80% of his net monthly income. *Hoffman v. Hoffman*, 127 So.3d 863 (Fla. 2d DCA 2013).

Husband appealed an order requiring him to make temporary support and fee payments to Wife that would consume more than 80% of his net monthly income, as well as to pay all of Wife's temporary fees.

The Second DCA agreed that the trial court abused its discretion: "'[T]emporary awards are among the areas where trial judges have the very broadest discretion.' [Citations omitted.] . . . However, '[t]he correct standard by which temporary support and alimony are to be assessed balances needs, as fixed by the parties' standard of living on the one hand, and ability to pay, on the other.' [Citation omitted.] A temporary award that virtually exhausts one party's income and deprives that party of the ability to support himself or herself is not based on that party's ability to pay and constitutes an abuse of discretion. [Citations omitted.]"

Despite equal distribution of marital assets, error to deny fees to wife where denial would result in inequitable diminution of her assets. *Duncan-Osiyemi v. Osiyemi*, 117 So.3d 882 (Fla. 4th DCA 2013).

The trial court ordered a substantially equal distribution of marital assets. Husband had a greater anticipated future income. The court denied Wife's motion for fees. The Fourth DCA reversed, noting that "[n]otwithstanding an equal distribution of assets, a significant income disparity can justify an award of attorney's fees and costs." (Citations omitted.)

Insurance Cases:

One insurance company may recover fees from another insurer under section 627.428. *Indiana Lumbermens Mutual Ins. Co. v. Pennsylvania Lumbermens Mutual Ins. Co.*, 125 So.3d 263 (Fla. 4th DCA 2013).

Subcontractor was sued under a general liability policy. Subcontractor tendered its defense to carriers "ILM" and "PLM." PLM refused to defend, and ILM defended under a reservation of rights. ILM settled the claim against Subcontractor and took an assignment of Subcontractor's rights against PLM regarding PLM's alleged failure to fulfill its duties to defend and indemnify. ILM then proceeded against PLM.

In the ILM-PLM suit the court entered summary judgment for ILM but denied ILM's motion for fees under F.S. 627.428. ILM appealed, contending that the statute permits a fee award to an assignee of an insured's rights under an insurance policy when the insurer denies coverage.

Agreeing, the Fourth DCA reversed. "As an assignee of the subcontractor's claim, ILM fell within the class entitled to recover fees under the statute. To enforce its assigned rights, ILM had to file suit against PLM, and obtain a favorable judgment. This is all that section 627.428 requires."

Miscellaneous Fee Cases:

Fee award to receiver's lawyer is reversed because lawyer lacked standing to pursue receiver's claim for fees and costs. *Saga Bay Gardens Condominium Ass'n, Inc. v. For the Appointment of Blanket Receiver*, 127 So.3d 800 (Fla. 3d DCA 2013).

A condo association dealing with delinquent assessments petitioned the court for appointment of a receiver. The order appointing the receiver authorized him to employ lawyers as needed and also stated that "'[s]hould the Receiver be required to engage the services of [his] attorney(s) for the enforcement of this Order, the Receiver shall [be] entitled to reasonable costs, expenses, and attorney(s) fees.'" The receiver later moved to withdraw from the case and filed a motion for fees and costs. The trial court granted the motion.

The Third DCA reversed. "The receiver's attorney lacked standing to pursue an award of attorney's fees and costs independent of the receiver. [Citations omitted.] Under the order appointing the receiver, the receiver – not an attorney – was entitled to seek an award of attorney's fees and costs: 'the *Receiver* shall [be] entitled to reasonable costs, expenses, and attorney(s) fees.' (emphasis [by court])."

First DCA reverses denial of petition to approve contingent fee above limits set in Rule 4-1.5. *In re: Buggs*, 122 So.3d 519 (Fla. 1st DCA 2013).

Law Firm agreed to represent Client in a medical malpractice action for a straight 40% contingent fee, which exceeded the fee caps set in Rule 4-1.5(f)(4). Client signed the waiver of rights form and petitioned the circuit court for approval of the fee contract under Rule 4-1.5(f)(4)(B)(ii). The court denied the petition without holding a hearing or making factual findings.

The First DCA reversed. Rule 4-1.5(f)(4)(B)(ii) provides that the court "shall" approve a petition if it "determines the client has a complete understanding of the client's rights and the terms of the proposed contract." The court was required to approve the petition if it found that Client understood the rights she was waiving and the terms of the fee contract. The case was remanded for the court to determine if Client's waiver "was knowingly and voluntarily made."

Contingent fee caps in Rule of Professional Conduct 4-1.5 do not limit what court can award under fee-shifting statute in inverse condemnation case. *Fla. Dept. of Agriculture and Consumer Services v. Bogorff*, 132 So.3d 249 (Fla. 4th DCA 2013).

The Department of Agriculture and Consumer Services ("DACS") litigated a class action brought by homeowners whose residential citrus trees were destroyed by the Department under a citrus canker virus eradication program. The court awarded fees to the homeowners. In affirming most aspects of a fee award in this class action inverse condemnation case, the Fourth DCA addressed issues relating to fee awards generally and awards in these kinds of cases in particular.

Applicability of Rules of Professional Conduct. DACS argued that "any fee based upon a fee-shifting statute which exceeds the contingent fee schedule contained in the rules of professional responsibility is per se excessive." The court disagreed, noting that this argument ignored Rule 4-1.5(e), which provides: "The fact that a contract may not be in accord with these rules is an issue between the attorney and client and a matter of professional ethics, but is not the proper basis for an action or defense by an opposing party when fee-shifting litigation is involved." The court concluded that "[t]he statute provides no cap, and we will not impose one, particularly in this case where the size of the fee awarded to class counsel was the result of [DACS]'s litigation strategy and desire to 'go to the mats,' as the trial court described."

Effect of fee contract between class counsel and one class member. The court rejected DACS's contention that a fee contract between class counsel and one class member should set the percentage cap for the overall fee award. "First, the contract with one plaintiff and one counsel does not bind the rest of the class counsel to its terms. Second, the contractual provision does not limit the attorney to 30%. It is not an agreement to charge that amount but a description of what a customary fee might be."

Application of F.S. 73.092. DACS argued that the "benefits achieved" clause of F.S. 73.092(1) controlled. "Benefits" are determined by the last "written offer" made by DACS. The trial court instead applied the multi-factor analysis of F.S. 73.092(2), and the appeals court affirmed. DACS did not submit a written "offer" within the meaning of the statute.

***Stockman v. Downs* rule of pleading entitlement to fees does not bar fee claim that did not exist at outset of action.** *Ocean Bank v. Caribbean Towers Condominium Ass'n, Inc.*, 121 So.3d 1087 (Fla. 3d DCA 2013).

Bank brought foreclosure suits against 2 condominium unit owners. The condo Association was also named as a defendant because it had liens for unpaid assessments. Bank obtained foreclosure judgments and bought the units at foreclosure sales. Bank and the Association disputed the extent of Bank's liability for unpaid assessments after it bought the units. The statute capped it at 1% of the original mortgage debt, but the Association sought a much larger amount.

Bank filed post-judgment motions seeking application of the statutory cap as well as a fee award under F.S. 718.303(1) (prevailing party fees in unit owner- association disputes). Although Bank prevailed on the merits, both judges refused to award fees. Bank appealed.

The Third DCA reversed. The Association argued that Bank "was barred from recovering attorney's fees by the "no pleading, no fees" rule announced in *Stockman v. Downs*, 573 So.2d 835 (Fla. 1991). The appeals court rejected this argument. Bank's entitlement to fees did not exist from the outset of the actions and so could not have been raised in the pleadings. The dispute leading to the fee claim did not arise until *after* Bank bought the units. "Simply put, the Bank could not have sought fees as a unit owner under section 718.303(1) before the Bank purchased the units. Thus, the Bank properly raised the issue of attorney's fees only after it arose; and the Association was provided notice and adequate time to decide whether to pursue its claim for a lien in excess of the statutory maximum, drop it, or settle it."

The trial court also erred in not awarding fees to the Bank as the prevailing party.

Pending post-judgment motion to set aside default judgment does not toll rule 1.525 30-day time limit for serving motion for fees. *ASAP Services, LLC v. S A Florida International, LLC*, 122 So.3d 965 (Fla. 3d DCA 2013).

"ASAP" filed a motion for fees more than 30 days after entry of a final default judgment. Under Fla.R.Civ.P. 1.525, such motions must be served "no later than 30 days after the filing of the judgment." The court denied the motion.

The Third DCA affirmed. In *Saia Motor Freight Line, Inc. v. Reid*, 930 So.2d 598 (Fla. 2006), the Supreme Court noted that rule 1.525 established a "bright-line time requirement" for

filing fees and costs motions. The only exception is when the final judgment determines entitlement to fees but reserves jurisdiction to set the amount. That did not occur here.

The court declined ASAP's invitation to "carve out an additional exception to rule 1.525's 'bright-line' time requirement by concluding that a pending post-judgment motion to set aside a judgment tolls the thirty-day time requirement for serving a motion for attorneys' fees and costs" under rule 1.525.

Court departed from essential requirements of law by awarding fees to appointed counsel without findings regarding reasonable hours worked and reasonably hourly rate. *Watts v. Justice Administrative Commission*, 115 So.3d 431 (Fla. 2d DCA 2013).

Lawyer was appointed to represent a defendant charged with second-degree murder. After a significant amount of work by Lawyer a plea was negotiated. Lawyer billed the Justice Administrative Commission ("JAC") for about $10,000 (131.8 hours at $75 per hour). The statutory flat fee was $2500. The JAC did not argue that the hours were unreasonable. Lawyer argued that the case required extraordinary effort and that a higher fee was justified.

The circuit court agreed that the case was extraordinary but did not award Lawyer the $10,027.50 he requested. "Instead, the court awarded [Lawyer] twice the statutory flat fee, or $5000. It did not reject the reasonableness of the number of hours [Lawyer] expended or the corresponding hourly rate but simply stated that $5000 was not confiscatory. This was error."

The court made the necessary finding that the case required the lawyer's extraordinary and unusual efforts, but failed to "explain why it capped the fees at 200 percent of the flat fee except to summarily determine that this amount was not confiscatory. Without making a finding regarding the reasonable number of hours [Lawyer] expended the court could not make such a determination." The court remanded for reconsideration of the fee motion.

Court erred in awarding less than amount of fees requested by lawyer who was court-appointed counsel to criminal defendant. *Watts v. Justice Administrative Commission*, 135 So.3d 357 (Fla. 2d DCA 2013) (on rehearing).

Lawyer was appointed to represent a defendant in a capital case. He filed a request for fees above the statutory amount, seeking $75 per hour for 276 hours of work (about $20,752). Lawyer testified to his work and his billing. The Justice Administrative Commission did not object to the bill. Lawyer testified that any amount lower than $75 per hour would be confiscatory. The court, however, entered an award for $15,000 (200 hours at $75 per hour).

The Second DCA granted Lawyer's certiorari petition. "[W]hen it is uncontested that any hourly award less than $75 would be confiscatory, the decision to reduce the billing from $20,752.50 to $15,000 – a reduction of more than 25 percent – without any explanation would seem to be an arbitrary decision approaching a violation of due process."

Offers of Judgment and Proposals for Settlement:

Supreme Court amends offer of judgment rule to clarify that partial proposals for settlement are not authorized. *In re: Amendments to the Florida Rules of Civil Procedure*, 112 So.3d 1209 (Fla. 2013).

Responding to proposals from the Bar's Civil Procedure Rules Committee, the Supreme Court adopted several amendments to the Rules of Civil Procedure effective January 1, 2014.

One change was to Fla.R.Civ.P. 1.442, "Proposals for Settlement." The Court explained: "A majority of the Committee members urge the Court to delete the rule 1.442(c)(2)(B) (Form and Content of Proposal for Settlement) requirement that the proposal for settlement 'identify the claim or claims the proposal is attempting to resolve' and replace it with the requirement that the proposal 'state that [it] resolves all damages that would otherwise be awarded in a final judgment in the action,' subject to the provision in the rule governing attorney fees. The majority of the Committee determined that the amendment was needed to curtail partial proposals for settlement and to comport with [F.S. 768.79(2) (2012)], which states, in pertinent part, that '[t]he offer [to settle] shall be construed as including all damages which could be awarded in a final judgment.' Although the Committee reported that a minority of its members are of the view that the rule should not be changed without clarification from the Legislature or the courts, we defer to the majority view and amend the rule as proposed."

Supreme Court answers certified questions from 11th Circuit about fee awards under FDUTPA and offer of judgment statute. *Diamond Aircraft Industries, Inc. v. Horowitch*, 107 So.3d 362 (Fla. 2013).

The Supreme Court answered 4 questions of Florida law certified by the 11th Circuit Court of Appeals. Two questions dealt with prevailing party fee awards under the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA") and the other 2 involved application of the offer of judgment statute, F.S. 768.79.

Horowitch, an Arizona resident, sued Diamond Aircraft Industries, Inc., which operates in Florida, over the purchase of an airplane. The case was removed to federal district court. The amended complaint had 4 claims: (1) specific performance; (2) breach of contract; (3) breach of the covenants of good faith and fair dealing; and (4) deceptive trade practices under FDUTPA. Horowitch demanded fees pursuant to a prevailing party fees provision in FDUTPA. Diamond Aircraft served an offer of judgment for $40,000 stating, in part, it was "intended to resolve all claims that were or could have been asserted by Plaintiff against Diamond Aircraft in the Amended Complaint." Horowitch did not accept. The federal court applied Florida law as to the specific performance and breach of contract and implied covenants of good faith and fair dealing claims, entering summary judgment for Diamond Aircraft. As to the deceptive trade practices claim, the court held that Arizona law (rather than FDUTPA) applied, and entered judgment for Diamond Aircraft on the deceptive trade practices claim.

Diamond Aircraft moved for fees under the offer of judgment statute and FDUPTA's prevailing party provision (F.S. 501.2105). Diamond Aircraft contended that by seeking recovery under FDUTPA Horowitch had involved its fees provisions, even though he did not prevail.

The court denied the fee motion. "[S]ection 768.79 was inapplicable because Horowitch asserted both an equitable claim for non-monetary relief (specific performance) and, in the alternative, a claim for damages based on either breach of contract, breach of implied covenants, or a deceptive trade practice by Diamond Aircraft. The district court also held that Diamond Aircraft was not entitled to attorney's fees under FDUTPA because Arizona law and not FDUTPA applied to the deceptive trade practices claim advanced by Horowitch. The district court concluded that Diamond Aircraft was not entitled to attorney's fees under the Arizona law . . . . Diamond Aircraft sought review of the denial of its motion for attorney's fees in the Eleventh Circuit."

First certified FDUTPA question: "Does [F.S. 501.2105] entitle a prevailing defendant to an attorney's fee award in a case in which a plaintiff brings an unfair trade practices claim under the FDUTPA, but the District Court decides that the substantive law of a different state governs the unfair trade practices claim, and the defendant ultimately prevails on that claim?" Summary of answer: Yes. "Diamond Aircraft is entitled to attorney's fees under section 501.2105(1) because Horowitch . . . filed an action against Diamond Aircraft under FDUTPA and ultimately was the nonprevailing party. By invoking FDUTPA and seeking redress under its remedial provisions, Horowitch exposed himself to both the benefits and the possible consequences of that act's provisions." (Citations omitted.)

Second certified FDUTPA question: "If [F.S. 501.2105] applies under the circumstances described in the previous question, does it apply only to the period of litigation up to the point that the District Court held that the plaintiff could not pursue the FDUTPA claim because Florida law did not apply to the unfair trade practices claim, or does it apply to the entirety of the litigation?" Summary of answer: "We conclude that Diamond Aircraft is entitled to fees but only for the period of litigation until the federal district court held that FDUTPA did not apply to Horowitch's claim." To hold otherwise would be contrary to the purpose of FDUTPA's fees provision, "which is to award attorney's fees to the party that prevailed in civil litigation that involved a violation of FDUTPA – not for an action clearly beyond FDUTPA's scope."

First certified offer of judgment question: "Does [F.S. 768.79] apply to cases that seek equitable relief in the alternative to money damages; and, even if it does not generally apply to such cases, is there any exception for circumstances in which the claim for equitable relief is seriously lacking in merit?" Summary of answer: The Court answered both parts of this question in the negative. "We hold that section 768.79 does not apply to an action in which a plaintiff seeks both damages and equitable relief, and in which the defendant has served a general offer of judgment that seeks release of all claims. We further conclude that there is no basis to establish an exception for instances in which the equitable claim lacks serious merit."

Second certified offer of judgment question: "Under [F.S. 768.79] and rule 1.442, is a defendant's offer of judgment valid if, in a case in which the plaintiff demands attorney's fees, the offer purports to satisfy all claims but fails to specify whether attorney's fees are included and fails to specify whether attorney's fees are part of the legal claim?" Summary of answer: No. "[E]ven if section 768.79 applied in this case, Diamond Aircraft would not be entitled to attorney's fees under that section because Diamond Aircraft's offer of settlement did not strictly comply with rule 1.442, as it did not state that the proposal included attorney's fees and attorney's fees are part of the legal claim. Unlike the complaint in *Bennett* [*v. American Learning Systems of Boca Delray, Inc.*, 857 So.2d 986 (Fla. 4th DCA 2003)], the complaint here contained a legal claim for attorney's fees, which created an ambiguity in Diamond Aircraft's offer of settlement that was not present in *Bennett*, thereby necessitating the presence in the offer of settlement of a specific statement regarding attorney's fees."

Offer of judgment statute does not apply where offer seeks release of all claims, both equitable and monetary. *Bull Motors, LLC v. Borders*, 132 So.3d 1158 (Fla. 3d DCA 2013).

Borders pursued arbitration against a car dealership ("Maroone"). The arbitrator found that Maroone violated the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA") and that Borders was the prevailing party for purposes of FDUTPA's fee provision. The court awarded Borders $62,000 in fees, although her recovery in the arbitration was $5626.

The Third DCA affirmed, rejecting Maroone's contention that the lower court erred by refusing to consider an early settlement proposal by Maroone. "Maroone's offers of judgment addressed Ms. Borders' claim for equitable relief as well as her claims for damages. The offer of judgment statute [F.S. 768.79], does not apply to cases that, as here, involve a general offer seeking release of all claims in the case, both equitable and monetary. *Diamond Aircraft Indus., Inc*. [*v. Horowitch*], 107 So.3d [362] at 374 [(Fla. 2013)]."

Offer of judgment made less than 90 days after action commenced is invalid, regardless of whether made by plaintiff or defendant. *Regions Bank v. Rhodes*, 126 So.3d 1259 (Fla. 4th DCA 2013).

Plaintiff sued defendants on March 3. Bank was added as a defendant on May 27. On June 30 Bank served Plaintiff with an offer of judgment under F.S. 768.79. Plaintiff did not accept. After summary judgment was entered for Bank, Bank moved for fees. The court denied the motion as premature under Fla.R.Civ.P. 1.442(b), which provides: "A proposal to a defendant shall be served no earlier than 90 days after service of process on that defendant; *a proposal to a plaintiff shall be served no earlier than 90 days after the action has been commenced*. No proposal shall be served later than 45 days before the date set for trial or the first day of the docket on which the case is set for trial, whichever is earlier." (Emphasis added.)

The Fourth DCA affirmed, addressing 2 issues: (1) whether the proposal was premature under the plain language of Rule 1.442(b) because it was served earlier than 90 days after commencement; and (2) if so, whether a *defendant's* premature proposal invalidates the proposal.

The offer was premature because it was made less than 90 days after Bank was brought into the action. The date on which Bank was added as a defendant (May 27), not the date on which the suit was filed (March 3), was controlling.

The court also rejected Bank's argument that a premature offer made by a defendant to a plaintiff is not invalid because no prejudice to the plaintiff occurs. Prejudice is not a factor under Rule 1.442; any premature offer is an invalid offer. On this issue, the court certified conflict with two Third DCA decisions.

There is no "tenancy by the entireties" exception to apportionment requirement of offer of judgment rule. *Cobb v. Durando*, 111 So.3d 277 (Fla. 2d DCA 2013).

Mr. and Mrs. Durando sued Cobb alleging breach of a contract for roofing work. After Cobb rejected their offer of judgment and they prevailed at trial, the Durandos moved for fees

pursuant to F.S. 768.79 and Fla.R.Civ.P. 1.442. The court awarded fees. Cobb appealed, arguing that the Durandos' offer "failed to apportion the amount of their demand between them."

The Second DCA reversed. Rule 1.442 requires that the offer state the amount "attributable to each party." The Durandos argued that apportionment was not required "because their claim for breach of contract derived from their ownership of real property as tenants by the entireties; therefore, they conclude that the apportionment of the amount attributable to each party was not feasible." The appeals court disagreed for 2 reasons. "First, the Durandos' claim against Mr. Cobb did not arise directly from their ownership of entireties property. Instead, their claim was for the breach of a contract for roofing services. Second, the rule requiring apportionment of proposals for settlement made by multiple plaintiffs does not recognize an exception for joint proposals made by tenants by the entireties."

Reference to "subsidiaries" in general release attached to proposal for settlement did not render proposal ambiguous. *Alamo Financing, L.P. v. Mazoff*, 112 So.3d 626 (Fla. 4th DCA 2013).

After being hit by a rental car, Plaintiff sued the renter and Alamo Financing, the owner. The alleged basis of Alamo Financing's liability was that it was vicariously liable for the renter's negligence. A separate entity, Alamo Rental, had rented the vehicle to the renter. Alamo Financing served a proposal for settlement on Plaintiff. The proposal included a general release providing "that the plaintiff would release Alamo Financing and 'their parent corporations, subsidiaries, officers, directors, and employees' from any and all claims." Plaintiff did not accept. Alamo Financing moved for summary judgment. Just before the hearing, Plaintiff moved for leave to add Alamo Rental as a defendant. The court granted summary judgment for Alamo Financing, but also granted the motion for leave to amend the complaint.

Alamo Financing moved for fees based on the rejected proposal. Plaintiff's counsel argued that acceptance of Alamo Financing's offer would have resulted in Plaintiff releasing Alamo Rental. Alamo Financing's counsel "disputed this argument, claiming that the release would not have applied to Alamo Rental. Defense counsel stated that Alamo Rental was an 'affiliate' of Alamo Financing, but was not a subsidiary." The court denied Alamo Financing's motion for fees, "finding that the proposed release, which included language releasing parent corporations and subsidiaries, 'may have extinguished' the plaintiff's current claim against Alamo Rental."

The Fourth DCA reversed, agreeing with Alamo Financing that the reference to "subsidiaries" in the release did not render the proposal ambiguous. Plaintiff's reading of the "subsidiaries" sentence was "grammatically possible" but "substantively unreasonable." The question of ambiguity must be considered by examining the proposal for settlement "as a whole." While the language of the release may have been broad, it was not ambiguous. Nor was it an undifferentiated joint proposal.

Fourth DCA reverses fee award because offer of judgment was "apostrophe-challenged" and thus ambiguous. *Bradshaw v. Boynton-JCP Associates, Ltd.*, 125 So.3d 289 (Fla. 4th DCA 2013).

A court awarded fees pursuant to an offer of judgment under F.S. 768.79 and Fla.R.Civ.P. 1.442. The award was appealed on the ground that the offer was ambiguous and so unenforceable.

The Fourth DCA agreed and reversed, stating: "The offer was apostrophe-challenged, creating ambiguities as to whether the drafter intended references to singular or plural defendants or plaintiffs. The offer, entitled 'Defendant's Joint Proposal for Settlement,' also appears to have been adopted from a form without sufficient editing; it requires 'Plaintiff'(s)' to 'execute a stipulation,' and 'Plaintiff(s)' to 'execute a general release of 'Defendant(s).'"

Court erred in denying fees under offer of judgment statute to insurer who made nominal offer to insured. *State Farm Florida Ins. Co. v. Laughlin-Alfonso*, 118 So.3d 314 (Fla. 3d DCA 2013).

Insurer denied a supplemental home damage claim that Insured submitted through her public adjustor. Insured sued Insurer. Insurer made a "nominal settlement offer," which Insured did not accept. The court entered summary judgment for Insurer, but denied Insurer's motion for fees under the offer of judgment statute after finding that Insurer "made the initial settlement offer in bad faith."

The Third DCA reversed. Insurer did not act in bad faith in making a nominal settlement offer. Insured did not comply with conditions precedent before filing suit. "[Insured] did not respond to any of [Insurer]'s requests and failed to submit a Sworn Proof of Loss. [Insured] also failed to respond to [Insurer]s discovery requests. Additionally, she failed to submit any credible evidence to support her supplemental claim, other than the public adjuster's report."

Insurer who is defendant entitled to fees under offer of judgment statute regardless of policy's provisions. *United States Auto Ins. Co. v. Virga*, 116 So.3d 1288 (Fla. 3d DCA 2013).

A defendant insurer sought an appellate fee award under the proposal for settlement statute. The circuit court in its appellate capacity denied fees, construing the statute to require the insurer to reference a policy provision providing for a fee award.

The Third DCA granted the insurer's certiorari petition, ruling that the lower court incorrectly construed F.S. 768.79(1). "The circuit court held that the words 'pursuant to a policy of liability insurance' in section 768.79(1) require a defendant-insurer to refer to the policy provision providing the substantive basis for fees. However, this language relied upon by the circuit court merely refers to third-party actions where the insurer seeks to recover attorney's fees based on an insurance policy provision requiring the insurer to provide a legal defense for its insured. Section 768.79(1) does not require a policy provision regarding attorney's fees in actions where, as here, the insurer is the defendant, incurring attorney's fees on its own behalf."

Fee award under offer of judgment statute reversed because underlying judgment was capped due to sovereign immunity. *UCF Athletics Ass'n Inc. v. Plancher*, 121 So.3d 616 (Fla. 5th DCA 2013).

In a negligence case against a university athletic association ("UCFAA"), the plaintiff got a $10 million verdict. Fees were awarded due to an offer of judgment under F.S. 768.79 that was not

accepted. Ultimately the underlying judgment was reduced to $200,000 because the defendant was entitled to limited sovereign immunity. As a result, the Second DCA reversed the fee award.

Under the offer of judgment statute, the judgment obtained, not the verdict, controls whether fees can be awarded. Because "the total amount of the judgment, inclusive of attorney's fees and costs, cannot exceed the statutory cap of $200,000," the court reversed the award of fees and costs.

Prevailing Party:

Supreme Court approves use of "alternative fee recovery clauses" ("greater-of-contract-or-court-awarded" clauses) in hourly fee agreements as well as in contingent fee agreements. *First Baptist Church of Cape Coral, Florida v. Compass Construction, Inc*., 115 So.3d 978 (Fla. 2013).

Church, whose legal representation was provided pursuant to an insurance policy, prevailed in a contractual indemnity claim against Compass and was entitled to court-awarded fees. The parties disagreed about the hourly rate. The fee agreement between Church's lawyer and the hiring insurance company provided for a non-contingent, hourly rate of $170. The fee agreement also contained an "alternative fee recovery clause" providing that, if someone other than the insurer paid the fees, the amount of the fee would be the greater of the amount charged the insurer or the amount to be determined by the court. The trial court ruled that Church could recover from Compass a reasonable fee to be later determined by this Court even if that amount is greater than the amount Church's counsel charged Church.

The Second DCA reversed. *Compass Construction, Inc. v. First Baptist Church of Cape Coral, Florida, Inc*., 61 So.3d 1273 (Fla. 2d DCA 2011). The appeals court ruled that an alternative fee recovery clause may be relied upon as a basis for a fee award only where the fee arrangement is contingent. Here, however, the fee arrangement was *non*-contingent. The court certified conflict with *Wolfe v. Nazaire*, 758 So.2d 730 (Fla. 4th DCA 2000).

The Florida Supreme Court quashed the Second DCA's opinion and approved *Wolfe* "to the extent that it recognizes the validity of an alternative fee recovery clause with an hourly-rate alternative." The Court previously upheld the use of alternative fee recovery clauses in contingent fee cases. See *Kaufman v. MacDonald*, 557 So.2d 572 (Fla. 1990); *Florida Patient's Compensation Fund v. Moxley*, 557 So.2d 863 (Fla. 1990); *Wilson v. Wasser*, 562 So.2d 339 (Fla. 1990). The Court summarized: "The reasoning we used to uphold alternative fee recovery clauses with contingency fee alternatives in *Kaufman*, *Moxley*, and *Wasser* applies to alternative fee recovery clauses in general, regardless of the other basis for payment. Once a fee-shifting statute or contract triggers a court-awarded fee, the trial court is constrained by *Rowe* [*Florida Patient's Compensation Fund v. Rowe*, 472 So.2d 1145 (Fla. 1985)] and its progeny in setting a fee that must be reasonable. This alleviates any concern that enforcing an alternative fee recovery clause will result in the nonprevailing party paying an unreasonable fee."

In breach of contract case, court erred in finding "bona fide tie" and declining to award prevailing party fees. *Newton v. Tenney*, 122 So.3d 390 (Fla. 4th DCA 2013).

Tenney sued Newton and other defendants in a securities suit. They settled. The first of 8 payments was to be made by all defendants, with only certain defendants making the final 7 payments. When the first payment was not made, Tenney sued to enforce the settlement agreement. The court found the settlement agreement enforceable, but also found that Newton was not obligated for any payments under the agreement. Newton moved for fees as the prevailing party. Tenney also sought fees. The court denied both motions, finding that the case was "a bona fide tie" and that there were compelling circumstances warranting a finding that both parties had equally prevailed to some degree. Newton appealed.

The Fourth DCA reversed, citing its prior cases in stating that ordinarily in a breach of contract action one party must prevail. Newton prevailed here. "[T]he significant issue in the litigation was whether Newton was required to pay Tenney $50,000. Newton prevailed on that issue. Even though Newton's challenges to the enforceability of the settlement agreement failed, these were simply alternative arguments for avoiding the money judgment. Based on the trial court's interpretation of the settlement agreement, Newton ultimately succeeded in not having a $50,000 judgment entered against him.

Court erred in ruling that both plaintiff and counterclaiming defendant were entitled to prevailing party fees. *Leon F. Cohn, M.D., P.A. v. Visual Health and Surgical Center, Inc*., 125 So.3d 860 (Fla. 4th DCA 2013).

Cohn sued Visual Health for breach of contract arising from the sale of an ophthalmology practice. Visual Health counterclaimed for breach of contract and for money had and received. The jury found that "Visual Health had breached its contractual obligations to Cohn, but that Cohn was in possession of funds which, in good conscience, had to be returned to Visual Health." Cohn moved for fees as the prevailing party and Visual Health moved for fees based on the offer of judgment statute. The court "found that both parties had prevailed on their claims and held that both parties were entitled to any fees or costs for which they could establish a contractual or statutory basis. On rehearing, however, the trial court reversed its original order and held that Cohn was not entitled to attorney's fees because the net judgment Cohn received was less than seventy-five percent of the offer of settlement proposed by Visual Health."

The Fourth DCA reversed the denial of prevailing party fees to Cohn. Under the facts of the case, the court erred in finding that there was more than one prevailing party. Both parties' claims arose from the set of operative facts. "'When one party loses in an action for breach of contract, the adverse party is the prevailing party.' [Citations omitted.] Notwithstanding Visual Health's counterclaim in quasicontract, the issue in this case was which party bore the blame for the medical practice's decline. The jury found that Visual Health was responsible, thus making Cohn the prevailing party in this litigation."

Defendant in mortgage foreclosure suit entitled to prevailing party fees when suit dismissed for failure to prosecute. *Vivot v. Bank of America, NA*, 115 So.3d 428 (Fla. 2d DCA 2013).

Bank sued Vivot in a mortgage foreclosure case. Bank moved for summary judgment in October 2009. In August 2011 Vivot moved to dismiss for lack of prosecution. The court granted Vivot's motion and dismissed the suit. Vivot filed a motion alleging "that he was entitled to fees as

the prevailing party based on the provisions of the note and mortgage and section 57.105(7)." The court denied the motion, however, "stating that there was no prevailing party in the case."

The Second DCA reversed. "Vivot became the prevailing party when the foreclosure suit was dismissed for failure to prosecute. He gave notice of his claim for fees in his answer and timely filed his motion for attorney's fees. Pursuant to section 57.105(7), the provisions of the note and mortgage permit Vivot to claim attorney's fees as the prevailing party."

Plaintiffs' voluntary dismissal of some claims did not automatically make defendant prevailing party for purposes of fee award. *Tubbs v. Mechanik Nuccio Hearne & Wester, P.A.*, 125 So.3d 1034 (Fla. 2d DCA 2013).

Michael and Raymond Tubbs were engaged in litigation in two counties with parties including RC Highlands. The litigation arose from the sale of a business and real property. The Tubbses were plaintiffs in 2 actions and defendants in another. Eventually the Tubbses voluntarily dismissed their claims against RC Highlands in one case (the "foreclosure case"). The mortgage agreement contained a prevailing party fee award clause. RC Highlands moved for a fee award, contending it was the prevailing party because the Tubbses voluntarily dismissed their claims. The court awarded fees to RC Highlands. The Tubbses appealed.

The Second DCA reversed, concluding that the court "abused its discretion in determining that RC Highlands became the prevailing party after the Tubbses dismissed without prejudice their foreclosure claims against RC Highlands." Although the general rule is that the defendant is considered the prevailing party when a plaintiff voluntarily dismisses an action, "the general rule does not apply without exception." A court may look behind the voluntary dismissal to the underlying factors of the litigation.

Section 57.105 and Other Sanctions:

Court may not award sanctions under section 57.105 against plaintiff who voluntarily dismissed the suit before sanctions motion was filed. *Pino v. Bank of New York*, 121 So.3d 23 (Fla. 2013).

Plaintiff Bank sued Defendant to foreclose a mortgage. Defendant served on Bank a motion for sanctions under F.S. 57.105(1), alleging that Bank had engaged in fraud on the court. Before the expiration of the 21-day safe harbor period in the statute, Bank voluntarily dismissed the suit without prejudice.

Bank later re-filed the suit against Defendant. Again alleging fraud on the court, Defendant filed a motion to reopen the dismissed suit and strike Bank's voluntary dismissal. The trial court denied the motion and the Fourth DCA affirmed. *Pino v. Bank of New York Mellon*, 57 So.3d 950 (Fla. 4th DCA 2011).

The Supreme Court agreed. The Court explained: "If the plaintiff does not file a notice of voluntary dismissal or withdraw the offending pleading within twenty-one days of a defendant's request for sanctions under section 57.105, the defendant may file the sanctions motion with the

trial court, whereupon the trial court will have continuing jurisdiction to resolve the pending motion and to award attorney's fees under that provision if appropriate, regardless of the plaintiff's subsequent dismissal." Because Bank voluntarily dismissed the suit within 21 days of Defendant's request for sanctions, Defendant "could not obtain the relief of setting aside the voluntary dismissal and reinstating the dismissed action in order to obtain the sanction of dismissal with prejudice."

Warning letter does not satisfy requirement of F.S. 57.105 that proposed fee motion be served to start mandatory 21-day safe harbor period. *Global Xtreme, Inc. v. Advanced Aircraft Center*, Inc., 122 So.3d 487 (Fla. 3d DCA 2013).

Advanced was in litigation with Global over an aircraft. On July 21 Advanced sent Global a letter stating that Global "should 'consider this your twenty-one (21) day notice pursuant to [F.S.] 57.104(4) to withdraw your complaint." The letter did not reference an enclosed motion, but the court later found that a copy of the 57.105 motion for fees was enclosed with the July 21 letter.

On August 12 Advanced served Global with a motion claiming that it was entitled to fees under F.S. 57.105 because it had demanded that Global withdraw its pleading in the July 21 letter. Four days later Advanced filed the motion seeking fees. The court granted the motion, finding that the 57.105 motion was sent with the July 21 letter.

The Third DCA reversed. F.S. 57.105(4) requires that a party "must first serve a motion seeking fees, 'followed by its filing twenty-one days later.'" A letter does not meet the statutory 21-day notice period. The July 21 letter did not attach or reference any proposed 57.105 motion for fees and so did not meet the requirements of section 57.105. The record did not support the trial court's finding that a copy of the motion was included with the July 21 letter.

Filing second or amended motion for 57.105 fee sanctions restarts 21-day safe harbor clock for curing the alleged defect. *Lago v. Kame by Design, LLC*, 120 So.3d 73 (Fla. 4th DCA 2013).

Plaintiff moved for sanctions under F.S. 57.105(1) on the ground that Defendants filed a motion for fees that was not supported by the material facts or the law. Plaintiffs later filed a second 57.105 motion with the same arguments raised in the original motion but adding a new argument. The court granted the second motion and imposed sanctions against Defendants.

The Fourth DCA reversed. Plaintiff's second motion did not comply with the "safe harbor" provision of 57.105(4), which gives the offending party 21 days to cure the alleged defect. "We hold that if a party files a subsequent or amended motion for sanctions under section 57.105 and raises an argument that was not raised in the original motion for section 57.105 sanctions, the subsequent motion must independently comply with the twenty-one-day 'safe harbor' provision of section 57.105(4). To hold otherwise would allow a party to raise a new ground for sanctions in a subsequent motion under section 57.105 without giving the other side the opportunity to withdraw the offending claim or defense within twenty-one days after receiving notice of the new ground . . ."

Court erred in awarding 57.105 appellate fees on its own initiative without complying with 10-day notice provision in Fla.R.App.P. 9.410(a). *United Automobile Ins. Co. v. Doctor Rehab Center, Inc.*, 121 So.3d 66 (Fla. 3d DCA 2013).

A circuit court acting in its appellate capacity awarded appellate fees to Doctor Rehab Center in its PIP suit against United Auto Insurance ("United"). The order "provided no findings and cited no statutory or other basis for the award." United appealed. Doctor Rehab countered that F.S. 57.105 provided the basis for the fee award, although it conceded that it had not filed a written motion for appellate fees under section 57.105.

The Third DCA reversed. An appellate court may sua sponte award fees as a sanction under section 57.105, but it must comply with the statute's 10-day notice requirement. The trial court did not give the required notice.

Court abused discretion in awarding 57.105 fees where there were issues of material fact regarding applicability of privilege. *Wapnick v. Veterans Council of Indian River County, Inc*., 123 So.3d 622 (Fla. 4th DCA 2013).

Wapnick sued Defendants for defamation and invasion of privacy – false light. The false light claim was dismissed, and Wapnick amended the defamation claim. Eventually the court granted Defendants' motions for partial summary judgment on the defamation claim because Wapnick was a "limited public figure." The court, however, found that there were genuine issues of material fact regarding whether certain statements were privileged. Defendants sought fees under F.S. 57.105. After Wapnick voluntarily dismissal the litigation, the court awarded fees against him.

The Fourth DCA reversed the fee award. The claim was not frivolous or completely devoid of merit, as the trial court found that "genuine issues of materials fact existed on whether a privilege attached to certain communications with third parties, thereby shielding them from liability." And the fact that Wapnick could not ultimately sustain his claims under the burden of proof required for a limited public figure did not mean they were totally devoid of merit.

Court lacked authority to impose monetary sanctions on party for filing Bar complaints against opponent's lawyers. *Kass Shuler, P.A. v. Barchard*, 120 So.3d 165 (Fla. 2d DCA 2013).

See discussion in "Disciplinary Proceedings" section.

Workers' Compensation Cases:

First DCA rules that 2 workers' compensation fee statutes are unconstitutional as applied in claimant's defense against motion to tax costs. *Jacobson v. Southeast Personnel Leasing, Inc./Packard Claim Administration, Inc.*, 113 So.3d 1042 (Fla. 1st DCA 2013).

Claimant's claim for workers' compensation benefits was denied by the Judge of Compensation Claims ("JCC"). The Employer/Carrier ("E/C") moved to tax costs against Claimant. Claimant's counsel withdrew, and Claimant retained Winer as new counsel to respond to the E/C's motion. The JCC denied Winer's motion for approval of an hourly retainer agreement,

"ruling that chapter 440 prohibited her from approving an hourly fee under such circumstances." Winer then withdrew.

Claimant represented himself and had more than $17,000 in costs taxed against him. He appealed, arguing that the JCC erred in reading F.S. 440.34 to preclude approval of the retainer agreement and that JCC's ruling violated his First Amendment rights and thus infringed on his right to contract for legal counsel.

The First DCA reversed, noting that the statute could not be read in a way that would allow it to avoid reaching the constitutional issue. Using strict scrutiny because the right to contract for legal representation is a fundamental right, the court concluded that "the prohibition on claimant-paid attorney's fees in sections 440.105(3)(c) and 440.34 are unconstitutional, and thus unenforceable, as they apply to cases where the fee is for legal services performed in defense against an E/C's motion to tax costs."

The court continued: "Although section 440.105(3)(c) prohibits such attorneys from receiving unapproved fees, section 440.34 does not, under our holding today, preclude a JCC's approving a fee agreement when a claimant chooses to obtain legal representation to aid in defense against an E/C's motion to tax costs. Such a fee agreement must nonetheless, like all fees for Florida attorneys, comport with the factors set forth in *Lee Engineering Construction Co. v. Fellowe*s, 209 So.2d 454, 458 (Fla. 1967), and codified in" Rule 4-1.5(b).

First DCA declines to find workers' compensation fee statute unconstitutional, despite award of $164 for 107 hours of work. *Castellanos v. Next Door Co.*, 124 So.3d 392 (Fla. 1st DCA 2013).

The Judge of Compensation Claims applied F.S. 440.34(1) (2009) and awarded a claimant's lawyer a fee "of only $164.54 for 107.2 hours of legal work reasonably necessary to secure the claimant's workers' compensation benefits."

The First DCA reluctantly affirmed, stating: "We do not disagree with the learned judge of compensation claims that the statute required this result, and are ourselves bound by precedent to uphold the award, however inadequate it may be as a practical matter." The court rejected the claimant's constitutional challenges, both facial and as-applied, citing its prior decisions.

The appeals court certified the following question to the Supreme Court as one of great public importance: "Whether the award of attorney's fees in this case is adequate, and consistent with the access to courts, due process, equal protection, and other requirements of the Florida and federal constitutions."

JCC erred by not holding evidentiary hearing to allow claimant's lawyer to build record for constitutional challenge to fee statutes. *Russ v. Brooksville Health Care Center LLC/Premier Group Ins.*, 109 So.3d 1266 (Fla. 1st DCA 2013).

Claimant and her counsel filed a motion "seeking both approval of an hourly attorney's fee retainer agreement and an evidentiary hearing to build a record to support a constitutional challenge to the attorney's fee statutes." The Judge of Compensation Claims ("JCC") denied the motion. The First DCA granted Claimant's certiorari petition as to denial of the evidentiary hearing. Although a JCC lacks jurisdiction to rule on constitutional issues, this "does not preclude a claimant's right to build an evidentiary hearing in preparation for [an as-applied] constitutional challenge."

FILES

Third DCA supports lawyers' claim of retaining lien on client papers, rejecting argument that claim should fail because there were other avenues for payment. *Fox v. Widjaya*, __ So.3d __, 38 Fla.L.Weekly D2287 (Fla. 3d DCA, No. 3D13-2548, 11/6/2013), 2013 WL 5927583.

Lawyer represented Client in a marriage dissolution. The retainer agreement provided that Lawyer "would 'have retaining lien on your entire file, including evidentiary documents, property or any other thing of value of yours in our possession to secure the payment of all sums due to us from you under the terms of this agreement." Lawyer later moved to withdraw for reasons including non-payment of fees, and filed a notice and claim of retaining lien. At a status conference the court *sua sponte* ordered Lawyer to provide all "discovery and mandatory disclosure" in Lawyers possession to Client's new counsel.

The Third DCA quashed the order. It was "undisputed" that Lawyer had established a valid retaining lien and, consequently, Lawyer could "properly maintain this retaining lien over the former client's file until the legal fees have been paid or an adequate security for payment has been posted." The court rejected Client's argument that Lawyer had "other avenues of recourse" to ensure payment. "Absent rare circumstances not present in this case, the retaining lien may not be impaired by the client securing an order compelling their production. . . . An attorney with a valid retaining lien is not required to pursue 'other avenues of recourse.'"

The court stated in a footnote that "[i]t matters not that the order compelled the production of the documents to successor counsel, rather than to the client himself. The retaining lien extends to the client's agents and representatives, including successor counsel."

Former client of Office of Criminal Conflict and Civil Regional Counsel is entitled to copies of discovery materials at no charge. *Roland v. State*, 120 So.3d 103 (Fla. 2d DCA 2013).

A former client of the Office of Criminal Conflict and Civil Regional Counsel asked the Office for copies of discovery materials received from the state. Dissatisfied with the Office's response, the former client petitioned the circuit court in an effort to obtain the materials. The court dismissed the petition as "facially insufficient for failure to include an acknowledgment of a legal obligation to pay regional counsel's office for the costs associated with providing the requested items."

The Second DCA granted the former client's mandamus petition. He stated a facially sufficient claim of entitlement to free copies of the discovery evidence. "Because his request was not for all items in counsel's possession, but was for specific discovery materials, [former client] was not required to pay for originals or copies thereof." (Citations omitted.)

INEFFECTIVE ASSISTANCE OF COUNSEL AND RIGHT TO COUNSEL

Supreme Court rules that criminal defendant's lawyer, not defendant, has final authority to call or not call witnesses at trial. *Puglisi v. State*, 110 So.3d 1196 (Fla. 2013).

See discussion in "Attorney-Client Relationship" section.

Per Supreme Court, trial courts may consider "excessive caseload conflict" issue in deciding motions to withdraw on systemic rather than case-by-case basis. *Public Defender, Eleventh Judicial Circuit of Florida v. State*, 115 So.3d 261 (Fla. 2013).

The Supreme Court accepted review of two Third DCA decisions: *State v. Public Defender, Eleventh Judicial Circuit*, 12 So.3d 798 (Fla. 3d DCA 2009), because it directly affected a class of constitutional officers (i.e., public defenders); and *State v. Bowens*, 39 So.3d 479 (Fla. 3d DCA 2010), which certified the question of whether F.S. 27.50303(1)(d) was constitutional. (F.S. 27.50303(1)(d), per the Third DCA, "prohibits a trial court from granting a motion for withdrawal by a public defender based on 'conflicts arising from underfunding, excessive caseload or the prospective inability to adequately represent a client.'")

In *Public Defender* the Public Defender's Office filed motions to be relieved of the obligation to represent indigent defendants in some non-capital felony cases. In *Bowens* an assistant public defender sought to withdraw on the basis of a conflict created by an excessive caseload. The Supreme Court consolidated the 2 cases in one opinion that set forth the following conclusions.

Applicability of F.S. 27.50303(1)(d). The Court concluded that F.S. 27.50303(1)(d) is applicable. Even though its language refers to "withdrawal," the Court concluded that the statute also reached to motions to decline future appointments.

Scope of relief: systemic vs. case-by-case. After reviewing prior decisions, the Court stated: "The Third District's conclusion that the courts cannot fashion an 'office-wide solution' to the public defender's excessive caseload does not comport with Florida case law. We have approved aggregate or systemic relief in a number of cases where public defenders were experiencing excessive caseloads or where the offices were underfunded." The Court was "struck by the breadth and depth of the evidence of how the excessive caseload has impacted the Public Defender's representation of indigent defendants" and stated that "[i]n extreme circumstances, where a problem is system-wide, the courts should not address the problem on a piecemeal case-by-case basis." The Court "reaffirm[ed] that aggregate/systemic motions to withdraw are appropriate in circumstances where there is an office-wide or wide-spread problem as to effective representation."

Standard applicable under F.S. 27.5303. The Court addressed the standard for reviewing motions to withdraw under F.S. 27.5303. After analyzing cases the Court concluded: "[T]he prejudice required for withdrawal under section 27.5303 when it is based on an excessive caseload is a showing of 'a substantial risk that the representation of [one] or more clients will be materially limited by the lawyer's responsibilities to another client.' R. Regulating Fla. Bar 4-1.7(a)(2). The records in the instant cases show competent, substantial evidence to support the trial courts' findings and conclusions of law to that effect."

Constitutionality of F.S. 27.50303(1)(d). The Court found the statute facially constitutional, but noted that it "should not be applied to preclude a public defender from filing a

motion to withdraw based on excessive caseload or underfunding that would result in ineffective representation of indigent defendants nor to preclude a trial court from granting a motion to withdraw under those circumstances."

Standing of State Attorney's Office. The State had standing to challenge the motions.

The Court remanded for a determination of whether "the circumstances still warrant granting the Public Defender's motion to decline appointments in future third-degree felony cases under the standards approved in this decision."

Supreme Court addresses ineffective assistance claims based on counsel's failure to correctly inform defendant of maximum possible penalty when advising on plea offer. *Alcorn v. State*, 121 So.3d 419 (Fla. 2013).

Convicted Defendant moved for postconviction relief under Fla.R.Crim.P. 3.850, asserting that trial counsel was ineffective by failing to correctly inform Defendant of the maximum penalty before Defendant rejected a plea offer. Defendant qualified to be sentenced as a habitual felony offender ("HFO"), although neither his counsel nor the prosecution was aware of this when the state made a plea offer of 12 years. As a HFO, he could have been sentenced to life imprisonment. Defendant's counsel told him that the maximum penalty was 30 years. Defendant rejected the offer, went to trial, and was convicted. He was sentenced to 30 years.

The Fourth DCA affirmed the denial of Defendant's claim, ruling that Defendant failed to show prejudice because he received a 30-year sentence, which was the same sentence that his counsel incorrectly advised was the maximum. *Alcorn v. State*, 82 So.3d 875 (Fla. 4th DCA 2011). The Fourth DCA certified conflict with *Lewis v. State*, 751 So.2d 715 (Fla. 5th DCA 2000), and *Revell v. State*, 989 So.2d 751 (Fla. 2d DCA 2008).

The Supreme Court quashed the Fourth DCA's decision because it "incorrectly analyzed the prejudice prong" of the *Strickland v. Washington* test. The Court also disapproved *Revell* and *Lewis* because their analysis is inconsistent with the U.S. Supreme Court's decisions in *Missouri v. Frye* 132 S.Ct. 1399 (2012), and *Lafler v. Cooper*, 132 S.Ct. 1376 (2012). The Court also receded from *Morgan v. State*, 991 So.2d 835 (Fla. 2008), and *Cottle v. State*, 733 So.2d 963 (Fla. 1999), which concerned requirements for demonstrating prejudice for claims of ineffective assistance when a defendant rejects a plea offer and goes to trial.

The Court summarized: "We hold that in order to show prejudice, the defendant must demonstrate a reasonable probability, defined as a probability sufficient to undermine confidence in the outcome, that (1) he or she would have accepted the offer had counsel advised the defendant correctly, (2) the prosecutor would not have withdrawn the offer, (3) the court would have accepted the offer, and (4) the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed."

Prejudice must be determined based on a consideration of "the circumstances as viewed at the time of the offer" rather than in hindsight. The Court remanded for further proceedings, noting that it did not reach the issue of an appropriate remedy "[b]ecause the issue of whether Alcorn can establish prejudice remains unresolved at this juncture."

Supreme Court amends criminal and appellate procedure rules relating to postconviction proceedings. *In re: Amendments to the Florida Rules of Criminal Procedure and the Florida Rules of Appellate Procedure*, 112 So.3d 1234 (Fla. 2013).

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

Ineffective assistance claim recognized by *Padilla v. Kentucky* applies only to defendants in the country legally at time of plea. *Joseph v. State*, 107 So.3d 492 (Fla. 4th DCA 2013).

In affirming denial of a defendant's motion for postconviction relief, the Fourth DCA ruled that the ineffective assistance claim recognized in *Padilla v. Kentucky*, 130 S.Ct. 1473 (2010) does not apply unless a defendant was present in this country lawfully at the time of the plea; otherwise, the defendant is unable to show that "the plea is the sole reason for his removability."

See also *Donegal v. State*, 107 So.3d 490 (Fla. 4th DCA 2013).

Denial of post-conviction relief remanded to determine whether lawyer's inadequate representation, which led to his disbarment, prejudiced client. *Wallace v. State*, 128 So.3d 139 (Fla. 2d DCA 2013).

Defendant, represented by Lawyer, was convicted. She moved for post-conviction relief, alleging that Lawyer provided ineffective assistance because he "was unprepared to cross-examine witnesses and that he failed to adequately prepare her and other defense witnesses to testify." Defendant contended that Lawyer's "lack of preparation was prejudicial." The postconviction court summarily denied the motion.

The Second DCA reversed. "This case is exceptional because [Defendant]'s attorney was actually disbarred, in part, because of his inadequate representation of her in this trial." The postconviction court assumed that Defendant established the first prong of a *Strickland* analysis and, to refute the claim of prejudice, attached portions of the transcript. The appeals court concluded that the transcript did not conclusively refute Defendant's claim. The transcript "cannot demonstrate the steps taken or not taken by the disbarred attorney to prepare witnesses for trial. Likewise, although they can demonstrate cross-examination by the attorney, they cannot demonstrate how the cross-examination would have been altered by adequate preparation."

Conviction reversed because defendant was excluded from conference between judge, prosecutor, and defense counsel about defense counsel's competence. *Sims v. State*, 135 So.3d 1098 (Fla. 2d DCA 2013).

On the second day of Defendant's second-degree murder trial, the judge called an in-chambers conference between the judge, the prosecutor, and defense counsel. Defendant was not present. The judge expressed concern about defense counsel's mental status and whether she had been consuming alcohol. Defense counsel denied that she was impaired. When asked if she was ready to proceed, defense counsel said "no" and asked the judge to declare a mistrial. The judge denied a mistrial but instead adjourned and allowed defense counsel to continue the next day.

Defendant was convicted. On appeal he contended that he had a constitutional right to be present at the in-chambers conference. Agreeing, the Second DCA reversed and remanded for a new trial. The conference was a "crucial or critical stage of the proceeding" because those present were discussing not legal issues but defense counsel's competence – a "factual issue relating to [Defendant's Sixth Amendment] right to have competent counsel at this trial." Defendant did not waive his right to be present (and perhaps was unaware of the subject of the conference).

Two-year time limit for filing rule 3.850 motion for postconviction relief tolled while defendant was in custody in another state with no access to Florida legal materials. *Wilson v. State*, 105 So.3d 667 (Fla. 4th DCA 2013).

Defendant moved for postconviction relief under Fla.R.Crim.P. 3.850. The motion was summarily denied as untimely. Defendant appealed, contending that the 2-year period for filing the motion was tolled while he was in federal custody in South Carolina and had no access to Florida legal materials. Agreeing, the Fourth DCA reversed and remanded.

Fourth DCA declines to extend holding in *Spera v. State* to ineffective assistance of appellate counsel claims. *Fields v. State*, 126 So.3d 382 (Fla. 4th DCA 2013).

Convicted defendant filed a habeas corpus petition with the Fourth DCA, seeking a new appeal for alleged ineffective assistance of counsel in her direct appeal. The court denied the petition on the ground that it did not comply with Fla.R.App.P. 9.141(d)(4)(F) because it did not list the specific acts constituting the alleged ineffective assistance.

The majority declined to adopt the dissent's suggestion that the court "should extend the supreme court's decision in *Spera v. State*, 971 So.2d 754 (Fla. 2007), requiring the trial court to allow a defendant at least one opportunity to cure a facially insufficient motion for postconviction relief filed under [Fla.R.Crim.P.] 3.850, to petitions for ineffective assistance of appellate counsel filed under [Fla.R.App.Proc.] 9.141(d)."

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

Pretrial defendant not denied access to courts when he chose self-representation knowing he had no access to legal research materials. *Henry v. State*, 124 So.3d 958 (Fla. 5th DCA 2013).

A Defendant in custody awaiting trial asked to represent himself. At the *Faretta* hearing he was warned "about lack of access to legal research materials in the county jail where he was held." The court allowed the public defender to withdraw and Defendant to proceed pro se, although standby counsel was appointed. Defendant was tried and convicted. He appealed, contending that "he was denied his constitutionally protected rights to a fair trial and access to the courts when, after electing self-representation, he was given no access to a law library, online legal research materials or some comparable legal resource."

The Fifth DCA affirmed. The court noted that the precise question of "whether an incarcerated pretrial defendant, who chooses self-representation, is denied the right of access to the courts when he is not provided access to legal research materials" has not been addressed in U.S. Supreme Court or Florida cases. The court, however, found guidance in *Bounds v. Smith*, 430 U.S. 817 (1977), and cases relying on *Bounds*. The state satisfied its obligations under *Bounds* when it offered Defendant counsel. The state meets its constitutional obligation "by providing 'adequate law libraries or adequate assistance from persons trained in the law.' *Bounds*, 430 U.S. at 828 (emphasis added). The state is not required to provide both."

Court violated criminal defendant's constitutional rights by denying continuance sought to allow replacement of private counsel. *Madison v. State*, 132 So.3d 237 (Fla. 1st DCA 2013).

Defendant was charged with armed robbery. The public defender initially appointed to represent him was replaced a month later by private counsel hired by Defendant's family. Neither lawyer did any significant work on the case. There were 2 continuances of pre-trial conferences. A few months later new private counsel was hired. There was little activity until a month before the trial date. At that time Defendant wrote to the judge expressing dissatisfaction with counsel and stating that he wished to change lawyers.

The court held a hearing on the motion to discharge counsel. Defendant's lawyer put "on the record" that she recently learned that she had represented children of one of the victims in a prior case, although she felt that it would not be a conflict of interest. The court denied the continuance without inquiring into the conflict issue. Defendant was convicted.

The First DCA reversed. The trial court abused its discretion in denying the continuance, and in so doing deprived Defendant of his Sixth Amendment right to counsel of his choice. The court failed to proper consider and balance the factors outlined in *McKay v. State*, 504 So.2d 1280 (Fla. 1st DCA 1986). The court noted that this was not a motion for continuance made "on the eve of trial" and the fact that a prior continuance was some months earlier did not change the result.

For purposes of *Faretta* self-representation inquiry, jury selection is not a separate, crucial stage from rest of trial. *Brown v. State*, 113 So.3d 134 (Fla. 1st DCA 2013).

Convicted defendant contended on appeal that the court erred by failing to conduct an adequate *Farretta* [*v. California*, 422 U.S. 806 (1975)], hearing after he expressed his desire to represent himself. Although a full *Faretta* inquiry was conducted immediately prior to jury selection on September 12, Defendant argued that another full *Faretta* inquiry should have been conducted at the beginning of the trial on the next day.

The First DCA affirmed. Although a *Faretta* inquiry must be renewed "at each subsequent crucial or critical state of the proceedings where defendant appears without counsel," the court disagreed that the start of the trial was a separate, crucial stage from jury selection for purposes of *Faretta*. "Taken to its ultimate conclusion, [Defendant's] reasoning would require a renewed *Faretta* inquiry at the start of each and every component part of the trial." No such requirement exists under the constitution or Fla.R.Crim.P. 3.111(d)(5).

LAW FIRMS

Board of Governors approves Florida Ethics Opinion 12-3, concluding that lawyers may use "cloud computing" if they take reasonable steps to protect confidentiality.

The Professional Ethics Committee published and the Board of Governors approved Florida Ethics Opinion 12-3, which concludes that it is ethically permissible for lawyers to use "cloud computing" if they take reasonable precautions to protect confidential information. The final paragraph summarizes: "[L]awyers may use cloud computing if they take reasonable precautions to ensure that confidentiality of client information is maintained, that the service provider maintains adequate security, and that the lawyer has adequate access to the information being stored remotely. The lawyer should research the service provider to be used."

Subordinate lawyers remain responsible for complying with ethics rules even when acting at their superior's direction. *Briarwood Capital v. Lennar Corp*., 125 So.3d 291 (Fla. 3d DCA 2013).

See discussion in "Candor Toward the Tribunal" section.

Introduction of letter of protection language indicating that doctor would reduce bill if patient/client got reduced recovery did not violate collateral source rule. *Smith v. Geico Cas. Co*., 127 So.3d 808 (Fla. 2d DCA 2013).

Plaintiff sued Insurer in an uninsured motorist case. Over Plaintiff's objection, Insurer was allowed to introduce language from letters of protection that Plaintiff's counsel provided to treating doctors. The language indicated that the doctor's bill would be reduced proportionately if Plaintiff's recovery was "reduced, compromised or modified and if the client does not receive full value to their [sic] claim." The court allowed this in based on Insurer's argument that Plaintiff's counsel opened the door on direct examination of a treating doctor "by giving the impression that if [Plaintiff] obtained a judgment less than the amount of the medical bills, he would be held personally responsible [by the doctor] for the difference."

Judgment was rendered for Insurer. Plaintiff appealed, arguing that introduction of the language from the letters of protection "amounted to collateral source evidence, which is per se inadmissible." The Second DCA disagreed and affirmed. "The reduction-of-fee agreements included in the letters of protection at issue here do not involve a payment by a third party. The doctors' fees will only be established after the jury determines the damages. The collateral source rule specifically relates to the offsetting of damages, but there is no offset to be paid here. Accordingly, the instant agreements do not meet the definition of a collateral source."

The court continued: "We agree that the evidence might lead to the same prejudice that collateral source evidence can cause. But the way to remedy that problem is by weighing the potential prejudice against the evidence's probative value as called for in section [F.S.] 90.403, not by per se excluding the evidence as violative of the collateral source rule." (Plaintiff, however, did not raise that issue.)

Florida court has personal jurisdiction over out-of-state client who never came to Florida but allegedly breached contract with Florida law firm. *Metnick & Levy, P.A. v. Seuling*, 123 So.3d 639 (Fla. 4th DCA 2013).

Client, a New York resident, was injured in an auto accident in Vermont. Based on a relative's referral Client telephoned Florida Law Firm about representing her. One of the lawyers in that firm was licensed to practice in New York. A firm paralegal sent Client a retainer agreement, which she signed and returned to the firm's Delray Beach office. Client never went to Florida.

The firm negotiated with the tortfeasor's insurer. Client was unhappy with the result and hired a New York lawyer, who informed Florida Law Firm that it was discharged. Florida Law Firm filed suit in Florida state court against Client for breach of contract and against the New York Lawyer for tortious interference with a contract. Both defendants moved to dismiss. The motions to dismiss were granted. Florida Law Firm appealed.

A 2-step inquiry determines whether a Florida court has jurisdiction over a non-resident: (1) the plaintiff must allege facts that bring the claim within the ambit of the Florida long-arm statute; and (2) if the statute applies, there must be sufficient "minimum contacts" by the defendant with Florida to satisfy due process requirements.

As to Client, the long-arm statute applies when a person breaches a contract in Florida "by failing to perform acts required by the contract to be performed in this state." F.S. 48.193(1)(g) (2012). Where, as here, the contract did not designate a place of payment, that placed is deemed to be in Florida. Thus, Client was within the ambit of the long-arm statute.

The court then concluded that there were requisite "minimum contacts" between Client and Florida. Although merely contracting in Florida is not sufficient, courts have held that Florida has personal jurisdiction over an out-of-state defendant where the defendant "enters into a contract with a forum-state party 'for substantial services to be performed in Florida.'" Client "had sufficient minimum contacts with Florida because she voluntarily contracted with a law firm in this state to perform services on her behalf."

The court affirmed dismissal of the New York lawyer. The long-arm statute did not apply because the complaint did not sufficiently allege that he committed a tortious act in Florida.

Court erred in ruling on venue motion before determining "true nature" of law firm's claim against client. *Aboul-Hosn v. Frost Van Den Boom & Smith, P.A.*, 117 So.3d 445 (Fla. 2d DCA 2013).

Law Firm sued Client in Polk County, where the Firm has its office. The suit alleged that the client had a written contingent fee agreement with the Firm, that the Firm performed legal services for Client that led to the Firm's receipt of checks totaling more than $200,000 from an insurance company, and that Client refused to pay Law Firm more than $75,000 in fees. Client moved to transfer venue to Osceola County, where Client lives. The court denied the motion.

The Second DCA reversed and remanded, concluding that the court "erred in deciding the issue of venue in favor of the plaintiff's chosen venue when the complaint failed to allege sufficient information to determine the true nature of the pending claim." Law Firm did not appear to be seeking fees as a discharged law firm, but instead seemed "to be seeking fees on a contingency basis even though the law firm has not yet convinced its client to conclude the settlement." The

venue issue was "difficult to resolve because the complaint fails to contain a short and plain statement of the ultimate facts showing that [Law Firm] has earned a contingency fee."

Court erred in granting new trial in a suit against lawyer after ruling that breach of fiduciary duty cannot be waived. *Band v. Libby*, 113 So.3d 113 (Fla. 2d DCA 2013).

See discussion in "Legal Malpractice" section.

Litigation privilege applies to protect lawyers from claims for abuse of process and malicious prosecution. *Wolfe v. Foreman*, 128 So.3d 67 (Fla. 3d DCA 2013).

See discussion in "Confidentiality and Privileges" section.

Court lacked authority to impose monetary sanctions on party for filing Bar complaints against opponent's lawyers. *Kass Shuler, P.A. v. Barchard*, 120 So.3d 165 (Fla. 2d DCA 2013).

See discussion in "Disciplinary Proceedings" section.

LEGAL MALPRACTICE

Court was not required to admit evidence of any rule of professional conduct claimed to have been violated by legal malpractice defendant. *Greenwald v. Eisinger, Brown, Lewis & Frankel, P.A.*, 118 So.3d 867 (Fla. 3d DCA 2013).

Plaintiffs sued a lawyer and his law firm ("Defendants") alleging legal malpractice. The jury's verdict was for Defendants. Plaintiffs appealed, alleging that the court erred in granting a motion in limine barring their expert witness from opining that Defendants violated several ethics rules. Plaintiffs had argued that "evidence of a violation of the Rules of Professional Conduct is admissible to establish the standard of care for attorneys, and as evidence of negligence in legal malpractice actions."

The Third DCA affirmed, concluding that "Plaintiffs failed to properly preserve the issue for appeal." Plaintiffs had not sought a ruling on Defendants' motion in limine prior to calling their expert to testify. When Plaintiffs questioned their expert Defendants made 2 objections that were sustained. Plaintiffs' request for a sidebar conference was denied. Plaintiffs never proffered the proposed testimony. "The fact the trial court sustained an objection to the question and denied a request for a sidebar did not obviate the need for a proffer in this case, nor did it suffice to preserve the claimed error."

Even had the claim been adequately preserved, Plaintiffs did not establish that the court abused its discretion in excluding the reference to the Rules or that the exclusion was harmful. The Third DCA rejected the contention that the Preamble to the Rules mandated admission of any Rule of Professional Conduct allegedly violated by Defendants. "We do not agree that the preamble

language or the caselaw mandates the admission of such evidence; rather, the decision to admit or exclude such evidence remains vested in the broad discretion of the trial court, and will not be disturbed absent an abuse of that discretion." In exercising its discretion, a trial court may balance probative value against unfair prejudice "or, more specifically here, to ensure the Rules of Professional Conduct are not 'subverted when they are invoked by opposing parties as procedural weapons.' R. Regulating Fla. Bar 4 – Preamble."

Firm did not properly raise lack of standing in moving for summary judgment on malpractice claim. *Alexopoulos v. Gordon Hargrove & James, P.A.*, 109 So.3d 248 (Fla. 4th DCA 2013).

Client sued Law Firm alleging legal malpractice. Law Firm's motion for summary judgment was granted based "solely on its finding that [Client] did not have standing to bring her legal malpractice claim" against Law Firm.

The Fourth DCA reversed and remanded, concluding that Law Firm "did not raise the issue of standing sufficiently in its motion for summary judgment, and never raised standing as an affirmative defense." The court stated that it is reversible error to enter summary judgment on a ground not raised with particularity in the motion.

Law Firm had moved for summary judgment on 2 bases, neither of which was Client's lack of standing. On page 17 of its 19-page motion, without citing to case law or other authority, Law Firm stated "in a conclusory, one-sentence footnote that [Client] did not have standing to pursue her claims." This footnote "did not provide [Client] adequate notice that she would be required to offer record evidence to refute the allegations of lack of standing and to offer a legal rebuttal as to this issue." Further, none of Law Firm's affirmative defenses raised lack of standing.

Court erred in granting new trial in suit against lawyer after ruling that breach of fiduciary duty cannot be waived. *Band v. Libby*, 113 So.3d 113 (Fla. 2d DCA 2013).

Lawyer Band and his law firm, Abel Band, represented Libby over an 8-year period. Band invited Libby to invest in a real estate project. Libby made an initial investment, creating an LLC as his vehicle for participation. Abel Band provided Libby with conflict disclosure and waiver letters on two occasions. Libby signed the waivers.

The project faltered and Libby and his LLC ("Libby") sued Band and Abel Band for legal malpractice, constructive fraud, and breach of fiduciary duty. Summary judgment was granted for defendants on the malpractice claim. Libby settled with the law firm, leaving Band as the only defendant. The jury found for Band on the constructive fraud claim but for Libby on the breach of fiduciary duty claim. The jury also found, however, that Libby had waived the breach of fiduciary claim. The court granted Libby's motion for new trial on the issue of damages relating to this claim, ruling "that as a matter of law, there can be no waiver of a breach of fiduciary duty."

The Second DCA reversed, emphatically stating: "We hold that a party may waive a claim based on the breach of a fiduciary duty. 'Parties, by their own knowledge and conduct, can waive or be estopped to raise a wide array of constitutional, statutory, and common law rights . . . .' [Citation omitted.] Indeed, '[a] party may waive any rights to which he or she is legally entitled, by actions or conduct warranting an inference that a known right has been relinquished.' [Citation omitted.] It follows that a claim based on a breach of fiduciary duty, like any other claim, may be

waived." The court noted that the Fourth DCA "has expressly held that a party has the right to interpose the affirmative defense of waiver to a claim based on a breach of fiduciary duty."

Fourth DCA questions whether nominal damages are recoverable in legal malpractice claim. *Bluth v. Blake*, 128 So.3d 242 (Fla. 4th DCA 2013).

Plaintiffs sued Lawyer for legal malpractice for an alleged conflict of interest. The jury found that Lawyer was negligent in his representation of the clients "resulting in damage to either or both of them." As to the amount of damages, the jury answered "zero." After trial Plaintiffs moved for an additur to the zero damages, requesting "that the court add at least nominal damages" against Lawyer. The court granted the motion for additur for $10.

Plaintiffs moved for a new trial on the issues of damages under F.S. 768.74(4), arguing that they had objected to the amount of the additur. The court granted a new trial. Lawyer appealed, arguing that "no legal basis existed for the additur and, therefore, no legal basis existed for the new trial." The Fourth DCA agreed and reversed.

There were 4 reasons why the trial court erred in granting the motion for additur. As its third reason, the appeals court stated: "we question whether nominal damages are recoverable on a legal malpractice claim given that the claim does not accrue until redressable harm occurs."

PROFESSIONALISM

Supreme Court:

Supreme Court adopts "Code for Resolving Professionalism Complaints." *In re: Code for Resolving Professionalism Complaints*, 116 So.3d 280 (Fla. 2013).

Responding to a request from its Commission on Professionalism, the Supreme Court adopted a "Code for Resolving Professionalism Complaints." The Code includes "a structure to provide a process to more critically address professionalism issues in Florida."

Although "Florida has traditionally followed a more passive, academic approach to enhance and improve professionalism," in adopting the Code the Court expressed its view that "further integrated, affirmative, practical and active measures are now needed" to address problems with unprofessional behavior.

Choosing not to promulgate a new code of conduct, the Court instead adopted "the collection and integration of our current and already existing standards of behavior as already codified in: (1) the Oath of Admission to The Florida Bar; (2) The Florida Bar Creed of Professionalism; (3) The Florida Bar Ideals and Goals of Professionalism; (4) The Rules Regulating The Florida Bar; and (5) the decisions of the Florida Supreme Court into and as part of the Code for Resolving Professionalism Complaints . . ."

The mechanism for handling complaints about unprofessional behavior is housed largely in the Bar's existing ACAP (Attorney Consumer Assistance and Intake Program) office. The ACAP structure will be used "to receive and resolve any complaints before and in the place of the initiation of formal grievance proceedings." In addition to expanding the role of ACAP, the Court created the

"Local Professional Panel Plan." This requires the chief judge in every circuit to "create a Local Professionalism Panel to receive and resolve professionalism complaints informally if possible. In the discretion of the Chief Judge, the Circuit Committee on Professionalism may be designated as the Local Professionalism Panel."

Supreme Court ups lawyer's suspension to 2 years for unprofessional conduct toward judges and opposing counsel. *Florida Bar v. Norkin*, 132 So.3d 77 (Fla. 2013).

Lawyer represented a client in a business dispute. Lawyer's behavior toward opposing counsel and judges was contentious. The Bar brought charges and the referee recommended that Lawyer be found guilty of violating Rules 4-3.5(c) (conduct intended to disrupt tribunal), 4-8.2(a) (statements made with knowing falsity or reckless disregard about qualifications or integrity of judge), 4-8.4(a) (violating or attempting to violate Rules), and 4-8.4(d) (conduct prejudicial to administration of justice). The referee recommended a 90-day suspension followed by probation.

In the Supreme Court the Bar argued for a 1-year suspension and a public reprimand, while Lawyer argued for only a public reprimand.

The Supreme Court approved the guilt findings and suspended Lawyer for 2 years along with a public reprimand to be administered by the Court. Noting that it was "profoundly concerned with the lack of civility and professional demonstrated by some Bar members," the Court reviewed its actions designed to improve lawyer professionalism. Those actions included establishment of the Bar's Henry Latimer Center for Professionalism, creation of the Court's Commission on Professionalism and the Bar's Standing Committee on Professionalism, and adoption of the Code for Resolving Professionalism Complaints (see 116 So.3d 280 (Fla. 2013)).

The Court concluded: "One can be professional and aggressive without being obnoxious. Attorneys should focus on the substance of their cases, treating judges and opposing counsel with civility, rather than trying to prevail by being insolent toward judges and purposefully offensive toward opposing counsel. This Court has been discussing professionalism and civility for years. We do not tolerate unprofessional and discourteous behavior. We do not take any pleasure in sanctioning [Lawyer], but if we are to have an honored and respected profession, we are required to hold ourselves to a higher standard. [Lawyer] has conducted himself in a manner that is the antithesis of what this Court expects from attorneys. By his unprofessional behavior, he has denigrated lawyers in the eyes of the public. [Lawyer]'s violations of the Bar rules and unprofessional behavior merit a two-year suspension and a public reprimand. We direct [Lawyer] to appear personally before this Court to receive the public reprimand. His unprofessional conduct is an embarrassment to all members of The Florida Bar."

In a footnote, the Court stated that "[m]embers of The Florida Bar, law professors, and law students should study the instant case as a glaring example of unprofessional behavior."

Second DCA:

Second DCA criticizes lawyer's improper argument but concludes it does not constitute fundamental error. *Carnival Corp. v. Jimenez*, 112 So.3d 513 (Fla. 2d DCA 2013).

Trial of a shipboard slip and fall case resulted in a small verdict for Plaintiff. The court granted Plaintiff's motion for new trial based on "misconduct and improper argument" by defense counsel. The Second DCA reversed because any error stemming from defense counsel's misconduct was unpreserved and did not rise to the level of fundamental error.

Plaintiff had no medical insurance and was treated by her doctor and his surgical center under a letter of protection. (In a footnote, the appeals court defined "letter of protection.") During closing argument defense counsel emphasized the doctor's financial interest due to the letter of protection. Defense counsel suggested that the doctor's testimony was "scripted" for him by plaintiff's counsel; no record evidence supported this allegation. Defense counsel also made a personal attack on plaintiff's counsel. Plaintiff's counsel made 2 objections to the comments about the letter of protection and none regarding the personal attack. No motion for mistrial was made.

The appeals court criticized remarks made by defense counsel, calling them "highly improper and inappropriate." The court further stated: "We agree that an unsubstantiated accusation that a lawyer conspired with a witness to present 'scripted' testimony and to thereby perpetrate a fraud on the court is highly improper and should not be condoned." The trial court, however, abused its discretion in granting a new trial.

Court lacked authority to impose monetary sanctions on party for filing Bar complaints against opponent's lawyers. *Kass Shuler, P.A. v. Barchard*, 120 So.3d 165 (Fla. 2d DCA 2013).

See discussion in "Disciplinary Proceedings" section.

Third DCA:

Lack of candor toward tribunal thrusts a "dagger into the heart of the rule of law." *Briarwood Capital v. Lennar Corp*., 125 So.3d 291 (Fla. 3d DCA 2013).

See discussion in "Candor Toward the Tribunal" section.

Third DCA calls on prosecutors and defense counsel to be more professional and urges trial courts to respond firmly to unprofessional argument. *Fagans v. State*, 116 So.3d 569 (Fla. 3d DCA 2013).

In affirming a criminal conviction in the absence of fundamental error, the Third DCA noted that improper comments on the credibility of opposing counsel "are recurring in closing arguments at an alarming rate." Consequently, the court cautioned both prosecutors and defense counsel to "uphold their professional and ethical obligations." Additionally, the appeals court called on trial courts to assist: "We also entreat the trial courts to be mindful of such misconduct and to respond accordingly with appropriate curative instructions and firm admonishment of counsel."

Fourth DCA:

Fourth DCA reverses convictions in 2 cases due to improper prosecutorial argument.

Becker v. State, 110 So.3d 473 (Fla. 4th DCA 2013). During closing argument the prosecutor stated that "as an officer of this Court" he could assure the jury that there was no deal between the prosecution and the informant who testified against the defendant. This statement was in rebuttal to a defense suggestion that such a deal was made. Nevertheless, the prosecutor's argument went too far: "[The defendant] was denied his right to a fair trial when the prosecutor vouched for the informant's credibility. Simply stated, the prosecutor was not permitted to give his personal assurances that the informant received nothing in exchange for his testimony."

Petruschke v. State, 125 So.3d 274 (Fla. 4th DCA 2013). Defendant was convicted of child molestation. During the trial the prosecutor made objected-to remarks that were improper: (1) stating that the child victim lacked the mental ability to fabricate the allegations; and (2) repeatedly referring to the defendant as a "pedophile." The first argument was improper because no evidence was presented on this point. "The prosecutor simply invented this claim in closing argument." The second argument "constituted an impermissible general attack on [the defendant]'s character."

Fifth DCA:

Calling quality of legal work "disturbing," Fifth DCA orders 3 lawyers to show cause why they should not be sanctioned. *Hagood v. Wells Fargo, N.A.*, 112 So.3d 770 (Fla. 5th DCA 2013).

Appellant appealed from a summary judgment in a mortgage foreclosure case that was entered when his counsel failed to appear at the hearing due to a calendaring error by counsel's firm ("Law Firm"). Law Firm moved for relief from the judgment due to excusable error. Law Firm pointed out that notice of hearing was received by the firm but was not calendared due to a clerical error, and also alleged that there was a meritorious defense based on a previously-filed answer and defenses. The court denied the motion.

The Fifth DCA affirmed, stating that Law Firm "waived any viable issue on appeal by failing to assert the issue in the initial brief." Law Firm did not file a transcript of the hearing. "Inexplicably, instead of challenging the summary judgment on the basis that the lower court erred in granting the judgment in the face of the answer and defenses on file, or that it abused its discretion in denying the request for relief from judgment based on excusable neglect, Appellant's initial brief, prepared by three [Law Firm] lawyers, asserts that Appellant was not given notice of the hearing, an assertion that the record conclusively refutes." When the opposing answer brief clearly refuted the lack of notice contention, Law Firm's reply brief ignored this and tried to raise a new issue for the first time. "Like Appellant's initial brief, the reply brief fails to properly cite to the record on appeal to support any factual assertions."

In ordering three lawyers from Law Firm to show cause why sanctions should not be entered against them pursuant to Fla.R.App.P. 9.410, the court stated: "The quality of the legal work performed by [Law Firm]'s attorneys in this case is disturbing. It resulted in a waste of judicial resources and, perhaps, an injustice to the litigants. At a minimum, it increased the cost of the litigation and the time necessary to conclude it. The three lawyers who represented Appellant on

appeal are not novices. In the aggregate they have over sixty years of experience as members of The Florida Bar." (The court later sanctioned the lawyers $1000. *Hagood v. Wells Fargo, N.A.*, 125 So.3d 1012 (Fla. 5th DCA 2013).)

Fifth DCA criticizes level of professionalism demonstrated by lawyer representing client in criminal appeal. *Bell v. State*, 114 So.3d 229 (Fla. 5th DCA 2013).

Lawyer represented Defendant in an appeal, raising claims of double jeopardy. The Fifth DCA affirmed, criticizing Lawyer's lack of professionalism: "We caution counsel that the most basic tenets of professionalism in appellate practice require more than this of a practitioner." After reciting shortcomings, in a footnote the court summarized its professionalism-related concerns: "In addition to failing to acknowledge binding precedent contrary to his argument and instead citing a dissent in support of his argument, without noting it as a dissent, [defendant]'s counsel has previously raised the same challenge before this court at least once without success."

Despite granting motion to reinstate appeal it had dismissed, Fifth DCA reiterates referral of counsel to Florida Bar for ethical concerns. *Montijo v. State*, 123 So.3d 133 (Fla. 5th DCA 2013).

Lawyer represented his client in an appeal. Despite repeated extensions of time, Lawyer failed to file an initial brief. The Fifth DCA dismissed the appeal and asked the Bar to investigate Lawyer "for his apparent violations" of the Rules (specifically, Rule 4-1.1 (competence) and Rule 4-1.3 (diligence). Lawyer moved to reinstate the appeal. The court granted the motion, stating in its order "that 'all other aspects' of the dismissal order would stand." The court wrote an opinion "to clarify that it is the request that the Florida Bar investigate [Lawyer]'s conduct that we intended to 'stand.'" The opinion detailed Lawyer's "wholly unacceptable dilatory conduct" in a variety of cases.

Fifth DCA chief judge criticizes professionalism of assistant state attorney, saying state should "demand better" from its prosecutors. *Benoit v. State*, 113 So.3d 939 (Fla. 5th DCA 2013).

The Fifth DCA affirmed convictions in a criminal case. The chief judge wrote a concurring opinion criticizing the prosecutor's professionalism: "In her opening statement, the prosecutor referred to matters that the trial court previously ruled were inadmissible. Then, when the mistrial motion was made, the prosecutor claimed that she did not violate the order in limine, arguing that her opening statement was not evidence and the order only precluded the matters referred to from being introduced into evidence. That explanation is disingenuous at best and fails even the 'straight face' test. The prosecutor should have been sanctioned for what was a blatant violation of the court's order. The State should demand better from its assistant state attorneys."

PUBLIC OFFICIAL ETHICS AND PUBLIC RECORDS

Public Official Ethics:

One governmental entity may not assert public records exemption at direction of another governmental entity. *Chandler v. City of Sanford*, 121 So.3d 657 (Fla. 5th DCA 2013).

Chandler made a public records request to the City of Sanford Police Department's Volunteer Program Coordinator for an original copy of an email sent by the coordinator to George Zimmerman. Three weeks later Chandler petitioned for writ of mandamus against the City seeking the requested records. The City produced emails with Zimmerman's email address redacted. Chandler claimed that those records were not responsive and did not conform to the requirements of the public records laws. The City defended by asserting that it had turned over its original records to the State Attorney's Office as part of the criminal investigation and that, "pursuant to the State Attorney's directive [not to produce the records in their original format] and the ongoing criminal investigation and prosecution, the City did not have authority to release the original records."

The court ruled that the State Attorney, rather than the City, was the proper to the petition and dismissed the petition against the City. The court informed Chandler that his remedy, if any, was against the State Attorney. Chandler appealed.

The Fifth DCA reversed and remanded. One governmental agency may not avoid a public records request by transferring the requested records to another agency. Despite the instruction to from the State Attorney, the City "the City remained the governmental entity responsible for the public records. While the court is sympathetic that the City was placed between a proverbial 'rock and a hard place,' the City cannot be relieved of its legal responsibility for the public records by transferring the records to another agency."

Mandamus lies to compel Florida Ethics Commission to process complaint against a state attorney's office. *Young v. Lamar*, 115 So.3d 1132 (Fla. 1st DCA 2013).

Petitioner filed a complaint with the Ethics Commission against the State Attorney's Office for the Ninth Judicial Circuit. The Commission did not process the complaint, but simply returned it to Petitioner along with a letter from the Commission's executive director stating that "the Commission was refusing to accept the complaint as it was outside the Commission's jurisdiction."

The First DCA issued a writ of mandamus. Fla. Admin. Code Rule 34-5.002 sets out a mandatory process that the Commission must follow in handling complaints. Even where a complaint is legally insufficient to invoke the Commission's jurisdiction, the Commission must "engage in what is essentially a two-step process: 1. Upon concluding that a complaint is legally insufficient, the Executive Director *must* bring the complaint 'before the Commission in executive session with the recommendations of the Executive Director.' 2. The Commission may then take one of three steps: a. Find the complaint sufficient and order an investigation[;] b. Find the complaint insufficient, dismiss it, and notify the complainant that no investigation will be made[; or] c. Take such other action as may be appropriate." (Emphasis by court.)

Although the Commission is not obligated to initiate an investigation, it must process the complaint in compliance with Rule 34-5.002.

Mayoral candidate who holds county commission seat is considered "public servant" for purposes of applying official misconduct statute to mayor's race. *Gonot v. State*, 112 So.3d 679 (Fla. 4th DCA 2013).

Gonot was convicted of crimes including official misconduct in violation of F.S. 838.022(1)(a). The basis of this charge was falsification of a campaign report during his campaign for mayor. On appeal he argued that he was entitled to acquittal on this count because the definition of "public servant" in the statute does not include a *candidate* for the office.

Rejecting his argument, the Fourth DCA affirmed. Gonot was a "public servant" for purposes of the official misconduct statute because, while running for mayor, he held a seat as city commissioner. Gonot "was not just a candidate at the time of the offense; it was his dual status as a candidate and an incumbent commissioner that brought him within the ambit of the statute."

Public Records:

Regardless of agency's intent, fees are to be awarded whenever public agency refuses to permit access to public records. *Lee v. Board of Trustees, Jacksonville Police and Fire Pension Fund*, 113 So.3d 1010 (Fla. 1st DCA 2013).

Plaintiff sued to compel a public agency to disclose public records. The suit was successful. Plaintiff moved for fees pursuant to F.S. 119.12, which "authorizes an award of fees when an agency has 'refused to permit a public record to be inspected or copied' in violation of chapter 119." The court denied Plaintiff's motion for fees.

The First DCA reversed. "[T]he lower court erred as a matter of law by concluding that the agency had violated section 119.07 by refusing to disclose certain records, yet plaintiff was not entitled to attorney's fees because the agency's violation was neither knowing, willful, nor done with malicious intent. As the supreme court observed in *PHH* [*New York Times Co. v. PHH Mental Health Services, Inc.*, 616 So.2d 27 (Fla. 1993)], 'refusal by an entity that is clearly an agency within the meaning of chapter 119 will always constitute unlawful refusal.'"

Public records laws do not require disclosure of name of student who sent email complaining about state college teacher. *Rhea v. Board of Trustees of Santa Fe College*, 109 So.3d 851 (Fla. 1st DCA 2013) (on rehearing).

Rhea was not re-hired as an adjunct instructor at a state college, allegedly due to an email sent by a student to the department chair complaining about Rhea and his teaching. Rhea was given a redacted copy of the email; the author's name was not shown. Rhea sued the college and sought release of the complaining student's name, claiming that neither the public records laws nor the federal Family Educational Rights & Privacy Act ("FERPA") protected the information from disclosure. The court dismissed this complaint, ruling that state and federal law did not require the college to give Rhea an unredacted copy.

In an opinion on a motion for rehearing, the First DCA affirmed the dismissal order. (In its original opinion, the First DCA had reached the opposite conclusion.)

Rhea alleged that the email was a communication sent to and received by the college as part of its transaction of official business; thus, he "sufficiently pled that it is a Florida public record subject to disclosure in the absence of a statutory exemption." Florida law contains an exemption for a student's "education records." Because Florida law uses FERPA's definition of "education records," the court looked to federal law. Education records generally include "'those records, files, documents, and other materials which . . . (i) contain information *directly related to a student* and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.' 20 U.S.C. § 1232g(a)(4)(A)(i)-(ii) (emphasis [by First DCA])." Education records do *not* include records maintained exclusively regarding a person's capacity as an employee.

The appeals court rejected Rhea's contention that the email was not an education record because it did not "directly relate" to its student author. The "plain language of FERPA supports the distinction between information that is directly related to a student and that which is related to a student only tangentially or indirectly." Here, the email "identifies the student and the student's enrollment in his class. Further, the e-mail describes that student's personal impressions of the classroom educational atmosphere in the context of Rhea's teaching and methodology. The student's knowledge of, and connection to, the information conveyed in the e-mail is not merely peripheral or tangential. . . . Although Rhea may be the primary subject of the e-mail, the e-mail also directly relates to its student author." The record at issue need not relate *exclusively* to the student.

Court erred in excluding from evidence portion of public record containing investigator's "mental impressions." *City of Avon Park v. State*, 117 So.3d 470 (Fla. 2d DCA 2013).

During City's dispute with Police Chief, an investigator prepared a written report that eventually was released as a public record under F.S. Ch. 119. At Police Chief's administrative hearing, City wanted the investigator to testify. The state petitioned to quash the subpoena. The court granted the petition in part, ruling that "any portion of the written investigative report containing the mental impressions of [investigator] was not admissible in the administrative hearing." City appealed, arguing that the complete report was admissible as a public record.

The Second DCA concluded that the court erred in excluding the portion of report containing the investigator's mental impressions, and accordingly reversed that part of the court's order. The exemption in F.S. 119.071(1)(d)(1) for work product only applies until the conclusion of the litigated proceedings. Here, the investigator's investigation "and any related criminal proceedings have concluded, since no charges were filed against any of the parties mentioned in the report."

Records regarding "value added" by individual public school teachers to student's FCAT score are not exempt from disclosure under public records law. *Morris Publishing Group, LLC v. Fla. Dept. of Education*, 133 So.3d 957 (Fla. 1st DCA 2013).

The Florida Department of Education ("DOE") assesses public school teachers by comparing the score that a student is predicted to get on the Florida Comprehensive Assessment

Test ("FCAT") with the score the student actually gets. The amount by which the actual FCAT score exceeds the predicted score is called the "value added" by the teacher. The "value added" measurement ("VAM") is used in a teacher's performance evaluation by local school districts.

Publisher sought access to the VAM for Florida teachers. Publisher sought immediate release of the records, although "Florida law provides for eventual release of VAM data following 'the end of the school year immediately following the school year in which the evaluation was made.'" F.S. 1012.31(3)(a)2. DOE declined to produce the records, apparently contending that the VAM scores were teacher evaluations and that, as such, they were exempt from disclosure under F.S. 1012.31(3)(a)2 (exempting teacher evaluations from public records disclosure). Publisher sued for release of the records. The court denied relief, ruling that "VAM data is exempt from disclosure as a public record until the end of the school year immediately following the school year in which the evaluation was made."

The First DCA reversed. Public records laws are to be liberally construed, with any doubts resolved in favor of disclosure. The VAM data is "only one part of a larger spectrum of criteria by which a public school teacher is evaluated; it is not, by itself, the "employee evaluation." Had the Legislature wanted any matter material to a teacher's evaluation to be exempt from disclosure, the Legislature would have exempted personnel files as a whole. To the contrary, personnel files of public school teachers are generally subject to disclosure."

Court erred in ruling that location of university primate research facility was exempt from public records request. *Marino v. University of Florida*, 107 So.3d 1231 (Fla. 1st DCA 2013).

The University received a public records request for records regarding 33 non-human primates whose captivity was documented in a USDA inspection report. The University ultimately produced the records, redacting the physical housing location of the primates. The University claimed that this information was confidential and exempt under F.S. 119.071(3) and 281.301, contending that the physical location of the facility was covered by exemption language related to security system plans. The court ruled that the information was permissibly redacted.

The First DCA reversed. "[T]he University effectively argues that it can shield the location of certain public facilities when it determines that the nature of the public activities occurring at the facilities subjects them to physical threats. Such a reading is not compatible with the admonition that public records exemptions are to be narrowly construed to provide for public access." The court further stated that "the construction advanced by the University is at odds with how the legislature itself has viewed the physical addresses of public activities," pointing out that after the September 11, 2001, terrorist attacks the legislature added a public records exemption for medical or similar facilities that were part of the state's anti-terrorism plan. That exemption was not needed if the University's interpretation was correct.

RULES AND ETHICS OPINIONS

Rule changes generally.

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

Supreme Court approves major revisions to lawyer advertising rules, including websites. *In re: Amendments to the Rules Regulating The Florida Bar - Subchapter 4-7, Lawyer Advertising Rules*, 108 So.3d 609 (Fla. 2013).

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

Supreme Court adopts "Code for Resolving Professionalism Complaints." *In re: Code for Resolving Professionalism Complaints*, 116 So.3d 280 (Fla. 2013).

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

Supreme Court adopts rules regulating use of electronic devices by jurors and others in court. *In re: Amendments to the Florida Rules of Judicial Administration – Rule 2.451 (Use of Electronic Devices)*, 118 So.3d 193 (Fla. 2013).

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

Supreme Court amends criminal and appellate procedure rules relating to postconviction proceedings. *In re: Amendments to the Florida Rules of Criminal Procedure and the Florida Rules of Appellate Procedure*, 112 So.3d 1234 (Fla. 2013).

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

Supreme Court adds new Rule of Juvenile Procedure governing withdrawal in dependency and termination of parental rights cases. *In re: Amendments to the Florida Rules of Juvenile Procedure*, 115 So.3d 286 (Fla. 2013).

See discussion in "Withdrawal" section.

Board of Governors approves Florida Ethics Opinion 12-3, concluding that lawyers may use "cloud computing" if they take reasonable steps to protect confidentiality.

See discussion in "Law Firms" section.

Professional Ethics Committee publishes Florida Ethics Opinion 12-4 concerning title insurers' audits of lawyers' trust accounts under Florida law.

See discussion in "Trust Accounting" section.

TRIAL CONDUCT

Subordinate lawyers remain responsible for complying with ethics rules even when acting at their superior's direction. *Briarwood Capital v. Lennar Corp*., 125 So.3d 291 (Fla. 3d DCA 2013).

See discussion in "Candor Toward the Tribunal" section.

Calling quality of legal work "disturbing," Fifth DCA orders 3 lawyers to show cause why they should not be sanctioned. *Hagood v. Wells Fargo, N.A*., 112 So.3d 770 (Fla. 5th DCA 2013).

See discussion in "Professionalism" section.

Letter of protection between plaintiff and her treating physician who testified as expert admissible to show physician's potential bias. *Pack v. Geico General Ins. Co*., 119 So.3d 1284 (Fla. 4th DCA 2013).

See discussion in "Expert Witnesses" section.

Trial court lacked authority to impose monetary sanctions on party for filing Bar complaints against opponent's lawyers. *Kass Shuler, P.A. v. Barchard*, 120 So.3d 165 (Fla. 2d DCA 2013).

See discussion in "Disciplinary Proceedings" section.

Defense counsel's violation of a motion in limine prohibiting mention of plaintiff's visit to a lawyer on day of accident results in reversal. *Howard v. Palmer*, 123 So.3d 1171 (Fla. 4th DCA 2013).

In an auto accident case, the court granted Plaintiff's motion in limine to prohibit defense counsel from introducing evidence that Plaintiff visited a lawyer on the day of the accident. During trial, however, defense counsel asked one of Plaintiff's treating physicians whether the physician knew that Plaintiff had seen a lawyer before seeing the first treating doctor. Plaintiff's lawyer objected, and the judge gave a curative instruction. The jury returned a verdict for less than Plaintiff sought. Plaintiff moved for a new trial, arguing "that defense counsel's violation of the order granting the motion in limine, in combination with other improper statements by defense counsel, was so prejudicial that it required a new trial." The motion was denied.

The Fourth DCA reversed and remanded for a new trial. Addressing the violation of the motion in limine, the court stated that it "cannot see how defense counsel 'misunderstood' the trial

court's order" granting the motion. The court also pointed out other improper statements of defense counsel, such as referring to "lawsuit photographs" taken by Plaintiff's father.

On rehearing, Fourth DCA affirms trial court's dismissal of case for fraud on the court. *Herman v. Intracoastal Cardiology Center*, 121 So.3d 583 (Fla. 4th DCA 2013).

See discussion in "Candor Toward the Tribunal" section.

Court abused discretion in paternity case by sanctioning father for challenging recommendations in psychologist's report. *J.D.C. v. M.E.H.*, 118 So.3d 933 (Fla. 2d DCA 2013).

In a paternity action the court appointed a psychologist to conduct an investigation and make a report. The report contained a recommendation that did not support the Father's arguments for primary time-sharing. The court "ordered the Father to pay all of the Mother' attorney's fees incurred after the investigation report was completed" because the Father had "engaged in vexatious litigation" by continuing to litigate after getting the unfavorable report.

The Second DCA reversed on due process grounds. "[A] party cannot be forced to accept the findings and recommendations in such a report without first being given the opportunity to challenge them."

Court erred in denying motion for new trial based on alleged juror misconduct without conducting juror interview. *Hillsboro Management, LLC v. Pagono*, 112 So.3d 620 (Fla. 4th DCA 2013).

See discussion in "Communication" section.

TRUST ACCOUNTS

Supreme Court disbars rather than suspends lawyer whose gross negligence regarding trust account was insufficient to prove intent to misappropriate funds. *Florida Bar v. Johnson*, __ So.3d __, 38 Fla.L.Weekly S626 (Fla. 2013), 2013 WL 4734568.

See in "Disciplinary Proceedings" section.

Lawyers whose bookkeeper embezzled millions in client funds are disbarred rather than suspended for trust accounting violations and other conduct in responding to the problem. *Florida Bar v. Rousso*, 117 So.3d 756 (Fla. 2013).

See discussion in "Disciplinary Proceedings" section.

Professional Ethics Committee adopts Proposed Advisory Opinion 12-4 concerning title insurers' audits of lawyers' trust accounts under Florida law.

The Professional Ethics Committee adopted Florida Ethics Opinion 12-4, which answers questions concerning a lawyer's ethical obligations in light of both the Rules of Professional Conduct and F.S. 626.8473(8). The statute requires lawyers to maintain funds received in the capacity of a "title or real estate settlement agent" in a separate trust account and to "permit the account to be audited by its title insurers, unless maintaining funds in the separate account for a particular client would violate applicable rules of The Florida Bar."

The Committee responded to two questions asked by an inquiring bar member:

"Question 1: Is an attorney permitted to allow a title insurance company to audit the firm's special trust account used exclusively for real estate and title transactions without the informed consent of the clients who have no involvement with that particular title insurance company?"

"Question 2: If an attorney is not ethically permitted to allow a title insurer to audit the special trust account without the clients' informed consent because the special trust account involves unrelated transactions, but new section 626.8473(8), Florida Statutes, requires that attorney to allow the audit, does the attorney abide by the ethics rules or the statute?"

The Committee's responses are summarized in the final paragraph of Opinion: "[T]he inquirer may not permit multiple title insurance companies to audit a single trust account used exclusively for real estate and title transactions, unless the lawyer reasonably concludes that permitting the audits would serve the affected clients' interests and the affected clients have not prohibited disclosure of the information. The inquirer may permit a title insurer to audit a single trust account used exclusively for client transactions insured by the title insurer requesting the audit. The answer to the inquirer's second question offers three alternatives that may harmonize the inquirer's obligations under the applicable Rules Regulating The Florida Bar and the statute if the lawyer concludes that permitting the audits is not necessary to serve the affected clients' interests or if affected clients' have prohibited the lawyer from disclosing the information."

UNAUTHORIZED PRACTICE OF LAW

Supreme Court holds disbarred lawyer who continued to practice in contempt and orders him jailed for 60 days. *Florida Bar v. Palmer*, __ So.3d __, 38 Fla.L.Weekly S312 (Fla., No. SC10-543, 5/9/2013), 2013 WL 1908405.

See discussion in "Disciplinary Proceedings" section.

$900 million judgment reversed because court abused discretion by striking non-Florida lawyer's motion for admission pro hac vice. *Trans Health Management, Inc. v. Webb*, 132 So.3d 1152 (Fla. 1st DCA 2013).

Plaintiff sued several defendants regarding alleged nursing home negligence and abuse. Two defendants ("THI" and "THMI," or "Appellants") were related corporate entities. A Maryland court appointed a receiver over assets of THI, which previously sold its interest in THMI but continued handling THMI's defense. The Maryland court set a deadline for creditors to file a notice of claim. When Plaintiff did not file by the deadline, the receiver "determined there was no longer a need to defend the [Florida] lawsuit, and it accordingly discharged Appellants' counsel."

A successor judge assigned to the Florida case ordered all papers served on the receiver's counsel, a Maryland lawyer. The court allowed Plaintiff to amend the complaint and add a punitive damages claim, but Appellants did not respond because their counsel had been discharged. A default was entered against Appellants and a trial on damages was set.

On the morning of trial Appellants moved to vacate the defaults, for continuance, to allow the Maryland lawyer to appear pro hac vice, and for the appearance of a Florida lawyer as local counsel. The motions were signed by the Maryland lawyer. The court stated that "waiting until the last minute was 'frankly unacceptable' and stated that it would not let [the Maryland lawyer] appear." The Florida lawyer "acknowledged that she was not retained, or prepared, to defend the case, but stated that she assumed she 'would be here with' [the Maryland lawyer] during trial." The court struck the motion for the Maryland lawyer's pro hac vice admission and the Florida lawyer's notice of appearance. The jury returned a $900 million verdict against Appellants.

The First DCA reversed. The pro hac vice admission motion was legally sufficient under Fla.R.Jud.Admin. 2.510(b). The Maryland lawyer's motion was legally sufficient under rule 2.510. The court's reason for denying the motion "appears to be that it (along with the motions to vacate the defaults and for continuance) was filed the morning of trial – a circumstance the court found 'frankly unacceptable.' We cannot find, and [Plaintiff[has not provided, any decision by a Florida appellate court holding or suggesting that the filing of a motion to appear pro hac vice on the day of trial is a legally permissible basis upon which to deny such a motion."

No "special background" in type of litigation at issue needed for out-of-state lawyer to be admitted pro hac vice in Florida court. *Kelley v. Kelley*, 123 So.3d 692 (Fla. 4th DCA 2013).

A Louisiana lawyer moved for pro hac vice admission to a Florida state court case. The lawyer met the requirements specified in Fla.R.Jud.Admin. 2.510(a) and 2.510(b). Nevertheless, the court denied the motion.

The Fourth DCA quashed the order denying pro hac vice admission. "The trial court's view that the attorney needed to show a 'special background,' suitable to the type of litigation in which the attorney appears, departs from the essential requirements of law. Neither the rule nor case law requires such a showing."

Court erred in revoking a foreign lawyer's pro hac vice admission based on a conflict alleged by opposing party. *Information Systems Associates, Inc. v. Phuture World, Inc.*, 106 So.3d 982 (Fla. 4th DCA 2013).

Lawyer Dugan was admitted pro hac vice on behalf of Information Systems Associates ("ISA") in a state court suit against Phuture World Inc. ("Phuture"). The court granted Phuture's motion to revoke Dugan's pro hac vice admission, finding "that Dugan had engaged in the

unauthorized practice of law in Florida by representing one of ISA's witnesses at his deposition and because of a conflict of interest."

The Fourth DCA quashed the revocation order. "We conclude that an alleged conflict of interest asserted by someone not a party to the attorney/client relationship is not a ground for revoking the pro hac vice status of a foreign attorney. We also conclude that in this case, the foreign attorney did not provide representation beyond the order authorizing his pro hac vice status."

As to the conflict allegation, the appeals court noted that "a conflict of interest is an improper basis for revocation of pro hac vice status."

Court erred in dismissing case where party was not notified that his lawyers had withdrawn and was not provided copy of withdrawal order. *Brunoehler v. Burger*, 108 So.3d 733 (Fla. 5th DCA 2013).

Plaintiff's case originally was filed by a California lawyer who was not authorized to practice in Florida but had Florida counsel to assist. Florida counsel was frustrated with the slow pace of the case and moved to withdraw. Both sides stipulated to the withdrawal and that "the Florida attorney would be replaced and a third amended complaint would be filed within thirty days of the order approving the stipulation. It was also agreed that if the complaint was not timely filed, the action would be dismissed with prejudice."

A copy of the withdrawal order was sent to California counsel's outdated address and did not arrive until 5 days before the 30-day period had run. California counsel's motion for an extension of time (accompanied by a proposed third amended complaint) was opposed by defense counsel. The court struck the application as a nullity filed by a non-Florida lawyer and dismissed the case with prejudice.

The Fifth DCA reversed on the ground that Plaintiff was not at fault. There were 2 problems with the dismissal: "First, the record does not reflect that [Plaintiff] was ever notified by either of his attorneys about the withdrawal. Second, there is no indication that the court's order permitting the withdrawal was provided to [Plaintiff]."

WITHDRAWAL

Per Supreme Court, trial courts may consider "excessive caseload conflict" issue in deciding motions to withdraw on systemic rather than case-by-case basis. *Public Defender, Eleventh Judicial Circuit of Florida v. State*, 115 So.3d 261 (Fla. 2013).

See discussion in "Ineffective Assistance of Counsel" section.

Supreme Court adds new Rule of Juvenile Procedure governing withdrawal in dependency and termination of parental rights cases. *In re: Amendments to the Florida Rules of Juvenile Procedure*, 115 So.3d 286 (Fla. 2013).

Responding to proposals submitted by the Juvenile Court Rules Committee, the Supreme Court amended the Rules of Juvenile Procedure effective July 1, 2013. Among the amendments was new rule 8.517, titled "Withdrawal and Appointment of Counsel." The rule addresses withdrawal of counsel for a parent or custodian in a dependency or termination of parental rights proceeding and the appointment of appellate counsel.

The Court summarized: "The new rule provides that after an order of adjudication of dependency, an order of disposition, or an order terminating parental rights has been entered, counsel of record shall not be permitted to withdraw until counsel certifies that he or she has discussed appellate remedies with the parent or custodian and certifies that the parent or custodian does not wish to appeal or, if the parent or custodian wishes to appeal, certain appellate documents have been filed and appellate counsel has been appointed. If counsel is unable to contact the parent or custodian, counsel must certify the efforts made to contact the parent or custodian. Finally, the rule requires the court to serve a copy of the order appointing appellate counsel on the appointed counsel and the clerk of the appellate court."

Court erred in dismissing case where party was not notified that lawyers had withdrawn nor given copy of withdrawal order. *Brunoehler v. Burger*, 108 So.3d 733 (Fla. 5th DCA 2013).

See discussion in "Unauthorized Practice of Law" section.