2012 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 affect all lawyers. These materials are designed to help lawyers learn about significant developments in legal ethics that may affect them. The following summaries of rule changes, cases, and ethics opinions reflect developments that occurred during 2012. The summaries are arranged by subject.

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

Subjects addressed in this Review are:

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

RULE CHANGES (AND PROPOSED CHANGES)

Supreme Court amends some rules as proposed by Bar, but rejects others including use of lien resolution services and trust account signatory rules. *In re: Amendments to the Rules Regulating The Florida Bar (Biannual Report)*, __ So.3d ___, 37 Fla.L.Weekly S275 (Fla., No. SC10-1967, 4/12/2012), 2012 WL 1207226.

In October 2010 the Bar filed a rules proposal package with the Court. The filing was bifurcated into 2 petitions, the first with the more substantive changes and the second with "housekeeping" changes. (The Court acted on the "housekeeping" changes in July 2011. *In re: Amendments to the Rules Regulating The Florida Bar (Biannual Report Housekeeping)*, 67 So.3d 1037 (Fla. 2011).)

The substantive rule change proposals encompassed a variety of topics. In April 2012 the Court approved a number of the proposals, either as proposed or with modifications, but rejected others. Below is a summary of significant actions. All amendments are were effective July 1, 2012.

Proposed rules APPROVED by the Court included:

Reporting misconduct of other lawyers and judges (Rule 4-8.3). This amendment to Rule 4-8.3 creates an exception to the duty to report misconduct of other lawyers and judges when a lawyer gains the information "while serving as a mediator or mediation participant if the information is privileged or confidential under applicable law." The addition to the Comment explains: "Generally, Florida statutes provide that information gained through a 'mediation communication' is privileged and confidential, including information which discloses professional misconduct occurring outside the mediation. However, professional misconduct occurring during the mediation is not privileged or confidential under Florida statutes."

Minimum trust account records (Rule 5-1.2(b)). Rule 5-1.2(b) was amended to require that the name or case number of the client appear in the memo area of a trust account check and specifies the information that must be kept regarding electronic funds transfers.

Electronic wire transfers from trust accounts (Rule 5-1.2(d)). This addition to Rule 5-1.2 limits electronic wire transfers from a lawyer's trust account to: "(1) money required to be paid to a client or third party on behalf of a client; (2) expenses properly incurred on behalf of a client, such as filing fees or payment to third parties for services rendered in connection with the representation; (3) money transferred to the lawyer for fees which are earned in connection with the representation and which are not in dispute; or (4) money transferred from one trust account to another trust account."

Pro hac vice appearances in Florida state courts by non-Florida lawyers (Comment to Rule 1-3.10). The new Comment to Rule 1-3.10 addresses what constitutes an "appearance" and how to calculate the number of appearances in any 365-day period; the Comment gives examples using specific dates of pro hac vice admission. It also points out that the rule's pro hac vice limits are "not applicable to appearances in federal courts sitting in Florida" and that "an appearance in a federal court sitting in Florida does not constitute an 'appearance' as contemplated by" Rule 1-3.10.

Maximum period of probation (Rule 3-5.1(c)). This amendment to Rule 3-5.1(c) increases the maximum length of a disciplinary probation from 3 years to 5 years.

Disciplinary revocation of license to practice (Rule 3-5.1(g)). This new rule provides for a "disciplinary revocation" of a lawyer's license to practice that would be "tantamount to disbarment" and would be for a minimum of 5 years.

Emergency suspension from practice (Rule 3-5.2(a)). This amendment allows for imposition of an emergency suspension when a lawyer is suspended or disbarred in a foreign jurisdiction.

UPL and form completion by nonlawyers (Rule 10-2.2). This new rule clarifies and defines "the the unlicensed practice of law when a nonlawyer is engaged in assisting self-represented litigants to complete legal forms." The Court modified the rule as proposed by the Bar "to eliminate language that would allow a nonlawyer to sell legal forms and kits."

Proposed rules that were REJECTED by the Court included:

Attorney's fees and subrogation/lien resolution (Rule 1.5). The Bar proposed that a lawyer be required to put in the attorney-client contract "an explanation of the scope of any subrogation or lien resolution services the lawyer will undertake at the conclusion of the primary matter." When "extraordinary subrogation or lien resolution services" were needed, with the client's consent the lawyer could have referred the client to someone outside the lawyer's law firm for these services, with that person or entity charging the client a separate fee (with the referring lawyer not sharing in that fee). The Court *rejected* the proposed rule and its commentary, making clear that it disagreed with the underlying premise. "After considering the concerns raised in the comment and the discussion at oral argument, we decline to adopt new subdivision (f)(4)(E). Indeed, we take this opportunity to clarify that lawyers representing a client in a personal injury, wrongful death, or other such case charging a contingent fee should, as part of the representation, also represent the client in resolving medical liens and subrogation claims related to the underlying case."

Attorney's services and fees in wrongful death matters requiring probate or guardianship filings (Comment to Rule 1.5). Along with rejecting the proposed lien-resolution rule, the Court *rejected* a proposed new provision to the Comment to Rule 1.5 that would have expressly stated that a lawyer handling a wrongful death matter in which an estate must be opened or a guardianship established may charge an additional fee for providing those services. The rejected Comment also would have identified "ancillary services such as estate planning, bankruptcy, financial planning, public benefit planning, tax planning, real estate transactions, and medicare set-asides" as not being part of the personal injury or wrongful death matter subject to the contingent fee schedule.

Temporary practice in Florida by out-of-state lawyers after a major disaster (Proposed Rule 1-3.12; Rule 4-5.5(c)). This would have authorized pro bono practice in Florida by out-of-state lawyers following a major disaster in Florida, and would have authorized out-of-state lawyers to temporarily practice in Florida following a major disaster in their home state. It also would have provided that temporary practice pursuant to Rule 1-3.12 does not constitute the unlicensed practice of law in Florida. The Court *rejected* these proposals. "This rule [1-3.12] would allow lawyers from other jurisdictions to practice in Florida on a limited basis following a natural disaster. Because we have concerns about how this rule would apply, we decline to adopt it. We also do not adopt proposed amendments to rule 4-5.5 (Unlicensed Practice of Law; Multijurisdictional Practice of Law), which would provide that lawyers authorized to practice law in another United States jurisdiction may provide legal services in Florida in accordance with rule 1-3.12."

Signing trust account checks (Proposed Rule 5-1.2(d)). The proposed new rule would have required that all trust accounts be signed by a lawyer, thus effectively eliminating the practice approved in Florida Ethics Opinion 64-40 (Reconsideration) of allowing a trusted non-lawyer employee of a lawyer to be a signatory on the lawyer's trust account. The proposed rule also would have prohibited lawyers from signing trust account checks in blank and from signing using a

signature stamp (or similar means). The Court *rejected* this proposed rule and referred the matter back to the Bar for further study. "Both the Bar and the Court received comments addressed to this proposal. In general, the comments assert that the proposed rule imposes a significant and disproportionate burden on lawyers who practice solo or in very small firms. We believe the commentors have raised some legitimate concerns. Accordingly, we decline to adopt subdivision (d) at this time, and instead refer the matter back to the Bar for additional study. In particular, the Bar should revise its proposal so as to accommodate the issues raised by solo practitioners and lawyers in small firms."

Supreme Court amends court rules to implement mandatory e-filing and e-mail service.

In companion opinions the Supreme Court amended and adopted various court rules to implement mandatory electronic filing of documents (e-filing) and electronic service (e-service) in proceedings in Florida trial and appellate courts. Highlights appear below.

In re: Amendments to the Florida Rules of Civil Procedure, the Florida Rules of Judicial Administration, the Florida Rules of Criminal Procedure, the Florida Probate Rules, the Florida Small Claims Rules, the Florida Rules of Juvenile Procedure, the Florida Rules of Appellate Procedure, and the Florida Family Law Rules of Procedure – Electronic Filing, __ So.3d ___ (Fla., No. SC11-399, 6/21/2012), 2012 WL 4936363. The Court amended and adopted rules in what it called "a significant and important step toward our goal of a fully electronic court system by transitioning from permissive to mandatory electronic filing (e-filing)." Key rules amended were Fla.R.Jud.Admin. 2.520 (Documents) and 5.525 (Electronic Filings). "Rule 2.520 provides in general terms that all documents filed in any court shall be filed by electronic transmission in accordance with rule 2.525. In turn, rule 2.525 provides the specific procedures for electronic filing." In the civil, probate, small claims, and family law divisions of the trial courts, as well as for appeals to the circuit courts in these categories of cases, mandatory e-filing is effective on April 1, 2013. In the criminal, traffic, and juvenile divisions of the trial courts, as well as for appeals to the circuit court in these categories of cases, mandatory e-filing is effective on October 1, 2013 (except as may be otherwise provided by administrative order). Finally, in the Supreme Court and in the district courts of appeal, mandatory e-filing is effective on October 1, 2012 (although clerks will not be required to electronically transmit the record on appeal until January 1, 2013). In all types of cases, however, "self-represented parties and self-represented nonparties, including nonparty governmental or public agencies, and attorneys excused from e-mail service under [Fla.R.Jud.Admin.] 2.516 will be permitted, but not required, to file documents electronically."

In re: Amendments to the Florida Rules of Judicial Administration, the Florida Rules of Civil Procedure, the Florida Rules of Criminal Procedure, the Florida Probate Rules, the Florida Rules of Traffic Courts, the Florida Small Claims Rules, the Florida Rules of Juvenile Procedure, the Florida Rules of Appellate Procedure, and the Florida Family Law Rules of Procedure – E-mail Service Rule, __ So.3d ___ (Fla., No. SC10-2101, 6/21/2012), 2012 WL 4936305. "The central rule adopted in this case is new [Fla.R.Jud.Admin.] 2.516 (Service of Pleadings and Papers). This rule was modeled after current [Fla.R.Civ.P.] 1.080 (Service of Pleadings and Papers) and includes many of the same provisions and requirements for service. However, new rule 2.516 provides that all documents required or permitted to be served on another party must be served by e-mail." Upon appearing in a proceeding, a lawyer must designate a primary e-mail address for receiving service. Thereafter, service on the lawyer must be made by e-mail. There are limited exceptions to this

requirement (e.g., a lawyer with no email or internet access may file a motion to be excused from the rule; pro se litigants are not required to use e-mail service). E-mail service is deemed complete when the e-mail is sent. Size limits on attachments and required language in the subject line of the e-mail are spelled out. Regarding implementation, in the civil, probate, small claims, and family law divisions of the trial courts, as well as in all appellate cases, e-mail service is mandatory effective September 1, 2012. In the criminal, traffic, and juvenile divisions of the trial court, e-mail service is mandatory effective October 1, 2013. The Court noted that "self-represented parties involved in any type of case in any Florida court, may, but are not required to, serve documents by e-mail" and that "[a]ttorneys excused from e-mail service are also not obligated to comply with the new e-mail service requirements."

Supreme Court grants Bar's motion to amend proposed advertising rules pending before the Court since July 2011.

In an unusual move, the Florida Bar filed a motion asking the Supreme Court to accept amendments to 2 proposed advertising rules that the Bar filed with the Court in July 2011. Oral argument on the previously-filed rules was scheduled for March 7, 2012. The proposed new amendments would prohibit lawyer ads from using actors portraying "authority figures," such as police officers and judges, who are acting as spokespersons for the advertiser. The term "authority figure" is not defined. On February 14, 2012, the Court granted the Bar's motion.

Supreme Court hears oral argument on proposed amendments to rules governing lawyer advertising, including websites.

In September 2012 the Supreme Court heard oral argument on an extensive set of *proposed* amendments to the lawyer advertising rules submitted by the Florida Bar. Among other things, the proposed rules would subject lawyer and law firm websites to regulations that govern other forms of lawyer advertising. The new Rules and their titles are: Rule 4-7.1 (Application of Rules); 4-7.2 (Required Content); 4-7.3 (Deceptive and Inherently Misleading Advertisements); 4-7.4 (Potentially Misleading Advertisements); 4-7.5 (Unduly Manipulative or Intrusive Advertisements); 4-7.6 (Presumptively Valid Content); 4-7.7 (Payment for Advertising and Promotion); 4-7.8 (Direct Contact with Prospective Clients); 4-7.9 (Evaluation of Advertisements); 4-7.10 (Exemptions From the Filing and Review Requirement); 4-7.11 (Firm Names and Letterhead); 4-7.12 (Lawyer Referral Services); and 4-7.13 (Lawyer Directory). Significant proposed changes are summarized below.

Proposed Rule 4-7.1 (Application of Rules). The advertising rules would apply to "all forms of communication in any print or electronic forum," including "websites, social networking, and video sharing media." For websites of multistate law firms, the proposed 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 would apply to all lawyers, whether admitted in Florida or not, "who advertise that the lawyer provides legal services in Florida or who target advertisements for legal employment at Florida residents." As to ads in "national media" (e.g., cable television), the rules would not apply "if the disclaimer 'cases not accepted in Florida' is plainly noted in the advertisement."

Proposed Rule 4-7.2 (Required Content). All ads must have the name of the lawyer, law firm, lawyer referral service, or lawyer directory responsible for the ad. If the cases 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 current rules.)

Proposed Rule 4-7.3 (Deceptive and Inherently Misleading Advertisements). This 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 proposed Rule permits.

References to past results are permitted if "objectively verifiable." Per the Comment, 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 current Rule requiring all non-lawyer spokespersons to be identified as such is 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 have 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."

For the first time in many years, the proposed Rule generally allows testimonials. However, it does not permit testimonials: "(A) regarding matters on which the person making the testimonial is unqualified to evaluate; (B) that is not the actual experience of the person making the testimonial; (C) that is not representative of what clients of that lawyer or law firm generally experience; (D) that has been written or drafted by the lawyer; (E) in exchange for which the person making the testimonial has been given something of value; or (F) that does not include the disclaimer that the prospective client may not obtain the same or similar results." Per the proposed Comment, a "testimonial" is "a personal statement, affirmation, or endorsement by any person other than the advertising lawyer or a member of the advertising lawyer's firm regarding the quality of the lawyer's services or the results obtained through the representation."

Finally, ads may not contain an advertising lawyer's "judicial, executive or legislative branch title with or without modifiers." (The proposed 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.").

Proposed Rule 4-7.4 (Potentially Misleading Advertisements). The proposed rules, for the first time, explicitly regulate "potentially misleading" ads. Significantly, the proposed Rule provides that an ad may be rendered permissible through the inclusion of "information or statements that adequately clarify the potentially misleading issue." The non-exclusive list of potentially misleading 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."

Proposed Rule 4-7.5 (Unduly Manipulative or Intrusive Advertisements). This 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 the voice of image of a "celebrity" (except a local announcer who regularly records ads and does not endorse the advertiser); or (c) "offers consumers an economic incentive to employ the lawyer or review the lawyer's advertising" (except for discounted fees). A late-filed proposed amendment would prohibit lawyer advertisements from using actors portraying "authority figures," such as police officers and judges, who are acting as spokespersons for the advertiser. The term "authority figure" is not defined.

Neither the proposed Rule nor its Comment attempt to define what would be considered "intrusive" or "unduly intrusive."

Proposed Rule 4-7.6 (Presumptively Valid Content). Certain listed information is "presumed not to violate" the advertising rules. These items are almost identical that those in the current Rrules. One notable addition allows inclusion of membership in and positions held in *any* state bar (the current Rule is limited to Florida Bar membership and positions held).

Proposed Rule 4-7.7 (Payment for Advertising and Promotion). This continues the prohibitions against (a) a lawyer 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) a lawyer giving anything of value in exchange for a recommendation of the lawyer's services. A new prohibition is added as subdivision (c): "A lawyer may not permit a nonlawyer to pay all or a part of the cost of an advertisement by that lawyer."

Proposed Rule 4-7.8 (Direct Contact with Prospective Clients). This continues to prohibit most in-person solicitation. Regulations on direct mail and email communication with prospective clients would be extended to *all* written communications seeking professional employment (not just "unsolicited" ones as provided for currently). Most of the requirements for direct mail communications remain unchanged. The most significant change is that the word "Advertisement" must appear on each page of the communication (instead of only the first page).

Proposed Rule 4-7.9 (Evaluation of Advertisements). This requires that all ads (except websites) be filed with the Bar 20 days before their first use. (Currently pre-filing is required only for TV and radio ads.) The proposed Rule prohibits the filing of "an entire website" for review, but a lawyer "may obtain an advisory opinion concerning the compliance of a specific page, provision, statement, illustration, or photograph on a website," even though these are not required to be filed.

Currently the Bar's finding that an ad is in compliance is binding on the Bar in a grievance proceeding (absent a misrepresentation not apparent from the face of the ad). The proposed Rule would allow the Bar to retract a finding of compliance at its pleasure, even when the underlying rules have not changed. Continued dissemination of the no-longer-approved ad would subject the advertiser to discipline. The proposed Rule creates a limited safe harbor "take-down" period for websites. 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.

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

Proposed Rule 4-7.10 (Exemptions From the Filing and Review Requirement). The exemptions from the filing-and-review requirement remain substantially unchanged. A "written or recorded communication requested by a prospective client" is exempt. Although the

communication itself is exempt from filing, the *content* of any such requested communication is subject to the advertising rules. (This is a change from the current rule, which provides that the advertising rules do not apply to requested information.) Websites are not required to be filed.

Proposed Rule 4-7.11 (Firm Names and Letterhead). This leaves the standards governing firm names and letterhead unchanged. The proposed Comment clarifies 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."

Proposed Rule 4-7.12 (Lawyer Referral Services). This imposes a new requirement on lawyer referral services by mandating that all lawyer 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 affirmative "lawyer referral service" disclosure currently required.)

Proposed Rule 4-7.13 (Lawyer Directory). For the first time, the proposed Rule recognizes a "lawyer directory," which is 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." (Traditional telephone directories, and voluntary bar associations that list members on a website or in a publication do not fall within the 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 Florida Bar with a list of participating lawyers.

Supreme Court's Commission on Professionalism considers adopting formal procedures to enforce professionalism standards.

The Supreme Court's Commission on Professionalism considered pursuing adoption of formal procedures designed to enforce standards of professionalism among Florida lawyers. The Commission held a public hearing at the Bar's 2012 Annual Meeting following publication for comment of a "Proposed Model for Resolving Professionalism Complaints" in the May 15, 2012, *Florida Bar News*. Among other things, the "Proposed Model for Resolving Professionalism Complaints" would create a formal intake system for complaints to be operated through the Bar's existing Attorney Consumer Assistance and Intake Program ("ACAP"). Complaints about lawyers' professionalism could be resolved through involvement of ACAP staff attorneys or referral to a local professionalism panel in the offending lawyer's area.

CASES AND ETHICS OPINIONS (BY SUBJECT)

ADVERTISING

Supreme Court grants Bar's motion to amend proposed advertising rules pending before the Court since July 2011 and hears oral argument on proposed rules.

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

Supreme Court suspends, rather than reprimands, 2 lawyers for misconduct during their departure from their former law firm. *Florida Bar v. Winters*, __ So.3d ___, 37 Fla.L.Weekly S545 (Fla., Nos. SC10-1332, SC10-1333, 9/6/2012), 2012 WL 3853528.

See discussion in "Disciplinary Proceedings" section.

Supreme Court affirms ruling that law limiting public adjusters' communication with potential clients is unconstitutional restriction on commercial speech. *Atwater v. Kortum*, 95 So.3d 85 (Fla. 2012).

A public adjuster challenged F.S. 626.854(6) (2008) as an unconstitutional restriction on commercial speech. The statute provides in pertinent part: "A public adjuster may not directly or indirectly through any other person or entity initiate contact or engage in face-to-face or telephonic solicitation or enter into a contract with any insured or claimant under an insurance policy until at least 48 hours after the occurrence of an event that may be the subject of a claim under the insurance policy unless contact is initiated by the insured or claimant."

The trial court ruled that the statute regulated conduct rather than speech and was constitutional. The First DCA disagreed and reversed. *Kortum v. Sink*, 54 So.3d 1012 (Fla. 1st DCA 2010). The court ruled that the statute regulated commercial speech, not conduct, and applied the *Central Hudson* test (*Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York*, 447 U.S. 557 (1980)).

The Supreme Court affirmed. The statute met the first 3 prongs of the 4-part *Central Hudson* test but failed to satisfy the fourth (regulation must not be more extensive than necessary to serve its substantial governmental interest). The Department of Financial Services "failed to demonstrate 'that prohibiting property owners from receiving any information from public adjusters for a period of 48 hours is justified by the possibility that some public adjuster may unduly pressure traumatized victims or otherwise engage in unethical behavior.' *Kortum*, 54 So.3d at 1020."

Solicitation in a business context is protected commercial speech, the Court noted. See, e.g., *Edenfield v. Fane*, 507 U.S. 761 (1993). "Because section 626.854(6) regulates commercial speech – not merely conduct – the First District was correct in applying the test from *Central Hudson* to evaluate the constitutionality of the statute. The Department has failed to present any argument showing that the First District erred in concluding that the challenged restriction is more extensive than necessary to serve the State's interests."

ATTORNEY-CLIENT RELATIONSHIP

Fifth DCA indicates that lawyer's motion to withdraw should be granted where attorney-client relationship has become "adversarial," stressing personal nature of the relationship. *Bowin v. Molyneaux*, 100 So.3d 1197 (Fla. 5th DCA 2012).

Lawyer moved to withdraw after disagreements with clients over the scope of the representation and the fee arrangements grew into an "adversarial" relationship. The court orally denied the motion. While awaiting a written order, Lawyer filed an amended motion to withdraw that included a supporting affidavit. The court deferred ruling pending an evidentiary hearing. Meanwhile Lawyer petitioned the Fifth DCA for a writ of certiorari.

The appellate court denied the petition as premature but suggested that the motion be granted. After quoting from the *Fisher v. State*, 248 So.2d 479 (Fla. 1971), regarding when withdrawal should be permitted in civil cases, the court indicated that the standard had been met in the instant case: "At the time the trial court denied [Lawyer]'s first motion to withdraw, the [clients] had received due notice of [Lawyer]'s intent to withdraw from the case. No trial date had been scheduled and there was ample time for the [clients] to obtain substitute counsel. Consequently, at that time it appears there was no reason for the trial court to believe that allowing [Lawyer] to withdraw would interfere with its orderly functioning." The court concluded by stressing the personal nature of the attorney-client relationship, stating that it requires trust and confidence on the part of each party.

Public Defender's Office representing ward in Baker Act case should not have been discharged on claim that guardian's lawyer could represent ward. *Auxier v. Jerome Golden Center for Behavioral Health*, 85 So.3d 1164 (Fla. 4th DCA 2012).

The Public Defender's office (the "PD") was appointed to represent the ward in a Baker Act proceeding. At the hearing the guardian's lawyer orally moved to discharge the PD. "The magistrate accepted the argument that because the patient had a plenary guardian, her rights had been transferred to her guardian and counsel for the guardian would represent her in the Baker Act proceedings. The patient was not present at the hearing and she did not have independent counsel." The patient/ward was committed for 30 days.

The Fourth DCA quashed the order discharging the PD. F.S. 394.467(4) requires that the PD be appointed to represent the patient in a civil commitment proceeding unless the patient is represented by independent counsel. The guardian's lawyer is *not* independent counsel; the guardian's lawyer represents the guardian, not the ward. The ward is "entitled to representation by independent counsel, free from any conflict of interest."

Per Third DCA, "traditional conflict model" is inadequate to resolve disqualification motions in class action context. *Broin v. Phillip Morris Companies, Inc.*, 84 So.3d 1107 (Fla. 3d DCA 2012).

See discussion in "Conflicts of Interest" section.

Suspending rather than admonishing lawyer, Supreme Court broadly construes rule against limiting malpractice liability to client. *Florida Bar v. Head*, 84 So.3d 292 (Fla. 2012).

See discussion in "Disciplinary Proceedings" section.

CANDOR TOWARD THE TRIBUNAL

Court abused discretion in dismissing complaint based on alleged fraud on the court where there was no "fraud." *Rocka Fuerta Construction Inc. v. Southwick, Inc.*, __ So.3d ___ (Fla. 5th DCA, No. 5D11-2994, 12/28/2012), 2012 WL 6719470.

Rocka and Southwick had a dispute over construction projects. Their settlement agreement required Southwick to pay Rocka in 2 installments of $4000. Southwick's check for the first payment was due at execution of the settlement agreement, but was dishonored. Rocka resubmitted it to the bank and it was dishonored again.

Rocka sued Southwick for $42,835, the amount it originally claimed that it was owed. Rocka did not attach or refer to the settlement agreement in its complaint. Southwick moved for sanctions alleging that Rocka attempted to perpetrate a fraud on the court. Southwick contended that Rocka acted in bad faith by not disclosing the settlement agreement to the court. Rocka responded that there was no valid settlement agreement due to Southwick's failure to make the required payments. The court "dismissed Rocka's complaint with prejudice as a sanction for what it believed was Rocka's attempt to perpetrate a fraud on the court."

The Fifth DCA reversed. Dismissal of a complaint is "strong medicine" warranted only where the party's conduct is "correspondingly egregious." This was not such a case. "Rocka's failure to refer to or seek to rescind the Settlement Agreement is simply not fraud. Instead, if anything, the Settlement Agreement's effect on Rocka's claim is more appropriately raised by Southwick as an affirmative defense." (Footnote and citation omitted.) "Rocka disclosed the Settlement Agreement to its attorneys, and there is nothing in the record to suggest that Rocka, or its attorneys, engaged in what Southwick contends was a 'fraud on the court.'"

Third DCA discusses need for candor to the court in ex parte proceedings. *Velasquez v. Ettenheim*, 89 So.3d 981 (Fla. 3d DCA 2012).

Appellee foreclosed a mortgage on one of two adjacent lots owned by Appellants and obtained a judgment for appellate attorney's fees of over $21,000. The other lot (in which Appellee had no interest) was sold at auction and produced surplus proceeds. Appellee sought to garnish the Clerk of Court to satisfy his fee judgment. The Clerk moved to dissolve the writ of garnishment, stating that the "tax collector had identified twenty-two lienholders, including five governmental lienholders, entitled to notice and (potentially, based on priority and compliance with applicable

law) disbursement." At a hearing not attended by any of the lienholders, the court granted Appellee's motion for disbursement.

The Third DCA reversed, noting that Appellee "led the trial court into error." There was a "complete departure from the statutory procedures for surplus proceeds as orchestrated by" Appellee. The court emphasized the need for candor to the tribunal in these types of ex parte situations: "The appellee's arguments here no doubt seemed logical to a trial court considering a motion with no opposition present. Candor to the tribunal, however, would have included copies of the pertinent statutes, the applicable rule, and the reported case of *DeMario v. Franklin Mortgage & Investment Co., Inc.*, 648 So.2d 210 (Fla. 4th DCA 1994)."

COMMUNICATION

Supreme Court holds that physician-patient confidentiality law bars ex parte meetings between nonparty treating physician and lawyer hired by her insurer. *Hasan v. Garvar*, __ So.3d ___ (Fla., No. SC10-1361, 12/20/2012), 2012 WL 6619334.

Exercising its conflict jurisdiction, the Supreme Court reviewed and quashed the decision in *Hasan v. Garvar*, 34 So.3d 785 (Fla. 4th DCA 2010). Hasan sued dentist Garvar alleging medical malpractice. Hasan later sought treatment from another dentist, Schaumberg. Although not a party to the suit, Schaumberg was scheduled for deposition. The same carrier insured both Garvar and Schaumberg, but hired different counsel for each. Schaumberg's lawyer planned to have an ex parte pre-deposition conference with her. Hasan learned of this and moved for protective order. The court denied the motion. The Fourth DCA approved the trial court's action, reasoning that the ex parte conference was permissible because the order prohibited Schaumberg and her lawyer from discussing privileged medical information about Hasan and because Schaumberg was meeting with the lawyer hired by the insurer to represent *her*, not with Garvar's lawyer.

On review in the Supreme Court, Hasan argued that the physician-patient confidentiality statute (F.S. 456.057(8) (2009)) prohibits such ex parte conferences "even if there is a verbal representation not to discuss privileged information." Garvar, on the other hand, contended "that to prohibit an ex parte meeting between a nonparty treating physician and counsel provided by the insurance company would violate the physician's common law right to counsel and First Amendment right to freedom of speech."

The Supreme Court sided with Hasan. "At issue here is whether the patient confidentiality statute prohibits a nonparty treating physician from having an ex parte meeting with an attorney selected and provided by the defendant's insurance company. We hold that the physician-patient confidentiality statute, section 456.057, prohibits such meetings and we quash the decision of the Fourth District." An ex parte meeting "is prohibited irrespective of whether the attorney and physician claim they will discuss only non-privileged matters."

The Court rejected Garvar's First Amendment and right to counsel arguments because the statute "allows for such meetings if a physician becomes a party to a legal action and provides for disclosures if properly protected."

Chief Justice Polston, joined by Justice Canady, vigorously dissented.

Order broadly restricting a party from engaging in out-of-court communications about the case is reversed. *Romero v. Erik G. Abramson, P.A.*, __ So.3d ___, 37 Fla.L.Weekly D1655 (Fla. 2d DCA, No. 2D11-5037, 7/11/2012), 2012 WL 2813988.

Plaintiff claimed that Law Firm owed money to him and his medical clinic. Law Firm, however, eventually sued Plaintiff. Things grew contentious, and Law Firm twice moved for a temporary injunction to prevent Plaintiff from "engaging in activities related to dispersing defamatory information about the firm," such as picketing outside the Firm's office and posting derogatory comments on the Internet. The court denied Law Firm's motions, but did issue an order purporting "to prevent [Plaintiff] from speaking about the case in the future to anyone other than court personnel."

The Second DCA reversed the order. Although styled as a case management order, the order effectively was an injunction. Citing *Forest v. Citi Residential Lending, Inc*., 73 So.3d 269, 275-76 (Fla. 2d DCA 2011), the court ruled that the order was "an unauthorized prior restraint on speech" rather than "a proper exercise of the trial court's authority to control the dissemination of information gleaned through the court's process or as a protection of that process." The order went beyond information learned in discovery, instead broadly prohibiting any communication about any issues involved in or related to the case with any person outside the court process. The trial court failed to make the findings that would be necessary to support such a limitation on protected speech.

Supreme Court criticizes lawyer for disregarding "spirit" of rules governing post-trial communication with jurors. *Van Poyck v. State*, 91 So.3d 125 (Fla. 2012) (revised opinion).

Defendant was convicted of a 1987 murder and sentenced to death. In 2010 Defendant got affidavits from 4 trial jurors indicating that, had they known that Defendant was not the triggerman, they would have recommended a life sentence instead of death. Defendant claimed that these affidavits were newly-discovered evidence entitling him to a new trial.

The Supreme Court affirmed the denial of the postconviction claim. The Court also criticized the conduct of Defendant's counsel in using these affidavits. The affidavits were obtained without court permission, which is required by Rule 4-3.5(d)(4) and Fla.R.Crim.P. 3.575. "[A]lthough defense counsel was not representing [Defendant] at the time these affidavits were obtained and thus may not have violated rule 4-3.5(d)(4), counsel's decision to later use these affidavits to support this claim constitutes a disregard for the spirit of the rule. As the circuit court cogently explained: 'In this case, though defense counsel states [Defendant] was not represented at the time these affidavits were collected, counsel, as a member of The Florida Bar, still utilized affidavits in crafting the present motion. Though it might not be a technical violation, the actions of [Defendant's] attorney nonetheless constitute a disregard for the spirit of the rule. A lawyer may not simply stick his head in the sand when his client presents juror affidavits collected after a guilty verdict was rendered and simply present them to the Court. Though a lawyer has a duty to zealously advocate for a client, this duty must be tempered by the lawyer's other professional obligations. A lawyer must always keep in mind the broader duty to the criminal justice system which can never be forsaken in the interest of zealous advocacy.'"

Criminal conviction reversed due to judge's ex parte communication with the prosecution. *Howell v. State*, 80 So.3d 441 (Fla. 4th DCA 2012).

Defendant contended that his conviction should be reversed due to the trial judge's ex parte communication with an assistant state attorney about the State's motion in limine. Agreeing, the Fourth DCA reversed and remanded for a new trial. "[T]he trial court erred by engaging in an ex parte communication in which the trial judge indicated how he would rule on the State's motion in limine to preclude the defendant from claiming a mental health defense."

Court erred in denying party's motion to conduct post-trial interviews based on alleged concealment of material information during voir dire; concurrence calls for adoption of public record juror information search procedure. *Borroto v. Garcia*, __ So.3d ___, 37 Fla.L.Weekly D2122 (Fla. 3d DCA, Nos. 3D11-2678, 3D11-1880, 9/5/2012), 2012 WL 3870861.

Garcia was a defendant in a personal injury suit. During voir dire counsel questioned prospective jurors about having been injured in any way. The court clarified that this included *any* injuries, regardless of who caused them. After an adverse verdict Garcia moved for a new trial and to interview jurors, alleging that the defense's investigation concluded that "two jurors had failed to reveal prior involvement in auto accidents and had filed PIP claims." The motions were denied.

The Third DCA reversed. "'A juror interview is warranted if the moving party demonstrates reasonable grounds to believe that nondisclosure of relevant and material information occurred.'" (Citation omitted.) Garcia met this burden and the trial court abused its discretion in denying his motion. Garcia "provided the court with sufficient facts that tended to demonstrate that two of the jurors who actually served in the case concealed material information during voir dire. . . . Mr. Garcia was entitled to conduct juror interviews and inquire whether the identified jurors concealed relevant and material information."

A concurring opinion discussed the desirability of courts establishing procedures in appropriate cases for public records searches for litigation history of prospective jurors.

Court properly denied motion for post-trial juror interviews because movant failed to sufficiently inquire during voir dire. *Rodgers v. After School Programs, Inc.*, 78 So.3d 42 (Fla. 4th DCA 2012).

After a defense verdict Plaintiffs' lawyer unsuccessfully moved for leave to interview several jurors on the ground that they "concealed prior involvement with the court system during voir dire." The Fourth DCA affirmed.

In order to obtain a post-trial juror interview on these grounds, a movant must meet the 3-part test of *De La Rosa v. Zeqeira*, 659 So.2d 239, 241 (Fla. 1995): "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." Analyzing the questioning by Plaintiffs' lawyer during voir dire, the appeals court concluded: "[P]laintiffs were not entitled to the interviews because the jurors' failure to disclose the information, if any, were attributable to the plaintiffs' lack of diligence in uncovering the information during voir dire."

CONFIDENTIALITY AND PRIVILEGES

Finding additional violation and imposing harsher discipline than sought by Bar, Supreme Court suspends lawyer who breached client confidentiality. *Florida Bar v. Knowles*, 99 So.3d 918 (Fla. 2012).

See discussion in "Disciplinary Proceedings" section.

Supreme Court holds that physician-patient confidentiality law bars ex parte meetings between nonparty treating physician and lawyer hired by her insurer. *Hasan v. Garvar*, __ So.3d ___ (Fla., No. SC10-1361, 12/20/2012), 2012 WL 6619334.

See discussion in "Communication" section.

Court erred in ruling that all of client's communications with her lawyer were not privileged as a matter of law because non-client was present for 60-65% of them. *Witte v. Witte*, __ So.3d ___, 37 Fla.L.Weekly D786 (Fla. 4th DCA, No. 4D11-3520, 4/4/2012), 2012 WL 1108539.

Wife was deposed in a divorce case. Wife and her lawyer refused to answer questions, asserting attorney-client privilege. After a non-evidentiary hearing the trial court ruled that there was a voluntary wavier of the privilege because "60-65 percent of [Wife's] communications with her counsel occurred in the presence of Wife's daughter and some communications occurred in the presences of Wife's son-in-law."

The Second DCA quashed the order and remanded the case. F.S. 90.502(1)(c) provides: "A communication between lawyer and client is 'confidential' if it is not intended to be disclosed to third persons other than: 1. Those to whom disclosure is in furtherance of the rendition of legal services to the client. 2. Those reasonably necessary for the transmission of the communication." Wife, who was 74 years old and in poor health, argued that the disclosures of otherwise-confidential communications to the daughter and son-in-law were reasonably necessary for transmission of the communications. Noting several out-of-state decisions construing similar privilege provisions, the appeals court stated that "[s]uch decisions suggest that the presence of a close family member does not, in and of itself, waive the attorney-client privilege."

The court decided that the disputed issue of whether Wife waived the privilege "cannot be determined as a matter of law based on the percentage of time a third party was present." The court remanded for a factual determination of "whether the wife's communications with counsel in the presence of her daughter and son-in-law were intended to remain confidential as to other third parties, and whether the disclosure to the daughter and son-in-law, within the factual circumstances presented by this case, was reasonably necessary for the transmission of the communications."

Court erred in disqualifying wife's counsel in divorce case based on receipt of confidential information allegedly improperly obtained from husband's computer regarding different lawsuit. *Strawcutter v. Strawcutter*, 101 So.3d 417 (Fla. 5th DCA 2012).

See discussion in "Conflicts of Interest" section.

Third DCA addresses standard for disqualification when lawyers receive inadvertently disclosed confidential information. *Moriber v. Dreiling*, 95 So.3d 449 (Fla. 3d DCA 2012).

See discussion in "Conflicts of Interest" section.

Certiorari does not lie to prevent in camera review of documents listed on privilege log. *Bennett v. Berges*, 84 So.3d 373 (Fla. 4th DCA 2012).

Petitioners and Respondents had a probate dispute. Respondents subpoenaed Petitioners' former lawyer for production of documents. Petitioners objected, asserting attorney-client privilege. Respondents moved to compel production. The former lawyer prepared a privilege log. The court ordered that the documents in the privilege log be produced for an in camera inspection. Seeking to quash that order, Petitioners sought a writ of certiorari.

The Fourth DCA denied the petition. Although a court's order erroneously compelling discovery of attorney-client privileged materials is reviewable by certiorari, in this case the order did *not* compel production to the opposing party – it only required Petitioners to produce the documents for an in camera inspection by the judge. The petition was premature.

Court erred in ordering alleged bad faith production of insurer's claims file materials before coverage dispute was resolved. *State Farm Florida Ins. Co. v. Aloni*, __ So.3d ___, 37 Fla.L.Weekly D2737 (Fla. 4th DCA, No. 4D11-4798, 11/28/2012), 2012 WL 5933001.

In 2010 Aloni filed a homeowners insurance claim with State Farm for damage allegedly caused by a 2005 hurricane. State Farm sent a reservation of rights letter 12 days later stating that it would investigate the claim. Aloni sued and sought production of the complete claims file. State Farm raised attorney-client privilege and work product objections. Moving to compel production, Aloni argued that State Farm was improperly withholding documents created before the denial of his claim and not in anticipation of litigation. He also argued that work product protection did not attach to portions of the file generated in the ordinary scope of business. State Farm responded that whether the claim was covered was a disputed issue because Aloni did not report the damage for 4 1/2 years, and "while the coverage issue is pending, the claims file is not discoverable." The court ordered production of certain activity log notes, internal emails, and photos.

The Fourth DCA granted State Farm's petition for a writ of certiorari. An insurer's claim file ordinarily "constitutes work product and is protected from discovery prior to a determination of coverage." Where the coverage issue is unresolved at the time of the insurer's objection to a request for discovery of its claim file, the court errs if it overrules the insurer's objection. The insured, however, may ask the court to inspect the file in camera "'to ensure that each [withheld

document] properly meets the specific criteria of the work product and/or attorney-client privilege.'" (Citation omitted.) Additionally, "a party may obtain privileged work product documents by making the required showing of a good cause exception to the work product privilege under" Fla.R.Civ.P. 1.280(b)(4). The court concluded: "In this case, where the coverage issue is in dispute and has not been resolved, the trial court departed from the essential requirements of the law in compelling disclosure of State Farm's claim file materials without the requesting party proving need and the inability to obtain the substantial equivalent of this material without undue hardship."

Grocery store's incident reports prepared after customer's slip and fall are protected by work product privilege. *Publix Super Markets, Inc. v. Anderson*, 92 So.3d 922 (Fla. 4th DCA 2012).

After a customer slipped in a Publix supermarket, she and her husband sued the store. They sought discovery of "any and all reports concerning the incident." Publix identified 2 incident report documents ("a report of the incident by the assistant store manager and a 'customer incident witness statement' of a customer service staff associate") on its privilege log but asserted that they were protected from disclosure as work product. The court ordered production.

The Fourth DCA quashed the order requiring production of the incident reports. "Both the incident report and the witness statement state that they were 'prepared in anticipation of a claim or litigation' and are 'confidential.' We agree with the observation of the fifth district that such items are obviously documents prepared in anticipation of litigation." (Citation omitted.) Publix met its burden of showing that the incident reports were prepared in anticipation of litigation, and Plaintiffs failed to demonstrate that they were unable to obtain the "substantial equivalent of the material by other means," such as depositions." See Fla.R.Civ.P. 1.280(b)(3).

Court erred in ordering production of information gathered in risk management investigation over work product objections. *Heartland Express, Inc., of Iowa v. Torres*, 90 So.3d 365 (Fla. 1st DCA 2012).

Plaintiff sued for alleged negligence arising from a traffic accident. Plaintiff moved to compel Defendant's corporate representative to answer certain questions asked at deposition. Defendant objected on work product privilege grounds. The court granted the motion to compel.

The First DCA granted Defendant's for a writ of certiorari quashed the order as to 4 of the 10 questions. "Information received by attorneys prepared in anticipation of trial by investigators or non-attorneys has been determined to qualify for work-product protection. . . . Work-product protection also extends to information gathered in an investigation conducted in anticipation of litigation by corporate non-attorney employees, including employees of a corporation's risk management department. . . . It is not necessary that a lawsuit be filed for information gathered in an accident investigation to qualify for work-product protection." (Citations omitted.)

Several questions "sought information gathered in the course of the risk manager's investigation of the accident" or "sought information related to the preventability of the accident, which is information that [Defendant] could have obtained only through its risk management investigation." One question "requested that the risk manager disclose whether his investigation of the accident revealed the speed at which [Defendant]'s driver was traveling at the time of the accident." Because the information sought would require Defendant to disclose information

gathered in the course of the investigation by its risk manager in anticipation of litigation, and because Plaintiff made no showing of need or undue hardship, the order compelling disclosure was a departure from the essential requirements of law.

Court erred in allowing discovery of defense counsel's billing records to support *plaintiff's* claim for fee award. *Estilien v. Dyda*, 93 So.3d 1186 (Fla. 4th DCA 2012).

Plaintiff sued Defendant for injuries from an auto accident. After a favorable verdict Plaintiff moved for fees under F.S. 768.79 based on Defendant's rejection of an offer of settlement. Because Plaintiff's lawyer did not keep time records, in order to support his claim for fees Plaintiff sought to discover the billing records of *Defendant's counsel*. The court ordered production of the billing records (with privileged information to be redacted).

The Fourth DCA quashed the order. "We hold that where the billing records of opposing counsel are sought solely for the purpose of supporting a claim for attorney's fees, '[t]he party seeking production must establish that the requested material is actually relevant to a disputed issue, that the records sought are needed to prepare for the attorney's fee hearing, and that substantially equivalent material cannot be obtained from another source.' [Citation omitted.]." The court noted that billing records "should generally be protected as work product." The failure of Plaintiff's lawyer to keep billing records was an insufficient basis for ordering production of defense counsel's records. Further, the time defense counsel spent defending the case was not shown to be relevant to the time Plaintiff's lawyer expended on his case, "nor has the need for such discovery been demonstrated. See Fla.R.Civ.P. 1.280(b)(1)." In short, the trial court erred in ordering production of the billing records "without a showing of relevancy, need, and undue hardship obtaining the information elsewhere. See Fla.R.Civ.P. 1.280(b)(3)."

CONFLICTS OF INTEREST (INCLUDING DISQUALIFICATION)

Supreme Court construes rule of professional conduct regulating attorney-client business transactions in disbarring lawyer. *Florida Bar v. Doherty*, 94 So.3d 443 (Fla. 2012).

Lawyer provided legal services, financial planning, and investment services to his clients, including an elderly couple. After the husband died, Lawyer continued to provide investment services to the widow. On the client's behalf Lawyer applied to buy annuities from a subsidiary of Conseco Insurance Company. Lawyer did *not* tell the client that he owed money to Conseco. Conseco claimed more than $86,000 from Lawyer under terms of prior commission sales. That dispute was settled by an agreement providing that Lawyer would owe the full amount of the debt to Conseco if Lawyer made no commissionable sales of Conseco products within a certain period. The client died before any sales to her were completed.

Lawyer prepared a will for the client naming himself as personal representative and as successor trustee to an existing trust, and giving him "final and uncontestable authority to determine whether certain estate planning methods the client effectuated were successful." Lawyer also prepared 2 new trusts for client, with Lawyer named as successor trustee for both trusts. For one of

the trusts Lawyer was granted sole discretion to select the annuities that would be purchased – but in reality, and unknown to the client, Lawyer could sell only Conseco-related financial products.

Lawyer was charged with violating the general conflict of interest rule (Rule 4-1.7(a)(2)) and the rule regulating business transactions with clients (Rule 4-1.8(a)). The referee recommended that Lawyer be found guilty of both charges. The Supreme Court agreed and disbarred Lawyer.

The Court rejected Lawyer's contention that Rule 4-1.8(a) did not apply to his dealings with his client: "We hold that the sale of annuities to a client in the context presented here is a business transaction and [Lawyer] was required to comply with rule 4-1.8(a)." A lawyer's involvement in a business transaction with a client violates the rule unless the lawyer makes the written disclosures required by the rule; Lawyer did not make those disclosures.

Lawyer also argued that Rule 4-1.8(a) did not apply because he was not a principal to the business transaction – the seller was Conseco and the buyer was the client. The Court disagreed. Although the rule itself does not identify the types of transactions to which it applies, the Comment references a lawyer who "*participates in a business, property, or financial transaction* with a client." (Emphasis by Court.) The Court concluded that "a lawyer providing financial planning services to a client is subject to the rule prohibiting a lawyer from engaging in a business transaction with a client unless the lawyer makes the required disclosures in writing."

Per Supreme Court, public defender's certification of conflict does not automatically shift representation to RCC, but RCC has no standing to object to P.D.'s motion to withdraw. *Johnson v. State*, 78 So.3d 1305 (Fla. 2012).

Resolving a conflict between DCAs, the Supreme Court concluded that: (1) a public defender's certification of conflict does not by itself shift the representation to the Office of Criminal Conflict and Civil Regional Counsel ("RCC"); and (2) as a non-party, the RCC has no standing to object to the public defender's conflict-based motion to withdraw.

Florida Bar Board of Governors concludes that criminal plea offers conditioned on waivers of ineffective assistance of counsel and prosecutorial misconduct are unethical. Florida Ethics Opinion 12-1.

See discussion in "Ineffective Assistance of Counsel" section.

Lawyer working for law firm as outsourced independent contractor not "associated" with firm for purposes of conflicts imputation. *Brown v. Fla. Dept. of Highway Safety and Motor Vehicles*, 2012 WL 4758150 (N.D. Fla., No. 4:09-cv-171-RS-CAS, 10/5/2012).

Lawyer worked on a case as an Assistant Attorney General. After leaving that position she began working on matters for Law Firm. The Lawyer-Law Firm relationship "was not a typical associate relationship. [Lawyer] was to work from home preparing summary-judgment responses on specific cases as assigned. There was some prospect that in the future [Lawyer] might also draft complaints. [Lawyer] was to be paid a set hourly rate without the health and retirement benefits available to attorneys employed at the firm's offices. The firm and [Lawyer] did not address how

long the relationship would last and did not define the relationship with precision. This was a relationship of indefinite duration, terminable at will by either side, with no expectation that [Lawyer] would ever have client contact or responsibility for cases beyond drafting papers for review by another attorney."

Law Firm was representing a client in the same case on which Lawyer had represented the Department of Highway Safety and Motor Vehicles while with the Attorney General's Office. The Department moved to disqualify Law Firm based on its relationship with Lawyer. The U.S. District Court denied the disqualification motion, concluding that Lawyer was not "associated" with Law Firm as required by the rules imputing conflicts of interest among lawyers.

It was undisputed that Lawyer could not work on the case for Law Firm and that she could not use or reveal confidential information to her former client's disadvantage. See Rule 4-1.9. The court noted that "screening" a disqualified lawyer would not prevent imputation of a conflict in a private firm under Florida Bar rules; thus, the question presented was whether Lawyer's conflict was imputed to Law Firm under Rule 4-1.10(b), which "addresses the imputed disqualification of an entire firm when it hires an attorney who is disqualified from working on a case under Rule 4-1.9." Rule 4-1.10(b) applies when "a lawyer becomes *associated* with a firm" (emphasis by court). Regarding this term, the court stated: "The meaning of 'associated' is not completely clear. But one thing is clear: not every lawyer who is paid by a law firm to do work of a legal nature is 'associated' with the firm. Thus, for example, a firm can outsource research or other support services so long as the firm complies with any applicable requirements on billing and on disclosures to the client. [Citations omitted.] An attorney to whom work is outsourced – for example, an attorney who contracts to do research or draft pleadings from the attorney's own premises on the attorney's own schedule – ordinarily is not an associate."

The court observed that "outsourcing" types of relationships are no longer rare, and stated that whether a lawyer is "associated" in a particular situation "requires an analysis of all the circumstances. No one factor is determinative in every case." Here, Lawyer worked from home, had no client contact, did not receive benefits provided to associates employed by the firm, and "does only work for review by another attorney of a kind that can properly be outsourced." The court noted countervailing considerations (e.g., Lawyer had a firm email address, called herself an associate, used the firm's physical address on her Florida Bar filing, and received a first paycheck that treated her as an employee rather than an independent contractor) but found them unpersuasive: "the substance of the relationship is much more important than where the attorney gets her email or whether the firm pays her employment and Medicare taxes."

Third DCA addresses standard for disqualification when lawyers receive inadvertently disclosed confidential information. *Moriber v. Dreiling*, 95 So.3d 449 (Fla. 3d DCA 2012).

A difficult situation "not attributable to unethical conduct" served to "illustrate some of the adverse consequences resulting from the injection of technology into today's modern and busy law practice." An assistant in one law firm sent an email to 2 lawyers in an opposing law firm, Heller Waldman. The assistant meant to attach a copy of a motion for summary judgment but instead inadvertently attached a confidential mediation statement. Only one of the recipients, Barnett, actually reviewed the mediation statement. When Barnett began to "skim" the mediation statement, she realized what it was and paused to confirm that it did not have "'the the usual header in bold and all caps stating that the letter was Confidential and for the Mediators [sic] Eyes Only.'" Barnett

assumed that the sender had intentionally copied her with the statement. Later that day Barnett emailed opposing counsel and mentioned something she had noticed in the mediation statement. Opposing counsel realized there had been an inadvertent disclosure and emailed Barnett that the mediation statement was confidential and sent in error, and asked Barnett to immediately destroy all copies. Barnett did so.

Opposing counsel's client, Moriber, moved to disqualify Heller Waldman on the ground that the firm violated Rule 4-4.4(b) "by reviewing the mediation statement, and that this violation enabled them to obtain an unfair informational advantage." The court referred the matter to a special master, who held a hearing and "concluded that 'there is nothing within [the mediation statement] that gives rise to any possibility that Defendants gained an unfair advantage – or any advantage – by receiving it.'" The court denied the motion to disqualify.

The Third DCA upheld the denial of disqualification. It analyzed the standards that apply when a party seeks to disqualify an opposing firm that received inadvertently disclosed privileged or confidential material. The mere fact that there is an inadvertent disclosure of confidential or privileged information does *not* by itself automatically warrant disqualification. Rather, "[t]he receipt of an inadvertent disclosure warrants disqualification when the movant establishes that: (1) the inadvertently disclosed information is protected, either by privilege or confidentiality; and (2) there is a 'possibility' that the receiving party has obtained an 'unfair' 'informational advantage' as a result of the inadvertent disclosure."

Regarding the second element, a court "must look not only to the content of the inadvertent disclosure, but also 'to the actions taken by the receiving lawyers' upon their receipt of the inadvertent disclosure." The receiving lawyers' actions help show whether they obtained an informational advantage, and also "shed light on whether any informational advantage was obtained 'unfairly.'"

Here, the special master's determination that there was no possibility that Heller Waldman obtained "an unfair advantage – or any advantage" was supported by the appeals court's review of the mediation statement and by the actions of the receiving lawyers. Only Barnett saw the statement, her exposure to it was brief (she "merely skimmed" it and did not make notes), and all copies were destroyed right away upon request of the sending firm.

Additionally, Heller Waldman did not violate Rule 4-4.4(b). Barnett did not know that the mediation statement was confidential (it was not obvious from its face that it was intended to be confidential), and her lack of knowledge was reasonable under the circumstances.

Court erred in disqualifying wife's counsel in divorce case based on receipt of confidential information allegedly improperly obtained from husband's computer regarding different lawsuit. *Strawcutter v. Strawcutter*, 101 So.3d 417 (Fla. 5th DCA 2012).

Husband (a lawyer) and Wife were litigating a divorce case. Wife was represented by law firm "KEL." Husband moved to disqualify KEL, alleging that Wife "conveyed to KEL attorney-client privileged information, improperly accessed from the husband's computer, regarding the husband's representation of a client in a separate lawsuit against KEL." Husband argued 2 grounds for disqualification. First, he "asserted that KEL had filed a civil suit against the husband based on the privileged information it had received from the wife and, thus, KEL was conflicted out of" the Husband-Wife divorce case. Second, Husband argued that Husband's disclosure of financial documents to Wife in the divorce case provided KEL with financial information in the separate civil

suit that it would not otherwise be entitled to obtain absent a judgment. Neither side presented evidence or testimony at the hearing on the disqualification motion.

The trial court granted Husband's motion. On certiorari review, the Fifth DCA quashed the disqualification order. Husband's first ground for disqualification failed because Husband "did not present any evidence demonstrating that KEL became privy to any privileged information" and, furthermore, Husband did not show that receipt of the allegedly privileged communications gave Wife any "unfair advantage" in the divorce case.

The appeals court also rejected Husband's second ground for disqualification because its relevance, if any, would be to the other suit rather than the divorce case: "[I]t is not clear what role, if any, the potential use of the husband's financial information in the civil action played in the trial court's decision to disqualify KEL. However, to the extent that this concern was a basis for the decision, disqualification was not warranted because this concern would properly be addressed in the civil suit, not this dissolution suit."

Per Third DCA, the "traditional conflict model" is inadequate to resolve disqualification motions in class action context. *Broin v. Phillip Morris Companies, Inc.*, 84 So.3d 1107 (Fla. 3d DCA 2012).

Lawyers Hunter and Gerson represented flight attendants in class action claims for damages from exposure to second-hand smoke. As part of a court-approved settlement defendants funded a foundation ("FAMRI") to sponsor research for early detection and cure of flight attendants' diseases caused by smoke. The settlement allowed attendants to file individual actions for compensation.

Hunter and Gerson were concerned that FAMRI's activities were unsupervised and sought an accounting. When FAMRI was "unresponsive," clients of Hunter and Gerson petitioned for enforcement of the settlement. FAMRI and 2 flight attendants who were on FAMRI's board of directors objected and moved to disqualify Hunter and Gerson. The objectors argued that, because Hunter and Gerson were now challenging the foundation formed under a settlement agreed to by all class members, they had in essence "switched sides." The objectors alleged that they considered *all* of the plaintiffs' counsel in the class action case as "their attorneys . . . regardless of individual representations." The court disqualified Hunter and Gerson.

The Third DCA quashed the disqualification. It rejected the allegation that the lawyers had a conflict under Rule 4-1.7. There was no conflict under the current client conflict rule (4-1.7); there was no evidence that Hunter and Gerson currently represented the objectors.

Nor did the lawyers violate former client conflict rule (4-1.9). Except for one flight attendant, from whose representation Hunter and Gerson withdrew after getting notice of the objection, there was no evidence that either lawyer had personally represented the objectors.

The objectors also argued that the court should impute an attorney-client relationship as a result of the lawyers' limited involvement in the litigation of the original action. The court rejected this contention, and suggested that "Florida's Rules of Professional Conduct alone are inadequate to resolve conflict of interest problems typical to class actions." The court approved a balancing test used by the Third Circuit. "The need to balance the traditional rules of loyalty to a client, duties to the court, and duties to the class as a whole, calls for adaptation of the traditional conflict model." Before disqualifying a class member's lawyer on the motion of another class member, a court should balance actual prejudice to the objector with the opponent's interest in continued representation by experienced counsel. The trial court failed to do that in this case.

Public Defender's Office representing ward in Baker Act case should not have been discharged on claim that guardian's lawyer could represent ward. *Auxier v. Jerome Golden Center for Behavioral Health*, 85 So.3d 1164 (Fla. 4th DCA 2012).

See discussion in "Attorney-Client Relationship" section.

In reversing application of multiplier in FCCPA case, Second DCA searches for solution to problems, including attorney-client conflict, generated by fee statutes in cases where client's damages are small. *Dish Network Service L.L.C. v. Myers*, 87 So.3d 72 (Fla. 2d DCA 2012).

See discussion in "Fees" section.

Court erred in denying pro hac vice admission based on alleged conflicts of interest. *THI Holdings, LLC, v. Shattuck*, 93 So.3d 419 (Fla. 2d DCA 2012).

See discussion in "Unauthorized Practice of Law" section.

DISCIPLINARY PROCEEDINGS

Supreme Court suspends, rather than reprimands, 2 lawyers for misconduct during their departure from their former law firm. *Florida Bar v. Winters*, __ So.3d ___, 37 Fla.L.Weekly S545 (Fla., Nos. SC10-1332, SC10-1333, 9/6/2012), 2012 WL 3853528.

Two lawyers left the Mulholland Law (the "Firm"). The Firm sued the lawyers civilly. The Bar charged the lawyers with soliciting clients to fire the Firm and hire their new firm, of making misrepresentations to the Firm and clients, of improperly copying and taking the Firm's client files, and of improperly using another lawyer's name in their new law firm's name.

The referee recommended that the lawyers be found guilty of violating rule 4-7.10(f) (lawyers may state or imply they practice in partnership only when true) due to improper inclusion of the third attorney's name on the new firm letterhead for a short period of time), and rule 3-4.3 (misconduct and minor misconduct), due to their personal use of the files of the Firm. The referee recommended not guilty findings for other charges, and recommended admonishment as a sanction.

The Bar sought review of the recommendations that the lawyers were not guilty of violating rules 4-8.4(b) (criminal act reflecting adversely on honesty, trustworthiness, or fitness), 4-8.4(c) (dishonesty, fraud, deceit, or misrepresentation); and 4-8.4(d) (conduct prejudicial to administration of justice). The Bar also sought harsher discipline.

The Supreme Court agreed with the Bar. The lawyers' use of the Firm's files was theft under F.S. 812.014 (2001). This reflected adversely on their honesty, trustworthiness, or fitness as lawyers and violated Rules 4-8.4(b) and 4-8.4(c). Rule 4-8.4(d) was violated because the lawyers' conduct was dishonest and occurred while they were employed in a legal capacity and so "was

sufficiently 'in connection with the practice of law' to be covered by this rule." The Court suspended one lawyer for 91 days and the other for 60 days.

Finding additional violation and imposing harsher discipline than sought by Bar, Supreme Court suspends lawyer who breached client confidentiality. *Florida Bar v. Knowles*, 99 So.3d 918 (Fla. 2012).

The Bar charged Lawyer with misconduct relating to withdrawal from her client's immigration matters, including a request for political asylum. Lawyer filed 2 motions to withdraw containing disparaging information about her client. The first motion: stated in a misleading way that the client had written Lawyer an insufficient funds check; stated that she regretted helping her client, who was rightly convicted of grand theft; and stated that she "received reports from the Romanian community that her client had robbed them." The motion asserted that the client would *not* be prejudiced by Lawyer's withdrawal. After meeting with the client and getting his agreement for additional payment, Lawyer withdrew her motion and stated that, instead, the client *would* be prejudiced if she withdrew. The client then retained new counsel. Lawyer filed a second motion to withdraw. Rather than just stating that the client had new counsel, Lawyer asserted "that she had received more reports that her client had intentionally failed to honor her contractual promises and had refused to pay for fulfilled work assignments." Lawyer also communicated with the assistant state attorney assigned to the client's criminal case, who wrote to the Department of Homeland Security that Lawyer "informed her that she had reason to believe her client would lie to the Immigration Court at an upcoming hearing." Lawyer anonymously sent confidential paperwork to the assistant state attorney relating to the client's political asylum case.

The referee recommended that Lawyer be found guilty of violating Rule 4-8.4(d) (conduct prejudicial to administration of justice) but not guilty of violating Rule 4-1.6 (confidentiality). The referee recommended a 90-day suspension. The Bar petitioned for review of the finding that Lawyer had not violated Rule 4-1.6 and sought a 91-day suspension. The Court concluded that Lawyer had violated both Rule 4-8.4(d) and Rule 4-1.6 and suspended Lawyer for one year.

Regarding Rule 4-1.6, the Bar argued that Lawyer violated the rule "when she called the Assistant State Attorney and stated that she had reason to believe that her client would lie to the Immigration Court. The referee relied on an exception to the rule of confidentiality to find that [Lawyer] did not violate rule 4-1.6 because [Lawyer] would have had a duty to report future criminal conduct." (Footnote omitted.) The Bar argued that this exception was inapplicable because Lawyer disclosed the confidential information to the assistant state attorney rather than the Immigration Court. The Court ruled that no disclosure at all was called for under Rule 4-1.6. "We need not address the Bar's specific contention as to whom the disclosure should have been made. The disclosure was improper on its face and should not have been made to any individual or entity. Rule 4-1.6(b)(1) allows a lawyer to reveal confidential information only to the extent the lawyer *reasonably believes it necessary* to prevent a crime. Here, the referee stated in his report that [Lawyer] had testified that her client had been through numerous attorneys to avoid deportation and had mentioned to her attorney that she would do anything, including lying in court, to avoid deportation. Contrary to the referee's conclusion, this testimony did not establish that there was a sufficient basis for [Lawyer] to reasonably believe that her client was going to commit a crime by lying to the court at the upcoming hearing." (Emphasis by Court.)

Even though the guilt finding regarding Rule 4-8.4(d) was not challenged, the Court addressed it in strong language: "[W]e write to emphasize the inappropriateness of [Lawyer]'s actions in violating her client's sacred trust. [Lawyer] filed two motions on separate occasions in which she disparaged her client's character in a reprehensible fashion. [Lawyer] attacked her client's integrity with regard to her alleged failure to honor checks and fulfill contracts. [Lawyer] further stated that she had heard reports that her client had robbed members of the Romanian community. Finally, and most egregiously, [Lawyer] brazenly asserted that her client had been rightfully convicted for grand theft, and that [Lawyer] actually regretted having helped her client. Such disparaging language is needless and has no place in a public court pleading, especially when the statements are made by an attorney and are directed at the attorney's own client. Unbridled language of this sort harms the client and causes the public to lose faith in the legal profession. [Lawyer]'s conduct was highly prejudicial to the administration of justice and cannot be tolerated."

Supreme Court imposes harsher-than-recommended discipline, suspending lawyer for misconduct not related to attorney-client representation. *Florida Bar v. Draughon*, 94 So.3d 56 (Fla. 2012).

Lawyer was charged with ethical violations relating to a real estate financing transaction in another state. He was accused of transferring property from a corporation he controlled to himself individually and thereby defrauding the holder of a note given by the corporation. The referee agreed with the bankruptcy court judge that Lawyer orchestrated a fraudulent transfer for his personal benefit. The referee recommended that Lawyer be publicly reprimanded for violating Rule 3-4.3 ("commission by a lawyer of any act that is unlawful or contrary to honesty and justice, whether the act is committed in the course of the attorney's relations as an attorney or otherwise, whether committed within or outside the state of Florida, and whether or not the act is a felony or misdemeanor, may constitute a cause for discipline").

On review, the Supreme Court rejected Lawyer's argument that Rule 3-4.3 cannot serve as an independent basis for discipline. "[T]he rule expressly contemplates that the enumerated categories of misconduct – specifically the Rules of Professional Conduct contained in Chapter 4 of the Rules Regulating the Florida Bar – are not intended to be an exhaustive list of unethical conduct that may provide grounds for imposing discipline. Rather, the commission by a lawyer of any act that is 'unlawful or contrary to honesty and justice' may be cause for discipline." The Court cited *Florida Bar v. Cocalis*, 959 So.2d 163, 166 (Fla. 2007), in which it imposed discipline where the sole ethical violation was of rule 3-4.3.

The Court, however, rejected a public reprimand as too lenient and instead suspended Lawyer for one year. "Although [Lawyer] was acting on behalf of his own corporation, and not as a lawyer representing a client in a transaction, he is nonetheless a member of The Florida Bar and subject to the disciplinary authority of this Court. See R. Regulating Fla. Bar 3-4.1. The Court expects members of the Bar 'to conduct their personal business affairs with honesty and in accordance with the law.' [Citations omitted.] Moreover, we have consistently stated that basic fundamental dishonesty is a serious flaw, one which cannot be tolerated by a profession that relies on the truthfulness of its members."

Suspending rather than admonishing lawyer, Supreme Court broadly construes rule against limiting malpractice liability to client. *Florida Bar v. Head*, 84 So.3d 292 (Fla. 2012).

The Florida Bar charged Lawyer with ethical violations. In Count I Lawyer was found guilty of violating rules including Rule 4-8.4(c) (dishonesty, fraud, deceit, or misrepresentation). The Supreme Court pointed out that the required element of intent under Rule 4-8.4(c) "can be satisfied merely by showing that the conduct was deliberate and knowing;" the Bar was *not* required to show that the lawyer had an improper motive.

Count II involved Rule 4-1.8(h) (limiting liability for malpractice). Lawyer withdrew after a dispute with Client. Client hired another attorney to represent him in concluding the case. Client filed a Bar complaint against Lawyer, which Bar initially viewed as a fee dispute and closed. After a failed request for fee arbitration Lawyer sent the client a claim for fees allegedly owed and stated that he would not file suit if client signed a mutual general release. Client did not sign the release, but instead contacted the Bar. The Bar reopened the prior file and charged Lawyer with violating Rule 4-1.8(h) by "failing to advise [Client] of his right to independent counsel when attempting to limit his liability through the mutual release." Lawyer asserted that Rule 4-1.8(h) was inapplicable because the client never alleged malpractice and the Bar did not plead or prove malpractice. Lawyer also argued that Client was represented by counsel when Lawyer sent the demand.

The Supreme Court rejected both arguments. Regarding applicability of Rule 4-1.8(h), the Court stated: "[Lawyer] attempts to characterize the situation with [client] solely as a fee dispute. However, [Client]'s Bar complaint alleged that [Lawyer] had not represented him appropriately in his water intrusion case. In addition, [Client] provided several examples in his testimony about [Lawyer]'s allegedly inadequate service. [Client] believed that [Lawyer] committed malpractice." Thus, the dispute with the client involved allegations of malpractice.

The fact that Client was represented by other counsel in the underlying action did *not* change Lawyer's duty to inform Client that he should seek independent representation regarding the potential malpractice issues.

Finally, the Court rejected the referee's recommended disciplinary sanction of an admonishment and instead suspended Lawyer for 91 days.

Supreme Court imposes longer-than-recommended suspension on lawyer for misconduct in bankruptcy representation. *Florida Bar v. Gwynn*, 94 So.3d 425 (Fla. 2012).

Lawyer was charged with violations arising from representation of a client in a bankruptcy. Lawyer failed to expedite litigation in the best interest of the client, filed frivolous claims, and was sanctioned by the bankruptcy court for acting in bad faith. She also continued to make filings with the court after she no longer had a client – despite the court's direct order prohibiting the filings.

The Supreme Court rejected Lawyer's assertion that the referee erred in taking judicial notice of and relying on the factual findings in the bankruptcy court's sanction order. The Court also ruled that the referee did not abuse his discretion in refusing to allow Lawyer to subpoena the bankruptcy judge to testify in the disciplinary case. Finally, the Court rejected the referee's recommendation of a 90-day suspension and instead suspended Lawyer for 91 days.

Supreme Court construes rule of professional conduct regulating attorney-client business transactions in disbarring lawyer. *Florida Bar v. Doherty*, 94 So.3d 443 (Fla. 2012).

See discussion in "Conflicts of Interest" section.

EXPERT WITNESSES

Court erred in dismissing professional negligence suit against expert witness on ground of witness immunity. *Hoskins v. Metzger*, __ So.3d ___ (Fla. 2d DCA, No. 2D11-6384, 12/19/2012), 2012 WL 6601407.

Clients and their counsel ("Plaintiffs") hired private investigator Metzger and his employer in connection with a suit against Kia Motors. Metzger was to be an expert witness. After Plaintiffs lost their suit against Kia they sued Metzger and his employer alleging professional and common law negligence. Claiming that Metzger caused their loss in the Kia suit, Plaintiffs alleged that Metzger appeared for trial with "unkempt hair" and "wearing 'unwashed' and 'excessively worn' jeans and a Polo style shirt." (Footnote omitted.) They also alleged that he could not support his theory when cross-examined, was impeached concerning his prior experience, was unfamiliar with critical aspects of the 'scientific method of investigation.'" Essentially, Plaintiffs "theorize that the jury believed Kia's experts and not Mr. Metzger because of his fashion faux pas and his inadequate testimony." (In a footnote, the Second DCA stated: "All things being relative, Albert Einstein would likely have been a great expert witness despite his unkempt appearance.")

The trial court dismissed the complaint with prejudice, ruling that the suit was barred by "absolute witness immunity under *Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, P.A. v. United States Fire Insurance Co.*, 639 So.2d 606 (Fla. 1994)." Plaintiffs appealed.

The Second DCA reluctantly reversed and remanded. It discussed the "obvious problems" with the negligence suit against Metzger and suggested that the complaint may fail to state a cause of action. Nevertheless, it was error to dismiss the case with prejudice based on the doctrine of witness immunity. The "witness immunity" applied in *Levin* was not necessarily applicable here because of the differing circumstances of the cases. *Levin* immunity "was created in the context of a lawsuit brought by an attorney who was forced to withdraw from a lawsuit because the other side claimed it was going to call him as a witness. When he was not actually called as a witness, the attorney sued his adversaries for intentional interference with his business relationship with his client. . . . Thus, the context of the *Levin* case is dramatically different from the context of this case, and we are not entirely convinced that all of the legal propositions discussed in that opinion can transfer to the facts of this case."

State agency seeking expert's deposition in termination of parental rights proceeding must pay for it. *Colaizzo v. Office of Criminal Conflict and Civil Regional Counsel*, 82 So.3d 195 (Fla. 4th DCA 2012).

See discussion in "Fees" section.

FEES

Attorney's Liens:

Second DCA addresses the differing applications of a charging lien to personal property as contrasted with real property. *Riveiro v. J. Cheney Mason, P.A.*, 82 So.3d 1094 (Fla. 2d DCA 2012).

A court ordered that a charging lien for about $76,000 attach to assets that Wife received in a divorce case. Wife appealed, and the Second DCA affirmed in part and reversed in part. The appeals court emphasized that Florida law on lawyers' charging liens "has differing applications to real and personal property."

Because nothing in the record indicated an agreement between Wife and Lawyers that her fees would be secured by any *real property* she was awarded in the dissolution, the trial court erred in imposing a charging lien against real property owned by Wife subject to the dissolution action. In contrast, the court affirmed the charging lien on the *personal property* Wife obtained in the dissolution, noting that "[a]ll the requirements for imposing a charging lien on personal property are present here. [Wife] had a written contractual agreement regarding the payment of attorneys' fees with [Lawyers]. Thus, the trial court could properly conclude that an implied understanding existed that payment would come from her portion of the equitable distribution of personal property."

Lawyer's efforts did not produce "tangible fruits" to support imposition of a charging lien where property was "upside down". *Joel M. Weissman, P.A. v. Abou-Sayed*, __ So.3d ___, 37 Fla.L.Weekly D2786 (Fla. 4th DCA, No. 4D11-1524, 12/5/2012), 2012 WL 6027798.

The Fourth DCA affirmed the denial of Lawyer's motion seeking to impose a charging lien on Client's property. Lawyer failed to prove that his efforts resulted in "tangible fruits" for Client. Other than accounts protected from creditors' liens by operation of statute, the record supported the finding that Lawyer's efforts "produced only valueless assets, thus leaving no 'tangible fruits' to which a charging lien may attach." In a footnote the court observed that the marital home was "upside down" (i.e., more was owed on the home than the home 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.)

Law firm's charging lien did not attach to aircraft obtained for firm's client in replevin action because lien was not filed with FAA. *US Acquisition, LLC v. Tabas, Freedman, Soloff, Miller & Brown, P.A.*, 87 So.3d 1229 (Fla. 4th DCA 2012).

Law Firm represented a bank in an action on a promissory note secured by an aircraft. Law Firm successfully prosecuted a replevin action to obtain the aircraft for the Bank. After the FDIC took over the Bank, Law Firm filed a notice of charging lien for unpaid fees of $56,000. Law Firm withdrew with its fees still unpaid and it motion to enforce a charging lien was granted. US

Acquisition was substituted for the FDIC after acquiring the loan at auction. US Acquisition appealed, challenging the validity of the order granting the charging lien because the Firm "fail[ed] to record the lien with the FAA" (Federal Aviation Administration).

The Fourth DCA reversed the order enforcing the charging lien because the firm failed to record the charging lien with the FAA and thus it was not perfected, pursuant to Title 49, U.S. Code, sec. 44108(a). Noting that this was a "case of first impression," the court explained: "While it is true that a charging lien requires only timely notice for perfection, the charging lien in this case does not only attach to a monetary judgment, but also to the actual aircraft and/or its parts. Therefore, the lien which is attached to the aircraft should be recorded with the FAA, pursuant to federal law, to protect any third parties from subsequently purchasing an interest in the aircraft which inaccurately appears to have free and clear title. US Acquisition purchased the loan to the aircraft without notice, actual or constructive, that a lien was attached by [Law Firm]. This is the exact situation which recordation would prevent, thereby shifting responsibility to the transferee to diligently search the FAA's registry before obtaining an interest in the aircraft."

Citing "textbook example of legal chutzpah," Third DCA affirms denial of disbarred lawyer's charging lien for costs. *Wingate v. Celebrity Cruises, LTD*, 79 So.3d 180 (Fla. 3d DCA 2012).

See discussion in "Professionalism" section.

Domestic Relations Cases:

Fees incurred in litigating over *modification* of marital settlement agreement may not be awarded based on provision allowing fees for *enforcing* agreement. *Miller v. Miller*, __ So.3d ___, 37 Fla.L.Weekly D2679 (Fla. 4th DCA, No. 4D10-5138, 11/21/2012), 2012 WL 5870100.

A final divorce judgment incorporated the terms of the Marital Settlement Agreement ("MSA"). Former Wife ("Wife") later filed a petition for Modification of Shared Parental Responsibility and Visitation. In response, Former Husband ("Husband") petitioned for Modification of Residential Custody and Child Support and for fees. The matters were litigated extensively, including a dispute over contempt and enforcement motions filed by Wife.

The court awarded over $500,000 in fees to Husband under the prevailing party provision in the MSA, which stated: "If any subsequent proceedings to *enforce* any provisions of the Agreement are necessary, the prevailing party in any such proceeding will be entitled to reasonable attorney's fees, costs and expenses from the losing party." (Emphasis by court.)

The Fourth DCA reversed the fee award. "Reading the MSA by its plain language, attorney's fees are to be awarded only when one party brings an action to *enforce* the terms of the MSA. Here, the husband did not seek to *enforce* the terms of the MSA, but rather to modify its terms. The trial court erred in awarding the former husband fees for his modification petition because it did not trigger the prevailing party fee provision of the MSA." (Emphasis by court.)

In action to enforce marital settlement agreement, fees may be awarded under F.S. 61.16 unless agreement expressly waives that right. *De Campos v. Ferrara*, 90 So.3d 865 (Fla. 3d DCA 2012).

Former Husband petitioned to enforce the terms of the Property Settlement Agreement ("PSA") that was approved by the court in his divorce action. The court ruled for Husband but denied his motion for a fee award on the ground that the action was an equitable one and, under *Flanders v. Flanders*, 516 So.2d 1090 (Fla. 5th DCA 1987), the PSA rather than F.S. 61.16 governed the issue of entitlement to fees – and the PSA did not provide for an award of fees.

The Third DCA reversed. The action below was for enforcement of a final judgment and so was legal, rather than equitable, in nature and thus entitlement to fees was governed by sec. 61.16. Concluding that Husband was entitled to fees, the court explained a party to a property settlement agreement can waive the statutory right to a fee award in an enforcement proceeding "but such waiver depends upon express language to that effect. [Citations and footnote omitted.] The parties' Property Settlement Agreement contains neither a provision for the award of attorney's fees and costs nor an express waiver of attorney's fees and costs. Because there is no language, express or implied, in the agreement before us that can be construed as an intent to waive attorney's fees and costs, the terms of the parties' Property Settlement Agreement do not bar the Former Husband from seeking an award of attorney's fees under section 61.16(1)."

Spouse's refusal to accept reasonable settlement offer is basis for denying fee award under F.S. 61.16. *Hallac v. Hallac*, 88 So.3d 253 (Fla. 4th DCA 2012).

Wife appealed an order denying her a portion of her attorney's fees and assessing a portion of Husband's fees *against* her based on Wife's unreasonable refusal to accept a favorable settlement offer. The Third DCA affirmed the portion of the order denying Wife's fees after the date of the offer, because *Rosen v. Rosen*, 696 So.2d 697 (Fla. 1997), permits a court to consider results obtained in determining a F.S. 61.16 (2009) fee award. Refusal to accept a reasonable offer is a "relevant circumstance" that may be considered under *Rosen* in making a sec. 61.16 fee award.

The court, however, reversed the award of fees to Husband, who had a greater ability to pay, because Wife's "failure to accept a reasonable settlement offer, without other vexatious conduct, does not justify an award of fees to the husband under Chapter 61."

Court did not err in awarding fees against former wife under F.S. 61.16 without express finding of her ability to pay. *Randazzo v. Randazzo*, 89 So.3d 984 (Fla. 4th DCA 2012).

Former Husband moved for recalculation of his support obligation and claimed that he had overpaid in the past. The court ordered a reduction in support and also ordered Former Wife to pay a portion of Former Husband's fees and costs. "Citing section 61.16, Florida Statutes (2009), *Rosen v. Rosen*, 696 So.2d 697 (Fla. 1997), and other authorities, the court concluded that former wife was responsible for a portion of the fees due to conduct that caused former husband to unreasonably and unnecessarily incur those fees."

The Fourth DCA affirmed. The findings were sufficient to support the award, despite the fact that there was no finding of Husband's financial need and Wife's ability to pay. There was no need for such findings because the award was based on the fact that "former wife's conduct caused former husband to incur unreasonable and unnecessary fees and costs."

Marital settlement agreement purporting to limit right to request pre-dissolution temporary support or fees violates public policy and is unenforceable. *Khan v. Khan*, 79 So.3d 99 (Fla. 4th DCA 2012).

Husband and Wife were married in 1991 and initiated divorce proceedings in 1998. After entering a marital settlement agreement (the "MSA") that was never approved by the court, the spouses reconciled. The MSA provided that, in a later action for interpretation or enforcement of the MSA, the prevailing party would be entitled to fees but that in any action to *terminate* the marriage each party would be responsible for his or her own fees.

In 2009 Wife filed a dissolution action without mentioning the MSA. Husband stipulated to temporary alimony and a temporary award of $15,000 in fees and costs. When Wife moved for an increase in temporary alimony and additional temporary fees and costs, Husband raised the MSA as a defense. Based on the MSA, the court granted Husband's motion to strike the hearing on additional temporary alimony and fees.

The Fourth DCA reversed. Its decision was controlled by prior cases concluding that "public policy prevents a spouse from contracting away his or her obligation of support during the marriage." Florida has a long-standing policy against enforcing waivers of pre-dissolution support. That policy "draws no distinction between prenuptial and postnuptial agreements." Accordingly, the court concluded that "*pending dissolution of marriage*, public policy and the statutory obligation of support permits the award of temporary attorney's fees to a spouse even where an agreement provides that the parties will each pay their own attorney's fees or that the prevailing party is entitled to fees in any litigation over the validity of the agreement." (Emphasis by court.)

Unsuccessful but non-frivolous appeal in family law case is not grounds for denial of F.S. 61.16 attorney's fees. *Lomalinara v. Lamolinara*, 85 So.3d 1147 (Fla. 1st DCA 2012).

Former Wife appealed the denial of her Motion for Relief from Judgment. The First DCA affirmed, finding the appeal to be "without merit, but not frivolous." Over Husband's objection, the court remanded the case for consideration of her motion for fees filed pursuant to F.S. 61.16 and Fla.R.App.P. 9.400. Under sec. 61.16 appellate fees could be denied if Former Wife's appeal was "frivolous," but here the court found that it was not.

Fees may be awarded under F.S. 61.16 when a party petitions for mandamus to obtain a ruling from the trial court after waiting 9 months. *Huebner v. Huebner*, 93 So.3d 470 (Fla. 2d DCA 2012).

After a hearing in a dissolution matter, the court had not entered an order for 9 months. Husband filed a pro se petition for mandamus seeking to force the court to issue a ruling. Wife's

counsel filed a lengthy brief opposing Husband's petition. Additionally, Wife moved for fees under F.S. 61.16 (2007). A few weeks later Wife moved to dismiss Husband's petition as moot because the order had been issued by that time.

Regarding the fee motion, the Second DCA concluded that, although sec. 61.16(1) could provide a basis for a fee award "in an appropriate case," a fee award was *not* appropriate here. "[T]he response opposing the issuance of a writ and discussing the law in detail was well beyond the needed response. We are hesitant to make the Husband pay attorney's fees for pleadings opposing his petition when his pro se petition was well-founded and actually benefitted both parties to the extent that it prompted the trial court to rule."

Fourth DCA points out that relative resources of parties are not court's only consideration when granting temporary fees. *Hoff v. Hoff*, 100 So.3d 1164 (Fla. 4th DCA 2012).

A court denied Wife's motion for temporary fees, finding that she lacked need. On appeal Wife contended that "she is unemployed and in a significantly inferior financial position to the Husband." She did not argue need and ability to pay; "instead she argues that it is inequitable to require her to deplete her assets when the Husband's assets and income substantially exceed hers." The appeals court rejected this argument. The appropriate inquiry is whether one party has a need for fees and the other party has the ability to pay, and this standard is used whether an award of fees is final or temporary.

Insurance Cases:

Fee award to insured is not a "covered claim" for which FIGA is responsible, per Florida Supreme Court. *Petty v. Florida Ins. Guaranty Ass'n*, 80 So.3d 313 (Fla. 2012).

Resolving conflict among DCAs, the Supreme Court concluded that a fee award to an insured under F.S. 627.428(1) (2008) is *not* a covered claim under sec. 631.54(3) that the Florida Insurance Guaranty Association ("FIGA") must pay.

The purpose of the sec. 627.428(1) fee award provision is to discourage insurers from contesting legitimate claims and to reimburse insureds for fees that they incur when they must enforce their policies in court against the insurer. Under sec. 631.57(1)(a), FIGA is "obligated to the extent of covered claims existing" prior to an insurer's insolvency. Per the Court, a "covered claim" must meet two requirements: "(1) it must arise, or originate, from an insurance policy and (2) it must be within the coverage of, or be included within the risks taken on and losses protected against in, an insurance policy."

The Insured's policy did not expressly provide coverage for her sec. 627.428(1) fee award. The Court rejected Insured's contention that the fee award was impliedly covered by her policy because every Florida policy is subject to sec. 627.428(1). Even though sec. 627.428 is an implicit part of the policy, it is not part of the policy's *coverage*.

Error to deny fees to insured homeowners who prevailed in dispute with insurer. *Barreto v. United Services Automobile Ass'n*, 82 So.3d 159 (Fla. 4th DCA 2012).

Insured homeowners had a dispute with their insurer over property damage and additional living expenses following a covered loss. Sometime after Insurer had demanded an appraisal under to the policy, Insureds filed suit. Insurer subsequently paid additional sums. Insureds' motion for fees under F.S. 627.428 (2008) was denied.

The Fourth DCA reversed. Insureds were entitled to fees because they had to resort to the judicial process to obtain what was owed them under the policy. The suit "served a legitimate purpose because it motivated the insurer to pay not only the full amount of the appraisal award, but the additional living expenses incurred, as well."

Although insurer admitted coverage prior to being served with complaint, its delay in paying claim results in award of fees to insured. *Barreau v. Peachtree Casualty Ins. Co.*, 79 So.3d 843 (Fla. 5th DCA 2012).

Insured was in an auto accident and his Insurer initially denied coverage. Insured sued. Before being served Insurer told Insured that his policy was reinstated. Insurer did not pay the claim until 9 months after the accident. Insured moved for fees under F.S. 627.428(1) (2009), but was awarded fees for work done *only* up until the date on which Insurer admitted coverage.

The Fifth DCA reversed and remanded for an award of additional fees. "A delay of nine months from the date of the accident until the tender of payment is not reasonable under the facts and circumstances presented. [Insurer]'s belated recognition of coverage does not effectuate repair of the vehicle and is little solace to the policy holder who is without transportation. [Insured] was forced to secure counsel to both respond to the initial denial of coverage and to subsequently litigate over the delay in payment. The trial court erred in not awarding attorney's fees for the reasonable and necessary hours spent in pursuing those claims. His counsel may also recover reasonable fees incurred in establishing entitlement to fees."

Miscellaneous Fee Cases:

Supreme Court upholds constitutionality of county hospital lien ordinance and affirms award of attorney's fees to hospital. *Shands Teaching Hospital & Clinics, Inc. v. Mercury Ins. Co. of Florida*, 97 So.3d 204 (Fla. 2012).

The Supreme Court concluded that the Alachua County Lien Law (Ch. 88-539, Laws of Florida) was unconstitutional but upheld the constitutionality of the Alachua County Hospital Lien Ordinance (Alachua County Code sec. 262-20-262.25 (1997)). The First DCA had held both laws unconstitutional. *Mercury Ins. Co. of Florida v. Shands Teaching Hospital & Clinics, Inc.*, 21 So.3d 38 (Fla. 1st DCA 2009).

The Court also ruled that fees were properly awarded to Shands, which prevailed on its suit against the insurance company for allegedly impairing its lien but had its damages limited to

$10,000. The trial court "applied the correct 'significant issues' test, as opposed to the 'net judgment' test" (see *Prosperi v. Code, Inc.*, 626 So.2d 1360 (Fla. 1993)).

In reversing application of multiplier in FCCPA case, Second DCA searches for solution to problems generated by fee statutes in cases where client's damages are small. *Dish Network Service L.L.C. v. Myers*, 87 So.3d 72 (Fla. 2d DCA 2012).

Dish Network appealed a fee award against it under the Florida Consumer Collection Practices Act ("FCCPA"). Plaintiff Duplantis was awarded $5000 in actual damages, $1000 in statutory damages, and almost $17,000 in fees.

The Second DCA concluded that the trial court erred in 2 respects. First, the 2.0 contingency fee multiplier should not have been awarded as an enhancement to the lodestar fee amount. Under federal case law "there is little doubt that if a case similar to this one were filed in the local federal court, the prevailing attorney would not receive a fee enhanced by a contingency multiplier." Second, travel time should not have been included in the fee award because "there was no competent, substantial evidence to support a finding that [plaintiff] could not obtain a competent Pasco County lawyer to handle his case."

Most of the opinion was devoted to discussing problems generated by the availability of statutory fees in cases like this, where a client's damages are small. The court called the case "a small claims lawsuit run amok." The court indicated that lawyers who take these kinds of cases face an economic disincentive to settle quickly for a damage amount acceptable to the client. "In a typical contingency fee case, the plaintiff's attorney will recover a fee based on a percentage of the total recovery. Thus, the monetary success of the client and the attorney are closely interrelated. By contrast, in this type of statutory fee case where the damages are relatively small, as the lawsuit progresses, it quickly becomes a larger monetary asset for the law firm than for the client."

The court suggested that the economics of the situation can create a *conflict* between the interests of lawyer and client. "By the time the lawsuit approaches trial, so long as the defendant is not making offers to settle that include a separate resolution of the fee issue, a reasonable offer for the client under a contingency contract is unlikely to be a reasonable offer from the perspective of the attorney." The conflict problem may be exacerbated if the opponent offers a lump-sum settlement that includes both the client's damages and the lawyer's fees.

The court noted that a solution to "this economic problem" was beyond its power and suggested that action by the Legislature or the Supreme Court was needed. "From the perspective of the judiciary, the problem could be addressed, in part, if courts required offers from defendants in these cases to include a damages settlement to be paid to the plaintiff and a separate fee settlement to be paid to the plaintiff's attorneys. Although this change would eliminate the inherent conflict between the plaintiff and his or her attorney created by lump sum offers to settle this type of case, it would not eliminate all of the economic disincentives to settle these small lawsuits. Somehow we need to create a solution that continues to provide adequate protection for consumers, who must rely on private attorneys general for this legal work involving claims of small monetary value, without simultaneously creating undue incentives that hinder resolution of these claims prior to trial."

Property owner awarded fees on inverse condemnation claim is entitled to fees for all work, even that performed before suit was filed. *Board of Supervisors of St. John's Water Control*

District v. State of Fla. Dept. of Transportation, __ So.3d ___, 37 Fla.L.Weekly D2736 (Fla. 4th DCA, No. 4D11-2349, 11/28/2012), 2012 WL 5933012.

The District had property taken by the Department of Transportation ("FDOT") in a condemnation proceeding. During the proceeding the District discovered that an additional parcel, a canal, had been filled in by FDOT during the work. The District filed a counter-claim alleging that FDOT took the parcel without compensating the District. The counter-claim was resolved for the District. The court applied the lodestar method and awarded fees to the District. In making the award "the court only considered 'the time counsel spent on the case starting at and around the time the [District] amended [its] pleadings to seek the inverse condemnation of'" the canal parcel.

The Fourth DCA reversed on the ground that "the judgment impermissibly limited the District's recovery to fees incurred after it filed its inverse condemnation claim." The District was entitled to reasonable fees "for all work relating to a condemnation suit, including work performed before the date suit is actually filed."

ALJ properly denied party's motion for fees where no motion was filed before ALJ closed case and relinquished jurisdiction results. *Town of Davie v. Santana*, 98 So.3d 262 (Fla. 1st DCA 2012).

In cases consolidated on appeal, the Town argued that the administrative law judge ("ALJ") erred in denying its motion for fees. The motion asserted a claim for fees under F.S. 120.595(1); however, it was filed *after* the ALJ closed the cases and relinquished jurisdiction to the Florida Commission on Human Rights.

The First DCA affirmed. There were no motions for fees pending when Appellees voluntarily dismissed their cases and when the ALJ closed the files and relinquished jurisdiction. The court distinguished *G.E.L. Corp. v. Dep't of Environmental Protection*, 875 So.2d 1257 (Fla. 5th DCA 2004), which held that an ALJ has jurisdiction to award fees under the statute when a petition has been voluntarily dismissed but the motion for fees was filed *prior to* dismissal.

ALJ erred in denying fees to intervenor under F.S. 120.595(4) in administrative proceeding. *J.S. v. C.M.*, __ So.3d ___, 37 Fla.L.Weekly D2374 (Fla. 1st DCA, No. 1D12-261, 10/10/2012), 2012 WL 4800987.

Petitioner filed a Petition for Administrative Determination of Invalidity of Agency Statements under F.S. 120.56(4). Petitioner alleged that an agency statement constituted an unadopted rule and so was improperly used by the agency. Other parties, including J.S., were permitted to intervene. Ultimately the parties stipulated that the agency statement constituted an unadopted rule in violation of sec. 120.54. All parties except J.S. waived their right to fees. The Administrative Law Judge ("ALJ") denied J.S.'s motion for fees on the ground that the applicable statute (sec. 120.595(4)) authorized a fee award only to the petitioner, *not* to an intervenor.

The First DCA reversed. "The plain language of paragraph (a) does not limit the recovery of attorney's fees to 'the petitioner.' Moreover, the attorney's fees provisions of paragraph (b) that specifically apply to paragraphs (a) and (b) do not preclude an award of attorney's fees to J.S. on

the basis that J.S. is an intervenor. Thus, the ALJ reversibly erred in concluding that section 120.595(4) does not authorize attorney's fees for intervenors."

Court correctly awarded fees for all claims arising from common core of facts, as well as fees for litigating amount of fee award. *Waverly at Las Olas Condominium Ass'n, Inc. v. Waverly Las Olas, LLC*, 88 So.3d 386 (Fla. 4th DCA 2012).

Condo Association was sued by a tenant over assignment of parking spaces. The Association filed a third-party complaint against Developer. The third-party complaint was dismissed. The Association filed two amended complaints, each of which was dismissed. The Developer sought fees. The court awarded fees for the entire litigation, including the proceedings necessary to determine the amount of fees, concluding that the Association's "various contractual, common law, and statutory third-party claims were all inextricably intertwined with one set of core facts and had no separable damages."

The Fourth DCA affirmed. "The various third-party complaints focused on a common core set of facts. And, while the fees might be capable of apportionment between the breach of contract claims in the original and amended complaint and the other claims in the second amended complaint, the broad language in the fee provision contemplates its application to more than breach of contract claims. The fee provision [in the unit owners' purchase agreement] provided for an award of fees for "*any* litigation between the parties under this Agreement." (Emphasis by court.)

The appeals court also affirmed the award of fees for litigating the *amount* of the fee award, rejecting the Association's reliance on *State Farm Fire & Casualty Co. v. Palma*, 629 So.2d 830 (Fla. 1993). "Unlike *Palma*, which relied upon a statute and limited fees to those incurred in litigating entitlement, the contractual provision here authorizes attorney's fees for 'any litigation' between the parties under the agreement. This language is broad enough to encompass fees incurred in litigating the amount of fees." (Footnote omitted.)

Concern about state's economic condition is not basis for judge's refusal to approve reasonable fee for court-appointed criminal defense lawyer. *Still v. Justice Administrative Comm'n*, 82 So.3d 1168 (Fla. 4th DCA 2012).

After representing an indigent criminal defendant in 2 cases, Lawyer filed a motion to exceed the statutory flat fee limits. The Justice Administrative Commission objected. At the hearing the judge expressed concern about whether the State "could afford to pay the fees sought given the economy." When awarded less than the requested amount, Lawyer sought certiorari review on the basis that the award was confiscatory. The Fourth DCA agreed. "While the trial court's concerns as to the State's financial condition were obviously well intended, it must be recognized that matters of appropriation and adequacy of state funds are legislative functions and not judicial. It would be a violation of the separation of powers doctrine for trial courts to address whether adequate state funding is available to discharge a statutory provision authorizing payment of attorney's fees, such as here."

Third DCA cautions lawyers against filing or relying on extra-record documents and denies appellate fees for that reason. *Velazquez v. South Florida Federal Credit Union*, 89 So.3d 952 (Fla. 3d DCA 2012).

Credit Union's Lawyers obtained a deficiency judgment against pro se Defendants in a case arising out of a loan used to buy a boat. The Third DCA affirmed, noting that although the conduct of Credit Union and Lawyers was "aggressive" it was legally authorized.

The court also warned Lawyers against filing or relying on extra-record documents. The court rejected the excuse that Lawyers filed the documents due to *Defendants'* filing of extra-record documents. "Two wrongs never make a right in such matters, and obviously an attorney may not disregard Florida Rule of Appellate Procedure 9.200 simply because a pro se party has first done so." Due to the extra-record filings, the court denied Credit Union's motion for appellate fees.

State agency seeking expert's deposition in termination of parental rights proceeding must pay for it. *Colaizzo v. Office of Criminal Conflict and Civil Regional Counsel*, 82 So.3d 195 (Fla. 4th DCA 2012).

Doctor was medical director of a Child Protection Team and had a separate contract to provide other services. In a dependency proceeding Doctor examined one of the mother's children and rendered an expert opinion "as an independent contractor." The Office of Criminal Conflict and Civil Regional Counsel ("ORC") subpoenaed Doctor to appear at an expert witness deposition. Doctor appeared and testified, and then sent ORC a bill for $650 (at $200 per hour). ORC did not dispute the reasonableness of the fee, but refused to pay the bill.

Doctor's motion to compel ORC to pay his fee was denied. The Fourth DCA reversed, framing the question as: "[B]etween two agencies funded by state government, which should bear the responsibility for an expert witness fee incurred in a deposition taken in a termination of parental rights proceeding?" The court held that, absent any statutory direction, under the Rules of Juvenile and Civil Procedure the agency seeking the deposition is responsible for payment.

Appellate court's denial of appellate fees does not preclude award of fees in trial court in proceedings on remand. *Siegel v. J.P. Morgan Chase Bank*, 100 So.3d 783 (Fla. 4th DCA 2012).

The Fourth DCA reversed a trial court's final judgment, and the judgment awarding fees was also reversed. The appeals court clarified that its denial of appellate fees in the appeal on the merits would *not* preclude an award of fees in the proceedings on remand. "We reject the contention that our denial of an award of appellate attorney's fees in the prior appeal constitutes the 'law of the case' as to any award of attorney's fees in the trial court should the appellees prevail ultimately in the trial court proceedings." (Citation omitted.)

To recover fees in original proceeding under Fla.R.App.P. 9.100 a request must be in petition, response, or reply rather than separate motion. *Advanced Chiropractic and Rehabilitation Center Corp. v. United Auto. Ins. Co.*, __ So.3d ___ (Fla 4th DCA, No. 4D11-4801, 12/19/2012), 2012 WL 6600482.

Advanced Chiropractic's petition for writ of certiorari in the Fourth DCA was granted. Advanced filed a motion for fees 3 days later. The trial court denied the motion as untimely.

In denying Advanced's motion for rehearing the Fourth DCA discussed how a proper claim for fees must be asserted in an original proceeding filed under Fla.R.App.P. 9.100. The appellate rules do not set forth the procedure for requesting fees in a Rule 9.100 proceeding. Absent guidance in the rules, the pleading requirement for fees is controlled by *Stockman v. Downs*, 573 So.2d 835, 837 (Fla. 1991), "where the Supreme Court observed that the 'fundamental concern is one of notice' and held that a claim for attorneys' fees 'must be pled.'" In other words, the request must be contained in a "pleading" in accordance with Fla.R.Civ.P. 1.100(a). Such a pleading would be a complaint, an answer, or a counterclaim – but not a motion. Advanced's request for fees was not contained in its petition or reply and so was untimely.

Offers of Judgment and Proposals for Settlement:

Supreme Court amends Family Law Rules of Procedure, specifying that "proposals for settlement" are not used in family law matters. *In re: Amendments to the Florida Family Law Rules of Procedure*, 101 So.3d 360 (Fla. 2012).

See discussion in "Rules and Ethics Opinions" section.

Offer of judgment statute does not apply to cases governed by substantive law of another state, per Supreme Court. *Southeast Floating Docks, Inc. v. Auto-Owners Ins. Co.*, 82 So.3d 73 (Fla. 2012).

Answering a certified question from the Eleventh Circuit Court of Appeals, the Florida Supreme Court concluded that the offer of judgment statute (F.S. 768.79) does *not* apply to cases that are governed by the substantive law of another jurisdiction.

A contract between Auto-Owners Insurance Company and Southeast Floating Docks, Inc., provided that the substantive law of Michigan controlled. Southeast served Auto-Owners with an offer of judgment, which Auto-Owners rejected. Ultimately Southeast moved for fees as a result of the rejected offer of judgment. The court denied the motion as untimely.

Southeast sought review of the denial in the Eleventh Circuit, which certified 3 questions to the Florida Supreme Court. The dispositive question was: "Does Fla. Stat. § 768.79 apply to cases that are governed by the substantive law of another jurisdiction; and, if so, is this statute applicable even to controversies in which the parties have contractually agreed to be bound by the substantive laws of another jurisdiction?"

The Court answered the certified question in the negative. Because sec. 768.79 "alters the common law approach to attorney's fees" it creates a substantive right. Accordingly, the statute "is substantive for both constitutional and conflict of law purposes." Florida courts enforce a choice-of-law provision applying another forum's law unless doing so contravenes a strong public policy of Florida. The Court concluded that the public policy advanced by sec. 768.79 is not sufficient to override the strong public policy of protecting freedom of contract. Accordingly, "because an

award of attorney's fees under Florida's offer of judgment statute is a substantive right, section 768.79 will not apply in instances where the parties have agreed to be governed by the substantive law of another jurisdiction."

Offer of judgment was undifferentiated joint proposal that could not serve as basis for fee award against party who rejected it. *Duplantis v. Brock Specialty Services, Ltd.*, 85 So.3d 1206 (Fla. 5th DCA 2012).

Plaintiff sued a truck driver and his employer for injuries sustained when the truck hit his vehicle. The basis for the claim against the employer was vicarious liability. The employer served Plaintiff with an offer of judgment pursuant to Fla.R.Civ.P. 1.442 and F.S. 768.79 (2009). The offer was conditioned on execution of a release in favor of all named defendants. Plaintiff did not accept.

Plaintiff obtained a verdict in his favor, but it was more than 25% lower than the offer of judgment. The court granted the defendants' motion for a fee award against Plaintiff.

The Fifth DCA reversed, agreeing with Plaintiff that the offer was invalid because the joint offer failed to state the amount and terms attributable to each defendant as required by the version of Rule 1.442 in effect at that time. The court distinguished *Andrews v. Frey*, 66 So.3d 376 (Fla. 5th DCA 2011), noting that in *Andrews* – unlike here – vicarious liability was not disputed. "The offer of judgment made in this case stands on different footing because vicarious liability was contested by the offeror. The issue was not conceded until trial began. Under these circumstances, we believe that [plaintiff] was entitled to separate offers from each defendant, which would have permitted him to independently and intelligently assess and evaluate each offer." The court observed that "a plaintiff in Duplantis' position should not be required to compromise legitimate claims against defendants whose liability is independent of the offeror to avoid an award of attorney's fees. This defeats the intent of the offer of judgment statute and rule."

Separate offers of judgment to co-defendants offering to release all defendants if one accepted were not invalid. *Health First, Inc. v. Cataldo*, 92 So.3d 859 (Fla. 5th DCA 2012).

Plaintiff made a offer of judgment to both defendants. One defendant's potential liability was solely vicarious. The offer made to each defendant stated that, for a payment of $1,475,000, plaintiff would execute a release of all claims against all defendants. The release was attached to each offer. Neither defendant accepted the offer, the case was tried, and a verdict was entered against the defendants in excess of $2 million. The court awarded fees to plaintiff based on the rejected offers. Defendants appealed, contending that the offers were too ambiguous.

The Fifth DCA affirmed. Defendants argued that "[b]ecause more than one offer was made and each offered to resolve [plaintiff]'s claims against more than just the offeree, . . . it was impossible to tell whether each defendant had to pay $1,475,000, the amount stated in the offer, or whether a single payment of $1,475,000 would resolve both claims." Defendants also asserted that the offers were impermissible joint offers. Neither argument persuaded the appeals court. "[E]ach offer was made by the single plaintiff (Cataldo) to a single defendant, one of whom (Health First) was vicariously liable for the remaining defendant (Ori). There was no denial of vicarious liability so that the interests of the defendants were coextensive. Each offer was for a definite amount and was not the equivalent of a joint offer, even though the plaintiff promised to release all the

defendants if the offer was accepted. As for the requirement that a release be executed, the Florida Supreme Court has expressly recognized the right to include nonmonetary conditions (such as a release) in an offer of judgment, as long as such conditions are described with particularity in the offer. [Citation omitted.] Finally, the offer was not too indefinite or ambiguous for enforcement simply because an offer was made to each defendant . . . Nor were the offers invalidated because of [plaintiff]'s promise to release the remaining defendants as a nonmonetary term of the settlement. This covenant does not transform the offer into an undifferentiated joint offer."

Court erred in not awarding fees pursuant to offer of judgment made by two co-plaintiffs to single defendant. *Wolfe v. Culpepper Constructors, Inc.*, __ So.3d ___, 37 Fla.L.Weekly D2708 (Fla. 2d DCA, Nos. 2D10-3228, 2D10-3670, 11/28/2012), 2012 WL 5935633.

Wolfe and his wife sued their contractor ("Culpepper"). They made a joint offer of judgment, which Culpepper rejected. The offer required that Culpepper dismiss all claims against both Wolfes with prejudice. At trial judgment was in favor of Culpepper for more than 25% below the Wolfes' offer. The Wolfes moved for fees under the offer of judgment statute (F.S. 768.79 (2006)). The court denied the fee motion, concluding "that the offer of judgment was invalid because it was a joint offer that could only be accepted by Culpepper were Culpepper to dismiss its then pending claims against both Mr. and Mrs. Wolfe."

The Second DCA reversed. Joint proposals are not prohibited. The Wolfes' proposal was made to "but one offeree – Culpepper. It is Culpepper and Culpepper alone which had to decide whether to accept the joint offerors' proposal for settlement. The trial court erred in concluding that the Wolfes' offer was invalid per se because it was a joint offer conditioned on dismissing charges against both offerors."

Proposal for settlement under F.S. 768.79 invalid as "joint proposal" that did not apportion proposed amount. *Arnold v. Audiffred*, 98 So.3d 746 (Fla. 1st DCA 2012).

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

Defendant appealed, contending that the proposal for settlement was invalid because it was a joint proposal that did not apportion the amount attributable to each party. The First DCA agreed and reversed.

Although the proposal stated it was made by Audiffred, it included this condition: "Both Plaintiffs will dismiss this lawsuit, with prejudice, as to the Defendant." Fla.R.Civ.P. 1.442(c)(3) requires that a "joint proposal" for settlement "shall state the amount and terms attributable to each party." This requirement is strictly construed and can be especially important in cases involving a loss of consortium claim. The First DCA concluded that the proposal was a joint one, notwithstanding that it purported to be from only Audiffred. "[W]hile the first two paragraphs stated appellee Audiffred was the sole offeror, the proposal as a whole offered that both appellee Audiffred and appellee Kimmons would dismiss their claims against appellant upon appellant's

acceptance. Therefore, the proposal was a joint proposal. Thus, it should have apportioned the settlement amount between [plaintiffs]."

Proposal for settlement made by 2 defendants was not invalid for failure to apportion offer between defendants. *Pratt v. Weiss*, 92 So.3d 851 (Fla. 4th DCA 2012).

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

Plaintiff appealed, contending that the proposal was unenforceable because "it failed to apportion the offer between two separately named defendants." The defendants responded that "the proposal did not have to apportion the offer because Florida Medical Center was the single hospital entity alleged to be responsible."

Agreeing with defendants, the Fourth DCA affirmed. The requirement of Fla.R.Civ.P. 1.442 that a joint offer "state the amount and terms attributable to each party" was not violated. "[T]he offer was made on behalf of the single hospital entity allegedly responsible. The release referred to the two companies that owned, controlled, or maintained the single hospital entity allegedly responsible. As the defendants argue, they were treated as a single entity during the litigation."

Second DCA reverses order awarding fees for consortium claim due to failure to present evidence, and rejects call for "blanket rule" that claims are always too intertwined for allocation. *Blanton v. Godwin*, 98 So.3d 609 (Fla. 2d DCA 2012).

Wife was injured in an auto accident. Wife sued Tortfeasor, with Husband suing for a loss of consortium. Wife and Husband served proposals for settlement on Tortfeasor, pursuant to F.S. 768.79 (2007) and Fla.R.Civ.P. 1.442. Neither proposal was accepted. After trial Husband moved for fees based on the rejected proposal. Husband's lawyers testified that "they could not itemize the amount of time which was spent on the consortium claim because it was necessary to prove the allegations in the personal injury claim in order to prevail on the consortium claim." As a "'fall-back' position," Husband's expert estimated that 35% of the total time expended was attributable to the consortium claim. In contrast, Tortfeasor's expert testified that per billing records only 3.3 hours were spent on the consortium claim. The court found that 25% of Husband's lawyers' time was spent on the consortium claim. Tortfeasor appealed. Husband cross-appealed, arguing that the court erred in not awarding fees for the work done "in his case and his wife's case because the issues were so intertwined that allocation of time spent in each case was not feasible."

The Second DCA concluded that the court erred in awarding fees to Husband for more than 3.3 hours of attorney time. The evidence did not support the trial court's finding. "The only testimony presented regarding the actual amount of time spent on the consortium claim was that of [the tortfeasor]'s expert. Therefore, the trial court erred in failing to award [Husband] attorney's fees for the 3.3 hours expended on his claim."

The appellate court also rejected Husband's cross-appeal. As the moving party, it was Husband's burden to allocate the fees claimed to his consortium claim or to show that the issues were so intertwined that allocation is not feasible. The court ruled that Husband "cannot meet that burden and be awarded with fees related to both claims on the basis that some people do not take copious notes [a comment made by Husband's lawyer]. Further, [Husband] urges this court to adopt a blanket rule that consortium claims are always so intertwined with the spouse's claim that allocation is never possible. We decline to do so and would note that if such a rule were adopted, in every case containing a consortium claim, where a defendant or one of the plaintiffs are entitled to fees for one claim, that party would automatically be able to obtain fees for work done on both cases."

See also *Saunders v. Dickens*, __ So.3d __, 37 Fla.L.Weekly D2274 (Fla. 4th DCA, Nos. 4D09-5302, 4D10-2062, 9/27/2012), 2012 WL 4448820 (relying on *Blanton* to reach similar result).

Fee award reversed because proposal for settlement did not attach release or sufficiently describe its terms. *Lyons v. Chamoun*, 96 So.3d 456 (Fla. 4th DCA 2012).

Plaintiff sued Car Owner and Driver following an accident. Plaintiff served a proposal for settlement on Owner, who did not accept it. After a favorable jury verdict, Plaintiff moved for attorney's fees based on the rejected proposal. The court awarded fees of $141,475.

The Fourth DCA reversed, ruling that the proposal was deficient because it failed to state with particularity the relevant terms and so did not comply with F.S. 768.79 and Fla.R.Civ.P. 1.442. The proposal provided that Plaintiff would execute a full release in favor of Owner and his insurer. The proposal was ambiguous because the terms regarding the release failed "to define the parties included. The [proposal] does not state whether the driver is covered by the release. This term is essential for the owner because he is responsible for the driver's negligence under the dangerous instrumentality doctrine." Just as in *Papouras v. Bellsouth Telecommunications, Inc.*, 940 So.2d 479 (Fla. 4th DCA 2006), the proposal was too ambiguous to satisfy Fla.R.Civ.P. 1.442.

Where party is entitled to fees under offer of judgment statute, court errs concluding that zero is a reasonable fee. *Braaksma v. Pratt*, __ So.3d ___, 37 Fla.L.Weekly D2577 (Fla. 2d DCA, No. 2D12-214, 11/2/2012), 2012 WL 5373433.

Plaintiff sued 2 defendants in a personal injury case. He made an offer of judgment to one defendant. The offer was rejected. No offer was made to the other defendant. The case was tried and Plaintiff obtained a judgment against both defendants (jointly and severally) that was more than 25% greater than the offer; thus, it was undisputed that Plaintiff was entitled to fees. The court, however, concluded that a reasonable fee was $0 "because [the one defendant's] rejection of the offer did not result in any additional delay costs and expenses to" Plaintiff – Plaintiff would have been required to proceed to trial on the vicarious liability claim even if the one defendant had accepted the offer.

The Second DCA reversed. "Once the court determines that a party has complied with the technical terms of section 768.79 and rule 1.442, the court may disallow fees only upon a finding that the offer was not made in good faith." (Citations omitted.) The statute lists factors for a court to consider in deciding upon a reasonable fee. Apparently the trial court relied on sec. 768.79(7)(b)

in concluding that zero was a reasonable fee. This was error; "once entitlement to a fee award is determined in favor of a party, a trial court cannot then use the reasonableness factors to deny fees altogether." Although the trial court "could have awarded a *reduced* amount of attorney's fees to [Plaintiff] based on the applicable factors," it was error to deny fees entirely. (Emphasis by court.)

Where offeror had no exposure to liability, $1 offer of judgment was made in good faith and supported fee award. *General Mechanical Corp. v. Williams*, __ So.3d ___ (Fla. 1st DCA, No. 1D12-1210, 12/17/2012), 2012 WL 6554560.

A corporation ("GMC") and an individual were sued by Williams for alleged breach of a 5-year oral contract. GMC made a nominal offer of judgment in the amount of $1 to Williams. The offer was not accepted and a jury verdict was rendered for GMC. GMC moved for fees and costs pursuant to F.S. 768.79 (2009). The court denied the motion on the ground that GMC's nominal offer was not made in good faith.

The First DCA reversed. F.S. 768.79 and Fla.R.Civ.P. 1.442 permit a court to deny an award of fees to which the moving party would otherwise be entitled when it finds that the offer "was not made in good faith." To determine whether an offer of judgment was made in good faith the court must consider whether the offeror had a reasonable basis to support the offer. When the offer is a nominal one "a reasonable basis exists only where the undisputed record strongly indicates that the defendant had no exposure. A nominal offer should otherwise be stricken." Here, the First DCA pointed out that "[t]he undisputed record strongly indicates that GMC had no exposure to liability. In the complaint, Williams alleged the breach of a five-year oral agreement. GMC correctly maintained throughout the case that such an agreement was barred by the statute of frauds." Thus, GMC had a "reasonable basis" for its $1 offer and should have been awarded fees.

Order denying fee award under offer of judgment statute is reversed because court erred in finding offer not made in good faith. *McGregor v. Molnar*, 79 So.3d 908 (Fla. 2d DCA 2012).

McGregor sued Molnar and a corporation ("CCC") for her injuries in an auto accident. She served Molnar with an offer of settlement that expressly reserved her right to proceed against CCC. Molnar rejected the offer. The final judgment exceeded the offer by 25% and McGregor sought fees under F.S. 768.79 and Fla.R.Civ.P. 1.442. The court denied the fee motion on the ground that it was not made in good faith, primarily because it was not intended to conclude the litigation.

The Second DCA reversed, stating 3 reasons that the trial court erred in finding that McGregor's offer of settlement was not made in good faith. "First, the fact that the offer did not conclude the litigation with regard to CCC is irrelevant." The law does not require that an offer settle all claims against all parties. "Second, in its order, the trial court stated that if McGregor's offer were accepted, it would merely provide funds for McGregor to proceed with the litigation. But this court has noted that securing funding to further prosecute a case is a valid strategic reason behind an offer to settle." (Citation omitted.) "Third, the trial court found that Molnar's failure to accept the offer caused no additional delay or litigation costs. But this is not a factor to be considered in determining good faith; it is one of the six factors to be considered in determining the reasonableness of the amount of the fee award."

Fees awarded against estate's personal representative under offer of judgment statute cannot be recovered against funds allocated to survivor – even if survivor is P.R. *Kadlecik v. Haim*, 79 So.3d 892 (Fla. 5th DCA 2012).

Kadlecik, the decedent's sole survivor, was named personal representative ("PR") of the estate. He sued several defendants on a wrongful death claim. He settled against one defendant, and apportioned those proceeds to his sole survivor claims. Other defendants served proposals for settlement on him as PR under F.S. 768.79. Kadlecik rejected the proposals. The defendants prevailed at trial and were awarded fees of $200,000 against Kadlecik as PR. The court ordered Kadlecik, as survivor, to pay the fees.

The Fifth DCA reversed. Survivors, such as Kadlecik, are *not* parties to wrongful death actions under Florida law. It is error for a court to award fees against a survivor because the PR is the only person with authority to settle the claim and an individual survivor cannot accept or reject proposal for settlement.

Court abused its discretion by awarding $25,000 in nontaxable costs as sanction under F.S. 768.79. *Delmonico v. Crespo*, __ So.3d ___ (Fla. 4th DCA, No. 4D11-1523, 12/5/2012), 2012 WL 6027800.

A court entered an award of fees under F.S. 768.79. The court found that certain claimed costs were not taxable but "[n]evertheless, reasoning that section 768 is a form of sanction" awarded $25,000 of the claimed expenses as a sanction under sec. 768.79. The Fourth DCA reversed the $25,000 award. The expenses in question were for accountants at a CPA firm who were consultants but did not testify, and for jury consultants. Neither of these expenses were taxable costs. The trial court abused its discretion by awarding the $25,000 in nontaxable costs as a sanction under sec. 768.79.

Court erred in allowing discovery of defense counsel's billing records to support *plaintiff's* claim for fee award. *Estilien v. Dyda*, 93 So.3d 1186 (Fla. 4th DCA 2012).

See discussion under "Confidentiality and Privileges" section.

Prevailing Party:

Court erred in awarding fees to prevailing party for services of lawyers employed on contingent fee basis who withdrew prior to jury verdict. *Fidelity Warranty Services, Inc. v. Firstate Insurance Holdings, Inc.*, 98 So.3d 672 (Fla. 4th DCA 2012).

In a commercial suit JMA prevailed on its defense of counterclaims, but Firstate obtained significant jury verdicts on its claims of tortious interference and defamation. The court awarded fees to Firstate. JMA contended on appeal that the court erred in awarding fees for the services of

several lawyers who were employed under a contingent fee agreement but withdrew from the representation prior to the occurrence of the contingency. JMA argued that, as a result, "each forfeited their right to a fee."

The Fourth DCA agreed and reversed to the extent that the fee award included fees for the withdrawn lawyers. The appeals court summarized applicable Florida law. "If, prior to the conclusion of the case, the client discharges an attorney employed under a contingency fee agreement without cause, then the attorney may recover the reasonable value of his services, as limited by the contract maximum. . . . If an attorney employed under a contingency fee agreement is discharged for cause, he may recover in quantum meruit, with such amount reduced by the damages suffered by the client as the result of counsel's misconduct. . . . But, where an attorney voluntarily withdraws from the representation prior to the conclusion of the case, the attorney generally forfeits all right to recover a fee. . . . An exception is made, allowing the withdrawing attorney to recover in quantum meruit, if the client's conduct made the attorney's continued representation legally impossible or if the client's conduct would cause the attorney to violate his or her ethical obligations. . . ." (Citations omitted.) Here, the evidence "established a voluntary withdrawal, not necessitated by the conduct of the client," and so it was error to include the withdrawn lawyers' services in the fee award.

The court also rejected the argument that the lawyers had entered an amended fee agreement prior to withdrawal that purported to obligate the client to pay the greater of a stated amount for services already rendered or 3% of any recovery. "Prevailing law does not permit an attorney who represented a client under a contingency fee agreement to avoid the consequences of his withdrawal by subsequently modifying his fee agreement." (Citations omitted.)

Party who successfully asserted that contract was breached but was awarded no damages is entitled to prevailing party fees. *Khodam v. Escondido Homeowner's Ass'n, Inc.*, 87 So.3d 65 (Fla. 4th DCA 2012).

Homeowner alleged that Homeowner's Association breached a contract (a declaration of covenants). The jury found that the contract was breached but awarded zero damages. Homeowner moved for prevailing party fees and costs. The court awarded costs but not fees, "determining that neither party prevailed for purposes of awarding attorney's fees."

The Fourth DCA reversed. "The party who prevails 'on the significant issues in the litigation is the . . . prevailing party for attorney's fees.' [Citation omitted.] Absent compelling circumstances, 'we have maintained that '[i]n a breach of contract action, one party must prevail.'' [Citation omitted.]" The finding that Association breached the contract made Homeowner the prevailing party on the litigation's significant issues, despite the lack of a damage award.

Court did not err in awarding prevailing party fees to mortgage foreclosure defendant after lender's complaint was dismissed. *J.P. Morgan Mortgage Acquisition Corp. v. Golden*, 98 So.3d 220 (Fla. 2d DCA 2012).

Lender sued Defendant in a mortgage foreclosure. The court dismissed the complaint and awarded fees to Defendant as the prevailing party. On appeal Lender argued that Defendant "was not the prevailing party because the complaint was dismissed and could be filed again in a

subsequent action." The Second DCA affirmed. "'The refiling of the same suit after the voluntary dismissal does not alter the [mortgagor's] right to recover prevailing party attorney's fees incurred in defense of the first suit.' *Bank of N.Y. v. Williams*, 979 So.2d 347, 348 (Fla. 1st DCA 2008)."

Court awards prevailing party fees to successful defendant even though third party paid his legal bills. *Rogers v. Vulcan Manufacturing Co., Inc.*, 93 So.3d 1058 (Fla. 1st DCA 2012).

Plaintiff sued Defendant, a former employee, for alleged breach of a non-solicitation and non-competition agreement. The suit was dismissed for lack of prosecution and Defendant moved for prevailing party fees, pursuant to this provision in the agreement: "In any action to enforce any term, condition, or provision of this agreement, the prevailing party shall be entitled to recover the reasonable attorney's fee *incurred to enforce same*." (Emphasis by First DCA.) The court awarded Defendant $0 on the ground that Defendant's new employer, *not* Defendant, had paid the fees of Defendant's lawyer and that there was no evidence that *Defendant* was obligated for repayment.

The First DCA reversed. "The Agreement does not say the prevailing party is entitled to the attorney's fees 'it' incurred; it says entitlement is to 'the' fees incurred as a result of prevailing in any enforcement action brought under the Agreement. The clear intent of this provision is that the loser pays, and the winner does not. That a non-party may be the initial source of funds for prosecuting or defending an enforcement action is not dispositive."

Error to award prevailing party fees to party that cannot prevail because its complaint failed to state a cause of action. *Alorda v. Sutton Place Homeowners Ass'n, Inc*., 82 So.3d 1077 (Fla. 2d DCA 2012).

Homeowners failed to demonstrate proof of insurance as required by the Association's covenants. The Association sought a permanent injunction requiring Homeowners to obtain the required coverage. Homeowners moved to dismiss, alleging that Association "failed to sufficiently establish that it lacked an adequate remedy at law to justify injunctive relief." (The covenants provided that, if an owner failed to provide proof of insurance, Association could buy the insurance and assess the cost to the owner.) The court denied the motion to dismiss. *After* suit was filed, Homeowners obtained insurance. The court dismissed the complaint as moot but awarded prevailing party attorney's fees to Association.

The Second DCA reversed. "[T]he Association cannot be considered the prevailing party because it did not state a cause of action for injunctive relief in its complaint."

Per First DCA, there is no "de minimus" involvement exception concerning entitlement to prevailing party fees. *First Real Estate, LLC v. Grant*, 88 So.3d 1073 (Fla. 1st DCA 2012).

Appellant sued Bachman and others for breach of contract. Judgment was entered for Bachman. Appellant appealed, but voluntarily dismissed the appeal before any briefs were filed. Bachman then sought an award of appellate fees as the prevailing party in the appeal. Appellant objected "on the basis that '[Bachman]'s involvement in this appeal has been de minimus.'" The appeals court rejected this contention, stating " there is no de minimus exception when determining

entitlement to a fee award. . . . Although the dismissal of this appeal at an early stage will certainly impact the amount of fees awarded, it has no bearing on Bachman's *entitlement* to fees." (Citation omitted, emphasis by court.)

Prevailing party award of fees in a construction lien case is premature when significant issues remain pending. *GMPF Framing, LLC v. Villages at Lake Lily Associates, LLC*, 100 So.3d 243 (Fla. 5th DCA 2012).

GMPF filed a construction lien claim against property owned by Villages. The court discharged the lien claim but additional claims for imposition of an equitable lien and unjust enrichment remained pending. The court awarded fees to Villages under F.S. 713.29 as the prevailing party on the lien claim. GMPF appealed, contending that the order was premature because significant issues remained pending in the suit. Agreeing, the Fifth DCA reversed. Because significant counts remained pending, it was premature to determine that Villages was the prevailing party.

Second DCA declines to authorize award of fees when covenantee successfully sues covenantor to remove encumbrances. *Reiterer v. Monteil*, 98 So.3d 586 (Fla. 2d DCA 2012).

A covenantee prevailed in a suit against the covenantor who breached a covenant against encumbrances on real property. The court awarded fees and costs to the covenantee. The Second DCA reversed, noting that "Florida law supports no such award." The appeals court observed that a covenantee may recover fees incurred in a suit to maintain or defend title against a *third party* occasioned by the covenantor's breach of contract, but declined to extend that "narrow" rule.

State law providing for prevailing party attorney's fees must yield to federal government's sovereign immunity claim. *United States v. Wonders*, 86 So.3d 544 (Fla. 2d DCA 2012).

The U.S. government brought a mortgage foreclosure action against Wonders. Wonders prevailed. The promissory note allowed the U.S. to recover its fees if it had prevailed, and under F.S. 57.105(7) that provision is reciprocal. Wonders moved for prevailing party fees, and the U.S. defended by asserting sovereign immunity. The trial court awarded fees to Wonders.

The Second DCA reversed. "The law is clear that even when the United States initiates litigation in a state court in a context such as this, state laws providing for attorney's fees against the losing party cannot be enforced against the United States."

The court commented: "[I]n our modest contribution to federal deficit reduction, we reverse the judgment on appeal and direct the trial court to deny the motion on remand."

Court's reservation of judgment to enter "additional orders" was not specific enough to excuse party's failure to move for fees within 30 days after final judgment. *Kalb as Trustee v. Nack Holding, LLC*, 79 So.3d 175 (Fla. 3d DCA 2012).

Judgment for Nack Holding was entered on October 20, 2009. On March 12, 2010, Nack Holding moved for prevailing party trial and appellate fees. The court granted the motion.

The Third DCA reversed the award of trial level fees. "The thirty-day bright line had already expired when Nack Holding filed its motion. Further, Nack Holding incorrectly contends no motion was necessary after the judgment because it served a demand for attorney's fees in July 2007, and the trial court reserved jurisdiction to enter additional orders. The trial court's reservation of jurisdiction 'to enter such additional orders,' does not suffice because it does not determine Nack Holding is entitled to attorney's fees."

Applying axiom "what's sauce for the goose is sauce for the gander," Fourth DCA reverses fee award. *Surgical Partners, LLC v. Choi*, 100 So.3d 1267 (Fla. 4th DCA 2012).

Doctor successfully defended Medical Association's breach of contract claim. He argued that the employment agreement at issue "was unenforceable because the medical association failed to provide the requisite written notice to commence the agreement term." The court awarded fees to Doctor under the prevailing party provision of the agreement, concluding that an agreement existed but was unenforceable due to the Association's failure to send the notice. The court rejected the Association's argument that an agreement never existed because the "lack of notice was tantamount to a failure of a condition precedent."

The Fourth DCA reversed, beginning its opinion by reciting the axiom "what is sauce for the goose is sauce for the gander." In other words, Doctor could *not* argue that an agreement never came into effect while contending that he was entitled to fees under that same agreement. "Written notice was a condition precedent to formation. The medical association never sent that notice, which permitted the trial court to grant the doctor's motion for summary judgment. It was on this basis that we affirmed the summary judgment. The doctor simply cannot avoid a liquidated damages provision by claiming the agreement never came into effect, or was unenforceable, and at the same time be entitled to attorney's fees under the same agreement."

Proof Needed for Fee Award:

Plaintiff seeking attorney's fees as element of "wrongful act" damages need not present expert witness testimony as to reasonableness of fees. *Schwartz v. Bloch*, 88 So.3d 1068 (Fla. 4th DCA 2012).

Plaintiff sued a lawyer and law firm alleging legal malpractice and breach of fiduciary duty. Judgment was entered for Defendants. The jury awarded Plaintiff $250,000 in "wrongful act" damages for attorney's fees and costs he incurred in connection with legal claims against some of his family members occasioned by the alleged malpractice. The court struck the award because Plaintiff had not presented independent expert testimony as to the reasonableness of the fees.

The Fourth DCA reversed: "We hold that such independent expert testimony was not required for fees which plaintiff incurred in the litigation with his family and sought as an element of his compensatory damages under the wrongful act doctrine."

Lawyer who failed to testify in support of his attorney's fee request precluded from receiving award of fees. *Neitlich v. Thirty-Three Sixty Condominium Ass'n, Inc.*, 77 So.3d 248 (Fla. 4th DCA 2012).

A condo association was awarded fees. The losing unit owners appealed the award of fees to lawyer Perez-Martinez. The Fourth DCA reversed, agreeing with the unit owners "that it was error to award fees to attorney Perez-Martinez. Perez-Martinez failed to testify at the hearing and is therefore precluded from an award of attorney's fees."

Section 57.105 and Other Sanctions:

In reversing order granting fees as sanction, Second DCA discusses purpose of section 57.105(1). *Swan Landing Development, LLC v. First Tennessee Bank N.A.*, 97 So.3d 326 (Fla. 2d DCA 2012).

Bank sued Swan Landing to foreclose a mortgage. After the final judgment was entered, Swan Landing filed a motion to set aside the judgment under Fla.R.Civ.P.1.540(b). The court denied Swan Landing's rule 1.540(b) motion and, without an evidentiary hearing, granted Bank's motion for sanctions and fees pursuant to F.S. 57.105 (2010). Swan Landing appealed.

The Second DCA reversed, finding an abuse of discretion. The court discussed the proper uses of sec. 57.105. "We emphasize that section 57.105 should be applied with restraint 'to ensure that it serves the purpose for which it was intended.' . . . The purpose of section 57.105 'is to discourage baseless claims . . . [and] not to cast a chilling effect on use of the courts.' In this context, section 57.105 should not be construed to discourage a party from pursuing a colorable claim under rule 1.540. And because Swan Landing and its attorneys presented a colorable claim to support the 1.540(b) motion, we conclude that the trial court abused its discretion in granting the Bank's motion for sanctions and fees under section 57.105." (Citations omitted.)

Court erred in awarding F.S. 57.105 fees solely against party rather than equally against party and its lawyer. *Shelly L. Hall, M.D., P.A. v. White*, 97 So.3d 907 (Fla. 1st DCA 2012).

The First DCA ruled that a court abused its discretion by awarding fees under F.S. 57.105(1) solely against a *party*. "Section 57.105(1) provides that the fees are 'to be paid to the prevailing party in equal amounts by the losing party and the losing party's attorney.' Here, the appellees' motion for fees under section 57.105 was clearly addressed toward the conduct of the appellant's attorney, Roger Hall, and we decline to infer that the trial court intended to find that Hall acted in good faith so as to be exempt from fees under section 57.105(3)."

Lawyer who files time-barred claim cannot evade imposition of section 57.105 fees by claiming good faith reliance on clients' representations. *Shuck v. Smalls*, __ So.3d __, 37 Fla.L.Weekly D2783 (Fla. 4th DCA, Nos. 4D10-206, 4D11-1861, 12/5/2012), 2012 WL 6027820.

In 2 consolidated cases with appeals and cross-appeals, the Fourth DCA addressed issues relating to imposition of fee awards as a sanction under F.S. 57.105 (2007). The trial court awarded sec. 57.105 fees only from May 24, 2007, forward rather than from the inception of the case in 2006, apparently being of the view that the claims were not frivolous from inception.

For 2 reasons the appeals court rejected appellant's contention that a case or claim must be frivolous from its inception to trigger the statute. First, the 1999 amendment to sec. 57.105 "specifically allows the frivolousness of a claim to be measured either when the claim is initially presented to the court *or at any time before trial*." (Emphasis by court; citation omitted.) Second, in this case the claims "were in fact frivolous at the time they were initially filed, because they were time-barred." Because the claims were time-barred and thus frivolous from the outset, the trial court abused its discretion in failing to award sec. 57.105 fees from the inception of the case.

The appeals court also agreed that it was error to not assess the fees in equal parts against appellants and their lawyer. Sec. 57.105 "shifts attorney's fees and costs to 'a losing party and the losing party's attorney' in equal amounts when the court finds that a claim or defense was not supported by the material facts necessary to establish it, or that it would not be supported by applying then-existing law to those material facts. However, the losing party's attorney is not personally responsible if he or she has acted in good faith, based on the representations of his or her client as to the existence of those material facts." Fees should have been awarded against both appellants *and* their counsel; the fact that claims were time-barred precluded counsel "as a matter of law, from asserting any good faith reliance upon the representations of their clients."

Third DCA affirms section 57.105 fee award for "frivolous and dilatory tactics," but orders it paid in equal parts by party and his lawyer. *Stratton v. 6000 Indian Creek, LLC*, 95 So.3d 334 (Fla. 3d DCA 2012).

See discussion in "Professionalism" section.

Lawyer who appealed 57.105 attorney's fee sanction by arguing 1979 version of statute now faces imposition of appellate sanctions. *Robbins v. Rayonier Forest Resources, L.P.*, __ So.3d ___ (Fla. 1st DCA, No. 1D12-2254, 12/13/2012), 2012 WL 6199971.

See discussion in "Trial Conduct" section.

First DCA imposes attorney's fees as sanction for a frivolous appeal, and denies lawyer's motion to withdraw. *Florida Houndsmen Ass'n, Inc. v. Florida Fish and Wildlife Conservation Comm'n*, __ So.3d ___, 37 Fla.L.Weekly D1353 (Fla. 1st DCA, No. 1D11-3190, 6/6/2012), 2012 WL 2018848.

Lawyers represented Appellants in an appeal from an executive order of the Fish and Wildlife Commission ("FWC"). The challenged order was superseded by an administrative rule, rendering the complaint moot. The court granted FWC's motion to dismiss without prejudice and gave Appellants 30 days to amend. The complaint was not amended.

Lawyers' initial appellate brief "failed to acknowledge the mootness issue or the fact that they had not taken advantage of their opportunity to amend. After FWC raised these points in the answer brief, Appellants failed to reply, and they continued to ignore these points, which were again raised in the motion for attorney's fees, after we [the First DCA] ordered them to show cause why the motion should not be granted." Lawyers "knew or should have known" that the appeal was frivolous and imposed sanctions under F.S. 57.105(1) (2010). The court stated that because its "decision is based on the lack of legal, rather than factual, merit, only Appellants' attorneys shall be responsible for paying this award."

The court also denied the motion to withdraw filed by one of Appellants' attorneys. He stated that he had limited involvement with the appeal, signing only a single pleading. The court observed that is docket "indicates otherwise" and, moreover, "also reject[ed] the suggestion that such involvement is insignificant.

Workers' Compensation Cases:

Workers comp claimant's lawyer fired by claimant is entitled to fees on full amount of benefits obtained, not just those paid prior to lawyer's discharge. *Oliver v. Dunn*, 100 So.3d 1187 (Fla. 1st DCA 2012).

In representing Claimant in a worker's compensation case, Lawyer secured "the entirety of past and future PTD [partial total disability] benefits due Claimant." The benefits were to be paid out in installments. Claimant discharged Lawyer and new counsel was substituted in on March 29, 2011. The Judge of Compensation Claims ["JCC"] ruled that Lawyer was not entitled to any fees after March 29, 2011. The JCC reasoned "that 'there must exist some continuing responsibility through the attorney/client relationship in order for continuing fees to be paid,' and that to rule otherwise 'would result in a windfall to the former attorney.'"

The First DCA disagreed and reversed. Lawyer was entitled to a fee based on the total benefit secured, regardless of when it was paid.

A concurring opinion put it this way: "The rule cannot be that claimants have the ability to extinguish their liability for attorney's fees simply by discharging counsel."

Workers' comp claimant may recover fees where counsel must attend deposition set by E/C when no petition for benefits has been filed. *Shannon v. Cheney Brothers, Inc.*, 98 So.3d 1228 (Fla 1st DCA 2012).

Workers' compensation claimant Shannon had not filed a petition for benefits against his employer or the employer's carrier ("E/C"). E/C took Shannon's deposition, as permitted by F.S. 440.30 (2010). Shannon's lawyer attended the deposition. E/C disputed the amount of fees claimed by Shannon's lawyer and, ultimately, the lawyer was deposed. Shannon's lawyer then amended his motion for fees, seeking payment for attending the second deposition under sec. 440.30. The Judge of Compensation Claims ("JCC") denied fees for attending the second deposition.

The First DCA reversed. Sec. 440.30 provides in pertinent part that, "If no claim has been filed, then the carrier or employer taking the deposition shall pay the claimant's attorney a

reasonable attorney's fee for attending said deposition." The motion for fees under sec. 440.30 is not a "claim" as that term is used in the statute. The court held that "the plain language of section 440.30 compels the payment of an attorney's fee in those circumstances where a claimant's attorney is required to attend a deposition set or compelled by an employer or carrier, when no petition for benefits – or other document that if timely filed would toll the statute of limitations – has been filed under section 440.192."

FILES

Court discusses which items from case file that indigent prisoner's former publicly-paid counsel must provide to him for free. *Brown v. State*, 93 So.3d 1194 (Fla. 4th DCA 2012).

A prisoner petitioned for mandamus to require his former public defender and former appointed counsel to provide him with free copies of documents from his case such as "charging documents, police reports, transcripts, sentencing paperwork, and appellant's attorneys' files." The trial court summarily denied the petition.

The Fourth DCA reversed and remanded, explaining which file items must be provided by former counsel at no charge and which file items counsel may provide only if the defendant pays the cost of copying. "Transcripts or record documents that were prepared at public expense on behalf of an indigent defendant must be provided to the defendant without charge for copying. . . . By contrast, '[f]iles prepared and maintained by an attorney for the purpose of representing a client are the attorney's personal property.' . . . Apart from transcripts or record documents prepared on the defendant's behalf at public expense, the defendant's attorney cannot be required to provide other documents that are in the case file without adequate compensation." (Citations omitted.)

INEFFECTIVE ASSISTANCE OF COUNSEL AND RIGHT TO COUNSEL

United States Supreme Court issues 2 opinions addressing ineffective assistance in the context of plea bargains.

The United States Supreme Court expanded the range of ineffective assistance of counsel claims available to convicted criminal defendants in 2 cases addressing ineffective assistance in the context of plea bargains.

Missouri v. Frye, 132 S.Ct. 1399 (2012). A 5-4 majority concluded that a criminal defense lawyer who fails to inform a client of a written plea offer before it expires has rendered constitutionally ineffective assistance of counsel. "Defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused." This is the case even though there is no constitutional right to be offered a plea bargain. In order to prove prejudice, however, the defendant must show that the plea bargain would have been consummated had the defendant been told of it (i.e., the defendant must demonstrate that he or she would have accepted the offer, that the court would have approved it, and that the agreement would have resulted in a lower sentence than the defendant actually received).

Lafler v. Cooper , 132 S.Ct. 1376 (2012). A 5-4 majority concluded that a criminal defendant who was given erroneous advice by defense counsel showed the prejudice necessary to establish an ineffective assistance of counsel claim even if he or she received a fair trial after not accepting the plea offer. "Even if the trial itself is free from constitutional flaw, the defendant who goes to trial instead of taking a more favorable plea may be prejudiced from either a conviction on more serious counts or the imposition of a more severe sentence."

First DCA rejects contention that *Lafler* and *Frye* create new constitutional rights concerning ineffective assistance of counsel claims. *Simmons v. State*, __ So.3d ___, 37 Fla.L.Weekly D2802 (Fla. 1st DCA, No. 1D12-4065, 12/5/2012), 2012 WL 6029093.

Convicted Defendant filed a postconviction motion contending that *Lafler v. Cooper* and *Missouri v. Frye* "establish new, fundamental constitutional rights of the kind contemplated by [Fla.R.Crim.P.] 3.850(b)(2) and apply retroactively to his case." The postconviction court denied his motion as untimely. The First DCA affirmed. "We agree with the learned trial judge that *Lafler* and *Frye* are but a refinement of decisions already handed down, a clearer articulation of existing law that does not establish new constitutional rights: Both *Lafler* and *Frye* are properly viewed as 'evolutionary refinements' to well-established rules governing ineffective assistance of counsel claims in the context of convictions predicated on pleas."

Per Florida Supreme Court, U.S. Supreme Court decision in *Martinez v. Ryan* does not create new cause of action for ineffective assistance of collateral counsel. *Gore v. State*, 91 So.3d 769 (Fla. 2012).

Convicted defendant Gore appealed the summary denial of his successive motion for postconviction relief. He argued that the U.S. Supreme Court decision in *Martinez v. Ryan* afforded a basis for relief, contending that *Martinez* "creates a new and independent cause of action for ineffective assistance of collateral counsel in our state courts system." The Florida Supreme Court disagreed: "While the decision in *Martinez* does contain expansive language, a proper analysis reveals that the Supreme Court specifically declined to address the issue of whether a constitutional right to effective assistance of collateral counsel exists . . ." Gore had received a "full collateral review" of his case in the Florida state court system and held that "that under the facts and circumstances of this case, *Martinez* provides Gore with no basis for relief in this Court."

Per Supreme Court, standard warning on immigration consequences of plea can be constitutionally deficient, but *Padilla*'s holding not applied retroactively. *Hernandez v. State*, __ So.3d ___, 37 Fla.L.Weekly S730 (Fla., Nos. SC11-941, SC11-1357, 11/21/2012), 2012 WL 5869660.

Answering certified questions from the Third DCA posed in *Hernandez v. State*, 61 So.3d 1144 (Fla. 3d DCA 2011), the Supreme Court decided how *Padilla v. Kentucky*, 130 S.Ct. 1473 (2010), is to be applied in Florida courts. In *Padilla*, the U.S. Supreme Court concluded that

defense counsel provided ineffective assistance by failing to advise his client of the mandatory deportation consequences of entering a guilty plea.

Fla.R.Crim.P. 3.172(c)(8) contains a standard warning regarding the immigration-related consequences of entering a guilty plea., stating that the plea "may subject [a defendant who is not a U.S. citizen] to deportation pursuant to the laws and regulations governing the United States Immigration and Naturalization Service." The Court held that a trial court's recitation of "the equivocal warning pursuant to rule 3.173(c)(8) does not bar ineffective assistance of counsel claims in every instance." Where the deportation consequences of a plea "are 'truly clear,' the United States Supreme Court in *Padilla* requires effective counsel to provide more than equivocal advice concerning those consequences. . . . At least in those circumstances, an equivocal warning from the trial court is less than what is required from counsel and therefore cannot, by itself, remove prejudice resulting from counsel's deficiency."

However, the Court pointed out that the giving of the warning in rule 3.172(c)(8) does *not* automatically result in ineffective assistance of counsel. Rather, this warning "contributes to the totality of the circumstances by providing evidence that the defendant is aware of the possibility that a plea could affect his immigration status." The rule 3.172(c)(8) colloquy "may refute a defendant's postconviction claim that he had no knowledge that a plea could have possible immigration consequences; however, it cannot *by itself* refute a claim that he was unaware of presumptively mandatory consequences." (Emphasis supplied.)

The Court also held that *Padilla* does *not* apply retroactively. (The U.S. Supreme Court granted certiorari to review this question. See *Chaidez v. United States*, 655 F.3d 684 (7th Cir. 2011), cert. granted, 132 S. Ct. 2101 (April 30, 2012) (No. 11-820).)

Supreme Court vacates death sentence due to ineffective assistance of counsel in investigating and presenting mitigation evidence. *Robinson v. State*, 95 So.3d 171 (Fla. 2012).

Defendant filed a Fla.R.Crim.P. 3.850 motion to vacate his conviction and death sentence due to alleged ineffective assistance provided by trial counsel. The postconviction court denied the motion. The Supreme Court reversed the denial of the claim of ineffective assistance during the penalty phase of the trial. "[C]ounsel rendered ineffective assistance by failing to investigate, develop, and present available mitigating evidence that would have legally precluded the trial court from overriding the jury's life recommendation. We therefore vacate [Defendant]'s death sentences and remand for the imposition of sentences of life in prison."

Supreme Court affirms postconviction court's summary denial of claim that trial counsel's heavy workload resulted in actual conflict of interest. *Dennis v. State*, __ So.3d ___ (Fla., Nos. SC09-1089, SC09-2289, 12/20/2012), 2012 WL 6619282.

Convicted Defendant unsuccessfully moved for postconviction relief under Fla.R.Crim.P. 3.851. He appealed the postconviction court's denial of his claim, alleging that trial counsel "was operating under an actual conflict of interest due to trial counsel's workload and that conflict adversely affected his representation of" Defendant.

The Supreme Court affirmed, noting that under *Quince v. State*, 732 So.2d 1059, 1064 (Fla. 1999), a postconviction movant urging a conflict of interest claim must "allege that trial counsel

‘‘actively represented conflicting interests’ and that ‘an actual conflict of interest adversely affected his lawyer’s performance.’’ Defendant failed to meet this requirement. “[I]nstead of identifying anything specific in the record suggesting that his interests were compromised by an actual conflict, [Defendant] alleges that trial counsel’s ‘work load’ related to his other clients, including clients involved in other high profile cases, adversely affected his representation. This allegation of a conflict is overly speculative and hypothetical. [Defendant] failed to allege that counsel actively represented conflicting interests, and we affirm the denial of relief.”

Supreme Court reiterates that courts reviewing summary denials of postconviction motions must accept movant's factual allegations as true if not refuted by record. *Nordelo v. State*, 93 So.3d 178 (Fla. 2012).

The Supreme Court quashed a Third DCA decision affirming the summary denial of Nordelo’s successive motion seeking postconviction relief on the basis of allegedly newly discovered evidence. In remanding for an evidentiary hearing, the Court explained: “We have repeatedly held that ‘where no evidentiary hearing is held below, [the appellate court] must accept *the defendant’s factual allegations to the extent they are not refuted by the record*.’ *Peede v. State*, 748 So.2d 253, 257 (Fla. 1999) (emphasis by Court). The district court misapplied this precedent when it failed to accept the factual allegations of the motion, including the affidavit, in determining if the motion was legally sufficient. In spite of the fact that the record was not before either court, both courts proceeded to make factual determinations as a basis for summary denial of the motion.”

Florida Bar Board of Governors concludes that criminal plea offers conditioned on waivers of ineffective assistance of counsel and prosecutorial misconduct are unethical. Florida Ethics Opinion 12-1.

In December 2012 the Florida Bar Board of Governors approved Florida Ethics Opinion 12-1, which concludes that a criminal defense lawyer has an unwaivable conflict of interest that precludes the lawyer from advising a client whether to accept a plea offer requiring the client to waive any past or future ineffective assistance of counsel by the defense lawyer or to waive any claims of prosecutorial misconduct. The opinion also concludes that it is unethical for a prosecutor to make such an offer.

Ineffective assistance claim based on alleged misadvice concerning rule 3.170(l) motion to withdraw plea is cognizable and cannot be waived. *Pagan v. State*, __ So.3d ___, 37 Fla.L.Weekly D2636 (Fla. 2d DCA, No. 2D11-3804, 11/14/2012), 2012 WL 5499990.

Defendant entered an open guilty plea and received a long sentence. He moved to withdraw his plea pursuant to Fla.R.Crim.P. 3.170(l), alleging that his trial counsel “gave him misleading advice concerning his decision to enter the plea.” Conflict-free counsel was appointed to represent Defendant on his motion. Just prior to the hearing the state made an offer conditioned on immediate acceptance and on waiving any rights he would have to seek collateral relief. After consulting with his counsel, Defendant accepted the offer and was resentenced.

Defendant subsequently filed a motion for postconviction relief under Fla.R.Crim.P. 3.850, alleging ineffective assistance "in connection with the State's offer to resolve his rule 3.170(l) motion." The court summarily denied the motion on the ground that a claim of ineffective assistance in a postconviction proceeding is not cognizable.

The Second DCA reversed and remanded for an evidentiary hearing on Defendant's claim. A rule 3.170(l) motion is *not* a postconviction matter, but rather a motion to withdraw a plea before it becomes final. This is "a critical stage of the proceedings" and, as such, a defendant making such a motion is entitled to the effective assistance of counsel. The court concluded that Defendant had not waived his right to assert this claim, citing *Stahl v. State*, 972 So.2d 1013 (Fla. 2d DCA 2008), in which the court "specifically noted that 'ineffective assistance of counsel claims attacking the advice received from counsel in entering into the plea and waiver cannot be waived.'"

Fourth DCA certifies question about ineffective assistance claims based on misadvice about plea offers. *Sirota v. State*, 95 So.3d 313 (Fla. 4th DCA 2012).

Defendant sought postconviction relief for alleged ineffective assistance of counsel relating to a plea offer. Defendant alleged that counsel misadvised him regarding the maximum possible sentence and that he rejected a plea offer based on the misadvice. His motion was denied.

The Fourth DCA affirmed based on *Cottle v. State*, 733 So.2d 963 (Fla. 1999) and *Morgan v. State*, 991 So.2d 835 (Fla. 2008). Pursuant to these cases, a defendant seeking the type of relief sought here was *not* required to show that the trial court would have accepted the plea agreement. Two recent decisions of the U.S. Supreme Court, however, led the Fourth DCA to question whether the decisions in *Cottle* and *Morgan* may have been overruled. See *Lafler v. Cooper*, 132 S.Ct. 1376 (2012), and *Missouri v. Frye*, 132 S.Ct. 1399 (2012).

Consequently, although the Fourth DCA affirmed, it certified the following question to the Supreme Court: "Do the decisions in [*Lafler* and *Frye*], which establish the minimum requirements of the Sixth Amendment, supersede the decisions in [*Morgan* and *Cottle*], as to the pleading requirements and remedy for an ineffective assistance of counsel claim regarding a lost plea offer? If so, are evidentiary hearings on such claims limited to circumstances involving 'formal plea offers,' that is, verifiable offers that are either in writing or made on the record in open court?"

Per Second DCA, criminal defendant cannot waive claim of ineffective assistance regarding counsel's advice about entering into plea agreement. *Contreras-Garcia v. State*, 95 So.3d 993 (Fla. 2d DCA 2012).

Defendant pleaded guilty to a felony. He later moved for postconviction relief under Fla.R.Crim.P. 3.850. The court denied the motion on the basis that Defendant signed a plea agreement form whereby Defendant "waived all collateral remedies, including rule 3.850."

The Second DCA reversed and remanded. "'[I]neffective assistance of counsel claims attacking the advice received from counsel in entering into the plea and waiver cannot be waived.' [*Stahl v. State*, 972 So.2d 1013, 1015 (Fla. 2d DCA 2008)] (citing *Nixon v. United States*, No. CV206-071, 2006 WL 2850430, at *2 (S.D. Ga. Oct. 3, 2006))." Because Defendant's claims "relate to the voluntariness of his plea and the effectiveness of counsel in advising him on the plea,

the waiver of his right to seek collateral relief does not bar these claims and the postconviction court erred in not considering these claims on their merits."

Client's consent to trial counsel's strategic choice is fatal to ineffective assistance of counsel claim. *Mendoza v. State*, 81 So.3d 579 (Fla. 3d DCA 2012).

Convicted Defendant alleged that counsel rendered ineffective assistance of counsel by failing to call certain witnesses at trial. The postconviction court denied the motion without an evidentiary hearing. The Third DCA affirmed. If counsel conducted a reasonable investigation before deciding whether to call a witness, counsel's decision to call or not call a witness to testify ordinarily is a strategic decision that will not be second-guessed via an ineffective assistance claim. Defendant did not allege a failure to investigate. Additionally, the record showed that Defendant agreed with counsel's decision. "[Defendant]'s express agreement to such a decision is fatal to his claim of ineffective assistance of counsel." (Footnote omitted.)

Failure to respond right away to defendant's request for advice about plea offer does not constitute ineffective assistance of counsel. *Hurt v. State*, 82 So.3d 1090 (Fla. 4th DCA 2012).

Through his defense counsel, on August 7 Defendant received an 8-year plea offer from the State on a violation of probation charge. He asked counsel how much time he would have to serve in prison, but counsel was unsure because he didn't know whether a certain statute applied. Defendant allegedly "declined the offer based on his lack of knowledge about the amount of time he would actually have to serve in prison." On September 4 counsel asked the State about the time served question. The State was unsure about the answer. On October 23 defense counsel "gave [Defendant] 'good news' that, because the offense was old, he would have to serve only 55 to 65% of the eight-year sentence offered in the plea deal. [Defendant] wanted to accept the deal, but the prosecutor would not agree to it and rescinded the offer."

Defendant moved for postconviction relief alleging that counsel was ineffective in failing to advise him sooner as to the amount of time he would actually serve. The State argued that there was no basis for relief because there was no allegation that defense counsel gave incorrect advice. The court denied the motion.

The Fourth DCA affirmed. "[P]lea offers are subject to withdrawal at any time before formal acceptance by the court. Counsel's inability to immediately provide perfect advice about the wisdom of accepting a plea offer, which results in the loss of what in hindsight turns out to have been a favorable plea offer, does not result in the type of prejudice necessary to establish a violation of the Sixth Amendment right to effective counsel. The defendant has no constitutional right to enforcement of any plea bargain until the plea is formally accepted by the court."

Fourth DCA clarifies legal standard applicable to postconviction ineffective assistance claims related to defendant's competency. *Thompson v. State*, 88 So.3d 312 (Fla. 4th DCA 2012).

The Fourth DCA issued a detailed opinion "to clarify the legal standard that applies to postconviction claims of ineffective assistance of counsel related to a defendant's competency to proceed to trial or to enter a plea."

The appeals court discussed "procedural" and "substantive" competency claims and noted that ordinarily neither may be raised in a postconviction motion. "Florida courts, however, continue to recognize a 'narrow' claim of ineffective assistance of counsel for failure to raise a defendant's alleged incompetency, [citation omitted], but the legal standard that applies to such claims is unsettled." The court turned to clarifying that standard, stating that it saw no reason why the standard should differ depending on whether the claim was procedural or substantive.

The court stated: "To establish ineffective assistance of counsel, the movant must show both counsel's deficient performance and actual prejudice. . . . To satisfy the deficiency prong based on counsel's handling of a competency issue, the postconviction movant must allege specific facts showing that a reasonably competent attorney would have questioned competence to proceed. . . . In order to establish prejudice in a properly raised ineffective assistance of counsel claim, the postconviction movant must, as with a substantive incompetency claim, set forth clear and convincing circumstances that create a real, substantial and legitimate doubt as to the movant's competency. . . . The presumption of incompetency that can arise when a *Pate* [*v. Robinson*, 383 U.S. 375 (1966)] claim is raised on direct appeal does not apply in a postconviction posture."

The court continued: "To be entitled to an evidentiary hearing on this type of claim, the movant must set forth clear and convincing circumstances that create a real, substantial and legitimate doubt as to competency. In making this determination, a court may consider the totality of the circumstances, including: (1) the nature of the mental illness or defect which forms the basis for the alleged incompetency; (2) whether the movant has a history of mental illness or documentation to support the allegations; (3) whether the movant was receiving treatment for the condition during the relevant period; (4) whether experts have previously or subsequently opined that defendant was incompetent; and (5) whether there is record evidence suggesting that the movant did not meet the *Dusky* [*v. United States*, 362 U.S. 402 (1960)] standard during the relevant time period."

Fourth DCA reverses criminal conviction on direct appeal due to ineffective assistance apparent on face of record. *Capiro v. State*, 97 So.3d 298 (Fla. 4th DCA 2012).

The Fourth DCA took the unusual step of reversing a criminal conviction on direct appeal due to ineffective assistance of counsel. Ordinarily these claims are heard on collateral motions for post-conviction relief, but an appellate court may reverse on direct appeal when the ineffective assistance and resulting prejudice are apparent on the face of the record.

Defendant was charged with grand theft arising out of a poorly-documented loan arrangement in a business context. Defendant claimed that the terms of the loan allowed him to spend the money as he did (on personal expenses), while the prosecution contended otherwise. Defendant's counsel failed to request a "good faith belief" defense jury instruction. The Fourth DCA concluded that this constituted ineffective assistance on the face of the record because the issue was "a defense central to [Defendant]'s case. We further hold that [Defendant] was prejudiced by virtue of the fact that the jury was not presented with an instruction on the law applicable to his only defense." (Citation omitted.)

Quoting Popeye the Sailor Man, Third DCA bars prisoner from further pro se filings. *Woodson v. State*, 100 So.3d 222 (Fla. 3d DCA 2012).

Woodson, who was incarcerated, repeatedly filed pro se motions for collateral relief with the Third DCA. Many of the claims were identical to ones previously considered and rejected by the court. The appellate court decided it was time to bar Woodson from further pro se filings and ordered him to show cause why the court should not take that action. The court stated that "we have arrived at the point where 'enough is enough.' *Isley v. State*, 652 So.2d 409, 410 (Fla. 5th DCA 1995)." In a footnote, the court explained: "Though not credited in the *Isley* opinion, it is likely this axiom is derived from Popeye (the sailor man) who, under dissimilar circumstances, occasionally proclaimed: 'That's all I can stands, 'cause I can't stands no more.' See http://www.youtube.com/watch?v=EdAB_7_B9Cs."

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

Court must appoint counsel for indigent parent in private termination of parental rights proceeding. *T.M.W. v. T.A.C.*, 80 So.3d 1103 (Fla. 5th DCA 2012).

F.S. 39.807(1) requires appointed counsel for indigent parents in termination of parental rights cases. "It is clear from the record that the trial court failed to appoint counsel for [Father], and failed to make written findings indicating that [Father] waived that right. We suspect that the trial court did so because this was a private TPR proceeding, rather than a proceeding commenced by the Department of Children and Family Services. The statute requiring the appointment of counsel for indigent persons, however, does not make that distinction."

LAW FIRMS

Florida Supreme Court suspends, rather than reprimands, 2 lawyers for misconduct during their departure from their former law firm. *Florida Bar v. Winters*, __ So.3d ___, 37 Fla.L.Weekly S545 (Fla., Nos. SC10-1332, SC10-1333, 9/6/2012), 2012 WL 3853528.

See discussion in "Disciplinary Proceedings" section.

Florida Bar Board of Governors advises that lawyers may permit trusted, properly supervised nonlawyers to file documents via E-Portal using the lawyer's access credentials. Florida Ethics Opinion 12-2.

In December 2012 the Board of Governors approved Florida Ethics Opinion 12-2, which concludes that it is ethically permissible for a lawyer to provide his or her access credentials to the E-Portal to trusted, properly supervised nonlawyer employees so that they may electronically file

court documents on the lawyer's behalf. The lawyer is ultimately responsible for the filing. The opinion also advises that the lawyer should immediately change the lawyer's password if the nonlawyer leaves the lawyer's employ or shows untrustworthiness in the use of the E-Portal.

Law firm alleged sufficient facts to go forward on claims against another firm for tortious interference with its contract with client. *Swope Rodante, P.A. v. Harmon*, 85 So.3d 508 (Fla. 2d DCA 2012).

One law firm ("Swope") sued another firm ("Harmon"), alleging claims including (1) that Harmon tortiously interfered with its contract for legal representation of a client that resulted in Swope being fired in favor of Harmon, and (2) that Harmon breached an oral contract between Swope and Harmon. The court granted Harmon's motion to dismiss the entire complaint.

The Second DCA held that Swope alleged facts sufficient to survive a motion to dismiss regarding these 2 claims. As to the tortious interference count, the appeals court concluded: "The pleading alleges that Harmon knowingly, intentionally, and unjustifiedly provided disparaging information about Swope to Swope's client for the purpose of inducing the client to fire Swope and hire Harmon. It further alleges that Swope suffered damages because it lost out on a legal fee due to Harmon's actions. Where a claim for tortious interference sets forth an attorney-client relationship and a contingency fee agreement, and includes 'elements of knowledge, intentional and unjustified interference, and damage,' the party has sufficiently pled a cause of action. *Ellis Rubin, P.A. v. Alarcon*, 892 So.2d 501, 503 (Fla. 3d DCA 2004)."

Law firm sued for malpractice and other claims could compel arbitration based on co-defendants' arbitration agreement with plaintiff. *Lash & Goldberg LLP v. Clarke*, 88 So.3d 426 (Fla. 4th DCA 2012).

Law Firm and other defendants were sued by Plaintiffs. The complaint included a legal malpractice claim directly solely at Law Firm. Law Firm's co-defendants had an agreement with Plaintiff that included an arbitration clause. Law Firm was not a signatory to that agreement. All defendants moved to compel arbitration. The court granted the motion as to all defendants *except* Law Firm. Law Firm appealed.

The Fourth DCA reversed the order denying arbitration as to Law Firm. "Generally, a non-signatory to an arbitration agreement cannot compel a signatory to submit to arbitration. . . . One exception to the rule is that a non-signatory can compel arbitration when the signatory to the contract containing the arbitration clause alleges substantially interdependent and concerted misconduct by both the non-signatory and one or more of the signatories. . . . This exception is based on the doctrine of equitable estoppel." Here, all counts stemmed from the same occurrence. The Plaintiff alleged "concerted misconduct" by signatories and non-signatories.

Court did not err in reducing punitive damages award in legal malpractice case or excluding testimony that lawyer was disbarred for conduct in unrelated case. *Young v. Becker & Poliakoff, P.A.*, 88 So.3d 1002 (Fla. 4th DCA 2012) (on rehearing).

Young sued Law Firm alleging legal malpractice. A Firm associate represented her in an employment discrimination suit against BellSouth filed on May 1, 2001. At that time, however, the Firm "was engaged in settlement negotiations on behalf of Young and several other plaintiffs in a separate action [*Jackson*] against BellSouth." The May 1 suit was later dismissed due to the statute of limitations; the associate allegedly attached the wrong right-to-sue letter to the complaint. Young allegedly was not informed about the dismissal until after *Jackson* settled.

Young sued Law Firm alleging that it had a conflict of interest in representing her in the new suit while at the same time negotiating to settle *Jackson*. Young alleged, and the jury found, that Law Firm knew that her case had been dismissed but "withheld that information from Young so they could settle *Jackson* and secure the $2.9 million fee and cost reimbursement in that case." The jury awarded punitive damages of $4.5 million. The court remitted the amount to $2 million, finding that the larger figure "was not supported by evidence that [Law Firm] had sufficient financial resources to support such a verdict without facing bankruptcy."

The Fourth DCA affirmed the remittitur, finding that the trial court did not abuse its discretion. "Contrary to Young's contention, the trial court did not improperly substitute its judgment for that of the jury, but instead properly exercised its discretion in reviewing the award upon the financial information in evidence. . . . While a punitive damages award should be painful enough to provide some retribution and deterrence, it should not financially destroy a defendant." (Footnote and citations omitted.)

The appellate court also rejected Law Firm's cross-appeal in which it contended that the trial court erred by not granting its motion for directed verdict because the evidence failed to show that the Firm caused Young to lose the ability to proceed with her discrimination claims against BellSouth. The Firm contended that Young voluntarily abandoned her discrimination suit against BellSouth, thus precluding her legal malpractice claim. The court disagreed: "Young introduced sufficient evidence to demonstrate that her voluntary dismissal of the later-filed 2003 suit did not constitute an abandonment or waiver of her claims and did not cause her loss. Rather, her employment discrimination claims, all of which arose out of the same operative facts as those alleged in her 2001 complaint, were severely damaged, if not destroyed, by defenses available to, and actually raised by, BellSouth. . . . Under these facts and circumstances, and viewing the evidence and all inferences in a light most favorable to Young, we cannot find that Young abandoned or waived her claims or that [Law Firm]'s mishandling of her case could have been corrected by pursuit of the second suit."

The court also rejected another argument on cross-appeal, concluding that the trial court properly excluded evidence that the Firm's associate had been disbarred for misconduct unrelated to the instant case.

LEGAL MALPRACTICE

Summary judgment inappropriate in legal malpractice case where plaintiffs alleged they were intended beneficiaries of negligently implemented estate plan. *Hodge v. Cichon*, 78 So.3d 719 (Fla. 5th DCA 2012).

Client hired an estate planning lawyer, Yong, who prepared a plan and related documents for Client. A dispute arose regarding Client's property and competency. Guardians for Client were

appointed by the probate court. The court also ordered implementation of the Yong estate plan. At Client's death more than 2 years later, however, Yong's plan had not been fully implemented. Two persons named in Client's will ("Appellants") sued lawyers for the guardians alleging negligence in failing to implement the Yong estate plan as the court ordered.

Defendant lawyers moved for summary judgment and argued "that Appellants lacked standing because no attorney-client relationship existed between them and Appellants. Further, they posited that an attorney-client relationship could not have existed due to the adversarial nature of the parties' positions." The court granted the lawyers' motion for summary judgment.

The Fifth DCA reversed and remanded. Summary judgment was inappropriate because there were genuine issues of material fact. Generally, the party who brings a malpractice action against a lawyer must be in privity with the defendant. "A limited exception to the privity requirement in the area of will drafting allows an intended beneficiary to file a legal malpractice claim for losses resulting from a lawyer's actions or inactions, where it was the apparent intent of the client to benefit that third party. . . . Standing to pursue a legal malpractice action is conferred upon 'those who can show that the testator's intent as expressed in the will is frustrated by the negligence of the testator's attorney.' . . . While the standing exception has been relaxed in will drafting situations, 'the third party intended beneficiary exception to the rule of privity is not limited to will drafting cases.'" (Citations omitted.)

Appellants had standing even if they never had an attorney-client relationship with Defendants. The purpose of the estate plan was to benefit all named and intended beneficiaries of Client's estate, and Appellants alleged that they were intended beneficiaries. Furthermore, "[w]hile there may have been animosity or acrimony among the various heirs and beneficiaries, the actions of retained counsel and the direction of the court in ordering the implementation of the estate plan were intended to benefit all and harm none." There was no conflict among the need of everyone to maximize the estate. "If the dispute concerns whether or not Appellants were intended beneficiaries, the issue is one of fact for the jury to determine."

Third DCA affirms summary judgment for defendant lawyers in malpractice case because "no one could have anticipated" decision of trial court on remand. *Hanson v. Fowler, White, Burnett, P.A.*, __ So.3d ___, 37 Fla.L.Weekly D2446 (Fla. 3d DCA, No. 3D11-805, 10/17/2012), 2012 WL 4897329.

Rose sued Hanson in federal court for imposition of a maritime lien against a vessel owned by Hanson and captained for a time by Rose. Hanson raised affirmative defenses including waiver and set-off. The District Court ruled that Rose could not recover the full amount claimed due to a $375,000 set-off in favor of Hanson. Both parties appealed. The Eleventh Circuit addressed Rose's appeal of the lower court's decision on the waiver issue. As a result of its decision on that issue, the appeals court "refused to consider Rose's second argument that Hanson was not entitled to the first $375,000 from the sale of the vessel, leaving that determination intact." The appeals court remanded for recalculation of the amount of the lien based on its decision on the waiver issue.

On remand, however, the District Court recalculated the lien amount but in doing so "failed . . . to accord the $375,000 offset due to Hanson as adjudicated in the original judgment and left untouched by the appellate court." Hanson subsequently sued his lawyers for legal malpractice in state court.

The trial court decided the case on summary judgment, ruling that "based on the totality of the circumstances – including the claims and counterclaims actually pled, as well as the matters actually tried in the federal court" Hanson's lawyer and his firm were entitled to judgmental immunity under *Crosby v. Jones*, 705 So.2d 1356 (Fla. 1998). Hanson appealed.

The Third DCA affirmed. Although judgmental immunity did not apply, the lawyer and his firm were entitled to a judgment as a matter of law. "On this record, we are constrained to agree with the assessment of the court below that no one could have anticipated what the District Court ultimately did. More to the point, it was the District Court's declination on remand to apply its prior determination – which had become final after the Circuit Court left it intact and remanded only for recalculation of the lien amount – and not any failure or negligence on Hanson's lawyers' part that was the cause of Hanson's loss."

PROFESSIONALISM

Florida Supreme Court:

Criticizing prosecutor's professionalism, Florida Supreme Court reverses death sentence and remands for new penalty phase proceeding. *Delhall v. State*, 95 So.3d 134 (Fla. 2012).

The Supreme Court reversed a death sentence and remanded for a new penalty phase proceeding due to the prosecutor's "overzealous and unfair advocacy" that "appeared to be committed to winning a death recommendation rather than simply seeking justice. The prosecution's improper comments denied the defendant a fair penalty phase proceeding. The Court detailed how the prosecutor's comments denigrated the defense's mitigation evidence and violated a pretrial ruling prohibiting argument about the defendant's future dangerousness. The Court stated: "We have cautioned in the past that a prosecutor shall not exceed the bounds of proper conduct and professionalism by overzealous advocacy, which is especially egregious in a death case 'where both the prosecutors and courts are charged with an extra obligation to ensure that the trial is fundamentally fair in all respects.' . . . We are compelled once again to emphasize that the prosecutor has a 'duty to seek justice, not merely 'win' a death recommendation.'"

Supreme Court criticizes lawyer for disregarding "spirit" of rules governing post-trial communication with jurors. *Van Poyck v. State*, 91 So.3d 125 (Fla. 2012) (revised opinion).

See discussion in "Communication" section.

Supreme Court's Commission on Professionalism considers adopting formal procedures to enforce professionalism standards.

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

First DCA:

First DCA commends professionalism of criminal prosecutors who conceded error regarding *Faretta* issue. *Bowers v. State*, 85 So.3d 1230 (Fla. 1st DCA 2012).

Criminal Defendant was unhappy with his counsel's representation. The judge held a *Nelson* hearing and ruled that counsel was providing effective representation. A few months later Defendant "wrote a letter to the judge asking to represent himself." At the *Faretta* hearing the judge "was understandably confused" about the relief sought by Defendant, who complained about his lawyer but wanted some level of assistance from the lawyer. Apparently the *Faretta* hearing was never completed. Defendant was convicted and appealed.

The First DCA reversed, commending the prosecutors' professionalism in conceding error. The court stated: "We believe the following comment is pertinent: 'In light of the consequences of a trial judge's failure to comply with this rule [Florida Rule of Criminal Procedure 3.111(d)] – as reflected by the large number of reported reversal of convictions resulting from noncompliance – trial judges should be particularly attuned to the requirements of this rule. *Prosecutors provide valuable assistance to trial judges and to the criminal justice process generally by reminding trial judges of these requirements when appropriate*.' (emphasis supplied). [Citation omitted.]"

Third DCA:

Citing "textbook example of legal chutzpah," Third DCA affirms denial of disbarred lawyer's charging lien for costs. *Wingate v. Celebrity Cruises, LTD*, 79 So.3d 180 (Fla. 3d DCA 2012).

Lawyer and his law firm represented 77 plaintiffs in cases against a cruise line ("RCL"). RCL moved to disqualify Lawyer and the firm, alleging that Lawyer paid an RCL employee "to provide insider information on the cruise line's claims files" that Lawyer could use in negotiations. Lawyer and the firm then stipulated to withdrawal from all 77 cases. The court's order allowed the withdrawal and permitted the filing of charging liens for fees and costs, but specified that the merits of any such liens would be adjudicated at a future hearing.

Later it became known that Lawyer entered into a "secret agreement with successor counsel" providing that Lawyer would get a portion of the funds recovered by successor counsel in the RCL cases. The court entered an order of criminal contempt and referred Lawyer to the Bar. Lawyer was disbarred by the Supreme Court. Despite all this, Lawyer filed a motion with the trial court seeking disbursement of costs allegedly owed to him in cases that had not been settled at the time of the contempt hearing. When the court denied that motion, Lawyer appealed.

The Third DCA affirmed. Not only was the motion legally insufficient, but it was barred by the earlier contempt order. The appeals court described Lawyer's conduct in even filing the motion as "a textbook example of legal chutzpah." In a footnote, the court observed that the classic definition of "chutzpah" was "that quality enshrined in a man, who having killed his mother and father, throws himself upon the mercy of the court because he is an orphan."

Third DCA affirms section 57.105 fee award for "frivolous and dilatory tactics," but orders it paid in equal parts by party and his lawyer. *Stratton v. 6000 Indian Creek, LLC*, 95 So.3d 334 (Fla. 3d DCA 2012).

Lawyer Stratton represented defendant Lesman in a condo unit foreclosure suit. Lesman failed to comply with the terms of a court order on rent payments. He allowed other persons to occupy the unit without a lease or condo association approval, contrary to the condominium rules and Lesman's lease. The Trust that pursued the foreclosure action against Lesman moved for an award of fees against Lesman and Lawyer as a sanction under F.S. 57.105(1) (2010). The court granted the motion, ordering $1,540 paid by Stratton and $25,150 paid by his client, Lesman.

Lesman and Stratton appealed. The Trust cross-appealed, asking the court "to reallocate the attorney's fees and costs awards . . . so that Lesman and Stratton will each be liable for one-half of the total." The Third DCA affirmed the award and also ruled in favor of the Trust on the cross-appeal, remanding for entry of an amended final judgment against Lesman and Stratton "severally, each for one-half of the total sanctions awarded."

The court stated: "[T]he trial court specifically found that the Trust's attorney's fees and costs were incurred because of the frivolous legal positions taken by the appellants and the legal advice given by Stratton. In such a case, the sanctions award is 'to be paid to the prevailing party in equal amounts by the losing party and the losing party's attorney' as specified by section 57.105(1). 'Said another way, an attorney has a duty to refrain from advocacy, such as filing frivolous claims, which undermines or interferes with the functioning of the judicial system.' [Citation omitted.] Accordingly, we reverse the awards insofar as the amounts allocated between Lesman and Stratton, and we remand with instructions to enter the amended final judgment against Lesman and Stratton in equal amounts, i.e., $13,345 each."

In a footnote, the court further stated: "Because of the changes in membership and title of Stratton's law firm, and because Stratton himself is the attorney who filed the pertinent pleadings and was found to have provided the sanctionable legal advice, the one-half allocable to Lesman's counsel is to be borne by Stratton individually."

Judge's actions to control attorney behavior in courtroom are not grounds for disqualification, per Third DCA. *Bert v. Bermudez*, 95 So.3d 274 (Fla. 3d DCA 2012).

In hotly-contested litigation arising out of a deadly traffic accident, the law firm representing the defendants (two members of the Miccosukee Indian Tribe) petitioned for writ of prohibition to disqualify the judge who was presiding over post-trial proceedings. The alleged basis for the disqualification occurred during a hearing on March 19, 2012. The law firm and one of its partners, Mr. Tein, asserted that the judge "'vindictively' reversed a prior ruling and 'lost control' when he 'yelled' at Mr. Tein, told Mr. Tein to 'shut up,' threatened Mr. Tein with contempt, told Mr. Tein he was getting on his nerves, and stated that Mr. Tein might be better served by allowing Mr. Lewis [Mr. Tein's partner] to make the remaining arguments."

The Third DCA denied the petition, concluding that the judge's comments, considered in the context in which they were made, did not require disqualification. "A review of the transcript of the March 19, 2012, hearing, however, paints an entirely different picture [than that asserted by the firm] – one that reveals great restraint by the trial judge, and an attorney who either lost control or was intentionally trying to bait the judge. Whether Mr. Tein lost control or was purposely baiting

the judge, the result was the same. Mr. Tein's behavior was totally unprofessional, disrespectful, and disruptive. In short, his behavior *was* contemptuous." (Emphasis by court.)

Additionally, the court criticized the professionalism of Mr. Tein's partner. "[T]he unprofessional conduct of the Lewis Tein law firm was not confined to Mr. Tein's behavior at the March 19, 2012, hearing. The petition filed in this Court, signed by Mr. Lewis, fares no better. The language, mischaracterizations, and 'spin' employed speak volumes."

The court closed with a condemnation of the lawyers' conduct: "What we have here is a lawyer, and now lawyers, who have acted recklessly and unprofessionally, and are now concerned that their behavior may have tarnished their image. We have, however, reviewed the record and conclude that although the trial court was justifiably frustrated with Mr. Tein's behavior at the March 19, 2012, hearing, he expressed no views as to Mr. Tein's credibility, made no comment suggesting he had pre-judged any issue, harbored any bias or prejudice against the defendants, Mr. Lewis, Mr. Tein, or the Lewis Tein law firm, or said anything to support a finding that the petitioners' fear that they will not enjoy the impartiality and neutrality of the judge in deciding the issues is reasonable. We, therefore, deny the petition, and remind Mr. Tein and Mr. Lewis of their obligations and responsibilities as members of The Florida Bar and as officers of the court."

Fourth DCA:

Fourth DCA judge criticizes lawyers for pushing to exceed the bounds of permissible discovery. *Coopersmith v. Perrine*, 91 So.3d 246 (Fla. 4th DCA 2012).

To "prevent any intrusion into the privacy rights of non-parties," the Fourth DCA quashed a discovery order requiring petitioner to produce information about non-party compulsory medical exams. In a concurring opinion, one judge expressed concern about discovery requests "that go above and beyond those relevant to the case." These requests seek to require physicians to divulge confidential information of other patients or to "create" documents. In trying to discredit witnesses lawyer for both plaintiff and defense "are exceeding the bounds of the rules of civil procedure, confidentiality laws, and professionalism by engaging in irrelevant, immaterial, burdensome, and harassing discovery. Parameters have already been expanded to allow both sides to explore financial interests of medical witnesses and the volume of referrals to those witnesses. . . . And now, attempts to expand the scope of that discovery to treating physicians as well as retained experts are usurping the limited resources of our trial courts. This not only creates unnecessary burdens on our over-strained justice system, it further taints the public's view of our profession."

Fifth DCA:

Criticizing professionalism of trial counsel, Fifth DCA affirms order striking pleadings of lawyer's client as sanction. *Adams v. Barkman*, __ So.3d ___, 37 Fla.L.Weekly D2260 (Fla. 5th DCA, No. 5D10-2610, 9/21/2012), 2012 WL 4208097.

Defendant was represented by Lawyer in a motor vehicle accident trial. For "conscious, intentional" violations of the court's rulings on several motions in limine, the court granted Plaintiffs' motion for mistrial and stated that it would impose sanctions. After an evidentiary hearing, the court struck Defendant's pleadings. The case was tried only on damages, and resulted in a $1.3 million verdict for Plaintiffs.

The Fifth affirmed. Criticizing Lawyer and others who engage in similar conduct, the court suggested that more orders like this one are needed to promote professionalism. "[T[he conduct exhibited by [Lawyer] is a continuing problem with these types of cases. Although the Southern Reporter is replete with cases where appellate courts have granted new trials based on similar behavior, counsel for both plaintiffs and defendants continue to make improper arguments and violate orders of the court. In the last two years, this court has admonished other lawyers regarding such conduct on at least three occasions. [Citations omitted.] While it is suggested that these cases should be tried on the merits and not attorney shenanigans, the threat of an admonishment and a new trial appears to be of no avail. By sanctioning a party as Judge Dickey did in this case, maybe attorneys will get the message to either change their tactics or clients will stop hiring them."

Defense counsel in a civil case "stepped over the behavioral bounds" so often during trial that the Fifth DCA reversed the judgment. *Irizarry v. Moore*, 84 So.3d 1069 (Fla. 5th DCA 2012).

Observing that "[t]his is a troubling case," the Fifth DCA reversed a verdict favorable to defendants on the grounds that defense counsel's "egregious behavior" and "questionable tactics" undermined the court's confidence that the parties got a fair trial. The appeals court stated that, "while each individual defalcation of [the lawyer]'s might not justify reversal, their totality surpasses the critical mass that compels us to order a new trial." The court listed a number of the "problematic" actions of counsel, noting that its list was not exhaustive.

In closing, the court criticized the lawyer's conduct and noted how it intended to address it. "Unfortunately, this is not the first time [the lawyer]'s trial behavior has been called into question. [Citations omitted.] We are, thus, less inclined to lay off the problems we see to simple overzealousness. We suspect that the best way to put a stop to this kind of bad trial behavior is to grant a new trial when the misconduct reaches the appropriate level. We choose to do so in the present case, but reverse only on the issue of damages. . . . We trust that civility will be more in evidence at that proceeding."

Fifth DCA orders imposition of sanctions and refers counsel to the Florida Bar for "willful non-disclosure of truthful facts in discovery." *Jones v. Publix Super Markets, Inc.*, __ So.3d ___, 37 Fla.L.Weekly D1787 (Fla. 5th DCA, No. 5D09-4120, 7/27/2012), 2012 WL 3044250.

Mr. and Mrs. Jones sued Publix in a slip and fall case. Despite a proper discovery request, defense counsel did not disclose the known address of a key witness. The Fifth DCA discussed the need for sanctions and referred defense counsel to the Florida Bar, stating: "As we have already said about the willful non-disclosure of truthful facts in discovery: 'A system that depends on an adversary's ability to uncover falsehoods is doomed to failure, which is why this kind of conduct must be discouraged in the strongest possible way.' [Citation omitted.] If trial counsel cannot be relied on to comply with their ethical obligations for something as basic as the address of a witness,

we will either have to do a better job of punishing misconduct or devise an entirely new system. On remand to the trial court, the trial court shall award to the Joneses their expenses associated with the failure of Publix to disclose the [witness's] address. We further instruct the Clerk of this Court to forward this opinion to the Florida Bar for its examination of the conduct of counsel."

Fifth DCA criticizes professionalism of insurer's counsel in filing, and then not withdrawing, motion to strike opponent's answer brief. *Lopez v. State Farm Florida Ins. Co.*, __ So.3d ___, 37 Fla.L.Weekly D1728 (Fla. 5th DCA, No. 5D11-4339, 7/20/2012), 2012 WL 2936390.

State Farm filed an initial appellate brief. Lopez had 20 days to respond. After Lopez filed his brief, State Farm moved to strike it on the ground that it was not timely filed. Lopez responded by detailing the applicable procedural rules and explaining how he had complied. Despite this, State Farm's counsel did *not* withdraw her motion to strike. The Fifth DCA denied the motion to strike and criticized State Farm's counsel for wasting the court's resources. "Attorneys handling appeals in our court have a professional responsibility to have a working knowledge of the Rules of Appellate Procedure and to act in a way that does not force the opposing party or the court to expend time and effort on baseless matters. In addition to not filing a meritless motion, an attorney also has a professional responsibility to withdraw a motion when its lack of merit is made clear."

Fifth DCA criticizes professionalism of lawyer who "strongly disagreed" with trial court's order in family law case. *Robinson v. Robinson*, 88 So.3d 973 (Fla. 5th DCA 2012).

In a divorce case appeal, the Fifth DCA criticized the professionalism of one of the parties' lawyers at the trial court level. In a footnote, the court stated: "The former husband's counsel strongly disagreed with this court's entry of the stay order. Although it was not improper for counsel to express his disagreement with our decision, his disparaging comments regarding this court, made at a subsequent hearing below, fell far below the standards of professionalism expected of members of The Florida Bar. See, e.g., Preamble, Rules of Professional Conduct, R. Regulating Fla. Bar Ch. 4 ('A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers, and public officials.'); Oath of Admission, In re The Fla. Bar, 73 So.3d 149 (Fla. 2011) ('I will maintain the respect due to courts of justice and judicial officers.')."

Fifth DCA dissenting opinion urges reversal due to lawyer's unprofessional comments about opposing expert witness. *Rogers v. Bhowani*, 89 So.3d 1074 (Fla. 5th DCA 2012).

The Fifth DCA affirmed an appeal per curiam. One judge wrote a dissenting opinion in which he posited that the judgment should have been reversed because he did not believe that the appellant received a fair trial "due to the misconduct of defense counsel throughout the trial." Among other conduct recited by the judge, defense counsel: demonstrated his disdain for the plaintiff's expert witness by making faces at the expert, saying the that the expert looked like Alfred E. Neumann, and that the expert was "the Costco of experts;" objected (successfully) to a proposed curative instruction, leaving the jury with the impression that the plaintiff was "being evasive;" and again demeaned the expert witness in closing argument. The judge concluded: "Because of the

cumulative effects of defense counsel's unprofessional behavior, I would reverse, finding that [plaintiff] did not receive a fair trial and that she met the requirements as set out in *Murphy v. International Robotic Systems, Inc.*, 766 So.2d 1010 (Fla. 2000)."

PUBLIC OFFICIAL ETHICS AND PUBLIC RECORDS

Public Official Ethics:

Former public employee's "no contest" plea is "conviction" for purposes of forfeiture of state retirement benefits. *Brock v. Fla. Dept. of Management Services*, 98 So.3d 771 (Fla. 4th DCA 2012).

A former public employee pleaded "no contest" to an offense specified in the public ethics laws as requiring forfeiture of state retirement benefits upon a "conviction." See Fla.Constit. Art. II, Sec. 8; F.S. 112.3173. The Department of Management Services, Division of Retirement, determined that the no contest plea was a "conviction" for purposes of the forfeiture statute. The First DCA affirmed, discussing the relationship between the constitutional provision and the statute and distinguishing cases cited by the former employee that define "conviction" in other contexts.

Law firm in which county commission candidate is a partner may continue as special counsel of city within county if candidate is elected, per Florida Commission on Ethics. Florida Commission on Ethics Opinion CEO 12-21.

A county commission candidate asked the Commission on Ethics whether representation of a municipality within the county by the law firm in which the candidate is a partner would constitute a prohibited conflict of interest under Florida ethics laws. The Commission answered in the negative.

The Commission summarized: "A prohibited conflict of interest would not be created under Section 112.313(7)(a), Florida Statutes, were the law firm of a candidate for the county commission to continue to serve as special counsel to a municipality located within the county, if the candidate is elected and takes office, even though the county and the municipality have an ongoing dispute over the expansion of an airport and its impact on the municipality and its citizens. The municipality is not 'regulated' by the county, and an interlocal agreement between the county and the city does not constitute 'doing business' for purposes of Section 112.313(7)(a), Florida Statutes. Moreover, the situation does not create a continuing or frequently recurring conflict or impediment to duty under the second part of Section 112.313(7)(a), Florida Statutes, since the airport expansion is a unique situation and since neither the candidate nor his law firm have had any involvement in the city's dispute with the county." (Citations omitted.)

Public Records:

Public Records Act permits city to redact questions and answers from pre-employment polygraph report before releasing it to applicant/requestor. *Rush v. High Springs, Florida*, 82 So.3d 1108 (Fla. 1st DCA 2012).

An Applicant for a job with City took a pre-employment polygraph test. She was not hired. Applicant filed a public records request seeking a copy of the polygraph report. City released a redacted version of the report that did not contain the questions and answers. Applicant filed suit against City, seeking the unredacted version. "The trial court found that the City had properly redacted the material pursuant to [F.S. 119.071(1)(a) (2010)]. This provision exempts from the Public Records Act any examination questions and answers prepared and received by a government agency for the purpose of employment." Applicant appealed.

The First DCA affirmed, concluding that the trial court properly construed the exemption in sec. 119.071(1)(a). "The exemption applies if a document (1) consists of examination questions or answers; (2) the questions or answers were part of an examination administered by a governmental agency; and (3) the examination was given for purposes of 'licensure, certification, or employment.' It requires nothing more. Given this plain language, the trial court was correct in finding the exemption applied to the redacted questions and answers in this pre-employment polygraph report."

Court applied wrong test in denying City's motion to inspect court records in dependency case. *City of Plant City v. Dept. of Children and Family Services*, 101 So.3d 407 (Fla. 2d DCA 2012).

City was sued in a wrongful death action on behalf of J.B., a child whose mother was killed and whose father was jailed for the murder. J.B. was under the supervision of the Department of Children and Family Services in a dependency action. City sought to inspect the court records in the dependency action. By statute these records are not public; F.S. 39.0132(3) provides for their inspection "only upon order of the court by persons deemed by the court to have a proper interest therein." The court denied City's motion, reasoning "that the City 'failed to put forth any compelling reason for the release of the confidential records sought which would outweigh the privacy interests of [the child].'"

The Second DCA reversed, concluding that the lower court applied the wrong test. "The statute does not require a third party seeking to inspect dependency court records to prove that its interest in doing so is compelling or that it outweighs the child's privacy interest. When enacting the statute, the legislature has already weighed the interests at issue and determined that those with a 'proper' interest in inspecting the records shall be permitted to do so. In the context of the statute as a whole, the test requires a third party seeking to inspect dependency court records to demonstrate that doing so will serve a legitimate and appropriate interest that differs from that of the public at large." City made the required showing; it had "a legitimate, appropriate interest in discovering facts that will permit it to assess the damages claimed against it, for purposes of either defending itself or engaging in settlement negotiations."

Municipality permitted, but not required, to release records of juvenile offense investigation to victim. *Harvard v. The Village of Palm Springs*, 98 So.3d 645 (Fla. 4th DCA 2012).

The mother of a minor victim of a juvenile offense filed a public records request seeking to compel a municipality (the "Village") to release records of that juvenile offense investigation. The Village declined to do so, and Mother petitioned for a writ of mandamus. The circuit court denied that petition. Mother appealed.

The Fourth DCA affirmed. Although juvenile offense records ordinarily are confidential, F.S. 985.04(3) contains an exception stating that a law enforcement agency "may release a copy of the juvenile offense report to the victim of the offense." The Village contended that use of the term "may" means that this exception is discretionary, not mandatory. The appeals court agreed: "We hold that the plain language of section 985.04(3) is unambiguous, and thus interpret the word 'may' as a permissive term. . . . Accordingly, we affirm the trial court's ruling that the Village was not required to produce the requested juvenile offense report to [Mother]."

First DCA discusses exceptions to statutory confidentiality of juvenile criminal records. *G.G. v. Fla. Dept. of Law Enforcement*, 97 So.3d 268 (Fla. 1st DCA 2012).

Reversing the trial court, the First DCA held that a juvenile whose offense did not meet the requirements of F.S. 985.04(2), was entitled to confidential treatment of her juvenile criminal records. This section creates an exception to the general rule of confidentiality for juvenile records. The court agreed with the juvenile that a minor's criminal history information loses its confidential status only when the minor and the arrest report fit under sec. 985.04(2).

Public records requestor's objection to court's proposed in camera review of relevant records results in denial of request. *Althouse v. Palm Beach County Sheriff's Office*, 89 So.3d 288 (Fla. 4th DCA 2012).

Althouse filed a public records request with the Sheriff's Office ("PBCSO"). PBCSO argued that the records sought were exempt from the Public Records Act as part of an active criminal investigation. Althouse asserted that "some of the information may be exempt, but that PBCSO was still required to provide him with redacted copies of the records." Althouse objected when PBCSO raised the possibility of submitting the records to the court for an in camera inspection. The trial court denied the public records request.

The Fourth DCA affirmed. Although the failure to conduct an in camera inspection usually constitutes reversible error, "in this case, Althouse invited the trial court's ruling by arguing against an in camera inspection and asserting that one would not be necessary. See *Held v. Held*, 617 So.2d 358, 360 (Fla. 4th DCA 1993) ('A party cannot claim as error on appeal that which he invited or introduced below.' (citations omitted)). The trial court was unable to determine what portions of the record were subject to disclosure without conducting an in camera review."

Court erred in denying fees to public records requestor after government entity "responded" but did not comply for 45 days. *Hewlings v. Orange County*, 87 So.3d 839 (Fla. 5th DCA 2012).

Hewlings faxed a written request to County demanding copies of all records relating to a dangerous dog investigation of her dog. The next day County called Hewlings and left a voicemail message responding to her request. The following day Hewlings faxed another request to County. A week later, Hewlings' lawyer contacted County and was told that a response would be issued that day. It was not. Eventually Hewlings filed a mandamus petition seeking an order directing County to comply with her public records request. The court entered the order. County complied.

Hewlings moved for fees due to County's 45-day delay in complying with her request. The court denied fees, concluding that County had promptly "responded" to Hewlings' request by voicemail and fax.

The Fifth DCA reversed. The purpose of the fee provision (F.S. 119.12) in the public records law is to encourage public agencies to voluntarily comply with records requests made pursuant to Chapter 119. "An unjustified delay in complying with a public records request amounts to an unlawful refusal under [the statute]." *Barfield v. Town of Eatonville*, 675 So.2d 223, 224 (Fla. 5th DCA 1996). The trial court, however, relied on *Office of State Attorney v. Gonzalez*, 953 So.2d 759 (Fla. 2d DCA 2007) in concluding that fees were not warranted because County had "responded" to Hewlings' request by voicemail and fax. "This interpretation of *Gonzalez* is incorrect. Two cases on which *Gonzalez* relied, *Barfield* and *Brunson v. Dade County School Board*, 525 So.2d 933 (Fla. 3rd DCA 1985), referred to delay in complying with a records request, not delay in responding to a records request . In addition, the mere fact that the County quickly responded to Hewlings' request was not dispositive of whether the County unjustifiably delayed in complying with her request. As such, the trial court's ruling that Hewlings was not entitled to recover attorney's fees because the County responded to her records request was erroneous."

RULES AND ETHICS OPINIONS

Rule changes generally.

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

Florida Bar Board of Governors concludes that criminal plea offers conditioned on waivers of ineffective assistance of counsel and prosecutorial misconduct are unethical. Florida Ethics Opinion 12-1.

See discussion in "Ineffective Assistance of Counsel" section.

Florida Bar Board of Governors advises that lawyers may permit trusted, properly supervised nonlawyers to file documents via E-Portal using the lawyer's access credentials. Florida Ethics Opinion 12-2.

See discussion in "Law Firms" section.

Supreme Court amends family law form to implement disclosure requirements for non-lawyers who help parties complete forms. *In re: Amendments to the Family Law Rules of Procedure*, __ So.3d ___, 37 Fla.L.Weekly S690 (Fla., No. SC12-1930, 11/15/2012), 2012 WL 5518352.

See discussion in "Unauthorized Practice of Law" section.

Supreme Court amends Family Law Rules of Procedure, specifying that "proposals for settlement" are not used in family law matters. *In re: Amendments to the Florida Family Law Rules of Procedure*, 101 So.3d 360 (Fla. 2012).

The Supreme Court amended the Family Law Rules of Procedure, including adopting some new rules. The changes were effective October 4, 2012. Among the changes are: adoption of new rule 12.281 (inadvertent disclosure of privileged materials governed by Fla.R.Civ.P. 1.285); and adoption of new rule 12.442 (Fla.R.Civ.P. 1.442 does not apply in family law proceedings). The Court agreed with the Family Law Rules Committee that "proposals for settlement are not used and are not appropriate in family law matters."

TRIAL CONDUCT

Lawyer who appealed 57.105 attorney's fee sanction by arguing 1979 version of statute now faces imposition of appellate sanctions. *Robbins v. Rayonier Forest Resources, L.P.*, __ So.3d ___ (Fla. 1st DCA, No. 1D12-2254, 12/13/2012), 2012 WL 6199971.

Lawyer had represented Appellant in a civil action. At trial Appellant was sanctioned under F.S. 57.105 (2010) for "pursuing a frivolous counterclaim." When Appellant appealed the fee award he consistently – and incorrectly – cited the 1979 version of sec. 57.105 and case law interpreting that version of the statute. The First DCA affirmed, pointing out that the counterclaim "was filed in 2010, so obviously the 1979 version of the statute is not applicable."

The First DCA denied Appellee's motion for appellate fees under sec. 57.105 because of failure to comply with the safe harbor provisions of sec. 57.105(4). The court, however, noted that sec. 57.105(1)(b) "authorizes this court, on its own initiative, to award the prevailing party a reasonable attorney's fee 'on any claim or defense at any time during a civil proceeding or action in which the court finds that the losing party or the losing party's attorney knew or should have known that a claim or defense when initially presented to the court . . . [w]ould not be supported by the application of then-existing law to those material facts.'" Such fees are assessed only against the losing party's *lawyer*, per sec. 57.105(3)(c). The court issued an order to show cause why fees should not be assessed as a sanction under sec. 57.105(1), and why any fees assessed should not be required to be paid solely by counsel.

Court abused discretion in dismissing complaint based on alleged fraud on the court where there was no "fraud." *Rocka Fuerta Construction Inc. v. Southwick, Inc.*, __ So.3d ___ (Fla. 5th DCA 2012), 2012 WL 6719470.

See discussion in "Candor Toward the Tribunal" section.

TRUST ACCOUNTS

Supreme Court approves some rule changes regarding trust accounts while rejecting other proposals. *In re: Amendments to the Rules Regulating The Florida Bar (Biannual Report)*, __ So.3d ___, 37 Fla.L.Weekly S275 (Fla., No. SC10-1967, 4/12/2012), 2012 WL 1207226.

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

UNAUTHORIZED PRACTICE OF LAW

Supreme Court adopts rule allowing parties to private action alleging unlicensed practice of law to stay action in order to seek advisory opinion from Florida Bar. *In re: Amendments to the Rules Regulating The Florida Bar – 10-9.1 (Procedures for Issuance of Advisory Opinions on the Unlicensed Practice of Law)*, 82 So.3d 66 (Fla. 2012).

In *Goldberg v. Merrill Lynch Credit Corp*., 35 So.3d 905 (Fla. 2010), the Supreme Court ruled that a party seeking to recover damages in a private action based on the alleged unlicensed practice of law must allege that the Court has determined that the activities in question constituted the unauthorized practice of law. Because the rules then in place prohibited the Bar's UPL Committee from issuing an advisory opinion in a pending case, the Court directed the bar to propose an amendment to Rule 10-9.1 that would allow parties to the civil action to stay the action in order to seek a Court determination on an underlying UPL question.

The Bar proposed an amendment. The Court modified the Bar's proposal as suggested by a Bar member who filed comments. "After considering the petition and the comment, the Court adopts the amendments to rule 10-9.1 with Mr. Chinaris's proposed modifications. The resulting amendments would provide parties in certain situations, who have brought a civil suit alleging the unlicensed practice of law, with a mechanism to request an advisory opinion." The amended rule was effective April 1, 2012.

Supreme Court amends family law form to implement disclosure requirements for non-lawyers who help parties complete forms. *In re: Amendments to the Family Law Rules of Procedure*, __ So.3d ___, 37 Fla.L.Weekly S690 (Fla., No. SC12-1930, 11/15/2012), 2012 WL 5518352.

The Supreme Court amended 7 Court-approved family law forms to implement an earlier change to Bar rules governing unlicensed practice of law. In April 2012 the Court adopted new Rule 10-2.2. See *In re Amendments to the Rules Regulating The Florida Bar (Biannual Report)*, 37 Fla.L.Weekly S275 (Fla. April 12, 2012), 2012 WL 1207226. Subdivision (a) Rule 10-2.2 provides: "It shall not constitute the unlicensed practice of law for a nonlawyer to engage in limited oral communication to assist a self-represented person in the completion of blanks on a Supreme Court Approved Form." Subdivision (c) of the rule requires that the non-lawyer who assists in preparation of a form provide his or her name and contact information on each such form. The Court amended the 7 family law forms to include the required non-lawyer information.

Court erred in denying pro hac vice admission based on alleged conflicts of interest. *THI Holdings, LLC, v. Shattuck*, 93 So.3d 419 (Fla. 2d DCA 2012).

THI Holdings, Inc. ("THI") sought to have an out-of-state lawyer admitted pro hac vice to represent it in a Florida state court action. Local counsel filed a verified motion (see Fla.R.Jud.Admin. 2.510) and the lawyer, Balassa, filed an affidavit in support of the motion. Balassa is an Illinois lawyer in good standing with that state's bar.

Plaintiff, the estate of a deceased nursing home patient, objected to Balassa's admission on the basis of "irreconcilable conflicts of interest." The Estate argued that Balassa should not be admitted because he previously represented 2 entities who were now defendants in the Estate's action. The alleged prior representation was in separate matters that were not substantially related to the current suit. The Estate did not assert that Balassa had ever represented the Estate or any party related to it. "Instead, it argued only that Balassa's prior representation of [the other defendants] *might* result in these defendants raising Balassa's alleged conflict of interest at some point during the current litigation and that, if they did so, it would delay justice for the Estate." (Emphasis by court.) The Estate submitted no evidence to support its position, relying only on the arguments of counsel. The trial court denied Balassa's pro hac vice admission.

The Second DCA ordered the trial court to admit Balassa pro hac vice. Supreme Court rules and case law and relevant case law demonstrate that "a motion for admission pro hac vice, while subject to the discretion of the trial court, should usually be granted on a pro forma basis if it is facially sufficient and if the attorney is a member in good standing of the bar of another jurisdiction." The record revealed no "*reasonable* basis" for denying Balassa's pro hac vice admission. (Emphasis by court.)

The appeals court emphatically rejected the Estate's conflict argument. "Rule 2.510(a) sets forth the requirements for admission pro hac vice, and the absence of conflicts of interest is not among them." A potential conflict of interest is *not* a legally permissible basis for denying admission pro hac vice. Additionally, the Estate lacked standing to raise any allegations of conflict because there was no privity between the Estate and Balassa.

Court erred in striking pleadings filed pro se by out-of-state lawyer on grounds that he committed UPL. *Bovino v. MacMillan*, __ So.3d ___, 37 Fla.L.Weekly D2787 (Fla. 4th DCA, No. 4D11-3105, 12/5/2012), 2012 WL 6027769.

Bovino is licensed to practice law in Colorado but not in Florida. Bovino represented Client in 2010-11 and held a broad power of attorney relating to Client's affairs. Client's mother filed a petition for an emergency temporary guardianship of Client. Client subsequently filed a petition for voluntary guardianship. Bovino filed an objection to Client's guardianship position, seeking a less restrictive alternative. In his pleadings Bovino "stated that he was representing himself, pro se, as Attorney in Fact." The trial court entered an order stating that, despite alleging in his pleadings that he had a relationship as trusted counsel and advisor to Client, Bovino had not entered an appearance as attorney of record for Client. The court struck Bovino's pleadings on the grounds that Bovino's pleadings constituted "the unauthorized practice of law and are a nullity."

The Fourth DCA reversed. "Clearly, Bovino's pleadings did not purport to be filed on behalf of [Client] and explicitly were not filed as representing him in this proceeding. Therefore, they did not constitute the unauthorized practice of law."

Lawyer's representation of criminal defendant while on one-month suspension from practice is not per se reversible error, per Fourth DCA. *Thornhill v. State*, __ So.3d ___, 37 Fla.L.Weekly D2828 (Fla. 4th DCA, No. 4D10-2927, 12/12/2012), 2012 WL 6171033.

Lawyer represented a Defendant indicted for murder. During the representation Lawyer was suspended from practice for one month. While suspended Lawyer "twice received discovery from the State" and appeared in court "for a brief docket call" at which Lawyer acknowledged that Defendant had already waived speedy trial and requested a continuance that was granted.

Three months after Lawyer was reinstated to practice, Defendant's grandmother wrote to the judge raising concerns about Lawyer's representation of Defendant. When questioned under oath Defendant indicated that she had no complaints. Defendant pleaded guilty to second degree murder and other charges. Defendant appealed, contending that Lawyer's "representation of her during his one-month suspension constitutes a Sixth Amendment violation that is per se reversible error."

The Fourth DCA disagreed and affirmed. Per se reversible error arises from a complete denial of counsel at a critical stage of a criminal proceeding, but "for the purpose of deciding whether a denial of counsel constitutes per se reversible error, Florida courts have drawn a distinction between complete and partial deprivations of counsel." The court viewed the deprivation of counsel in this case as no more than partial. Accordingly, "we conclude that any error in this case was harmless beyond a reasonable doubt and did not contribute to her convictions. [Citation omitted.] The events that occurred in the case during [Lawyer]'s one-month suspension were largely ministerial." Defendant received the requested continuance at the docket call, and Defendant did not suggest that her case would have benefitted from being tried at that time instead. "During plea negotiations and the plea conference, [Lawyer] was licensed to practice law in Florida and was not under any suspension. Furthermore, under questioning by the trial judge, [Defendant] did not voice any dissatisfaction with her counsel."

The court distinguished *State v. Joubert*, 847 So.2d 1023 (Fla. 3d DCA 2003), where a disbarred lawyer represented a criminal defendant during the trial and sentencing of a murder case. "*Joubert* turned on the fact that the disbarred attorney represented the defendant throughout his trial and sentencing, the two most important stages of a criminal proceeding."

WITHDRAWAL

Fifth DCA indicates that lawyer's motion to withdraw should be granted where attorney-client relationship has become "adversarial," stressing personal nature of relationship. *Bowin v. Molyneaux*, 100 So.3d 1197 (Fla. 5th DCA 2012).

See discussion in "Attorney-Client Relationship" section.

First DCA imposes attorney's fees as sanction for a frivolous appeal, and denies lawyer's motion to withdraw. *Florida Houndsmen Ass'n, Inc. v. Florida Fish and Wildlife Conservation Comm'n*, __ So.3d ___, 37 Fla.L.Weekly D1353 (Fla. 1st DCA, No. 1D11-3190, 6/6/2012), 2012 WL 2018848.

See discussion in "Fees" section.